

3-1990

# The Asymmetrical Conditions of Legal Responsibility in the Marketplace

Bailey Kuklin

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Contracts Commons](#), and the [Law and Philosophy Commons](#)

---

## Recommended Citation

44 U. Miami L. Rev. 893 (1990)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

# University of Miami Law Review

VOLUME 44

MARCH 1990

NUMBER 4

## The Asymmetrical Conditions of Legal Responsibility in the Marketplace

BAILEY KUKLIN\*

I. THE QUALITIES OF LEGALLY RESPONSIBLE ACTS .....	896
II. AUTONOMOUSLY CHOSEN ACTIONS .....	909
A. <i>Autonomy</i> .....	910
B. <i>Willpower</i> .....	923
III. LIMITATIONS TO COMPLETE AUTONOMY .....	936
A. <i>Knowledge</i> .....	936
1. INFORMATION .....	937
2. FORESIGHT .....	960
B. <i>Capability</i> .....	966
1. REASON .....	970
2. SENSE .....	982
IV. THE CONSEQUENCES OF THE IMPERFECTIONS IN THE CONDITIONS OF LEGALLY RESPONSIBLE ACTS .....	993
A. <i>Decision Theory</i> .....	994
B. <i>Differential Rationality</i> .....	997
V. CONCLUSION .....	1003

In the seventeenth and eighteenth century struggles for individual rights, common rallying cries were "freedom," "liberty," and "natural rights." Indignantly urging the government to "get off my back," a claimant would explain: "I can take care of myself quite well, thank you." A common warrant for this explanation, especially as time went on, was that an individual knows better what is good for herself and, as a rational person, is fully able to seek that good.<sup>1</sup> As

\* The author appreciates the useful discussion and comments on prior drafts of this Article by Robert Abrams, John Cirace and Michael Madow, and is grateful for a summer research stipend from Brooklyn Law School, which supported this endeavor.

1. The drive for religious freedom was also central.

[T]he basis of the equality of men for the exponents of natural law, and of their intrinsic worth for Kant is the fact that they all have reason. . . . [R]eason was alike in all men, it was man's defining characteristic. Hence it is the foundation, too, of his natural rights, as a human being.

Macdonald, *Natural Rights*, in *PHILOSOPHY, POLITICS AND SOCIETY* 35, 42-43 (P. Laslett ed.

later articulated, a liberal democracy should respect individual choices as long as they harm no others.<sup>2</sup> Similarly, no duties should be imposed on a person, or in other words, a person should not be held responsible for the consequences of acts that are not voluntarily undertaken.<sup>3</sup> These rallying cries reverberate loudly today in the

---

1st series 1956); see also H.L.A. Hart, *Are There Any Natural Rights?*, in *POLITICAL PHILOSOPHY* 53, 53-54, 66 (A. Quinton ed. 1967) (The right to be free "is one which all men have if they are capable of choice."); Pateman, *Political Obligation and Conceptual Analysis*, in *PHILOSOPHY, POLITICS AND SOCIETY* 227, 238 (P. Laslett & J. Fishkin eds. 5th series 1979) ("Liberal democratic theory . . . lays particular stress on the individual social actor as an actor who judges for himself, makes his own choices and decisions, looks only to his own conscience, pursues his own, private interests, and enters into his own, voluntary contracts and exchanges."). Bentham, no believer in natural rights ("nonsense on stilts"), agreed with their underpinnings. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* lxvi (J. Burns & H.L.A. Hart eds. 1970) (1st ed. Oxford 1789). See generally C. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS* (1932); C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962). For an argument that the grounds of this claim for human rights are not fully satisfactory, see Feinberg, *Introduction*, in *MORAL CONCEPTS* 1, 15 (J. Feinberg ed. 1969) ("The proposed natural bases neither exclude differences in the strength of the claims . . . nor justify the exclusion of some animals.").

The liberal response to this claim of the citizen is, arguably, not "okay, if that is what will make you happy," but rather, "okay, after all, what harm will it do?" See B. BARRY, *POLITICAL ARGUMENT* 42 n.1 (1965). This claim is not just that one can take care of oneself and thus does not need the assistance of the state, but also that to keep the state at bay, one must not be held responsible unless certain conditions are satisfied. See F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 68 (1981) ("The principle of blameworthiness imposes restraint on the state by insisting on the relevance of facts and values that go beyond the interests and purposes of the political regime.").

2. See J.S. MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 81, 176-200 (1951) (1st ed. London 1859) ("harm principle"). To eighteenth century judges, "theories of natural law meant that men had an inalienable right to make their own contracts for themselves, and to the judges of the nineteenth century the philosophy of *laissez-faire* similarly meant that the law should interfere with people as little as possible." P. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 4 (3d ed. 1981). "[The nineteenth century] rejection of paternalism was actually part of a reform movement which was closely allied to the political movement towards democracy." *Id.* at 5.

3. In this situation, the person is not blameworthy for the consequences. "Such responsibility is commonly thought to have some essential link to freedom of will or action. . . . In this sense of 'responsibility,' if someone is responsible for some event, then he is worthy of praise or blame for that event." Zimmerman, *Luck and Moral Responsibility*, 97 *ETHICS* 374, 375 (1987). If he is not worthy of praise or blame, he does not deserve it. See Lingren, *Criminal Responsibility Reconsidered*, 6 *LAW & PHIL.* 89, 92-100 (1987) (the interrelationship between the desert, voluntariness, and fairness theses of criminal responsibility, with criticism); Vandervort, *Social Justice in the Modern Regulatory State: Duress, Necessity and the Consensual Model in Law*, 6 *LAW & PHIL.* 205, 207-08 (1987) (" 'Choice' and 'desert' remain fundamental reference points in the cognitive map we use in Western society to interpret and evaluate human behavior."). "The predominant theory of criminal responsibility is a form of Kantian theory. People should be excused if they could not have avoided performing a criminal act. This claim is reminiscent of Kant's dictum that 'ought' implies 'can.' " Bayles, *Character, Purpose, and Criminal Responsibility*, 1 *LAW & PHIL.* 5, 6 (1982). Kant's canon is central to Rawls' account of responsibility. See M. MOORE, *LAW AND PSYCHIATRY* 341-42 (1984). "[T]he principle that only those who are responsible and culpably responsible for their

invisible-hand literature of the law and economics movement.

It did not require the loosening of the shackles of feudalism to make apparent that some individuals are not rational persons who are able to take care of themselves, or perhaps that individuals are not rational in all circumstances.<sup>4</sup> The law never held perfect rationality as a requisite to legal responsibility.<sup>5</sup> The common law response to the acknowledged irrationality is nevertheless to hold persons, outside certain classes such as minors, as generally legally responsible.<sup>6</sup> The citizenry is held liable for their actions upon meeting a lower standard, an objective one, such as that of the "reasonable person" of ordinary prudence.<sup>7</sup>

---

law-violating conduct should be subject to criminal liability and punishment" has been justified by three arguments: "(1) it maximizes liberty, (2) it maximizes justice by basing liability on fault, and (3) it satisfies the requirements of humanity in making criminal law 'treat persons as persons,' i.e., creatures to be reasoned with and called upon to answer for their actions." Baker, *Mens Rea, Negligence and Criminal Law Reform*, 6 LAW & PHIL. 53, 68 (1987) (footnote omitted); see also H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 158, 181-82 (1968). Other theories of responsibility abide. See, e.g., Bayles, *supra*, at 7; Lingren, *supra*, at 100-10 (motivation and objective (utilitarian) theories).

4. "Thus all those who have argued for a natural sovereign autonomy have agreed that persons have the right of self-government if and only if they have the capacity for self-government." J. FEINBERG, *HARM TO SELF* 28 (1986). With this proposition comes the slippery slope: "By the standards of full rationality we are all impaired." O'Neill, *Between Consenting Adults*, 14 PHIL. & PUB. AFF. 252, 257 (1985).

5. The antirationalistic approach, which regards man not as highly rational and intelligent but as a very irrational and fallible being, whose individual errors are corrected only in the course of a social process, and which aims at making the best of a very imperfect material, is probably the most characteristic feature of English individualism.

F. HAYEK, *Individualism, True and False*, in INDIVIDUALISM AND ECONOMIC ORDER 1, 8-9 (1948), quoted in Epstein, *Private Property and the Public Domain: The Case of Antitrust*, in ETHICS, ECONOMICS, AND THE LAW 48, 76 n.12 (J. Pennock & J. Chapman eds. 1982).

6. "The [mid-eighteenth century] common law did not often protect individuals from themselves, from monopolies, or from anything. It tended more strongly to express its individualism not by tenderness but by harshly and uncompromisingly treating men as free-willed, self-reliant, risk-and-responsibility-taking individuals." L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 318 (1957). "[T]he spirit of the common law was epitomized in the maxim, 'Let the buyer beware' (*caveat emptor*)."  
*Id.*

7. The word "lower" may be misleading. Meeting the reasonable person standard is easier than satisfying the qualities of an ideally responsible action, so in one respect, it is a lower standard. On the other hand, because a person is held to this standard and is therefore liable more often than if perfection is demanded, this is a higher standard.

One defense of an objective or reasonable person standard is that a subjective standard entails an examination of the person's mental state, a notoriously difficult or impossible evidentiary exercise. See Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1, 60-62 (1989). The unworkability of a subjective standard has led to the objective theory of contracts. See J. MURRAY, *MURRAY ON CONTRACTS* § 19 (2d rev. ed. 1974). In the criminal context, one must not forget that "no individual is to be punished who lacks the capacity to obey." H.L.A. HART, *Diamonds and String: Holmes and the Common Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 278, 284 (1983). If the "personal

This Article analyzes the conditions generally required for legal responsibility under contract law, tort law, and criminal law; it then examines these conditions in the context of the consumer marketplace. With the modern scientific scrutiny of the human condition, the vague judicial awareness that one is often not in a position to meet strong requisites of legal responsibility is undergoing explication. Once the necessary conditions are understood, it becomes apparent not only that persons often fail to satisfy them fully, for that may always be true to some degree, but also that in certain settings, such as the consumer marketplace, one party is systematically less able to satisfy them than the other. An asymmetry exists. Not only is this disparity in the meeting of the conditions of responsibility an inherent aspect of certain interactions, but the asymmetry can also be irresistibly increased by the advantaged party (typically, the merchant) in many instances. One party to a transaction frequently is in a better position to distort the other's choice. Furthermore, the inherently advantaged party often has an economic incentive to increase the asymmetry. The net result is that the marketplace works neither efficiently nor fairly. Insofar as this is true, there is *prima facie* justification for intervention. The claim that one has a moral right to profit from another's relative disadvantage which reasonable behavior will not prevent does not ring true, especially when: (1) one has exacerbated the disadvantage, and (2) the advantage gives rise to resource misallocation. Modern legal developments, such as the doctrines of contractual unconscionability and products liability, reflect this. The law and economics analysis of the invisible-hand stripe gives this short shrift.

## I. THE QUALITIES OF LEGALLY RESPONSIBLE ACTS

An act entails a choice and a consequent physical response. Two

---

equation" of the actor is ignored, the moral blameworthiness arguably diverges from legal blameworthiness. Then, "[l]egal fault is not coextensive with moral fault, and so lacks any moral point or moral justification." N. MACCORMICK, *The Obligation of Reparation*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 212, 222 (1982) (reference omitted). MacCormick resists this conclusion. *See id.* In tort law, however, as evidenced by the "reasonable person" standard, the concern "for the moral character of the injurer's conduct has always been rather minimal." Coleman, *Corrective Justice and Wrongful Gain*, 1 J. LEGAL STUD. 421, 430 (1982). "Moreover, by the early 1970s, the prevailing view had become that the only plausible, coherent account of fault in torts was an economic one: to be at fault is simply to fail to take the precautions necessary to avoid an inefficient (in cost/benefit terms) harm." *Id.* Coleman is critical of this view. *See id.* at 430-36. He notes that the pricing model for general deterrence will minimize accident costs only when the actor has a certain degree of rationality. *See Coleman, Mental Abnormality, Personal Responsibility, and Tort Liability*, in *MENTAL ILLNESS: LAW AND PUBLIC POLICY* 107, 116 (B. Brody & H. Engelhardt, Jr. eds. 1980).

foci are suggested: actor and action. First, the actor. The qualities of a legally competent or responsible actor have been expressed in various ways.<sup>8</sup> The idea of responsibility is often stated in terms of rationality,<sup>9</sup> but a narrow conception of rationality does not capture enough of the underlying idea.<sup>10</sup> Although "rationality" has been used

8. For descriptions of the qualities of the morally or legally responsible person, see, e.g., J. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 175, 180-81 (3d ed. 1979); F. BRADLEY, *ETHICAL STUDIES* 5-7 (2d ed. 1927); R. PERRY, *REALMS OF VALUE* 62-63 (1954) (in terms of personhood); Moore, *The Moral and Metaphysical Sources of the Criminal Law*, in *CRIMINAL JUSTICE* 11, 12-14 (J. Pennock & J. Chapman eds. 1985). Hart comes to the same point in the criminal context by looking to those doctrines that diminish proper responsibility: mitigation, justification, and, particularly, excuse. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 1, 13-17 (1968); H.L.A. HART, *Legal Responsibility and Excuses*, in *id.* at 28. Benn and Peters, looking to Bradley and Hart, also put responsibility into the negative: "We conclude that a man is responsible for his actions when there is no case for saying that he acted under compulsion, in ignorance, under duress, and so on." S. BENN & R. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 241 (1959). Gross advances a "principle of responsibility [which] announces that criminal liability is unjust if the one who is liable was not able to choose effectively to act in a way that would avoid criminal liability, and because of that he violated the law." H. GROSS, *A THEORY OF CRIMINAL JUSTICE* 137 (1979) (emphasis omitted); see also S. BENN & R. PETERS, *supra*, at 240 ("To say that a man cannot avoid or help doing what he does amounts to saying that he is not responsible for his actions."). Notice, once again, that these principles echo Kant's canon that "ought" implies 'can.' See Bayles, *supra* note 3, at 6.

The standards of responsibility depend upon the context. Conflicting interests and principles of justice must be considered. See J. FEINBERG, *Problematic Responsibility in Law and Morals*, in *DOING AND DESERVING* 25, 27-29 (1970); G. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 6.7-.8 (1978). Contextual questions, other than in a brief consideration of strict liability, are largely ignored in this Article. See *infra* note 139 and accompanying text. Even the meaning of "responsibility" may depend upon the context of its use. "Sometimes 'responsibility' means causal assignability, sometimes authorship, causal or simple, sometimes fault-imputability or creditability, sometimes liability." J. FEINBERG, *Action and Responsibility*, in *DOING AND DESERVING*, *supra*, at 119, 137; see also M. MOORE, *supra* note 3, at 49-53 (six senses of "retrospective responsibility"); Wolf, *The Legal and Moral Responsibility of Organizations*, in *CRIMINAL JUSTICE* 267, 275-79 (J. Pennock & J. Chapman eds. 1985) (three senses of "responsibility"). For a discussion of "at least five closely related but distinguishable things that might be meant by the phrase 'ascription of responsibility,'" see J. FEINBERG, *Action and Responsibility*, *supra*, at 130-37.

9. See, e.g., Lucas, *Or Else*, in *MORAL PROBLEMS* 222, 235 (J. Rachels ed. 1971) ("[I]f a man was not capable of rational choice at the time of the offence, then the imperative major premise 'Do not do it, or else' cannot have been properly addressed to him, and we cannot acquire any warrant for carrying out the 'Or else.'"); Mitchell, *Efficiency, Responsibility, and Democratic Politics*, in *LIBERAL DEMOCRACY* 343, 345 (J. Pennock & J. Chapman eds. 1983) ("Responsibility is defined in a slightly unfamiliar way as rational choice.").

10. See McGregor, *Philips on Coerced Agreements*, 7 *LAW & PHIL.* 225, 227-28 (1988) (criticizing "tief[ing] too closely the notions of rationality and voluntariness" which "link[s] up with our entrenched views about moral and legal responsibility"). For examples of conceptions of rationality too narrow to capture the full richness of legal and moral responsibility, see H. MORRIS, *ON GUILT AND INNOCENCE* 84 (1976) ("The paranoid is not irrational given what he believes . . ."); Harsanyi, *Morality and the Theory of Rational Behaviour*, in *UTILITARIANISM AND BEYOND* 39, 42 (A. Sen & B. Williams eds. 1982) ("Basically, rational behaviour is simply behaviour consistently pursuing some well defined goals, and pursuing them according to some well defined set of preferences or priorities."); Sen,

broadly enough,<sup>11</sup> a word richer in connotations that more adequately

*Choice, Orderings and Morality*, in PRACTICAL REASON 54, 55 (S. Korner ed. 1974) ("Morality would seem to require a judgement among preferences whereas rationality would not."). For more detail, see 2 H. SIMON, *Rationality*, in MODELS OF BOUNDED RATIONALITY 405 (1982). Early theorists asserted: "To be rational was to be able to recognise truths and the connections between them. To act rationally was, therefore, to have one's non-theoretical propensities controlled by one's apprehension of truths about the conduct of life." G. RYLE, *THE CONCEPT OF MIND* 26 (1949). Hobbes and Bentham were among those with rather narrow views of rationality, including rational ethics as, essentially, calculation. See Ladd, *The Use of Mechanical Methods for the Solution of Ethical Problems*, in HUMAN VALUES AND ECONOMIC POLICY 157, 158 (S. Hook ed. 1967). So generally do the economists. See F. KNIGHT, *Science, Philosophy, and Social Procedure*, in FREEDOM AND REFORM 205, 207 (1947); H. MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY* 6 (1982) ("Rationality, in the model [from economic theory], implies very little beyond a certain consistency of choice: if I prefer A to B and B to C, then I prefer A to C."); Hogarth & Reder, *Introduction: Perspectives from Economics and Psychology*, in RATIONAL CHOICE 1, 2-4 (R. Hogarth & M. Reder eds. 1987); Ladd, *supra*, at 159-60 ("Philosophers instinctively balk at the definition of 'value' and 'rationality' used by economists."); Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977). For a discussion of the inadequacies in the classical economic view, see Harsanyi, *Does Reason Tell Us What Moral Code to Follow and, Indeed, to Follow Any Moral Code at All?*, 96 ETHICS 42, 42-43 (1985). For a discussion of the distinctions between the economic view and that of the other social sciences, see Simon, *Rationality in Psychology and Economics*, in RATIONAL CHOICE, *supra*, at 25, 26.

11. Rawls twice gives an expansive list of the qualities of a person under "the usual definition of rationality":

[T]hey know their own interests more or less accurately; they are capable of tracing out the likely consequences of adopting one practice rather than another; they are capable of adhering to a course of action once they have decided upon it; they can resist present temptations and the enticements of immediate gain.

Rawls, *Constitutional Liberty and the Concept of Justice*, in RIGHTS 26, 30 (D. Lyons ed. 1979); Rawls, *Justice as Fairness*, in PHILOSOPHY, POLITICS AND SOCIETY 132, 137 (P. Laslett & W. Runciman eds. 2d series 1962). For further elaboration, see J. RAWLS, *A THEORY OF JUSTICE* §§ 61-66 (1971). See also A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 208 (1957); F. HAYEK, *THE CONSTITUTION OF LIBERTY* 76 (1960) ("The assigning of responsibility thus presupposes the capacity on men's part for rational action . . . [which] presupposes a certain minimum capacity in them for learning and foresight, for being guided by a knowledge of the consequences of their action."); G. WARNOCK, *THE OBJECT OF MORALITY* 13 (1971) ("[W]hat makes 'people' eligible for consideration, and sometimes for judgement, as moral agents is that they are in a certain sense rational . . . . For one's doings to be a proper or possible object of moral evaluation whether by others or by oneself, it is a necessary condition that one should have at least some ability to perceive and consider alternative courses of action, to appreciate what is to be said for or against the alternatives, to make a choice or decision, and to act accordingly."); R. WOLFF, *THE POVERTY OF LIBERALISM* 90 (1968) ("A man becomes more rational just insofar as he brings within the scope of his will some datum of experience which previously confronted him as independent of his will."); Coleman, *Mental Abnormality, Personal Responsibility, and Tort Liability*, *supra* note 7, at 130 ("Because agency requires the ability to form intentions and to act accordingly, an agent is someone with an integrated network of wants and beliefs that are translatable into conduct.").

Rawls notes that "there seems to be no one best interpretation of rationality." Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 529 (1980). Despite Rawls' concern for rationality, he has been criticized for failing to take human irrationalities adequately into account in his great work, *A Theory of Justice*. See Gibson, *Rationality*, 6 PHIL. & PUB. AFF. 193, 193 (1977) ("[T]he theory provides no basis for criticizing a society whose institu-

symbolize the quality of a responsible actor is "autonomous." The choice by the actor must be autonomous, reflective of her own will.<sup>12</sup> Second, the act. A responsible choice is not enough; the actor must also be able to act sufficiently upon the conclusions of her reasonings.<sup>13</sup> In other words, the actor must exercise the willpower required

tions systematically promote, and whose members acquire and act upon, objectionable desires and ends, including some that would, on a less neutral conception of rationality, be termed irrational."); Lyons, *The Nature of the Contract Argument*, 59 CORNELL L. REV. 1064, 1067 (1974) ("An obvious difficulty [with Rawls' claim] is that any group of individuals is likely to be misinformed about, or at least ignorant of, some relevant facts, and may not be very rational. How absurd to suppose ourselves bound by principles that may be grounded in ignorance or bad reasoning!"). Rawls now disclaims that his theory of justice is "part of the theory of rational choice," and acknowledges its incompatibility with a Kantian view "of trying to derive the content of justice within a framework that uses an idea of the rational as the sole normative idea." Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 237 n.20 (1985). For various interpretations of rationality, see, e.g., R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 20-25, 85-86 (1983); R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 10-16 (1979); L. HAWORTH, *AUTONOMY* 27 (1986) ("technically," "economically," and "fully" rational person); F. SCHICK, *HAVING REASONS* 62-65 (1984); Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 6-9 (1980) ("interpretive and evaluative rationality"); Lukes, *Some Problems About Rationality*, in *RATIONALITY* 194, 207-08 (B. Wilson ed. 1970); Newton, *The Political Animal*, in *HUMAN NATURE IN POLITICS* 142, 152-53 (J. Pennock & J. Chapman eds. 1977). Rawls cautions against the vagueness and indeterminacy of the features that inform a conception of the responsible person when analyzed in isolation. See Rawls, *Kantian Constructivism in Moral Theory*, *supra*, at 571.

Arrow stresses: "[R]ationality is not a property of the individual alone, although it is usually presented that way. Rather, it gathers not only its force but also its very meaning from the social context in which it is embedded." Arrow, *Rationality of Self and Others in an Economic System*, in *RATIONAL CHOICE* 201, 201 (R. Hogarth & M. Reder eds. 1987). I rely upon the marketplace as a setting to bring concreteness to the analysis. Among the lessons of this examination will be:

Rational procedures and methods do not exist in the air, apart from actual reasoners: they are things which are learned, employed, sometimes modified, on occasion even abandoned, by the people doing the reasoning, and to this extent the field of logic is inevitably open on one side to the field of psychology.

S. TOULMIN, *THE USES OF ARGUMENT* 212 (1958). Individual procedures and methods aside, the objectivity of conceptions of rationality is problematic. See *infra* note 255. In the end, "the term 'rational' is far from precise." R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* 5 (1957). It is "a chameleon among words." Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427, 429 (1972).

12. Autonomy and rationality together may be the essential elements of responsibility. "Rationality and autonomy have, of course, been proposed as the morally relevant aspect of human beings by moral philosophers as different as Aristotle, Kant, and Rawls." M. MOORE, *supra* note 3, at 95. For Moore's unpacking of these two terms, see *id.* at 100-12. The term "voluntary" has also been used to point towards responsibility. See, e.g., J. FEINBERG, *Legal Paternalism*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 110, 115-16 (1980) ("To whatever extent there is compulsion, misinformation, excitement or impetuosity, clouded judgment (as e.g. from alcohol), or immature or defective faculties of reasoning, to that extent the choice falls short of perfect voluntariness.").

13. Many theorists use the word "rational" to zero in on both the choice (actor) and the consequent response (action). See *supra* note 11; see also J. ELSTER, *ULYSSES AND THE SIRENS* 36 (rev. ed. 1984) ("Ulysses was not fully rational, for a rational creature would not

to carry out her will. Otherwise, a just society would have compunctions about declaring her morally blameworthy,<sup>14</sup> and therefore legally accountable.

Together the conceptions of will and willpower, or autonomous actor and action, may be characterized by the term "volition." A person is responsible for voluntary impacts on others whether the impacts are the products of purposive or negligent acts.<sup>15</sup> The terminology is unimportant. As already revealed in the footnotes, many labels have been used to point to the underlying considerations. To focus on the important considerations operating in the marketplace, I will invoke several more labels to facilitate the explication of the qualities of the responsible actor. The act itself, or willpower, will get brief attention because of its lesser role in these circumstances. For an act, then, to be voluntary—the consequence of an autonomous choice, a manifestation of the actor's will—conditions falling within two categories must be satisfied: knowledge and capability.<sup>16</sup> These two categories are further bifurcated. Knowledge requires: (1) information,

---

have to resort to this device [of being bound to the mast when approaching the sirens]."). On the other hand, terms related to volition, such as "act" or "action," may be defined so broadly as to encompass several or all the dimensions I separate in analyzing the rational actor. See, e.g., S. BENN & R. PETERS, *supra* note 8, at 236 n.\* ("Of course the category of 'action' . . . may be co-extensive with that of 'rationality.' For this covers the sort of things for which a man could have a reason . . ."); J. HALL, *FOUNDATIONS OF JURISPRUDENCE* 95 (1973) ("In everyday experience and in many psychologies and philosophies, 'action' implies thinking, planning, the anticipation of an end to be achieved, the visualization of a change in a state of affairs and of the effort required to effect a plan."); H. PITKIN, *WITTGENSTEIN AND JUSTICE* 262-63, 268-73 (1972). There is nothing objectionable about these mergings in principle, but the purposes of this Article are better served by distinguishing choice from action.

14. One would not feel moral indignation at her action. See T. HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 122 (1969). "More important, however, we tend to cease to regard [her] as a fitting object of *any* moral attitude." *Id.*; see also A. GEWIRTH, *REASON AND MORALITY* 31-41 (1978) (nature of voluntariness and purposiveness which provide the "justificatory basis of the supreme principle of morality").

15. A negligent action can be regarded as itself voluntary in the sense of being the result of not caring sufficiently about what one is doing to ascertain its nature: this is why negligence can be regarded as a form of *mens rea* and why it is just to punish negligent actions.

A. KENNY, *FREEWILL AND RESPONSIBILITY* 85 (1978). Liability for the failure to act (omission) may also be analysed as a consequence of a voluntary act: "The punishment of negligent actions can be regarded as a special case of the punishment of omissions: in this case, the omission to acquire the requisite knowledge about what one is doing." *Id.* Recklessness is a form of negligence. See *id.* at 88.

16. Similarly, Chief Justice Shaw, in a case of "partial insanity," applied a standard of legal responsibility in terms other than "rationality."

"A man is not to be excused from responsibility . . .

. . . If he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment . . ."

data regarding the past (in other words, the current state of affairs); and (2) foresight, the position to predict the consequences of the contemplated act. Capability requires: (1) reason, the ability to cope with information; and (2) sense, the ability to make normative judgments.<sup>17</sup>

The two broad categories of knowledge (information and foresight) and capability (reason and sense) might better be thought of as centers of attention than as hermetically discrete.<sup>18</sup> The discussion of

Commonwealth v. Rogers, 48 Mass. 500, 501-02 (1844), discussed in D. ROBINSON, *PSYCHOLOGY AND LAW* 49-50 (1980). Robinson puts the modern test in these terms:

[For legal responsibility, the question] is whether, in the circumstance, the accused had the capacity to know and desire the right course of action; whether he had the power to act on this knowledge and to give public expression to his desire; whether, in the circumstance, anyone could have acted differently.

D. ROBINSON, *supra*, at 15; see H.L.A. HART, *supra* note 3, at 160 ("[T]he criminal's act . . . must be the act of one who *could have* kept the law which he has broken"); see also H.L.A. HART, *Changing Conceptions of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 186, 207-08 (1968); H.L.A. HART, *Postscript: Responsibility and Responsibility*, in *id.* at 210, 218, 227 ("[T]he most important criteria of moral [and legal] liability-responsibility . . . are those of understanding, reasoning, and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made."); J. MURPHY, *Incompetence and Paternalism*, in RETRIBUTION, JUSTICE, AND THERAPY 165, 174 (1979) ("We have, as an ideal norm, the model of a fully competent agent as one who acquaints himself with all available relevant evidence, who is unmoved by emotional bias or internal or external compulsion, and who has all of his rational faculties intact.").

17. The term "sense" is being used in an unusual manner. Rawls summarizes the qualities of a competent moral judge: "Competence is determined solely by the possession of certain characteristics, some of which may be said to be capacities and achievements (intelligence and knowledge), while others may be said to be virtues (thus, the intellectual virtues of reasonableness)." Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 180 (1951). The similarity between my categories of knowledge and capability and Rawls' defined characteristics is more apparent in his explication. See *id.* at 178-81. Elster refers to "three distinct elements in the choice situation": "the feasibility set" (knowledge); "the causal structure of the situation" (foresight) and "a subjective ranking of the feasible alternatives" (sense). "To act rationally, then, simply means to choose the highest-ranked element in the feasible set [reason]." Elster, *Introduction*, in RATIONAL CHOICE 1, 4 (J. Elster ed. 1986). Elster goes on to summarize the basic concepts in this excellent collection of essays. See *id.* at 4-27.

18. This is evident in Hart's list of defenses to a contract claim:

A. Defences which refer to the knowledge possessed by the defendant [misrepresentation and non-disclosure]. . . . B. Defences which refer to what may be called the will of the defendant [duress and undue influence]. . . . C. Defences which may cover both knowledge and will [lunacy and intoxication]. . . . E. The defence that the contract is rendered "impossible of performance" or "frustrated" by a fundamental and unexpected change of circumstances ["foresight" in my parlance] . . . .

H.L.A. Hart, *The Ascription of Responsibility and Rights*, in LOGIC AND LANGUAGE 145, 149 (A. Flew ed. 1st series 1951). Hart mentions omissions, such as "mistake," in a footnote. See *id.* He observes that the analysis is more complicated in criminal responsibility than in contract. See *id.* at 152. Theorists have imposed a "spurious unity" upon the defenses and excep-

knowledge and capability will overlap.<sup>19</sup> The fashion today is not to conceive of information (the external) as independent of the perceiver (the internal). Modern studies indicate that both the objective and the subjective are intertwined. Furthermore, these relationships are not independent of time and place. The case supporting the argument that values vary from person to person need not be made to a member of our society, a society which holds pluralism as one of its abiding strengths. Truth, along with beauty, is to some extent in the eyes of the beholder.<sup>20</sup> Moreover, the beholder and her responses are a product of the times.

To summarize, the conceptions of responsibility, rationality, actor, autonomy, will, act, willpower, volition, knowledge, information, foresight, capability, reason, sense, knowledge, etc., blur at the edges—some even at the cores. Despite the mergings and overlappings, the specified terms are used in this Article to point towards the various considerations of courts and commentators when characterizing responsibility.<sup>21</sup> The variations are not without reason. Different

---

tions to liability, as by the mental element "voluntariness" or the mental elements "voluntariness" and "foresight," but these "refer back to the various defences; and then these general words assume merely the status of convenient but sometimes misleading summaries expressing the absence of all the various conditions referring to the agents' knowledge or will which eliminate or reduce responsibility." *Id.* at 153-54. Finally, even in settling the concept of an action, as distinguished from a mere physical movement, reference must be made to the ascription of responsibility. Crudely put, if one is not responsible, it is a physical movement or event; if one is responsible, it is an action. *See id.* at 160-66; *see also* H. PITKIN, *supra* note 13, at 262-63, 268-73.

19. "There is no obvious way to determine just how much knowledge and capacity for thought are sufficient to ground the market model. Indeed, there is not even a clear distinction between what one knows and a general capacity to deliberate." C. FRIED, *RIGHT AND WRONG* 102 (1978). Volition and capability may merge together. *See* H. GROSS, *supra* note 8, at 137. Volition and sense (my label for an aspect of capability) have also been treated as central: "[I]nsofar as men are agents, they initiate and control their movements (voluntariness) in the light of their intentions and purposes (purposiveness). This is why human agents can be held responsible both for their acts and for the consequences of the acts." Gewirth, *Institutions and Obligations*, in *MORALS AND VALUES* 348, 357 (M. Singer ed. 1977).

20. Arendt summarizes the modern view:

But do facts independent of opinion and interpretation exist at all? Have not generations of historians and philosophers of history demonstrated the impossibility of ascertaining facts without interpretation, since they must be first picked out of a chaos of sheer happenings (and the principles of choice are surely not factual data) and then be fitted into a story which can be told only in a certain perspective that has nothing to do with the original occurrence?

Arendt, *Truth and Politics*, in *PHILOSOPHY, POLITICS AND SOCIETY* 104, 112-13 (P. Laslett & W. Runciman eds. 3d series 1967) (cautioning the historian against blurring lines between fact, opinion, and interpretation).

21. For example, speaking more generally than the concerns of this Article, Gewirth observes:

All actions as envisaged by moral and other practical precepts, then, have two generic features. One is voluntariness or freedom, in that the agents control or

facets of the question snap into focus when approached from different angles.<sup>22</sup>

Along with briefing the basic conditions of responsibility, the sources of their shortfalls or distortions are discussed. At times, it will be useful to look at these shortfalls from the vantage point of two sets of polarities: the shortfalls may be inherent or imposed, or they may be external or internal.<sup>23</sup>

The first set of polarities involves inherent versus imposed distortions. "Inherent" distortions refer to those existing even in a passive world. They follow from the intrinsic ignorance or incapacity that cannot be overcome by the impacted party, at least not in a reasonable or efficient manner. "Imposed" distortions refer to those produced, exacerbated, or unalleviated by one of the interacting parties, generally, the nonimpacted party.<sup>24</sup> By concerted action or deliberate inaction, one party ends up in a worse position to make a fully responsible choice.<sup>25</sup>

---

can control their behavior by their unforced choice while having knowledge of relevant circumstances. The other generic feature is purposiveness or intentionality, in that the agents aim to attain some end or goal which constitutes their reason for acting; this goal may consist either in the action itself or in something to be achieved by the action.

Gewirth, *The Epistemology of Human Rights*, 1:2 SOC. PHIL. & POL'Y 1, 14 (Spring 1984) (emphasis omitted).

22. Though they may snap into focus, they may never be clear. As Wittgenstein pointed out, "a clear picture of a fuzzy thing is a fuzzy picture." (I couldn't turn up a cite for this remembered(?) quotation, but Geertz paraphrases it, without citation, in C. GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE 167, 215 (1983).).

23. Feinberg uses the labels "external" and "internal" to classify "voluntariness-reducing factors" in a manner that cuts across my inherent-imposed, external-internal distinctions. See J. FEINBERG, *supra* note 4, at 150-53. Regarding compulsion, his external types include forced movement (compulsion proper; strictly no choice) and coercive pressure (forced choice of the lesser evil), which includes natural sources ("nature coerces") and personal sources (coercion proper; duress), while internal factors include neurotic compulsions, obsessions, inhibitions, and incapacities. *Id.* at 151 (diagram 21-2). Regarding ignorance or mistake, his external sources include natural ignorance and "honest mistake," as well as ignorance produced by fraud or deception, while internal sources include neurotic delusions, misestimations of danger, mistaken self-evaluations, and paranoid suspiciousness. *Id.* at 152 (diagram 21-3).

24. The distortions may be self-imposed. The person may, for example, choose to become intoxicated or refuse to acquaint herself with readily available useful data. Self-imposed distortions usually do not constitute legal excuses. For example, conduct manifesting mutual assent turns on whether the assenter "knows or has reason to know that the other party may infer from his conduct that he assents." RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981). "A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist." *Id.* at comment b. The doctrine of constructive notice in property law is to similar effect. See 4 AMERICAN LAW OF PROPERTY § 17.11 (A. Casner ed. 1952). This Article is mainly concerned with other-imposed distortions.

25. Inherent and imposed distortions interrelate. Knowing that certain circumstances give

The second set of polarities involves external versus internal distortions. "External" distortions refer to those that are not contingent upon the actor. Even in a world free of individual foibles, reality, including both the realm of fact and the realm of value, can be portrayed "correctly" by diverging characterizations, thereby begetting varying understandings and reactions.<sup>26</sup> "Internal" distortions, on the other hand, refer to those that are contingent upon the actor. Here, the human element, independent of "objective" data, skews perception and judgment. The personal, of course, inevitably spills into the impersonal. Yet, the differences between these polar distortions are crucial to the thesis of this Article, so further introductory discussion follows.

External distortions require little additional introduction. As implied by the "garbage in, garbage out" expression associated with computers, a prerequisite of useful output is satisfactory input. The input turns on the characterization and specificity of the data. Neither the referent nor its symbol are sharply focused.<sup>27</sup> An automobile, for instance, may be truthfully characterized as a "roadster" or a "roadhog." Certain features may be standard or optional. It may have a repair record which is "pretty good" or one "averaging \$438.63 per year for the first five years." This example reveals that "distortion" does not necessarily mean inaccuracy. Whereas an object as concrete as an automobile may be variously detailed, other input is even more open. Imagine the range of proper depictions of the qualities of another person, such as her veracity, dependability, or competence. The qualities of objects, together with the symbols and language used to describe them, are inescapably woolly.

Internal distortions arise from cognitive and affective (conative) processes and states of mind. The cognitive processes and states pertain to the mechanisms by which one discerns the input, or reality, upon which a choice is based. Epistemic considerations are particularly relevant.<sup>28</sup> The sources of distortions attended to here are

---

rise to an inherent distortion, an interacting party may create those circumstances, or an existing inherent distortion may be increased.

26. "If we held very different beliefs about the theoretical parts of physics and the other sciences, we would, in consequence, divide the world into very different entities, and the facts we 'encountered' about these different entities would be very different from the facts we now take to be unassailable." R. DWORKIN, *A MATTER OF PRINCIPLE* 169 (1985) ("theory dependence"); see also Loewinger, *Facts, Evidence and Legal Proof*, 9 CASE W. RES. L. REV. 154, 160 (1958) ("We have learned that what we regard as the simplest perceptions are the product both of the immediate external stimuli and of our own concepts.").

27. For an influential discussion of the relations among a referent, a symbol, and a thought or reference, see C. OGDEN & I. RICHARDS, *THE MEANING OF MEANING* ch. I (8th ed. 1946).

28. "Cognitive states of mind are those which involve a person's possession of a piece of

labeled framing, heuristic, environmental, and semantic.<sup>29</sup> The affective or conative processes and states pertain to the emotional life.<sup>30</sup> This, it will be seen, clearly bears on the perception of data.

Framing is a type of internal, cognitive distortion.<sup>31</sup> It refers to the variations in perceptions due to particular circumstances. Context affects understanding. The frame in which data is embedded biases one's expectations and informs one's judgments of both facts and values.<sup>32</sup> For instance, advertisers make sure their spokespersons

information (true or, as the case may be, false): such things as belief, awareness, expectation, certainty, knowledge." A. KENNY, *supra* note 15, at 46.

29. Notice there are two forms of semantic distortions, external and internal. External distortions refer to those intrinsic to the nature of communication; internal distortions refer to those which depend upon the actor's special understanding of the language in question. Being straightforward enough, internal semantic distortions are not further discussed in this Section.

30. Affective states of mind are neither true nor false but consist in an attitude of pursuit or avoidance: such things as purpose, intention, desire, volition. Some mental states, of course, are both affective and cognitive: hope and fear, for instance, involve both an expectation of a prospective state of affairs and a judgment of the state of affairs as good or evil.

A. KENNY, *supra* note 15, at 46.

31. "Framing is controlled by the manner in which the choice problem is presented as well as by norms, habits, and expectancies of the decision maker." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, in *RATIONAL CHOICE* 67, 73 (R. Hogarth & M. Reder eds. 1987). "[T]he framing of decisions depends on the language of presentation, on the context of choice, and on the nature of the display . . ." *Id.* at 89. "Framing effects arise when the same objective alternatives are evaluated in relation to different points of reference." Kahneman & Tversky, *The Psychology of Preferences*, 246 *SCI. AM.* 160, 166 (Jan. 1982). "The framing of a transaction can alter its attractiveness by controlling the costs and benefits that are assigned to its account . . ." *Id.* at 168.

32. Two of the leading analysts state:

Further complexities arise in the normative analysis because the framing of an action sometimes affects the actual experience of its outcomes. For example, framing outcomes in terms of overall wealth or welfare rather than in terms of specific gains and losses may attenuate one's emotional response to an occasional loss. . . . The framing of acts and outcomes can also reflect the acceptance or rejection of responsibility for particular consequences . . . . When framing influences the experience of consequences, the adoption of a decision frame is an ethically significant act.

Tversky & Kahneman; *The Framing of Decisions and the Psychology of Choice*, in *RATIONAL CHOICE* 123, 139 (J. Elster ed. 1986). Because the way a question is posed may significantly affect the expressed values of undecided actors, merchants and others "can represent issues in such a way as to induce random error (by confusing the respondent), systematic error (by hinting at what the 'correct' response is), or unduly extreme judgments (by suggesting clarity and coherence of opinion that are not warranted). In such cases, the method becomes the message." B. FISCHOFF, S. LICHTENSTEIN, P. SLOVIC, S. DERBY & R. KEENEY, *ACCEPTABLE RISK* 23 (1981); see also *id.* at 23-27.

The gestalt psychologists, among other social scientists, study this phenomenon. For example, Arnheim, armed with this background, has done much work in the study of framing in aesthetics. See, e.g., R. ARNHEIM, *ART AND VISUAL PERCEPTION* (1974); R. ARNHEIM, *TOWARD A PSYCHOLOGY OF ART* (1966). Sociologists are also interested. Goffman, for example, has powerfully demonstrated that one's interpretations and reactions are inextricably intertwined with the frame. E. GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZA-*

are appealing. Interactions typically involve imposed as well as inherent framing distortions.<sup>33</sup>

Heuristics give rise to another type of internal, cognitive variation. Studies of reasoning skills reveal that people systematically make miscalculations of recurring types. This observation is hardly new.<sup>34</sup> Psychologists and other social scientists have produced many studies of these and related phenomena.<sup>35</sup> They have investigated the processes by which individuals draw conclusions in the face of risk and uncertainty and have found that rather than a strict reliance upon scientific or mathematical techniques (algorithms), people instead utilize shorthand approaches called heuristics.<sup>36</sup> To capsize, "people's intuitive inferences, predictions, probability assessments, and diagnoses do not conform to the laws of probability theory and statistics."<sup>37</sup> A human being, the "rational animal," is not very logical.<sup>38</sup>

---

TION OF EXPERIENCE (1974). Even the perception of pain is affected by, among other things, the frame or circumstances, for example, childbirth versus an accident. See Ainslie, *Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control*, 82 PSYCHOLOGICAL BULL. 463, 490-92 (1975). See generally J. WILSON & R. HERRNSTEIN, CRIME AND HUMAN NATURE ch. 7 (1985); Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355, 1364-65 (1974).

33. Discreet employment and credit applicants go to their interviews wearing appropriate clothes. Madison Avenue has also made its fame and fortune by not imparting purely neutral information to consumers (assuming that is possible). No extensive discussion of advertising ploys is needed for anyone living in this, the media age fueled by the ad age.

34. See, e.g., D. HUME, A TREATISE OF HUMAN NATURE 372-75, 427-38 (L. Selby-Bigge ed. 1888) (1st ed. London 1739 & 1740).

35. For an important collection of these studies, many of them done by the editors, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (D. Kahneman, P. Slovic & A. Tversky eds. 1982). In the preface, the editors indicate that this approach to the study of judgment originated in the 1950s and 1960s in "the comparison of clinical and statistical prediction, . . . the study of subjective probability in the Bayesian paradigm, . . . and the investigation of heuristics and strategies of reasoning." *Id.* at xi. This has converged with "another strand of psychological research: the study of causal attribution and lay psychological interpretation." *Id.*

36. "A heuristic is any guiding principle for transforming information to solve a problem or to form a judgment." Nisbett, Krantz, Jepson & Fong, *Improving Inductive Inference*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 445, 447 (D. Kahneman, P. Slovic & A. Tversky eds. 1982) (emphasis omitted).

37. This quotation appears in the text on the back cover of the paperback edition of JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (D. Kahneman, P. Slovic & A. Tversky eds. 1982).

38. These irrationalities are now the stuff of newspaper articles. For example, in detailing studies that often combine cognitive, framing and heuristic distortions, it was reported:

People are more sensitive to negative consequences than to positive ones—more worried, for example, about losing a given amount of money than eager to win the same amount. . . . People have no sensible mental model for dealing with very improbable events, so they either ignore them entirely and assume they will not happen or, if forced to consider them, grossly overestimate their likelihood. . . . People overvalue the complete elimination of a lesser hazard and undervalue an equivalent reduction in a greater hazard. . . . People are more

Environmental factors are also at work. They include narrow, individualized elements such as personal nurture and socialization. Beyond these factors is a broader middle range which includes variations due to education, neighborhood, subculture, community, class, region, and religion. The widest viewpoint looks even beyond this middle range to such factors as contingent uniformities within nations, cultures, hemispheres, and all of humanity. The lessons of none of the social sciences can be ignored.<sup>39</sup> The shrewd (successful?) businessperson need not be told. For example, the effective promoter of costly goods might prominently display the pricetag or remind the prospective consumer of what Sir Jones prefers.<sup>40</sup> Implicit in the courts' struggles with the notion of unconscionability may be the idea that the merchant takes undue advantage of the cognitive distortions

---

willing to accept a negative outcome if it is considered as a "cost" rather than as a "loss." . . . The manner of framing questions and alternative solutions can profoundly affect the choices made by both experts and lay people.

Boffey, "Rational" Decisions Prove Not To Be, N.Y. Times, Dec. 6, 1983, at C1, col. 1, C7, col. 1.

39. Those in the hermeneutic tradition, and its fellow-travelers, have even criticized the historical idea of rationality and related notions. For example:

Dewey and Foucault . . . agree, right down the line, about the need to abandon traditional notions of rationality, objectivity, method, and truth. They are both, so to speak, "beyond method." They agree that rationality is what history and society make it—that there is no overarching ahistorical structure . . . to be discovered.

R. RORTY, *Method, Social Science, and Social Hope*, in CONSEQUENCES OF PRAGMATISM 191, 204 (1982).

Antifoundationalism denies that rationality or truth consists of linear deductions from an unquestioned foundational reality or truth. Coherence theories stress holistic interdependence of an entire body of beliefs and commitments; they judge truth or rightness by fit, not by correspondence with an external foundational standard. . . . Hermeneutics, the sociology of knowledge, and perhaps post-structuralism are other thought traditions that converge with coherence theory on the issue of the theory- or discourse-dependence of reality.

Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1881 n.120 (1987). The leading works in the recent Anglo-American hermeneutic literature include: R. BERNSTEIN, *supra* note 11; T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); A. MACINTYRE, *AFTER VIRTUE* (1981); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); R. UNGER, *PASSION* (1984).

40. These tactics may be briefly described: "There are conspicuous consumptions ('I spend, therefore I am,' Veblen's man would say), consumptions between rivals (keeping up with the Joneses) and those that are tied to status or standing ('maintaining one's rank'), etc." Kolm, *The Buddhist Theory of "No-Self,"* in *THE MULTIPLE SELF* 233, 244 (J. Elster ed. 1986). Becker refers to "bandwagon" and "snob" effects. G. BECKER, *Irrational Behavior and Economic Theory*, in *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 153, 155 n.2 (1976). The consumer's reactions may also be to the contrary: "We frequently want to be in fashion, or distinctly out of it; we want to keep up with the Joneses, or to lead them; and we want to share our ways of life with others." Bennett, *Ethics and Markets*, 14 PHIL. & PUB. AFF. 195, 201 (1985).

common to certain socioeconomic classes.<sup>41</sup>

As evoked by the nature-nurture controversy, at the other pole from environmental factors are personal ingredients determined at the moment of conception. The Fates provide the clay molded by the environment. Standards of legal responsibility cannot neglect this chancy element.

Finally, the internal affective or conative processes are subject to variation and distortion. Emotions and drives are individually distinct and manifestly mutable. The psychological ingredients of value, preference, interest, and desire differ from person to person as do physical prowess and appearance. Subscribers to liberal democracy consider this a societal strength. Madison Avenue judges it an opportunity.<sup>42</sup>

My approach to the types of shortfalls in the conditions of legal responsibility is not traditional. A more usual categorization, itself overlapping, might include mental conditions (e.g., insanity and intoxication), status conditions (e.g., minority and slavery), overreaching (e.g., coercion and undue influence), and excuse-justification<sup>43</sup> (e.g., provocation and self-defense).<sup>44</sup> Redistributing the elements in the manner suggested by this Article will, I believe, provide a clearer picture of their occurrences in the marketplace.

By way of summary, the analysis of legal responsibility cuts across four dimensions. First, responsibility necessitates the satisfaction of certain conditions with respect to an actor (autonomous choice) and an act (willpower). Second, the requisites for autonomous choice are knowledge (information and foresight) and capability (reason and sense). Third, the shortfalls from the ideal conditions

---

41. See, e.g., *E & W Bldg. Material Co. v. American Sav. & Loan Ass'n*, 648 F. Supp. 289, 291 (M.D. Ala. 1986) ("Rescission of a contract for unconscionability is an extraordinary remedy usually reserved for the protection of the unsophisticated and uneducated."); *Gonzalez v. Gainan's Chevrolet City*, 690 S.W.2d 885, 887 (Tex. 1985) (Unregulated consumer credit practices "impose intolerable burdens on those segments of our society which can least afford to bear them—the uneducated, the unsophisticated, the poor and the elderly.").

42. Because of the many impingements on ideal models, one commentator refers to seven varieties of rationality: limited, contextual, game, process, adaptive, selected, and posterior. See March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, in *RATIONAL CHOICE* 142, 147-50 (J. Elster ed. 1986).

43. "In the one defence [justification], briefly, we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don't accept full, or even any, responsibility." J. AUSTIN, *supra* note 8, at 176. See generally G. FLETCHER, *supra* note 8, §§ 10.1, 10.3; M. MOORE, *supra* note 3, at 84-90. That I may be criticized for not attending to the distinction between justification and excuse, see Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954-62 (1985).

44. For another grouping of defenses in the context of contract law, see Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318-19 (1986).

may be inherent in the circumstances or imposed by one of the parties. Fourth, the sources of the shortfalls may be external or internal to the actor.<sup>45</sup>

Now that the terrain has been mapped, it is time to look more closely at the ideal conditions of responsibility and the reaction of the law to their shortfalls.

## II. AUTONOMOUSLY CHOSEN ACTIONS

An act must be voluntary—a product of free will—in order to be morally<sup>46</sup> and, normally, legally ascribable to an actor.<sup>47</sup> To act voluntarily, an individual must have sufficient autonomy (freedom of choice) and willpower (freedom of action).<sup>48</sup> In other words, under the labels “autonomy” and “willpower,” two aspects of volition are held out as centerpieces: choice and action. These are not purely

45. The cells of the matrix are not equally extensive. For example, an inherent, external distortion of capability seems intuitively more limited than an imposed, external distortion of information.

46. In 1788, Thomas Reid insisted: “What is in no degree voluntary, can neither deserve moral approbation nor blame.” Reid, *Of the First Principles of Morals*, in *MORALS AND VALUES* 63, 64 (M. Singer ed. 1977). Only a voluntary act manifests the actor’s character. See Dewey, *The Moral Situation*, in *id.* at 24, 24.

47. As a conception of “rational” has been said to include all the elements of the responsible actor, see *supra* note 9, so has a conception of “voluntary.” For Aristotle’s version, see J. FEINBERG, *What Is So Special About Mental Illness?*, in *DOING AND DESERVING* 272, 274-77 (1970); J. FEINBERG, *supra* note 12, at 116. The same can be said for words related to “voluntary,” such as “act” or “action.” See *supra* note 13.

48. See Young, *Autonomy and the “Inner Self,”* 17 AM. PHIL. Q. 35, 40-43 (1980). It is not uncommon for commentators to conflate my conceptions of autonomy and willpower. See, e.g., L. HAWORTH, *supra* note 11, at 42-43 (autonomy is “competence,” “procedural independence,” and “self-control”); Haworth, *Autonomy and Utility*, 95 ETHICS 5, 8-10 (1984) (“autonomy”). Other terms, such as “act” or “action” may be used for this. See *infra* note 109 and accompanying text. Furthermore, the question of voluntariness may be inappropriate to the everyday setting of marketplace transactions:

The notion of voluntariness . . . gets its grip when there is some reason to think that conduct might not be voluntary. . . . [W]ith regard to routine conduct, such as a driver’s making a left-hand turn, we would not ordinarily ask whether he did so voluntarily. The question itself would be puzzling and prompt us to consider reasons why his turning might not have been voluntary (did someone force him to turn left?). It follows from this analysis of usage that many routine acts of daily life are not aptly described either as voluntary or as involuntary.

G. FLETCHER, *supra* note 8, at 450. “[T]he word ‘voluntary’ in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, mistakes, etc., and not to designate a mental element or state . . .” H.L.A. Hart, *supra* note 18, at 153. The bias of the law towards classifying harmful acts as either voluntary or involuntary may lead to the search for “chimerical essences” of internal events. See G. FLETCHER, *supra*, at 451-52. The key terms invoked may be logical primitives. For example: “The term ‘volition’ is a primitive in the language whose function is to mark off the class of human acts from the class of events; to distinguish between ‘I raised my arm,’ and ‘my arm went up.’” R. EPSTEIN, *A THEORY OF STRICT LIABILITY* 22 (1980).

binary, all-or-nothing states;<sup>49</sup> they are subject to pressures from sources inherent and imposed, external and internal. All choices and actions fall short of being absolutely self-determined.<sup>50</sup> Where the exculpating line is drawn is far from clear.<sup>51</sup> Following a brief discussion of the importance of autonomy, some of the considerations pressuring the standard of responsibility will be addressed.

### A. Autonomy

The gist of the idea of autonomy is that the responsible individual must be her own person, or that the particular act must be a product of the individual's own free choice, unencumbered by undue pressures and influences from others.<sup>52</sup> The term "will" is closely

---

49. See, e.g., Benn, *Persons and Values: Reasons in Conflict and Moral Disagreement*, 95 ETHICS 20, 27 (1984) (autonomy); Haworth, *supra* note 48, at 10; Plamenatz, *Responsibility, Blame and Punishment*, in PHILOSOPHY, POLITICS AND SOCIETY 173, 179 (P. Laslett & W. Runciman eds. 3d series 1967) (responsibility).

50. Realistically, full autonomy is "an ideal limit which may be approached asymptotically but never actually reached." L. HAWORTH, *supra* note 11, at 64; see also *id.* at 47-49 ("the more autonomous an individual is the more responsible he is"). To generalize: "An action is the outcome of a choice within constraints. The choice, according to the orthodox view, embodies an element of freedom, the constraints one of necessity." J. ELSTER, *SOUR GRAPES* vii (1983); see also D. ROBINSON, *supra* note 16, at 97 ("To insist that all . . . transactions are void unless it can be shown that some hypothetical rational being would have entered into them is effectively to put an end to nearly all commercial and social institutions, and surely to every form of entertainment and amusement."); Brandt, *The Insanity Defense and the Theory of Motivation*, 7 LAW & PHIL. 123, 127-28 (1988) (psychological theory of the variables of voluntary action).

51. See, e.g., Hook, *Necessity, Indeterminism, and Sentimentalism*, in DETERMINISM AND FREEDOM 167, 176-77 (S. Hook ed. 1958). Kennedy argues that because "the abstract notion of voluntariness or freedom . . . is among the most manipulable and internally contradictory in the legal repertoire," principled resolution of such issues as fraud, duress, and incapacity cannot be achieved "because the mandate is just too vague." Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 582-83 (1982). On the other hand, if the decisionmaker refrains from considering these issues, is that fairer? Some, libertarians in particular, may say yes. In his article, Kennedy reluctantly says no. See *id.* at 638-49 ("ad hoc paternalism").

52. Gewirth pinpoints "autonomy":

Viewed etymologically, "autonomy" means being a law (*nomos*) unto oneself (*auto*), or setting one's law for oneself. . . . If . . . one is rationally autonomous in the strict sense, then the general principle one chooses for oneself will have been arrived at by a correct use of reason, including true beliefs and valid inferences.

A. GEWIRTH, *supra* note 14, at 138. "Autonomy" may be used as a descriptive term of personal characteristics, as is generally done in this Article, or as a normative term, as where the user claims "that he has a right (to autonomy) that the interferer has violated." See L. HAWORTH, *supra* note 11, at 1. For the legal uses of the word, see M. MOORE, *supra* note 3, at 108-12. The term, like the other key, related words, can be loaded. See, e.g., Schwartz, *Meaningful Work*, 92 ETHICS 634, 635-36 (1982) ("[P]eople achieve autonomy to the extent that they lead lives of intelligence and initiative . . .").

allied<sup>53</sup> and is here not distinguished.<sup>54</sup> The will theory, for example, has grounded contract law,<sup>55</sup> as well as political theory.<sup>56</sup> If a decision preceding an action is a consequence only of another's will, it can hardly be called the individual's act.<sup>57</sup> More properly, it would seem

---

53. Although the word "will" fills up nearly ten pages in *The Oxford English Dictionary*, this definition makes the point: "II. 5. The action of willing or choosing to do something; the movement or attitude of the mind which is directed with conscious intention to (and, normally, issues immediately in) some action, physical or mental; volition." 8 THE OXFORD ENGLISH DICTIONARY 129 (1971). For an example of an exposition of "autonomy" closely tied to "will," see Darwell, *How Nowhere Can You Get (and Do Ethics)?*, 98 ETHICS 137, 154-55 (1987). One must note, however, that "will" and "volition" can be sharply distinguished. See A. WHITE, *FOUNDATIONS OF LIABILITY* 51 (1985). Many of the key terms of legal responsibility, including "act," "voluntary," and "intention," are thoroughly analyzed in White's book.

A person's will is the set of all his second-order desires, not of all his wantings but of all his wantings to want. A weak-willed person is a person whose will is ineffective, who cannot subdue his own inclinations. Such a person persists in wanting the opposite of what he wants to want.

F. SCHICK, *supra* note 11, at 144-45 (footnote omitted). Schick ignores the distinction between what I call "will" and "willpower." Being weak-willed is having little willpower. A weak-willed person is not a person whose will is ineffective, because he knows what he wants, but rather a person who is unable to carry out his will. Such a person persists in wanting the opposite of what he wants to want in the sense that he is overwhelmed by temptations, and fails to pursue what he perceives (wills) as his long-term interests, etc. Akrasia may be the problem. See *infra* note 137. Schick's reference to second-order desires comes from an influential article by Frankfurt. See Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971). Others have used this or related ideas to develop (partially) the concept of the autonomous person. See, e.g., L. HAWORTH, *supra* note 11, at 49-54; Richards, *Rights and Autonomy*, 92 ETHICS 3 (1981); Wolf, *Sanity and the Metaphysics of Responsibility*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 46, 47-53 (F. Schoeman ed. 1987) (discussing and criticizing these "deep-self views"). Frankfurt states that along with the person who is unable to pursue his second-order desires is the person who is a "wanton." "The essential characteristic of a wanton is that he does not care about his will. His desires move him to do certain things, without its being true of him either that he wants to be moved by those desires or that he prefers to be moved by other desires." Frankfurt, *supra*, at 11. The wanton is anomic, rather than akrasiatic. See *infra* note 134.

54. The word "freedom" also encroaches on "autonomy." See Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy*, 99 ETHICS 109, 111 (1988) (the relation between autonomy and freedom is unexplicated or words are used interchangeably); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 371 n.34 (1973) ("Many liberal writers use the word freedom to denote the concept I call autonomy . . ."); see also T. HONDERICH, *supra* note 14, at 106 ("Freedom" has various contextual meanings and may itself be used as the label for the idea of "whether we are free in such a sense as to be responsible.").

55. "According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect." M. COHEN, *The Basis of Contract*, in LAW AND THE SOCIAL ORDER 69, 92 (1933). Cohen criticizes the will theory, see *id.* at 92-95, and discusses other justifications of contract law, see *id.* at 88-92, 95-102. See also Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 599-600 (1969); Fuller & Purdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 58 (1936).

56. See *infra* note 66.

57. "Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose. It is not that the coerced does not choose at all; if that

to be the act of the other person, the "actor" being merely a vehicle or instrument.<sup>58</sup> The concept of autonomy can be held out as the keystone of responsibility. To express it another way, a fair rendering of a common understanding of an autonomous choice is that it is one that follows adequate information, foresight, reason, and sense.<sup>59</sup> "Autonomy" may be simply a placeholder for these other conditions, but because the term evokes additional important connotations, it is worthy of separate attention.

Before the idea of autonomy can be properly expounded, the ontological question must be considered: Is there such a thing as autonomy or will, or is it, as insisted by Ryle and others, simply a ghost in the machine, a nonverifiable reification of a fictitious construct of self-deluded introspection, a mere cover for traits such as aspirations, dispositions, and propensities, an unnecessary excrescence best lopped by Ockham's razor?<sup>60</sup> Now that the cosmic question has

---

were the case, we should not speak of his 'acting.' " F. HAYEK, *supra* note 11, at 133. In the criminal context, it is that "the evil which he sees himself about to undergo, in the case of his *not* engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater." J. BENTHAM, *supra* note 1, at 162 (footnote omitted). Under this rationale, Bentham includes natural physical danger as well as threatened mischief by another person.

58. See G. FLETCHER, *supra* note 8, at 639-40 ("perpetration-by-means," that is, causing an innocent or irresponsible person to engage in proscribed conduct). One may voluntarily alienate one's autonomy to another, within limits: "No man can make himself into a mere instrument of another's will. Even an autonomous agent cannot alienate his ultimate accountability." Feinberg, *Autonomy, Sovereignty and Privacy: Moral Ideas in the Constitution?*, 58 NOTRE DAME L. REV. 445, 475 (1983).

59. Feinberg points out that "autonomy" may refer to several things: either the capacity, the condition, the ideal of character, or the sovereign authority to govern oneself. See J. FEINBERG, *supra* note 4, at 28; Feinberg, *supra* note 58, at 447; see also Johnson, *The Idea of Autonomy and the Foundations of Contractual Liability*, 2 LAW & PHIL. 271, 280 n.14 (1983) ("[T]he abstract concept of autonomy is ambiguous and shelters many different specific concepts . . ."); Kuflik, *The Inalienability of Autonomy*, 13 PHIL. & PUB. AFF. 271, 272 n.2 (1984) (meanings of "autonomous"). Here is one way to make "autonomy" the keystone: "The root idea of autonomy is that in making a voluntary choice a person takes on responsibility for all the foreseeable consequences to himself that flow from this voluntary choice." Arneson, *Mill Versus Paternalism*, 90 ETHICS 470, 475 (1980), quoted in Feinberg, *supra*, at 481; see also J. FEINBERG, *supra*, at 43-44 ("responsibility for self"); R. TAYLOR, *FREEDOM, ANARCHY, AND THE LAW* 48 (2d ed. 1983) (the concept of autonomy); R. WOLFF, *IN DEFENSE OF ANARCHISM* 12-18 (1970).

Although the word "autonomy" has been used as the sole label for those qualities sufficient to endow a person with rights or responsibilities, see, e.g., L. HAWORTH, *supra* note 11, one must be cautious of placing upon this word such a heavy burden; it may lead one to ignore the full range of qualities required of the responsible actor, see A. MELDEN, *RIGHTS AND PERSONS* 187-89 (1977).

60. See G. RYLE, *supra* note 10, ch. 3 ("the will"); see also D. HUME, *supra* note 34, bk. I, pt. IV, § VI (the idea of "self" not intelligible). Or is the will sufficiently definite and coherent to be a useful notion? See J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 253, 256-57 (3d ed. 1950) ("will" as "an indeterminate bundle of vague impulses loosely playing about given slogans and mistaken impressions"); Laslett, *The Face to Face Society*, in

been raised, I will carry on. Whether or not autonomy or the will is real,<sup>61</sup> it is convenient to treat it as such,<sup>62</sup> and the law in fact does.<sup>63</sup>

Autonomy is important in the liberal tradition.<sup>64</sup> Political philosophers of both rights (Kantian) orientations and, to some extent,

PHILOSOPHY, POLITICS AND SOCIETY 157, 167-68 (P. Laslett ed. 1st series 1956) (Under individualistic political theory, the individual is analyzed as having metaphorical layers, like an onion, which can be stripped down "into a chaos of unrelated fragments—'will,' 'desire,' 'passions,' and so on.")). For a brief description of various theories of the person, see Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 962-65 (1982).

61. For discussion of Ryle's view of actions, and other types of mechanical explanations, with criticism, see M. MOORE, *supra* note 3, at 32-43.

62. See H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74-75 (1968) ("Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."). For the pragmatic reasons, see *id.* at 75; Mayo, *Is There a Case for the General Will?*, in PHILOSOPHY, POLITICS AND SOCIETY 92, 94 (P. Laslett ed. 1st series 1956).

63. "From time beyond legal memory English jurists had regarded individuals as free moral agents possessing a will to act lawfully or unlawfully by choosing between right and wrong." L. LEVY, *supra* note 6, at 208 (citing Blackstone, Bracton, Coke, and Hale). Levy is quick to note, however, that the common law jurists struggled with a notion of criminal insanity consistent with their theory of rational will. See *id.* at 209-10. Hart reports that the struggle resurfaced in England as late as 1960. See H.L.A. HART, *Murder and the Principles of Punishment: England and the United States*, in PUNISHMENT AND RESPONSIBILITY 54, 246 (1968); see also H.L.A. HART, *Acts of Will and Responsibility*, in *id.* at 90, 253-54. In the latter article, Hart expresses doubts about the doctrine whereby responsibility requires the conduct to be "voluntary."

Modern commentators also zero in on will:

[T]his distinct element in criminal intent consists not alone in the voluntary movement of the muscles (i.e., in action), nor yet in a knowledge of the nature of the act, but in a combination of the two—the specific will to act, i.e., the volition exercised with conscious reference to whatever knowledge the actor has on the subject of the act.

2 J. WIGMORE, EVIDENCE § 242 (J. Chadbourn rev. ed. 1979) (emphasis and footnote omitted). Notice Wigmore's distinction between knowledge and volition. Hart believes this traditional analysis of action to be mistaken because:

[O]ur concept of an action . . . is a social concept and logically dependent on accepted rules of conduct. It is fundamentally not descriptive, but ascriptive in character; and it is a defeasible concept to be defined through exceptions and not by a set of necessary and sufficient conditions whether physical or psychological.

H.L.A. Hart, *supra* note 18, at 161; see also H.L.A. HART, *Acts of Will and Responsibility*, *supra*, at 90.

64. "The autonomous person—the truly 'self-made man'—is an ideal rooted very deep in the liberal tradition." Benn, *supra* note 49, at 26 (footnote omitted). Not all political traditions trade on autonomy. For example, the current interest in communitarianism, which looks back to Greek ideals, and the virtue theory often embraced by communitarians, ignores or downplays autonomy, largely because it rejects the notion of the "self-made man." See, e.g., M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985) ("[t]he Hegelian conception of man as a historically conditioned being"); Macneil, *Bureaucracy, Law, and Community—American Style*, 79 NW. U.L. REV. 900, 934-37 (1984); Putnam, *Reciprocity and Virtue Ethics*, 98 ETHICS 377 (1988); Radin, *supra* note 60, at 965 ("Persons are embedded in language, history, and culture, which are social creations; there can be no such thing as a person without society."); Sandel, *Introduction*, in LIBERALISM AND ITS CRITICS 1 (M. Sandel ed. 1984);

utilitarian orientations stress its centrality.<sup>65</sup> Without the exercise of autonomy or the will, the obligatory nature of the law may be doubted.<sup>66</sup>

Various reasons are advanced for the essential role of autonomy. It is intrinsically valuable,<sup>67</sup> bestowing dignity on the individual.<sup>68</sup> The autonomous person is a thinking and a valuing individual<sup>69</sup> who is capable of higher order plans.<sup>70</sup> Self-development and self-mastery ensue,<sup>71</sup> as do respect and self-respect.<sup>72</sup> In sum, the very idea of per-

Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 454 (1987) ("The central value is not freedom or independence but *belonging*.").

65. See L. HAWORTH, *supra* note 11, at 129 ("autonomists," libertarians, and utilitarians value a person's "domain for autonomy"); cf. *infra* note 71 (Rawls and Mills). For a criticism of Kant's conception of autonomy, see J. FEINBERG, *supra* note 4, at 94-97. Haworth points out that if "'autonomism,' the view that personal autonomy is a fundamental value that conditions such other values as freedom and satisfaction," is true, "then both philosophical libertarianism and the versions of utilitarianism that I am familiar with are untenable." L. HAWORTH, *supra*, at 7.

66. See, e.g., N. MACCORMICK, *Law, Obligation, and Consent: Reflections on Stair and Locke*, in LEGAL RIGHT AND SOCIAL DEMOCRACY 60, 64 (1982) ("Obligations bind the will, and only an act of will can bind the will."). One might turn this argument 90 degrees. It is not that autonomous will must be exercised to make the law binding, but that invocation of the law is evidence that one has an autonomous will. See Nonet, *Legal Competence*, in LAW AND SOCIETY 268, 274-75 (C. Campbell & P. Wiles eds. 1979).

67. "Autonomy is intrinsically valuable. One can use it in a way detrimental to one's interest, or in a way contrary to reason. This is no reason to invade or restrict one's autonomy. It is no mere means to rational action or to personal prosperity." Raz, *Government by Consent*, in AUTHORITY REVISITED 76, 86 (J. Pennock & J. Chapman eds. 1987).

68. "Autonomy is therefore the ground of the dignity of human nature and of every rational nature." I. KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 436 (H. Paton trans. 3d ed. 1956) (1st ed. Riga 1785) (emphasis omitted). "The dignity of man consists in his autonomy, i.e., in the individual's freely choosing his own values or his own ideals or in obeying the injunction: 'Become what thou art.'" L. STRAUSS, NATURAL RIGHT AND HISTORY 44 (1950) (quoting Max Weber) (footnote omitted); see also L. HAWORTH, *supra* note 11, at 140 ("sense of dignity or self-esteem"). Goodin argues that dignity, not autonomy, is the "logical primitive." See R. GOODIN, POLITICAL THEORY AND PUBLIC POLICY 81-84 (1982).

69. "Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another." F. HAYEK, *supra* note 11, at 21; see also Richards, *supra* note 53, at 7.

70. Autonomy, in the sense fundamental to the idea of human rights, is a complex assumption about the capacities, developed or undeveloped, of persons, which enable them to develop, want to act on, and act on higher-order plans of action which take as their self-critical object one's life and the way it is lived.

Richards, *supra* note 53, at 6 (footnote omitted).

71. Rawls and Mill align on this point:

Rawls and Mill agree that one's individual development is better promoted by an inferior plan selected by oneself than by a plan that is in some sense superior but imposed by others. In Rawlsian language, an imposed plan would not induce the feelings of self-mastery and competence that develop when one executes a plan of one's own devising . . . . Mill is even more adamant: to force anyone to act against his will 'always tends, *pro tanto*, to starve the development of some portion of the bodily or mental faculties, either sensitive or active . . . .'

sonhood may turn on autonomy.<sup>73</sup> Despite the merits of autonomy, in the end it is not evident that the lack of autonomy, heteronomy, is necessarily bad because an "actor" may nevertheless order her life rationally<sup>74</sup> or may happily have all her wants satisfied.<sup>75</sup> Rather, lib-

---

Gaus, *The Convergence of Rights and Utility: The Case of Rawls and Mill*, 92 ETHICS 57, 65-66 (1981) (footnote omitted). Luban mentions several of the ideas in the text:

Autonomous decision making is valuable for two complementary reasons: meta-physically and axiologically, the exercise of freedom is one of the most important (if not the most important) components of human well-being; and psychologically, the exercise of freedom is developed in tandem with prized traits of character: rationality and prudence, adult commitment, self-actualization, and responsibility.

Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 642-43.

72. See L. HAWORTH, *supra* note 11, at 140 ("sense of dignity or self-esteem" and esteem or attributions of dignity by others); Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY 110, 114 (P. Laslett & W. Runciman eds. 2d series 1962) ("desire for self-respect"); Young, *supra* note 48, at 35.

73. See L. HAWORTH, *supra* note 11, at 185 ("Autonomy grounds individuality."); C. LEWIS, *The Meaning of Liberty*, in VALUES AND IMPERATIVES 145, 146 (1969) (in terms of "liberty"). For the history of the idea of autonomy as a theory of the person, see Richards, *supra* note 53, at 7-10. This may be the point: "The decision [to which a person commits himself] determines what the person really wants by making the desire upon which he decides fully his own. To this extent the person, in making a decision by which he identifies with a desire, constitutes himself." Frankfurt, *Identification and Wholeheartedness*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 27, 38 (F. Schoeman ed. 1987). "Will refers to your experience of yourself as the cause of what happens to you." Gibbons, *Justifying Law: An Explanation of the Deep Structure of American Law*, 3 LAW & PHIL. 165, 170 (1984); see L. HAWORTH, *supra*, at 189 ("[H]aving a sense of responsibility is a facet of one's autonomy . . ."); Haworth, *supra* note 48, at 8-10.

74. See Gray, *Hayek on Liberty, Rights, and Justice*, 92 ETHICS 73, 75 (1981) ("A man may order his life rationally even when he is subject to severe coercive restraint . . .").

75. "[O]ne can have a great degree of freedom (high level of actual satisfaction of desire) without any autonomy at all (where the high level depends on the arbitrary, subjective wills of others)." Kennedy, *supra* note 54, at 371 (footnote omitted). "Perfect manipulation, which arouses no hostility and makes people want nothing but what they are going to be given anyway, is an excellent practice, on the want-regarding theory; yet on an ideal-regarding theory which makes autonomy its ideal, the more smoothly effective the manipulation is, the worse it is." B. BARRY, *supra* note 1, at 71. Though the preferences are not autonomous, their satisfaction may be welfare promoting. See Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1147 (1986). The point may be stated in terms of "liberty" or "freedom." "It is also a part of the liberal faith in human nature to believe that normal men prefer freedom to objective well-being, within limits, when the two conflict." F. KNIGHT, *The Sickness of Liberal Society*, in FREEDOM AND REFORM 370, 372 (1947). "If liberty were specified solely in terms of the ability to do what one actually wants then it would be possible to increase a person's liberty by restricting his actual wants through social conditioning." Sterba, *Neo-Libertarianism*, in JUSTICE: ALTERNATIVE POLITICAL PERSPECTIVES 172, 175 (J. Sterba ed. 1980). Among the limits to the preference for freedom is where a choice involves a painful, "no-win" situation. See, e.g., T. SCHELLING, *Strategic Relationships in Dying*, in CHOICE AND CONSEQUENCE 147, 153-55 (1984) (patient in extremis deciding whether to have the plug pulled to stop the burden and expense on family); see also J. FEINBERG, *supra* note 4, at 65-66 (value of tradeoffs for freedom). Finally, Regan, in challenging "the theorist who takes ['true' ultimate] preference satisfaction as the fundamental

eral regimes attribute positive values to autonomy.<sup>76</sup>

The State, by means of coercive laws, limits the range of choices of the citizenry. The conclusion that this invades autonomy is not a happy one. Some commentators have attempted to avoid this conclusion by finding a social contract which legitimates laws by indirectly making them the choice of the citizenry.<sup>77</sup> Perhaps morally justifiable limitations, as well as those consented to, do not necessarily impinge upon autonomy,<sup>78</sup> or for that matter, perhaps no rule impinges upon autonomy.<sup>79</sup> The State's adoption of "neutral principles" to allow individuals to act upon their own conceptions of the good may pre-

---

good," observes that "it is by no means a necessary truth that we will enjoy life more if we discover and act on our true preferences." Regan, *On Preferences and Promises: A Response to Harsanyi*, 96 ETHICS 56, 58 (1985). Harsanyi concedes the point, begrudgingly. See Harsanyi, *On Preferences, Promises, and the Coordination Problem: Reply to Regan*, 96 ETHICS 68, 69-70 (1985).

76. The liberal doctrine holds "that men 'ought' to prefer freedom." F. KNIGHT, *supra* note 75, at 372.

77. See generally SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU (E. Barker ed. 1947). For Kant's adoption of the social contract in the name of autonomy, and Hume's rejection of it, see J. MURPHY, *Hume and Kant on the Social Contract*, in RETRIBUTION, JUSTICE, AND THERAPY 58 (1979). For general criticism of social contract theories of the state, see, e.g., J. SCHUMPETER, *supra* note 60, at 247-56; R. WOLFF, *supra* note 59, ch. II.

78. "To the benefits conferred by the status of citizenship might be added that of Moral Freedom, which alone makes a man his own master. For to be subject to appetite is to be a slave, while to obey the laws laid down by society is to be free." J. ROUSSEAU, *The Social Contracts*, in SOCIAL CONTRACT, *supra* note 77, at 167, 186 (bk. I, ch. 8); see N. MACCORMICK, *Legal Right and Social Democracy*, in LEGAL RIGHT AND SOCIAL DEMOCRACY 1, 11-12 (1982); Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 528 (1987) (Murphy invokes Kant and Rawls for the "hypothetical rational consent" of the rational will, rather than the actual will.); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 550-51 (1971) ("legitimate power"); Wall, *Philosophical Anarchism Revisited*, in ANARCHISM 273, 284-87 (J. Pennock & J. Chapman eds. 1978) ("Autonomy and authority are really just two sides of the same coin."). But see Kuflik, *supra* note 59, at 274 n.5 ("But it does not follow that a person 'acts autonomously' even when he is compelled to act, contrary to his present will, in accordance with rules for which there is a morally adequate justification."); Thomas, *Rationality and Affectivity: The Metaphysics of the Moral Self*, 5:2 SOC. PHIL. & POL'Y 154, 159 (Spring 1988) (Thomas views being moral as a matter of "coercive rationality."). Related to this is Rawls' insistence that promises are binding only in a just society. See J. RAWLS, *supra* note 11, at 344-50. Atiyah suggests that Rawls' theory may explain why certain contracts have been held unenforceable, for example, some nineteenth century contracts between factory owners and workers, and modern rent control statutory limitations. See P. ATIYAH, *PROMISES, MORALS, AND LAW* 114-15 (1981).

79. See Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 816 (1986) ("Formal liberty is satisfied as long as people are allowed to pursue the opportunities that the rules make available."); Kennedy, *supra* note 54, at 371 ("An individual has complete autonomy when he is dependent for the satisfaction of desire only on events ordered according to rules," "rather than arbitrary or indeterminate events beyond his control . . ."); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1768 (1976) ("If we define freedom as the ability to choose for oneself the ends one will

serve autonomy.<sup>80</sup> State intervention may be accepted as the second-best solution or by default for lack of an alternative.<sup>81</sup> In any event, society, if not the State, should affirmatively foster autonomy.<sup>82</sup> These often apologetic attempts to reconcile State coercion have led some commentators to conclude that autonomy is possible only in a state of nature.<sup>83</sup>

---

pursue, then an individualist order maximizes freedom, within the constraints of whatever substantive regime is in force."). Even Hayek, the libertarian, reconciles rules and autonomy:

The coercion which a government must still use for this end [of protecting individuals' private spheres against interference by others] is reduced to a minimum and made as innocuous as possible by restraining it through known general rules, so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced.

F. HAYEK, *supra* note 11, at 21.

80. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10-12, 367-68 (1980) ("Neutrality and Convergence" and "The Good of Autonomy"); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 127-36 (S. Hampshire ed. 1978); Rawls, *The Basic Liberties and Their Priority*, in 3 *THE TANNER LECTURES ON HUMAN VALUES* 1, 17-20 (S. McMurrin ed. 1982). But see *infra* note 300. Kant demanded neutral principles:

Man's *freedom* as a human being, as a principle for the constitution of a commonwealth, can be expressed in the following formula. No one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law—i.e., he must accord to others the same right as he enjoys himself.

Kant, *The Contractual Basis for a Just Society*, in *JUSTICE: ALTERNATIVE POLITICAL PERSPECTIVES* 42, 42-43 (J. Sterba ed. 1980).

81. See F. HAYEK, *supra* note 11, at 21 ("Coercion, however, cannot be altogether avoided because the only way to prevent it is by the threat of coercion."); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923).

82. Madison insisted that protecting human diversity "is the first object of government." *THE FEDERALIST* NO. 10, at 42 (Everyman's Library ed. 1911) (J. Madison). According to Haworth even the utilitarian would endorse "the further idea that people's capacity for choosing autonomously should be nurtured and developed, and that social practices and institutions should exist which permit maximal expression of people's capacity for autonomy." Haworth, *supra* note 48, at 18; see also L. HAWORTH, *supra* note 11, ch. 7; Gibson, *supra* note 11, at 193 (non-value-neutral rationality); White, *Economics and Law: Two Cultures in Tension*, 54 *TENN. L. REV.* 161, 178-80 (1986) ("The question is not only how far people are free or restrained in their exercise of dominion over the assets that nature and society give them, but far more importantly, what our community enables its people to do or to become."). Perhaps the individual has the moral duty to foster her own autonomy. See Riley, *On the "Kantian" Foundations of Robert Paul Wolff's Anarchism*, in *ANARCHISM* 294, 294-95 (J. Pennock & J. Chapman eds. 1978). Yet, whether one has a basic right to autonomy may be doubted, and the usual fears regarding government intervention are raised if the government is to regulate, say, commercial speech in the name of protecting the autonomy of listeners. See Machina, *Freedom of Expression in Commerce*, 3 *LAW & PHIL.* 375, 389-91 (1984).

83. See, e.g., J. MURPHY, *supra* note 77, at 70 ("Hume simply *denies* the possibility of reconciling, in any totally consistent way, human freedom with coercive authority."); R. NOZICK, *ANARCHY, STATE AND UTOPIA* 6 (1974) ("Some anarchists have claimed not merely that we would be better off without a state, but that any state necessarily violates people's moral rights and hence is intrinsically immoral."); R. WOLFF, *supra* note 59, at 103.

Autonomy does not mean total freedom in the sense of unpredictability.<sup>84</sup> Chaos would reign in those circumstances. External influences on an individual's choices lead to an expected range of responses.<sup>85</sup> In the contractual setting, this is obvious. If behavior were unpredictable, no one would bother contracting. For example, a bargained-for exchange (consideration) supports a contract. Without the apparent inducement of the promisee's counterpromise, the contract is unenforceable. The usual counterpromise falls short of the overreaching persuasions that invade autonomy, but a court would rule to the contrary should the counterpromise be: "If you promise to give me \$100,000, I will not shoot you."<sup>86</sup>

---

84. "At least since Adam Smith, most rational choice theorists have considered their theory to be the description of the behavior of free agents. The idea of behavioral laws for autonomous agents has always seemed self-contradictory to me." Herrnstein, *Lost and Found: One Self*, 98 ETHICS 566, 577 (1988).

85. Education and language are prominent molders.

All education concerns the transformation of man, the alteration of his dispositions; it consists in the strengthening or forming of certain impulses, and the weakening or removal of others. That is . . . , education attempts to equip certain ideas with a greater pleasure-tone and to make others, on the contrary, have as little as possible, or even to make them very unpleasant.

M. SCHLICK, PROBLEMS OF ETHICS 123-24 (1939). "We are ourselves to some degree formed by the languages that we use, for they imply criteria of selection, grounds of motivation, dispositions of mind and feelings, ways of telling the stories of our individual and collective lives, and so on, all of which become part of ourselves." J. WHITE, *The Judicial Opinion and the Poem*, in HERACLES' BOW 107, 126-27 (1985).

86. Situations of duress or extortion are not objectionable simply on the grounds that the actor is put in a position where she cannot choose to maximize her utility. Even in performing the contract of "your money or your life" (if it may be called a "contract"), the actor is presumably maximizing her utility, whichever she chooses. This does not, however, exclude coercion or duress. See *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326-27 (1942); *Union Pac. R.R. v. Public Serv. Comm'n*, 248 U.S. 67, 70 (1918) (Holmes, J.); F. HAYEK, *supra* note 11, at 20-21, 133-34 (coercion); Slawson, *supra* note 78, at 549 (contracts of adhesion). On the other hand, all contracts are to some extent coercive, for example, "If you want my candy, you must give me your dime." See J. FEINBERG, *supra* note 4, ch. 24; Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 605-07 (1943) ("In consenting to enter into any bargain, each party yields to the threats of the other."); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 728 n.49 (1931) ("The problem of 'reality of consent' is essentially one of determining what types of pressure or other stimuli are sufficiently out of line with our general presuppositions of dealing to open the expression of agreement to attack."); Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 276-323 (1973) (critique of Hale's paradigm of freedom, coercion, and power). That coercive contracts are not binding is a conclusion arrived at only after a long philosophical struggle. See P. ATIYAH, *supra* note 78, at 22-23 (referring to Aristotle, Hobbes, Grotius, Pufendorf, and Locke). The resolution today generally is that the threatening party does not have a legal right to perform her conditional promise, that is, to shoot. See F. KNIGHT, *Freedom as Fact and Criterion*, in FREEDOM AND REFORM 1, 12-13 (1947); R. NOZICK, *supra* note 83, at 262-65 ("voluntary exchange"); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 788. But see Steiner, *Capitalism, Justice and Equal Starts*, 5:1 SOC. PHIL. & POL'Y 49, 55 n.8 (Autumn 1987) ("[S]uch a right [against coercion] would amount to an infinitely regressive right against

Beyond the decisions at gunpoint, an actor is subject to inherent and imposed influences. Her conceptions of "the good" and of the proper and practical means of obtaining it for herself are informed by her nature and nurture.<sup>87</sup> What she finds personally worthwhile is surely dependent upon her personal characteristics. For one, her native talents channel her aspirations. The extent of her talent is a morally neutral fact, while a choice turning on this fact shares this neutrality even though, in some respect, the choice is not totally free. At this point, nurture, which is imposed from without, enters the calculus.<sup>88</sup> One expects the properly humble star, along with being thankful for her given talents, to thank her family and others for their help. This propriety is not a baseless ritual. Nurture, like nature, is morally neutral.<sup>89</sup> One feels more respect for the star who makes it

---

having one's rights interfered with . . ."). The absence of a right to enforce the contract may also be the way fraud is dealt with in the common law. See P. ATIYAH, *supra*, at 24. Yet, the existence of a right does not preclude the claim of coercion, as where a party makes demands by a threat to exercise a right, for example, "abuse of rights." See Hale, *supra*, at 612-21. Through coercion, the actor's will is "overborne." According to Feinberg:

The coerciveness of a proposal is . . . a function of two variables, (1) the polarity (that is, the recipient's assessment as 'good' or 'evil') of the projected consequences of the posed alternatives, and (2) the proximity of the alternative projections on the recipient's scale of preferences, how 'close' and therefore difficult the choice, or 'distant' and therefore unavoidable the choice.

J. FEINBERG, *supra*, at 235 (emphasis omitted).

Liability in tort requires less voluntariness than liability in contract. See, e.g., Levin & McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 MCGILL L.J. 24, 81-82 (1983) ("In protecting voluntariness the common law has imposed obligations in tort different than those in contract."). One reason is that we feel that the "actor," though perhaps "innocent," should bear the loss rather than the innocent victim.

87. Nurture may play a bigger role than most think. "Our ideas, our values, our acts, even our emotions, are, like our nervous system itself, cultural products—products manufactured, indeed, out of tendencies, capacities, and dispositions with which we were born, but manufactured nonetheless." C. GEERTZ, *THE INTERPRETATION OF CULTURES* 50 (1973); see Markl, *Constraints on Human Behavior and the Biological Nature of Man*, in LAW, BIOLOGY AND CULTURE 90, 91 (M. Gruter & P. Bohannon eds. 1983) ("Man exhibits a high degree of freedom of behavioral choice—human behavior can be influenced, modified and manipulated throughout life more than that of any other known organism."); Masters, *Evolutionary Biology, Political Theory and the State*, in *id.* at 171, 172 ("Biology now teaches us that the existence and structure of social groups varies, even within a single species, as a consequence of the interaction between animals and their environment; a species that is asocial in one setting may be social in others."); Selznick, *supra* note 64, at 447 ("To say that humans are social animals is to say that they depend on others for psychological sustenance, including the formation of their personalities.").

88. See *infra* note 315. As later discussed, market availability influences consumer preferences. See *infra* note 329. Kelman worries that the consumer whose preferences do not conform to market availability may feel coerced, impotent. See Kelman, *supra* note 86, at 788.

89. "[T]he initial endowment of natural assets and the contingencies of their growth and nurture in early life are arbitrary from a moral point of view. The precept which seems intuitively to come closest to rewarding moral desert is that of distribution according to effort, or perhaps better, conscientious effort." J. RAWLS, *supra* note 11, at 311-12 (footnote

"against all odds" and who overcomes a nonsupportive background. She deserves her success more.<sup>90</sup> In light of the ubiquity of these external factors, one must be cautious about assessing their effects on the legal notion of autonomy.<sup>91</sup>

A choice, then, is not necessarily heteronomous simply because it is not entirely independent of influences from other persons.<sup>92</sup> The distinction is vague.<sup>93</sup> The struggle with it goes far back.<sup>94</sup> The circumstances, the character of the impingements, and the reasons for

---

omitted); see also Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 42 (1989) (similar observation).

90. There are, as perhaps implied by Rawls, see text accompanying *supra* note 89, three categories of traits. To be explicit:

[O]ur environment is not just biological: it is social, and it can be manipulated not only by other people, but by the agent himself. Thus, some biological endowments will not be under any agent's control ["hereditary traits"], others will be the responsibility of those who nurture the agent ["domestic traits"], and still others will be the responsibility of the agent himself ["acquired traits"].

Rosenberg, *The Political Philosophy of Biological Endowments: Some Considerations*, 5:1 SOC. PHIL. & POL'Y 1, 4 (Autumn 1987). This third category, interrelated with the first two, challenges the common judgment that talents and disabilities, not being the responsibility of the actor, are morally distinguishable from tastes and preferences, for which the agent is responsible. See *id.* at 27-28. The actor may transform all her own characteristics. Hence, Rosenberg concludes, "there is no fundamental moral difference between tastes and preferences, and talents and disabilities." *Id.* at 28. On the other hand, whether or not a person who is successful because of nature and nurture "deserves" it, society may choose to reward her in order to encourage the social benefits. See F. HAYEK, *supra* note 11, at 88-90; J. RAWLS, *supra* note 11, at 311-12.

91. That Kant may not have been cautious enough, see J. RAWLS, *supra* note 11, at 252. Along with directly induced preferences and other forms, many commentators have expressed concern about the nonautonomous "preferences resulting from pervasive acculturation or socialization processes which are not directly manipulative in the ways brainwashing and subliminal advertising are." Haworth, *supra* note 48, at 15; see, e.g., J. FEINBERG, *The Idea of a Free Man*, in RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 3, 23 (1980) ("Autonomy is also contrasted with forms of passive mindless adjustment (the pejorative term is 'conformity') to the requirements of one's culture."); J. HALL, *supra* note 13, at 108 ("[I]n Durkheim's sociology all social facts are coercive since in all social relations one is subjected to psychological pressures."); Nonet, *supra* note 66, at 273-74 ("Legal competence requires a certain degree of autonomy, a detachment of the person from the system of social relations that determines his position and interests."); Samuels, *supra* note 86, at 276-95 (discussing the affect of "real-world restrictions" on autonomy); *infra* note 320.

92. Barry states the problem this way: "What has to be shown is that criteria can be produced according to which some actions are at least 'more self-determined' than others or according to which some people are 'more autonomous' than others." B. BARRY, *supra* note 1, at 141 n.1. Haworth proposes that critical reflection upon one's "internalizations of parental commands" "to determine whether, all things considered, one wants to be guided by them, is to institute self-rule in a more profound sense." L. HAWORTH, *supra* note 11, at 2; see *supra* note 90.

93. "[T]his appeal to autonomy . . . is hard to assess; for its central notion is notoriously unclear." Sher, *Our Preferences, Ourselves*, 12 PHIL. & PUB. AFF. 34, 46-48 (1983); see also J. SCHUMPETER, *supra* note 60, at 259 n.12 ("This distinction between genuine and manufactured will . . . is a difficult one and cannot be applied in all cases and for all

them are critical.<sup>95</sup> To point to the basic idea, one might say that the autonomous choice must be authentic.<sup>96</sup>

purposes." This, in turn, complicates the judgment of the merit or blameworthiness deserved by the actor. See, e.g., F. HAYEK, *supra* note 11, at 85-102 (equality, value and merit).

On the other side of the coin, "coercion is nearly as troublesome a concept as liberty itself, and for much the same reason: we do not clearly distinguish between what other men do to us and the effects on us of physical circumstances." *Id.* at 133. Even the meaning of outright coercion is not self-evident. For analyses of possibilities, see Alexander, *Zimmerman on Coercive Wage Offers*, 12 PHIL. & PUB. AFF. 160 (1983); Hale, *supra* note 86.

94. See, e.g., ARISTOTLE, *ETHICA NICOMACHEA* bk. III, ch. 5 (W. Ross ed. 1942). In justifying punishment, Kant was troubled by the unavoidable influences of nature and nurture on autonomous choice.

The problem is that, logically, if law is the product of reason, and obedience to law is rational, then it is only the man who is irrational, who is governed not by reason but by sensible impulse, who will break the law. But then he, the phenomenal man, is precisely the individual who does not deserve his punishment.

Norrie, *Thomas Hobbes and the Philosophy of Punishment*, 3 LAW & PHIL. 299, 318 (1984) (citing I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd ed. 1965)). Hobbes noted this problem also. See *id.* at 318-19.

95. Autonomy is not to be equated with self-sufficiency. Indeed, in a complex world it is difficult to believe that anyone is always the best judge of every possible matter. . . . The crucial point is that . . . whether he decides a particular matter directly or relies on the knowledge or judgment of another, he must be able to justify, on morally rational grounds, the direction he has taken.

Kuflik, *supra* note 59, at 273. "Indeed someone who refused to acknowledge any restrictions on conduct could be justly accused of not functioning autonomously, i.e., as a self-regulating moral agent, at all." *Id.* at 274 n.5. "Part of avoiding exaggeration is giving up the Kantian notion that autonomy is a matter of escaping determination by any contingency whatsoever. Part, too, is refusing to conflate autonomy with sheer independence from others." Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFF. 134, 147 (1984). Voluntariness is a matter of degree, and the critical question is when a choice is sufficiently voluntary. See J. FEINBERG, *supra* note 4, at 104 ("To whatever extent there is compulsion, misinformation, clouded judgment . . . , or impaired reasoning, to that extent the choice falls short of perfect voluntariness."). Two "common sense" rules of thumb are: the required degree of voluntariness is greater as, first, the conduct is riskier, and second, the risked harm is more irrevocable. See *id.* at 118-21. The relevant factors include the context, the purpose of the judgment and the background assumptions. See *id.* at 121-24.

96. See, e.g., J. FEINBERG, *supra* note 4, at 32-33; L. HAWORTH, *supra* note 11, at 220 n.4 (Dworkin defines the formula for autonomy as "authenticity and independence."); Charvet, *A Critique of Human Rights*, in HUMAN RIGHTS 31, 33 (J. Pennock & J. Chapman eds. 1981); Christman, *supra* note 54, at 112; Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563, 575 (1980); Young, *supra* note 48, at 35. "Authenticity is a notion that applies also to tastes, opinions, ideals, goals, principles, values, and preferences." J. FEINBERG, *The Idea of a Free Man*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 3, 21 (1980). "We may all be, in some respects, irrevocably the 'products of our culture,' but that is no reason why the self that is such a product cannot be free to govern the self it is." *Id.* at 22. Hence, the condition of autonomy "refers to a congeries of virtues all of which derive from a conception of self-determination, though sometimes by considerable extension of that idea." J. FEINBERG, *supra* note 4, at 31-32. The twelve chief virtues are self-possession, distinct self-identity (individuality), authenticity, self-selection, self-creation (self-determination), self-legislation, moral authenticity, moral independence, integrity (self-fidelity), self-control (self-discipline), self-reliance, initiative (self-generation), and responsibility for self. *Id.* at 32-44. But see *id.* at

Insofar as imposed framing distortions prevent one from objectively discerning facts and values, they appear to invade autonomy. For example, temptation, as from advertisements which are sexually charged, distorts objective decisionmaking. Similarly, as mentioned in the introduction,<sup>97</sup> goods may be more saleable if it is suggested that Sir Jones consumes them and if the goods are designed to appear pricey. Because sense data are always embedded in a culturally-determined frame and because that frame is often shifted by the choice of another party, the line between framing choices that are properly said to invade autonomy and those that do not will always be subject to debate.<sup>98</sup> Convention (culture) will be influential in the line drawing.<sup>99</sup> Heuristic distortions are subject to similar considerations.

No choice is totally free.<sup>100</sup> All are subject to constraints. Thus

---

45 (caveats). On the other hand, perhaps more than one "self," that is, more than one set of values, may be the "authentic self." See Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 AM. ECON. REV. 1, 8-9 (1984). But cf. M. MOORE, *supra* note 3, ch. 11 (supporting "the legal view of persons as unified agents"). Frankfurt, concerned mainly with internal struggles, uses the word "wholehearted" rather than "authentic." See Frankfurt, *supra* note 73, at 32-34.

97. See *supra* note 40.

98. Though most economists accept the principle of consumer sovereignty, see T. SCITOVSKY, *THE JOYLESS ECONOMY* 4-5 (1976),

[t]hat approach overlooks the fact that tastes are highly variable, easily influenced by example, custom, and suggestion, constantly changed by the accumulation of experience, and modified by changing prices and the availability of some satisfactions and the unavailability of others. It also overlooks the possibility that the same influences that modify our tastes might also modify our ability to derive satisfaction from the things that cater to our tastes.

*Id.* at 5. In response to this type of criticism, one famous economist rejoins: "I confess I still find a similar rising of my hackles when I hear people's preferences dismissed as not genuine, because influenced or even created by advertising, and somebody else telling them what they 'really want.'" Lerner, *The Economics and Politics of Consumer Sovereignty*, 62 AM. ECON. REV. 258, 258 (1972). There is "an unreasonable exaggeration of the actual troubles." *Id.* at 260.

99. Cf. Johnson, *supra* note 59, at 302-03 (legislative, judicial or informal conventions provide collective standards operating in contract law which are consistent with autonomy broadly conceived).

100. "Philosophers, and social theorists in general, have yet to come up with a general account of what kinds of interferences with an individual undermine moral accountability." Schoeman, *Statistical Norms and Moral Attributions*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 287, 302 (F. Schoeman ed. 1987). The primary battleground historically, of course, has been the debate over freewill and determinism. Without becoming immersed in the debate, a few words might be said. One view sees, as a first approximation, freewill as inversely proportional to the actor's conflict with acculturated values. The greater the act conflicts with conditioned convention, the less free one is to choose and perform it. Compare Wren, *Social Learning Theory, Self-Regulation, and Morality*, 92 ETHICS 409, 413 (1982) (Wren's brief description of intrapsychic conflict) with I. KANT, LECTURES ON ETHICS 62-70 (L. Infield trans. 1930) (stating that "[t]he degree of responsibility depends on the degree of freedom"). That Kant refers to internal freedom rather than external freedom, see Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 537 (1987). For a brief description

far, the emphasis on interferences with full autonomy has largely neglected the action ensuing from the choice. This is not proper. The notion of autonomy or will verges into that of willpower.

### B. Willpower

An essential element of the legally responsible act is that it is intentional<sup>101</sup> or voluntary.<sup>102</sup> In other words, as is here focussed upon, the legally responsible act must be the product of the requisite willpower.<sup>103</sup> Without willpower, a person is not in a position to act upon her own choices as to what is best for herself. Without willpower she cannot adequately take care of herself. "Willpower," then, is distinguished from "autonomy" and "will" by concentrating on the consequent action rather than on the decision or choice.<sup>104</sup>

---

of developments along similar lines, see I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 130 n.1 (1969); J. FEINBERG, *supra* note 4, at 115-17 (degrees of voluntariness). But see Moore, *The Determinist Theory of Excuses*, 95 *ETHICS* 909 (1985) (challenging the view that there are degrees of causation and degrees of freedom); see also Gruzalski, *Parfit's Impact on Utilitarianism*, 96 *ETHICS* 760, 774-75 (1986) ("If [a person] could not do differently given her dispositions, then her act is neither right nor wrong."). For a general discussion of determinism with respect to excusing conditions in criminal law, and analogously to invalidating conditions in certain civil transactions, see H.L.A. HART, *Legal Responsibility and Excuses*, *supra* note 8, and for a discussion of determinism resulting from the discovery of the unconscious, see M. MOORE, *supra* note 3, at 351-65. Other interesting essays on related topics appear in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS*, *supra*. We might glibly dispense with the problem altogether, as has van den Haag, by insisting that if there is general determinism and therefore the criminal has no freewill, then neither does anyone else, so no one can be blamed for going ahead with criminal punishment. See E. VAN DEN HAAG, *PUNISHING CRIMINALS* 108 (1975).

101. The act must be intentional even if the consequences are not. Thus, the negligent actor must have intended to act (misfeasance) or, as a sort of negative act, intended not to act (nonfeasance). The law is loathe to impose affirmative duties to act, though it will in special circumstances. See generally M. SHAPO, *THE DUTY TO ACT* (1977). Unconscious acts, not being intentional, generally will not give rise to (or ought not to) the ascription of responsibility. See Moore, *Responsibility and the Unconscious*, 53 *S. CAL. L. REV.* 1563 (1980).

102. The term "voluntariness" and its cognates are often used in my sense of "willpower," or in a sense that fuses my "willpower" and "autonomy" ("will"). See, e.g., H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 44-65 (1979) ("insanity and involuntariness").

103. See, e.g., *RESTATEMENT (SECOND) OF CONTRACTS* § 15 comment b (1981) ("Even though understanding is complete, he may lack the ability to control his acts in the way that the normal individual can and does control them . . ."). The qualifier "requisite" is to be emphasized: "The spectrum of culpability teaches us that culpability is not only a matter of cognitive foresight, but of self-control. The issue of self-control, we learn, requires subtle judgments of degree." G. FLETCHER, *supra* note 8, at 353.

104. See *RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 1634 (unabr. ed. 1967) (willpower defined as "control of one's impulses and actions; self-control").

"An agent's will is weak if he acts, and acts intentionally, counter to his own best judgement; in such cases we sometimes say he lacks the will power to do what he knows, or at any rate believes, would, everything considered, be better." Davidson, *How Is Weakness of the*

The circumscriptions of willpower, like the other boundaries of responsible action, may also be roughly categorized as inherent or imposed, external or internal. Examples of inherent, internal limitations include certain forms of insanity and mental conditions such as impulsive or compulsive behavior.<sup>105</sup> An example from the opposite poles, those of imposed, external limitations, may be drawn from the famous English case of *Smith v. Stone*,<sup>106</sup> in which a defendant was found to have committed no trespass when he was carried upon the land of the plaintiff by the force and violence of other persons.<sup>107</sup>

These examples may also be analyzed in terms of "act" or "action." We might say that because of the insanity of the defendant or because of the role of the violent strangers, the defendant performed no act.<sup>108</sup> Willpower and act are inextricably intertwined.<sup>109</sup>

---

*Will Possible?*, in MORAL CONCEPTS 93, 93 (J. Feinberg ed. 1969). Some commentators believe weakness of the will is impossible for a free agent, or like Davidson and Aristotle, recognize only an attenuated sense of it. These views are criticised in Young, *supra* note 48, at 41-43.

The distinction between will and willpower may be difficult to draw, as in Robinson's discussion of impulse:

No one smokes cigarettes in conformity with the dictates of reason. . . . The issue, then, is not whether there are such impulses, but whether proof of them is a defense against punishment for a criminal offense. The law says, *so far may you go and no further*, and it is speaking here of impulses, for it is not necessary to constrict the domain of rational choice.

D. ROBINSON, *supra* note 16, at 62.

105. Elster reports an interesting distinction between impulsive and compulsive behavior in an unpublished paper by Ainslie. Impulsive and compulsive behavior "may be considered species of weakness of will, if that notion is simply understood as acting against what, all things considered, one thinks is best . . . . If the will is seen as invested in the ego, these two threats are represented by the id and superego respectively . . . ." J. ELSTER, *supra* note 50, at 21 n.42 (references omitted).

106. 82 Eng. Rep. 533 (K.B. 1647); *see also* *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616) ("as if a man by force take my hand and strike you, . . . so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt"); *Martin v. State*, 31 Ala. App. 334, 17 So. 2d 427 (1944) ("[A]n accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.").

107. The defendant successfully defended on the ground that he was not there "voluntarily." "[I]n this case Roll Justice said, that it is the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant: as he that drives my cattel into another mans land is the trespassor against him, and not I who am owner of the cattell." *Smith*, 82 Eng. Rep. at 533. To focus on the willpower (rather than autonomy) aspect of voluntariness, imagine this scenario: A person decides to trespass when, as he is about to, strangers grab him and carry him onto the land. Being a rugged individual who wants on principle to act on his own, he struggles mightily against the strangers, but to no avail. Presumably, despite his initial decision, he commits no trespass. In this case, we might say that he autonomously chose to trespass but was unable to exercise the willpower to trespass, that is, he did not "act."

108. A response by automatic reflex may be similarly analyzed. For example, there was no

The literature addresses the issue more commonly under the label of act or action. A glance at the literature demonstrates that a full analysis of the nature of an act or action is extraordinarily complex.<sup>110</sup> Although the courts have justified some of the standard excusing conditions partially in terms of willpower, the central problems of the marketplace are elsewhere, and willpower is therefore deemphasized. It should not, however, be entirely neglected. The consumer setting typically involves a natural person dealing with a corporate entity. The corporate merchant indeed operates by means of human agents, but they are regimented by predetermined operating guidelines that are hardly subject to deficiencies of willpower. The same cannot be said of the consumer.

To summarize before examining legal doctrines, one is generally legally responsible only for autonomous choices followed by willful actions. Autonomous choices entail knowledge (information and foreseeability) and capability (reason and sense). Many doctrines excuse individuals who fail either to satisfy one or more of these conditions. Although the courts and commentators often fail either to state explicitly or to agree upon the conditions that justify particular doctrines, a broad range of doctrines are mentioned to buttress the thesis of this Article. A close examination of the justifications, the controversies surrounding them, and the differences among legal topics (e.g., criminal, tort, and contract law) is not undertaken.

The legal doctrines, roughly classified, include: status categories (e.g., minors<sup>111</sup> and, previously, seamen,<sup>112</sup> and women<sup>113</sup>); mental

---

tort liability for the reactive, "hot potato" tossing of a lighted squib in the famous case of *Scott v. Sheperd*, 96 Eng. Rep. 525 (K.B. 1773).

109. See *supra* note 17.

110. See, e.g., J. AUSTIN, *supra* note 8, at 189-204; R. BERNSTEIN, *PRAXIS AND ACTION* 277-78 (1971); J. FEINBERG, *Action and Responsibility*, *supra* note 8, at 119; G. FLETCHER, *supra* note 8, § 6.4; H. GROSS, *supra* note 8, at 57-73, 132-35; H.L.A. HART, *Acts of Will and Responsibility*, *supra* note 63, at 90; M. MOORE, *supra* note 3, at 67-75, 292-94; J. MURPHY, *Involuntary Acts and Criminal Liability*, in *RETRIBUTION, JUSTICE, AND THERAPY* 116 (1979); H. PITKIN, *supra* note 13, at 157-68, 262-63, 268-73; A. WHITE, *supra* note 53; H.L.A. Hart, *supra* note 18, at 160-66. My analysis, essentially finessing the question of "act," "makes principles of responsibility fundamental and insists that acts are whatever satisfy certain basic requirements under these principles." H. GROSS, *supra*, at 56.

111. With respect to the obligation of promise-keeping, "the child is still not sufficiently a master of social intercourse to qualify him as a responsible and autonomous member of society." S. CAVELL, *THE CLAIM OF REASON* 310 (1979). In the natural law tradition, an apparent promise was held to be nonbinding when the "act of will" was somehow deficient, as with minors and the mentally deranged who were said to have undeveloped or "defective" wills. See P. ATIYAH, *supra* note 78, at 22. For the contract doctrine, see generally E. FARNSWORTH, *CONTRACTS* §§ 4.2-.5 (1982). Regarding torts, "[t]he general rule is that an infant has no tort immunity based solely on the fact of infancy." W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 134 (5th ed. 1984) (with exceptions). For criminal liability, "[t]he

categories<sup>114</sup> (e.g., insanity,<sup>115</sup> somnambulism,<sup>116</sup> intoxication,<sup>117</sup>

rationale the common law adopted in the early fourteenth century as to why a child under 7 lacked capacity, was 'because he knoweth not of good and evil.' " M. MOORE, *supra* note 3, at 64. For a child between 7 and 14, the prosecutor must prove the requisite knowledge. *Id.* See generally Schoeman, *Childhood Competence and Autonomy*, 12 J. LEGAL STUD. 267 (1983).

112. The interesting history of the concern of courts for seamen, and its anomalous nature in light of past and contemporary political and economic theory, is discussed in *Hume v. Moore-McCormack Lines*, 121 F.2d 336 (2d Cir. 1941) (Frank, J.). "Story was famous, for example, for a series of decisions in which he intervened to protect sailors from themselves and the contracts they had made. He defined seamen as 'special wards' because of their 'rashness, thoughtlessness and improvidence.'" Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1933 n.60 (1987). "[T]he courts will give jealous scrutiny to contracts made by seamen, who are regarded as 'wards in admiralty.'" Hale, *supra* note 86, at 621 (footnote omitted). Native Americans have also been a protected class. See 2 S. WILLISTON, *CONTRACTS* § 272 (3d ed. 1959) ("wards of the Federal government").

113. I have found no useful discussion of the basis for the historic disabilities of women. Currie surmises the reason, "the only one even remotely intelligible in modern times," would be that "married women as a class are a peculiarly susceptible lot, prone to make improvident promises, especially under the influence of their husbands." Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 230 (1958).

114. The Model Penal Code describes involuntary acts relating to mental states:

The following are not voluntary acts within the meaning of this Section: (a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

MODEL PENAL CODE § 2.01(2) (1962). Feinberg's list of "the standard forms of moral and legal incapacity" is: "coma, motor paralysis, severe retardation, derangement, psychosis; recurrent seizures, depressions, manias, and rages; addiction; infancy and immaturity; intoxication and other nonaddictive drugged states; fever, nausea, pain, and extreme debility or fatigue; gripping moods and distracting emotions." J. FEINBERG, *supra* note 4, at 322.

115. See D. RICHARDS, *THE MORAL CRITICISM OF LAW* 214-15 (1977) (a moral theory of the insanity defense in criminal law); Richards, *supra* note 53, at 6-7. For reasons why mental illness is special, see *infra* note 247. Psychopaths, for example, lack sense, or what has been called moral feeling, moral sense, respect for duty, or conscience. See J. MURPHY, *Moral Death: A Kantian Essay on Psychopathy*, in *RETRIBUTION, JUSTICE, AND THERAPY* 128, 130 (1979). "Though psychopaths know, in some sense, what it means to wrong people, to act immorally, this kind of judgment has for them no motivational component at all." *Id.* Murphy contends psychopaths are not responsible and have no rights. *Id.* at 131. "In fact, the concepts of sanity and personhood are intertwined: At some point we question whether the insane person is a person at all." Radin, *supra* note 60, at 969 (footnote omitted); see M. MOORE, *supra* note 3, at 65-66 (children and insane without personhood). Mental incompetency does not always produce total irresponsibility. It must be "pronounced." See O.W. HOLMES, *THE COMMON LAW* 87-88 (M. Howe ed. 1963).

The MODEL PENAL CODE § 4.01(1) (1962) provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Moore summarizes the historical doctrines: "There are thus basically two kinds of traditional insanity tests: those based on the ignorance of the mentally ill accused person; and those based on some notion of his being compelled to act as he did." Moore, *Legal Conceptions of Mental Illness*, in *MENTAL ILLNESS: LAW AND PUBLIC POLICY* 25, 31 (B. Brody & H. Engelhardt, Jr. eds. 1980). After critically analyzing the traditional meanings of criminal insanity and other mental disabilities, such as intoxication, Fingarette and Hasse propose a unified "disability of mind doctrine." See H. FIN-

drugs,<sup>118</sup> and hypnosis<sup>119</sup>); supervision<sup>120</sup> (e.g., compulsion,<sup>121</sup> coer-

GARETTE & A. HASSE, *supra* note 102, at 199-217. To summarize, "[w]hatever form the [mental] abnormality takes, it is relevant if (but only if) it means that the accused was incapable of choosing effectively a course of conduct that did not violate the law." H. GROSS, *supra* note 8, at 149. See generally G. FLETCHER, *supra* note 8, §§ 4.2.2, 7.3.2, 10.4.4 (Diminished Capacity, The Borderland of Culpability, and Insanity, respectively); H. GROSS, *supra*, at 292-316 (mental abnormality); M. MOORE, *supra*, ch. 6. Like Bentham, see *infra* note 309, Posner justifies the defense of insanity, and others (e.g., intoxication), not by the lack of moral responsibility, but rather because of undeterrability. See Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1224 (1985). There is evidence, however, that mental patients are responsive to economic incentives. See Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1080 (1977).

Courts are wary of this excuse. In the tort context, "[i]nsanity has always been a disfavored excuse." Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 554 (1972). "The common law holds that the mentally defective are at fault for their torts." Coleman, *Mental Abnormality, Personal Responsibility, and Tort Liability*, *supra* note 7, at 107. They personally may, nonetheless, be morally blameless, see *id.* at 111, 119-20, and thus should be legally excused when "the minimal conditions of agency have not been satisfied," *id.* at 128. Coleman criticizes the tort and economic theories supporting the liability of the mentally disabled, but justifies the common law rule on the principle of compensatory justice. See *id.* at 131; see also *infra* note 247. In contract law, "[t]he strict nature of the traditional test for incapacity may have stemmed in part from the drastic consequences of its application: general incapacity usually renders the transaction voidable by the promisor." Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 766 (1982). Also troubling is that, under one line of authority, the defense remains even if the competent person had no reason to know of the other's incompetence. See *id.*

116. A famous case is *Fain v. Commonwealth*, 78 Ky. 183, 39 Am. Rep. 213 (1879), in which a conviction for murder was reversed because the defendant was a known somnambulist treated by the court as "unconscious when he killed the deceased." 78 Ky. at 193, 39 Am. Rep. at 219. Another is the unreported 1950 case from the Supreme Court of Victoria, *King v. Cogdon*, in which the defendant, while sleeping, axed her daughter but was acquitted "because the act of killing itself was not, in law, regarded as her act at all." See Morris, *Somnambulistic Homicide: Ghosts, Spiders and North Koreans*, 5 RES JUDICATAE 29 (1951); see also H. FINGARETTE & A. HASSE, *supra* note 102, at 47 (Insanity and Involuntariness); A. WHITE, *supra* note 53, at 61. Movements during sleep are also "involuntary," see *id.*, as well as is "automatism," see *id.*

117. See, e.g., MODEL PENAL CODE § 2.08 (1962) (Intoxication, including drug intoxication); H. FINGARETTE & A. HASSE, *supra* note 102, at 175-86 (criticizing current legal analysis). Intoxication may preclude the specific intent required for a particular crime, though, generally, voluntary intoxication is no defense. See MODEL PENAL CODE, *supra*, § 2.08; H. FINGARETTE & A. HASSE, *supra* note 102, at 77-78. See generally *id.* at 77-116; G. FLETCHER, *supra* note 8, § 10.4.5 (Intoxication). That gross intoxication may overlap with the criminal insanity defense, see H. FINGARETTE & A. HASSE, *supra* note 102, at 5. Involuntary intoxication will allow a party to disaffirm a contract, see E. FARNSWORTH, *supra* note 111, § 4.6, while in tort law, "[i]nvoluntary, non-negligent intoxication, as where the old lady who never has tasted whiskey is given a cup of 'tea,' is held to be treated like illness or physical disability." W. PROSSER & W. KEETON, *supra* note 111, at 178 n.40.

118. In contract and tort law, drug intoxication basically is treated like alcohol intoxication. See E. FARNSWORTH, *supra* note 111, § 4.6; W. PROSSER & W. KEETON, *supra* note 111, at 178 n.40.

119. See MODEL PENAL CODE § 2.01(2)(c) (1962), quoted in *supra* note 114 (conduct during hypnosis or resulting from hypnotic suggestion). The excuse of hypnosis "denies

cion or duress,<sup>122</sup> provocation,<sup>123</sup> necessity,<sup>124</sup> deceit,<sup>125</sup> undue influ-

agency and therefore culpability." Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 1), 1 LAW & PHIL. 371, 386 (1982).

Drugs and hypnosis may be self- or other-imposed, but if drugs are consumed accidentally, the imposition is severely attenuated. The consumption may be not quite accidental:

The fault of the person who carelessly and unthinkingly becomes very drunk and then commits an offence while thoroughly drunk, and of the person who inadvertently but carelessly neglects to take understood preventative measures to forestall the onset of a loss of conscious control, will be sufficient to make them subject to criminal liability and penalties if their subsequent conduct violates prohibitive norms.

Baker, *supra* note 3, at 64-65 (discussing the working papers of the Law Reform Commission of Canada). Both drugs and hypnosis, when having the effect of allowing the person to choose, but not to act upon that choice, become questions of willpower. Here as elsewhere, the examples do not nondebatably exemplify single categories of distortions.

120. See, e.g., H. FINGARETTE & A. HASSE, *supra* note 102, at 47-48 (In criminal law, nonvoluntariness includes physical compulsion, necessity, coercion or duress.). For a general discussion of nonvoluntary conduct as treated in tort law, covering most of the examples here, and others, see H.L.A. HART & T. HONORE, CAUSATION IN THE LAW 142-62 (2d ed. 1985). In criminal law, for consideration of the four different ways to interpret the claim "I couldn't help it," with discussion of the relationship of compulsion to coercion or duress, see H. GROSS, *supra* note 8, at 276-92.

121. See J. BENTHAM, *supra* note 1, at 162; H. FINGARETTE & A. HASSE, *supra* note 102, at 169-72 (psychiatric and criminal law meanings differ). Feinberg speaks of "a spectrum of force [i.e. duress] running from compulsion proper, at one extreme, through compulsive pressure, coercion proper, and coercive pressure, to manipulation, persuasion, enticement, and simple requests at the other extreme." J. FEINBERG, *supra* note 4, at 189 (footnote omitted). See generally *id.* at 150-59, ch. 23.

122. See, e.g., MODEL PENAL CODE § 2.09 (1962) (Duress). Whether the conduct, otherwise criminal, of the "actor" is justifiable, excusable, or mitigable depends upon the degree or manner in which she was the instrument of the other. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *supra* note 8, at 16. Homicide is the line at which coercion or duress becomes problematic as a defense. The "actor" is placed in a no-win situation in which the principle of general deterrence overwhelms, in the view of most authorities, the principle of blameworthiness. Compare *Lynch v. D.P.P. for Northern Ireland*, 1 All E.R. 913 (1975) with *Abbott v. Queen*, 3 All E.R. 140 (1976) (threatened murder from I.R.A. agents a defense to murder charge for accessories but not for principals). "Though text writers in the common law have resisted recognition of the excuse [in criminal law], the courts have been more compassionate." G. FLETCHER, *supra* note 8, at 829 (footnotes omitted). "Some writers may balk at metaphoric language about the 'will's being overborne' by threats, but this indeed is one effective way to state the true ground of the excuse." *Id.* at 831. See generally *id.* § 10.4.2 (Duress). For a synthesis of duress and necessity in criminal law, see *id.* § 10.4.3. "Where the threat comes from another actor, the defense is duress. . . . When the threat comes from natural circumstances, the defense is necessity." Von Hirsch & Jareborg, *Provocation and Culpability*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 241, 242 n.7 (F. Schoeman ed. 1987).

Contracts of adhesion have been characterized as coercive. See Slawson, *supra* note 78, at 549-51. For an argument that coerced agreements, inevitable in social life, are not involuntary, though some of them should not be enforced, see Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHIL. 133 (1984).

123. See G. FLETCHER, *supra* note 8, § 4.2.1 (Provocation); H. GROSS, *supra* note 8, at 157-58, 174-75 (same); Von Hirsch & Jareborg, *supra* note 122, at 241.

124. "The earliest thinking about excuses appears to be the recognition that the necessity to

ence,<sup>126</sup> unconscionability,<sup>127</sup> and, perhaps, ambivalence<sup>128</sup> and

save one's own life prevails over the positive law." G. FLETCHER, *supra* note 8, at 818. See generally *id.* § 10.4.1 (Necessity). For the related ideas of self-defense and the defense of others or property, see *id.* § 10.5. In the classic lifeboat example of necessity, Posner argues that the defense may be justified by a hypothetical *ex ante* agreement among the parties. See Posner, *supra* note 115, at 1230. Some courts are beginning to recognize the excuse in the criminal context. See Von Hirsch & Jareborg, *supra* note 122, at 244. Under one analysis, "coercion merges into the idea of 'necessity' which appears on the margin of most systems of criminal law as an exculpating factor." H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *supra* note 8, at 16 (footnote omitted). The emergency doctrine, whereby the actor is excused from liability when responding to personally dangerous circumstances not of his own making, has been put in terms of "compulsion." See Fletcher, *supra* note 115, at 551-53. However, "[t]he [tort] privilege of necessity, whose basis has been said to be 'a mixture of charity, the maintenance of the public good and self-protection,' has been recognized in a comparatively small number of cases which have dealt with the problem." W. PROSSER & W. KEETON, *supra* note 111, at 145 (footnote omitted); see also *supra* note 57.

125. See generally E. FARNSWORTH, *supra* note 111, §§ 4.9-15 (misrepresentation); W. PROSSER & W. KEETON, *supra* note 111, §§ 105-10 (misrepresentation and nondisclosure). In the contractual setting, when the intent to agree is implied despite the actor's lack of full knowledge of the terms of the written agreement, either from the failure to read or to understand fully, it may be said that the act is not autonomous. Johnson argues, however, consistent with the principle advocated in the text accompanying *infra* note 371, that the autonomy of such parties, "ambiguous as that notion is," is respected if "they had fair opportunity to find out, and were at least by informal conventions put on notice that their actions would likely have important legal consequences." Johnson, *supra* note 59, at 301.

126. See generally E. FARNSWORTH, *supra* note 111, § 4.20. Undue influence requires a preexisting relationship between the parties. See *id.* Dauer considers overreaching through undue influence, even without the confidential relationship, as one of the main problems raised by the adhesive nature of mass-market contracts. See Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1, 29-30 (1972). Eisenberg would extend the defense to all "unfair persuasion." See Eisenberg, *supra* note 115, at 774-75.

127. To state it succinctly, "[t]here is no freedom of contract in the equal treatment of unequals." Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 28 (1969) (footnote omitted). Exculpatory provisions may be struck down. "Another reason [in addition to loss spreading] we use to justify compulsion is the notion that, because of the ignorance or incapacity of one of the parties, compulsion of that party is inherent in allowing exculpatory agreements." G. CALABRESI, *THE COSTS OF ACCIDENTS* 52 (1970); see U.C.C. § 2-302 (1978) (unconscionable contract or clause); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (unconscionability); E. FARNSWORTH, *supra* note 111, § 4.28 (unconscionability).

Related to unconscionability and the other interferences with sensibility are the statutes that require a cooling-off period in which either party may withdraw from a contract. See, e.g., FTC Cooling-Off Period for Door-to-Door Sales Rule, 16 C.F.R. § 429.1 (1989). Kronman finds these restrictions "antidemocratic," but defends those rules that protect against the exercise of poor judgment ("sense," in my parlance). See Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 794-96 (1983). In any event, there is some early empirical evidence suggesting that the cooling-off statutes have little effect, "at least if effect is measured by the number of cancellations that occur within the 'cooling-off' period." Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 463 (footnote omitted).

128. "Certain kinds of ambivalence . . . disqualify one from acting of one's own free will." Slote, *Understanding Free Will*, in *MORAL RESPONSIBILITY* 124, 128 (J. Fischer ed. 1986). Ambivalence may arise from opposite tuggings, such as desire and interest, or egoism and altruism. See March, *supra* note 42, at 153. Generally, ambivalence may be a product of

temptation<sup>129</sup>); and a miscellany,<sup>130</sup> (including mistake,<sup>131</sup> impractica-

vacillation or uncertainty in preference orderings. See Steedman & Krause, *Goethe's Faust, Arrow's Possibility Theorem and the Individual Decision-Taker*, in *THE MULTIPLE SELF* 197 (J. Elster ed. 1986). Ambivalence may arise from "the complications of guessing future preferences." March, *supra* note 42, at 145. It may be an inherent aspect of the human condition. See G. MYRDAL, *OBJECTIVITY IN SOCIAL RESEARCH* 16 (1969) ("[A] person's valuations are usually shifting and contradictory. Behind *behavior* there is not one homogeneous set of valuations but a mesh of struggling inclinations, interests, and ideals."). Hence, ambiguous preferences, in light of limited rationality, may be sensible. See March, *supra* note 42, at 156-58. Ambivalence, by forcing the person into a position of choice, may even be a prerequisite of acts of will. See M. SCHLICK, *supra* note 85, at 33 ("What we call an act of will occurs only where several stimuli are at work simultaneously, to which one cannot respond at the same time, because they lead to incompatible activities.").

Economists and other theorists of decision making generally ignore the complexities of ambivalence. See Steedman & Krause, *supra*, at 197. Schelling is an exception.

I suggest that the ordinary human being is sometimes also not a *single* rational individual. Some of us, for some decisions, are more like a small collectivity than like the textbook consumer. Conflict occurs not only when two distinct human beings choose together but also within a single one; and individuals may not make decisions in accordance with the postulates of rationality, if by individuals we mean live people.

Schelling, *Ethics, Law, and the Exercise of Self-Command*, in 4 *THE TANNER LECTURES ON HUMAN VALUES* 43, 58 (S. McMurrin ed. 1983).

A different form of ambivalence may be what Davidson calls "weakness of the warrant," which he sees as a cognitive error analogous to weakness of the will.

Weakness of the warrant can occur only when a person has evidence both for and against a hypothesis; the person judges that relative to all the evidence available to him, the hypothesis is more probable than not; yet he does not accept the hypothesis (or the strength of his belief in the hypothesis is less than the strength of his belief in the negation of the hypothesis).

Davidson, *Deception and Division*, in *THE MULTIPLE SELF* 79, 81 (J. Elster ed. 1986).

129. "Bentham would not have considered that exposure to an unusual, or specially great, temptation was in itself a ground for mitigating the [criminal] penalty." H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *supra* note 8, at 239. "Temptation may diminish responsibility somewhat, and hence be a mitigating factor; but it does not, extreme cases aside, diminish responsibility so substantially as to constitute an excusing factor." Altman & Lee, *Legal Entrapment*, 12 *PHIL. & PUB. AFF.* 51, 59 (1983). For a discussion of the relation between will and ambivalence (temptation in its neutral form?), see *supra* note 128.

130. See *infra* note 242 and accompanying text (ex post facto, retroactive, and uncertain laws).

131. "The concept of involuntariness readily fits the situation in which an actor surrenders to external pressure, but it seems more strained in English to regard mistakes as raising problems in the voluntariness of conduct." G. FLETCHER, *supra* note 8, at 807. Fletcher discusses the theory of mistake at length. See *id.* §§ 9.1-.4; see also MODEL PENAL CODE § 2.04 (1962) ("Ignorance or Mistake"); H. GROSS, *supra* note 8, at 213-23, 256-75. In any event, "[t]here is some support in legal usage for regarding acts done in ignorance or by mistake as less than fully voluntary." H.L.A. HART & T. HONORE, *supra* note 120, at 138 n.40. "One who commits a criminal act under mistake of fact has a defense, because he has wrong or insufficient data for reasoning." Keedy, *Ignorance and Mistake in the Criminal Law*, 22 *HARV. L. REV.* 75, 81 (1908).

In contract law, the distinction between unilateral and mutual mistake, only the latter allowing relief, is breaking down. See Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 *J. LEGAL STUD.* 1, 5 (1978).

An economist would be likely to define a mistake as an error in prediction

bility,<sup>132</sup> and frustration of purpose<sup>133</sup>).

Two other conditions may be mentioned, not for their importance in the law, which is virtually nil, but for their interesting features, as recognized in literature and philosophy, and for the light they shed on impaired willpower. I am referring to anomie and akrasia. Anomie is a state of weakened compliance with social norms.<sup>134</sup> The individual loses self-control,<sup>135</sup> not from excited passions, but

resulting from a state of uncertainty which the mistaken party himself would agree could have been cured at a reasonable cost (by augmenting his knowledge of the world). In ordinary parlance, however, the term 'mistake' is often used in a much broader sense to mean simply an error which would not have been made if the mistaken party's knowledge of the world had been more complete.

*Id.* at 2 n.1.

Where one party to the knowledge of the other is mistaken, information transfer is cheap; where information is valuable to the pricing of the contract, other things equal, it should be transferred. Exceptions to the disclosure requirement can be explained as attempts to overcome the inefficiency arising from the nonappropriability characteristic of information—thus the right to enforce a contract creates a property right in the information, giving people an incentive to invest in generating valuable information.

Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEGAL STUD. 241, 257 (1983) (footnote omitted); see *infra* note 369. The "public good" quality of information is taken up in *infra* note 177.

132. See RESTATEMENT (SECOND) OF CONTRACTS §§ 261-64, 266-72 (1981); E. FARNSWORTH, *supra* note 111, §§ 9.5-9 (Impracticability and Frustration).

133. See RESTATEMENT (SECOND) OF CONTRACTS §§ 265-69, 272 (1981); E. FARNSWORTH, *supra* note 111, §§ 9.5-9 (Impracticability and Frustration).

134. This word is derived from the Greek word "anomia," meaning "lawlessness." Haworth includes anomic preferences as one sort of nonautonomous preferences. See Haworth, *supra* note 48, at 15. "The anomic preferer is simply careless." *Id.*

Merton defines 'the sociological concept of anomie' as 'a breakdown in the cultural structure, occurring particularly when there is an acute disjunction between the cultural norms and goals and the socially structured capacities of members of the group to act in accord with them,' and Robin Williams observes that 'Anomie as a social condition has to be defined independently of the psychological states thought to accompany normlessness and normative conflict'; while, for example, Riesman, MacIver, Lasswell and Srole take it to refer to a state of mind.

Lukes, *Alienation and Anomie*, in PHILOSOPHY, POLITICS AND SOCIETY 134, 135-36 (P. Laslett & W. Runciman eds. 3d series 1967) (footnotes omitted).

135. There are a variety of familiar ways of falling short of the ideal of autonomy, a noting of which might be useful for strengthening our grasp of the concept. When the *I* is incapable of governing its *Me*, the result is anomie, a condition which is not control from without, but rather being virtually 'out of control' altogether.

J. FEINBERG, *supra* note 91, at 23. Anomie may not be all bad: "Some of this normative diversity [through anomie] provides valuable liberties for the individual and variations for the society. When anomie passes a certain limit (which we cannot yet identify), however, it can destroy mutual trust, confidence, legitimacy and a willingness to adhere to and support the code of the society." Schwartz, *On the Prospects of Using Sociobiology in Shaping the Law: A Cautionary Note*, in LAW, BIOLOGY AND CULTURE 15, 26 (M. Gruter & P. Bohannon eds. 1983).

rather from, or accompanied by, weariness or disillusionment.<sup>136</sup> Akrasia, on the other hand, occurs when the will is overcome by the emotions.<sup>137</sup> Even though the person knows better, a rush of feelings dominates her will, or she impetuously fails to deliberate and instead chooses against her better judgment.<sup>138</sup>

The legal doctrines mentioned above do not unequivocally support my conception of legally responsible actions. There are limits to each of these doctrines and variations occur as the doctrines are applied in different legal areas. These limits and variations reveal that the concerns of the law go beyond merely ascribing liability for autonomous actions. In short, the grounding of the law is multifaceted, involving polycentric social choices which preclude systematization along a single parameter. Nowhere is the rejection of my univocal standard more evident than in the doctrine of strict liability, which, in both the civil law and the criminal law, runs afoul of the requisites for autonomous choice and willful action.<sup>139</sup> The normative bases of the

---

136. Durkheim uses "anomie" to describe a pathological mental state "accompanied by 'weariness,' 'disillusionment,' 'disturbance, agitation and discontent,' 'anger' and 'irritated disgust with life.' In extreme cases this condition leads a man to commit suicide, or homicide." Lukes, *supra* note 134, at 138. "Durkheim [also] uses 'anomie' . . . to characterize the pathological state of the economy . . ." *Id.* For more on Durkheim's use of the term, see *id.* at 138-39.

137. See Davidson, *supra* note 104, at 99-102 (discussing the views of Plato, Aristotle, St. Paul, Mill, Hare, Austin, and others). The word "akrasia" "means 'lack of control' and the idea is that the agent, or the agent's reason, is not in control of his actions. . . . Aristotle compares an agent in *akrasia* to a city with a good legislature but an inefficient executive." D. PEARS, *MOTIVATED IRRATIONALITY* 17 (1984) (footnote omitted). "Akrasia is characterized by the following features. (1) There is a *prima facie* judgement that X is good; (2) There is a *prima facie* judgement that Y is good; (3) There is an all-things-considered judgement that X is best; (4) There is the fact that Y is chosen." Elster, *supra* note 17, at 15.

138. Davidson speaks in terms of "incontinence":

In the usual accounts of incontinence there are, it begins to appear, two quite different themes that interweave and tend to get confused. One is, that desire distracts us from the good, or forces us to the bad; the other is that incontinent action always favours the beastly, selfish passion over the call of duty and morality.

Davidson, *supra* note 104, at 101. Davidson concludes:

The akrates does not, as is now clear, hold logically contradictory beliefs, nor is his failure necessarily a moral failure. What is wrong is that the incontinent man acts, and judges, irrationally, for this is surely what we must say of a man who goes against his own best judgement. . . .

What is special in incontinence is that the actor cannot understand himself: he recognizes, in his own intentional behaviour, something essentially surd.

*Id.* at 112-13. See generally D. PEARS, *supra* note 137, at 16-25; Elster, *Weakness of Will and the Free-Rider Problem*, 1 *ECON. & PHIL.* 231, 250-56 (1985); Rorty, *Self-Deception, Akrasia and Irrationality*, in *THE MULTIPLE SELF* 115 (J. Elster ed. 1986).

139. One must not overemphasize the strictness of strict liability. See R. EPSTEIN, *supra* note 48, at 133-35; H. GROSS, *supra* note 8, at 343 ("A more careful examination discloses that in most crimes of strict liability there actually is a requirement of low-grade culpable conduct

usual elements of responsibility are eclipsed by other policies. In the case of civil liability in particular, other policies have been expressed: risk avoidance,<sup>140</sup> loss spreading,<sup>141</sup> deterrence,<sup>142</sup> cost internalization,<sup>143</sup> evidentiary burdens,<sup>144</sup> and moralisms.<sup>145</sup> Still, much of the

---

akin to certain sorts of negligence for which there is civil liability."); M. MOORE, *supra* note 3, at 53 ("A mental element is built into all strict liability rules because of their requirement that the actor at least have performed a voluntary action . . ."). Even the classical and biblical examples of strict criminal liability may not have been as strict or extensive as is commonly supposed. See Kneale, *The Responsibility of Criminals*, in MORAL PROBLEMS 161, 169-70 (J. Rachels ed. 1971). The Model Penal Code adds an element of foreseeability when absolute liability for causing a particular result is imposed by law. See MODEL PENAL CODE § 2.03(4) (1962). This is "a minimal protection against the limitless extrapolation of liability without fault." *Id.* (explanatory note).

140. See H. GROSS, *supra* note 8, at 351-52 ("Encouragement of Precaution"). The best risk avoider is one who is in the position to most easily minimize the risk. In one context, it is the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (emphasis omitted). The manufacturer, for example, can minimize the risk of gas tanks exploding upon collision more cheaply than the driver. By strictly imposing such a duty upon the manufacturer, the hazards will decrease and thereby the overall social costs of the product will be lower. However, whether this happens is an empirical question. See Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 130-31 (1982). One justification for strict criminal liability is that individuals or enterprises may be stimulated "to invent new techniques for avoiding violations. . . ." H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *supra* note 8, at 240..

141. See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); G. CALABRESI, *supra* note 127, at 50-54 ("Enterprise Liability"); Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1040 (1980); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120-22 (1960); Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 292-95 (1981) (discussing pros and cons of loss spreading).

142. "For in a system of strict liability anyone who is at all susceptible to influence by threats knows that, if he is caught, he can have no hope of evading punishment by any excuse, and this consideration may perhaps make him more careful than he would be otherwise." Kneale, *supra* note 139, at 177 (citing H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *supra* note 8, at 1); see R. EPSTEIN, *supra* note 48, at 78 n.2 (liability of the insane as an incentive for interested parties "to keep the insane person out of trouble"). Prosser was skeptical about whether strict products liability would provide a significant incentive for producers to improve product safety. See Prosser, *supra* note 141, at 1119.

Strict liability is most in place when it is brought to bear on corporations. In such cases there may not be, in advance, any individual on whom an obligation of care rests which would ground a charge of negligence for the causing of the harm which the statute wishes to prevent: the effect of the legislation may be to lead corporations to take the decision to appoint a person with the task of finding out how to prevent the harm in question.

A. KENNY, *supra* note 15, at 93. For extensive discussion of "general" and "specific" deterrence in tort law (and contracts), see generally G. CALABRESI, *supra* note 127. In criminal law, strict liability may be imposed for special governmental purposes, such as to protect the public from impure food. See G. FLETCHER, *supra* note 8, § 9.3.2.

143. To promote an efficient market, it is important for the pricetags of goods to reflect their true social costs. In an efficient market, a purchaser can more easily make a rational

criticism of strict liability is raised for the very reason that the liable

choice maximizing his utility. This leads to Pareto Optimality. See A. BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* 125 (1985) (defining the "Pareto Optimality Principle").

To state it with moral overtones: "Strict liability may be even more strongly endorsed if consumers underestimate risks, because without the standard consumers will purchase products too dangerous for their own good." Priest, *supra* note 140, at 128 (footnote omitted); see also A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 98 (1983); W. PROSSER & W. KEETON, *supra* note 111, § 97; Bishop, *supra* note 131, at 245-46; Henderson, *supra* note 141, at 1040 (stating that "by causing the prices of products and services to reflect more fully their defect-related accident costs, strict liability helps to reduce this overconsumption [by consumers who underassess accident costs] and thus to reduce the overall costs of defect-related accidents"); Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561, 564 (1977). Presumably consumers underassess risks, rather than overassess them, because "[i]f consumers overestimated product risks, then producers would have an incentive to voluntarily provide full product warranties. These warranties would lead to the same outcome as a rule of strict liability." A. POLINSKY, *supra*, at 99 n.61. Finally, strict liability, unlike negligence liability, internalizes the full costs of injuries to third parties. See *id.* at 103.

144. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *supra* note 8, at 201; Henderson, *supra* note 141, at 1040; Kneale, *supra* note 139, at 178. At times one party will be in a position to control the evidence regarding the event in question. Especially if a party's mental state is in issue, the other party may confront an insurmountable hurdle in proving it directly. Presumptions and circumstantial evidence may help. When certain actions are particularly socially undesirable, that is, have a highly negative impact on individuals or the public at large, this hurdle may be finessed by strict liability. Examples are the strict criminal liability for the importation of contraband and for food adulteration. See G. FLETCHER, *supra* note 8, § 9.3.2. The tort doctrine of *res ipsa loquitur*, although it merely shifts the burden of going forward with the evidence rather than imposing strict liability, stems from similar evidentiary hurdles. See W. PROSSER & W. KEETON, *supra* note 111, §§ 39, 40. Prosser believed that *res ipsa loquitur* is adequate to handle the evidentiary burdens in products liability cases. See Prosser, *supra* note 141, at 1114-15. A related reason for strict liability is that it may reduce the administrative cost of decision. The courts need not bother with various hard questions, including an economic analysis. See R. EPSTEIN, *supra* note 48, at 48-49; H. GROSS, *supra* note 8, at 349-51 ("administrative convenience"); Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 90 (1980) ("information costs of determining liability"); see also Page, *Responsibility, Liability, and Incentive Compatibility*, 97 ETHICS 240 (1986) (strict liability justified in terms of "incentive compatibility" which turns on incentives to misrepresent owing to asymmetries in information).

145. For a general discussion of liability decisions based upon moralisms, see G. CALABRESI, *supra* note 127, at 100-02. Ausness provides an example of moralistic justification, along with other policy intimations, related to this Article's thesis: "Some courts and commentators have espoused a representational theory of liability. Under this approach, strict liability in tort is justified because manufacturers possess superior knowledge and skill, induce consumer reliance on their judgment through advertising, and expressly or impliedly represent their products to be safe." Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 86 n.569 (1985-86); see also R. EPSTEIN, *supra* note 48, at 77-79 (infants and the insane should be liable because of relative fairness); Henderson, *supra* note 141, at 1039-40 ("fairness"); Prosser, *supra* note 141, at 1122-23 ("public interest in human life, health and safety" and claims owing to supplier's assurances of safety). The classic victim of "strict liability" in the name of moralisms is Oedipus. Hegel objects to holding Oedipus guilty of parricide because of Oedipus' lack of knowledge. See G. HEGEL, *PHILOSOPHY OF RIGHT* 250 n.74 (T. Knox trans. 1952) (1st ed. Berlin 1821). More common today are situations in which one of two relatively innocent parties must absorb a loss. If one party triggered the loss, and the party impacted was purely passive, there is a

person may not be in a position to foresee the consequences of her act or otherwise make a rational choice to avoid liability; in other words, she may not be morally at fault.<sup>146</sup>

disposition to impose the loss on the actor. The actor seems morally responsible and, all else being equal, ought to pay for any harm. The basis of this disposition is far from clear. The result is that responsibility attaches to action more than inaction. Disruption of the status quo is at the actor's risk. In the last century, the disposition was to the contrary, at least concerning business and industry. For when the actor was an entrepreneur, the perceived social advantage was in encouraging the activity by reducing liability. See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); J. HURST, *LAW AND MARKETS IN UNITED STATES HISTORY* (1982); J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

146. See, e.g., H. GROSS, *supra* note 8, at 346-48 (criticizing the objections to strict liability). But see W. PROSSER & W. KEETON, *supra* note 111, § 75 ("fault" in tort law not synonymous with moral blame). Some courts have resisted the unfairness by finding a foreseeability limitation to strict tort liability and, in Fletcher's view, would recognize the excuse of compulsion. See Fletcher, *supra* note 115, at 554-55. In criminal law, where strict liability is especially disturbing, one may avoid the problem by taking a narrow view of criminality: "Since criminal lawyers are in general agreement that strict liability offenses are not 'really' criminal laws and since objective liability is being progressively reduced, it is only inadvertent negligence (about which criminal lawyers disagree) that raises a serious question about the scope of the narrower descriptive theory of criminal law." J. HALL, *supra* note 13, at 84. In this context, strict liability offenses have been called "public torts" and "violations," instead of "crimes." See *id.* at 86; see also MODEL PENAL CODE §§ 1.04(5), 2.05 (1962) ("violations"); H. GROSS, *supra*, at 352-57 ("analogy to tort liability" and "mildness of sanction"). This appears to be solution by linguistic fiat. This solution will not reach the strict criminal liability of crimes such as statutory rape or bigamy. But see Lindgren, *supra* note 3, at 107-08 (dismissing unfairness of statutory rape by recharacterizing risk assumed by intercourse); see also G. FLETCHER, *supra* note 8, § 9.3.3 ("Arguments for Strict Liability: The Wrongdoer Runs the Risk," with criticism). As a result, some courts have modified the strictness. See D. RICHARDS, *supra* note 115, at 205; Fletcher, *supra* note 115, at 567 n.110 (California cases). Generally, "[s]trict [criminal] liability, when rational, is never totally unconditional or random." J. FEINBERG, *Collective Responsibility*, in *DOING AND DESERVING* 222, 225 (1970). Nevertheless, it "is generally viewed with great odium and admitted as an exception to the general rule, with the sense that an important principle has been sacrificed to secure a higher measure of conformity and conviction of offenders." H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *supra* note 8, at 20; see also D. RICHARDS, *supra* note 115, at 205-06.

On the other hand, one must not overemphasize the indefensibility of strict liability. Holmes, in pushing towards legal liability based upon formal, external, and objective standards, was largely unconcerned with the personal element.

A legal system approaches maturity to the extent that it succeeds in eliminating any reference to what the defendant actually thought, intended, or willed. In a mature system the defendant's conduct will be judged in the light of the general standards accepted in the relevant community; individual guilt or moral blameworthiness become alike irrelevant. The good man and the bad man stand equal at the bar of justice.

G. GILMORE, *THE AGES OF AMERICAN LAW* 54 (1977) (describing Holmes' view). For more along this line, see *supra* note 7. Coleman analyzes tort liability from a perspective that reduces the moral repugnance of strict liability. He points out the similarity between the two systems: the fault system is a form of strict victim liability with the defense of injurer fault. Once this similarity is recognized, the preferred form of liability should depend upon the type of case. See Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259

To summarize, the requisites of responsibility are autonomous choice and the willpower to exercise it. In the marketplace, willpower is seldom problematical. Whether the marketplace infringes on autonomy, however, may be a serious question. It is to this question that I now turn. The elements of autonomous choice, knowledge (information and foresight) and capability (reason and sense), are examined along with the means by which they are distorted.

### III. LIMITATIONS TO COMPLETE AUTONOMY

#### A. Knowledge

Knowledge is the first requisite of a responsible act.<sup>147</sup> One must know, first, the state of affairs in which a choice is embedded (information) and, second, the probable consequences of the potential choices (foresight).<sup>148</sup> Information and foresight involve risk and

---

(1976); see also Coleman, *supra* note 119, at 377 (distinguishing "two senses in which liability in torts might be said to be strict").

147. "For the unlearned man, who uses the best means in his power to know his duty, and acts according to his knowledge, is inculpable in the sight of God and man. He may err, but he is not guilty of immorality." Reid, *supra* note 46, at 70. This is not quite true. For example, the criminal law defense of impossibility is more complicated than Reid's eighteenth century rule. See, e.g., H. GROSS, *supra* note 8, at 196-232. Generally, ignorance of the law is not an excuse. See *id.* at 268-75. But then one otherwise competent individual who is ignorant has, by fiat of law, not, "use[d] the best means in his power to know his duty." Reid, *supra*, at 70. Thus, Hart reports: "I have not succeeded in finding cases where a normal person, merely lacking some ordinary element of knowledge or intention on a particular occasion, is said for that reason not to be responsible for that particular action, even though he is for that reason not liable to punishment." H.L.A. HART, *supra* note 16, at 219. From a moral point of view, "mistaken beliefs are relevant to what the actor is trying to do if they affect his incentive in acting. They affect his incentive if knowing of the mistake would give him a good reason for changing his course of conduct." G. FLETCHER, *supra* note 8, at 161. For a discussion of the principle of unavoidable ignorance as an excuse to tort liability, see Fletcher, *supra* note 115, at 551-56. The extent of the actor's knowledge or awareness required for responsibility is debatable. See, e.g., Baker, *supra* note 3, at 68-75. Finally, for a theory of contracts espousing fairness, which turns on "knowledge and foresight," see Levin & McDowell, *supra* note 86.

148. "[A]cting intentionally consists merely in 'having' certain cognitive states, such as the foresight of consequences and the knowledge of what one is doing." G. FLETCHER, *supra* note 8, at 440. "A person does something *intentionally* under a certain description only where he correctly believes that what he is doing can be so described, and believes it not as a lucky shot but in some understanding way." F. SCHICK, *supra* note 11, at 15; see also J. FEINBERG, *supra* note 4, ch. 25 (situations in which the voluntariness of consent is questionable owing to defective beliefs as to what is being agreed to, background facts, and future occurrences); Davidson, *Agency*, in *AGENT, ACTION, AND REASON* 3, 7-8 (R. Binkley, R. Brunaugh & A. Marras eds. 1971) (discussing the principle that "a man is the agent of an act if what he does can be described under an aspect that makes it intentional"). This general idea may be reversed: "[W]hosoever voluntarily doth any action, accepteth all the known consequences of it." T. HOBBS, *LEVIATHAN* 226 (W. Smith ed. 1909) (1st ed. 1651); see also F. HAYEK, *supra* note 11, at 71 ("Liberty not only means that the individual has both the opportunity and the burden of choice; it also means that he must bear the consequences of his actions and will receive praise or blame for them. Liberty and responsibility are inseparable.").

## uncertainty:

A decision maker faces risk "if each action leads to one of a set of specific outcomes, each outcome occurring with a known probability"; he faces uncertainty if any action among the alternatives contemplated "has as its consequence a set of possible specific outcomes, but where the probabilities of these outcomes are completely unknown or are not even meaningful."<sup>149</sup>

## 1. INFORMATION

A responsible choice requires information. Although neoclassical economic theory assumes that parties operate with perfect information,<sup>150</sup> this ideal is far from realistic.<sup>151</sup> Responsibility requires

149. D. BRAYBROOKE & C. LINDBLOM, A STRATEGY OF DECISION 249 n.8 (1963) (quoting R. LUCE & H. RAIFFA, *supra* note 11, at 13); see also F. SCHICK, *supra* note 11, at 40, 43; Harsanyi, *Advances in Understanding Rational Behavior*, in RATIONAL CHOICE 82, 87 (J. Elster ed. 1986); Zeckhauser, *Comments: Behavioral Versus Rational Economics: What You See Is What You Conquer*, in RATIONAL CHOICE 251, 257 (R. Hogarth & M. Reder eds. 1987) ("distinction between risk (where probabilities are known) and uncertainty (where they are unknown)"). But see A. DOWNS, *supra* note 11, at 77 ("Uncertainty is any lack of sure knowledge about the course of past, present, future, or hypothetical events."). For a classification of uncertainty, see Kahneman & Tversky, *Variants of Uncertainty*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 509 (D. Kahneman, P. Slovic & A. Tversky eds. 1982), and for an additional category, "ambiguity" or "uncertainty about uncertainties," see Einhorn & Hogarth, *Decision Making Under Ambiguity*, in RATIONAL CHOICE (R. Hogarth & M. Reder eds.), *supra*, at 41. The usefulness of the distinction between risk and uncertainty has been doubted. See O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 23 (1975).

150. The conditions of the ideal market have been expressed in various ways, but this view highlights several of the problems emphasized in this Article:

The conditions of perfect competition can be summarized, roughly, as (1) All individuals in the market behave as price takers (i.e., they choose consumption and production bundles subject to fixed positive prices). (2) All producers sell commodities that are identical with respect to physical characteristics, location, and time of availability. (3) There is no cost involved in exchanging commodities, and there is free entry and exit from the market. (4) Producers and consumers possess perfect information concerning the price, physical characteristics, and availability of each commodity.

Kraus & Coleman, *Morality and the Theory of Rational Choice*, 97 ETHICS 715, 716 n.3 (1987). But see W. VICKREY, MICROSTATICS 17 (1964) (On the point of perfect information, "economic analysis is subject to a rather disquieting paradox" since the "assumption of too perfect knowledge can easily lead to the collapse of the entire structure.").

151. Some economists have been confronting the problem of imperfect information since the early 1960s. See Bishop, *Negligent Misrepresentation Through Economists' Eyes*, 96 LAW Q. REV. 360, 363-64 (1980). For an argument that many economists have not been attentive enough, see Goldberg, *Institutional Change and the Quasi-Invisible Hand*, in THE ECONOMICS OF CONTRACT LAW 72, 74 (A. Kronman & R. Posner eds. 1979). "The very notion of perfect information reduces economics to absurdity; but the apparently more reasonable idea of 'adequate market and technical information' is fully as pernicious. In the business world the correct term, with all its warlike connotations, should be not 'information' but 'intelligence.'" M. HOLLIS & E. NELL, RATIONAL ECONOMIC MAN 211 (1975). If information were perfect

adequate information.<sup>152</sup> Legal liability is limited for those who are understandably without adequate information because they are not in a posture to obtain or process it.

A person who is in a posture to obtain and process the requisite information is normally liable for her choice whether or not it is actually based upon ample information. In effect, she has a duty to herself to become informed. The acquisition and processing of the necessary data involve effort and generate transaction costs.<sup>153</sup> At some point, the transaction costs may reach the point where, under the circumstances, further expenditure is irrational.<sup>154</sup>

Information regarding goods can be divided into three types according to the means of acquisition. First, search goods reveal their main qualities through inspection before purchase. Second, experience goods require use after purchase for evaluation. Third, credence goods hinge upon the reliability of others.<sup>155</sup> The complexity of the

---

(and consumers were otherwise rational), one would expect price dispersion to be minimal. Instead, "[i]n many markets, price dispersion is substantial for identical or similar products." Beales, Craswell & Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 502 (1981) (footnote omitted). Stigler offers reasons for price dispersion, including "the fact that knowledge becomes obsolete," "the instability of supply and/or demand," "ignorance due to the changing identity of buyers and sellers," and "the size . . . of the market." Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 220 (1961). Stigler does not discuss dispersion due to imposed distortions. Perhaps economic theory should begin with the assumption of consumer ignorance, rather than perfect information. See *infra* note 175.

152. See, e.g., Elster, *supra* note 17, at 1 (in terms of rationality); see also *infra* note 179 (information and paternalism).

153. Transaction costs are "[t]he costs of making exchanges, including the costs of formulating bargains and contracts, and the costs, in terms of delays and losses of opportunities for mutually advantageous exchanges, of strategic behavior (bluffing, holding out for higher or lower prices, threatening to break off negotiations, and so forth)." A. BUCHANAN, *supra* note 143, at 126. But "[n]o term in the philosopher's lexicon is more imprecisely defined than is the economist's term 'transaction costs.' Almost anything counts as a transaction cost." Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 666 (1984). This exemplifies Coleman's point: "For the [rich person], a new car might be a symbol of wealth and status and a source of pleasure. To consult a host of facts and figures, to calculate marginal benefits, probable fuel costs, and resale values, and so on, might well diminish that pleasure." R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 277 (1980).

154. See *infra* note 197 and accompanying text.

155. "A search good is one whose salient characteristics can be ascertained by presale inspection (e.g., the comfort of a pair of shoes); experience goods are those which must be consumed to be evaluated (e.g., the taste of a candy bar)." Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 529 (1979).

Some goods or, more often, services have 'credence' qualities, defined as characteristics whose quality cannot be monitored by the nonexpert, even after consumption. For instance, if an automobile repair shop sells a consumer a part which he does not need, he will probably not detect any fraud if his car now runs better, even if it would have run equally well without the part.

information, which increases the opportunity for distortions, generally varies with the type. To illustrate this and to clarify the three types of information, the market in television sets is examined.

Imagine a consumer considering the purchase of a television set.<sup>156</sup> First, brands and models must be evaluated and compared. The consumer must tabulate not only search qualities which include the picture, sound, and other aesthetics, but also experience qualities of durability, serviceability, electrical drain, and so on. Once the model is determined, or as a part of this choice, the best (cheapest) merchant must be found. The merchant's pricetag, contract terms,<sup>157</sup> and the credence quality of support services are germane.<sup>158</sup> Finally, the cost of substitute goods such as films and other forms of entertainment must be incorporated.<sup>159</sup> At last, the consumer has the information required for an ideally rational choice.<sup>160</sup>

---

*Id.* at 530; see also R. POSNER, *THE ECONOMICS OF JUSTICE* 289-90 (1981) (stating that "[t]he buyer's need for legal protection rises as we move along the spectrum from search to credence goods"); Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 69 (1973) ("three types of qualities associated with a particular purchase: search qualities which are known before purchase, experience qualities which are known costlessly only after purchase, and credence qualities which are expensive to judge even after purchase").

156. For theories of consumer search strategies for product attributes, see Grether, Schwartz & Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 281-82 (1986) ("noncompensatory" and "conjunctive" choice strategies).

157. The contract itself may be thought of as a product. See *id.* at 281 n.7 (contract "regarded as another product attribute or as a product that has several attributes (i.e., different terms)"); Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 353 n.18 (1970) ("consumer adhesion 'contracts' as . . . products, just like the products sold pursuant to them"); see also *infra* note 160. To emphasize this point, in this age of form contracts where the terms are specified by the merchant or producer, the consumers are "contract term takers" subject to "private legislation." See Goldberg, *supra* note 151, at 72-73. Goldberg refers to the terms other than the basic price and quantity terms as "hidden." *Id.*

158. In promoting the implied warranty doctrine for consumer service transactions, one commentator notes the consumers' "necessary reliance on the skill and honesty of their service-providers." Norman, *Consumer Service Transactions, Implied Warranty and a Mandate for Realistic Reform*, 11 LOY. U. CHI. L.J. 405, 407 (1980).

159. The comparability of a television set and other forms of entertainment is not great. Most research into consumer choice strategies has examined comparable alternatives only. For an exception, see Johnson, *Consumer Choice Strategies for Comparing Noncomparable Alternatives*, 11 J. CONSUMER RES. 741 (1984).

160. Spence advocates that a product "should be thought of as a bundle of characteristics: a price, a distribution over the space of possible product failures, and an insurance policy. Guarantees are a form of insurance against product failure. To be misinformed about the probabilities of product failure, is to be misinformed about the product." Spence, *supra* note 143, at 561 (footnote omitted). Schwartz and Wilde analyze imperfect information problems this way:

Imperfect information exists when consumers are uninformed about risk, are unaware of the array of choices that firms offer, or do not know what the contract says. Firms are likely to respond to the second form—ignorance of

The merchant must also select the brands and models to handle, as well as the prices to charge. This requires the gathering of information similar to that which consumers must gather. The goods must be satisfactory to the merchant and, perhaps more importantly, to customers. Backup service from both the distributor and the manufacturer to both the consumer and the merchant counts. As a customer chooses among merchants, so may a merchant choose among customers. For transactions on credit, this need is obvious; yet, even for cash deals, the merchant risks later complaints and service demands, some of which spring from the user or the use, rather than from the quality of the goods alone.<sup>161</sup> The merchant, then, also confronts the problems of costing search, experience, and credence qualities.

This example illustrates the obstacles to a fully rational choice that originate in the contingency of future costs and benefits.<sup>162</sup> There are elements of uncertainty and risk. Both are typically measured on scales of probability.<sup>163</sup> Statistical studies, if available, may provide

---

market opportunities—by charging supracompetitive prices for those contract terms that consumers prefer, rather than by offering unwanted terms. The best remedy for this aspect of imperfect information is to reduce the costs to consumers of comparing the offers of different firms: comparison shopping drives prices down and reduces further the likelihood that firms will frustrate consumer preferences respecting terms. In addition, comparison shopping partly resolves the problems that may arise from failure to read contracts.

Schwartz & Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1461-62 (1983). In conclusion, "if consumers actually care about important contract terms, legislatures should facilitate comparison shopping for them and courts should ban only those trivial terms that seem unfair." *Id.* at 1462.

161. See *infra* note 191. In one respect, the merchant chooses among substitute goods. Not the substitution of one model for another, but the background choice of one business or another. Perhaps it would be more rewarding to sell flowers than television sets. This decision, however, does not immediately confront the merchant at each sale of a television set as does a comparable substitute choice confront the consumer at each purchase.

162. Knight summarizes the consequences of vague information:

[A] large part of the goods and services which are subject to exchange cannot be effectively standardized, because their relevant qualities and characteristics are not a matter of common knowledge and direct observation, or of physical measurement, but are very largely a matter of judgment and there is wide diversity of opinion. In such cases, market dealings inevitably become affected by *efforts to persuade*, on the part of the seller or buyer or both. As it works out, also inevitably, it is ordinarily the seller who immediately sets the price, and marketing becomes a literally 'competitive' endeavour or struggle on the part of sellers to influence buyers.

F. KNIGHT, *Ethics and Economic Reform*, in FREEDOM AND REFORM 45, 65-66 (1947).

163. See *supra* note 149. The question of risk is taken up in the next section, "foresight." The decision maker's maximization of her expected utility under Bayesian decision theory involves objective probabilities known to the decision maker (risk) and subjective probabilities when objective ones are unknown (uncertainty). See Harsanyi, *supra* note 149, at 87-88; see

the probability data. If, for example, one will obtain lifelong benefit from particular goods, one's life expectancy can be estimated from actuarial tables.<sup>164</sup> But what is the probability that a contemplated television set will need servicing next year? If it needs servicing, what servicing? A new tube? A minor adjustment? Might it cause a serious injury?<sup>165</sup> Notice also that the set may be a new model or it may have been manufactured by a new company without a track record. Furthermore, the consumer may be a tyro with respect to high-tech goods, and she may not even realize what she does not know, that is, she may not even know what questions to ask.<sup>166</sup> Even if the neces-

---

also F. SCHICK, *supra* note 11, at 43-44 (uncertainty can be read in terms of indeterminacy). Disagreement remains, however, on how to deal with uncertainty. See R. LUCE & H. RAIFFA, *supra* note 11, at 275-306; Edwards & von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 228-29 (1986) (compares the Bayesian position with the frequentist view); see also Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 330 n.5 (1986) (two hypotheses in conceptions of ideal rationality under conditions of uncertainty). For a brief description of the best known rules advanced to deal with profound uncertainty, see R. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 177-79 (1982).

Anticipating some of the discussion here and elsewhere, Locke wrote:

But if assent be grounded on likelihood, . . . it will be demanded how men come to give their assents contrary to probability. . . . The reasons whereof, though they may be very various, yet, I suppose may all be reduced to these four: I. Want of proofs. II. Want of ability to use them. III. Want of will to see them. IV. Wrong measures of probability.

2 J. LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 442 (A. Fraser ed. 1894) (1st ed. 1690) (emphasis omitted).

164. These are far from perfect estimates. Even though the tables may rightfully claim the certainty of large numbers, they necessarily include a type of sampling error. For example, do the life expectancy tables combine smokers and nonsmokers? City dwellers, suburbanites, and country folks? Fast livers and stick-in-the-muds? Persons with long-lived ancestors and those with short-lived ones? Those who live on truck-busy 23d Street and those on quiet 22d Street? Insurance companies will combine these groups for convenience and, in the extreme, out of necessity, thereby creating allocative and distributive consequences. See G. CALABRESI, *supra* note 127, at 60-64; see also Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1298-300 (1980) (Only a small fraction of insurance premiums are calculated on the "basis of risks associated with the particular insured."). To the extent a decision maker must rely upon gross estimates, there is a shortfall from ideal rationality.

165. Who would worry about a serious injury from color television sets? The National Commission on Product Safety found them among the products that create "unreasonable hazards to the American consumer." NATIONAL COMM'N ON PROD. SAFETY, *FINAL REPORT* 1 (1970).

166. Ackerman said:

[A]n unregulated 'free market' in information suffers from any number of well-known defects: most obviously, an ignorant person may, precisely *because* he is ignorant, pass up the chance to buy a bit of information that would redound greatly to his advantage. This means that *laissez faire* will systematically give some people special transactional advantages to exploit ignorance in ways they could hardly justify in a Neutral conversation.

sary information is or might be available somewhere, how is the consumer to know whether the costs of seeking and processing it are worthwhile?<sup>167</sup>

To demonstrate the nature of these difficulties, let us return to the purchase of the television set. Where is the relevant information? For inspection qualities, we are on our own. For experience qualities, we may turn to a consumer magazine such as *Consumer Reports*. Examining the *1989 Buying Guide Issue*,<sup>168</sup> we find that the only color televisions that were evaluated, from the June 1988 issue, are twenty-four models with 13- or 14-inch screens.<sup>169</sup> Overall scores are given which range from eighty-five to seventy, but "[d]ifferences of 5 points or less in score were judged not very significant."<sup>170</sup> In sum, "[s]o consistently high is the general standard in TV sets today that any of the top 12 sets in the Ratings would probably be a good choice over-

---

B. ACKERMAN, *supra* note 80, at 188 (footnote omitted).

167. "If the cost of search is equated to its expected marginal return, the optimum amount of search will be found." Stigler, *supra* note 151, at 216 (footnote omitted); *see also* Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 IND. L.J. 8, 9 (1973) (suggesting that buyers must make rational choices related to bearing or shifting risks). "This is an infinitely complex and subtle problem; uncertainty itself is subject to uncertainty; we do not know how much we know, or how accurately; there is no visible boundary between knowledge, opinion, and ignorance." F. KNIGHT, *supra* note 162, at 66.

[W]e might want to impose an optimality condition on how much evidence to collect before forming the belief. Every decision to act can be seen as accompanied by a *shadow decision*—the decision about when to stop collecting information. The rationality of the former decision depends on that of the latter, on which it is founded. It is not possible, however, to give general optimality criteria for the gathering of information. One frequently made proposal—to collect information up to the point where expected marginal value of more evidence equals marginal cost of collecting it—fails because it does not respect the subjective character of rational choice . . . .

Elster, *supra* note 17, at 14. For the approach to this problem under Simon's satisficing model, *see* 2 H. SIMON, *Rationality as Process and as Product of Thought*, in *MODELS OF BOUNDED RATIONALITY* 444, 453-54 (1982) ("search terminates when the best offer exceeds an aspiration level that itself adjusts gradually to the value of the offers received so far"). This rule of thumb provides little help to the consumer: "[I]n the risky case, [the rational problem solver] chooses that alternative for which expected utility is greatest; and in the case of uncertainty he chooses according to some such rule as 'minimax risk' or 'minimax regret.'" D. BRAYBROOKE & C. LINDBLOM, *supra* note 149, at 40 (footnote omitted).

168. 53 CONSUMER REP. (Dec. 1988).

169. The index tells us that over the last five years, articles on choosing television sets appeared in the issues for January 1985 and March 1987. Reports on 19- and 21-inch color models appeared in the issues for January 1984, March 1987, May 1987, June 1987, and August 1987. *See id.* at 395. So until we can get to the library (which will run up our information costs), we will make do with what is reported in the Buying Guide. Computer printouts of the features of new models, but not evaluations, are available for eight dollars from the publisher. *See id.* at 7, 397.

170. *Id.* at 271.

all.”<sup>171</sup> Well, at least we don't have to worry very much about a lemon, but we are trying to make a refined calculation that requires more than a pass-fail test. Let's try another well respected source of consumer information, the *Consumer Guide*. Its 1989 *Best Buys & Discount Prices* evaluates three 30-, 31-, or 32-inch color sets (one “best buy” [Brand A] and two “recommended” [B & C]), five 26- or 27-inch sets (two “best buy” [D & E] and three “recommended” [F, G, & C]), five 20-inch sets (one “best buy” [A] and four “recommended” [H, F, I, & C]), and six portable sets (one “best buy” [H] and five “recommended” [C, H, F, J, & C]).<sup>172</sup> Finally, for credence qualities, one is almost at a loss as to where to begin. Reputation and goodwill will help as long as there is no need to monetize the value beyond ballpark figures.<sup>173</sup> The Better Business Bureau may help, if one is diligent.<sup>174</sup>

---

171. *Id.* at 272.

172. CONSUMER GUIDE 1989 BEST BUYS & DISCOUNT PRICES 62-76 (1988).

173. *Consumer Reports* states this about repair records of various brands (continuing the brand coding used in the text): “Among all the small TV sets for which we have meaningful frequency-of-repair data, [B] has the best brand repair record; [J] and [A] have the second-best records; and the next-best repair records after those are shared by [K], [L], [C], [I], and [M].” 53 *Consumer Rep.* 273 (Dec. 1988). *Consumer Guide* bases its evaluations on service as well as price, features, and quality. See CONSUMER GUIDE 1989 BEST BUYS & DISCOUNT PRICES 67 (1988). Because of this multi-dimensional evaluation, “the Best Buy and Recommended designations apply only to the model listed and not necessarily to other models from the same manufacturer.” *Id.*

Milton Friedman believes that the private market generally can provide adequate certification, as by the Good Housekeeping seal, Consumer's Union testing, the Better Business Bureau reports and the consumer confidence earned by retailers. See M. FRIEDMAN, CAPITALISM AND FREEDOM 146 (1962). For product information, Oi would have the consumer rely upon “institutions like *Consumer Report* [sic] and various trade journals” and, in addition, “various informal channels.” Oi, *The Economics of Product Safety*, 4 BELL J. ECON. & MGMT. SCI. 3, 26 n.45 (1973). I am questioning the degree of usefulness of these sources of information. One problem with reliance upon expertise of any kind is in evaluating its quality. See Beales, Craswell & Salop, *supra* note 151, at 504-05. Friedman acknowledges that the public goods aspect of certification information is a problem. See M. FRIEDMAN, *supra*, at 146-47; see also Oi, *supra*, at 26. “One way to get around this problem, as we get around other kinds of neighborhood effects [i.e., externalities], is to have governmental certification.” M. FRIEDMAN, *supra*, at 147. Oi notes that established merchants often provide implied warranties. Oi, *supra*, at 26 n.45. Whether warranties alone supply the consumer with the missing information may be doubted. See *infra* note 189.

174. The Better Business Bureau in Manhattan reports by recorded message that, upon written request, it will mail a listing of complaints against particular stores. The New York City Consumer Affairs Department will also mail complaint lists for particular stores without, however, specifying the nature of the complaint or the outcome.

The consumer survey detailed in *infra* note 176, reports that of the problems perceived by consumers with purchases of television sets, only 0.9% of the consumer responses were complaints to third parties. Of the overall complaints, about one-quarter of them were registered with the Better Business Bureau. See Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 714 (1977). The authors conclude: “[S]ellers have a near

I do not wish to demean the information from these consumer organizations. Quite to the contrary, I believe the information is exceedingly valuable. My point only goes to the difficulty in quantifying the cost-benefit analysis of goods and services from the generally qualitative information that is available. That is the nature of the beast.<sup>175</sup> To state the conclusion modestly, at the end of the consumer's tortuous road of sophisticated decision making, the valuation of goods is inescapably inexact.<sup>176</sup> A dearth of useful information

---

perfect monopoly on complaint handling. They can feel free to impose their own standards for complaint resolution confident that consumers will not make use of the third-party mechanisms to review their actions." *Id.*

175. *Consumer Guide* maps the trail at the beginning of its discussion of television sets:

At first glance, buying a TV set may seem to be a complicated process. However, a little foresight and planning make it quite straightforward. You must begin by analyzing what you need and want from a television. Consider your viewing habits and your financial resources, and then be prepared to comparison shop. Base your decisions on the products' features and prices, and make trade-offs with respect to the sizes of the screens and cabinets, as well as the features with which you will be most comfortable.

CONSUMER GUIDE 1989 BEST BUYS & DISCOUNT PRICES 62 (1988). That's the trail, now where are the mileage markers?

In sum, "[c]onsumer ignorance of nongeneric hazards should not be disparaged as a mere practical 'imperfection' detracting from a pure market model. Given the innateness of not knowing and the inevitable costs of acquiring information, sound market theory should ground itself in an initial assumption of consumer ignorance. . . . Even *Consumer Reports* was unable, in 1973, to discover the Pinto's gas-tank danger." G. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 149 n.78 (1982) (references omitted). A. Schwartz and Wilde believe these sources of information to be more useful than do I. Although we agree that the problem of imperfect information is greater for expensive, infrequently purchased goods, they argue that "[i]mpressionistic evidence suggests . . . that there is much data" about these goods. Schwartz & Wilde, *supra* note 160, at 1434. My impression is that the available information is neither as extensive nor useful as they imply.

176. In a 1975 survey of consumer reactions to common purchases, it was found, with respect to television sets, that consumers perceive weak, price-only problems with 1.6% of the television sets and weak nonprice problems with 11.1%, and they perceive strong price problems with 0.2% of the sets and strong nonprice problems with 9.7%. See Best & Andreasen, *supra* note 174, at 705. With respect to general appliance service complaints, the numbers in the two "weak" categories were 5.2% and 9.6%, and in the two "strong" categories, 2.3% and 19.9%. *Id.* Overall, weak problems averaged 15.8% and strong problems, 11.6%. *Id.* Despite the overall complaint rate of 27.4%, the authors speculate that many consumer problems are not perceived. See *id.* at 703. On the perceived complaints regarding television sets, the consumer reactions broke down this way: no action, 42.9%; exit (transfer patronage) only, 3.6%; voice (complaint) to seller only, 48.2%; voice to third party only, 0.9%; other voice, 4.5%; and other, 0.0%. *Id.* at 711. The consumer reactions to perceived general appliance repair complaints produced comparable percentages. *Id.* The results of voiced nonprice complaints regarding television purchases were: satisfactory, 61.1%; unsatisfactory, 13.0%; mixed, 22.0%; and other, 3.7%. The results for general appliance repair nonprice complaints were lower: satisfactory, 35.5%; unsatisfactory, 43.9%; mixed, 15.9%; and other, 4.7%. *Id.* at 726. The validity of the perceived problems, however, is a question not faced in the survey. Apparently, "most sellers will respond favorably to complaints when it seems to them fair or expedient to do so. Sellers probably reject those voiced complaints in which there is a real disagreement over facts or their legal implications."

about consumer goods is available. One reason for this is the problem of freeriders. Information is a public good.<sup>177</sup> Unlike private goods such as food, this good is not consumed when used, and one may therefore acquire it at a minimal cost by borrowing it from others.<sup>178</sup> Because freeriding allows people to pay less for the information than it is worth to them, the market will generate a suboptimal amount.<sup>179</sup> Depending on the goods, interested parties, such as merchants and

---

*Id.* at 732. Nevertheless, the authors conclude: "In sum, our data show that a large number of consumer problems exist, that many of those problems are never presented as complaints to businesses or third parties, and that many of the complaints that are voiced are not resolved to the satisfaction of the complainants." *Id.* at 734.

To zero in on one of the risks—*injury causing death*—Schelling questions whether the market provides evidence of what people will pay to avoid fatal injuries:

At the outset, we can conjecture that any estimate based on market evidence will at best let us know to within a factor of 2 or 3 (perhaps only 5 or 10) what the reflective individual would decide after thoughtful, intensive inquiry and good professional advice. This conjecture is based on the observation that most of the market decisions people make relate to contingencies for which the probabilities themselves are ill-known to the consumer, sometimes barely available to the person who seeks statistics, invariably applicable in only rough degree, and mixed with joint products that make the evidence ambiguous.

T. SCHELLING, *The Life You Save May Be Your Own*, in CHOICE AND CONSEQUENCE 113, 133 (1984).

177. Public goods are goods that "can be enjoyed by one person without reducing the enjoyment they give to others." E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 382 (shorter 3d ed. 1979). For a more complete definition, see A. BUCHANAN, *supra* note 143, at 125.

178. Because dissemination of information may be very costly, it does not have the full properties of a public good. See Coleman, *An Introduction to Privacy in Economics and Politics: A Comment*, 9 J. LEGAL STUD. 645, 645 (1980).

179. See, e.g., Beales, Craswell & Salop, *supra* note 151, at 503-05 (public good, natural monopoly and freerider externality problems); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 211 (1973) ("because property rights in information are relatively undeveloped, the supplier of information is frequently unable to recover his investment in obtaining and communicating it"); Schwartz, *supra* note 167, at 9, 14-15 (ramifications of "free" information); Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 372-73 (1976) (stating that "in markets characterized by monopolization . . . a firm may produce less information about its terms than is socially optimal"). Primarily because of the public good aspect of information, one economist urges that, though "[c]ourts should in general apply ordinary rules of negligence" to cases of negligent misrepresentation, the liability should be restricted "where the misrepresentation in question results from the production of valuable information." Bishop, *supra* note 151, at 378. But government intervention may reduce this problem without the need to restrict liability. Though often attacked as paternalistic, regulations requiring merchants to produce information are not.

In these cases all that is provided—it is true, by the use of compulsion—is information which it is presumed that rational persons are interested in having in order to make wise decisions. There is no interference with the liberty of the consumers unless one wants to stretch a point beyond good sense and say that their liberty to apply for a loan without knowing the true rate of interest is diminished.

G. Dworkin, *Paternalism*, in PATERNALISM 19, 21 (R. Sartorius ed. 1983); see also Regan,

producers, may have reason not to offset the freerider impediments. The information may simply provide free publicity to competitors, as in price advertising.<sup>180</sup> Moreover, producers may be reluctant to advertise safety data for fear of alarming potential consumers.<sup>181</sup> All

---

*Paternalism, Freedom, Identity, and Commitment*, in *RATIONAL CHOICE* 113, 114-16 (J. Elster ed. 1986) (information and paternalism).

180. See Beales, Craswell & Salop, *supra* note 151, at 503-06.

[F]irms that charge relatively low prices have an incentive to publish advertisements comparing their prices to those of their competitors, and such advertisements are sometimes seen. A disincentive to advertise in this fashion is that it can provide free and useful publicity to firms whose prices are close to those of the advertising firm, for consumers could decide that there is insufficient price dispersion to warrant searching out the firm that charges the very lowest price. Firms that engage in comparative price advertising also have incentives to misrepresent the comparisons, as, for example, by suppressing quality differences.

Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 674 n.97 (1979).

181. "For instance, announcements of product recalls in the drug and automotive industries result in stock price losses for all firms in the industry, and not just for the firm that is the subject of the recall." Romano, *A Comment on Information Overload, Cognitive Illusions, and Their Implications for Public Policy*, 59 S. CAL. L. REV. 313, 321 (1986) (footnote omitted).

[T]he firm that advertises that its product is safer than a competitor's may plant fears in the minds of potential consumers where none existed before. . . . In these circumstances a seller may be reluctant to advertise a safety improvement, because the advertisement will contain an implicit representation that the product is hazardous (otherwise, the improvement would be without value).

Posner, *supra* note 179, at 211. "Experts say companies tend to downplay safety improvements, partly because such improvements may imply that earlier models were defective and partly because the makers don't want to be stuck with inventories of older designs." Hinds, *Making a Safer Blow-Dryer: Progress, but at a Snail's Pace*, N.Y. Times, Aug. 27, 1988, at 50, col. 1. Only the producers of close substitutes may have sufficient incentive. See Posner, *supra* note 179, at 211. But then a freerider problem arises with other producers of close substitutes who will also benefit from the publicity. See Beales, Craswell & Salop, *supra* note 151, at 506. There may be a silver lining to this: "[I]f anxiety is a significant factor in consumer welfare, we might prefer that consumers underestimate hazards." Spence, *supra* note 143, at 563. But another dark cloud appears: "If advertising and marketing a safety improvement are thus discouraged, the incentive to adopt such improvements is reduced." Posner, *supra* note 179, at 211. This may be one reason why, according to the National Commission on Product Safety, the public is exposed to many unreasonably hazardous products. See *infra* note 183. Posner declares that strict liability will solve this problem: "But make the producer liable for the consequences of a hazardous product, and no question of advertising safety improvements to consumers will arise. He will adopt cost-justified precautions not to divert sales from competitors but to minimize liability to injured consumers." Posner, *supra* note 179, at 211. Posner doesn't favor strict liability, but whether strict liability would improve efficiency "is at bottom empirical and the empirical work has not been done." *Id.* at 212. Kennedy advances an efficiency argument regarding the alarms raised by safety advertising:

This would make out the type of market failure associated with 'freeloading': all sellers, and also all buyers, would be better off if they all together added the precaution, but no seller will do so for fear that none of the others will, so that if one goes ahead he will lose sales to the others.

Kennedy, *supra* note 51, at 598. For the argument that "on a pure risk utility analysis basis . . . the cost of almost any serious injury will justify the minor expense of supplying warnings,"

in all, the underproduction of information increases the uncertainty facing the consumer.<sup>182</sup>

One method for the consumer to reduce the unknowns arising from uncertainty and risk is to shift the costs of these unknowns to the merchant.<sup>183</sup> A warranty, for example, may partially do this.<sup>184</sup>

---

see Schwartz & Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 39 (1983) (footnote omitted).

182. For these and other reasons for the underproduction of information, including the "irrationalities" of the consumer, see Beales, Craswell & Salop, *supra* note 151, at 506. "While these problems can be formally (and tautologically) analyzed as a change in consumers' preferences for information, it seems more sensible to treat them as factors which lead the market to generate less information than informed consumers would 'really' prefer." *Id.*

Information problems may also prevent the underlying product markets from working properly in various ways. First, if consumers are imperfectly informed, even small sellers can achieve a degree of informational market power over price, leading to monopolistic rather than perfect competition. . . . If information is poor, price dispersion for identical products also occurs, even in unconcentrated markets. Similarly, poor information about the quality of competing brands may lead to spurious product differentiation and reputation premiums, raising prices for some or all functionally equivalent brands.

*Id.* at 509-10 (footnotes and emphasis omitted).

183. "One solution to the information problem is to impose risks of nonconformity on sellers, who presumably possess more information about what they sell than do buyers." Schwartz, *supra* note 167, at 9-10; see also Rea, *Nonpecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35, 41 (1982) (Owing to the consumer's inadequate information, "[t]he incentive for sellers to offer reliability must be provided by ex post damages."). See generally Schwartz, *supra* note 167, at 11-18. Schwartz prefers to provide more information to buyers. *Id.* at 10. This, however, raises the problems of "reason" and "sense" discussed later, which are beyond Schwartz's essay. If the unknowns are too great, or of a certain nature, the consumer may not realize the advantages of shifting the costs to the merchant. For example, the National Commission on Product Safety, reporting that the public is being exposed to many unreasonably hazardous products, declared that:

[P]reventable risk is not reasonable (a) when consumers do not know that it exists; or (b) when, though aware of it, consumers are unable to estimate its frequency and severity; or (c) when consumers do not know how to cope with it, and hence are likely to incur harm unnecessarily; or (d) when risk is unnecessary in . . . that it could be reduced or eliminated at a cost in money or in the performance of the product that consumers would willingly incur if they knew the facts and were given the choice.

NATIONAL COMM'N ON PROD. SAFETY, FINAL REPORT 11 (1970) *quoted and criticized in* Oi, *supra* note 173, at 4 n.2. In a weak sense, circumstance (d) constitutes the "imposition" of the risk by the merchant or manufacturer on the consumer. See *infra* note 368 and accompanying text.

184. "In situations in which a seller's information cannot be conveyed to a buyer, the seller's warranty can, in effect, transmit that information to the buyer. There is a sense in which the degree of warranty can be a sufficient statistic for the seller's information." Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461, 471 (1981). Grossman further states that even a monopolist has the incentive to offer a broad warranty because "consumers with rational expectations will assume that the monopolist is of the worst possible quality consistent with his disclosure when he makes less than a full disclosure. The monopolist, realizing this, decides to make a full disclosure." *Id.* at 462; see also Beales, Craswell & Salop, *supra* note 151, at 502

At the outset, it must be emphasized that shifting the costs to the merchant does not raise them, unless this shift causes new risks to arise.<sup>185</sup> The shift may even lower costs by decreasing the consumer's

---

(nonmonopolistic markets). Grossman, however, does not address the arguments in the text that follow immediately, nor does he examine the limits to rationality of the consumer other than information shortfalls. The issue partially involves signal theory which is criticized in the text accompanying *infra* note 207. Furthermore, under another analysis, if firms have market power, "they may have an incentive to exploit or even create uncertainty or imperfect information" and "may contrive either price or quality dispersion in order to price discriminate against consumers with less information or reduced ability to discover the better value." Beales, Craswell & Salop, *supra* note 151, at 507-08 (footnote omitted). *But see* Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1299-302, 1320-25 (1981) (criticizing as vague and nonpredictive the "exploitation theory" which views warranties as designed by producers to limit liability). "As a general matter, imperfectly competitive sellers may provide either too much or too little product information, according to the particular type of information, the market structure of the industry, and the distribution of consumer preferences." Beales, Craswell & Salop, *supra* note 151, at 508 (footnote omitted). "Finally, in an imperfectly competitive product market, sellers' incentives to supply brand information may result in an imperfect provision of product variety." *Id.* at 509. For Priest's "investment theory" of the warranty, which he argues has superior predictive ability than the signal or exploitation theories, see Priest, *supra*, at 1307-13, 1328-46, 1351-52.

185. One new risk arises from "moral hazard." When, via the warranty, the consumer is "insured" against losses, he will "behave in a way which increases the probability and magnitude of the adverse event against which he is insuring himself." Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's ECONOMIC ANALYSIS OF LAW*, 87 HARV. L. REV. 1655, 1671-72 (1974). The "insurance policy" must go up in price to reflect this risk. See Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 7 (1969). In light of moral hazard, Spence leaves us with this tantalizing thought: "An earlier version of this paper . . . argued that when consumers affect the probabilities of accidents, there is an optimal amount of consumer misperception, namely that required to compensate for the weakened incentives for precaution as a result of the insurance or risk-spreading." Spence, *supra* note 143, at 572 n.5; see also Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 491 (1980) ("Beyond a certain point, a rule requiring disclosure may have significant and undesirable incentive effects . . ."). Not to be forgotten is that without the warranty the merchant is "insured" against losses after the sale and hence is also subject to moral hazard. The merchant (and producer) will be less careful in constructing and servicing the goods. Which of the two moral hazards is greater is an empirical question, though the threatened loss of goodwill operates against the merchant but only minimally against the consumer. See *infra* note 348. On the other hand, O'Connell suggests that the moral hazard of the merchant and producer may be greater since the consumer is worried about the personal effects of an injury whereas the other party is only concerned about disembodied, aggregate financial losses. See O'Connell, *Elective No-Fault Liability Insurance for All Kinds of Accidents: A Proposal*, 1973 INS. L.J. 495, 512. O'Connell, however, does not take into account the consumer's "Faust attitude" and other distortions of rationality discussed in the text accompanying *infra* note 283. For an interesting analysis which concludes that "[m]oral hazard seems unlikely to exist in warranty markets," see Schwartz & Wilde, *supra* note 160, at 1446-50. Along with moral hazard, a second source of inefficiency when there is a warranty comes from "adverse selection," that is, "the existence of a warranty [tends] to attract careless buyers." Beales, Craswell & Salop, *supra* note 151, at 512; see *infra* note 221. Regarding heterogeneous preferences for warranty coverage, see Schwartz & Wilde, *supra* note 160, at 1448-50, and for the methods of the producer to cope with variable risks of loss among consumers, see Priest, *supra* note 184, at 1314-19.

information costs<sup>186</sup> or by inducing producers and merchants to raise the quality of the products or services.<sup>187</sup> The pricetag of the goods will go up to reflect the merchant's increased costs resulting from the shift, but absent the creation of new risks, the consumer's true costs remain unchanged because, previously, the costs from the unknowns were directly on the consumer.<sup>188</sup> Although this shift may reduce the magnitude of the consumer's unknowns, it does not eliminate them because the consumer must still determine whether the goods plus warranty are accurately priced.<sup>189</sup> Similarly, first-party insurance

---

186. Contracting for the merchant to disclose information may be the thing to do: "If the parties to a contract are acting rationally, they will minimize the joint costs of a potential mistake by assigning the risk of its occurrence to the party who is the better (cheaper) information-gatherer." Kronman, *supra* note 131, at 4. On the other hand:

[W]arranties are costly to enforce. Even if there is no need to litigate the dispute, the product often must be returned to the seller for the private remedy of repair, replacement, or refund. As a result, buyers often will not find it in their interest to pursue small claims. If enforcement costs are sufficiently high, due either to seller recalcitrance or simply to the necessary costs of transacting, warranty protections will be virtually worthless.

Beales, Craswell & Salop, *supra* note 151, at 512. For evidence of this, see *supra* note 176.

187. See, e.g., Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 4-6 (1980). There may be distributive consequences as well. "By refusing to enforce the no-warranty clause, we force automobile manufacturers to give up their monopoly profits to consumers, and the result will be greater economic efficiency—manufacturers will be moved to manufacture more or safer cars at the lower price." C. FRIED, *CONTRACT AS PROMISE* 107 (1981) (footnote omitted). Furthermore, because of the merchant's expertise and economies of scale, and the consumer's reduced search costs, a repair under a warranty may be cheaper than where the consumer must find repair services elsewhere. See, e.g., Schwartz & Wilde, *supra* note 160, at 1399 ("repairs of new products by firms commonly are less costly than repairs by consumers"). But see Schwartz, *supra* note 115, at 1060 (questioning the economies of scale for labor intensive products and services without mentioning search costs); see *supra* note 186.

188. See Schwartz, *Optimality and the Cutoff of Defenses Against Financers of Consumer Sales*, 15 B.C. INDUS. & COM. L. REV. 499, 502-03 (1974); Shavell, *supra* note 187, at 4-6.

189. See Priest, *supra* note 184, at 1303 (warranties as signals of product reliability reduce only information costs to consumers); Schwartz, *supra* note 167, at 15. "The price a seller or financier charges for abandoning negotiability, in short, communicates to the buyer the price of insurance, but tells him nothing about the value of the risk being insured against. The buyer is therefore unable to know whether to insure or not." Schwartz, *supra* note 188, at 511. "This argument demonstrates that informing buyers of their 'legal rights,' i.e., that the note will be negotiated and the consequences of negotiation, is only a partial solution to this consumer problem. But of course informing consumers of those rights is useful." *Id.* at 511 n.20. Schwartz then considers the two ways of resolving the difficulty: "to provide consumers with the information necessary to value the relevant risk" and "to change the law, thus eliminating the risk." *Id.* at 512. He rejects the first option as impractical, since the information is unobtainable, and, even if obtainable, not worth the costs. See *id.*; see also Schwartz, *supra* note 167, at 15-16 (the information is probably not worth the costs); Sunstein, *supra* note 75, at 1166-67 (public provision of information may be "quite costly" and "ineffective"). But see *supra* note 160. On the other hand, Schwartz acknowledges the value of the first option, though here offset, that "it increases buyer choice." Schwartz, *supra* note 188, at 513. Informed choice through information disclosure is preferable under the "conventional wisdom" to the regulation of contract terms adopted as a second best measure because of the

may protect the consumer against some of the eventualities of uncertainty and risk, but again, along with the failure of this strategy to internalize the costs of the goods, her determination of the accuracy of the insurance price is problematic.<sup>190</sup> The consumer's ignorance, in the end, perpetuates a marketplace not very responsive to her interests.<sup>191</sup>

The inherent hindrances to the collection and use of data are exploitable by various ploys. The merchant may suppress, make ambiguous, or misstate facts revealing the disvalue of goods.<sup>192</sup> A similar result follows from a different tack. Inundated by a welter of

---

difficulties of policing disclosure. See Schwartz & Wilde, *supra* note 180, at 635. Providing information to allow free choice "is thus to be preferred unless bargains will continue to yield too many unshifted losses after information is provided. Since it is difficult to know in advance whether this will happen, information should be made available and the results checked." Schwartz, *supra* note 167, at 29-30 ("too many unshifted losses" remain); see also Beales, Craswell & Salop, *supra* note 151, at 513-14 (information remedy also more responsive to preference changes, less subject to regulatory mistakes, and consumer enforcement is often more efficient). Regulating terms does not solve all the information problems, nor are information remedies without complexities and subtleties. See *id.* at 514. As evidenced by stores that offer them at over twice the list price, even straightforward knowledge of the list price of consumer goods such as radios and calculators is not complete. See Eisenberg, *supra* note 115, at 778-79 (discussing "price ignorance" and its effect on the market). See generally Beales, Craswell & Salop, *supra* note 151, at 513-31. Furthermore, regulating safety does not solve all the information problems. See Spence, *supra* note 143, at 561 (suggesting that "direct regulation of safety or reliability does not solve the problem of suboptimal insurance").

190. The National Commission on Product Safety found that consumers are often unable to purchase insurance against the risks of products at rates near the actuarial odds. See Oi, *supra* note 173, at 23. Oi points out that insurance raises problems of moral hazard and relatively high transaction costs. See *id.* at 24. Pricing distortions also arise from the insurer's information difficulties in assessing the risk. See *supra* note 164.

191. Regarding contract terms, see *infra* note 207. Schwartz describes the merchant's response:

Theory indicates that markets in which buyers will not search exhibit either widely disparate prices or terms of great similarity. With risks of nonconformity, similarity of terms seems more probable. It is good business for sellers to bear some risks of nonconformity since that indicates confidence in the product and may increase sales. On the other hand, since the costs to buyers of defects varies widely with buyer circumstances, its value is difficult to predict. Sellers should then bear the [standard and easily calculated] risks . . . [but] should bear no other risks.

Schwartz, *supra* note 167, at 16. There is some evidence to support Schwartz's theory. See *id.* at 17. For anecdotal support of the point that it is to the seller's advantage to bear some risks, see the Renault advertisement of its "protection" plan in SCI. AM., May 1985, at 78-79 ("We wouldn't offer the industry's best small car protection unless we were sure our cars would live up to it."). Schwartz's point about the seller's difficulty in predicting buyers' costs ignores the certainty of large samples. Though the degree of risk owing to buyer circumstances will be difficult for the seller to predict case by case, a track record will ameliorate the overall uncertainty. See *infra* note 201 and accompanying text.

192. Determining whether an assertion is deceptive is difficult. See Beales, Craswell & Salop, *supra* note 151, at 495-501. Furthermore, competitors may be reluctant to counter false claims for fear of alarming consumers regarding the negative attribute, because of freerider

information in undigested form produced by the merchant, the consumer, particularly of relatively inexpensive goods, may be simply overwhelmed,<sup>193</sup> or distracted from the important facts.<sup>194</sup> Similarly, the consumer may affect information relevant to the merchant.

---

externalities benefitting other competitors, and to prevent consumers from becoming wary of advertisement claims. *See id.* at 505-06.

193. "Adequate information often provides an embarrassment of riches; if it can be had, it will sometimes burden the analyst with problems of ordering and calculation that go beyond his capacities." D. BRAYBROOKE & C. LINDBLOM, *supra* note 149, at 51. Whitford addresses this problem in the consumer context:

The concern of these critics [of continued reliance on disclosure as an important technique for regulating consumer transactions] has not been principally with the difficulty in obtaining seller compliance with disclosure regulation, but rather with the alleged lack of effect either on consumer behavior or on the substance of transactions. . . . Critics argue this scenario [of informed consumers causing competition among sellers, and hence "fairer" or "proconsumer" transactions] rarely if ever takes place because the disclosed information either is not learned by consumers, or if it is, it is not used by them in reaching purchase decisions.

Whitford, *supra* note 127, at 403-04. The author goes on to examine studies and explanations of the phenomenon, *see id.* at 405-30, and concludes that "disclosure regulation making available information previously difficult to obtain can be expected very often to have limited impact on buying behavior," *id.* at 430. One study revealing the limited success of disclosure requirements is reported in Brandt & Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J.L. REF. 297 (1974). For doubts about "information overload" and responsive intervention, see Grether, Schwartz & Wilde, *supra* note 156, at 277; Schwartz & Wilde, *supra* note 180, at 675-77. Nevertheless, perhaps with disclosure regulation "we would have a more just society if relations between consumer and merchant appeared more honest, even if there is no change in consumer behavior or the content of transactions." Whitford, *supra* note 127, at 404; *see also* B. ACKERMAN, *supra* note 80, at 188 (The consumer "may also be obliged to listen to a lot of stuff he would rather not waste his time on.").

Davis asserts five factors that affect whether information will be understood: information load, readability, conceptual difficulty, reading environment, and, motivation. *See* Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841, 846-47 (1977). The problem of "conceptual difficulty," verging into my category of "reason," indicates that clarity alone is not enough. "With respect to those who do not understand currently used contracts, simplification is no guarantee of increased comprehension. Moreover, because the consumer-creditor relationship is relatively complex, simplifying the contract without altering its legal effect is inherently difficult." *Id.* at 844 (footnote omitted). Because of difficulties such as these, Eisenberg begins his critique of the article by Grether, Schwartz & Wilde, *supra* note 156: "My thesis is that consumers who are faced with the dense text of form contracts characteristically respond by refusing to read, and that it is reasonable for them to do so." Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 305 (1986); *see also* White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 509 ("How many of us read the agreements that we sign?").

194. Goodin refers to "the effective manipulative ploy of 'information overload,' wherein people are given so much information all at once that they are then willing to accept any framework they are offered to make sense of it." R. GOODIN, *supra* note 163, at 203 (reference omitted). One aspect of information overload is this: "Overuse of warnings, or use of encyclopedic warnings, without regard to their effectiveness may, in fact, decrease the effectiveness of all warnings by causing product users to distrust or become inured to all warnings." Schwartz & Driver, *supra* note 181, at 43 (footnote omitted); *see id.* at 59-62; *see*

Although the merchant's ability to refrain from selling to careless or litigious customers is constrained, accurate individual pricing requires information about the purchaser.<sup>195</sup> Both sides can play the game.

Transaction costs often prevent the consumer from rationally investing much to reduce uncertainty and distortions. For many goods, particularly the less commonly purchased ones, the amortized information costs may not be economic.<sup>196</sup> Assuming risks saves money.<sup>197</sup> At some point, the economics tilt the balance in favor of a substantial investment in information, as in the purchase of a

---

also Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 881 n.112 (1988). Advertisements may also be misleading:

[T]he principal attacks against image advertising are directed against its tendency to distract consumers from other arguably more important issues concerning the product at hand and against those claims which exploit the susceptibilities of the audience to which they are directed. The problem in these cases is not whether the claim is true or false but whether it is disruptive.

Duggan, *Fairness in Advertising: In Pursuit of the Hidden Persuaders*, 11 MELB. U.L. REV. 50, 54 (1977). Difficulties faced by the regulators of image advertising, including the Federal Trade Commission, are discussed, *id.* at 64-87. Addressing the distractions of information overload, Simon notes that "[i]n a world where attention is a major scarce resource, information may be an expensive luxury, for it may turn our attention from what is important to what is unimportant. We cannot afford to attend to information simply because it is there." 2 H. SIMON, *supra* note 167, at 456.

195. A credit transaction, for example, allows questionable consumer tactics. Even warranty coverage may require complete information to avoid misallocations. Otherwise, insofar as consumers know their own costs with respect to the goods, their strategic behavior when opting for the warranty, and the merchant's counteractions, will lead to inefficiencies. For modeling of this proposition, see Schwartz, *supra* note 167, at 26-28. Thus:

[There is] a choice between evils. While allowing buyers to bear risks produces inefficiencies, so also does imposing risks on sellers. This choice can be avoided if the parties are allowed to bargain and buyers are provided with information; they can then take information as to the probability and nature of defects and value all of R's [the risk of nonconformity] components, including those personal to them, when deciding whether to bear or shift risks.

*Id.* at 28 (footnote omitted). The problem is that the information costs are often too high. As discussed in the next Section, even with adequate data, accurate processing is doubtful. The choice between evils cannot be avoided.

196. The economics of comparison shopping give rise to a "prisoners' dilemma." See T. SCITOVSKY, *supra* note 98, at 172-74. The consumer's rational choice to forego search costs "ignores the external benefits to others from his, and to him from other people's, careful shopping. For, in addition to his immediate benefit from careful shopping, it also contributes, in the long run, to keeping producers on their toes, merchants honest, and the market competitive." *Id.* at 172. Scitovsky surveys evidence supporting the postulate that American consumers are "careless shoppers," especially as compared to Europeans, *id.* at 176-81. "The remedy . . . is to rely not on individual rationality, but on enforced regulation or moral imperative as the motivating, or at least modifying, force governing behavior." *Id.* at 173-74.

197. See Kennedy, *supra* note 51, at 599-600. Based upon these circumstances, Kennedy offers three arguments why a compulsory contract term would increase efficiency, and one counterargument. See *id.* at 600-03. Ultimately, as usual, the bottom line is an empirical matter. See *id.* at 603.

house.<sup>198</sup> The repeated purchases, like food and clothes, are also valuable enough overall to warrant a significant investment in information, and yet they may not require it. Because these items are bought in small quantities over a lifetime, certain information, such as that regarding the durability of brandname clothes or the freshness and flavor of produce from a particular grocery, is relatively inexpensive. The consumer can learn from experience without committing herself to a large expenditure.<sup>199</sup> Once the consumer enters the occasional market for moderately expensive, largely noninspection goods, such as electronic equipment and home appliances, the transaction economics lead to greater uncertainty.<sup>200</sup>

The merchant, on the other hand, is not subject to the same degree of overall misappraisals. First, the economies of scale, by allowing the merchant to spread costs over many transactions, induce the merchant to invest more in the collection and utilization of information. Second, the merchant has the statistical certainty of large numbers to make refined calculations of certain costs. Compared to the consumer's transaction, the individual transaction of the merchant is of lesser importance because the merchant enters into many essentially fungible contracts.<sup>201</sup> In the absence of extraordi-

---

198. See G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 6-7 (1976); Stigler, *supra* note 151, at 219.

199. To state it in sexist terms:

[C]onsumers learn to act upon unbiased expert advice about some things (houses, motorcars) and themselves become experts in others. It is simply not true that housewives are easily fooled in the matter of foods, *familiar* household articles, wearing apparel. And, as every salesman knows to his cost, most of them have a way of insisting on the exact article they want.

J. SCHUMPETER, *supra* note 60, at 258; see Stigler, *supra* note 151, at 219. Despite the lower cost of the information, one survey found that the problems perceived by consumers for frequently purchased products was about the same, even slightly higher, than for infrequently purchased products. See Best & Andreasen, *supra* note 174, at 705. Schumpeter's reasoning would lead one to think that the problem rate would be lower.

200. See R. GOODIN, *supra* note 163, at 140 ("consumer durables"). The information gained from experience may be less useful today due to the rapid changes occurring in consumer products. See B. FISCHHOFF, S. LICHTENSTEIN, P. SLOVIC, S. DERBY & R. KEENEY, *supra* note 32, at 114. Some of these diseconomies may be reduced by the information obtained from brand names and goodwill. Once a manufacturer or merchant has proven their value with product and service A, it is reasonable to assume the value of product and service B will be of a comparable level. However, advertisers may take undue advantage of the expectations aroused by their brand names. See S. HAYAKAWA, *LANGUAGE IN THOUGHT AND ACTION* 254-58 (4th ed. 1978). The *Consumer Guide* cautions against overgeneralizing about the quality of a brand name. See *supra* note 173. Similarly for service, an establishment may be expert at repairing television sets, but have little experience with stereos.

201. "[S]ome individuals who buy particular products will not know how risky they are, while the manufacturer, because he can view the risk as a statistic, can evaluate it clearly." G. CALABRESI, *supra* note 127, at 56 (footnote omitted). Further, the transaction may be of lesser

nary economic conditions, for example, the delinquency rate for credit transactions, can be narrowly averaged. The merchant need not fully investigate each customer's creditworthiness. For some customers the merchant undercharges for the credit line while for others it overcharges, but for a series of transactions, the logs roll and the net uncertainty is low.<sup>202</sup> A similar analysis applies to the goods handled by the merchant.<sup>203</sup> The merchant knows quite well the true costs of the goods as a result of continuing experience.<sup>204</sup> The common wisdom that a merchant new to the business is in greater danger of miscalculating its profit margin than an experienced merchant suggests, in part, that it is this lack of data that creates the handicap to the newcomer. Yet, even the new merchant is in a better position than the consumer with respect to many types of goods because it pays the merchant to learn "the going rate" more than it pays the occasional consumer.<sup>205</sup>

---

importance to the merchant because "rational consumers, unlike rational merchants, may place a personal value on a commodity." Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1133 (1984).

202. In light of this asymmetry in efficiently available information, "[i]ninstallment sellers thus seem better able to value the risk which most concerns them—that consumers will wrongly not pay—than consumers can value the risk which faces them—that sellers will wrongly not redress breach." Schwartz, *supra* note 188, at 514. For the difficulty faced by the consumer in valuing the costs in a credit transaction of the holder-in-due-course doctrine, see Comment, *The FTC's Holder-in-Due-Course Rule: An Ineffective Means of Achieving Optimality in the Consumer Credit Market*, 25 UCLA L. REV. 821, 829-33 (1978).

203. Which is not to say that the merchant does not prefer to exclude or charge more to the poor risks, whether the risk be from credit or otherwise. If it could, the price to the better risk category would be reduced, thereby increasing volume to this group. On the other hand, more discriminatory pricing would increase the price for the poorer risks and thereby decrease volume to this group. Merchants reduce the range of risks among their customers, or at least squeeze the shape of the curve, by pitching to a particular class, e.g., the chic boutique versus the ghetto store. A prominent effect of the diseconomies of discriminatory pricing is redistributive: the lower risk groups subsidize the higher risk groups. For the individual customer, all else being equal (which it is not), the best strategy is to purchase from the merchant who pitches to the lowest risk group.

204. In discussing the differences between primitive markets (caveat venditor) and nineteenth century markets (caveat emptor), Posner points to such factors as the costs of information, the complexity of products, and the frequency of trading. See R. POSNER, *supra* note 155, at 184. The current argument favoring caveat venditor on the grounds that the merchant, as a better loss spreader, is a superior insurer, is rejected by Posner "because the buyer has a variety of insurance options open to him which may be as good as or better than seller's self- or market insurance. The insurance options of the primitive consumer are more limited." *Id.* It is my contention that the buyer's options for many products are often not as good as the seller's, especially for those where trading is still infrequent.

205. Trial and error will lead the merchant and producer to the "going rate," more rapidly as the consumer search costs are low. See Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187, 1194 (1979). Even without the merchant's information gained directly from consumer choices, there are a variety of mechanisms for merchants and producers to exchange information. See *id.* This advantages the consumer "because the consumer's search costs will be higher, other things being equal, in

Even if the consumer learns the "going rate," the rate may well include misperceived costs taken advantage of by all merchants of the goods.<sup>206</sup> Similarly, pricing aimed at a small number of informed customers will not necessarily signal to others the true costs of the goods.<sup>207</sup> First, the informed customers may have different concerns from the uninformed. For example, the informed may be low credit risks who greatly discount extreme remedies for nonpayment, whereas the uninformed, high credit risk customers are vitally affected by this risk.<sup>208</sup> Second, the signal imparted by informed customers relates to the going price of the particular goods, but not to

---

a market in which prices are highly dispersed than in a market in which prices are not so dispersed." *Id.* at 1195.

206. "[Even] [i]f enough consumers comparison shop, the market would reach equilibrium [only] at the nominal competitive price." Schwartz & Wilde, *supra* note 180, at 660. The extra profitability from misperceived costs tends to bring in competition which drives down the profitability. See A. DOWNS, *supra* note 11, at 168-69. However, "[t]o summarize, inexpensively obtained and precise answers to the question whether the existence of imperfect information has caused given markets to behave noncompetitively will seldom be available in real cases." Schwartz & Wilde, *supra* note 180, at 655. Moreover, for some goods there is no ideally competitive market. That is, if responsible consumers perceive the true costs, too few would buy these goods to support the market. Those who purchase, whether or not the market is viable, "suffer a welfare loss; they would be paying a higher true price than they would have paid if the existence and significance of the clause at issue were disclosed, for the nominal competitive price does not reflect the costs the term shifted to consumers." *Id.* at 660. For the nonviable markets, the political question remains: Should society subsidize the goods, e.g., certain credit transactions for low-income consumers? The fact that inherent or imposed distortions are needed to make the market viable does not justify them.

207. Regarding contract terms, competition does not protect the "contract term taker" for two reasons. First, "the cost of acquiring and processing information on contract terms is much greater than for price; unless the firm intentionally makes the particular term an important selling point . . . few, if any, customers will perceive the existence of variations in terms." Goldberg, *supra* note 151, at 74. Second, "the 'aggressive bargain-seeking customer' is usually just a minor figure in the equilibrating process," with whom "a producer can 'contract term discriminate'—renegotiate the terms . . . while keeping the high information barrier for other customers virtually intact." *Id.* For further analysis, see *id.* at 74-75. Schwartz and Wilde disagree. In mass transactions, there is the possibility of a "pecuniary externality" from searchers because "it is usually too expensive for firms to distinguish among extensive, moderate, and nonsearchers. Also, it would often be too expensive to draft different contracts for each of these groups even if they could conveniently be identified." Schwartz & Wilde, *supra* note 180, at 638. For general criticisms of signal theory, see Priest, *supra* note 184, at 1303-07, 1326-27, and Schwartz & Wilde, *supra* note 160, at 1396-98 ("[S]ignalling explanations do not account for important facts about markets for warranty terms.").

208. Schwartz and Wilde qualify their position on markets and information: "When the preferences of searchers are positively correlated with the preferences of nonsearchers, competition among firms for searchers should tend to protect all consumers." Schwartz & Wilde, *supra* note 180, at 638 (emphasis added) (footnote omitted). Where price discrimination between sophisticated and unsophisticated consumers is feasible, as for individualized transactions where the merchant spends time with the consumer, e.g., cars and expensive stereo equipment, "[s]earch equilibrium models shed relatively little light on the question when [sic] discrimination is being practiced and what remedies are appropriate." *Id.* at 666. Beyond this, "the equation of term competition with price competition is not

their true costs.<sup>209</sup> For example, the goods may be oversold in light of available substitutes, the misinformation about their true costs even driving down the pricetag through the economies of scale of production. Third, for the particular experience or credence goods, there may be no informed customers because of the prohibitive cost of information.<sup>210</sup> Finally, even if all customers are perfectly informed, the market may still not be working properly because of the other

---

completely satisfactory because the overlap between consumers conscious of price and quality and those conscious of terms [e.g., acceleration clauses] may be imperfect." *Id.* at 660.

[A]dditional criteria are required to guide the decision to intervene when terms are at issue. A monopoly equilibrium provides the best case for an intervention; it occurs when firms do not compete to give consumers better terms, but instead are aware of consumer ignorance and actively exploit it to procure for the firms themselves the most favorable terms possible given consumers' tastes, resources and alternative opportunities.

*Id.* at 661 (footnote omitted). The search equilibrium model is less useful for experience goods purchased infrequently, *see id.* at 662, and, presumably, credence goods, though the authors do not distinguish these goods. *Cf.* Priest, *supra* note 184, at 1305 (stating that "since consumers remain largely ignorant of the content of subordinate provisions, normal competitive pressures are absent").

Kronman defends paternalistic limitations to contractual freedom in the name of efficiency where one party to a transaction, such as a seller or landlord, is in a position to commit fraud against the other, and the fraud cannot be proven readily. *See* Kronman, *supra* note 127, at 767-70. But, short of fraud, Kronman declines to defend the limitations, even though he notes that "[o]ne factor that may make the danger of unprovable fraud especially great in certain situations . . . is the existence of a significant asymmetry in the parties' access to relevant information." *Id.* at 769. His efficiency argument applies to all sources of the asymmetry, whether or not a product of fraud.

209. *See* Beales, Craswell & Salop, *supra* note 151, at 511. For example, the difficulties of costing risk and uncertainty relating to consumer credit transactions are discussed in Schwartz, *supra* note 188, at 504-09. "In sum, consumers will be unable even approximately to calculate the odds of their incurring losses because of legal rules permitting a cutoff of defenses, nor will they be able to predict either the composition or the amount of the losses they may incur." *Id.* at 509. Because consumers "are unable to value . . . the risk a cutoff rule creates[,] [i]t seems probable that they will tend to ignore it, since they may not be aware that defenses will be cut off or understand the implications of such a rule. Thus, many consumers may erroneously equate cost with price . . ." *Id.* at 510.

The search equilibrium models discussed by Schwartz and Wilde "assume that consumers are interested primarily in prices (since it is assumed that the goods are homogeneous) . . ." Schwartz & Wilde, *supra* note 180, at 642. When the authors relax the assumption of homogeneity, they assert the model continues its usefulness when the market is segmented into roughly homogeneous subsets of search goods, such as premium versus ordinary beer. *Id.* at 658-62 (None of the four examples advanced by the authors, i.e., radios, beer, wine and cars, are (entirely) search goods.). The models are of limited use for nonhomogeneous goods, such as the multifaceted questions regarding the preferable television set and merchant, and alternative expenditures of entertainment money. *See supra* note 155 and accompanying text.

210. For example, in considering some medical, automotive, and other repair services:

The contention that competitive markets are sufficient to prevent fraud by, at least, established firms, because of the effect on future sales of the eventual discovery of fraud, does not hold . . . . The provision of joint diagnosis and repair implies that some fraud can be successful because of the high, if not prohibitive, costs of discovery of the fraud. If a part is changed prematurely, say, then the

distortions to responsible actions that are discussed in this Article.<sup>211</sup> The result of signaling may simply be to channel competition toward those qualities, whether or not desirable, that are most easily observed or signaled.<sup>212</sup> Furthermore, the consumer's information costs and

---

new part will operate in the same manner as if the replaced part were really faulty.

Darby & Karni, *supra* note 155, at 68. The authors have a bleak prognosis for government intervention: "Much the same costs and rewards are present for governmental investigators as for private evaluators of services, and thus there is no apparent reason why governmental intervention should cause an increase in welfare sufficient to pay its cost." *Id.* "[T]his is primarily due to the fact that governmental operatives respond to much the same forces [e.g., bribes] as are present in the market." *Id.* at 86. Does it pay a merchant to bribe its way out of a mandated warranty for a television set?

Even search goods have signalling obstacles. "Signalling explanations necessarily assume that consumers know prices and contract terms well because firms have no incentive to send signals that will not be received." Schwartz & Wilde, *supra* note 160, at 1397. "This 'zero search cost' assumption is always false in fact, and its falsity seems at least partly responsible for the major difficulty with signalling explanations—their inconsistency with the data." *Id.*

211. Schwartz and Wilde acknowledge this point: "On the other hand, no consensus exists that the outcomes of competitive markets are always fair, and we take no position in this Article on whether the state should regulate contract terms on grounds of substantive fairness when information problems are absent." Schwartz & Wilde, *supra* note 180, at 639 (footnote omitted); see also *supra* note 206. Trebilcock provides another reason for insufficient information: "Even in competitive markets, a firm offering non-competitive terms may occupy too insignificant a share of the market to attract disparagement from competitors, particularly when a competitor who engages in justified disparagement has no way of confining the gains from such disparagement to himself alone." Trebilcock, *supra* note 179, at 372.

A major problem with the theory of the invisible hand is that "the fallibilities of economic agents are assumed [by economists] to be of a random rather than a systematic nature. That is, since agents who make systematic errors would be exploited by other agents and eventually forced to withdraw from the market, they would no longer be the subject of economic enquiry." Hogarth & Reder, *supra* note 10, at 1, 6. Consumers cannot withdraw from many of the markets.

212. The phenomenon has been described this way:

Taking a more general equilibrium view, the marketplace responds by channeling competition toward more easily observable product attributes and signals of unobservable product characteristics. By generalizing the concept of the "lemons" equilibrium, we can show that, if price is more easily observed than quality, competition may be skewed toward less expensive, lower-quality products. If consumers cannot easily obtain information about a product's safety (but can easily observe its price), price competition may reward those who cut their price by offering a less safe product. The same is true if consumers would prefer to pay extra for added warranty protection or for some other favorable contract terms, but the difficulty of comparing competing contracts prevents consumers from distinguishing those who offer such terms from those who do not. Many traditional consumer protection problems—unsafe products, defective or poor-quality services, or "unconscionable" contract terms—may be the result of such lemons competition.

Beales, Craswell & Salop, *supra* note 151, at 510-11 (footnotes omitted). "In other markets, if the lemons competition has led consumers to learn that low price may signal low quality, consumers may respond by taking high price to be a guide to higher quality, thus weakening the incentives for price competition." *Id.* at 511. For other problems with signaling, including overinvestment in the signal, see *id.* at 507. Regarding signaling, Romano asks skeptically:

misperceived risks undermine the explanation of warranty coverage on the basis of which party, consumer or merchant, has the comparative advantage in reducing or insuring against risks.<sup>213</sup>

Often relevant to a rational decision is information not yet extant. Uncertainty is unavoidable. Inspection goods, or aspects of goods, are exceptions. In principle, the aesthetics, say, of a television cabinet are fully determinable immediately. For experience and credence goods and services, on the contrary, the unknowns may be substantial, especially for new goods and services with short track records. Careful investigation may help. For example, there are stress tests and x-rays for experience goods and background checks for credence goods. Looming over these investigations is the problem of inefficiently high transaction costs.<sup>214</sup> Though unknowns are obstacles for both merchant and consumer, the merchant, being one of the main conduits or sources of information as it is generated, will obtain relevant data before the consumer.<sup>215</sup>

---

[I]f consumers desire information concerning certain attributes, why don't firms voluntarily provide that information? . . . In the absence of either extremely high disclosure costs, idiosyncratic consumer tastes or barriers to entry in a particular product market, it is difficult to imagine that demand for the observation of a particular attribute would go unsatisfied. To put it another way, if the benefits of disclosure outweighed the costs, I suspect that the attributes would be disclosed by producers without the necessity of prodding by the state.

Romano, *supra* note 181, at 322.

213. "Comparative advantage theorists argue that warranty coverage reflects the comparative advantages of firms and consumers in reducing the costs of, or insuring against, product defects. . . . [For example,] [f]irms can reduce the costs of defects in refrigerator motors more cheaply than consumers . . . . [While] consumers can better ensure the durability of refrigerator doors and shelves . . . ." Schwartz & Wilde, *supra* note 160, at 1398 (The authors include Calabresi and Oi as comparative advantage theorists. G. CALABRESI, *supra* note 127, at 161-73; see, e.g., Oi, *supra* note 173, at 3.). "Comparative advantage explanations, however, cannot generate unambiguous explanations of warranty behavior when their informational assumptions . . . [that consumers are perfectly informed as to risks of defects and how to reduce them, and search costs are zero] are relaxed." *Id.* at 1399. The authors proceed to develop their own model of the comparative advantage idea where search costs are positive. See *id.* at 1402-20. They find that when consumers misperceive the risks, rather than reducing warranty coverage, firms "are more likely to offer the correct coverage at supracompetitive prices," which, the authors intuit, though the consumers must pay too much for it, is better than frustrating altogether their desire for a warranty. *Id.* at 1414; see *supra* note 160.

214. Faulty automobile gas tanks are an example. The courts believe that the consumer ought not to be held responsible for this type of testing nor for the information even if extant. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

215. Kronman overlooks this fact, to say nothing of the other sources of asymmetrical responsibility:

Not all consumer contracts involve informational asymmetries of this sort. In the case of newly manufactured goods, for example, defects that occur during the manufacturing process may not be discoverable by either the buyer or the seller. The seller can, of course, take precautionary measures to avoid such defects, and if it is more efficient for him to do so than for the buyer to self-insure, the parties

Language channels thinking.<sup>216</sup> Therefore, information cannot be totally neutral. Beyond this, to put it loosely, the goods themselves may consist partially of words, that is, promises, conditions, etc. Warranties and contract rights to repossession are illustrative.<sup>217</sup> Irrespective of cultural baggage, ambiguity is inherent to language. Vagueness is arguably an aspect of all words and statements, however precise.<sup>218</sup> Equivocation is another problem which arises when a word or statement may refer to more than one referent.<sup>219</sup> Contractual language might fail to treat particular contingencies. The fuzziness, misunderstandings, and gaps create uncertainty. Inconsistency in the contract terms has a similar result.

Uncertainty owing to the nonexistence of facts may be imposed or exacerbated by one of the parties. "What you don't know, won't hurt you" is true only if, when known, the knowledge disserves you. The manufacturer of a drug who suspects the presence of deleterious side effects will "speak no evil" (to the FDA and adversaries) only if it keeps itself in a position to see and hear no evil.<sup>220</sup> From the consumer end, an insured may prudently obtain or increase policy coverage before seeking medical attention for an unknown source of nagging discomfort.<sup>221</sup>

---

will (in theory) agree on a warranty term that shifts the risk of the defect to the seller.

Kronman, *supra* note 127, at 769 n.28. Kronman's solution requires both parties to have much information, an assumption he seems uncomfortable with ("in theory"). It is important to note that information about the consumer, e.g., creditworthiness and litigiousness, is known first by the consumer.

216. "I start from the position that the languages we speak, and the cultural practices they at once reflect and make possible, form our minds by habituating them to certain modes of attention, certain ways of seeing and conceiving of oneself and of the world." White, *supra* note 82, at 166. "A second premise, related to the first, is that all cultural and linguistic systems have limits and lacunae, aspects of life that they leave out or distort." *Id.*

217. See *supra* note 157.

218. Even an extremely specific word such as "six" might be vague in context. If, for example, a contractor expressly agrees to build a six foot foundation as a condition of payment, nonperformance of the condition is an issue if the foundation is 5.9 feet, or 5.95 feet, or, for the quibbler, 5.99 feet. Express conditions must be strictly performed. See, e.g., E. FARNSWORTH, *supra* note 111, at 544-45. We have faith, of course, that the court will write off the shortfall as being "de minimis," or perhaps construe "six" to mean "almost six." Cf. *Hurst v. Lake & Co.*, 141 Or. 306, 16 P.2d 627 (1932) (supported by trade usage, court found that contract provision requiring a minimum of 50% protein in horse meat scraps satisfied by scraps containing 49.53% protein).

219. The most famous case of this is *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864), where cotton was to be shipped on the *Peerless*, there being two ships by that name. See generally Young, *Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619 (1964).

220. The failure to obtain or generate information when it might have adverse consequences for the party "imposes" uncertainty in a weak sense only. See *infra* note 367 and accompanying text.

221. See Kronman, *supra* note 131, at 27 n.77. This raises the problem of "adverse

Semantic uncertainty may also be imposed, consciously or otherwise. The nebulousity and contextuality of words such as "fair" or "good" allow a person in good conscience, or with minimal rationalization, to describe her health as "good" to a prospective employer while describing it as "fair" to a sympathetic companion. Contractual fuzziness, gaps, and inconsistencies may be concocted by a party who believes it advantageous to leave these terms unknowable or subject to multiple interpretations.<sup>222</sup>

In sum, for many transactions, even all of them, neither party is fully informed. Moreover, one party—typically the larger, more powerful one—often has an informational advantage over the other.<sup>223</sup> Economic efficiency is unlikely.<sup>224</sup> The abiding question is whether the advantaged party has a claim to this edge.

## 2. FORESIGHT

As a general proposition, one is not blameworthy for the consequences of an action that are not reasonably foreseeable.<sup>225</sup> That the

---

selection": "Persons who are the worst risks are those most likely to benefit from insurance. Such persons are therefore the most likely to insure themselves . . . ." Bishop, *supra* note 131, at 245.

222. See *infra* note 280 and accompanying text (discussion of cognitive dissonance). Legal realists argue that the factual uncertainty is unimportant to the consumer because "he has the vaguest possible idea of the Law governing the situation, and with our complicated system of Jurisprudence, it is impossible it should be otherwise." J. GRAY, *THE NATURE AND SOURCES OF LAW* 100 (1921).

223. "[T]he size or power disparity itself between producer and consumer . . . creates the possibility of extracting greater value from the transaction. For this disparity determines who controls the conditions surrounding the transaction, particularly *information* relevant to the transaction." J.S. COLEMAN, *POWER AND THE STRUCTURE OF SOCIETY* 60 (1974) (footnote omitted).

224. Atiyah stated:

It is now generally acknowledged that interference with freedom of contract is often justifiable even on strictly economic grounds. In the case of consumer contracts this is often the case, because the consumer frequently does not have the requisite knowledge or expertise to enable him to make a really informed choice. And if the consumer does not make an informed choice it cannot be assumed that what he actually chooses corresponds with his real preferences; and if this assumption in turn cannot be made the whole elaborate structure of free-enterprise economics falls to the ground.

P. ATIYAH, *supra* note 2, at 24.

225. Whether an event is foreseeable turns on both its likelihood and its impact, that is, the degree of its risk. "The expected value takes account of both the probability of the harmful event and the losses if it occurs ( $p [x] l$ ). Therefore, if the probability is low but the losses would be very high, the event still might be foreseeable." Rizzo, *Uncertainty, Subjectivity, and the Economic Analysis of Law*, in *TIME, UNCERTAINTY, AND DISEQUILIBRIUM* 71, 88 n.20 (M. Rizzo ed. 1979).

Foreseeability is an essential element not only of the deontological conceptions of blameworthiness, but also generally of the teleological (e.g., utilitarian) conceptions of proper actions.

Fates were cruel and visited sound behavior with an unfortunate outcome is grounds for sorrow, but hardly a basis for a condemnatory judgment.<sup>226</sup> Accordingly, once the responsible actor obtains and processes available data, she must be in a position to project the information into the future to evaluate the potential consequences of contemplated actions.<sup>227</sup> To make a rational choice having legal

---

[F]or many consequentialists, including I believe all the classical utilitarians, rightness or wrongness of acts was not determined by the *actual* consequences of one's actions, but by the *expected* consequences,—that is, the foreseeable consequences. Thus, J. Mill: “. . . it is intention, that is, the foresight of consequences, which constitutes the moral rightness or wrongness of an act.”

G. Dworkin, *Intention, Foreseeability, and Responsibility*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 338, 346-47 (F. Schoeman ed. 1987) (footnotes omitted) (The references in the footnotes that follow are to both deontologists and teleologists.).

226. “Since we assign responsibility to the individual in order to influence his action, it should refer only to such effects of his conduct as it is humanly possible for him to foresee and to such as we can reasonably wish him to take into account in ordinary circumstances.” F. HAYEK, *supra* note 11, at 83; *see id.* at 134, 160; *see also* J. BENTHAM, *supra* note 1, ch. IX; H. GROSS, *supra* note 8, at 79-80 (“Culpability is affected by what the actor knows (or should know) about the likelihood of harm on a particular occasion.”); Fletcher, *supra* note 115, at 541 (“[The] question of fairness in holding the risk-creator liable for the loss . . . is expressed by asking whether the defendant’s creating the relevant risk was excused on the ground, say, that the defendant could not have known of the risk latent in his conduct.”).

Hart observes that many writers define *mens rea* in terms of knowledge of circumstances and foresight of consequences. *See* H.L.A. HART, *Acts of Will and Responsibility*, *supra* note 63, at 90-91 (with citations). By foresight is meant, of course, the foresight of the reasonable person, for “there is no general reason why men should not be responsible for such omissions to think, or to consider the situation and its dangers before acting.” H.L.A. HART, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY 136, 151-52 (1968). For the ambiguities and compromises involved with this objective standard, *see id.* at 152-55; Schick, *Under Which Descriptions?*, in UTILITARIANISM AND BEYOND 251, 255-56 (A. Sen & B. Williams eds. 1982). Because one may never, or nearly never, foresee with certainty the consequences of one’s acts, G.E. Moore distinguishes between right and wrong on the one hand, and praiseworthiness and blameworthiness on the other. Actual consequences determine the wrongfulness of acts, and foreseeability determines their blameworthiness. *See* G.E. MOORE, *ETHICS* 79-83 (1912).

227. Holmes emphasized foreseeability:

Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of a series of extraordinary, although natural, events? The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so.

O.W. HOLMES, *supra* note 115, at 74-75. “A choice which entails a concealed consequence is as to that consequence no choice.” *Id.* at 76. Fault, according to Holmes, turns not on purely moral principles but rather on whether the actor “had at least a fair chance of avoiding the infliction of harm” and this “fair chance . . . is not sufficient to throw upon a person the peril of his conduct, unless, judged by average standards, he is also to blame for what he does.” *Id.* at 129. Contrary to Holmes’ objectification, when the standard of foreseeability is not subjective, the moral fault of the actor may be questioned. *See, e.g.,* Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473, 480-81 (1974). Or, as Godwin noted, since voluntary

repercussions, one must know what one is getting into.<sup>228</sup> In the marketplace decision regarding a package of goods, for example, one must (have reason to) know the accompanying risks.<sup>229</sup> One can then

---

actions require foresight, perhaps no action is perfectly voluntary. See W. GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE* 40-46 (K. Carter ed. 1971) (1st ed. 1793).

Strict liability is an exception. See *supra* note 139 and accompanying text. Nor does the presence of foreseeability automatically lead to the finding of legal responsibility:

All legal systems in response either to tradition or to social needs both extend responsibility and cut it off in ways which diverge from the simpler principles of moral blame. In England a man is not guilty of murder if the victim of his attack does not die within a year and day. In New York a person who negligently starts a fire is liable to pay only for the first of several houses which it destroys.

H.L.A. HART & T. HONORE, *supra* note 120, at 67 (footnote omitted).

228. The foreseeability requirements in tort and contract law are not identical, the tort limitation being less severe. See E. FARNSWORTH, *supra* note 111, at 874-75 ("By introducing this requirement of 'contemplation' for the recovery of consequential damages, . . . [t]he result was to impose a more severe limitation on the recovery of damages for breach of contract than that applicable to actions in tort or for breach of warranty . . ."); W. PROSSER & W. KEETON, *supra* note 111, at 665 ("Generally speaking, the tort remedy is likely to be more advantageous to the injured party [than the contract remedy] in the greater number of cases, if only because it will so often permit the recovery of greater damages."). Compare RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) with RESTATEMENT (SECOND) OF TORTS § 435 (1965). For purposes of this Article, the role of foreseeability in both topics is sufficiently parallel: to limit the responsibility of the actor. See McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 CASE W. RES. L. REV. 286 (1985).

The standard theoretical formulations of the role of foreseeability in these two fields are: (1) In contract, foreseeability limits the ambit of damages for which a breaching party is liable, and (2) in tort, foreseeability defines whether the defendant owed a duty to the plaintiff, and whether the injury sustained flowed proximately from the defendant's tortious act.

*Id.* at 288 (footnotes omitted). The fact that foreseeability requirements vary among legal topics, and even within topics, indicates that many policies are in operation, the "fault" basis of foreseeability being only one of them. See, e.g., Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 87-91, 100-08 (1975) (torts); Vandervort, *supra* note 3, at 208-09 (generally). As some view it, the purpose of foreseeability in both contracts and torts is to allow the actor to make a cost-benefit analysis. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 94-95, 130-31 (2d ed. 1977) (contracts and torts); Fletcher, *supra* note 115, at 563-64 (torts); Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CALIF. L. REV. 1123, 1125-30 (1986) (to allocate all possible contract risks); Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463, 490-92 (1980) (torts). If this is the purpose, the foreseeability element may have nothing to do with fairness or fault, since utilitarian reasoning, a common grounding for cost-benefit analyses, has little direct concern for these moral notions. See Kuklin, *supra* note 194, at 848-54. The foreseeability element in criminal law is examined in the text accompanying *infra* note 241.

229. "Risks are . . . costs to those who bear them, specifically a cost equal to the product of the probability that the risk will become real . . . and the losses if that probability materializes." Schwartz, *supra* note 188, at 501 n.5. As far as the consumer is concerned, not all economically identical risks are equal; it is the perceived risk that counts. See Brandt & Day, *supra* note 193, at 318 n.41 (comparing the perceived risk of whether the goods will perform to the perceived risks regarding credit or the merchant). In a related context, one group of commentators identify five generic complexities that characterize socially acceptable risk decisions: "(a) uncertainty about how to define the decision problem, (b) difficulties in

decide whether to assume the risks, induce the other party to assume them, or look for substitute goods.<sup>230</sup>

Law, religion, mores, customs, and other institutions and norma-

---

assessing the facts of the matter, (c) difficulties in assessing the relevant values, (d) uncertainties about the human element in the decision-making process, and (e) difficulties in assessing the quality of the decisions that are produced." B. FISCHHOFF, S. LICHTENSTEIN, P. SLOVIC, S. DERBY & R. KEENEY, *supra* note 32, at 9. These categories could be fit into my categories of knowledge, foresight, reason and sense.

230. See McDowell, *supra* note 228, at 302-06. Schwartz considers the effect of the lack of information about risks:

A lack of information is relevant in three ways. First, a buyer may bear R but erroneously believes that  $R < A(b)$ , in which case he will take no steps to eliminate or decrease R. Such inaction may result in avoidable losses being concentrated on him. Second, some buyers who accept the standard seller provisions for allocating risks rather than searching for better terms would in fact shift risks if they knew the costs involved. . . . A third problem is that the relevant data, when available, is in raw form, making search unduly costly and deterring many buyers from searching at all.

These problems may be resolved by providing information relevant to risk and avoidance costs, by reducing search costs, insofar as that is possible, and then allowing the parties to shift risks through bargains. Some buyers, however, may refuse to absorb the information, and for them nothing will change. Alternatively, we could, by case or statute, impose R on sellers, thereby compelling all buyers to "insure." This approach is undesirable for three reasons. First, since providing information in concise form may substantially reduce search costs, buyers may in fact absorb much of it, and shift risks, when the relevant costs so indicate, more frequently than they now do. Risks should therefore be imposed on sellers only if it is believed that the incidence of irrationally unshifted risks will be too high even with additional information provided. Since this is difficult to know in advance, information should be provided and the results analyzed. Second, imposing risks prevents gambles but reduces freedom of choice, which I take to be a value worth preserving for its own sake. Third, sellers cannot value certain of R's components, such as the losses resulting to a buyer's business from the failure of a particular part, as well as informed buyers can. If sellers bear risks such as these, they will guess at the correct valuation. When the guesses are too high, buyers will be paying excessive prices for shifting risks; when they are too low, sellers may be underinsured.

Schwartz, *supra* note 167, at 20-21 (footnote omitted).

I entirely agree with Schwartz's analysis of the relevance of information in contracting regarding risk. I also agree that the problems may be solved for many consumers by providing information by means of a proffered warranty. But I entirely disagree with his three reasons for not mandating warranties as applied to the types of purchases here being treated. None of the reasons are conclusions, but are empirical questions that cannot be resolved by thought experiment. First, will "the incidence of irrationally unshifted risks . . . be too high even with additional information provided?" My intuition, based upon the consumer's many forms of "irrationalities," is contrary to Schwartz's implication. With respect to the third reason, will the consumers be more informed of the risks than the sellers? Again, in the marketplace here considered, my guess conflicts with Schwartz's guess. Notice, however, that this disagreement with Schwartz is only on surmised facts. If his intuitions are correct for a particular market, then I agree with his conclusion. Finally, the second reason regarding freedom of choice also ultimately bottoms on an empirical question. There is no freedom of choice if that choice is uninformed, let alone a product of "incapacity." Insofar as the consumer is "irrational," his choice cannot be "free" in a significant sense. Elsewhere, Schwartz bases his argument con-

tive forces provide some degree of predictability of future human actions. Within the law, contract is the primary means by which private parties can engineer prospects with any confidence, but this depends upon the accuracy of the understanding of the current state of affairs, including the mental state of the other party. Contract cannot reach third parties (that is, nonagents or persons otherwise unconnected to the contracting parties), acts of God, or other quirks of fate. When a contracting party misstates her intended future actions, that is misinformation about her present mental state which was treated in the previous section. It appears that a party to a transaction cannot purposively affect the other's foreseeability other than through cognitive ploys.

When a person is unable to reasonably foresee a future occurrence and has not assumed the risk of the contingency,<sup>231</sup> the law will often free her from responsibility for that eventuality. Along with many of the general legal doctrines discussed before,<sup>232</sup> this is particularly evident in some tort doctrines.<sup>233</sup> The limitations to liability labeled "causation" and "proximate cause" manifest the concern for foreseeability.<sup>234</sup> The unforeseeable intervention of a third party or an

---

cerning the irrelevancy of the seller's bargaining power on the proposition that the buyers are "informed." See *id.* at 43-44. Countering Schwartz is this analysis:

Consumers often fail to inquire about the riskiness of different alternatives; when they do, advertising and marketing strategies may deny them that information. For example, unless automobile buyers know from a design standpoint what degree of safety is possible and at what price, and unless the industry provides varied alternatives, market behavior may not reflect the personal cost-benefit tradeoffs an individual might make after thoughtful inquiry.

B. FISCHHOFF, S. LICHTENSTEIN, P. SLOVIC, S. DERBY & R. KEENEY, *supra* note 32, at 94.

231. When there is no uncertainty about the risk, the actor "chooses rationally where he chooses the option (or one of the several) that have the best all-in-all prospects." F. SCHICK, *supra* note 11, at 40. The law holds the actor responsible for the consequences of lesser choices as well. How bad must the choice be before she ought to be freed of liability? One of the factors in the determination is the social value of the risk. Cf. J. FEINBERG, HARM TO OTHERS 191 (1984) ("In general, the greater the social utility of the act or activity in question, the greater must be the risk of harm (itself compounded of gravity and probability) for its prohibition to be justified."). If the risk is high but the value is low, the rational actor will hardly assume it. Hence, risk assessment, and therefore assumption of risk as judged by society, involves three factors: gravity, probability and social value. For a discussion in similar terms of the reasonability of risks, see generally J. FEINBERG, *supra* note 4, at 101-04.

232. See *supra* text accompanying note 111.

233. Intentional torts, generally, are exceptions. See W. PROSSER & W. KEETON, *supra* note 111, at 293. Among the justifications for the exceptions are that "it is better that [the loss] should fall upon the wrongdoer than upon one innocent victim, or a hundred," *id.*, and that "the tort fulfills subsidiary noncompensatory purposes, such as testing the title to land," Fletcher, *supra* note 115, at 555. When the main purpose is compensation, excuses such as compulsion and unavoidable ignorance are applicable. See *id.* at 556.

234. "[T]he standard of 'foreseeability' has become the dominant test of proximate cause." Fletcher, *supra* note 115, at 571 (footnote omitted). See generally W. PROSSER & W. KEETON,

act of God constitutes a superseding event which precludes liability.<sup>235</sup> In contract law,<sup>236</sup> along with doctrines such as unconscionability,<sup>237</sup> impracticability,<sup>238</sup> and frustration of purpose,<sup>239</sup> the court may adopt various limitations on remedies for unlikely harms.<sup>240</sup>

In criminal law, there are comparable exculpations grounded upon unforeseeability.<sup>241</sup> Ex post facto, retroactive, and unclear laws are exemplary. One cannot foresee the potential criminal liability if the statute has not been enacted, the extant statute has not been interpreted to cover the contemplated action, or the language of the statute is vague.<sup>242</sup> Due process is denied.<sup>243</sup> The general requirements of

*supra* note 111, §§ 41-44. Whether the problems of causation are simply "issues of legal policy in disguise ("causal minimalism")," to be decided only by whether the harm was foreseeable or within the risk, rather than purely as questions of physics, is glossed over. Hart and Honore reject strong causal minimalism. See H.L.A. HART & T. HONORE, *supra* note 120, at xxxiv-xxxv. They do, however, conclude that in tort law, a limitation to the extent of responsibility in addition to, but not in substitution for, causal limitations is foreseeability in the relevant sense. In contract law, foreseeability is whether the harm was within the contemplation of the parties. *Id.* at xlix. See generally *id.* ch. IX. As a cautionary note, "foreseeability, risk, and the other notions connected with probability as techniques for limiting responsibility . . . do not provide the sort of all-purpose tool kit which many courts and writers think they do." *Id.* at li. Questions of causation are complex. See, e.g., *Symposium on Causation in the Law of Torts*, 63 CHI.-KENT L. REV. 393 (1987).

235. See generally RESTATEMENT (SECOND) OF TORTS §§ 440-53 (1965) (superseding causes); W. PROSSER & W. KEETON, *supra* note 111, § 44 (intervening causes).

236. See generally H.L.A. HART & T. HONORE, *supra* note 120, ch. XI (causation and contract). A complication in the analysis should be introduced. By holding one party free of liability, the law effectively holds the other party liable for the losses. Oftentimes the warrant for this is not specified. For example, if a tenant can avoid a lease on the ground of frustration, the landlord may have to absorb the loss. This is not the case if the landlord can relet the premises, but of course, the tenant may also be able to assign or sublet the premises. Irrespective of this twist, the courts may find frustration without a close look at the merits (economics). See, e.g., *Garner v. Ellingson*, 18 Ariz. App. 181, 501 P.2d 22 (1972) (frustration of leasehold found without mention of tenant's right to assign or sublet).

237. See *supra* note 127.

238. See *supra* note 132.

239. See *supra* note 133.

240. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 350-52 (1981) (limitation on damages); E. FARNSWORTH, *supra* note 111, §§ 12.8, 12.9, 12.14 (damages). "Indeed, the distinction between the normal and the abnormal, the foreseeable and the unforeseeable, is one which runs right through the law of contract and . . . underlies the doctrine of frustration, as well as the principles of remoteness of damage." P. ATIYAH, *supra* note 2, at 319.

241. Comparable, but not identical. See generally H.L.A. HART & T. HONORE, *supra* note 120, chs. XII-XIV (causation and harm, criminal law and punishment). For the insanity defense, see *supra* note 115. Mackie would limit the criminal responsibility for intoxication on the basis of foreseeability: "[S]ince getting drunk (or perhaps rather starting to get drunk) is something that one does intentionally, one can be held responsible for doing this, and perhaps for doing so in circumstances in which one foresees that it is likely to lead to harm, but not for the further things that one does non-intentionally after one is drunk." J. MACKIE, *ETHICS* 212 (1977).

242. When relevant information is absent, punishment must be inefficacious. To say nothing of justice, this provides a utilitarian basis for proscribing ex post facto laws and

culpability under the Model Penal Code further reflect the concern for predictability;<sup>244</sup> of the four kinds of culpability, even the two more attenuated, which are based upon reckless and negligent acts, are defined in language of foreseeability.<sup>245</sup>

One may, like Lon Fuller, go so far as to elevate notice requirements to an inherent quality of any system worthy of being labeled "legal."<sup>246</sup> Whether or not one goes this far, there is no denying that foreseeability is an essential element undergirding the judgment of blameworthiness, and therefore moral responsibility.

### B. Capability

Once a person has the information and foresight needed to assess the consequences of possible actions, to be responsible for the ensuing choice, the person must be sufficiently capable of making it.<sup>247</sup>

---

requiring the publication of penal provisions of suitable clarity. See J. BENTHAM, *supra* note 1, at 160-61; L. FULLER, *THE MORALITY OF LAW* 38-39 (rev. ed. 1969) (describing the consequences to a legal system of the failure to provide relevant information).

243. See, e.g., G. FLETCHER, *supra* note 8, § 7.5 (Due Process and Fair Warning).

244. "Except as provided in Section 2.05 [regarding strict liability], a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." MODEL PENAL CODE § 2.02(1) (1962).

245. "A person acts recklessly with respect to a material element of an offense when he *consciously* disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." MODEL PENAL CODE § 2.02(2)(c) (1962) (emphasis added). "A person acts negligently with respect to a material element of an offense when he *should be aware* of a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02(2)(d) (emphasis added). In considering the causal relationship between conduct and result, the Code reaffirms the requirement of foreseeability for reckless and negligent acts. See *id.* § 2.03(3).

246. See L. FULLER, *supra* note 242, at 38-39. H.L.A. Hart, a legal positivist, will not go so far as to require tautologically of a legal system any such normative element. He still goes quite far along Fuller's road: "If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist." H.L.A. HART, *THE CONCEPT OF LAW* 121 (1961).

247. "Competence is the foundation of autonomy." L. HAWORTH, *supra* note 11, at 2. Feinberg offers insightful comments on why we insist that the responsible (criminal) actor be capable, or in other words, why mental illness is special. "[T]he sick criminal's motives appear quite unintelligible to us . . . because they are irrational . . ." J. FEINBERG, *What Is So Special About Mental Illness?*, *supra* note 47, at 285 (emphasis omitted). The motives are irrational because they are usually not self-interested. Indeed, "they are not interested at all. They do not further any of the actor's interests, self or other-regarding, benevolent or malevolent." *Id.* at 286 (emphasis omitted). To get to the core of the matter, "[t]he important point is that his behavior tends to be contrary to interest, as senseless [i.e., incoherent] almost as the repetitive beating of one's head against an unyielding stone wall." *Id.* (emphasis omitted). "Moreover, the 'senseless' desires, because they do not cohere, are likely to seem alien, not fully expressive of their owner's essential character." *Id.* at 288 (footnote omitted). "The final and perhaps most important feature common to the examples of voluntary crimes by mentally ill persons is the actor's lack of insight into his own motives." *Id.* (emphasis omitted). In the end, the

Mental elements must be satisfied.<sup>248</sup> Capability as here used, then, refers to reason (or analytical judgment) and sense (or normative judgment).<sup>249</sup> To put it another way, sense looks to the chosen ends

---

mental illness "is an alien condition involuntarily suffered." *Id.* at 289. For a similar analysis, see Moore, *supra* note 115, at 60.

That one is incapable does not mean one may not be obligated to compensate another for harm. "So, for example, in civil law an insane person can be held liable for his torts. . . . This may be morally absurd, . . . but it is not logically absurd." J. FEINBERG, *Supererogation and Rules*, in *DOING AND DESERVING* 3, 6 n.5 (1970) (emphasis omitted). Logical or not, commentators have difficulty with the proposition that mental incompetents and subnormal competents are liable for their torts. See, e.g., O.W. HOLMES, *supra* note 115, at 86-90; Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99-100 (1908); Coleman, *supra* note 227, at 473. The question, arguably, "is not whether it is fair for an insane person [or infant] to be held responsible for the harm he has caused, but only whether it is fairer for him or for the plaintiff to bear those costs." R. EPSTEIN, *supra* note 48, at 78. In balancing the pros and cons, "[t]he present law of negligence treats infancy and insanity not as independent defenses, but as elements to be taken into account in passing on the reasonableness of the defendant's conduct." *Id.*; see *supra* note 115. The other side of the coin of incompetence must also be noted: Inasmuch as a person is held incompetent, and thus free of certain liabilities, he also may be denied rights. See A. MELDEN, *supra* note 59, at 209.

248. The mental element of tort liability may be slight compared to that of criminal liability (*mens rea*). One explanation is that criminal liability, unlike tort liability, connotes, possibly denotes, blame and condemnation. See Burgh, *Guilt, Punishment, and Desert*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 316, 326-30 (F. Schoeman ed. 1987). As an evidentiary matter, the mental element may be presumed, perhaps rebuttably. See, e.g., H.L.A. HART, *supra* note 16, at 229 (Hence, "the apparently coarser-grained technique of exempting persons from liability to punishment if they fall into certain recognized categories of mental disorder is likely to be increasingly used [such as for very young children]."); P. NOWELL-SMITH, *ETHICS* 292 (1954) ("A man is held to have *mens rea*, and therefore to be guilty, if the *actus reus* is proved, unless there are certain specific conditions which preclude a verdict of guilty."). Or presumed, despite "what we know to be true in the particular case," on the basis of "what we believe will be the probable effects of encouraging people to behave rationally and considerately." F. HAYEK, *supra* note 11, at 77. Similarly, in order to "minimize the cost associated with the rules governing incompetence," Epstein recommends that the rules should "attempt to identify broad classes of individuals who in general are not able to protect their own interests in negotiation," "be designed to allow third parties to identify persons in the protected class in order that they may steer clear of contractual arrangements with them," and "not create artificial incentives for parties to lower the level of competence they bring into the marketplace." Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 300 (1975). For insightful discussions of *mens rea*, see H.L.A. HART, *Intention and Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 113 (1968); H.L.A. HART, *Legal Responsibility and Excuses*, *supra* note 8, at 28.

249. Thus, the Economic Man has a "complete and consistent system of preferences that allows him always to choose among the alternatives open to him [sense]; he is always completely aware of what these alternatives are [knowledge]; there are no limits on the complexity of the computations he can perform in order to determine which alternatives are best [reason and foresight(?)]." H. SIMON, *MODELS OF MAN* xxiii (1957), quoted in S. MAITAL, *MINDS, MARKETS AND MONEY* 24 (1982); see also F. HAYEK, *supra* note 11, at 76-77 (justification for assigning responsibility); 2 H. SIMON, *From Substantive to Procedural Rationality*, in *MODELS OF BOUNDED RATIONALITY* 424, 426 (1982). In the economic sphere, Weber refers to "reason" as "formal rationality" and "sense" as "substantive rationality." M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 185-86 (A. Henderson &

and other values, and reason, to the chosen means.<sup>250</sup>

Variations in capability and disposition are products of natural endowments and nurtured traits.<sup>251</sup> While nature does its work in an

---

T. Parsons trans. 1947); cf. *infra* note 256 (Simon's distinction between "substantive" and "procedural" rationality).

250. "Man's dignity, his being exalted far above everything merely natural or above all brutes, consists in his setting up autonomously his ultimate values, in making these values his constant ends, and in rationally choosing the means to these ends." L. STRAUSS, *supra* note 68, at 44. "In autonomous, rational action, then, we seek maximally to pursue and achieve our good as we perceive it—this is the ideal toward which purposive action is aimed." Brock, *Paternalism and Promoting the Good*, in *PATERNALISM* 237, 248 (R. Sartorius ed. 1983) (footnote omitted). "The theory of rational choice [under one conception] is, before it is anything else, a normative theory. It tell [sic] us what we ought to do in order to achieve our aims as well as possible. It does not tell us what our aims ought to be." Elster, *supra* note 17, at 1. Tribe refers to this theory as "instrumental rationality." Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 617-18 (1973) ("the selection of efficacious means to previously given ends"). "Sense" encompasses the full range of aims: values, ends, desires, wants, preferences, tastes, etc.

Whether reason and sense may be fully separated is debatable. For example, Tribe insists that instrumental rationality is limited, since "personal and social choices serve not merely to implement 'given' systems of values, but also to define, and sometimes to reshape, the values—indeed the very identity—of the choosing individual or community." *Id.* at 634 (emphasis omitted); see also M. HOLLIS & E. NELL, *supra* note 151, at 51 ("means and ends are [not] logically distinct; . . . ends are in fact determined progressively in the course of action"); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 99-100 (1972) (similar point). "Rationality" notwithstanding, the traditional preferences of Americans, who as consumers are "good-natured and easygoing" and embarrassed about bargaining "or even to engage openly in comparison shopping," give the advantage to producers and sellers, in which role aggression and conflict are expected. See T. SCITOVSKY, *supra* note 98, at 214-15. To the extent I have isolated reason and sense, my model is Humean, not Platonic. See Watson, *Free Agency*, in *MORAL RESPONSIBILITY* 81, 83-85 (J. Fischer ed. 1986) (comparison of Humean and Platonic theories). Weber and most social scientists "follow Hume in recognizing two little men in each of us, Reason and Will [sense]. Reason is interpersonally valid, Will is personally arbitrary." Alexander, *Human Values and Economists' Values*, in *HUMAN VALUES AND ECONOMIC POLICY* 101, 104 (S. Hook ed. 1967). Kant also declared the autonomous will independent of desire or inclination. See R. WOLFF, *UNDERSTANDING RAWLS* 113 (1977). That a complete separation of reason and sense is problematic, see, e.g., R. BRANDT, *supra* note 11, at 110-29 (developing an account of "rational desire"); F. KNIGHT, *Some Notes on the Economic Interpretation of History*, in *FREEDOM AND REFORM* 246, 253-54 (1947); N. MACCORMICK, *H.L.A. HART* 47-49 (1981); Alexander, *supra*, at 105; Baier, *Rationality, Value and Preference*, 5:2 SOC. PHIL. & POL'Y 17, 40-44 (Spring 1988) ("value"); Dahl, *Paternalism and Rational Desire*, in *PATERNALISM*, *supra*, at 261, 265-67; Selznick, *supra* note 64, at 459; *infra* note 262. "But the intellectual and the motivational aspects can be distinguished, and it is simply a confusion to suppose that the intellectual aspect rationally requires the motivational, though it is true that the motivational aspect necessarily presupposes the intellectual." J. MACKIE, *HUME'S MORAL THEORY* 141 (1980).

251. The perceived dichotomy between nature and nurture "has been superseded by a more sophisticated 'interactional' model. At the minimum, it is now appreciated that all behavior is biologically based at some level of analysis. Even learned behaviors depend upon evolved biological capacities, including the capacities for being 'rewarded' and 'punished' in learning situations." Corning, *Human Nature Redivivus*, in *HUMAN NATURE IN POLITICS* 19, 27 (J. Pennock & J. Chapman eds. 1977). As an example:

It is likely that the effect of maleness and youthfulness on the tendency to

instant, nurture takes time and requires help from others.<sup>252</sup> Competent persons differ in the ability to cope with fact and value.<sup>253</sup> With respect to facts, for instance, even assuming that incoming sense data facilitate an exact mirror of nature, which is not the case,<sup>254</sup> and assuming that there is an objective standard of rationality, which is

---

commit crime has both constitutional and social origins: That is, it has something to do both with the biological status of being a young male and with how that young man has been treated by family, friends, and society.

J. WILSON & R. HERRNSTEIN, *supra* note 32, at 69. For those who emphasize nurture, "a person is not a natural object, but a cultural artefact." R. HARRE, *PERSONAL BEING* 20 (1984).

252. "[T]here is a correlation between age, on the one hand, and judgmental capacities, on the other, in the sense that someone attuned to basic noncontroversial aspects of logical, moral, and prudential reasoning would notice systematic shortcomings in the reasoning processes of the child." Schoeman, *supra* note 111, at 269. One reason children have been considered incompetent is that they have had little time to be adequately nurtured. "[I]t is *via* the exercise of authority that they will be inducted into modes of social life and thus be made capable of deliberating and exercising choice. A child is obviously not in a position to *choose* to do this or that until he has *learned how* to do this and that." Winch, *Authority*, in *POLITICAL PHILOSOPHY* 97, 104 (A. Quinton ed. 1967); see also S. CAVELL, *supra* note 111, at 310-11. On the other hand, the time required for the educational process may not be the whole explanation of childhood incompetence: "Some theorists even suggest that the particular cognitive structure of children at various stages radically affects how the child experiences the world, so that much of what we call experience is theoretically as well as practically inaccessible to children." Schoeman, *supra* note 111, at 270 (footnote omitted). Therefore, "[a]ccording to the developmental psychologist, . . . the errors involved in adolescent and pre-adolescent thinking are not in general correctable or comprehensible to the agent himself." *Id.* at 269.

The legal incompetence of minors is not only a matter of capacity, but is also a matter of humane treatment. "It is cruel to subject the young to criminal punishment, and for much the same reason that punishment of sick persons is inhumane." H. GROSS, *supra* note 8, at 150.

253. "The threshold of competence in our society falls at or just below average because, first, the level of difficulty involved in key life tasks is in large part socially determined; and, second, because society stands to gain by setting this level so as to render the average person competent." Wikler, *Paternalism and the Mildly Retarded*, in *PATERNALISM* 83, 89 (R. Sartorius ed. 1983). Under a strong view of what qualities constitute capability, arguably such as those of Rawls and Kant (i.e., "the maximally rational reflective agent"), few people, if any, would qualify. See *id.* at 91. Ackerman requires the citizen to be capable of a "neutral dialogue." See B. ACKERMAN, *supra* note 80, at 69-103.

Full competence is never attained; weakness and misunderstanding and internal conflicts are parts of every human life. To speak of what we do as if all, or almost all, human conduct is equally competent, voluntary, and rational and entitled to respect as such, is to establish a vision that denies the central process of life, the transformation of the self through interactive experience with others.

White, *supra* note 82, at 180-81.

254. See, e.g., J. WHITE, *Fact, Fiction, and Value in Historical Narrative*, in *HERACLES' Bow* 139 (1985) ("factual" narratives are necessarily "fictional," expressing "values"); Winch, *Understanding a Primitive Society*, in *RATIONALITY* 78, 80-83 (B. Wilson ed. 1970). The leading tract espousing this general position is T. KUHN, *supra* note 39. Furthermore, "[t]he legal representation of fact is normative from the start . . ." C. GEERTZ, *supra* note 22, at 174.

also not the case,<sup>255</sup> the individuality of mental processes further skews the perception of reality.<sup>256</sup> If nothing else, the passions, as master of the mind, exact a toll.<sup>257</sup> When this and other tolls are too great, the person is incompetent.<sup>258</sup>

# 1. REASON

Reason involves, first of all, analysis.<sup>259</sup> To evaluate the potential

---

255. Axioms and inference rules together constitute the fulcrum on which the lever of reasoning rests; but the particular structure of that fulcrum cannot be justified by the methods of reasoning. For an attempt at such a justification would involve us in an infinite regress of logics, each as arbitrary in its foundations as the preceding one.

H. SIMON, *REASON IN HUMAN AFFAIRS* 5-6 (1983); see also M. HOLLIS & E. NELL, *supra* note 151, at 140 (questioning 'a priori' knowledge). See generally G. MYRDAL, *supra* note 128; RATIONALITY (B. Wilson ed. 1970). From a hermeneutic vantagepoint: "It is an illusion to think that there is something that might properly be labeled 'the standards of rationality,' standards that are genuinely universal and that are not subject to historical or temporal change." R. BERNSTEIN, *supra* note 11, at 8. "Reason . . . is a social product, limited in application and explicable by the analysis of history or the sociology of knowledge." M. HOLLIS & E. NELL, *supra* note 151, at 51. Even "common sense" is culture dependent. See C. GEERTZ, *Common Sense as a Cultural System*, in *LOCAL KNOWLEDGE* 73 (1983). The relativity of "reason" (or was it "information" or "sense"?) was recognized in *Regina v. Macheke-quonabe*, 28 O.R. 309 (1898), in which a native Canadian defendant was found guilty of only manslaughter for the deliberate killing of an "evil spirit" in human form, who turned out to be his foster father.

256. "[O]ur minds determine what is relevant and irrelevant, by imposing a structure upon the problem situation. This structure tends to vary from mind to mind . . . ." D. BRAYBROOKE & C. LINDBLOM, *supra* note 149, at 43. Discussing these complications in the context of the large organization, Simon argues that "a theory of rational behavior must be quite as much concerned with the characteristics of the rational actors—the means they use to cope with uncertainty and cognitive complexity—as with the characteristics of the objective environment in which they make their decisions." 2 H. SIMON, *supra* note 167, at 451-52; see also 2 H. SIMON, *supra* note 249, at 425-26.

257. See D. HUME, *supra* note 34, bk. II, pt. 3, § iii. Passions are not "wholly vicious and destructive," rather, as advanced by Hume, they are "the essence of life and . . . a potentially creative force." A. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* 47 (1977). Even if not total master, the emotions have the "function of selecting particular things in our environments as the focus of our attention." H. SIMON, *supra* note 255, at 29.

258. Psychiatry, including the discovery of the unconscious, poses a threat to the "view that we are [ever] responsible for who we are and what we do because we have the capacities rationally to will our fate in this world." M. MOORE, *supra* note 3, at xi. Moore's book counters the threat. *Id.* Rawls refers to the capacity for rational self-direction, moral personality, as being a "range" property. Once within the range, the condition for equal justice and liberty is satisfied. See J. RAWLS, *supra* note 11, at 502-12. Wikler, following Rawls' analysis, argues that "[s]uch a conception requires us to determine a nonarbitrary threshold, so that all standing above it are equally endowed and all falling below it are unendowed." Wikler, *supra* note 253, at 87. Kennedy, however, emphasizing the context-relativity and delineation difficulties, concludes that there is no principled way to evaluate whether another has the capacity to make a particular decision. See Kennedy, *supra* note 51, at 644.

259. In considering reason, or "rationality" in a narrow sense, discussion of mental states may be omitted. "Rational behavior to an economist is a matter of consequences rather than

consequences of a contemplated action, one examines the situation and determines the germane facts. After gathering the relevant data, one must process it to obtain useful information.<sup>260</sup> For weak and strong reasoners alike,<sup>261</sup> this lends itself to distortion. This is especially true when the facts are heavily intertwined with matters of values, tastes, and preferences (that is, matters of sense).<sup>262</sup>

To demonstrate briefly some of the problems, let us return to the purchase of the television set. It turns out that even inspection qualities, seemingly the most straightforward, are beyond completely neutral appraisal. The perception of the picture, sound, and other aesthetics of the set is inevitably affected by the frame, which includes the ambient light, furnishings, and other physical qualities of the setting. That environmental factors such as one's subculture and training affect aesthetic judgment is well known. The significance to performance of the "hard" data, including the technical specifications, is difficult for the lay person to comprehend, and the data are subject to heuristic deformity when expressed in terms noncom-

---

intentions . . . ." R. POSNER, *supra* note 155, at 204 n.72; see also M. FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 31 (1953). What is the relevance of economics to the concept of reason? "I have no hesitation in saying that all logic is derived from the pattern of the economic decision or, to use a pet phrase of mine, that the economic pattern is the matrix of logic." J. SCHUMPETER, *supra* note 60, at 122-23. Today, hesitation is in order. See *supra* note 10 and accompanying text.

260. One must neither equate information with reason, nor divorce it from reason altogether. "In order to know *p*, it is necessary that *p* is true, that I believe *p*, and that I have some justification for holding this belief." Resnick, *Due Process and Procedural Justice*, in *DUE PROCESS* 206, 214 (J. Pennock & J. Chapman eds. 1977); see also Walt, *Rationality and Explanation*, 94 *ETHICS* 680, 695-96 (1984). The law requires the actor to have the capacity for beliefs minimally intelligible, consistent, coherent, and true, presently and over time. See M. MOORE, *supra* note 3, at 104-06; cf. *infra* notes 298-99 (similar requirements for desires).

Institutionalized mental incompetents have greater ability to calculate than is commonly supposed. Studies in mental institutions show that patients, even those quite subnormal, respond to economic incentives. See, e.g., Gripp & Magaro, *The Token Economy Program in the Psychiatric Hospital: A Review and Analysis*, 12 *BEHAV. RES. & THERAPY* 205 (1974).

261. Braybrooke and Lindblom discuss the mysteries of the reasoning process:

When a man sets out to solve a problem, he embarks on a course of mental activity more circuitous, more complex, more subtle, and perhaps more idiosyncratic than he perceives. If he is aware of some of the grosser aspects of his own problem solving, as when he consciously focuses his attention on what he has identified as a critical unknown, he will often have only the feeblest insight into how his mind finds, creates, dredges up—which of these he does not know—a new idea. Dodging in and out of the unconscious, moving back and forth from concrete to abstract, trying chance here and system there, soaring, jumping, backtracking, crawling, sometimes freezing on point like a bird dog, he exploits mental processes that are only slowly yielding to observation and systematic description.

D. BRAYBROOKE & C. LINDBLOM, *supra* note 149, at 81.

262. See A. MELDEN, *supra* note 59, at 139-40; G. MYRDAL, *supra* note 128, at 14-34; R. NISBETT & L. ROSS, *supra* note 153, at 228-48.

parable, or difficult to compare, to those of competitors.<sup>263</sup> When the substitute goods have disparate attributes, people are poor at evaluating the tradeoffs.<sup>264</sup>

Because information is never perfect, the complications of risk and uncertainty open the door to distortion even for the best of reasoners.<sup>265</sup> Even the highly educated and competent have limited abilities to process information in the marketplace.<sup>266</sup>

Framing distortions are often imposed. The writer of boilerplate,

263. For example, Health and Human Services Secretary Sullivan, "[c]alling the supermarket 'a Tower of Babel [where] consumers need to be linguists, scientist, and mind readers,'" has proposed an overhaul of food package labeling to provide uniform and useful information. *What's Wrong with this Label?*, 55 CONSUMER REP. 326 (1990).

264. See R. BRANDT, *supra* note 11, at 76 ("man's demonstrable inability to take proper account, simultaneously, of the various component attributes of the alternatives").

265. See *supra* note 163 and accompanying text. For a related problem, see the discussion of discounting accompanying *infra* note 305.

Consumers are apparently poor at predicting future contingencies and thus irrationally favor the present. See Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607, 616. For a summary of the full cognitive complexity of thinking for oneself, see Lane, *Individualism and the Market Society*, in LIBERAL DEMOCRACY 374, 380 (J. Pennock & J. Chapman eds. 1983). He concludes that "[t]hese are formidable requirements; few people are fully endowed with these capacities, and fewer still employ them, especially in moral reasoning." *Id.* at 380-81 (footnote omitted). For many years Herbert Simon has studied and written about these limitations to full rationality under the label of "bounded rationality." The notion includes more than just defects in reason: "[R]ationality is bounded when it falls short of omniscience. And the failures of omniscience are largely failures of knowing all the alternatives, uncertainty about relevant exogenous events, and inability to calculate consequences." 2 H. SIMON, *supra* note 167, at 483. In speaking of the microeconomic assumptions of perfect rationality, he writes: "It is not a question of approximation; they do not even remotely describe the processes that human beings use for making decisions in complex situations." *Id.* at 491. "The tendency to underestimate risk goes far enough beyond mere misinformation . . . . It amounts to a cognitive bias, a systematic tendency to misinterpret or ignore information, to generate fantasies of safety, to repress unwanted information. It has to do with babyishness, not ignorance." Kennedy, *supra* note 51, at 627. It is not "babyishness" if that means that some adults are able to outgrow it, to free themselves of misestimative intuitions. Hence, the issue of responsibility depends on knowing "where to draw the line in order to exclude certain claims of inability as being too weak." H. GROSS, *supra* note 8, at 138 (criminal law).

266. One problem is that of "information overload." See, e.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) ("meaningful disclosure" is the balance between complete disclosure and the need to avoid "informational overload"); Davis, *supra* note 193, at 846-47 (discussing variables associated with understanding a document). But see Bettman, *Consumer Information Acquisition and Search Strategies*, in THE EFFECT OF INFORMATION ON CONSUMER AND MARKET BEHAVIOR 35, 41 (A. Mitchell ed. 1978) (required information processing speed, not amount, leads to overload); Grether, Schwartz & Wilde, *supra* note 156, at 280 (questioning the experimental evidence). Grether, Schwartz and Wilde reject the legal implications of "information overload" on the grounds that the consumer may satisfice (do as well as one can under the circumstances), if not optimize, thereby raising different normative questions, the answers to which do not justify intervention. See *id.* at 279, 301. But see Romano, *supra* note 181, at 314-15 (criticizing their use of "satisficing"). For "satisficing," see *infra* note 343.

Make no mistake, "miscalculation does not entail irrationality." Coleman, *supra* note

take-it-or-leave-it contracts may bury the warranty disclaimer or cognovit provision among innocuous clauses, in small print, or by means of complicated language.<sup>267</sup> Explicit contract terms may be expressed in a way which induces a favorable response.<sup>268</sup> Vague language may facilitate a naive interpretation unrealistically beneficial to the reader.<sup>269</sup> These distortions especially obstruct lucid reasoning when the morally acceptable puffing and avoidance tactics that are used in the marketplace<sup>270</sup> are combined with the additional, manipulable distortions discussed below.

Heuristic approaches, as shortcuts around refined algorithms, fall short of precise calculation. Exactitude, moreover, is beyond realistic expectation.<sup>271</sup> One finding of the studies of reasoning must be emphasized. The average person, even the trained expert, regularly

153, at 666. Economists, hiding "their own lack of understanding," often lose sight of this. See G. BECKER, *supra* note 198, at 11-13.

The proper response to the difficulties may be that, "other things being equal, the greater the risk and the more complex the information that a reasonable person would want to take into account in making a given decision, the higher the level of decision-making capacities the individual should have in order to be considered competent to make the decision." Buchanan, *Advance Directives and the Personal Identity Problem*, 17 PHIL. & PUB. AFF. 277, 283 n.10 (1988).

267. "[A]n individual is nearly always incapable of assessing with even a modicum of certainty the legal rights and duties generated by the often complex jargon of the [mass-market] document he has signed. In short, he lacks the capacity to understand the entire range of consequences of his agreement." Dauer, *supra* note 126, at 25 (emphasis omitted).

268. For example, an insurance policy may be framed as full protection against fire losses rather than only partial protection against property losses. "The preceding analysis suggests that insurance should appear more attractive when it is presented as the elimination of risk than when it is described as a reduction of risk." Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 456 (1981). Studies confirm this analysis. See *id.*

269. Once the consumer has decided to purchase the goods, cognitive dissonance may cause her to ignore facts, such as possible adverse interpretations of contract terms, that show the choice to be imprudent. Cognitive dissonance is illustrated in an experiment in which women were asked to rate the worthiness of two appliances. "They were then allowed to choose between the two appliances, which were given *wrapped* to the women. A few minutes later with the appliances still wrapped the women were asked for a second evaluation. These evaluations systematically changed in favor of the appliance that had been chosen." Akerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 309 (1982); see *infra* note 280.

270. See Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982) (nondisclosure and misrepresentation); Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397, 406-07 (1985) (discussing the impact of undisclosed information which benefits one party, referred to as "bluff and puff").

271. The reason for this is virtually self-evident:

For most problems that Man encounters in the real world, no procedure that he can carry out with his information processing equipment will enable him to discover the optimal solution, even when the notion of 'optimum' is well defined. There is no logical reason why this need be so; it is simply a rather obvious empirical fact about the world we live in—a fact about the relation between the

misestimates predictions based upon known probabilities.<sup>272</sup> When the probabilities are unknown, there are further sources of misdiscounting. Several may be mentioned.<sup>273</sup> One, attitude towards risk affects estimates of likelihoods; the optimist generally overestimates benefits and underestimates costs, and the pessimist, vice versa.<sup>274</sup> Two, risk attitude turns on whether the prospect is for gain or loss; one is usually averse to risk for gain while preferring risk to avoid loss.<sup>275</sup> Three, in estimating likelihoods, one is misled into overestimation by the saliency, vividness, or availability of known instances of the contemplated contingency, as where highway drivers become cautious after passing a bloody accident.<sup>276</sup> Four, "[i]n making a judg-

---

enormous complexity of that world and the modest information-processing capabilities with which Man is endowed.

2 H. SIMON, *supra* note 249, at 430.

272. See R. NISBETT & L. ROSS, *supra* note 153, at 140-41; Tversky & Kahneman, *Belief in the Law of Small Numbers*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23, 23-24 (D. Kahneman, P. Slovic & A. Tversky eds. 1982) (trained scientists). For a brief summary, see R. GOODIN, *supra* note 163, at 140-45 (errors in assessing probabilities), and for more detail, see R. NISBETT & L. ROSS, *supra* note 153, at 139-66.

273. Many are not mentioned. For example, the major parts of a leading collection of articles on the topic, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (D. Kahneman, P. Slovic & A. Tversky eds. 1982), that are not developed in the text are Causality and Attribution, Covariation and Control, Overconfidence, and Multistage Evaluation.

274. See F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 101-04 (1973). Related consequences may flow from whether persons are risk preferrers or risk averters. See *id.* at 104-06. Although these last two labels are more common to law and economics literature, and correlations may exist among the estimations of, for example, optimists and risk preferrers, the notions should be separated: "In theory, at any rate, the optimist can be distinguished from the risk preferrer in that optimism gives rise to exaggerated estimates of the probability of success whereas risk preferral leads to incurring hazards even when both the subjective or objective probability of success may be relatively slight." *Id.* at 104; cf. *infra* note 282 (misestimation of low and high risk events). "[M]any psychologists apparently believe that true pessimists are relatively few, and that most people tend to be overly optimistic in assessing their chances of avoiding misfortune." Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1540 (1974) (footnote omitted). For another explanation of optimism regarding one's own risks, which may differ from optimism regarding another's risks, see *infra* note 283 ("Faust attitude").

For an explanation of the meaning of risk attitude, see Kahneman & Tversky, *supra* note 31, at 160. "[N]o attitude toward risk is particularly rational. The appropriate attitude toward risk depends on the circumstances." Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105, 1130 (1982).

275. "This is a common pattern: choices involving gains are usually risk averse, and choices involving losses are often risk seeking—except when the probability of winning or losing is small." Tversky & Kahneman, *supra* note 31, at 71 (citations omitted); see also Kahneman & Tversky, *supra* note 31, at 160 (same conclusion).

276. This is generally known as the availability heuristic. See, e.g., R. NISBETT & L. ROSS, *supra* note 153, at 18-23; Nisbett, Borgida, Crandall & Reed, *Popular Induction: Information Is Not Necessarily Informative*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 101, 112-13 (D. Kahneman, P. Slovic & A. Tversky eds. 1982) (stating that when a

ment, people assess the degree to which the salient features of the object are representative of, or similar to, the features presumed to be characteristic of the category."<sup>277</sup> Five, estimations are influenced by the reference point from which an evaluation is made.<sup>278</sup> Six, people

---

person systematically investigates what the best car is, and then at a cocktail party hears a horror story about that car, a claim that the story would be put into proper statistical perspective "is either disingenuous or lacking in the most elementary self-knowledge"); Slovic, Fischhoff & Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in *id.* at 463, 470-72 ("out of sight, out of mind"). This tendency may explain why lottery and casino operators make such an ado when a patron wins big. Nisbett and Ross also refer to the idea as the "vividness criterion" whereby "[p]eople give inferential weight to information in proportion to its vividness." R. NISBETT & L. ROSS, *supra* note 153, at 62. "Vividness is defined as the emotional interest of information, the concreteness and imaginability of information, and the sensory, spatial, and temporal proximity of information." *Id.* See generally *id.* at 43-62. In introducing the "availability heuristic," Tversky and Kahneman highlight some of the factors: biases due to the retrievability of instances, biases due to the effectiveness of a search set, biases of imaginability, and illusory correlation. See Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 3, 11-14. See generally *id.* pt. IV ("Availability"). But see Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 706 n.46 (1986) (contending that "studies of residents of high crime areas show that they generally believe their own neighborhoods to be as safe or safer than the average community, regardless of the actual facts").

277. R. NISBETT & L. ROSS, *supra* note 153, at 24. See generally *id.* at 24-28; JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES pt. II (D. Kahneman, P. Slovic & A. Tversky eds. 1982) ("Representativeness"). In introducing the concept of representativeness, two researchers state that "[t]his approach to the judgment of probability leads to serious errors, because similarity, or representativeness, is not influenced by several factors that should affect judgments of probability." Tversky & Kahneman, *supra* note 276, at 4. The headings used to capsulize the factors are: insensitivity to prior probability of outcomes, insensitivity to sample size, misconceptions of chance, insensitivity to predictability, the illusion of validity, and misconceptions of regression. See *id.* at 4-11. One example of the representativeness heuristic is the "gamblers' fallacy" where, "[a]fter observing a long run of 'red' on a roulette wheel, people believe that 'black' is now due, because the occurrence of black would make the overall sequence of events more representative of the generating process than would the occurrence of another red." R. NISBETT & L. ROSS, *supra* note 153, at 25.

The "fundamental attribution error" is another phenomenon that relates to one's predictions of another's behavior, and is particularly applicable to credence goods. "As 'intuitive' psychologists, we . . . too readily infer broad personal dispositions and expect consistency in behavior or outcomes across widely disparate situations and contexts. We jump to hasty conclusions upon witnessing the behavior of our peers, overlooking the impact of relevant environmental forces and constraints." Ross & Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 129, 135; see also R. NISBETT & L. ROSS, *supra* note 153, at 30-32.

278. "The dependence of impressions, judgments and responses on a point of reference is a ubiquitous psychological phenomenon. . . . A given income may be considered lavish or inadequate depending on whether one's earnings have recently increased or decreased." Kahneman & Tversky, *supra* note 31, at 168. "Outcomes are commonly perceived as positive or negative in relation to a reference outcome that is judged neutral. Variations of the reference point can therefore determine whether a given outcome is evaluated as a gain or as a loss." Tversky & Kahneman, *supra* note 268, at 456. In another work, the authors discuss "adjustment and anchoring": "In many situations, people make estimates by starting from an initial value that is adjusted to yield the final answer. . . . [A]djustments are typically

tend to hold on to original estimations despite later undermining evidence.<sup>279</sup> Seven, an expected or preferred conclusion bends appraisals towards being supportive, as, for example, in "cognitive dissonance."<sup>280</sup> Eight, the fact that many contract terms are aimed at con-

---

insufficient. That is, different starting points yield different estimates, which are biased toward the initial values. We call this phenomenon anchoring." Tversky & Kahneman, *supra* note 276, at 14 (reference omitted). "The tendency of individuals to anchor their decisions in terms of their endowments at any point in time produces the 'endowment effect' . . . All things being equal, goods that are included in the individual's current endowment will be more highly valued than those that have not yet been acquired." Scott, *supra* note 163, at 339 (footnote omitted); see also Sunstein, *supra* note 75, at 1150-52 ("endowment effect").

279. "People tend to fix an initial probability estimate too firmly on the basis of inadequate information, and to cling to it too tenaciously in the face of conflicting evidence." R. GOODIN, *supra* note 163, at 142 ("anchoring and overconfidence"). Relatedly, "[p]eople's facility in forming causal explanations is so great that they usually will be able to explain most events and relationships they observe. These explanations may often prove so convincing that they survive even the total discrediting of the 'evidence' that prompted their invention in the first place." R. NISBETT & L. ROSS, *supra* note 153, at 186; see also *supra* note 278 (discussion of "adjustment and anchoring"). On the other hand, in terms of "framing," there is evidence "that humans can either over-respond to new evidence or ignore it, depending upon the precise experimental circumstances." 2 H. SIMON, *supra* note 249, at 430.

280. The idea of cognitive dissonance is not new. See F. BACON, *NOVUM ORGANUM* aphorisms xlv, xlix (1st ed. n.p. 1620) ("The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it."); W. GODWIN, *supra* note 227, at 82 ("Whoever ardently wishes to find a proposition true, may be expected insensibly to veer towards the opinion that suits his inclination."); 2 J. LOCKE, *supra* note 163, at 453 ("[W]hat suits our wishes, is forwardly believed, is, I suppose, what every one hath more than once experimented: and though men cannot always openly gainsay or resist the force of manifest probabilities that make against them, yet yield they not to the argument.").

We think the theory of cognitive dissonance can be fairly represented in economists' terms in three propositions: First, persons not only have preferences over states of the world, but also over their beliefs about the state of the world. Second, persons have some control over their beliefs; not only are people able to exercise some choice about belief given available information, they can also manipulate their own beliefs by selecting sources of information likely to confirm 'desired' beliefs. Third, it is of practical importance for the application of our theory that beliefs once chosen persist over time.

Akerlof & Dickens, *supra* note 269, at 307 (footnote omitted). For example, once a consumer decides to purchase goods, "information in the written contract which ordinarily would persuade him not to sign, . . . puts him in a conflict situation . . . which, in accordance with the theory of cognitive dissonance, he may resolve by discounting the disclosed information." Whitford, *supra* note 127, at 426 (footnote omitted). To reduce this phenomenon, the basic strategy proposed by the author "for enhancing the persuasive impact of seller disclosure is to manipulate the manner and timing of disclosure so that it is as unlikely as possible that consumers will reach purchase decisions without first having the disclosed information brought to their attention." *Id.* at 442. Much can be said, however, for required postcontract disclosure as well. See *id.* at 466-68. For other examples of this phenomenon, see Kassarian & Cohen, *Cognitive Dissonance and Consumer Behavior*, 8 CAL. MGMT. REV. 55 (1965) (reaction to the Surgeon General's report on smoking and health); Ross & Anderson, *supra* note 277, at 144-49 ("what happens when the holders of divergent viewpoints are allowed to examine relevant evidence").

For the distorting effects of expectations on judgment, whether or not the conclusion is

tingencies, rather than certainties, distracts the reader from paying them close attention.<sup>281</sup> Nine, people tend to overestimate the probabilities of low risk events and underestimate the probabilities of high risk events.<sup>282</sup> Ten, when the contingencies involve negative risks of low probability impacting on the estimator, the average person tends to overdiscount the risks or, effectively, to write them off.<sup>283</sup>

---

preferred, see, e.g., Jennings, Amabile & Ross, *Informal Covariation Assessment: Data-Based Versus Theory-Based Judgments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 211 (D. Kahneman, P. Slovic, & A. Tversky eds. 1982) (theory based expectations); Kahneman & Tversky, *The Simulation Heuristic*, in *id.* at 201 (expected scenarios from mental models); Kahneman & Tversky, *supra* note 149, at 510-13 (perceptual expectations); Taylor, *The Availability Bias in Social Perception and Interaction*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 190, 197 (stereotyping).

281. [W]ith respect to consumer 'contracts,' most of the boiler plate is about contingencies, things that will become important only if the product or deal breaks down. It is hard to focus attention on what should not ordinarily happen, or at least to focus as carefully as upon what will happen for sure; i.e., the price and the nature of the goods.

Leff, *supra* note 157, at 351.

282. "Low probabilities are commonly overweighted but intermediate and high probabilities are usually underweighted relative to certainty. . . . The overweighting of small probabilities can give rise to risk seeking in the positive domain and risk aversion in the negative domain . . . ." Kahneman & Tversky, *supra* note 31, at 164.

The inflated effect of small probabilities contributes to the appeal of lottery tickets and accident insurance, which are concerned with events that are highly significant and relatively improbable. The underweighting of intermediate and high probabilities, on the other hand, reduces the attractiveness of possible gains relative to sure ones. It also reduces the threat of possible losses relative to sure ones.

*Id.* at 164-66; see S. MAITAL, *supra* note 249, at 211 (misestimation and misweighting). For how insurance companies exploit this tendency, see *supra* note 268.

283. "In general, the areas where individuals do not know best for themselves are those where the choice is between immediate cost and long-range cost. In such cases, people tend to choose the immediate 'good life' and regret it later. This may be termed the 'Faust attitude.'" G. CALABRESI, *supra* note 127, at 57. "[I]n many instances it will be virtually impossible, for psychological reasons, adequately to inform individuals of the risk so that they can properly evaluate it—they will simply refuse to believe it." *Id.* at 222 n.18. "The amount we would pay to avoid a gamble with a catastrophic result gets smaller and smaller at a faster rate than the odds of the gamble diminish." G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 116-17 (1978). "[People have a] predilection to view themselves as personally immune to hazards. The great majority of individuals believe themselves to be better-than-average drivers, more likely than average to live past 80, less likely than average to be injured by tools they operate, and so forth." B. FISCHHOFF, S. LICHTENSTEIN, P. SLOVIC, S. DERBY & R. KEENEY, *supra* note 32, at 29-30 (references omitted); see Slovic, Fischhoff & Lichtenstein, *supra* note 276, at 468-70 (noting the statement "it won't happen to me"); see also F. ZIMRING & G. HAWKINS, *supra* note 274, at 102 ("magical immunity mechanism"). But see S. MAITAL, *supra* note 249, at 211 (stating that "[o]ur own subjective estimates of the risks of dying in a car crash or of a heart attack are, I believe, higher than those in mortality tables"). Notice that the "Faust attitude" runs contrary to the point that people overestimate small probabilities. Possibly this is the partial explanation: "While people may pay lip service to the concept of chance, they behave as though chance events are subject to control." Langer, *The Illusion of Control*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 280, at 231.

Eleven, the manner and situation in which the facts are presented, the frame, vitally affect the estimations.<sup>284</sup> In sum, though several of these sources of misestimation are closely aligned, others push in opposite directions, or are contradictory, indicating clearly enough

---

Finally, to follow up on Calabresi's mention of regret, *supra*: "The regret associated with a loss that was incurred by an action tends to be more intense than the regret associated with inaction or a missed opportunity." Kahneman & Tversky, *supra* note 31, at 160. For more on the quirkiness of regret, see *id.* at 170-73.

284. The summary of a leading article on the topic begins: "The psychological principles that govern the perception of decision problems and the evaluation of probabilities and outcomes produce predictable shifts of preference when the same problem is framed in different ways." Tversky & Kahneman, *supra* note 268, at 453; see J.S. COLEMAN, *THE ASYMMETRIC SOCIETY* 93 (1982); J. ELSTER, *supra* note 50, at 25 (discussing adaption and preference change); 2 H. SIMON, *supra* note 249, at 430 (noting that humans can over-respond to new evidence or ignore it). For example, "[b]ecause the value function is steeper for losses than for gains, a difference between options will loom larger when it is framed as a disadvantage of one option rather than as an advantage of the other option." Tversky & Kahneman, *supra* note 268, at 456 (referring to the credit-card industry lobbyists who wanted the reduction for cash payment referred to as a "discount," instead of the additional expense of a credit-card transaction referred to as a "surcharge"); see also Tversky & Kahneman, *supra* note 31, at 76-78 (discussing discounts and surcharges); cf. *supra* note 278 (reference points); *infra* note 318 (legal rules as a frame). With respect to the hypothetical television purchase discussed in the text: "Framing effects in consumer behavior may be particularly pronounced in situations that have a single dimension of cost (usually money) and several dimensions of benefit." Kahneman & Tversky, *supra* note 31, at 168; see also Cooper & Simon, *Economic Expectations and Plans of Firms in Relation to Short-Term Forecasting: Comment*, in 2 H. SIMON, *supra* note 249, at 372, 373 ("critical character of the form of the questions by which the expectations are solicited"). More broadly:

The value of an amount of money, as measured by its tendency to be chosen, seems to be significantly affected by such circumstances as the terms in which it is presented to the person, whether it represents a gain or an avoided loss, whether the person already has money at stake and whether or not the current choice is an obvious example of a larger set of choices.

Ainslie, *Beyond Microeconomics. Conflict Among Interests in a Multiple Self as a Determinant of Value*, in *THE MULTIPLE SELF* 133, 138 (J. Elster ed. 1986) (references omitted). Nisbett and Ross discuss "knowledge structures," some of which "may be represented as beliefs or theories," and which include "a variety of less 'propositional,' more schematic, cognitive structures," that psychologists have referred to in terms of "frames," "scripts," "nuclear scenes," "prototypes," "schemas," etc. R. NISBETT & L. ROSS, *supra* note 153, at 28 (emphasis omitted). See generally *id.* at 28-41. To conclude:

Individuals who face a decision problem and have a definite preference (i) might have a different preference in a different framing of the same problem, (ii) are normally unaware of alternative frames and of their potential effects on the relative attractiveness of options, (iii) would wish their preferences to be independent of frame, but (iv) are often uncertain how to resolve detected inconsistencies.

Tversky & Kahneman, *supra* note 268, at 457-58 (footnote omitted).

that people have a weak ability to estimate risk and uncertainty.<sup>285</sup> Even when assiduously attempted, overcoming this deficiency by adequately informing people is quite difficult.<sup>286</sup>

Thus far I have been attending to the foibles of the best of reason-

---

285. To summarize people's misestimations of the likelihood of uncertain events: "[T]he deviations of subjective from objective probability seem reliable, systematic, and difficult to eliminate. Apparently, people replace the laws of chance by heuristics which sometimes yield reasonable estimates and quite often do not." Kahneman & Tversky, *Subjective Probability: A Judgment of Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 32, 32 (D. Kahneman, P. Slovic & A. Tversky eds. 1982) (footnote omitted). "[T]he degree of fallibility [of judgments of risk] is often surprisingly great and . . . faulty estimates may be held with great confidence." Slovic, Fischhoff & Lichtenstein, *supra* note 276, at 488. Moreover, with respect to probability estimates in general, "[o]verconfidence is most extreme with tasks of great difficulty." Lichtenstein, Fischhoff & Phillips, *Calibration of Probabilities: The State of the Art to 1980*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 306, 315 (references omitted).

The conclusion to draw from this expanding understanding of human foibles is not self-evident. "We have found it extraordinarily difficult to make sense of the cognitive illusions, and this Article and others related to it have been through many previous unsuccessful versions." Edwards & von Winterfeldt, *supra* note 163, at 259. Schwartz and Wilde are ready to draw conclusions. See Schwartz & Wilde, *supra* note 160, at 1387. They argue that "firms will respond as if the consumers visiting them knew the odds perfectly" when the consumer estimations of the risks "fluctuate randomly around true values," and that markets "commonly correct for consumer pessimism" about the risks, but that "[m]arkets may correct poorly for consumer optimism." *Id.* at 1427, 1429. They then go on to examine the evidence regarding the consumer attitude towards risk, including some of the evidence discussed here. See *id.* at 1431-46. Cognitive errors, they find, are generally random, pessimistic, or irrelevant to the question of estimating risks. See *id.* at 1435-46. They base some of their findings on thought experiments positing random errors by consumers which, being unbiased, will tend to cancel out one another. See *id.* at 1437-38 ("availability heuristic"). No account is taken of the fact that the merchant may be doing its best to make sure that the errors are not random, but rather are biased in the merchant's favor. Similarly, though they observe that "negative evidence is often more vivid than positive evidence," *id.* at 1438, Madison Avenue promotes the positive while little is done to promote the negative. Evidence that consumers may "optimistically ignore the odds that products will physically harm them and demand less warranty protection against personal injuries than they should" is written off as "a shaky basis for policy judgments" requiring further evidence, as does policymaking based upon conclusions from the "availability heuristic" and the "fundamental attribution error." See *id.* at 1440-46. Indeed, once again, more experimental evidence is needed, especially in light of their insightful analysis. However, my reading of the evidence thus far, including factors they do not discuss, such as affects on preference formation, see *id.* at 1393 n.6, does not suggest that in the meantime, policymakers should be idle. For their final conclusions and recommendations, which go beyond passive waiting, see *supra* note 160.

286. See Schwartz & Driver, *supra* note 181, at 45-66 (discussing communication theories); Slovic, Fischhoff & Lichtenstein, *supra* note 276, at 478-84 (informing consumers about risks). See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 273, pt. VIII ("Corrective Procedures"). Schwartz and his co-authors are among the leading commentators rejecting oftentimes proposed intervention owing to information overload. See *supra* notes 193 & 266. Consumer satisficing will do:

One form of satisficing, which results from high costs of acquiring information, is to risk not choosing the best from the full market choice set but only the best that an unexhaustive search reveals. The unfortunate effects that this form of satisficing creates actually can be ameliorated by disclosure requirements that

ers. Everyone, obviously, is not the best, or perhaps, no one is the best at all times. The question of incompetence therefore arises. Incompetence may be a permanent, temporary, or episodic condition. Incurable madness exemplifies the first condition; minority, the second; and intoxication, the third. The emphasized marketplace distortions seemingly put people in this third category.<sup>287</sup> Episodic incompetence may be either self- or other-imposed, examples being the consumption of drugs or alcohol,<sup>288</sup> and hypnosis.<sup>289</sup> Examples

---

reduce the costs to consumers of inspecting product attributes. Those effects that remain are not amenable to solution by regulation.

Grether, Schwartz & Wilde, *supra* note 156, at 301. First, the authors fail to recognize that inspection (search) attributes are only one of the problems, and that experience and credence attributes can present even greater difficulties. See *supra* note 155 and accompanying text. Disclosure requirements could help with these attributes as well. Second, as Grether, Schwartz and Wilde note, disclosure requirements reduce consumer information problems by decreasing search costs, but consumers are subject to information overload, because all sources of information facing the consumer, including the required disclosures, must be taken into account. See Grether, Schwartz & Wilde, *supra* note 156, at 286-87. Madison Avenue will not collapse upon the adoption of disclosure requirements. Third, though I favor proper disclosure requirements, whether regulation, such as mandatory warranties, can solve the remaining affects is an open question, beyond the scope of this Article. A "second form of satisfying—task choice complexity—which results from high costs of processing information could in theory create serious problems for consumers. The experimental evidence to date, however, together with what is known about how consumers actually search, implies that consumers do relatively well when making purchase decisions." *Id.* at 301. Of course the issue, not one of "information overload" alone, should turn on the empirical findings. One of the main tasks of this Article is to refer to the vast amount of empirical work which argues against these authors' conclusion, but more experiments are certainly in order. In claiming the experiments support their view, the authors state that "the experiments show that when choice sets are small or otherwise not complex, people are good at making decisions that are in their own best interests." *Id.* at 294. How many consumer choices are not complex? See Eisenberg, *supra* note 193, at 308-09 (doubting the support of the experiments relied upon by the authors because based on simple choices); Romano, *supra* note 181, at 317 (same). Even for simple choices, to what extent are the decisions in the consumers' own best interests? To the extent they are not, is the merchant reaping an undeserved benefit? Finally, even if most consumers do a good job of choosing, Eisenberg queries whether intervention is justified to protect those who do not. See Eisenberg, *supra* note 193, at 310-11. In sum, I am questioning the authors use of the particular experimental evidence to determine that consumers are doing "relatively well," see Grether, Schwartz & Wilder, *supra* note 156, at 301, and am asking "relative to what?"

287. On the other hand, since nobody escapes these reasoning deficiencies altogether, perhaps they create a permanent "incompetence." In speaking of incapacity, Feinberg refers to permanent impairment, permanent or chronic conditions of alternating capacity and incapacity (e.g., epilepsy, drug addiction), and temporary impairment (e.g., drugged states without addiction, passions). See J. FEINBERG, *supra* note 4, at 318-22.

288. See *supra* notes 117-18.

As regards the voluntary nature of acts done when drunk or drugged, the law commonly draws a distinction . . . between cases when the agent is responsible for his condition and cases when he is not. Thus, acts due to externally administered drugs or drink are allowed to be involuntary, while those due to the self-administered are not.

A. WHITE, *supra* note 53, at 61 (footnotes omitted); see E. FARNSWORTH, *supra* note 111,

which fall clearly in neither classification of self- or other-imposed are somnambulism,<sup>290</sup> and possibly, provocation<sup>291</sup> and temptation.<sup>292</sup> While the marketplace does not trigger all these latter conditions, the last one again suggests that the effects of emotionally loaded choices, which market transactions may involve, should not be ignored.<sup>293</sup>

To summarize this Subsection, the costs and benefits of choices are not fully appreciated by even strong reasoners. The problem does not simply relate to the ability to cope with fixed facts, but it also encompasses the perceptual skills needed to fix the facts. It reaches circumstances of "neutral" choice, where the decision carries no moral weight and other persons remain disinterested. The miscalculations are not random. As inferable from the discussion above and as found empirically, the misestimation of costs is not balanced by the misestimation of benefits.<sup>294</sup> When another who is not disinterested is added to the decisionmaking context—a merchant, for example—the calculus is thrown further askew. Even if the merchant should attempt to act impartially, if for no other reason than because he is suffering the same "neutral" distortions as the consumer, he may not

---

§ 4.6 (quoting Coke: "As for a drunkard who is *voluntarius daemon*, he hath . . . no privilege thereby."); W. PROSSER & W. KEETON, *supra* note 111, § 32 (reasonableness and mental capacity).

289. See *supra* note 119.

290. See *supra* note 116.

291. See *supra* note 123.

292. See *supra* note 129.

293. Efficiency, Eisenberg claims, is not a defense:

[The bargain] principle rests in substantial part on the premises that a bargain context induces a deliberative state of mind, and that a promisor cannot complain if he is required to pay a price that at least equals his subjective utility as revealed by the terms of his promise. These premises do not hold, however, when the promisee has used techniques calculated to move the promisor out of a deliberative frame of mind and to change the promisor's utility function in a way the promisee knows or has reason to know is only transitory. There is no efficiency reason for encouraging the production of manipulative talk.

Eisenberg, *supra* note 115, at 775. To limit the scope of his "doctrine of unfair persuasion," Eisenberg would have the transitory nature of the persuasion evidenced by the buyer's reasonably prompt notice of her second thoughts. See *id.* at 777.

294. The evidence from psychologists does not support the proposition that an individual's choices maximize utility. See Herrnstein, *supra* note 84, at 576. "Indeed, the empirical study of behavior has converged on or near a law that implies, or is at least consistent with, . . . illustrations and violations of rationality, consistency, and unity." *Id.* at 578. Economists may not be attending to the evidence carefully enough: "Although Economic Man [who behaved rationally in the face of economic choices] has become extinct in most current economic theorizing, the concept of rational behavior as economic behavior survives. To the extent that behavior fails to conform to predictions of economic theory, it is labeled irrational. Much human and almost all animal behavior would seem to fall into this category." Rachlin, *Economics and Behavioral Psychology*, in *LIMITS TO ACTION: THE ALLOCATION OF INDIVIDUAL BEHAVIOR* 205, 205 (J. Staddon ed. 1980).

be able to refrain from biasing the choice in his favor. The last straw mentioned was a form of incompetence, episodic incompetence in particular such as mental states in the marketplace verging on euphoria, which muddles the organ of reason.

## 2. SENSE

For one to be responsible for her acts, she must be duly sensible, that is, have adequate normative judgment.<sup>295</sup> While reason looks to the realm of facts, sense looks to the realm of values, broadly speaking,<sup>296</sup> including preferences, wants, and tastes.<sup>297</sup> The incapability to choose or hold socially minimal values,<sup>298</sup> or a sufficiently consistent

---

295. Recall that "sense" and its cognates are used in an unusual manner. Regarding normative judgment, the word "adequate" must be emphasized. "Perfectly rational men can have 'unreasonable desires' as judged by other perfectly rational men, just as perfectly rational men (e.g. great philosophers) can hold 'unreasonable beliefs' or doctrines as judged by other perfectly rational men. Particular unreasonableness, then, can hardly be strong evidence of general irrationality." J. FEINBERG, *supra* note 12, at 121 n.9; *see also* J. FEINBERG, *supra* note 4, at 106-13 (relation between reasonableness, rationality and voluntariness).

296. I agree with Wolff who follows R. Perry in defining "'a value' as 'any object of interest.'" R. WOLFF, *supra* note 11, at 168 (without citation).

297. Kronman uses the term "judgment" for this idea: "Judgment, as I am using the term, involves a critical reflection on one's interests and desires and hence presupposes some distance from them; indeed, we associate judgment with sobriety and dispassion—with states of relative desirelessness—and think of judgment as requiring disengagement from the immediacy of desire." Kronman, *supra* note 127, at 789. "To deliberate about means we must first have deliberated about ends, and only a person who shows skill in his choice of ends can be said to possess judgment." *Id.* at 790 (footnote omitted). Elster, on the other hand, reserves "judgment" for capacity with respect to facts (my idea of "reason"), and "autonomy" for desires. *See* J. ELSTER, *supra* note 50, at 1-2, 16, 20-21.

One should not assume that sense is totally independent of the other qualities of the responsible actor, such as reason, knowledge and foresight. With respect to reason, *see supra* note 250; with respect to knowledge, *see, e.g.,* Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles*, in PATERNALISM 35, 40 (R. Sartorius ed. 1983) ("[I]gnorance may induce people to value a certain experience because they believe it will lead to their attainment of other ends. Alcoholics, for example, may value intoxication because they think it will enhance their social acceptance."); with respect to foresight, *see, e.g.,* Kronman, *supra* note 127, at 789 ("Judgment is, I believe, best thought of as the faculty of moral imagination, the capacity to form an imaginative conception of the moral consequences of a proposed course of action and to anticipate its effect on one's character.").

298. Rawls discusses "the fundamental aspect of moral personality in the theory of justice" and concludes: "The capacity for a sense of justice is, then, necessary and sufficient for the duty of justice to be owed to a person—that is, for a person to be regarded as holding an initial position of equal liberty." Rawls, *The Sense of Justice*, in MORAL CONCEPTS 120, 140 (J. Feinberg ed. 1969); *see also* Rawls, *supra* note 80, at 16 (stating that the "two powers [of moral personality] are the capacity for a sense of right and justice (the capacity to honor fair terms of cooperation and thus to be reasonable), and the capacity for a conception of the good (and thus to be rational)"). Under the law, one must have the capacity for desires minimally intelligible and correct. *See* M. MOORE, *supra* note 3, at 101-04.

Irrelevant to this discussion is whether sense is informed by "passion," as Hume would have it, or, at least partially, by reason or rationality. *See* D. HUME, *supra* note 34, at 416.

or coherent congeries of values,<sup>299</sup> disqualifies one from fully participating in the usual activities.

Ours is not a normatively homogeneous society. We are pluralistic in our ethical and political beliefs as well as in our aesthetic and other tastes. This is considered a strength. The preservation and promotion of this state of affairs by means of governmental value neutrality was a motivation and justification for the establishment of our political structure.<sup>300</sup> Still, society imposes normative standards. At

---

"The rationality the law supposes persons to have is the rationality of will and reason, not that of the passions." M. MOORE, *supra* note 3, at 107. Moral theory disagrees. See *id.* Some theorists consider the ability to "distance" oneself from the immediacy of the passions as a formal requirement of sense and a better way to judge what is in one's real interests. See R. BEINER, *POLITICAL JUDGMENT* 104-05 (1983) ("distancing as a formal requirement of judgment"); *supra* note 297 (Kronman's discussion of "judgment"). For doubts about the separation of reason and sense, see *supra* note 250.

299. "A man is a person insofar as there is a central clearing-house where his interests thus take account of one another, and are allowed to proceed only when the demands of other interests are consulted, and wholly or partially met." R. PERRY, *supra* note 8, at 62-63. The law requires the capacity for desires with some consistency, transitivity, and consistency and transitivity over time. See M. MOORE, *supra* note 3, at 102-03. Economists have difficulty coping theoretically with the intractability of preferences. See, e.g., Rosenberg, *Prospects for the Elimination of Tastes from Economics and Ethics*, 2:2 SOC. PHIL. & POL'Y 48 (Spring 1985); Sen, *supra* note 10, at 323-24. Under the theory of revealed preferences, they traditionally take tastes as a given, outside the scope of economics. See T. SCITOVSKY, *supra* note 98, at vii; *infra* note 329. In recognition of these problems, the demands for consistency and coherence are deliberately kept nebulous with the qualifier "sufficiently." There is a practical difficulty, or impossibility, or even undesirability in the maintenance of total consistency. First, factual settings, including the social system and the marketplace, have an unfortunate habit of intruding upon preference orderings. See *infra* note 329. Second, even if the ordering could be determined with exactitude, it is quite human to revise values regularly (although perhaps not basic values). See Schelling, *supra* note 96, at 5 ("We ignore too many important purposive behaviors if we insist on treating the consumer as having only values and preferences that are uniform over time, even short periods of time."). Third, "irrational" values are, to some extent, a fact of life, even perhaps a social virtue. See Friedman, *Value Judgments in Economics*, in *HUMAN VALUES AND ECONOMIC POLICY* 85, 88 (S. Hook ed. 1967) (J. Clark is quoted without citation: "an irrational passion for dispassionate rationality takes the joy out of life."); Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99, 104 (1983) ("A good society need not be hyperrational; a good society may want to permit (and even encourage) sympathetic response to a variety of nonrational preferences or feelings."); Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 75, 118 (1973) ("If we are not agents of the universal satisfaction system, we are not primarily janitors of any system of values, even our own: very often, we just act, as a possibly confused result of the situation in which we are engaged. That, I suspect, is very often an exceedingly good thing."). Fourth, we distrust an excessive pursuit of good reasons for one's decisions. See Kuklin, *supra* note 194, at 852 n.22. See generally de Sousa, *Rational Homunculi*, in *THE IDENTITIES OF PERSONS* 217 (A. Rorty ed. 1976) (discussion of the rationality of inconsistency).

300. Rawls insists upon this pluralism as a value that must be preserved in a just society; no particular conception of the good is to be presupposed. See J. RAWLS, *supra* note 11, at 94, 325-32. The importance of value neutrality in the political system is emphasized by other liberal political philosophers as well. See Kuklin, *supra* note 194, at 851 n.18; *supra* note 80. In terms of preferences, "[s]ome of the most well-established conceptions of public law view

some point, the law prohibits a person from realizing even entirely self-regarding values having no direct impact on others, such as certain sexual practices.<sup>301</sup> At another point further from the norm, the law declares the pursuit of some values to be unacceptable, intolerable, and irresponsible.<sup>302</sup> For example, one may not sell oneself into bondage even when slavery is the only expedient available to raise the capital needed to save the life of a family member.<sup>303</sup> For another

---

the state as a mechanism for aggregating private preferences. Shaping of preferences, or the rejection of particular preferences as distorted, tends to be treated as at best misguided and more likely tyrannical." Sunstein, *supra* note 75, at 1129 (footnote omitted). This principle of neutrality has been criticized as permitting chosen ends "no matter how pointless, harmful, or self-destructive." Gibson, *supra* note 11, at 200. Furthermore, value neutrality may require value nonneutrality, i.e., a theory about the good. See R. DWORKIN, *supra* note 26, at 191-92. Finally, it may be doubted whether value neutrality is even conceivable. "My argument against the possibility of the state's total neutrality falls into two parts: firstly, I shall argue that wants depend on the social environment and then secondly I shall argue that the social environment depends on the state." B. BARRY, *supra* note 1, at 75. The impossibility of neutrality is one of the arguments against liberalism. See M. SANDEL, *supra* note 64, at 11-13 ("the sociological objection"). Rawls grapples with this criticism by differentiating among the various definitions of "neutrality." See Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 260-63 (1988).

301. See Sunstein, *supra* note 75, at 1129-31. Whether or where society ought to impose this limitation is hotly debated. For the Hart-Devlin debate relating to this point, see P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963). Nevertheless, most commentators agree that private ends are to be questioned by society with reluctance. See, e.g., Bice, *supra* note 11, at 1; Gibson, *supra* note 11, at 209.

302. This position presents a real risk of paternalism.

Indeed, the dangers involved in disregarding individuals' personal values and in falsely branding their behavior involuntary are closely linked. In the absence of independent criteria [sic] for decision-making disability, the paternalist may try to determine disability by seeing whether the individual is rational, i.e., whether he or she competently pursues what is valuable. An absence of rationality may be reason to suspect the presence of involuntariness and hence grounds for paternalism. The problem, however, is that this test for rationality—whether the chosen means are appropriate for the individual's personal ends—is not fully adequate. Factors that deprive an individual of autonomy—such as compulsion or constraint—not only affect a person's ability to calculate means to ends but also induce ends that are in some sense foreign.

Wikler, *supra* note 297, at 40.

303. J.S. Mill would disallow self-chosen slavery since "[t]he principle of freedom cannot require that he should be free not to be free." J.S. MILL, *supra* note 2, at 213. On the other hand, Feinberg argues that although there may be a presumption that such a person is "incompetent, unfree, or misinformed," the choice may be perfectly rational, depending on the motivation. See J. FEINBERG, *supra* note 12, at 121-22; see also Kronman, *supra* note 127, at 777 (insisting that "the basic prohibition against self-enslavement is suspect from a purely economic point of view"). Rationality aside, "Plato pointed out that it is paradoxical to assert that men are free to act but not free to give up their freedom. The conflict here is between freedom of choice and freedom to change one's choices." S. GORDON, *WELFARE, JUSTICE, AND FREEDOM* 132-33 (1980). The problem is demonstrating that the "choice is fully informed, well considered and uncoerced, that is to say, fully voluntary." J. FEINBERG, *Voluntary Euthanasia and the Inalienable Right to Life*, in *RIGHTS, JUSTICE, AND THE*

example, though reasonable people vary in their attitude toward risk,<sup>304</sup> at some point, one's refusal or willingness to take risks, for example, to play "chicken" with a locomotive, will be declared legally out of bounds.

The limitations to chosen values discussed above occur at the penumbra of legally responsible sensibility. Related problems arise at the core. To demonstrate one of them, the concept of discounting is unpacked.

The complete costs and benefits of an action are rarely, if ever, instantaneously realized. They flow over time. The payoff one reaps tomorrow may be of more or less personal value than the same payoff reaped today. One must discount the future impact, positively or negatively, to determine its current value.<sup>305</sup> For the present value of future monetary effects, obvious places to look for the (positive) dis-

---

BOUNDS OF LIBERTY 221, 251 (1980) (emphasis omitted); see also Simmons, *Inalienable Rights and Locke's 'Treatises'*, 12 PHIL. & PUB. AFF. 175, 203-04 (1983) (stating that "[s]urely it would be very difficult to think of any right whose transfer was necessarily a sign of insanity or loss of control"). There are several possible justifications for disallowing self-chosen slavery. First, the self-chooser of slavery must be irrational. Because the chooser does not know what is good for himself, society, acting paternalistically, will tell him. Second, the agreement cannot be enforced because, in the long run, "this would be to render the whole national character cold and hard." J. FEINBERG, *supra* note 12, at 124. Third, society may simply be imposing a moralism, say, that slavery is just plain bad and we will not allow it. Fourth (Feinberg's favored defense), the legal machinery necessary to test the voluntariness of such an agreement "would be so cumbersome and expensive as to be impractical." *Id.* Mill, strongly antipaternalistic and antimoralistic, would object to several of these express defenses, although Feinberg accuses him of being paternalistic in his own position. See *id.* at 122. Fifth, society may collectively self-paternalize, that is, each individual may vote for the prohibition of this kind of contract to protect herself from being tempted to enter into one.

304. See, e.g., A. POLINSKY, *supra* note 143, at 51-53, 77-80; R. POSNER, *supra* note 228, at 75-76, 127-28, 136-37, 170, 343, 347-48.

305. Elster outlines the related irrationalities:

Time preferences typically involve *discounting* the future, i.e. attaching less weight to future consumption or utility than to present. Such preferences are subject to two kinds of irrationality, that we may call respectively *incontinence* (or more neutrally *impatience*) and *inconsistency*. Incontinence involves discounting the future over and above what can be justified by mortality statistics and similar considerations. . . . With inconsistent time preferences one is never able to stick to past plans. . . .

In addition to incontinence and temporal inconsistency, time also introduces the danger of *inconstancy*, or irrational preference change (including change of time preferences).

J. ELSTER, *supra* note 50, at 7-8 (footnote omitted). Pointing to similar conceptions, Zimring and Hawkins speak of the "present-oriented" or "present-dwellers" and the "future-oriented" or "future-dwellers." See F. ZIMRING & G. HAWKINS, *supra* note 274, at 98-101. Sen questions the "irrationalities": "In general, there is no reason to presume that the future interests as assessed today will coincide with those interests as assessed in the future." Sen, *supra* note 10, at 322 n.9.

count rate are the investment markets.<sup>306</sup> For the present value of future nonmonetary income, such as personal gratification, the discount rate is inevitably subjective. Reasonable (that is, sensible) persons differ on the felt rate. Some argue that it is juvenile or irrational to discount at all; pleasure tomorrow is exactly equal to the same pleasure today.<sup>307</sup> Once again, at some point the law declares an excessive discount rate to be irresponsible.<sup>308</sup>

Among the reasons a minor, for example, is said to be incompe-

306. See S. GORDON, *supra* note 303, at 71; S. MAITAL, *supra* note 249, at 57.

307. "It is widely, but far from universally, agreed that for an individual the very fact of having time preferences, over and above what is justified by the fact that we are mortal, is irrational and perhaps immoral as well." J. ELSTER, *supra* note 13, at 66 (footnote omitted). For a discussion of time preferences, see *id.* at 66-71. "In the case of the individual, pure time preference is irrational: it means that he is not viewing all moments as equally parts of one life." J. RAWLS, *supra* note 11, at 295; see R. GOODIN, *supra* note 163, at 162-63; H. SIDGWICK, *THE METHODS OF ETHICS* 124 n.1 (7th ed. 1907); B. SPINOZA, *THE ETHICS* pt. IV, prop. LXII (R. Elwes trans. 1883) (1st ed. Amsterdam 1677) ("In so far as the mind conceives a thing under the dictates of reason, it is affected equally, whether the idea be of a thing future, past or present."). See generally D. PARFIT, *REASONS AND PERSONS* 3-4, 149-186, 317-18 (1984) (self-interest theory). Economists traditionally find pure time preference irrational. See S. MAITAL, *supra* note 249, at 77-78. But Spinoza, as did Locke and most modern commentators, knew the limits of the dictates of reason: "Towards something future, which we conceive as close at hand, we are affected more intensely, than if we conceive that its time for existence is separated from the present by a longer interval . . ." B. SPINOZA, *supra*, pt. IV, prop. X; see also 1 J. LOCKE, *supra* note 163, at 354-60. Sociobiologists may not know the limits: "[A]s children grow older, and presumably develop the power to reason, their discount functions become less steep. Their economic horizon recedes further into the distance and they start to plan ahead. By extrapolation, a completely rational person might have a horizontal discount function. A benefit in the future would be worth as much as one in the present." Rachlin, *supra* note 294, at 209. Discounting, in the end, has a role. "Take an extreme case: the good Dr. Jekyll knows that by midnight he will turn into the vicious Mr. Hyde. Does prudence call for Jekyll's having an 'equal and impartial' regard for this monster?" F. SCHICK, *supra* note 11, at 84. A social choice involving discounting raises comparable issues, but is more complicated by the question of intergenerational equity. See generally D. PARFIT, *supra*, at 357, 480-86; Burness, Cummings, Gorman & Lansford, *Practically Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting*, 23 NAT. RESOURCES J. 289, 293-95 (1983).

308. "Animals and children have notoriously steep discount functions. . . . Children will choose one candy bar today in preference to two or three tomorrow." Rachlin, *supra* note 294, at 209; see also Ainslie, *supra* note 32, at 464-70 (selective review of social science literature). Perhaps because the law is ambivalent about high discount rates among adults, the spendthrift is not incompetent. But see *infra* note 311.

A person may have a negative discount rate. See R. BRANDT, *supra* note 11, at 79 (stating that "some people save so much of their income in order to provide for their old age that earlier parts of life are neglected"). One with a high negative rate, say, the religious ascetic who denies herself present gratification in favor of future reward, is a heroine, not an incompetent. Yet, if she starves herself to death, or her motivation is other than a "respectable" moral or religious conviction, her competence is questioned. Cf. Rachlin, *supra* note 294, at 209 ("The person with a horizontal discount function would thus rarely consume anything; he would be a miser. It is true that there are people who behave in this way, but rarely is their behavior considered rational.").

tent is because he "has not yet attained that state or disposition of mind in which the prospect of evils so distant as those which are held forth by the law, has the effect of influencing his conduct."<sup>309</sup> Normal adults also choose, at least in some circumstances, enormous discount rates.<sup>310</sup> Despite this, the doctrine of unconscionability seemingly manifests the concern to protect the uneducated from contracts reflective of an undue discount rate.<sup>311</sup>

Related to ordinary exponential discounting is the phenomenon of crossover preferences or myopic time discounting.<sup>312</sup> An example

309. J. BENTHAM, *supra* note 1, at 161; see also G. Dworkin, *supra* note 179, at 28-29 (justifying paternalism). The linkage between overdiscounting and foreseeability is evident from comparing the discussion accompanying *supra* note 226. Bentham's position that infants, as well as the insane and the intoxicated, are "unmeet for punishment," is based upon the proposition that for them "punishment must be inefficacious." The editors of his tract criticize Bentham's utilitarian rationale for failure to take into account possible overall deterrent advantages of punishing even the incapable and for ignoring the justice argument, deterrence notwithstanding, for excusing them. See J. BENTHAM, *supra* note 1, at lxii-lxiv; see also H. GROSS, *supra* note 8, at 151 (For young offenders, "our revised judgments of [greater] responsibility" conflict with "humane considerations.").

310. "For instance, both normal and impulsive human subjects, reporting how long they would wait to get double a hypothetical prize, usually generate answers reflecting annual discount rates in the billions, trillions, or quadrillions of per cent . . ." Ainslie, *supra* note 284, at 138. Scitovsky posits factors affecting tradeoffs involving discounting, such as between some immediate comforts and future pleasures (want satisfactions), which include age, affluence, habit and positive reinforcement. See T. SCITOVSKY, *supra* note 98, at 72-75; see also S. MAITAL, *supra* note 249, at 59 (age, circumstances, and socialization). Steep discounting may be defended on the grounds that the individual knows that her values will change as time goes on. See Parfit, *Lewis, Perry, and What Matters*, in *THE IDENTITIES OF PERSONS* 91, 99 (A. Rorty ed. 1976). On the other hand, the rational person, realizing her preferences might change, would hold resources in reserve to meet potential, unanticipated preferences. See Zeckhauser, *Resource Allocation with Probabilistic Individual Preferences*, 59 AM. ECON. REV. (Papers & Proc.) 546 (1969).

311. One must read between the lines, perhaps because the concept of discounting is not well-known to the courts. An example is the famous case of *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966). There, though the defendant-husband was about to lose his job, the Spanish speaking defendants bought a refrigerator-freezer for a total price, including credit charges, of over three times the seller's cost, the inducement being that they would earn commissions from similar purchases by neighbors and friends. The court found the contract unconscionable because, along with being in a language foreign to the defendants, they "were handicapped by a lack of knowledge . . . as to the commercial situation . . ." *Id.* at 27, 274 N.Y.S.2d at 759.

Maital reports of one study that "reveals [subjective] interest rates ranging from about 22 percent for educated, high-income family heads to 60 percent for less-educated, low-income family heads." S. MAITAL, *supra* note 249, at 59. See generally *id.* at 54-81. There may be good reason for what appears to be a high discount rate among the poor: "Low-income families face vastly higher effective interest rates than do average Americans; in some cases, when they simply cannot get access to funds, they are confronted by an infinite interest rate." A. OKUN, *EQUALITY AND EFFICIENCY* 80 (1975). Consequently, "many of the poor act like there's no tomorrow because their main problem is surviving today." *Id.*

312. See, e.g., Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUD. 166 (1955-56).

is the person with a toothache who makes a dental appointment, only to skip the appointment after contemplating the discomfort of the impending treatment in comparison to the continuing toothache. The preferences change, irrationally in terms of pure discounting.<sup>313</sup>

Environment informs preferences.<sup>314</sup> The good, the just, and the beautiful are partially products of nurture.<sup>315</sup> Thank goodness.

The problem here arises from the fact that people sometimes respond too emphatically to the short-term costs of engaging in an activity that may turn out to be exceptionally rewarding. More specifically, one might say that myopia is at work when four conditions are met: (1) the short-term costs of beginning an activity are very high; (2) those costs decrease sharply over time; (3) the long-term benefits of engaging in the activity are also very high; and (4) the benefits of the activity increase as one becomes acclimated to the activity.

Sunstein, *supra* note 75, at 1164. "Ulysses knew about myopic time discounting, hence had himself lashed to the mast (and his crew's ears plugged with wax) while the risks of approaching the song of the sirens still outweighed the temptations." Herrnstein, *supra* note 84, at 571. For some of the complexities of the theory of myopia, see Elster, *supra* note 138, at 237-38. The problem may be one of impulsive behavior. See Ainslie, *supra* note 32, at 463. Along with myopia, Sunstein categorizes addiction and habit as endogenous preferences produced by the very act of consumption. See Sunstein, *supra* note 75, at 1158-66. "The central point here is that private preference structures suffer from what might be called an intrapersonal collective action problem: the short-term costs of engaging in or stopping an activity are overvalued in comparison with the long-term gains." *Id.* at 1158.

313. "If going to the dentist seems like a good idea at one time, it should, other things equal, seem like a good idea at other times, if time discounting is exponential. That, rationally, is how it should be, and that is why rational choice theory assumes exponential time discounting." Herrnstein, *supra* note 84, at 572. If a person knows her preferences will change myopically, she has two strategies: first, to irrevocably precommit or penalize her future self ("the strategy of precommitment"), and second, "to select the present action which will be best in the light of future [self]-disobedience ('the strategy of consistent planning')." Strotz, *supra* note 312, at 173. Sunstein argues "that government action to counteract myopia should be quite rare" because overcoming myopia can be a burdensome and lengthy process, subject to political manipulation, and "confinement of the principle will be difficult." Sunstein, *supra* note 75, at 1165-66. For the effects of time discounting and related problems of criminal deterrence, see J. WILSON & R. HERRNSTEIN, *supra* note 32, at 49-56; Ainslie, *supra* note 32, at 489-92.

314. "Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think." J. HURST, *JUSTICE HOLMES ON LEGAL HISTORY* 31-32 (1964) (quoting Holmes); see H. SIMON, *supra* note 255, at 75 ("Some of our values and knowledge were sucked in with our mother's milk; others were taken, often quite uncritically, from our social environment. Still others, perhaps, were acquired by reacting against that environment, but few indeed, surely, in complete independence of it."). One must be careful about overemphasizing the exogenous source of preference formation. See Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 159, 168-69 (A. Sen & B. Williams eds. 1982) ("[A]s moral persons citizens have some part in forming and cultivating their final ends and preferences. . . . [One must not] presuppose that citizens' preferences are beyond their control as propensities or cravings which simply happen.").

315. "The dependence of wants on the social environment is a commonplace of sociology, which could almost be defined as the intellectual consequences of taking it seriously." B. BARRY, *supra* note 1, at 75; see also Flathman, *Convention, Contractarianism, and Freedom*, 98 *ETHICS* 91, 95 (1987) ("The desires and preferences that I *can* form are limited by the concepts

Chaos would reign if each individual formed normative convictions independently of general societal views.<sup>316</sup> Without substantial conformity to social mores, the operation of a workable society is impossible.<sup>317</sup> The strong arm of the government cannot be everywhere.<sup>318</sup> The breakdown occurring with social anomie is offered in support of this proposition.<sup>319</sup> Excessive conformity, on the other hand, must also be avoided. When individuals are unable to escape social rigidities, they can hardly be said to be their own persons, responsible for their choices.<sup>320</sup>

---

'desire' and 'preference,' and these limits are given by beliefs and understandings that are socially established, and are *mine* only insofar as they are also *ours*.'"); Hampshire, *Morality and Convention*, in *UTILITARIANISM AND BEYOND* 145, 153-54 (A. Sen & B. Williams eds. 1982) (moral dispositions). Barry's position that the social environment influences desire leads him to the conclusion that government cannot avoid influencing desire, since "the social environment depends on the state." B. BARRY, *supra* note 1, at 75.

Nature's role in value formation cannot be ignored. The relative effects of nature and nurture are being debated between those subscribing to the theories of cognitive development and social learning. See, e.g., *Symposium on Moral Development*, 92 *ETHICS* 407 (1982).

316. In a nutshell, "[t]he problem seems to be that the undetermined agent is so free as to be free from moral reasons." Wolf, *Asymmetrical Freedom*, in *MORAL RESPONSIBILITY* 225, 227 (J. Fischer ed. 1986).

317. Rawls accounts for this in his proposed just society. "It has always been recognized that the social system shapes the desires and aspirations of its members; it determines in large part the kind of persons they want to be as well as the kind of persons they are." Rawls, *A Well-Ordered Society*, in *PHILOSOPHY, POLITICS AND SOCIETY* 6, 9 (P. Laslett & J. Fishkin eds. 5th series 1979). This fact must be accommodated in the basic structure of the well-ordered society. See *id.* at 10. Although Rawls supports government neutrality in conceptions of the good, see *supra* note 300, he implies that persons "are treated unjustly if they are caused to develop preferences that prevent them from acquiring equitable shares of primary goods," that is, "things it is rational for us to want whatever else we want." Sher, *supra* note 93, at 39.

Liberalism has come under attack recently by "communitarian" political theorists, see *supra* note 64, who claim that the value neutrality and individualism of liberalism ignore the necessity and importance of cultural traditions and personalities informed by the social milieu. See, e.g., A. MACINTYRE, *supra* note 39; M. SANDEL, *supra* note 64; R. UNGER, *KNOWLEDGE AND POLITICS* (1975); M. WALZER, *SPHERES OF JUSTICE* (1983); cf. Gutmann, *supra* note 64, at 308 (calling for a synthesis with liberalism).

318. Though the executive branch cannot be everywhere, the legislative branch, by creating a frame of legal rules, in some ways is everywhere:

Preferences that depend on legal rules fall into three principal categories: adaptive preferences, or preferences that result from the lack of available opportunities; endowment effects, or preferences that are attributable to ownership or nonownership; and ideology, amounting to interest-induced beliefs on the part of the well-off and adaptive preferences on the part of the badly off. All of these effects might be regarded as cognitive defects to which the legal system should and sometimes does respond.

Sunstein, *supra* note 75, at 1146. See generally *id.* at 1146-58.

319. See *supra* note 134 (anomie).

320. Although this problem is often put in terms of autonomy, see *supra* note 91, its effects on sensibility should be emphasized. See J. ELSTER, *supra* note 50, at 23-24 ("[C]onformity may bring about desires that are ethically acceptable, yet lacking autonomy."); J. ELSTER, *supra* note 13, at 149 ("[W]e might want to call irrational the 'inverse dictator' whose

That values, predispositions, and beliefs affect one's perception of facts has long been known.<sup>321</sup> A modern label for one effect has already been mentioned: "cognitive dissonance."<sup>322</sup> Preferences also reflect these factors.<sup>323</sup> The effects may be exploited against oneself and others.<sup>324</sup> That tastes may be influenced is not lost to those in the marketplace, such as designers of fashionable goods. Madison Avenue knows this.<sup>325</sup> Who doesn't?<sup>326</sup> Merchants, for example, may

---

preferences always coincide with the social preferences, not because he is able to dictate them, but rather the other way around."); Nonet, *supra* note 66, at 274 ("Whether it is a direct response to oppression, insecurity, or group needs or a more immediate reflection of established value orientations, whether a product of culture or society, this captivity prevents persons from rationally assessing their special interests and developing distinct moral aspirations."). Unger states this position in stronger terms, in terms of imposed distortions rather than merely inherent ones: "Because of the fact of domination, moral agreement is often little more than a testimonial to the allocation of power in the group." R. UNGER, *supra* note 317, at 243. In order to counter this domination, "one must be able to distinguish the justified and the unjustified forms of power, and to trace the true limits of autonomy." *Id.*

321. Included are "subjective facts" such as the perception of pain. See Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation*, 1962 DUKE L.J. 344, 353-60 (the "nature of pain"); Peck, *supra* note 32, at 1356-68.

322. See *supra* note 280.

323. "What one wants, or is capable of wanting, is itself a function of numerous social forces, and importantly rests on a sense of what is possible. Many a potential desire fails to become an express preference because the thought is absent that it would ever be possible to achieve it." Williams, *supra* note 299, at 147. "There is considerable evidence that those with limited life prospects learn not to value what they do not have. In coming to expect failure, they quickly learn not to value success. It is in this way that the 'stacked deck' has coercively influenced the development of their preferences." J. FISHKIN, TYRANNY AND LEGITIMACY 39-40 (1979) (footnote omitted). Elster discusses at book length "the idea that the preferences underlying a choice may be shaped by the constraints [inherent to an action]." J. ELSTER, *supra* note 50, at vii. As the title *Sour Grapes* suggests, "people tend to adjust their aspirations to their possibilities." *Id.* at 109 ("adaptive preference formation"). Furthermore, "[t]he opposite phenomenon of sour grapes is clearly that of 'forbidden fruit is sweet,' which I shall call counteradaptive preference formation." Elster, *Sour Grapes—Utilitarianism and the Genesis of Wants*, in UTILITARIANISM AND BEYOND 219, 220 (A. Sen & B. Williams eds. 1982) (footnote omitted). Wants shaped by adaptive preference formation are not autonomous. See *id.* at 228; see also *infra* note 329.

324. "Insofar as man is wise or good, his 'character' is acquired chiefly by posing as better than he is, until a part of his pretense becomes a habit." F. KNIGHT, *The Playful Act: The Possibilities and Limitations of Collective Rationality*, in FREEDOM AND REFORM 335, 341 (1947). People keep up this pretense partly because they do not know what they want. "The principal thing that men actually want is to find out what they do really want; and the bulk of what they want, or think they want, is wanted because they think that in some sense they 'ought' to do so, that it is 'right.'" F. KNIGHT, *Fact and Value in Social Science*, in *id.* at 225, 234.

325. "Some advertisements are primarily devoted to spreading knowledge, while others are aimed at changing preferences or prejudices by creating pleasant, although logically irrelevant, associations with their products." G. BECKER, THE ECONOMICS OF DISCRIMINATION 17 n.5 (2d ed. 1971); see also J. SCHUMPETER, *supra* note 60, at 257-58 (Advertising, not appealing to reason alone, is so influential that producers often seem to dictate to consumers.); Wikler, *supra* note 297, at 40 ("Advertisements . . . may instill desires to consume certain substances whose pleasures would ordinarily be considered trifling."). "Consumption, especially the

engage in "psychological pricing" by raising the price.<sup>327</sup> They may create a frame designed to alter one's preferences.<sup>328</sup> Finally, even from a neutral viewpoint, "[p]erhaps the most potentially serious criticism . . . of the efficiency argument for the market . . . is the Marxist objection that the market process itself tends to generate 'distorted' preferences whose satisfaction does not promote the individual's well-being."<sup>329</sup>

consumption of new and (therefore) better goods is identified, more or less strongly, with familial love, sexual satisfaction, youth, health, social status, whatever primary good the advertiser can plausibly or implausibly connect with his product." Kaysen, *The Business Corporation as a Creator of Values*, in HUMAN VALUES AND ECONOMIC POLICY 209, 213 (S. Hook ed. 1967). These may not be deceitful values. "On the contrary, what is infinitely sadder is that, for the most part, they ['the elite who shape the market'] share these tastes, and are in this sense honestly expressing their own values in what they say and sell." *Id.* Nor are the values necessarily unsensible. "Status seeking, the wish to belong, the asserting and cementing of one's membership in the group is a deep-seated and very natural drive whose origin and universality go beyond man and are explained by that most basic of drives, the desire to survive." T. SCITOVSKY, *supra* note 98, at 115.

326. See, e.g., J. GALBRAITH, *THE AFFLUENT SOCIETY* 155-58 (1958) ("None of this is novel. All would be regarded as elementary by the most retarded student in the nation's most primitive school of business administration."); H. MARGOLIS, *supra* note 10, at 13 ("No one doubts that custom, fashion, and so on make the tastes of individuals in a society depend on as well as influence the social environment."); McPherson, *Mill's Moral Theory and the Problem of Preference Change*, 92 ETHICS 252, 252 (1982) ("Neoclassical welfare economics is a direct descendant of Benthamite utilitarianism and it has been roundly and perennially criticized for failing to take into account the process of preference formation and the endogeneity of preferences to the economic system."). But see T. SCITOVSKY, *supra* note 98, at 204-05 ("Advertising seems to have much influence on brand preference but little on commodity preference . . ."); Romano, *supra* note 181, at 319 ("[M]arketing experts frequently stress that firms cannot create consumer demand by advertising.").

327. "Psychological pricing" means this:

An interesting group of experiments . . . on consumer behavior shows that contrary to 'rational' expectations, fewer people sent for a premium when it was offered free than when fifty cents had to be paid. The finding is paralleled by the occasional observation of increased sales when prices are raised. This unusual, but by no means rare, phenomenon which seemingly contradicts the law of demand is called, by marketing experts, 'psychological pricing.'

Rachlin, *supra* note 294, at 215. Whether this is a matter of "sense" or "reason" is not clear. See also *supra* note 40.

328. For "framing," see *supra* note 284. See also L. HAWORTH, *supra* note 11, at 197-99 (differentiating advertising and public relations that invade one's autonomy from those that do not).

329. A. BUCHANAN, *supra* note 143, at 27 (footnote omitted). In overstated terms: "[The market] is not sufficient [for mutual gain] because market exchanges often create not only satisfactions, but also the needs they satisfy, and anything that gives rise to both a need and its satisfaction is of little or no use to anyone." T. SCITOVSKY, *supra* note 98, at 133; see also *id.* at 7 (noting that "the doctrine of consumer sovereignty[ ] is a gross oversimplification, especially in our age of mass production, when almost nothing gets produced that cannot be produced in the thousands"). "Individuals do not exist, as what they are, apart from the jobs they do and the services and commodities they produce. Their wants grow out of their daily lives which in turn rest on the work by means of which the system is reproduced and there is no such thing as abstract choice." M. HOLLIS & E. NELL, *supra* note 151, at 265; see also J. GALBRAITH, *supra*

In general, the full range of the sources of distortion, both inherent and imposed, operate on sensibility as well as on the other qualities of the responsible actor. Until recently, social scientists had not carefully studied preference processing in situations of choice.<sup>330</sup> Literature and the law did not wait.<sup>331</sup> When the underlying causes or overt effects of interferences with preference formation reach a threshold, the law will intervene.<sup>332</sup>

To conclude this Section, it should be noted that the element of

---

note 326, at 152-60 ("the dependence effect"); S. GORDON, *supra* note 303, at 60-64 (criticizing extreme positions); Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 490-93 (1978) (certain preferences are reinforced by rights and the market); Baker, *supra* note 79, at 785-804 ("market determination"); Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 32-41 (1975) (attacking Posner's analysis of value on the basis of market influence); Elster, *supra* note 323, at 219 (challenging utilitarianism because of these effects on preference); Miller, *Marx and Morality*, in MARXISM 3, 24-25 (J. Pennock & J. Chapman eds. 1983); Nagel, *Preference, Evaluation, and Reflective Choice*, in HUMAN VALUES AND ECONOMIC POLICY 73, 77-78 (S. Hook ed. 1967); *supra* note 318 (legal rules as a frame). "Liberalism responds to the claim that preferences are caused by systems of distribution, with the sensible answer that in that case it is all the more important that distribution be fair in itself, not as tested by the preferences it produces." R. DWORKIN, *supra* note 26, at 204. "The first argument for recognizing political authority to control or regulate market-oriented activities is that, because the market operates to determine the content of our social world, we can be free only if we can control the market." Baker, *supra* note 79, at 785-86.

This view of consumer preferences runs contrary to the usual economic model in which the consumer has in mind a cluster of the desired characteristics of goods before entering the marketplace. See MacKay, *Human Motivation: The Inadequacy of Economists' Models*, 10 HOFSTRA L. REV. 441, 441-42 (1982). "The assumption that tastes can be taken as given lies at the core of the mainstream economics, for its abandonment calls into question not only the efficiency of the competitive market, but also many of the tools economists use to study efficiency." Olson & Clague, *Dissent in Economics: The Convergence of Extremes*, in THE ECONOMIC APPROACH TO PUBLIC POLICY 79, 86 (R. Amacher, R. Tollison & T. Willett eds. 1976) ("the Achilles heel of neoclassical economics"). For suggested responses by economists, see MacKay, *supra*, at 444; Schultze, *Is Economics Obsolete? No, Underemployed*, in THE ECONOMIC APPROACH TO PUBLIC POLICY, *supra*, at 99, 107.

330. See March, *supra* note 42, at 142. March notes that the standard prescriptive theories of choice give taste the following properties: absolute, relevant, stable, consistent, precise, and exogenous. "Each of these features of tastes seems inconsistent with observations of choice behavior among individuals and social institutions. Not always, but often enough to be troublesome." *Id.* at 153.

331. See *supra* note 111 and accompanying text.

332. For status conditions, the law does not examine whether a threshold has been reached. Though an older minor, for example, may have fully autonomous preferences, the defense is recognized, albeit difficult to justify. See, e.g., E. FARNSWORTH, *supra* note 111, § 4.3.

[There are] circumstances in which collective decisions that depart from the satisfaction of private preferences, by general agreement, can be regarded as liberty-enhancing. The objection from liberty is met if it can be shown that, after legal interference, the preferences that are expressed are in some sense more autonomous than those expressed in a system in which regulation is (or appears) absent.

Sunstein, *supra* note 75, at 1132 (footnote omitted). The problems are "to identify . . . the setting in which legal interference will promote rather than undermine autonomy," *id.* at 1136,

capability, both the objective discernment and processing of data and the subjective weighing of them, takes place under charged conditions. Reasonable persons differ, but not from distinctly "reasonable" or "sensible" causes alone.

By way of a summary of the conditions of legal responsibility in the marketplace, the typical consumer, in assessing the net costs of goods, is perhaps never in a position to calculate them accurately. Almost invariably, the misvaluations are skewed towards underestimating costs and overestimating benefits.<sup>333</sup> The merchant, on the other hand, is also subject to the vagaries of rational choice, but from the objectivity of dispassionate distance and the certainties of large numbers, apparently to a lesser extent than the consumer.

#### IV. THE CONSEQUENCES OF THE IMPERFECTIONS IN THE CONDITIONS OF LEGALLY RESPONSIBLE ACTS

The bottom line is that an individual's choices are made in twilight. The generation of bright light often meets with a pair of obstacles: one, the transaction costs of enlightenment are inefficiently high, thereby making it rational to assume the risks hidden in the shadows; and two, feasible illumination is colored by the circumstances, the interests of the other transactor, and the decision maker's own internal mechanisms.<sup>334</sup> Even if a person sees clearly, producing the will-power to act upon that vision when there are contrary pressures and temptations is another matter.<sup>335</sup>

---

and to determine whether the threshold has been reached, since "[i]t is difficult indeed to generate a baseline from which to describe genuine autonomy . . .," *id.* at 1170.

333. The conclusion is that the consumer entered a bad deal. But we must be wary of falling into the circular argument: "the party is ruled incompetent because the deal is bad, while the deal is ruled bad because the party is incompetent." Schwartz, *supra* note 115, at 1078. There are reasonable grounds beyond the nature of the contract itself for finding the consumer in these circumstances relatively nonresponsible.

334. This condition of decision making must be distinguished from that of the "economic man." "Classical economics . . . got along almost without psychological hypotheses about economic man's intellectual qualities by assuming him to be 'objectively' rational—that is, rational in dealing with a given external environment as viewed by an omniscient being gifted with unlimited powers of computation." 2 H. SIMON, *Economics and Psychology*, in *MODELS OF BOUNDED RATIONALITY* 318, 341 (1982).

335. Scott, worried about the unintended secondary effects of regulation, observes that "[t]he risk of systematic manipulation by simple framing illusions seems less acute if consumers can routinely develop behavioral rules to facilitate their decisionmaking." Scott, *supra* note 163, at 348. However, Scott acknowledges my worry: "It may be, of course, that the internal rules and strategies people use to facilitate their decisionmaking do not have a dominating effect." *Id.* at 347.

Some ethicists, in constructing their moral stances, have confronted the problem of the agent's limitations. See, e.g., G. WARNOCK, *supra* note 11, at 21, 143-44; Rawls, *supra* note 17, at 178-81.

Mulling over the sources of interference with fully rational choice, one might ask how a "reasonable person" makes a reasonable decision. The answer is: "We don't know very well."<sup>336</sup> We might look briefly at what we do know.

### A. *Decision Theory*

Putting aside the question of willpower, the other problems of choice, here relevant, fall within the discipline of decision theory.<sup>337</sup> In a major work in the literature of this discipline, Braybrooke and Lindblom point out that two of the more sophisticated evaluative methods adopted by social scientists for contemplated policies are the "rational-deductive ideal" and the "welfare function."<sup>338</sup> Both employ a comprehensive synoptic approach which:

336. Simon describes our knowledge:

"Reasonable men" reach "reasonable" conclusions in circumstances where they have no prospect of applying classical models of substantive rationality. We know only imperfectly how they do it. We know even less whether the procedures they use in place of the inapplicable models have any merit—although most of us would choose them in preference to drawing lots.

2 H. SIMON, *supra* note 167, at 457. Keynes ascribes decisions to "animal spirits":

Most, probably, of our decisions to do something positive, the full consequences of which will be drawn out over many days to come, can only be taken as a result of animal spirits—of a spontaneous urge to action rather than inaction, and not as the outcome of a weighted average of quantitative benefits multiplied by quantitative probabilities.

J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 161 (1936). For the "technique" of problem-solving according to Braybrooke and Lindblom, see *supra* note 261. See also L. HAWORTH, *supra* note 11, at 85-86 (tasks in decision making); H. SIMON, *supra* note 255, at 17-20; Lane, *supra* note 265, at 380 (summarizing the "cognitive complexity" of thinking for oneself); Lynn, *The Behavioral Foundations of Public Policy-making*, in *RATIONAL CHOICE* 195, 200 (R. Hogarth & M. Reder eds. 1987) (decisions interrelate "in complex ways involving context and circumstances as well as personality"); Miller, *supra* note 329, at 24 (decision process moving "from the general to the specific and back to the revision of the general").

337. One typology is to divide the circumstances of choice into three:

1. Utility theory [which includes decision theory proper], which is the theory of individual rational behavior under certainty, under risk, and under uncertainty. . . . 2. Game theory, which is the theory of rational behavior by two or more interacting rational individuals, each of them determined to maximize his own interests, whether selfish or unselfish, as specified by his own utility function (payoff function). . . . 3. Ethics, which is the theory of rational moral value judgments, i.e. of rational judgments of preference based on impartial and impersonal criteria.

Harsanyi, *supra* note 149, at 89 (emphasis omitted). For elaboration, see *id.* at 88-96, and for another typology, see R. LUCE & H. RAIFFA, *supra* note 11, at 13.

338. See D. BRAYBROOKE & C. LINDBLOM, *supra* note 149, at 9-16. The authors quote Abram Bergson, the inventor of the term "welfare function":

[T]he value of [a welfare function] is understood to depend on all the variables that might be considered as affecting welfare . . . . [I]ts shape is determined by the specific decisions on ends that are introduced into the analysis. Given the

does not adapt in any specific way to: 1. man's limited intellectual capacities; 2. his limited knowledge; 3. the costliness of analysis; 4. the analyst's inevitable failure to construct a complete rational-deductive system or welfare function; 5. interdependencies between fact and value; 6. the openness of the systems to be analyzed; 7. the analyst's need for strategic sequences to guide analysis and evaluation; 8. the diversity of forms in which policy problems actually arise.<sup>339</sup>

In the presence of these problems, the authors urge the adoption of a piecemeal approach, similar to that espoused by others,<sup>340</sup> the "strategy of disjointed incrementalism."<sup>341</sup>

As I have tried to demonstrate, the list above largely applies to the choices of consumers in the marketplace. Although the consumption decisions do not contain the same global complexities and uncertainties as the political questions considered paradigmatically by these authors, there is an essential commonality. The choices must unavoidably be made in the face of risk and uncertainty and under adversarial circumstances. Synoptic rationality is typically not possible.<sup>342</sup> The consumer cannot normally make an optimal economic

---

decisions on ends, the welfare function is transformed into a scale of values for the evaluation of alternative uses of resources.

*Id.* at 12-13 (footnote omitted).

339. *Id.* at 113 (punctuation added).

340. Popper's doctrine of "piecemeal social engineering" is well known: "The piecemeal engineer . . . will make his way, step by step, . . . and he will avoid undertaking reforms of complexity and scope which make it impossible for him to disentangle causes and effects, and to know what he is really doing." K. POPPER, *THE POVERTY OF HISTORICISM* 67 (3d ed. 1961). For a discussion of "piecemeal social engineering" and the comparison with "Utopian" or "holistic" engineering, see *id.* at 64-70.

341. D. BRAYBROOKE & C. LINDBLOM, *supra* note 149, at 83-106. Although the authors admit the "conservative" overtones of their strategy, they believe it might be used for any political orientation. See *id.* at 106-10. A similar analysis of decision making comes from another group of authors who identify three generic methods of current acceptable-risk decision making: "(a) formal analysis, which decomposes complex problems into simpler ones and then combines the results into an overall recommendation; (b) bootstrapping, which uses history as a guide for setting safety standards; and (c) professional judgment, which relies on the wisdom of the best available technical experts." B. FISCHHOFF, S. LICHTENSTEIN, P. SLOVIC, S. DERBY & R. KEENEY, *supra* note 32, at 59. Overall, the authors give bootstrapping methods, which are akin to "disjointed incrementalism," poor ratings compared to the other methods. See *id.* at 120-33.

342. It may always be impossible. Speaking in the context of social choice, one author summarizes the human predicament: "[O]ur human activities are always piecemeal, and piecemeal rationality never ensures overall rationality." Y. MURAKAMI, *LOGIC AND SOCIAL CHOICE* 134 (1968), quoted in J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 365 n.4 (1979). "Hayek's main point is that no one can attain a point of Archimedean leverage on and distance from society such that any synoptic knowledge of it is available to him. . . . Thus comprehensive planning is, first and foremost, an epistemological impossibility." Gray, *supra* note 74, at 82-83. Similarly, Tribe notes the weaknesses in commensurating the various dimensions of a social problem. See Tribe, *supra* note 250, at 627.

choice; she must settle for a satisfactory one.<sup>343</sup>

In one respect the consumer's decision is more difficult than the political one. While the latter (arguably) may be done incrementally, the consumer's choice is often all or nothing—either the television set is purchased or it is not, there is no intermediate step.<sup>344</sup> The consumer is forced to embrace the synoptic method, as much as possible (that is, "reasonable" or "efficient").<sup>345</sup> This is also true of the merchant's choice to sell the goods. The differences are: (1) the merchant has more relevant information and fewer interfering personal foibles than the consumer; and (2) the merchant may "insure" its choice by spreading the losses from risk and uncertainty over many comparable sales.

When two or more people with conflicting interests are working towards agreement, they are involved with game theory.<sup>346</sup> Each tries to maximize her utility. In the marketplace, game theory is directly

343. This is the conclusion of decision theory:

Decision theory . . . retreats from the assertion that human behavior is rational and postulates various forms of less-than-perfect rationality. Thus, we have, "limited rationality," "contextual rationality," "game rationality," "process rationality," "adaptive rationality," "selected rationality," "posterior rationality," "systemic rationality," and "bounded rationality". . . . The exercise of these forms of rationality results not in maximization but in "satisficing". . . .

Rachlin, *supra* note 294, at 227 (references omitted). Simon coined the term "satisficing."

[T]he demands of computability led to two kinds of deviation from classical optimization: simplification of the model to make computation of an 'optimum' feasible, or, alternatively, searching for satisfactory, rather than optimal choices. I am inclined to regard both of these solutions as instances of satisficing behavior rather than optimization. . . . The problem has been shifted from one of characterizing the substantively optimal solution to one of devising practicable computation procedures for making reasonable choices.

2 H. SIMON, *supra* note 249, at 435. For his distinctions between the approaches of satisficing and optimizing, see 2 H. SIMON, *Theories of Bounded Rationality*, in *MODELS OF BOUNDED RATIONALITY* 408, 417-18 (1982). Elster discerns five views within the development of the theory of rational behavior. See J. ELSTER, *supra* note 13, at 133-37. He concludes "that for the analysis of business decisions, and probably for a large number of other decision problems, Simon's theory of satisficing is the most satisfactory yet presented." *Id.* at 136.

344. One might rent the model to gather information regarding some of its qualities. Rental selections, however, are probably quite limited. In addition, rental of such goods as regular shoes is out of the question.

345. Incrementalism has been challenged on the grounds, among others, that it may stymie a goal that requires taking "one step backward, in order to take two steps forward," and that policymakers can know and anticipate more than incrementalism admits. See J. ELSTER, *supra* note 13, at 9-18; see also J. ELSTER, *supra* note 50, at 94 n.124 (citing Tocqueville's objection to Burke); R. GOODIN, *supra* note 163, at 19-56 ("Overcoming the Errors of Incrementalism"). For a general rejoinder, see Braybrooke, *Scale, Combination, Opposition—A Rethinking of Incrementalism*, 95 *ETHICS* 920 (1985). The first objection does not seem pertinent to the concerns of this Article. What step backward would be useful in the long run to the purchaser of a television set?

346. See *supra* note 337.

relevant because contracting parties have divergent, conflicting interests. However, a great many of the central results of game theory are that rational decisions are possible only in very simple situations; therefore, for the normal complexity of most marketplace situations, rational outcomes are not expected.<sup>347</sup>

### B. *Differential Rationality*

The analysis of the qualities of the ideally responsible actor highlights shortcomings endemic to the marketplace. To ignore for the moment the impingements on autonomous preference formation, the discussion emphasizes the degree of risk and uncertainty that informs consumer decisions. Most likely this results in costs unperceived or misperceived by the consumer. The costs are inadequately perceived irrespective of whether the merchant consciously interferes with the appraisals or whether the consumer is reasonably diligent. Human nature and the practicalities of the marketplace are reasons enough.<sup>348</sup>

---

347. See R. ABRAMS, FOUNDATIONS OF POLITICAL ANALYSIS 340-45 (1980). Braybrooke sheds doubt on the usefulness of game theory for our type of problem because game theory "deals with games so well defined that there is no room for bargaining. . . . [T]he theory of bargaining, in the branch occupied by the theory of games, is a theory of outcomes, not of processes." Braybrooke, *The Possibilities of Compromise*, 93 ETHICS 139, 144 (1982). Nor, according to Braybrooke, will we find help in the economic models of bargaining.

[They] are very restricted, too: they generally leave some room for bargaining of a sort in leaving some room for the parties to try out each other's reactions stage by stage and reconstruct their strategies at each stage. However, the models are usually limited to single issues between just two parties concerning a homogeneous and infinitely divisible good like money. . . . In any case, the models in question generally take little or no account of misinformation. The parties know too much to be misled, or to try to mislead, by masked preferences or by formulas ambiguous and tendentious. Much of the color of bargaining, and with it much of what makes a real difference to whether it goes one way or another, escapes such models.

*Id.* (footnote omitted).

348. Epstein seems to lose sight of this when he discusses unconscionability. First, he would allow the doctrine of unconscionability to be used for procedural, not substantive unconscionability. See Epstein, *supra* note 248, at 294-95. Then, when discussing the unconscionability of the "waiver-of-defense" clauses for the benefit of finance companies which appear in consumer installment contracts, he concludes: "If buyers want protection against having to pay the price where there is a defect in the goods in question, then they should deal with sellers who carry their own contracts." *Id.* at 309. In the footnote, he takes the argument "one step farther": "If all parties who carry their own contracts refuse to allow breach of warranty to be a complete defense against the payment of installment obligations, there will be a good reason for them so doing: to wit, that most of the claims are manufactured as excuses for non-payment." *Id.* at 309 n.39. Against this argument of moral hazard, I offer another analysis. Because of the setting, buyers are unable to make rational choices when deciding whether to deal only with sellers who carry their own contracts. Those sellers who do carry their own contracts refuse to allow breach of warranty to be a complete defense against payment of installment obligations because, due to the irrationalities, the consumers cannot properly value the right. The moral hazard is on the sellers, i.e., they are "insured" against

For most consumers, these costs probably will be positive, that is, the goods will be more costly than anticipated. For some, the goods will be less costly. In either event, purchasing decisions fall short of the ideal.<sup>349</sup> Unequal bargaining power usually intrudes.<sup>350</sup>

The thought experiment in evaluating a television purchase demonstrated the difficulty. A conscientious consumer, taking the lesson to heart, might be paralyzed with indecision in the face of so

---

some warranty claims because of the consumer's lack of leverage. Relatedly, Grossman champions the informational value of warranties. See *supra* note 184. He concludes: "There are many products sold with warranties, but I find it surprising that they are not used even more often. The reader might think that the answer lies with moral hazard. Yet there are many risks which are insured by insurance companies but not by sellers." Grossman, *supra* note 184, at 479. This is not surprising, because sellers have more methods for taking advantage of buyers' irrationalities than do insurance companies.

349. Sociologist James Coleman holds out two models for the role of policy research in society. The first and dominant one, labeled the "policy maker-as-rational-actor" model, aims at "objectively correct" policy and "conceives of information fed back to a single central authority. . . . It has no place for a conception of different interests, of democratic political systems in which policy decisions come not from above but from a balance of pressures from conflicting interests." J.S. COLEMAN, *supra* note 284, at 166. The second one, termed the "pluralistic policy research" model, "begins with a conception of interested parties." *Id.* at 168. Because parties may use information for their own purposes, policy is regarded "as the resultant of a balance among conflicting values and interests." *Id.* "Policy research pluralistically formulated and openly published may strengthen the hand of those interests without administrative authority, by redressing the information imbalance between those in authority and those outside." *Id.* at 170. Coleman therefore urges work on a political theory of information rights.

As I see it, there would be two major branches in that theory: one concerning information rights in market relations between two independent actors—one large and one small—and the other concerning information rights for the sovereign citizens of a state who have both authority and responsibility for controlling the actions of the state.

*Id.* at 171.

In a similar vein, Gibson wrote:

[I]n a competitive society, it is, in general, in the interests of each person to be as rational as possible but to have his or her competitors be as irrational as possible (within certain limits, of course). . . .

It is, moreover, a system in which various kinds of deception are in the interests of persons who are in a position to carry out such deceptions on a rather large scale, not only through advertising campaigns but also through their influence on the kinds of research conducted, on the way it is conducted, and on the way the results are reported. Among these kinds of deceptions are deception of competitors or members of other classes concerning what their interests are and how best to pursue them; deception of consumers, concerning the usefulness, harmfulness, or uniqueness of products, and deception of oneself, concerning the fact that one is doing these things. Thus the availability of accurate information reported in an intelligible and non-misleading way, which is essential to the effective carrying out of a rational life-plan, is also undermined.

Gibson, *supra* note 11, at 218.

350. For a challenge to the liberal notion that unequal bargaining power should be rectified by government intervention, see Kennedy, *supra* note 51.

many unknowns. Obviously, few, if any, ever are. The typical purchase follows little study of the goods and visits to one or a few merchants.<sup>351</sup>

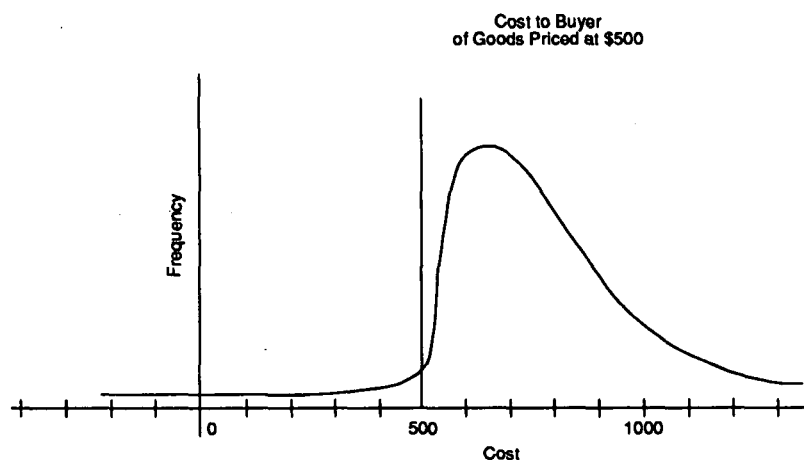


Figure I

Figure I portrays the frequency curve of the true costs to a purchaser of goods which have a purchase price of \$500, say, our television set. The average cost is shown to be somewhat above the purchase price in order to reflect transaction and other costs. The curve slopes upward towards infinity to indicate potential costs such as utilities, service, maintenance, physical injuries, and lawsuits. The slippery slope of throwing good money after bad partially explains why one might invest more money in old goods than is required to purchase new ones. The cost may be infinite if, for example, the goods should explode and kill the purchaser. In the opposite direction, the curve also slopes asymptotically towards negative infinity (that is, infinitely beneficial) to show the possibility that the goods may appreciate as an antique or become invaluable from a "genie in the lamp."<sup>352</sup> The curve is skewed to the right to represent the intuitive proposition that there is a larger range of possible costs, above the purchase price, than of benefits. Although the curve is drawn as a smooth one, there may be clusters of potential costs which create a lumpy curve.

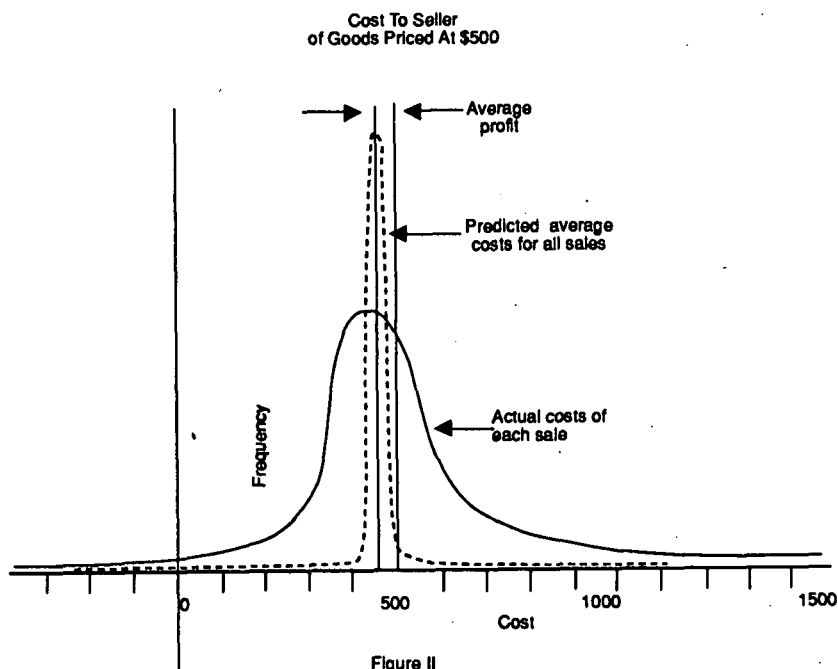
351. See, e.g., Brandt & Day, *supra* note 193.

352. Excluded from Figure I is the benefit of the purchaser's personal satisfaction from using the goods. This may be very large (even infinite, total bliss—it's a television set, after all). Presumably the pleasure is nearly the same as that gained from substituted allocations of resources, say, a different television model or other forms of entertainment.

A consumer must place her own planned purchase on the curve by means of the evaluations discussed. She must also do the same for the cost curves of substitute goods. Then, she can accurately determine whether she would maximize value by making the contemplated purchase or by allocating her resources elsewhere.

A merchant must also calculate its costs of the sale of goods in order to price them at a competitive and survivable level. The solid curve in Figure II portrays a frequency curve of the seller's actual costs of goods, say, the television set, priced at \$500. The average actual cost is shown below \$500 and reveals the profit margin. Wholesale costs, overhead, commissions, salaries, and so forth are built into the bulk of the curve. It slopes upward to reflect additional costs such as those arising from servicing defects, defending a products liability suit, or dealing with a customer who proves to be a recalcitrant debtor. The curve stretches downward to show unusual profitability due, primarily, to lucrative goodwill. The solid curve in Figure II is different from the one in Figure I for the obvious reason that the potential costs of the \$500 goods in Figure II include variables that are relevant to the merchant but not to the consumer, and vice versa.

The broken line in Figure II shows the actual frequency distribution of concern to a merchant. The seller must cope with effectively



fewer risks and uncertainties than the consumer for two reasons, both of which are due to the fact that the merchant, unlike the consumer, engages in a large number of comparable transactions. First, it is economically reasonable for the merchant to invest more in information.<sup>353</sup> Being able to spread this transaction cost over a large number of sales, it makes better business sense for the merchant than for the consumer to make a significant expenditure to determine the tradeoffs of a product.<sup>354</sup> As it turns out, because the seller deals with comparable goods over time, for the merchant uncommitted to a single product line,<sup>355</sup> little is required for some information about experience qualities (for example, data gained through customer feedback) and for some information about credence qualities (for example, data relating to the producer's reliability). Depending upon the elasticity of the market, adjustments to the price tag can perhaps be made by including the losses from prior underestimations in the new rate.

Second, the nature of the merchant's business allows it to be less concerned with finely tuning estimates of the experience and credence qualities of each customer than is true of the consumer's need to know the same qualities of her merchant. Though it may be to the merchant's advantage to have the contract terms reflect the buyer's reliability, litigiousness, etc., because it is costly to apply this information for each customer (as it is costly for the consumer to do the same for each merchant), the payoff is quickly offset by the expense, not only of collecting the data, but also of tailoring individual contracts. Yet, the merchant is not operating in the dark. Under the circumstances, it has the advantages of scale and the certainties of large numbers to make accurate calculations regarding the average buyer. Indeed, the retailer will be undercharging some actual customers while it will be overcharging others, but over a series of transactions, the logs will roll and the contracts will average out to an efficient level.<sup>356</sup> Having dealt with many customers, the merchant has at its

---

353. See Curran, *Legislative Controls as a Response to Consumer-Credit Problems*, 8 B.C. IND. & COM. L. REV. 409, 435 (1967) (creditor may obtain advice of experts, has more time to reflect on terms, and accumulates experience which provides knowledge and sophistication).

354. That is, the product tradeoffs for the merchant. These tradeoffs coincide only partially with those for the consumer.

355. For the merchant committed to a single product line, e.g., a car dealer, the large front-end and long-term investment demands substantial ex ante investment in information.

356. Warranty coverage is exemplary:

A warranty operates as an insurance policy to the extent that the occurrence of a product defect is probabilistic. To insure for a loss is to redistribute wealth from periods in which no losses are suffered to the period in which the loss occurs. A manufacturer can redistribute wealth in this manner by collecting a premium in the sale price from a broad set of consumers for whom the prospects of loss during any single period are unrelated. The market insurance premium reflects

disposal adequate information to make fair predictions of the costs of each transaction.<sup>357</sup> The common wisdom that a merchant new to the business is at greater risk of miscalculating its profit margin than is an experienced merchant suggests, in part, that it is the lack of this information that creates the handicap to the newcomer.<sup>358</sup>

There is a difference between Figure I and Figure II which may be thought to impair the comparison. Figure II includes a broken line representing the average costs per sale. This is absent from Figure I. Compared are the consumer's actual costs for the single purchase to the merchant's average cost per sale. Because the consumer makes many purchases over her lifetime, shouldn't the average costs of both be compared? I do not believe so because the consumer's purchases are not fungible, that is, few are of closely competitive goods. She is not going to get back from the savings in the purchase of an air conditioner what she lost in the purchase of the television set. For each of these types of noncompetitive goods, she probably has the same disadvantage vis-a-vis the merchant.<sup>359</sup> The merchant, on the other hand,

---

both the expected loss for the period and some share of the costs to the insurer of aggregating these unrelated contingencies, called loading costs.

Priest, *supra* note 184, at 1308.

357. Furthermore, "[the creditor's] stake in undertaking any particular arrangement is not as great as that of the consumer: other potential customers available to the creditor are greater in number than are other sources of credit available to the consumer." Curran, *supra* note 353, at 435.

358. Schwartz analyzes the information problems relating to the risks of defective products, but rejects the imposition of a mandatory warranty by either statute or case law. Instead, he favors providing the consumer with information and then allowing the parties to bargain over the risks. See Schwartz, *supra* note 167, at 20. He justifies this as follows:

First, . . . [the] [r]isks should . . . be imposed on sellers only if it is believed that the incidence of irrationally unshifted risks will be too high even with additional information provided. Since this is difficult to know in advance, information should be provided and the results analyzed. Second, imposing risks prevents gambles but reduces freedom of choice, which I take to be a value worth preserving for its own sake. Third, sellers cannot value certain of R's [the risk of nonconformity] components, such as the losses resulting to a buyer's business from the failure of a particular part, as well as informed buyers can.

*Id.* at 20-21. To these three points I respond: First, let's get on with the experiment, though obviously I am less confident of the invisible hand than is Schwartz; second, the burden of this Article is to show how thin this freedom of choice is under the circumstances; third, the foreseeability limitation of contract damage recoveries will limit some of the seller's worries over uncertain buyer losses, and although those remaining concerns may indeed create an inefficiency, my hunch is that they will amount to less than the net inefficiencies under a mandatory warranty. The whole question warrants empirical work.

359. Probably also with respect to other consumers. That is, a consumer who costs the merchant less than the average because, say, she is very careful with her possessions or is a good credit risk, is likely to be in the same relative position with respect to the purchase of other goods. This consumer will effectively subsidize the more costly consumers in all or most of her purchases. Cf. Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 231-39 (1976) (cross-subsidization tendency of price regulation).

does enter into essentially fungible transactions when selling the televisions. Low volume, mom-and-pop operations which are more analogous to the consumer's position are the exception.

The consumer, unlike the merchant, has neither the experience nor the data that are required in order to take advantage of the certainties of large numbers. She is buying her second or third color television set, the first one of this brand and size, and has dealt with this merchant only a few times before when buying stereo equipment. Her direct sampling experience includes so few transactions of a comparable nature that, even adding the limited information obtained from acquaintances who have made similar purchases and gleaned from the other usual sources of consumer information, she is left unable to speak with statistical confidence. The logs will not roll for her. She deals with only one or a few sellers of comparable goods. The number of related deals are small, contrary to what is true with some other merchants, such as grocers or department stores.<sup>360</sup> If she is "overcharged" in one transaction because she is a better than average customer, she is likely to be "overcharged" in others for the same reason.<sup>361</sup>

## V. CONCLUSION

The immediately preceding discussion dwells upon the marketplace imperfections in the conditions for legally responsible acts that arise from the collection and processing of the data necessary to make informed choices. In terms of the model championed in this Article, these flaws stem primarily from the inherent defects in the first condition, knowledge, and more particularly from its two aspects, information and foresight. Recall that for autonomously chosen actions, there is a second condition, capability, with its two aspects, reason (analytical judgment) and sense (normative judgment). This condition remained in the wings as an implied presence manifesting itself in some of the difficulties with collecting and processing data. Though nearly out of sight, it should not be out of mind. The shortfalls in knowledge and capability of both the consumer and the merchant

---

360. Moreover, "[w]here people seldom deal with one another, we find that they are somewhat disposed to cheat, because they can gain more by a smart trick than they can lose by the injury which it does their character." A. SMITH, LECTURES ON JURISPRUDENCE 538-39 (R. Meek, D. Raphael & P. Stein eds. 1978), *quoted in* N. MACCORMICK, *Law and Economics: Adam Smith's Analysis*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 103, 121 (1982).

361. See *supra* note 359. Kennedy notes this point. See Kennedy, *supra* note 51, at 599-600. A possible solution not pursued here is the "experience model" of contracting, justified by the differences in the expectations of the parties, which proposes standards for adjusting contract terms. See Narasimhan, *supra* note 228, at 1142-70.

imply that the market works inefficiently.<sup>362</sup> The inefficiency provides prima facie grounds for governmental intervention.<sup>363</sup>

Economic inefficiency is not the only problem with the market. There are moral problems as well. First, a moral issue may stem from the inefficiency itself insofar as efficiency is rooted in utilitarian, teleological theory.<sup>364</sup> Second, a deontological moral problem arises from the fact that the inefficiency is systematically beneficial to the merchant. That the merchant has a customary advantage does not seem quite right to the consumer.<sup>365</sup> Questions with overtones of fair-

---

362. Musgrave comes to this conclusion on the basis of the information defects alone. Increasing affluence brings a growth in available goods while the scarcity of more valuable time raises the costs of making the additional informed decisions. Thus, the value of choosing more intelligently among goods shrinks while the cost of the choice itself grows. "We may therefore be increasingly prepared to accept the judgment of the government or some other group who will do the screening, provide us with information, guarantee the safety of the products, etc., even though this involves some cost in terms of reducing the range of available commodities." Manne, *Edited Transcript of AALS-AEA Conference on Products Liability*, 38 U. CHI. L. REV. 117, 141 (1970) (Musgrave).

363. Prima facie grounds are not conclusive grounds. But society need not wait.

[T]he question of whether a given law is worth its costs (in terms of better resource allocation) is rarely susceptible to empirical proof. This does not mean, of course, that the best we can do is adopt a laissez faire policy and let the market do the best it can. It is precisely the province of good government to make guesses as to what laws are likely to be worth their costs. . . . [T]here is no reason to assume that in the absence of conclusive information no government action is better than some action.

Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 70 (1968). Coase studied the issue elsewhere: "It is now generally accepted by students of the subject that most (perhaps almost all) government regulation is anti-competitive and harmful in its effects." Coase, *The Choice of the Institutional Framework: A Comment*, 17 J.L. & ECON. 493, 493 (1974). Hayek and Director urge suspicion of intervention in the marketplace, but believe there is a place for it. See F. HAYEK, *supra* note 11, at 220-33; Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 2 (1964) ("Laissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error."), *quoted in* Epstein, *supra* note 248, at 294 n.3.

Baker does not believe that intervention is justified only by efficiency arguments. Emphasizing the market's influence on consumer preferences, see *supra* note 329, he observes that "the objection to an economic regulation is generally not that the regulation prohibits a substantively valued activity. Rather, the objection is that the regulation affects the valued activity's profitability." Baker, *supra* note 79, at 813 (footnote omitted). Hence, the market may be regulated to promote consumers' liberty. Regarding the merchants' liberty, "[i]n the market context, liberty requires only that a person be free to engage in those activities or roles that society makes available and in which, given the collectively adopted allocative criteria, she is qualified to engage." *Id.* at 815.

364. Posner has placed microeconomics in utilitarian theory. See R. POSNER, *supra* note 155, at 60-115; Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). For background on this view and a discussion of the distinction between teleology and deontology, see Kuklin, *supra* note 194, at 845-61.

365. Fears of paternalism may be put aside. "So long as one can see them as responsive to

ness and justice are raised. Does the consumer deserve the disadvantage or does the merchant deserve the advantage?

The apparent unfairness to the consumer of the asymmetry increases when another factor is brought to center stage. Section IV dwelled upon distortions inherent to the marketplace, whereas many distortions are imposed by the other party to the transaction. When one party interferes with the "objectivity" of another's choice, the moral reverberations swell, especially when the interferer gains from it. Irrespective of whether the economic system as a whole is "rational" despite the presence of irrational actors,<sup>366</sup> the system works unfairly at a micro, one-to-one level, particularly when one class of transactors exacerbates and takes methodical advantage of the irrationalities of another class. In these circumstances, at least, distributive consequences count regardless of overall allocative efficiency. Although full discussion of this point is beyond the scope of this Article, an outline is offered.

As a preliminary matter, the meaning of "imposed" distortion must be elaborated. One of the parties may be in a position of natural advantage to reduce distortions inherent to the other party's position. By failing to reduce them, the party "imposes" them on the affected party in a weak or passive sense. Three or more forms of the weak sense of imposed distortions may be noted. First, there are situations in which the imposer cannot pass along the costs of lessening the other's distortion and must therefore absorb them herself. Most non-consensual interactions are exemplary, as where a stranger trespasses on land unmarked by the owner while mistakenly, but reasonably, believing it to be public property.<sup>367</sup> Second, there are times in which the costs can be passed along and the effected party, in fact or as a reasonable person, would be willing to reduce the distortion by paying

---

unequal bargaining power, they [i.e., compulsory contract terms] don't raise any issue of paternalism." Kennedy, *supra* note 51, at 646. Kennedy then continues with a statement that I dispute: "But unequal bargaining power is of little use in understanding why we like them." *Id.*

366. Milton Friedman made the most famous pronouncement of the black box principle as applied to economics. He asserts that the inaccuracy of the strong assumptions of the invisible hand doctrine (e.g., zero transactions costs, perfect information, rational choice) is irrelevant so long as the derived theories give rise to confirmed predictions better than those of other black boxes, which they do. See M. FRIEDMAN, *supra* note 259, at 3; see also Plott, *Rational Choice in Experimental Markets*, in RATIONAL CHOICE 117 (R. Hogarth & M. Reder eds. 1987) (providing empirical evidence that the marketplace is roughly rational despite irrational choices).

367. This claim by the defendant is a defense to criminal trespass, but not to civil trespass. See W. PROSSER & W. KEETON, *supra* note 111, at 74-75. Posner ascribes this difference to the costs of determining the defendant's mental state at the trial stage. See Posner, *supra* note 115, at 1225.

the costs.<sup>368</sup> Thus, a consumer who cannot efficiently search for information regarding goods may be willing to pay the merchant for information.<sup>369</sup> Third, there are circumstances in which the reduction creates (virtually) no direct costs. For example, a merchant able to respond to a consumer's question with answers of varying usefulness chooses a less useful answer. As one moves from the first to the third form of weakly imposed distortions, the distortions become stronger.<sup>370</sup> Finally, there is a strong or active sense of imposed distortions which occurs when one party affirmatively creates or increases the other's distortion. False advertising, misrepresentation, and knowing concealment are instances primarily in the category of information, while coercion and undue influence are instances in the categories of capability and willpower. From a moral standpoint, the stronger the imposed distortion, the less justifiable.

This Kantian standard is therefore suggested: To the extent that a person invades an individual's autonomy by imposing distortions in her decision making for the purpose of using her as a means to an end,

---

368. Permutations of this form are possible. The actual consumer may not be willing to pay the costs of reducing the distortion whereas a reasonable consumer would, or vice versa. Variations in risk attitudes may explain this difference. Which of these two possibilities creates a "stronger" imposed distortion is not clear. If neither the actual nor a reasonable consumer prefers to pay the costs, the distortion is not imposed.

369. An extrapolation from contract principle is supportive:

The law of contract denies recovery to a plaintiff when four conditions are met: 1. The plaintiff possessed information unknown to the defendant. 2. The defendant, had he possessed that information, might have altered his behavior so as to make his breach less likely to occur. 3. The plaintiff could have conveyed the information to the defendant cheaply. (This condition is not mentioned in the cases, though it is clear that it is assumed by the courts to be fulfilled. Of course it is *not* fulfilled in tort.) 4. The plaintiff did not do so. . . . The central point here is that where the four conditions above are met, the value of the information to the defendant is greater than the cost to the plaintiff of conveying that information to him. To encourage such efficient transfers of information is the purpose of the contract remoteness rule of *Hadley v. Baxendale*.

Bishop, *supra* note 131, at 254-55 (footnote omitted). Bishop's last point suggests that, under Kaldor-Hicks reasoning, it is irrelevant whether the defendant in fact would have paid for the information.

370. When the weakly imposed distortion relates to information, it may be characterized as "deceit." Chisholm and Feehan, for example, refer to eight cases of deception, four by commission and four by omission.

In speaking of omission in these [latter four] cases, we mean to imply, not that the deceiver *L* has failed to act, but rather that he has failed to do something he could have done with respect to *D* [the deceived person] and the belief that *p* [a false proposition]. Let us say that a man *allows* a certain state of affairs to occur or obtain provided only [sic] (i) he *could prevent* that state of affairs from occurring or obtaining and (ii) he does *not* thus prevent it from occurring or obtaining.

Chisholm & Feehan, *The Intent to Deceive*, 74 J. PHIL. 143, 144 (1977).

and not merely as an unavoidable secondary effect, one may properly speak of a violation of moral duty.<sup>371</sup> This standard is offered as a

371. "What is the difference between one person merely 'utilizing' another for gain, and one person exploiting the other? The correct short answer to this question, of course, is that there is an element of *wrongfulness* in exploitation that distinguishes it from nonexploitative utilization." Feinberg, *Noncoercive Exploitation*, in *PATERNALISM* 201, 219 (R. Sartorius ed. 1983). Feinberg, refraining from full exposition because of the complexity of the problem, goes on to discuss cases of wrongfulness. See *id.* at 219-24. One of the factors is "[w]hether A used the situation of B for his own gain." *Id.* at 221. "[I]nsofar as A's profitable utilization of B is the consequence of manipulative techniques, it also tends to be unfair to B. I have in mind consent won by seductive luring, beguiling, tempting, bribing, coaxing, imploring, whimpering, flattering, and the like, short of deceptive innuendo, threats, or coercive offers (which diminish or vitiate voluntariness)." *Id.* at 222. "Less likely to be unfair are fishing expeditions in which A merely hangs his lure within range of vulnerable B, attracting his voluntary agreement to a scheme that is in fact likely to promote A's gain at B's expense." *Id.* Regarding fishing expeditions, see Sunstein, *supra* note 75, at 1159-61 (Regulation of addictive goods is impermissible, "even in a case of conscious manipulation of preferences by the seller," unless, to some extent, "(a) there are powerful asymmetries in available information and (b) the addiction is one in which the benefits of consumption decrease over time, and the costs of nonconsumption increase."). Even when B's consent is driven by unlucky circumstances which pressure him through no fault of A, perhaps the state may properly interfere "on the quite distinct ground that the agreement is unfair to B even though B's consent was voluntary, and that A's profit was parasitical, exploitative, or otherwise 'unconscionable.'" J. FEINBERG, *supra* note 4, at 197; see also *id.* at 178 ("Exploitation . . . of another's rashness or foolishness is often *wrong*, even when because of prior voluntary consent, it does not violate the other's right, wrong him, or treat him unjustly."). The active sense of Feinberg's "exploitation" has similarities to Raz's "manipulation," which is one of the three classes of interferences with another's life which violate his autonomy. See J. RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 221 (1979). "One manipulates a person by intentionally changing his tastes, his beliefs or his ability to act or decide. Manipulation—in other words—is manipulation of the person, of those factors relevant to his autonomy which are internal to him." *Id.*; see also Dauer, *supra* note 126, at 28 ("The standard for incompetence alone is more stringent than that for incompetence coupled with objectionable behavior.").

[I]f a provision changes the rights that a buyer would otherwise have on nonperformance in a manner the seller knows or should know many buyers would probably not knowingly agree to, it is unconscionable to word the provision in language the seller knows or should know many buyers will lack capacity to understand.

Eisenberg, *supra* note 115, at 771; see also Slawson, *supra* note 78, at 549-51 (Slawson considers a contract of adhesion as coercive.). Purely passive advantage-taking may be enough to violate one's duty. See Wilson, *In One Another's Power*, 88 *ETHICS* 299, 310 (1978) (Duty arises when one "choos[es] to benefit from a position of power in regard [to another], whether through the active exertion of pressure upon him or through the passive acceptance of what he offers.").

The rule of thumb in the text challenges this type of reasoning: "[T]he police power cannot be invoked to counter the perceived economic inequality between the parties, without force or misrepresentation, as there is no private wrong to control. The sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud." R. EPSTEIN, *TAKINGS* 112 (1985). My contention is that there are private wrongs which do not turn on force and fraud, unless one generously defines "fraud." That Epstein is not expansive about "fraud" is clear: "The frequent refrain of inequality of bargaining power as a reason to invalidate contracts introduces a wild card that blocks any serious discourse." *Id.* at 253. But in the footnote he leaves a crack in the door:

rule of thumb only, for when one considers such things as the extent of the autonomy of the invader or the degree to which her choice is conscious or unconscious, complications arise. Many questions must be dealt with before the rule of thumb is implemented,<sup>372</sup> including: What can the consumer do in light of her knowledge that, once she is in the marketplace, the Sirens can already be heard? Does "the logic of collective action" preclude privately organized solutions? If the remedy requires a standardized solution, such as government regulation, are the spillover costs offsetting? What justifies dictating the remedy to unwilling parties who have not abridged the rule of thumb, such as consumers disfavoring governmental intervention? If the "irrationality" of private choice grounds the seeking of government aid, what guards against the "irrationality" of public choice?

The difficult remedial questions aside, the conclusion of this Article is that, along with the efficiency basis for the consumer's relief, which may be grounded in consequentialist or utilitarian ethics alone, there also arises an independent basis in Kantian or deontological ethics. The invisible hand, when made visible, appears both defective and inequitable.

---

There is a sense in which the question might arise. In many bargains, especially as part of ongoing relationships, a surplus may be generated. Inequality of bargaining power can then be said rigorously to exist if one side has a systematic opportunity to exploit more of the surplus than the other.

*Id.* at 253 n.47. For similar reasoning which fuels an attack on the corporate defense of "We only give the public what it wants," see Braybrooke, *Skepticism of Wants, and Certain Subversive Effects of Corporations on American Values*, in *HUMAN VALUES AND ECONOMIC POLICY* 224 (S. Hook ed. 1967). Kronman reaches Epstein's conclusion of nonintervention another way. He unifies "involuntary" contractual agreements under objectionable forms of "advantage-taking," which may arise from a person's "superior information, intellect, or judgment, in the monopoly he enjoys with regard to a particular resource, or in his possession of a powerful instrument of violence or a gift for deception," but backs away from intervention because the plausible distinctions do not "provide[ ] a principled basis for determining which forms of advantage-taking ought to be allowed." Kronman, *supra* note 185, at 480-82; cf. J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 204-05 (1984) (Unfair advantage-taking in Kronman's sense, unlike coercion, may not invade the promisor's autonomy.).

372. I attempt to deal with these questions in a manuscript tentatively entitled *Self-Paternalism in Response to Asymmetrical Responsibility*.