

Consumer Law, Class Actions, and the Common Law

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I. INTRODUCTION

Even where bodies of law purport to be defined by their subject matter, such as “health care law” or “housing law,” they are often distinguished from legal arrangements covering the same area by their underlying presumptions. “Employment law,” for instance, covers substantially the same economic transactions as the older labor law and still-older common law doctrines. Those fields differ chiefly in their premises, and consequently, their institutional arrangements. Unlike labor law, which is principally the law of labor unions and their rights and relations vis-à-vis management (under the auspices of the National Labor Relations Board), employment law is individualistic. With few exceptions, the right to remain free from discrimination is the individual employee’s, and it can be enforced outside union channels and arbitration regimes.¹ In that respect, employment law resembles the old common law of contract and employment at will, but with a twist. Instead of a fundamental, bilateral freedom not to deal, employment law establishes the employee’s unilateral right to remain free from discriminatory treatment.² This antidiscrimination principle permits the employee to press the employer into transactions that they would rather avoid, all things considered.³ The purported extension of common law rights masks their redistribution.

In a similar way, “consumer law” is parasitic on, and transformative of, common law doctrines grounded in contract

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¹ That, of course, was the point: seniority rules and other labor union practices often worked to the disadvantage of minority employees. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 758-59 (1989).

² See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 3 (1992).

³ *Id.* at 5, 73.

and tort. While unknown before the 1970s, modern “consumer law” does not govern a single transaction that is not also covered by traditional common law doctrines. However, where tort law required an actual injury as an essential element of a cause of action; consumer law dispenses with that requirement and others like it, such as inducement and detrimental reliance.⁴ Where the common law matched the seller’s duty to steer clear of fraud and misrepresentation with the contractual principle of “buyer beware,” consumer law substitutes a unilateral duty of disclosure on the seller.⁵

My point in highlighting these differences is not to argue for the superiority of common law rules over consumer law constructs. I will stipulate that mandatory disclosure rules may be efficient in some settings. For purposes at hand, I will even concede—although I frankly doubt—that a full-fledged consumer law regime might, at a highly abstract and theoretical level, be shown to be just as efficient as an equally stylized common law regime. Rather, my point is that it makes no sense to have the two regimes operate on top of each other and over the same range of transactions. However, that is the system we now have. Just as employment law was superimposed on the pre-existing regime of contractual employment obligations, so too has consumer law been piggybacked on top of common law doctrines governing the promotion and sale of goods and services. This dual regime is extremely unlikely to enhance social welfare or even consumer interests.⁶

II. DEVELOPMENT OF CONSUMER LAW

Handbooks and treatises on “consumer law” often define it as a contradistinction to commercial law, meaning the law governing transactions among merchants.⁷ The common law, of

⁴ See, e.g., The Honorable Sheldon Gardner & Robert Kuehl, *Acquiring an Historical Understanding of Duties to Disclose, Fraud, and Warranties*, 104 COM L.J. 168, 186-88 (1999).

⁵ *Id.* at 178-79.

⁶ In commenting on an earlier draft, David Rosenberg has forcefully reminded me that redundant, competing systems of law may be very useful for a number of reasons, such as information discovery and a reduction of the frequency and cost of error. To that extent, the dual system problem dissolves into a coordination problem. This is the correct perspective. The central coordination problem to my mind is this: redundancy has salutary effects so long as in any given case or transaction, each system operates to the exclusion of the other. In such a case, the parties and their disputes can migrate from one to the other and the systems check each other at the margin. However, consumer law and common law rarely operate in this competitive sense of “redundancy.” They operate *jointly*, which is bound to compound errors. Even compound errors, one might argue, generate information, but they are unlikely to generate useful operational information at an acceptable cost.

⁷ See MICHAEL M. GREENFIELD, *CONSUMER LAW: A GUIDE FOR THOSE WHO*

course, made no such distinction; it rested on a robust, across-the-board presumption in favor of freedom of contract.⁸ Even the Uniform Commercial Code (“UCC”) treats consumer transactions under the same rules that apply to comparable business transactions.⁹ However, consumer law theorists and advocates insist that the assumptions that underpin freedom of contract simply do not apply in the context of consumer transactions. Using often-colorful language, consumer lawyers conjure up a world of ignorant, impulsive consumers who stumble helplessly through a world of serial monopolies.¹⁰ In soberer moments, they identify the characteristics that supposedly distinguish consumer markets: asymmetric information (or wholesale consumer ignorance), unequal bargaining power, and irrational consumer preferences.¹¹ Consumer protection laws attempt to redress these problems by imposing affirmative disclosure obligations¹² through outright prohibitions on abusive, extortionate, or unconscionable contract terms and sales practices,¹³ or through mandatory cooling-off or revocation periods.¹⁴

All these rationalizations prove either too much or too little to define the discrete field of “consumer law.” Information is asymmetric in business as well as consumer transactions (the seller almost always knows more than the buyer); still, for good reasons, the general rule remains “buyer beware.” Bargaining power is often unequal in the business sector, but within the general framework of protections against fraud and monopoly, we let the parties deal, or not deal, as they wish. Evidence of

REPRESENT SELLERS, LENDERS, AND CONSUMERS 2 (1995); FREDERICK H. MILLER ET AL., CONSUMER LAW: CASES, PROBLEMS, AND MATERIALS 3 (1998).

⁸ See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 769 n.33 (2002).

⁹ Even with respect to such consumer law chestnuts as unconscionability and warranties, the UCC makes no distinction between merchants and consumers. See U.C.C. §§ 2-302, 2-312 to 2-317 (1997 & Supp. 2003). The UCC did contain a few rare distinctions between consumers and businesses, which have been repealed. See, e.g., U.C.C. §§ 9-505, 9-507 (repealed 1999).

¹⁰ Even casebooks display that tendency: in consumer transactions, “the position of the parties is such that the consumer is faced with a take-it-or-leave-it proposition, and often few alternative sources of supply offering any substantially different deal.” MILLER ET AL., *supra* note 7, at 4.

¹¹ *Id.* at 3-4; Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 *OHIO ST. L.J.* 815, 817, 824-25 (1987).

¹² See, e.g., Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 (2001) (commonly referred to as “RESPA”); Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1997); Truth in Lending Act, 15 U.S.C. §1601 (1998); Magnuson-Moss Warranty Act, 15 U.S.C. § 2302 (1998); 12 C.F.R. § 18.4 (2003).

¹³ See, e.g., Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1998); 16 C.F.R. §§ 310.4, 453.2-453.3 (2003); 47 C.F.R. § 64.1200 (2002).

¹⁴ See, e.g., Truth in Lending Act, 15 U.S.C. § 1635 (1998) (establishing right for consumer—but not lending institution—to revoke mortgage contract within three days without penalty); 16 C.F.R. § 429.1 (2003).

pervasive irrationality is far too conjectural at this point to warrant careless paternalism; at most, it may justify circumspect interventions that protect the irrational from costly mistakes without, in the same process, inflicting costs on the rational.¹⁵

There is no set of criteria or principles that reliably delineates a discrete “consumer law,” and, in truth, the attempt to conjure up such a body of law partook of a broader, explicitly ideological reform movement. Beginning in the 1960s, large numbers of policy advocates and legal scholars argued that common law forms and formalities were an impediment to social reform, the effective management of public problems, and the aspirations and interests of deserving political constituencies.¹⁶ At its zenith, this critique became distilled in an ambitious effort to develop a full-blown theory of “public law,” a term that has since lost currency.¹⁷ The venue for the most serious and thoroughgoing version of this argument was environmental law, whose champions claimed that environmental complexities rendered common law distinctions between “mine and thine” “a menace to an imperiled planet.”¹⁸ In an interconnected world, human activities become per se externalities.¹⁹ Thus, when an endangered woodpecker decides to build its nest where you decide to build your house, the bird wins and you lose.²⁰

¹⁵ See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1212-14 (2003). Note also that this rationale would often appear to dictate regulatory strategies that are diametrically opposed to actually existing—and well-nigh sacrosanct—“consumer protections.” Disclosure obligations for public corporations and broker-dealers, for example, are loudly touted as protections for the proverbial “small investor.” Even if equity markets are approximately efficient, the vast majority of those investors should not dabble in the market; they should buy index funds. Merrill Lynch and its ilk complied with every applicable regulation, which did nothing to prevent unsophisticated consumers from entering a bubbly market. By taking those investors as the yardstick, disclosure regulation creates a moral hazard (a kind of deposit insurance for stock market amateurs), while distorting or suppressing information (such as forward-looking information) that *would* be of use to more sophisticated investors. Arguably, an efficient paternalistic regime would license stock buyers, not brokers. See Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 941-43 (1998).

¹⁶ See generally, Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing for the expansion of property rights to government entitlements).

¹⁷ See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988).

¹⁸ MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* 1 (1996).

¹⁹ See A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1125 (1994) (noting that all human activities produce negative externalities).

²⁰ Brian Mannix, *The Origin of Endangered Species and the Descent of Man*, AM. ENTERPRISE, Nov.–Dec. 1992, at 58, 58. This paradigm continues to appear in the case law. See, e.g., *Nat’l Assoc. of Home Builders v. Babbitt*, 130 F.3d 1041, 1052-54 (D.C. Cir.

Environmental law's ambition of managing entire ecosystems in accordance with a coherent political scheme rests on a full-scale repudiation of the common law and its theoretical foundations, including notions of property, harm, and individual injury.²¹

Consumer law advocates could rest their case, at least initially, on a more modest critique of the common law and of a market economy. Affirmative disclosure obligations, they argue, would make for more informed consumers and hence better customers.²² Such obligations would improve rather than stifle competition.²³ Unlike environmental law, consumer law remains at least superficially tied to production values.²⁴ Similarly, consumer law advocates need not attack the common law at its roots; they can plausibly rest their case on the enforcement problems and transaction costs that attend common law litigation. Those barriers, the argument runs, may prevent the victims of wrongful conduct from asserting their claims when, as is often the case in consumer transactions, those claims are small.²⁵ The costs of detecting and proving unlawful conduct—for example, in cases of fraud, which require proof of the defendant's knowing and intentional misrepresentation—may further exacerbate a tendency towards under-enforcement and under-deterrence. That is especially so when even the full enforcement of the available remedies, such as damages under the out-of-pocket rule, leave a lawbreaking defendant no worse off (net of the costs of defending the claims) than his law-abiding competitor.²⁶

This thoroughly familiar argument suggests equally familiar remedies. An obvious choice is to entrust public agencies with

1997) (holding that the Federal Endangered Species Act passes constitutional muster under the Commerce Clause due to the interconnectedness of the world).

²¹ Greve, *supra* note 18, at 6-7.

²² See, e.g., Truth in Lending Act, 15 U.S.C. § 1601 (1998); Magnuson-Moss Warranty Act, 15 U.S.C. § 2302 (1998).

²³ See, e.g., 15 U.S.C. §§ 1601, 2302.

²⁴ The unfair competition laws that were to become a principal vehicle for the creation of "consumer law," see, e.g., MILLER ET AL., *supra* note 7, at 5-6, were originally enacted to protect competitors and competition rather than consumers. The Federal Trade Commission Act of 1915 was amended to protect consumer interests after the Supreme Court ruled that the original statute protected competitors exclusively. See *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931); Federal Trade Commission Act, 15 U.S.C. § 41 (1914), amended by 15 U.S.C. § 45(a)(1) (1938). California's Unfair Competition Law, far and away the most draconian consumer statute in the nation, originated as a statute to protect competition and to this day is viewed as embodying that objective. See Robert C. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 CAL. REG. L. REP. 1, 2-3 (1995).

²⁵ See Fellmeth, *supra* note 24, at 4 ("One public price paid is a barrier to entry to one who has, in fact, a product or service many would greatly desire—if they could believe claims made about it.").

²⁶ RESTATEMENT (SECOND) OF TORTS § 549 cmt. g (1977).

the definition and enforcement of prohibitions and injunctions against unfair or fraudulent business practices, without having to prove the common law elements of such violations. Another strategy, albeit a crude one, is to increase the rewards for private enforcers. A third strategy, running roughly concurrent with the invention of consumer law, is the bundling of small claims in class actions. While all three strategies predate the invention of modern consumer law by more than a half-century,²⁷ their use increased enormously during the 1970s when Congress and state legislatures enacted a rash of consumer protection statutes and damages provisions.²⁸ As a result, jury awards proliferated.²⁹ Also, in the wake of the 1966 class action reforms, federal and state courts created a novel and remarkably permissive regime for the prosecution and adjudication of mass claims.³⁰

That prompt accommodation to perceived consumer needs failed to create an equilibrium where consumer law has come to rest. It is exceedingly difficult to tailor private rewards to deterrence objectives, and, in any event, their effectiveness still depends on the availability of a sufficiently large plaintiff class. Public consumer protection agencies, even when run by consumer advocates,³¹ still operate under budgetary constraints and countervailing political pressures. Modern class actions are fraught with a wide array of problems, including substantial transaction costs and sweetheart settlements or “reverse auctions” that dilute the deterrent value of such actions.³²

²⁷ See, e.g. Clayton Act, 15 U.S.C. § 15 (1914) (treble damages for antitrust violations); Federal Trade Commission Act, 15 U.S.C. § 41 (1914) (authorizing the Federal Trade Commission to regulate unfair or deceptive acts in business commerce), *amended* by 15 U.S.C. § 45(a)(1); Martin Act of 1921, N.Y. GEN. BUS. LAW §§ 352-359 (McKinney 1996 & Supp. 2003) (regulating investment security sales in New York and requiring brokers, advisors, etc. to register with the New York Attorney General’s office).

²⁸ Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 446 (1991) [hereinafter Sovern, *Reconsidering*].

²⁹ *Id.*

³⁰ Apparently, the Civil Rules Advisory Committee had no such goal in mind. See *Class Action Reform Gets a Shot in the Arm*, 69 DEF. C. J. 263, 264 (2002) (“Professor Arthur Miller, who was involved with the work of the committee at that time, tells us that ‘Nothing was in the committee’s mind And the rule was not thought of as having the kind of application that it now has.’”).

³¹ During the 1970s, leaders of Ralph Nader’s consumer organizations assumed high-ranking government positions: Joan Claybrook ran the National Highway Traffic Safety Administration and Michael Pertschuk the Federal Trade Commission.

³² The latter practice has prompted intense academic debate and a broad range of reform proposals. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Bruce L. Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341-42 (1999).

Besides, consumer law itself creates a kind of upward demand spiral. Confronted with a prohibition against competition on some margin (for example, interest rates on consumer loans or mortgages), sellers will compete on some other, less transparent margin, thus creating demands for additional interventions.³³ If more laws and affirmative obligations, bigger government agencies with bigger enforcement budgets, and better incentives for injured consumers do not do the job, the natural move is to mimic environmental law after all: divorce lawfulness from individual harm, legal claims from their common law owners, and legal theories from production values. In fact, the law has moved on this trajectory. Its chief propellant has been the consumer class action. A simple example, based loosely on an actual case that eventually settled for a modest \$2.1 billion, illustrates the progression.³⁴

III. CONSUMER LAW CLASS ACTIONS

Suppose a company sells a large number of identical computers at a price of \$1,000 with an implied or actual promise that the product will function flawlessly. Unfortunately, it turns out that a series of complex operations performed by only a small number of marginal consumers causes the system to crash. What is the sensible assignment of rights?

The common law rule, in a nutshell, is to deter negligent misrepresentation or simple mistake by means of providing redress for those persons, and *only* those persons, who have suffered an injury and who justifiably relied on the manufacturer's representations.³⁵ Under the out-of-pocket rule, redress includes restitution for the full purchase price minus the residual value of the product, if any.³⁶ It also includes the user's

³³ The literature on banking and consumer loan regulation has amply documented the phenomenon. See, e.g., Christopher C. DeMuth, *The Case Against Credit Card Interest Rate Regulation*, 3 YALE J. ON REG. 201 (1986); Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 82-83 (2000). In the area of subprime mortgage lending, consumer advocates are pressing—both at the state and the federal level—for the regulation of opaque loan terms whose use was very likely induced by earlier rounds of “consumer protection” legislation, in particular de facto usury ceilings. See Michael S. Greve, *Subprime, but not Half-Bad: Mortgage Regulation as a Case Study in Preemption*, FEDERALIST OUTLOOK Sept.-Oct. 2003, at 1, available at <http://www.aei.org/publications/contentID.20038142219500221/default.asp>.

³⁴ *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 926 (E.D. Tex. 1999); Andy Pasztor & Peter Landers, *Toshiba to Pay \$2B Settlement on Laptops*, WALL ST. J. ONLINE, Oct. 31, 1999, available at <http://zdnet.com.com/2100-11-516294.html>.

³⁵ In addition, a plaintiff must show that the representation was in fact false and made with the intent of inducing the plaintiff to rely on it. 37 AM. JUR. 2D *Fraud and Deceit* § 26 (2001); RESTATEMENT (SECOND) OF TORTS § 552 (1977). Of course, pleading and proof requirements for the historically disfavored tort of fraud are still more demanding. See RESTATEMENT (SECOND) OF TORTS § 526 cmt. b (1977).

³⁶ *Id.* § 552B.

opportunity costs (the foregone benefits of purchasing a competing, flawless product).³⁷ It appears that most courts also award quasi-contractual, benefit-of-the-bargain redress for the consumer's disappointed expectations.³⁸ Marginal consumers who satisfy the dual requirements of detrimental reliance receive full compensation, and the infra-marginal consumers for whom the product worked as promised receive nothing.

The alternative is to ask what legal regime individuals would choose *ex ante*—that is, prior to the purchase or use of this or any other product. The answer, some scholars have argued, is a rule that creates adequate deterrence for the manufacturer to optimally invest in precautionary measures.³⁹ On the additional assumption that individuals are risk-averse, the rule will also provide full insurance coverage for all economic losses. However, the rule will not provide compensation *in excess* of the insured amounts, for example, compensation for non-pecuniary losses.⁴⁰ This is bad news for consumer-plaintiffs from an *ex post*, wealth-maximizing perspective.

The good news is that from a deterrence-oriented, *ex ante* perspective, common law considerations of injury, inducement, and justifiable reliance are beside the point and quite probably harmful. Those questions go only to the *distribution* of the proceeds, which is separate from and secondary to the determination of the correct deterrence level.⁴¹ To be sure, if damages are set at the right level litigation by the marginal consumers may produce a deterrence level that will generate optimal investments in precautions. But why should we rely on those consumers and their uncertain incentives to extract the seller's windfall? It may make more sense to round up the purchasers all along the demand curve and figure out the difference between the purchase price and the price that consumers would have paid *in the aggregate* had the true characteristics of the product been known.

³⁷ See *id.*

³⁸ In other words, courts do not attempt to restore the plaintiff to the position that he would have occupied had the misrepresentation never been made; they attempt to put him into the position he would have occupied, had the false communication been true. *Id.* § 549 cmt. g (criticizing the practice but acknowledging its preponderance); Michael B. Kelly, *The Phantom Reliance Interest in Tort Damages*, 38 SAN DIEGO L. REV. 169, 170-71 (2001).

³⁹ CHARLES FRIED & DAVID ROSENBERG, *MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT* 18-20 (2003).

⁴⁰ See *id.* at 13-26 (describing this perspective in a non-technical manner).

⁴¹ See generally David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002) [hereinafter Rosenberg, *Decoupling Deterrence and Compensation*].

Increasing numbers of class actions, including some cases of considerable notoriety, proceed from this premise only to push towards a rather more insidious conclusion. A few examples illustrate the pattern:

*Williams v. Purdue Pharma Co.*⁴² was a class action on behalf of purchasers of OxyContin, a potent opioid.⁴³ The plaintiffs complained that Purdue conducted a deceptive, misleading, and fraudulent advertising campaign that falsely stated the product would provide “smooth and sustained pain relief,” and posed little risk of addiction when used as prescribed.⁴⁴ The class plaintiffs did not claim that the product failed to work as advertised for them or that they became addicted.⁴⁵ Instead, they argued that they were deprived of the full benefit of their purchase bargain because the product failed to work as advertised for some other consumers.⁴⁶

In *Avery v. State Farm Mutual Automobile Insurance Co.*,⁴⁷ an Illinois jury and judge awarded \$1.18 billion to a class of an estimated 4.5 million State Farm customers in forty-eight states. This award was based upon the company’s post-crash repair cost estimates on the basis of cheap and allegedly inferior aftermarket parts.⁴⁸ Plaintiffs did not allege that State Farm’s policy, which many states encourage or even require to control automobile insurance rates, caused them physical injury or consequential pecuniary losses such as lost resale value.⁴⁹ Instead, they prevailed on the claim that aftermarket parts are inherently inferior and therefore fail to satisfy State Farm’s contractual obligations to restore vehicles to their pre-loss condition.⁵⁰

In *Price v. Philip Morris Inc.*,⁵¹ another Illinois state court approved a \$10.1 billion verdict in favor of a class of Illinois purchasers and consumers of Marlboro Lights and Cambridge Lights.⁵² The action did not include claims for personal injury.⁵³ Rather, plaintiffs claimed that the advertisements of the

⁴² 297 F. Supp. 2d 171 (D.D.C. 2003).

⁴³ *Id.* at 172, 175.

⁴⁴ *Id.* at 172-73.

⁴⁵ *Id.* at 172.

⁴⁶ *Id.* at 175-76 (summarizing plaintiffs’ complaint).

⁴⁷ 746 N.E.2d 1242 (Ill. App. Ct. 2001).

⁴⁸ *Id.* at 1247. The court subsequently reduced the judgment by \$130 million. *Id.* at 1261. The case is pending on appeal to the Illinois Supreme Court. *Avery v. State Farm Mut. Auto. Ins. Co.*, 786 N.E.2d 180 (Ill. 2002).

⁴⁹ 746 N.E.2d at 1258.

⁵⁰ *Id.* at 1259.

⁵¹ No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct. Mar. 21, 2003).

⁵² *Id.* at *29.

⁵³ *Id.* at *3.

products as “Lights” and “Lowered Tar and Nicotine” were deceptive, unfair, and calculated to create the false consumer impression that the products were safer or less harmful than regular cigarettes.⁵⁴ Plaintiffs claimed to have overpaid in reliance on these misrepresentations.⁵⁵ They sought and obtained damages for the difference between the purchase price and the value of the product that they actually received.⁵⁶ The trial judge credited a consumer survey conducted by a plaintiff’s expert, which estimated the diminution in value at 92.3 percent, and on that basis arrived at “compensatory” class damages of \$7.1 billion.⁵⁷

Quite obviously, ordinary notions of detrimental reliance and inducement play a distinctly subordinate role in those cases; otherwise, it is hard to see how a court could possibly certify inchoate classes of consumers who vary greatly in their degree of reliance and injury (if any).⁵⁸ From the *ex ante* perspective, these differences are immaterial. The right rule will skim off the entire surplus of the transaction (both the producer and consumer surplus), which the inframarginal consumers, for whom the products worked as advertised, have already received and will get to keep in any event. The rule will provide full insurance compensation for the consumer class and distribute the remaining funds (if any) to someone else, for some other “public use.”⁵⁹

⁵⁴ *Id.* at *4.

⁵⁵ *Id.* at *15.

⁵⁶ *Price*, 2003 WL 22597606, at *15.

⁵⁷ *Id.* at *16–17.

⁵⁸ The nationwide class certified in *Avery* is highly problematic in many respects. It could not possibly be sustained in the Seventh Circuit, which covers Illinois. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (“Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.”), *cert. denied*, 537 U.S. 1105 (2003). Due to the requirement of complete diversity, however, the case could not be removed to federal court. State Farm’s repeated attempts to have the class decertified in state court and an interlocutory petition for certiorari to the U.S. Supreme Court remained unsuccessful. *State Farm v. Speroni*, 525 U.S. 922 (1998) (denying certiorari); *Avery v. State Farm*, 746 N.E. 2d 1242, 1257 (Ill. App. Ct. 2001) (affirming class certification).

⁵⁹ *See Rosenberg, Decoupling Deterrence and Compensation*, *supra* note 41, at 1896. The cheerful “public use” appellation conceals grave problems at both ends of the transaction. It suggests that the “public use” is *ipso facto* superior to the producer’s “private” use—including, presumably, the production of future goods or services. In this regard, the purveyors of an *ex ante* regime leave themselves open to the charge of playing in a static world. That problem is aggravated when the “public use” of the “excess” is handed over, as often it is, to a private organization with the stated objective of siphoning off the *next* producer’s surplus. *See James R. McCall et al., Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L. J. 797, 848 (1995) (“The consumer trust fund created by the court’s order in *Avco* funded . . . [cases involving issues of concern to] low and moderate income consumers in California . . .”). *See also Price*, 2003 WL 22597608, at *49–50 (awarding unclaimed funds to the Illinois Bar Foundation, eleven law schools, the

Like traditional common law plaintiffs, the members of the plaintiff classes just described at least purchased OxyContin, insurance policies, and Marlboro Lights, and did complain about the characteristics of those products and the sellers' representations. But if we are worried chiefly about deterrence levels, those limitations may be superfluous. Perhaps, *anyone*—bystander, malcontent, plaintiffs' lawyer, public prosecutor—should be permitted to sue and recover, so long as we rely on courts to generate optimal deterrence levels.

Modern “entrepreneurial” class actions, which are instigated and controlled entirely by plaintiffs' lawyers, conform to this pattern.⁶⁰ Statutory law has moved in the same direction. Most prominently, California's Unfair Competition Law (“UCL”)⁶¹ prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”⁶² “Unlawful” acts are those that are unlawful under any statute; hence, the UCL sweeps across the entire California Code, including the criminal code.⁶³ Moreover, compliance with the law is not necessarily a defense since business practices that are not “unlawful” may still be “unfair.”⁶⁴

The extraordinary breadth of the UCL is matched by the liberality of its enforcement provisions. The act may be enforced by state and local prosecutors and by literally any private party acting “for the interests of itself, its members or the general public.”⁶⁵ Anyone can sue anyone else; the only standing

American Cancer Society, and in-state domestic violence, drug, and legal aid programs).

⁶⁰ As for “plaintiffs' lawyer,” it has become generally recognized that consumer class actions are *their* products, not the nominal clients. See, e.g., Issacharoff, *supra* note 32, at 341 (“Class actions almost invariably come into being through the actions of lawyers—in effect, it is the agents who create the principals—and will not emerge without some protection of the entrepreneurial initiative of those lawyers.”). As for “bystanders,” the requirement that the nominal consumer plaintiffs must at least have purchased the product in question has been rejected explicitly in some cases. For example, the class in *Shaw v. Toshiba America Information Systems, Inc.*, included *potential* purchasers, who were found to have standing to obtain injunctive relief. 91 F. Supp. 2d 926, 938 (E.D. Tex. 1999) (“[I]t is not necessary for someone to actually *own* a defective computer in order to experience continuing, adverse effects from it.”). The *Shaw* court affirmed standing “regardless whether Plaintiffs currently own one of Defendants' computers, are thinking about buying one of Toshiba's computers, or are commuting to work over a bridge with design specifications tainted by allegedly faulty [diskette controllers].” *Id.* at 941. From an *ex ante* perspective, this seemingly bizarre position is in fact quite plausible. See Francesco Parisi & Jonathan Klick, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking*, 79 CHI.-KENT L. REV. (forthcoming Winter 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=441941.

⁶¹ CAL. BUS. & PROF. CODE § 17200 (Deering 1992 & Supp. 2003).

⁶² *Id.* (emphasis omitted).

⁶³ See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1091 (Cal. 1998).

⁶⁴ See McCall et al., *supra* note 59, at 822–25 (discussing case law).

⁶⁵ CAL. BUS. & PROF. CODE § 17204 (Deering 1992 & Supp. 2003).

requirement is “that the plaintiff can effectively represent the [broader] group’s interests.”⁶⁶ With respect to fraudulent business practices, for example, it is not necessary to show deception, reasonable reliance, or damages to anyone, let alone the plaintiff.⁶⁷ Private enforcement may proceed even where the predicate statute manifestly contemplates no such thing.⁶⁸ The procedural formalisms and due process safeguards of class actions, which from an *ex ante* perspective are deadweight at best and an invitation to opportunism at worst,⁶⁹ have in fact disappeared under the UCL. Actions on behalf of the public, sometimes called “representative actions” or “quasi-class actions,” may proceed without conforming to federal or state class action requirements.⁷⁰ While private litigants may not sue for damages,⁷¹ they may obtain injunctive relief, as well as restitution and disgorgement under equitable principles.⁷² The California courts have created multiple vehicles to facilitate generous monetary relief.⁷³ In short, “[t]he only apparent limitation upon the practical reach of the UCL is the imagination of man (and woman).”⁷⁴

The best-known UCL plaintiff is Marc Kasky, a self-proclaimed activist who sued Nike over the company’s allegedly false statements concerning its corporate practices in Third-World countries.⁷⁵ Mr. Kasky himself did not rely on those statements—and certainly not to his detriment. There was no evidence that he had ever purchased a Nike product; in any event, the company’s communications concerned its employment practices, not the attributes of its sneakers.⁷⁶ Nonetheless, and

⁶⁶ McCall et al., *supra* note 59, at 826.

⁶⁷ Podolsky v. First Healthcare Corp., 58 Cal. Rptr. 2d 89, 98 (Cal. Ct. App. 1996).

⁶⁸ See, e.g., *Stop Youth Addiction*, 950 P.2d at 1093; Consumers Union of U.S., Inc. v. Fisher Dev., Inc., 257 Cal. Rptr. 151, 155 (Cal. Ct. App. 1989).

⁶⁹ For example, intra-class conflicts and hence inadequate representation of some subclass by a class attorney have greatly troubled the Supreme Court. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627-28 (1997). The *ex ante* perspective, in contrast, pushes towards unified, mandatory class actions, which require a de facto surrender of the due process-based formalities of Rule 23(b). David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 834, 840 (2002). See also Rosenberg, *Decoupling Deterrence and Compensation*, *supra* note 41, at 1912 (class-action opt-out on grounds of plaintiff autonomy “is a prescription for making everyone worse off.”).

⁷⁰ See McCall et al., *supra* note 59, at 839.

⁷¹ *Bank of the West v. Superior Court*, 833 P.2d 545, 557 (Cal. 1992).

⁷² CAL. BUS. & PROF. CODE § 17203 (Deering 1992 & Supp. 2003).

⁷³ See generally McCall et al., *supra* note 59, at 826-49 (discussing forms of relief and case law).

⁷⁴ Gail E. Lees, *The Defense of Private and Governmental Unfair Competition Law Claims*, 694 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, UNFAIR COMPETITION CLAIMS 2003, at 261, 306 (2003).

⁷⁵ *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002).

⁷⁶ See *id.*

despite Nike's vociferous First Amendment objections, the California Supreme Court permitted the case to go to trial.⁷⁷ After an unsuccessful petition to the United States Supreme Court,⁷⁸ the case settled for a \$1.5 million payment to a corporate watchdog group and Nike promised to mend its ways, both employment-wise and speech-wise.⁷⁹

One can think of *Kasky v. Nike* as the ultimate consumer class action *ex ante*. The case conforms to that model in all essential respects except one: proponents of the *ex ante* model insist on a preclusive, *res judicata* effect on all possible claimants.⁸⁰ (Quasi-class actions under the UCL generally lack such effects.)⁸¹ Alternatively, one can think of *Kasky v. Nike* as a kind of consumerist public law action for the production of a more "republican" globalization discourse that ought to proceed regardless of what millions of participants below the Sunsteinian margin may actually want to hear or say.⁸² At this point of perfect convergence, consumer law has reached its culmination.

IV. RISKS OF A DUAL REGIME

It would be silly to deny the deterrence and transaction cost problems that afflict the common law model. It may even be true that those problems are particularly pronounced in the context of consumer transactions. All that granted, a wholesale divestiture of legal claims from their common law owners begets other, potentially more vexing difficulties. For example, an *ex ante* regime requires ancillary estoppel and preclusion rules that make good on the promise to get the deterrence level right. What then are those rules? Proponents of an *ex ante* regime, as noted, favor mandatory class actions and wholesale preclusion.⁸³ That position raises serious due process concerns⁸⁴ and numerous practical problems—prominent among them, the specter that corporate defendants will cut themselves cheap, collusive

⁷⁷ *Id.* at 262-63.

⁷⁸ *Nike v. Kasky*, 123 S.Ct. 2554 (2003).

⁷⁹ Lisa Girion, *Nike Settles Lawsuit Over Labor Claims*, L.A. Times, Sep. 13, 2003, at C1.

⁸⁰ See Rosenberg, *supra* note 69, at 849 n.42.

⁸¹ See Fellmeth, *supra* note 24, at 1 & 11 n.4; Lees, *supra* note 74, at 449.

⁸² Professor Cass Sunstein has repeatedly urged the mobilization of "public law" for a "republican discourse." See Cass R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 39-43, 68-92 (1993). Mercifully, Sunstein shrinks from the practical implications of his proposal. See Stephen F. Williams, *Background Norms in the Regulatory State*, 58 U. CHI. L. REV. 419, 427-29 (1991) (reviewing CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990)). More practical-minded individuals like Marc Kasky lack such inhibitions.

⁸³ See Rosenberg, *supra* note 69, at 840-48.

⁸⁴ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999).

settlements with a plaintiffs' lawyer of their choice.⁸⁵ The problem appears in even sharper relief outside the context of Rule 23 and its formal protections for absent class members.⁸⁶ As noted, under California's UCL, verdicts obtained by private litigants on behalf of the public have no preclusive effect (barring a preclusive judgment in a parallel class action).⁸⁷ If they did, the statute would be facially unconstitutional since it would create a roving commission to dispose of the rights of absent, unnotified parties.⁸⁸ But now, the due process problem appears at the other end—the lack of preclusion raises the very real threat of multiple prosecutions and verdicts over the same violations by the same parties.⁸⁹ This dilemma, which even the California courts have recognized,⁹⁰ has no easy solution.⁹¹

Similarly, the estimation of damages, restitution, or benefit-of-the-bargain losses over a disparate class of consumers (outside the context of particularized injuries) poses considerable risks of judicial error. Proponents of an *ex ante* model argue that liability awards are always a matter of statistics.⁹² Sophisticated survey and sampling techniques will reduce the room for error, and the elimination of confusing questions of causation or reliance will generate judicial economies of scale.⁹³ But neither the empirical evidence nor practical considerations provide much support for such comforting assurances.

⁸⁵ See Issacharoff, *supra* note 32, 381 n.152.

⁸⁶ FED. R. CIV. P. 23(d)(4).

⁸⁷ Fellmeth, *supra* note 24, at 1 & 11 n.4.

⁸⁸ See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1106 (Cal. 1998) (Baxter, J., concurring).

⁸⁹ See *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982). See *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (recognizing that court's failure to protect defendants from identical claims in other courts constitutes denial of due process).

⁹⁰ See, e.g., *Bronco Wine Co. v. Frank A. Logoluso Farms*, 262 Cal. Rptr. 899, 911 (Cal. Ct. App. 1989) ("One must question the utility of a procedure that results in a judgment that is not binding on the nonparty and has serious and fundamental due process deficiencies for parties and nonparties.").

⁹¹ In *dictum* in *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 733 (Cal. 2000), the California Supreme Court suggested that courts might tackle the possibility of future suits by "condition[ing] payment of restitution . . . on execution of acknowledgement that the payment is in full settlement of claims against the defendant, thereby avoiding any potential for repetitive suits on behalf of the same persons or dual liability to them." Such an extra-statutory band-aid, however, would do nothing to preclude follow-on suits in cases where the defendant prevailed in the first case. Moreover, it would do nothing to prevent plaintiffs' lawyer (and defendant) from disposing of the claims of members of the public, including actually injured parties, without any of the formal and due process protection of a class action.

⁹² Rosenberg, *Decoupling Deterrence and Compensation*, *supra* note 41, at 1893.

⁹³ *Id.*

In the *Avery* litigation, the plaintiffs' expert estimated consequential losses (principally the cost of replacing the installed aftermarket parts with the original manufacturers' products) at anywhere between \$658 million and \$1.2 billion.⁹⁴ On cross-examination, he conceded that his high-end estimate might be off by about \$1 billion.⁹⁵ The benefit-of-the-bargain award in *Price* was, as noted, based on surveys of consumer averments of what they would have paid had they known the true nature of the product.⁹⁶ The award is the difference between that hypothetical price and an allegedly promised "safe" cigarette—by plaintiffs' own admission, a non-existent product.⁹⁷ We are nonetheless asked to believe that it is possible somehow to estimate a demand curve that slopes from here to there.

The sorts of calculations that go into these awards treat the car buff who owns a vintage Chevy on a par with the owner of a run-of-the-mill vehicle with a previously dented fender.⁹⁸ The latter may well be better off, both because the "inferior" replacement part is superior to the dented, pre-loss original and because he benefits as a repeat customer from State Farm's general aftermarket parts policy. Likewise, the class in *Price* includes everyone from health-conscious nicotine addicts, who believed (however fantastically) that they were consuming a "safe" product, to the merely image-conscious who are under no such illusion and smoke Lights because they are socially more acceptable than in-your-face, filterless Camels. In calculating the awards in *Avery* and *Price*, the courts made do with an expert's wild guess about the margin—and then effectively treated every claimant as a marginal purchaser.⁹⁹ The "mistake" is hardly accidental. First, the lack of direct evidence of the location of the margin or the distribution of claimants along the demand curve invites this kind of shortcut.¹⁰⁰ Second, any serious consideration of the distribution—even if only for purposes of assessing aggregate damages—would tend to

⁹⁴ *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1260 (Ill. App. Ct. 2001).

⁹⁵ *Id.* The court nonetheless characterized the expert's testimony as more than "sheer speculation." *Id.* at 1261.

⁹⁶ *Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL 22597608, at *14-16 (Ill. Cir. Ct. Mar. 21, 2003).

⁹⁷ *Id.* at *15.

⁹⁸ The vintage Chevy owner has suffered a genuine loss because both he and his potential customers can tell a replacement fender from the real thing.

⁹⁹ See *Avery*, 746 N.E.2d at 1260; *Price*, 2003 WL 22597608, at *16.

¹⁰⁰ Nor can one ascribe the "mistake" of treating customers (yet again and by means of a liability verdict) to the benefits of a bargain that they have already received to the parochial incentives of state trial judges. For a federal appellate decision and opinion along these lines, by a judge who really should know better, see *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir. 2003).

illustrate that the customers have practically nothing in common but the bare fact that they *are* customers. A court that has slighted or sidestepped that reality at the class certification stage is unlikely to emphasize it at a later stage.

Put those considerations aside and assume a world without transaction costs and, importantly, without judicial mistakes. Assume that common law or *ex ante* rules could both yield efficient results: it still does not follow that the conjunction and simultaneous operation of those two regimes *also* yields efficient results. A system that bars recovery for non-injured consumers must offer full recovery for the marginal consumers who did rely to their detriment on the seller's representations. Conversely, an *ex ante* rule must bar additional claims for compensation as a form of *ex post* opportunism. In real life, however, the regimes work in tandem.

To revert to the case examples, the *Williams* class consists of all OxyContin purchasers for whom the product worked as intended but who claimed that the product, contrary to the company's representations, proved addictive for some other consumers.¹⁰¹ Those others are specifically *excluded* from the class and remain free to sue over their alleged injuries regardless of the outcome of the *Williams* litigation.¹⁰² The *Avery* plaintiffs sued on their contract and under a state consumer-fraud statute.¹⁰³ If inferior placement parts caused consequential damages for some class members (for example, by contributing to a second crash) those individuals remain free to bring suit against the manufacturer, installer, and presumably State Farm. The *Price* plaintiffs sued for misrepresentation, not bodily injury; Marlboro Lights smokers in Illinois remain free to bring product liability lawsuits.¹⁰⁴ Under California's Unfair Competition Law, verdicts and settlements in cases brought on behalf of the public do not preclude subsequent lawsuits against the same defendants over the same conduct by parties who are actually injured by the unlawful conduct (as well as those who are not).¹⁰⁵

While one might say that *ex ante* and *ex post* lawsuits deter different types of conduct (for example, the sale of a substandard product *and* fraudulent representations about it), one cannot easily separate the claims in this fashion. In these cases, misrepresentations count for legal purposes only if they induce social losses and only because they produce them. Why

¹⁰¹ *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 172-73 (D.D.C. 2003).

¹⁰² *Id.* at 172.

¹⁰³ *Avery*, 746 N.E.2d at 1247.

¹⁰⁴ *Price*, 2003 WL 22597608, at *3.

¹⁰⁵ Fellmeth, *supra* note 24, at 1 & 11 n.4.

else deter them? Conversely, the defendant's misrepresentations are typically a crucial element in common law cases, for example, to defeat the ordinary defenses in contract and tort. The plain fact is this: so long as the parties actually injured can sue, any additional deterrence is over the top.¹⁰⁶ In allowing both types of suits (without one foreclosing the other), we do in fact have an *ex ante* rule and a common law rule operating on top of each other, over the same range of transactions.

This dual regime has very nearly become a general norm. For example, voluminous federal and state regulations govern what manufacturers and service providers may and may not say about pharmaceutical drugs,¹⁰⁷ tobacco products,¹⁰⁸ warranties,¹⁰⁹ equity offerings,¹¹⁰ credit cards,¹¹¹ and mortgage loans,¹¹² among other products. We also have general federal and state prohibitions against "unfair" business practices, which are defined and enforced by the Federal Trade Commission and by state consumer protection agencies.¹¹³ These rules embody rough-and-ready judgments about the socially acceptable (if not exactly optimal) level of activity. They prohibit conduct that would otherwise have to be deterred by means of litigation. In other words, they are *ex ante* rules in legislative or administrative form. However, only rarely do these rules have preclusive and preemptive effect. For example, Marlboro Lights were sold in meticulous compliance with federal laws and regulations, but that fact failed to impress jurors and judges in Madison County, Illinois.¹¹⁴ Compliance defenses rarely succeed in liability lawsuits over "unsafe" pharmaceutical drugs or automobiles.¹¹⁵ The risk is not simply confusion or incoherence: it is massive over-deterrence.

¹⁰⁶ *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1017 (7th Cir. 2002) ("If tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation.") (internal footnote omitted).

¹⁰⁷ 21 C.F.R. § 202.1 (2003).

¹⁰⁸ Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (1993).

¹⁰⁹ Magnuson-Moss Warranty Act, 15 U.S.C. § 2302 (1998).

¹¹⁰ Truth in Lending Act, 15 U.S.C. § 1601 (1998).

¹¹¹ Truth in Lending Act, 15 U.S.C. § 1637 (1998).

¹¹² Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801 (1997).

¹¹³ Federal Trade Commission Act, 15 U.S.C. § 45 (1991 & Supp. 2003); California Unfair Practices Act, CAL. BUS. & PROF. CODE § 17200 (Deering 1992 & Supp. 2003).

¹¹⁴ *Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL 22597608, at *19 (Ill. Cir. Ct. Mar. 21, 2003) (rejecting defendant's claim under the Federal Cigarette Advertising and Labeling Act, 15 U.S.C. § 1331).

¹¹⁵ *See, e.g.,* *Edwards v. Basel Pharm.*, 933 P.2d 298, 303 (Okla. 1997).

V. COMMON LAW AND CONSUMER LAW: CAN'T WE HAVE ONE WITHOUT THE OTHER?

Confident assertions about the efficiency of the common law often seem to founder on the manifest inefficiencies of what now passes for common law: would Judge Posner and his followers kindly explain the liability explosion?¹¹⁶ Without wishing to enter that messy and complicated debate, the preceding casual observation suggests that many of the actual or perceived problems stem, not from common law adjudication *per se*, but from its conjunction or interaction with legislative rules and interventions.

It seems quite obviously the case that the common law may *sua sponte* go off the rails. Multi-billion dollar verdicts in some product design defect cases are an example.¹¹⁷ Common law terms and doctrines, from “nuisance” to “unconscionable” and, for that matter, “injury,” are sufficiently nebulous to sustain varying social and economic arrangements under a nominally unchanged doctrine.¹¹⁸ That openness creates a potential for efficient adaptation and for ideological flights of fancy.¹¹⁹

Still, slides into wholesale nominalism are probably bound to be exceptions to the general practice. At the end of the day, the common law embodies reciprocity relations that are real, not some theoretical construct. Not everything can be a nuisance. My averred right to an unobstructed view is a prohibition on my neighbor’s right to expand his home, and that consideration will be obvious to the judge because the defendant will press it with some force. Characterize anything but the literal truth as a “misrepresentation” and all advertising will cease; that intuition explains the continued viability of the distinction between actionable misrepresentation and permissible “puffery.”¹²⁰

¹¹⁶ See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1094 (1989), reprinted in ECONOMIC FOUNDATIONS OF PRIVATE LAW 173, 200 (Richard A. Posner & Francesco Parisi eds., 2002) (“[A] decade of effort by economists to develop theories of tort law succeeded on its own scholarly terms, but economists all too often provided efficiency proofs for institutions that most lawyers now view as inefficient.”).

¹¹⁷ See, e.g., Ann W. O’Neill, 1999: *The Year in Review*, L.A. TIMES, Dec. 26, 1999, at B2 (discussing a jury award of 4.9 billion in damages against General Motors when a 1979 Chevy Malibu burst into flames after being rear-ended by a drunk driver: the figure was later reduced by three billion dollars).

¹¹⁸ The textbook example is still Judge Skelly Wright’s wholesale transformation of “unconscionability” in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

¹¹⁹ See, e.g., George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284 (1981).

¹²⁰ See, e.g., *Charter Township of Ypsilanti v. Gen. Motors Corp.*, 506 N.W.2d 556, 559, 561 (Mich. Ct. App. 1993).

Recognize anything as an “injury” and it will soon transpire that nothing may be left to compensate actually injured victims.¹²¹ Characterize as “unconscionable” any sales practice or contract terms that might scandalize a middle-class consumer with secure credit (such as a federal judge) and it turns out that sales to low-income, riskier customers dry up altogether.¹²² At some level, a common law judge must care about activity levels as well as harms; about production values as well as consumption; about over- as well as under-deterrence.

So how does one strike a rough balance between these risks? The much-maligned common law requirements that circumscribe classes of plaintiffs and causes of actions, a starting point for the consumer law critique of the common law, can be understood as a kind of functional corollary or corrective to the inescapable vagueness of central substantive doctrines. A negligent misrepresentation lies somewhere on a spectrum between fraud at one end and an innocent effort to package consumer information at the other, which can be done only by omitting some information that is known to the seller. In cases alleging misrepresentation, there are substantial costs to erring on either side.

The common law must find a rough balance. On the one hand, the legal defenses that sound in tort (which are the third and last line of defense against abuse and exploitation, well behind the competitive discipline of the market and contractual defenses) must be given their proper real-world context to avoid the threat of under-deterrence. On the other hand, the threat of over-deterrence created by inflated loss allegations must be avoided by limiting the universe of cases to those where the losses are concretely visible. In these cases, detrimental reliance ensures that the plaintiff before the court is actually the marginal consumer whose losses are far more ascertainable than the infra-marginal class’s estimates of losses to someone else.¹²³

Reciprocity-based inhibitions tend to give way when the legislature signals an intention to promote consumer interests and consumption values. Presumably (judges surmise), a legislature that enacts a consumer protection statute wants to do more than to codify pre-existing law. Thus, courts may loosen injury requirements and adopt more relaxed notions of inducement and reliance even where the text of the statute

¹²¹ See *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 435-36 (1997) (asbestos litigation).

¹²² See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 305 (1975).

¹²³ I owe the point to Richard Epstein.

leaves some doubt about the legislature's intent to prompt that judicial response. Courts, one might say, act on what they take to be the legislature's signals, rather than following its affirmative commands.

This broad-brush description captures the state judiciaries' response to the enactment of "little FTC acts" and analogous consumer protection statutes passed by many states in the late 1950s and 1960s. For the most part, those state enactments sought to strengthen the hand of *public* regulators and prosecutors (foremost, the consumer protection offices of state attorneys general) in enforcing prohibitions against unfair competition, false advertising, and the like.¹²⁴ Like the FTC itself, state agencies generally enjoy broad discretion in defining "unfair" or "deceptive" practices.¹²⁵ Typically, public agencies are not required to prove all the common law elements of statutory offenses, for example, detrimental reliance by individual consumers.¹²⁶ This arrangement makes a good deal of sense: let individual consumers sue over direct harms, and let public prosecutors, whose abuses can be checked by political and budgetary means, direct their attention to "fraud on the market" offenses that are likely to be under-deterred through private litigation.

Over time though, many state courts came to read those statutes as a warrant for more expansive *private* litigation.¹²⁷ The train of thought is not hard to follow: the legislators' enhanced authorization of public prosecutors looks to all eyes like an endorsement of consumer interests outside the confines and strictures of the common law.¹²⁸ When private plaintiffs subsequently sue on those more expansive theories, they are

¹²⁴ See Sovern, *Reconsidering*, *supra* note 28, at 448 ("The state statutes, like the FTC Act, typically grant enormous power to the public agencies which enforce them . . .").

¹²⁵ Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1807 (2000).

¹²⁶ Agencies, both federal and state, need not even allege or show that a "misrepresentation" was false. See, e.g., *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) ("[P]roof of intention to deceive is not requisite to a finding of violation of the statute . . ."); *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943) ("It is not necessary . . . for the Commission to find that actual deception resulted."); *FTC v. Balme*, 23 F.2d 615, 621 (2d Cir. 1928) ("Nor is it necessary . . . to find . . . that any competitor of the respondent has been damaged."). See also Sovern, *Reconsidering*, *supra* note 28, at 444-45, 450-51.

¹²⁷ See Seth William Goren, *A Pothole on the Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law*, 107 DICK. L. REV. 1, 13-14 (2002) (collecting cases and commentary).

¹²⁸ See, e.g., *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 822 (Pa. 1974) (We cannot presume that the Legislature when attempting to control unfair and deceptive practices . . . intended to be strictly bound by common-law formalisms. Rather the more natural inference is that the Legislature intended the Consumer Protection Law to be given a pragmatic reading . . .").

hardly acting contrary to the statutory intent; they are merely assisting resource-strapped public agencies.

In the 1970s (the heyday of the consumer law movement), state legislatures made the next move and provided explicitly for the private enforcement of consumer protection statutes.¹²⁹ Most states also provided added incentives for private litigation, typically in the form of attorneys' fees and treble damages for certain violations.¹³⁰ While federal courts sought to limit the reach of expansive state statutes (for example, through broad preemption under the Federal Arbitration Act),¹³¹ judicial responses among the states appear to have varied greatly. In some states, courts limited what they viewed as the scope of private consumer litigation, often by means of reading common law requirements of inducement, reliance, and injury into the statutes.¹³² However, in most other cases the state judiciary accepted the legislature's invitation to give free rein to private enforcers.¹³³

California provides a dramatic illustration of judicial creativity in expanding the reach of the Unfair Competition Act. In particular, the creation of universal standing in *Barquis v. Merchants Collection Association of Oakland, Inc.*¹³⁴ was quite plainly neither intended nor anticipated by the legislature.¹³⁵ These differences in institutional agenda-setting and legal development would make an interesting study for political scientists. Of greater practical import though, is the near-uniform tendency toward greatly expanded private consumer litigation.

That tendency is readily explained. In the area of consumer law, as in many other venues, legislatures and courts act as competing suppliers of substantially identical goods. Naturally, the demand for consumer law will gravitate towards the more favorable forum. The default outcome is that an expansion of

¹²⁹ See Sovern, *Reconsidering*, *supra* note 28, at 448.

¹³⁰ *Id.* at 448-49.

¹³¹ See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). See also *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 174, 177 (D.D.C. 2003) (dismissing consumer complaint for lack of injury despite statutory language authorizing "any person" to seek redress for illegal trade practices); *Bullet Golf, Inc. v. U.S. Golf Ass'n*, No. CV-94-4182-ER, 1995 U.S. Dist. LEXIS 6189, at *2 (C.D. Cal. Mar. 20, 1995) (dismissing claim under California FAA without credible allegation of actual deception and injury).

¹³² See, e.g., *Heidt v. Potamkin Chrysler-Plymouth, Inc.*, 354 S.E.2d 440, 441 (Ga. Ct. App. 1987) (requiring reliance); Goren, *supra* note 127, at 32 (discussing and criticizing Pennsylvania Supreme Court's decision to that effect); Sovern, *supra* note 28, at 457-60.

¹³³ See Goren, *supra* note 127, at 13-14.

¹³⁴ 496 P.2d 817, 839 (Cal. 1972).

¹³⁵ *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1107-09 (Cal. 1998) (Brown, J., dissenting) (discussing statutory text and history).

consumer law occurs so long as both *or either* institution say “yes.” It can be avoided only if both say “no,” or else the nay-saying institution affirmatively refuses to cooperate and then presumes and exercises the authority to rein in the wayward rival.

Such a scenario is barely thinkable. Theoretically, state courts could, within the limits of their state constitution, refuse to apply statutes in derogation of common law requirements. Theoretically, legislatures could repeal private enforcement provisions or judicial decisions to that effect. Neither courts nor legislatures, however, are any good at this sort of thing. Both confront great institutional obstacles even in reversing their own decisions, let alone the decisions of a coordinate branch of government. Litigation under California’s Unfair Competition Law has spawned sufficient abuse and distress to prompt stopgap interventions by the office of the attorney general.¹³⁶ It has also prompted reform proposals by a reform commission that included prominent members of the plaintiffs’ bar¹³⁷ and a legal scholar with impeccable consumer advocacy credentials.¹³⁸ Still, the California Supreme Court has emphatically declined opportunities to curtail the scope of the statute.¹³⁹ The Sacramento legislature, for its part, has proven a graveyard for reform proposals.¹⁴⁰

VI. CONCLUSION

As legal doctrines change, so do institutional and interest group arrangements. The loosening of common law requirements in the 1970s had the intended result of facilitating consumer

¹³⁶ Attorney General Bill Lockyer filed suit against a Beverly Hills law firm under the same Unfair Competition Law that the firm was accused of abusing. Press Release, Office of the Attorney General, Attorney General Lockyer Files “17200” Consumer Protection Lawsuit Against Beverly Hills Law Firm (Feb. 26, 2003), *available at* <http://caag.state.ca.us/newsalerts/2003/03-021.htm>.

¹³⁷ *Unfair Competition Litigation*, 26 CAL. L. REVISION COMMISSION REPS. 191 (1996).

¹³⁸ See Fellmeth, *supra* note 24, at 1. Professor Fellmeth has a long and distinguished record as a consumer law advocate.

¹³⁹ See, e.g., *Stop Youth Addiction*, 950 P.2d at 1115 (Brown, J., dissenting) (observing that “the Courts of Appeal have done an admirable job of reining in the UCL’s potential for adverse regulatory effects” and charging the majority with “choos[ing] to speed us along the path to perdition.”).

¹⁴⁰ In point of fact, the California legislature has repeatedly *expanded* the reach of the UCL, typically in response to limiting judicial rulings. See, e.g., CAL. BUS. & PROF. CODE § 17203 (Deering 1992 & supp. 2004) (reversing *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1156 (1991)); *State v. Texaco, Inc.*, 762 P.2d 385, 399 (1988) (holding that the statute only applies to wrongful business practices). In light of the legislature’s resistance, business-backed reform advocates now propose reform by means of an initiative and referendum. See *STOP \$hakedown Lawsuits*, Californians to Stop \$hakedown Lawsuits, <http://www.stopshakedownlawsuits.com/> (last visited Mar. 4, 2004).

litigation by public interest organizations and legal aid groups.¹⁴¹ In retrospect, the dominance of that form of litigation has proven temporary. Consumer law has long since slipped its constituency-oriented moorings. It now responds to the demands of lone rangers and, far more importantly, the class action bar.

Strikingly, the role of consumer protection statutes has attracted very little attention in the public, political, or academic debate over "tort reform." Perhaps this is because billion dollar verdicts in "misrepresentation" cases are of somewhat more recent vintage than older, yet equally spectacular, product liability cases. Perhaps the business community prefers a unifying agenda, such as a campaign against punitive damages (which every corporation opposes) to an agenda that would require a partial surrender of tactical opportunities. Like many unfair competition laws, California's statute permits business firms to sue their competitors, and the state's leading tort reform group has insisted that these opportunities must be preserved in reforming the statute.¹⁴² Also, state legislators quite probably have an incentive to pretend that the "liability crisis" is altogether the fault of an out-of-control judiciary. Scholars continue to teach Torts and Contracts without much attention to peripheral interferences from consumer protection statutes.¹⁴³

The obvious problem is that the periphery has long begun to overwhelm the common law center. I seriously doubt that one could find many contemporary class action cases of any consequence where a conventional fraud or breach of contract claim is *not* accompanied by a statutory claim of unfairness, deception, or misrepresentation.¹⁴⁴ The less obvious and more challenging problem is the conjunction and interaction of disparate theories of enforcement and recovery. A theory of misrepresentation without reliance, inducement, and injury may make a certain amount of sense in the context of a public enforcement monopoly. However, wrenched out of that context,

¹⁴¹ Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 583 (1989) ("Legal services programs have brought many of the reported cases.").

¹⁴² See John H. Sullivan, California's Notorious "17200"—Written by Lewis Carroll, Adapted by Stephen King?, Remarks at the Meeting of the Center for Legal Policy at the Manhattan Institute and the Federation of Defense and Corporate Counsel (Oct. 24, 2002), transcript available at <http://www.cjac.org/bp17200/>.

¹⁴³ Macaulay, *supra* note 141, at 575-76.

¹⁴⁴ In three case examples discussed above, plaintiff sued under state fraud and unfair competition statutes. See *supra*, notes 42, 47 & 51 and accompanying text. Additionally, the *Toshiba* case was brought under the federal Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030. *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 926 (E.D. Tex. 1999).

it becomes profoundly problematic. Benefit-of-the-bargain redress makes eminent sense in a common law case over a breach of contract, but out of that context, it may turn into a menace. Yet, for perfectly understandable institutional reasons, what we have is a dual, overlapping regime.

I do not profess to know whether it is possible to unscramble this particular omelet. One can think of partial steps in that direction—for example, a sharper distinction between public and private enforcers, or an expansion of affirmative compliance defenses. The former strategy would confine common law and *ex ante* rules to their respective domains; the latter would force a social choice between the two. It may be too late or too early in the day to contemplate such steps. Too late because the privatization of public law norms, unhinged from requirements of injury, is a *fait accompli* sustained by a seamless coalition of consumer advocates and plaintiffs' attorneys. Too early because common law modes of thought continue to exert a powerful pull on our collective imagination.

To their credit, the most articulate proponents of an *ex ante* regime emphatically proffer their scheme as an alternative to common law modes of thought, not as a supplement.¹⁴⁵ They have been at pains to insist that public regulatory schemes are often superior to, and ought to preclude, private litigation.¹⁴⁶ Their clarion call is efficiency, not some boundless ideological conception of "consumer rights."¹⁴⁷ Precisely this convergence of efficiency theorems and consumerist nostrums ought to give pause, and, after a deep breath, call attention to the political economy of the beast. One may dismiss notions of plaintiff autonomy and the individual's right to a day in court as so much sentimental nonsense and *ex post* opportunism.¹⁴⁸ The fact is that the sentimentalists and opportunists will continue to vote, litigate, and agitate in defiance of elegant blackboard schemes. The siren song of consumer law in its modern, disembodied state is precisely that everyone should have a day in court, injured or not. To show that this bastard regime cannot be efficient from any perspective is the easy part. The hard part is to tie ourselves

¹⁴⁵ FRIED & ROSENBERG, *supra* note 39, at 14 ("Crucially, *ex ante* and *ex post* preferences are mutually exclusive concerning the fundamental purpose of the legal system in managing accident risk.")

¹⁴⁶ *Id.* at 66-67; ROSENBERG, *Decoupling Deterrence and Compensation*, *supra* note 41, at 1918-19 ("[T]he general, well-documented advantages of these "alternatives" dictate resorting to courts only to the extent of systematic failure of administrative regulation to control risk appropriately and of government and commercial first-party insurers to cover loss adequately.")

¹⁴⁷ FRIED & ROSENBERG, *supra* note 39, at 13.

¹⁴⁸ ROSENBERG, *Decoupling Deterrence and Compensation*, *supra* note 41, at 1911-16.

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