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EXPLAINING “BAIT-AND-SWITCH” REGULATION

DAVID ADAM FRIEDMAN*

ABSTRACT

“Bait and switch” can describe a range of commercial behaviors common in the everyday marketplace, but virtually ignored in the academic literature. The traditional definition of unlawful bait and switch applies to insincere offers to sell one item in order to induce the buyer to purchase another. Certain sellers have historically employed bait-and-switch tactics, including urban retailers, aluminum siding companies, and supermarkets.

Colloquially, this definition can also cover lawful or other borderline sales tactics, including the use of teaser rates or low introductory pricing, or even “free offers.” Even common lawful tactics, like the deliberate routing of customers past other retail displays on their way to purchase high-volume or featured items, may involve “bait” to induce other purchases.

Why are some of these behaviors lawful and others unlawful? In this Article, I examine several different flavors of bait-and-switch tactics, exploring the underlying behaviors behind the tactics and the welfare implications of regulating them. Looking to the literature on commercial custom and norms, I find a pattern showing that bait-and-switch practices that align with custom and norms tend to be lawful, and those that do not tend to be unlawful. Welfare advancement seemingly plays a distant secondary role in explaining bait-and-switch regulation.

My finding should compel regulators to consider whether the goal of elevating the market atmosphere by banning offensive behavior should trump welfare concerns. Further, my conclusion can also help advocates shape more effective arguments for adjusting trade practice regulation.

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INTRODUCTION

On the Golden Gate [University School of Law] campus recently, a group of first-year students at risk of losing their [merit] scholarships were trying to make sense of the system [T]he phrase “bait and switch” came up a lot. Several assumed that they were given what is essentially a discount to get them in the door.

“I had a friend once who told me that hunting is a sport,” said one Golden Gate merit grant winner who anticipated coming up shy of a 3.0 average. “I said, ‘Hunting is not a sport.’ He said: ‘Sure it’s a sport. It’s just that the animals don’t know they’re in a game.’ That’s what it feels like to be a law student these days. You have no idea you’re in a game.”¹

When do bait-and-switch tactics cross the line from “fair sport” to “turkey shoot”? A range of bait-and-switch tactics emerge in the marketplace. Some have been deemed *lawful* fair sport, and others have been deemed *unlawful* “turkey shoots.” Extending the metaphor, the formal hunting rules appear to reflect a sense of norms and imbued marketplace customs. Just as real hunting rules are driven by custom, norms, and formal regulation, so are rules about sales tactics. In this Article, I find that custom and norms²

¹ David Segal, *Behind the Curve: How Law Students Lose the Grant Game, and How Their Schools Win*, N.Y. TIMES, May 1, 2011, at BU1 (emphasis added). Just over one year after this *New York Times* article appeared, the American Bar Association House of Delegates promulgated a disclosure requirement for conditional scholarships at law schools. See Debra Cassens Weiss, *No Fudging: Revised Standard Bars Law Schools from Publishing Misleading Consumer Info*, A.B.A. J. (Aug. 6, 2012, 10:46 AM), http://www.abajournal.com/news/article/no_fudging_revised_standard_bars_law_schools_from_publishing_misleadin/; 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 39, Standard 509(e) (2012) [hereinafter Standard 509(e)]. Part III.C.2 discusses this standard in detail.

² In Roman law, custom was defined as “a repeat behavior to which the relevant majority of the community had tacitly consented to be bound to perform.” Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1163 (2012). See generally *id.* at 1163–67 (discussing the evolving historical definitions of commercial custom). Richard Posner defines norms as “rule[s] that [are] neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet [are] regularly complied with,” like rules of etiquette. Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997). For a compendium of articles about the role and influence of social norms, see generally ERIC A. POSNER, *SOCIAL NORMS, NONLEGAL SANCTIONS, AND THE LAW* (2007) [hereinafter POSNER, *SOCIAL NORMS*]. I often use the terms “customs” and “norms” interchangeably because they all work together to guide formal approaches toward regulation in this area. There are obviously significant distinctions between custom and norms, but for the purpose of this Article, the distinctions matter less. I observe that however defined, tradition and mores, as embedded in custom and norms, collectively explain which bait-and-switch-like tactics are deemed unlawful. Custom and norms are

drive the approach toward formal regulation of bait-and-switch tactics more than welfare advancement.³ The cultural explanation of commercial regulation can be identified in the history of commercial regulation⁴ and, I will argue, can be used to explain current regulation and to predict and guide its future. I use bait and switch to illustrate these dynamics.

Though custom and norms tend to explain our regulatory regime more closely than the construct of welfare advancement,⁵ this phenomenon might not always lead to the most desirable social result. Reinforcement of norms may correspond with notions of fairness, which may diverge from welfare advancement.⁶ This is not to say that reinforcing custom comes without benefits. A triumph of custom may vindicate the idea that certain rules are worth the welfare price because they elevate the morality and the fairness of the marketplace.⁷

In the consumer environment, persuasive and creative sales tactics are perpetually invented and deployed, and regulators are left to discern which

often discussed and distinguished together, but they both influence commercial culture. See Kadens, *supra* note 2, at 1166–67 & n.36. H.L.A. Hart noted the reality that “custom is law only if it is one of a class of customs which is ‘recognized’ as law by a particular legal system.” H.L.A. HART, *THE CONCEPT OF LAW* 44–45 (2d ed. 1994); see also K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 275 (William S. Hein & Co., 2002) (1941) (noting that customs and mores “fuse and confuse the notion of ‘practice’ (... actual behavior) with the notion of ‘standard’ (... an ideal of ... the proper line of actual behavior)”). Again, I acknowledge this confusion identified by Llewellyn, but put it aside for the purposes of this Article. I embrace the general notion that customs, mores, and norms all, in their own way, guide the formalization of our approach toward bait and switch.

³ For the foundational, classic principles of welfare economics, see generally PAUL ANTHONY SAMUELSON, *FOUNDATIONS OF ECONOMICS ANALYSIS* 203–53 (1947).

⁴ For a discussion of the role of custom and norms in the drafting of Article 2 of the Uniform Commercial Code, see *infra* Part II.A.1.

⁵ The very limited economic literature evaluating the regulation of bait and switch provides thin guidance about the welfare impact, though, as I discuss in Part I.B, the weight of the conjecture leads to a tentative conclusion that regulation should advance welfare in the traditional scenario. For the literature on point, compare Eitan Gerstner & James D. Hess, *Can Bait and Switch Benefit Consumers?*, 9 *MARKETING SCI.* 114, 114 (1990) [hereinafter Gerstner & Hess I], with William L. Wilkie et al., *Does “Bait and Switch” Really Benefit Consumers?*, 17 *MARKETING SCI.* 273, 273–74 (1998) [hereinafter Wilkie et al. I]. In reply to Wilkie et al. I, see James D. Hess & Eitan Gerstner, *Yes, “Bait and Switch” Really Benefits Consumers*, 17 *MARKETING SCI.* 283, 283–84 (1998) [hereinafter Hess & Gerstner II], and in reply to Hess & Gerstner, II, see William L. Wilkie et al., *Does “Bait and Switch” Really Benefit Consumers? Advancing the Discussion ...*, 17 *MARKETING SCI.* 290, 290–91 (1998) [hereinafter Wilkie et al. II].

⁶ See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *HARV. L. REV.* 961, 1035 (2001).

⁷ See *id.* at 1035–38.

tactics are deceptive. Choosing where and when to regulate common market activities can have a large impact. Consumer transactions are the fundamental lifeblood of the economy and, in aggregate, advance welfare.⁸ Government claims the responsibility of promoting the flow of accurate information “without unduly burdening legitimate business activity.”⁹ Bait and switch plays a significant role in the market, but the legal literature ignores not just the tactic, but what can be learned from examining it.

Of course, with bait and switch, definition of the tactic presents a critical starting point. Bait and switch is frequently used to describe a range of commercial behaviors, only some of which meet the legal criteria for deception under section 5 of the Federal Trade Commission Act (FTC Act).¹⁰ For the purposes of this Article, I expand the scope of the term “bait and switch” beyond the legal definition to include scenarios where consumers are lured in with a low-price introductory offer and are later locked in to paying a potentially higher price for the same offer.¹¹ Some of these tactics are omnipresent and lawful, but others have been designated unlawful by the Federal Trade Commission (FTC),¹² by federal statute,¹³ by state regulation,¹⁴ and are also held in disfavor by common law doctrines.¹⁵

The aforementioned “hunted” scholarship students at Golden Gate embraced “bait-and-switch” terminology.¹⁶ They felt like they had bought an

⁸ See generally SAMUELSON, *supra* note 3, at 203–53.

⁹ The Federal Trade Commission declares these goals within its mission and vision. *About the Federal Trade Commission*, FED. TRADE COMMISSION (Jan. 5, 2012), <http://www.ftc.gov/ftc/about.shtm>.

¹⁰ See 15 U.S.C. § 45 (2012).

¹¹ Examples of these include “free offers,” credit card rate hikes, and, for the sake of argument, law school merit scholarships, discussed *infra* Part III.C.

¹² See Guides Against Bait Advertising, 16 C.F.R. § 238 (2012). I focus primarily on distinctions made by the FTC, examining the tactics that it has deemed unlawful through Guidelines and civil actions.

¹³ See, e.g., Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734, 1735–36, 1738 (codified in scattered sections of 15 U.S.C.).

¹⁴ See, e.g., CAL. BUS. & PROF. CODE § 17500 (West 2012); N.Y. GEN. BUS. LAW § 396.1 (McKinney 2012); TEX. BUS. & COM. CODE ANN. § 17.46(b)(9)–(10) (West 2012).

¹⁵ Such doctrines include fraud, unconscionability, and unilateral mistake. See *infra* notes 39–42.

¹⁶ The Golden Gate students’ bait-and-switch label went “viral.” See, e.g., Debra Cassens Weiss, *Bait and Switch? Law Schools Gain in US News with Merit Scholarships Conditioned on High Grades*, A.B.A. J. (May 2, 2011, 7:34 AM), http://www.abajournal.com/news/article/bait_and_switch_law_schools_gain_in_us_news_with_merit_scholarships_conditi/; Nathan Koppel, *Are Law Schools Deceiving Students by Offering Merit Scholarships?*, WALL ST. J. L. BLOG (May 2, 2011, 11:31 AM), <http://blogs.wsj.com/law/2011/05/02/are-law-school-deceiving-students-by-offering-merit-scholarships/> (“Students accuse some schools of a bait and switch”).

offering at a low price only to be switched to a higher price, but they were not really alleging the deployment of a *traditional* bait-and-switch tactic. The FTC defines “bait” as

an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser.¹⁷

These students,¹⁸ as I will discuss, may have been “allured,” but they were not “switched.”

My definition of bait and switch includes the FTC definition, but expands it to apply to a range of tactics that offend general marketplace sensibilities. I discuss a number of these tactics, including a hypothetical of an auto dealer advertising a car just to lure customers to the lot,¹⁹ the real case of a retailer that frequently promoted a special offering to drive store traffic but rarely actually sold it on those terms,²⁰ and the company that required in-home salespersons to disparage big-ticket promoted goods to encourage the sale of higher-margin goods.²¹

Although they may not be explicitly labeled as such in a legal context, other forms of bait and switch exist, are regulated differently, and evoke different market customs. For example, “free offers” lure the attention of consumers to a packaged promotion. The FTC requires a free offeror to disclose conspicuously why an offer is not truly “free.”²² That is, after luring attention to an advertisement, the offeror presents the entirety of the sales story. This presents the market with a different sort of “switch,” a lawful switch, but a bait and switch nonetheless. Despite constituting a form of bait and switch, courts and regulators have been unwilling to eschew this old and established custom, though a plain look at free offers reveals that they interfere with consumer cognition. Stronger regulation that departs from the custom might conceivably advance welfare.²³

¹⁷ Guides Against Bait Advertising, 16 C.F.R. § 238.0 (2012).

¹⁸ Again, in 2011, these students transacted without disclosures mandated by ABA Standard 509(e).

¹⁹ See *infra* Part I.B.1.

²⁰ See *infra* Part III.A.3.

²¹ See *infra* Part III.A.2.

²² See Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251 (2012).

²³ See generally David Adam Friedman, *Free Offers: A New Look*, 38 N.M. L. REV. 49 (2008) [hereinafter Friedman, *Free Offers*] (describing the history of free offer regulation, the regulatory embrace of the free offer, and the cognitive distortions that free offers induce).

Also outside the formal bait-and-switch definition, but perhaps within its popular definition, are “teasers”—low-price introductory offers that can be used to lure consumers into arrangements where the terms can turn dramatically against their favor once they are locked in. The history of credit card rate regulation provides a high-profile example. The Credit Card Accountability Responsibility and Disclosure Act of 2009²⁴ (CARD Act) applied the brakes on well-established customary tactics. Historically, banks would dangle low rates to acquire customers and later raise the rate on their balances.²⁵ The CARD Act embodiment of bait-and-switch-like regulation provides further opportunity to explore how underlying economic and political forces can suddenly change the deep customs and culture associated with a set of business practices.

If one accepts the factual basis of the law students’ 2011 allegations,²⁶ Golden Gate could have been offering a “teaser,” but could not be said to be engaging in unlawful bait-and-switch behavior. The school sincerely intended to offer the students additional educational services, and did not intend to use the initial offering to “switch” the students to purchase something different. The students cried foul about a change in price that they felt resulted from a misleading initial offer. The argument about law school merit scholarships mirrors²⁷ some of the problems addressed by the CARD Act. Understanding the cultural dynamics that drove Congress to regulate bait-and-switch practices with sudden severity might prove instructive for understanding how students may have effected a modest change in law school merit scholarship practices.²⁸ If custom and culture drive regulation

²⁴ See generally Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2012) (codified in scattered sections of 15 U.S.C.).

²⁵ See *infra* Part III.C for historical context.

²⁶ The Golden Gate University Law School students have filed a class action lawsuit in California Superior Court that largely centers on false advertising and unfair competition related to job-placement and starting salary data. See Class Action Complaint at 2-4, 9-16, Arring v. Golden Gate Univ., No. CGC-12-517837 (Cal. Super. Ct. Feb. 1, 2012), available at http://www.anziskalaw.com/uploads/Filed_Golden_Gate_Complaint.pdf [hereinafter Complaint]. The law school merit scholarship issue is mentioned briefly in the Complaint, and the *New York Times* article, Segal, *supra* note 1, is attached to the Complaint as the first exhibit. See Complaint, *supra* note 26, at 10-11, Exhibit 1. The two paragraphs of the Complaint that focus on the merit scholarship draw on the article’s profile of Golden Gate graduate Alexandra Leumer, but Leumer is not a lead plaintiff. See *id.*

²⁷ I use the present tense because it is unclear if the “argument” has ended.

²⁸ Standard 509(e) requires disclosure about conditional scholarships with a focus on presenting scholarship retention data to the public and to scholarship offerees. Standard 509(e), *supra* note 1. Mandated disclosure may not always help consumers, as I discuss *infra* Part III.C.2. It remains unclear whether students would seek to eliminate conditional scholarships entirely in favor of a more certain financial aid structure. See *id.*

more so than welfare advancement, the roadmap to change, including the obstacles, is clearer.

Each flavor of bait-and-switch regulation provides an opportunity to explore the ways we have permitted custom to prevail over welfare advancement. In Part I, to provide grounding, I describe the current regulatory approach toward bait and switch. In Part II, I provide an overview of the theory undergirding the role norms and customs play in commercial regulation. In Part III, I examine three distinct categories of bait-and-switch behavior and regulation to assess whether they reinforce norms or customs and whether the regulatory approach promotes welfare advancement. In Part III.A, I examine “traditional” bait-and-switch regulation, as the FTC defines it, including special rules for retail grocers. In Part III.B, I analyze “free offer regulation,” and in Part III.C, “teaser” regulation via the CARD Act and first-year law school merit scholarships, respectively. I also discuss “lawful” forms of bait and switch and the role of custom in Part III.D. In Part IV, I globally assess the interplay between custom, norms, and welfare advancement in the regulation of broader bait-and-switch practices, and describe why this approach endures.

Below, I will outline the role of bait-and-switch regulation in our consumer economy. I then follow with a discussion of how the role of custom in commercial regulation informs discussion about the social welfare cost of custom in bait-and-switch regulation. Ultimately, I conclude that the primacy of custom and norms should compel policymakers to carefully consider the welfare impact of commercial regulations—and should inform advocates about how to influence regulatory change.

I. CURRENT BAIT-AND-SWITCH REGULATION

Bait-and-switch tactics are an effective tool for sellers to generate transactions, but the custom belying the regulation varies by context. For the purposes of the Article, I refer to the FTC’s definition of bait and switch as “traditional bait and switch.” The lawfulness of a “traditional bait and switch” is determined by some measure of the “sincerity” of the promoted offer. For enforcement purposes, lawfulness is, in part, discerned by the propriety of disclosure to the consumer about the nature of the “bait.”²⁹ The custom and norm would naturally be to regard “insincere” offers as ill-mannered. The public might associate unscrupulous retailers³⁰ and slick

²⁹ I describe this regulatory scheme in more detail in Part III.D.

³⁰ See, e.g., *In re Leon A. Tashof*, 74 F.T.C. 1361, 1362–63 (1968), *aff’d*, 437 F.2d 707, 709 (D.C. Cir. 1970) (regarding bait and switch involving cheap eyeglasses), discussed *infra* Part III.A.3.

sales forces³¹ with these practices, and our stern regulation of traditional bait and switch matches this norm against insincerity.³² For example, in the late 1960s, the FTC viewed bait and switch in retail grocery through the lens of the War on Poverty and regulated aggressively to meet that norm.³³ The FTC later pulled back on retail grocery regulation in the 1980s era where deregulation became the ethos.³⁴ Economic studies were used to support the initial regulation and the later deregulation, but even the very choice of the *line* of economic inquiry reveals that regulators were concerned with prevailing norms.³⁵

Marketing tactics are, of course, designed to induce consumers to transact. If a transaction occurs, the parties make an exchange because the subjective value of what they receive from each other exceeds the value of what they give in return. Such an exchange advances social welfare.³⁶

Rational choice theory often explains behavior that deviates from utility maximization as resulting from market failures like monopoly and informational asymmetries.³⁷ Bait-and-switch practices can indeed tamper with the information flow and exploit the structure of the market.³⁸ These impurities can spoil the market and potentially destroy welfare.³⁹ If sellers are deceptive, buyers should subsequently experience frustration in realizing the subjective value they expected.

³¹ See, e.g., *All-State Indus. of N.C., Inc. v. F.T.C.*, 423 F.2d 423, 425 (4th Cir. 1970); *In re S. States Dist. Co.*, 83 F.T.C. 1126, 1127–29 (1973) (regarding bait and switch involving sale of home improvement products), discussed *infra* Part III.A.1 and Part III.A.2, respectively.

³² However, the FTC separated retail grocers from the traditional bait-and-switch regulatory umbrella. See *Retail Food Store Advertising and Marketing Practices*, 16 C.F.R. § 424.2. In 1971, the FTC promulgated stricter guidelines for retail grocers but loosened them in 1989, using economic justifications at both junctures. I discuss this separate regulatory approach in detail, *infra* Part III.A.4.

³³ See generally STAFF REPORT TO THE FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON FOOD CHAIN SELLING PRACTICES IN THE DISTRICT OF COLUMBIA AND SAN FRANCISCO (1969) [hereinafter ECONOMIC REPORT ON FOOD CHAIN SELLING] (on file with author).

³⁴ See *infra* Part III.A.4, discussing the intersection between the cultural attitude toward regulation and retail grocer bait and switch.

³⁵ See *infra* Part III.A.4, discussing norms in retail grocery regulation.

³⁶ See 1 LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 203–04 (rev. ed. 1963) (“People buy and sell only because they appraise the things given up less than those received.”).

³⁷ See Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 790, 793–94 (2000).

³⁸ A dominant retailer can effectively manipulate a set of buyers that have an absence of a meaningful transactional alternative, diminishing the natural salutary effects of competition.

³⁹ See Howard Beales, Richard Craswell & Steven Salop, *The Efficient Regulation of Consumer Information*, 24 *J. L. & ECON.* 491, 505–06 (1981).

Though common law provides general avenues for these buyers to redress these deception scenarios⁴⁰ (through defenses like fraud,⁴¹ unconscionability,⁴² and unilateral mistake⁴³), regulation also directs behavior in the marketplace. In this instance, section 5 of the FTC Act declares unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,”⁴⁴ providing rulemaking⁴⁵ and enforcement authority⁴⁶ to the FTC.

Bait-and-switch guidance and enforcement fall within this anti-deception regime. The FTC has promulgated guides as to what constitutes bait-and-switch deception,⁴⁷ and has enforced bait-and-switch cases under section 5.⁴⁸ The states also offer protection against bait and switch through “little FTC Acts,” often providing private remedies.⁴⁹ The state bait-and-switch laws tend to mirror the federal approach,⁵⁰ so I focus on the FTC’s action in this area. In Part I.A, I describe the FTC’s guidance. In Part I.B, I discuss the welfare economics of bait and switch and explore the limited literature on the subject. A basic understanding of “traditional” bait-and-switch regulation will set a baseline for the discussion of the welfare impact.

A. FTC Guidance on Bait and Switch

The FTC’s “Guides Against Bait Advertising”⁵¹ provide sellers with a crisp outline of how the FTC internally defines a violation of section 5 in the bait-and-switch zone. The FTC defines “bait” as

⁴⁰ As do statutory regimes—*e.g.*, the UCC also protects buyers through implied warranties among other mechanisms. *See* U.C.C. §§ 2-314, 2-315, 2-714.

⁴¹ *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 159, 162, 164, 167 (1981); RESTATEMENT (SECOND) OF TORTS §§ 526, 530 (1977).

⁴² *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *see also* U.C.C. § 2-302 (1977).

⁴³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981).

⁴⁴ 15 U.S.C. § 45(a)(1) (2006).

⁴⁵ 15 U.S.C. § 57A.

⁴⁶ 15 U.S.C. § 45(b).

⁴⁷ Guides are promulgated to help advertisers understand how the FTC interprets the law, but they are not binding. To prosecute a case, the FTC must bring the action under section 5 of the FTC Act. *See* 16 C.F.R. §§ 1.5, 1.8 (2012); *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMMISSION (July 2008), <http://www.ftc.gov/ogc/brfovrvw.shtm>.

⁴⁸ *See infra* Part III for examples.

⁴⁹ For an exhaustive resource about state laws in the area of “baby FTC Acts,” see generally UNFAIR AND DECEPTIVE ACTS AND PRACTICES (Nat’l Consumer Law Ctr., Consumer Credit & Sales Legal Practice Series, 6th ed. 2004).

⁵⁰ Compare 16 C.F.R. § 238 (2012) with CAL. BUS. & PROF. CODE § 17500 (West 2012), N.Y. GEN. BUS. LAW § 396.1 (McKinney 2012), and TEX. BUS. & COM. CODE ANN. § 17.46(b)(9)–(10) (West 2012).

⁵¹ 16 C.F.R. § 238.

an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser.⁵²

The FTC also looks to the motive of an advertisement, defining bait as advertisements with “[t]he primary aim” of “obtain[ing] leads as to persons interested in” purchasing other merchandise.⁵³

The Guides also focus on the intent and character of the initial impression that the offer leaves on the consumer. An advertised offer should not be published if it does not represent “a bona fide effort to sell the advertised product.”⁵⁴ Further, “[n]o statement or illustration should be used in any advertisement which creates a false impression” about attributes of the offering, where revelation of the truth about the product would switch the buyer from the featured offering to a different one.⁵⁵ Subsequent disclosure of the truth to the consumer would not present a defense to the FTC “if the first contact or interview is secured by deception.”⁵⁶ The FTC also singles out certain behaviors that could constitute a violation of section 5, notably “discouragement of purchase of [the] advertised merchandise”⁵⁷ and post-sale switches.⁵⁸ All of these together comprise current bait-and-switch regulation at the federal level.⁵⁹

Though this FTC definition may seem like a straightforward, welfare-enhancing attempt to combat deception, the economics of bait and switch are a bit more complex. Next, I attempt to describe the welfare dynamics of the FTC’s approach.

B. Bait-and-Switch Economics

Before assessing the scant literature about the welfare impact of the FTC’s brand of bait-and-switch regulation, it is worth revisiting this regulation in the context of the FTC’s broader institutional purpose. The FTC declares a mission “[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice

⁵² 16 C.F.R. § 238.0.

⁵³ *Id.*

⁵⁴ 16 C.F.R. § 238.1.

⁵⁵ 16 C.F.R. § 238.2(a).

⁵⁶ *See* 16 C.F.R. § 238.2(b).

⁵⁷ *See* 16 C.F.R. § 238.3.

⁵⁸ *See* 16 C.F.R. § 238.4.

⁵⁹ As noted *infra* Part III.A.4, retail-grocer bait-and-switch regulation differs somewhat. *See* Retail Food Store Advertising and Marketing Practices, 16 C.F.R. § 424 (2012).

and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”⁶⁰ In sum, the FTC wishes to elevate the level of business practices without unnecessarily slowing commerce.

The FTC’s vision focuses more tightly on its role in promoting welfare advancement and the interests of consumers. The FTC envisions “[a] U.S. economy characterized by vigorous competition among producers and consumer access to accurate information, yielding high-quality products at low prices and encouraging efficiency, innovation, and consumer choice.”⁶¹

In the traditional case of bait and switch, where a buyer is switched through any sort of insincere tactic, it is entirely consistent with the mission of the FTC to deem these practices deceptive. But does bait-and-switch regulation advance welfare? As I discuss, formal economic studies of bait-and-switch laws are few. But in order to divine the source of bait-and-switch regulation in different contexts and account for the impact of regulation, this welfare impact question should be answered to the extent possible.

In order to set the stage for understanding the effect of traditional bait-and-switch regulation, it is helpful to compare two hypothetical, simple illustrations to contextualize the literature.

1. Illustration A: Traditional Bait and Switch

Assume that Alpha Autos, a used-car dealership, draws Consumer A to the Alpha lot with an “alluring but insincere” advertisement depicting a blue 1996 Nissan Sentra for sale at the bargain price of \$3000. Upon Consumer A’s arrival on the premises and two hours of negotiation, Alpha Autos pulls a “switch” and instead sells the consumer a higher profit-margin car, a 1994 Dodge Colt for \$5000. Also assume that the dealer disparaged the blue Nissan Sentra once the consumer was on the lot, or simply assume that the dealer never intended to sell the Sentra to *anyone*.

In this example, Alpha Autos has employed an unfair and deceptive practice that the FTC has been charged with stamping out. The hypothetical dealer has certainly violated the bait-and-switch guidelines. The bait was “alluring but insincere,” the dealer “[did] not intend ... to sell” the Sentra, and used the Sentra offer for purposes of “sell[ing] something else.”⁶² In

⁶⁰ *About the Federal Trade Commission*, *supra* note 9.

⁶¹ *Id.*

⁶² See 16 C.F.R. § 238.0 (“Bait advertising is an *alluring but insincere* offer to sell a product or service which the advertiser in truth *does not intend or want to sell*. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser.” (emphasis added)).

this case, the auto dealer put Consumer A in the psychological position of absorbing “sunk costs.”⁶³ Sunk cost incurrence generates a fallacy—an irrational “tendency to continue an endeavor once an investment in money, effort, or time has been made.”⁶⁴ One study concludes that this phenomenon is rooted in the “maladaptive ... desire [of people] not to appear wasteful.”⁶⁵ The sunk-cost fallacy has been used to explain routine behavior (for example, why people will continue to watch bad movies until the closing credits) and more spectacular behavior (for example, why the United States continued to remain engaged in the Vietnam Conflict).⁶⁶ Sunk costs should not bear on instant choices, but they do. They are irrecoverable.⁶⁷

In this Alpha Autos illustration, Consumer A “feels” the sunk costs of traveling to Alpha Autos and putting time into negotiation. Consumer A may also feel a disproportionate obligation to reciprocate⁶⁸ and reward a salesperson who put time into serving and educating him. The consumer is not imprisoned on site, but the dealer has some control over the consumer’s physical presence and attention. Additionally, time constraints may edge Consumer A to transact rather than continue car shopping elsewhere. Time, the ultimate scarce resource, may constrain the consumer’s choices, if the consumer has urgency to transact.

Eradication of this marketplace behavior might advance social welfare. Consumer A purchased the Dodge Colt for \$5000. Entering the dealership, Consumer A expected to purchase the Nissan Sentra for \$3000. The seller used tactics that put a thumb on the scale, leading Consumer A to complete a transaction that might not have been made without the weight of the sunk cost fallacy. If Consumer A would not have made the Dodge Colt transaction without Alpha’s deceptive approach, this transaction may have led to a misallocation of resources and welfare. If Consumer A wises up to the trick later, he may experience more post-transaction disappointment. One can see how this bait and switch could reduce utility for the consumer.⁶⁹

⁶³ See generally Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 *ORG. BEHAV. & HUM. DECISION PROCESS* 124, 124–25 (1985).

⁶⁴ *Id.* at 124.

⁶⁵ *Id.* at 125.

⁶⁶ *Id.* at 126.

⁶⁷ *Id.* at 125–26.

⁶⁸ This obligation, rooted in the “reciprocity norm,” might attach in any complex sales scenario. The reciprocity norm reflects the human tendency to return favors, but this tendency can be easily exploited in the context of consumer transactions. For a general discussion of the reciprocity norm, see Jerry M. Burger et al., *The Norm of Reciprocity as an Internalized Social Norm: Returning Favors Even When No One Finds Out*, 4 *SOC. INFLUENCE* 11, 11–12 (2009); Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 *AM. SOC. REV.* 161, 161–62 (1960).

⁶⁹ See generally Ulen, *supra* note 37, at 793–94.

2. *Illustration B: No Bait and Switch*

Next, assume that Consumer B, a virtual clone of Consumer A in preferences, approaches Beta Motors, a used-car dealer competing directly with Alpha Auto. Beta maintains a similar inventory to Alpha. Beta Motors advertises a blue 1996 Nissan Sentra for sale at \$3000, just as in the Alpha scenario.

Consumer B walks into the dealership ready to buy the Sentra, only to learn from the salesperson that the Sentra had been sold earlier that morning. Apologizing for any disappointment, the salesperson asks Consumer B if she has interest in the Dodge Colt that Beta Motors has on the lot for \$5000. At the end of two hours of negotiation, Consumer B purchases the Colt at that price.

Here, Beta Motors led with an “alluring but *sincere*” offer. The purpose of having the Sentra on the lot was not to enable a “switch.” No bait-and-switch problem emerges. Yet, the same outcome is reached. Sunk costs were incurred by Consumer B, but not through a sneaky practice. Consumer B was just unlucky—the first car was gone. Beta Motors was lucky, because the sold car effectively functioned as bait, even though it would not be classified as bait.

At the end of their respective transactions, Consumer A and Consumer B might be considered at first glance to be in similar welfare positions. They bought the same Dodge Colt for the same price after being lured in by the prospect of buying the Nissan Sentra. The sunk-cost fallacy works in the dealer’s favor in both scenarios. The “cost of leaving”⁷⁰ effectively creates a temporary monopoly by keeping the customer on the lots of both hypothetical dealerships. But this is a static and incomplete view of welfare. As I delve into the literature, I will explain why a dynamic view is required to fully understand the welfare impact.

3. *The Welfare Impact*

Continuing with our hypothetical competing dealers, a welfare problem lies with the fact that Beta Motors would not survive long in a marketplace with Alpha as the competitor. Alpha would use the Sentra as bait and never sell it. Beta would sincerely offer the Sentra, sell it, and lose its lure when it leaves the lot. Alpha would draw more traffic with the permanent “insincere” Sentra lure, all else equal. If Beta found it effective to

⁷⁰ This cost is reflected both as a real transaction cost reflected in restarting negotiation from the beginning with a different dealer, and as a sunk cost.

draw in people with Sentras as a loss leader of sorts,⁷¹ but wanted to deal honestly, it would require Beta to carry more inventory and use more capital. Honesty proves more expensive—perhaps fatally expensive in the marketplace. The existing economics literature supports this conclusion.

a. The “Lemons” Literature

In his Nobel Prize-winning work about “the market for ‘lemons,’”⁷² George Akerlof observes that dishonest practices, if left intact, tend to prevail over honest practices.⁷³ In the bait-and-switch circumstance, the seller that dangles the insincere bait effectively prevails over the seller that plays honestly.

Consider a market in which goods are sold honestly or dishonestly There may be potential buyers of good quality products and there may be potential sellers of such products in the appropriate price range; however, the presence of people who wish to pawn bad wares as good wares tends to drive out the legitimate business. The cost of dishonesty, therefore, lies not only in the amount by which the purchaser is cheated; the cost also must include the loss incurred from driving legitimate business out of existence.⁷⁴

In this instance, we would consider the presence of people who wish to use bait as equivalent to those pawning “bad wares.” Those who pawn bad wares with impunity will either drive other legitimate businesses to behave badly in a “race to the bottom,” as game theory and the “prisoner’s dilemma” might predict,⁷⁵ or simply eliminate them from the market.⁷⁶ If one accepts that Akerlof’s dynamic would be at work in the absence of regulation, bait-and-switch regulation should advance welfare.

If the tactic employed by Alpha Autos succeeds and pervades in the marketplace, consumers could also prove more wary in the long term, as they absorb initial offerings and then transact. Consumers might enter the marketplace with a defensive posture, not willing to pay as much for items due to suspicions about deceit. Akerlof’s work on “lemons” might provide a

⁷¹ This is a “sincere” mechanism for driving customer traffic to the dealer.

⁷² George A. Akerlof, *The Market for ‘Lemons’: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488 (1970). Akerlof was awarded a Nobel Prize in Economics for this work. See Jon E. Hilsenrath, *Three Americans Win Nobel for Economics*, WALL ST. J., Oct. 11, 2001, at A2.

⁷³ See Akerlof, *supra* note 72, at 495.

⁷⁴ *Id.*

⁷⁵ See *Prisoner’s Dilemma*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 22, 2007), <http://plato.stanford.edu/entries/prisoner-dilemma/>.

⁷⁶ The FTC’s stated goal to prevent anticompetitive behavior would be served by preventing this race to the bottom. See *About the Federal Trade Commission*, *supra* note 9.

basis for understanding these welfare effects, too. As Akerlof noted, information asymmetry leads to market failures.⁷⁷ A seller of a used car, for example, knows more about the car's attributes than the buyer. The buyer might not be willing to pay the price that the seller thinks the car is worth because the buyer has less information, making the transaction more risky.⁷⁸ This leads to a market failure. A marketplace that rewards deceit is a marketplace where distrust raises transaction costs and counterparty risk, and welfare does not advance.⁷⁹

b. The Marketing Economics Literature

Would Alpha Autos' practices instantly or ultimately reduce consumer welfare? The limited research on the topic⁸⁰ is more controversial than one might anticipate. Eitan Gerstner and James Hess provoked a debate with another set of economists on this question in the 1990s by contending that traditional bait-and-switch practices could potentially *benefit* consumers.⁸¹ Other analysis and evidence indicates otherwise.⁸² But the Gerstner and Hess analysis provides a starting point for understanding the welfare impact.

In 1990, Gerstner and Hess argued that that the FTC's viewpoint on bait and switch was "myopic."⁸³ They noted that the FTC's approach did not account for the competitive dynamic that could follow from bait and switch, notably, downward pressure on prices from aggressive sales promotions.⁸⁴ Gerstner and Hess also maintained that traditional regulation of bait and switch ignored the ultimate reputational impact bait and switch had on sellers; that is, the notion that repeated deployment of abusive sales practices would destroy a seller's reputation and prove unsustainable.⁸⁵ Further, they argued that sales of "featured items" led to inventory stock outs that were already anticipated by the consumer, but at the same time

⁷⁷ See Akerlof, *supra* note 72, at 490.

⁷⁸ *Id.* at 489–90.

⁷⁹ Akerlof illustrates this by describing the dysfunction of credit markets in India circa 1970. *Id.* at 497–99.

⁸⁰ The core research in the legal and social science literature is scarce, but in intellectual property, initial interest confusion is often discussed in the context of bait and switch. See, e.g., Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1354–55 (2011).

⁸¹ See the first study, Gerstner & Hess I, *supra* note 5, at 121; then see Wilkie et al. I, *supra* note 5, at 273–74; and in reply see Hess & Gerstner II, *supra* note 5, at 283; and in further reply see Wilkie et al. II, *supra* note 5, at 290.

⁸² Wilkie et al. I, *supra* note 5, at 274.

⁸³ Gerstner & Hess I, *supra* note 5, at 115.

⁸⁴ *Id.*

⁸⁵ *Id.*

stimulated welfare-advancing sales of complementary products at loss-leader pricing.⁸⁶ Gerstner and Hess further elaborated that:

[T]he process of bait and switch can enhance economic efficiency Competition to attract customers motivates retailers to cut the prices of featured brands to very low levels [T]hese [tactics] motivate in-store promotions that add real utility. Stores must guard against overdoing it when customers foresee stock outs. They cannot take full advantage of the monopoly power over customers already at the store because they are committed to a low price for the featured brand⁸⁷

These assumptions about competition presume, however, that the markets function efficiently. In certain low-income market zones, they might not. As I discuss in Part III, reputation and competition may not alleviate the deception where consumers lack meaningful retail choices—especially in lower-income neighborhoods, or certain sectors like retail grocery.⁸⁸ But the conjecture that aggressive sales tactics might benefit the consumer through loss leadership might carry some weight. Could a sleazy car dealership lose reputation and lose business to an ethical car dealership? Akerlof’s work predicts the opposite result—that the unethical dealership model would prevail.

In 1998, the journal *Marketing Science* published a rejoinder to the 1990 Gerstner and Hess article.⁸⁹ Wilkie et al. extended the Gerstner and Hess model, challenged its underlying assumptions, and concluded that bait and switch should remain prohibited.⁹⁰ Wilkie’s key critique was that the “planned fraud and deceit” at the core of bait-and-switch practices were absent from and needed to be included in the analysis.⁹¹ In the rejoinder, these authors drew upon the facts of an enforcement action⁹² to surface several observations about bait and switch that were ignored in the previous paper:

- “Actions are coordinated and practiced, relying on gaining sales through deception.”⁹³

⁸⁶ *Id.*

⁸⁷ *Id.* at 122.

⁸⁸ *See infra* Part III.A.

⁸⁹ Richard Staelin, *Editorial: A Discussion of Bait and Switch*, 17 *MARKETING SCI.* 271, 271 (1998). Publishing such rejoinders and replies was unprecedented for the journal, but the editor agreed to publish the piece because the issue was “very important (i.e., could alter the field, conclusions are major, etc.)” *Id.*

⁹⁰ Wilkie et al. I, *supra* note 5, at 273.

⁹¹ *Id.* at 280.

⁹² *In re New Rapids Carpet Ctr., Inc.*, 90 F.T.C. 64, 64, 75–76, 93–96 (1977).

⁹³ Wilkie et al. I, *supra* note 5, at 274.

- “Huge increases in actual prices paid by bait-and-switch victims are common ... [and could potentially range] from double to nine times the price featured in the bait ad.”⁹⁴
- “Customers are often poor, uneducated and susceptible to ‘hard-sell’ techniques.”⁹⁵
- “[P]ost-sale actions of bait-and-switch sellers often reveal a contempt for their customers ... includ[ing] refusals to honor warranties ... [and other post-sale promises]”⁹⁶

In the analysis of actual traditional bait-and-switch cases *infra* Part III, I find similar practices. Further, Wilkie et al. note that bait and switch exploits marketplace imperfections and that the assumption of perfect competition in these markets “belies ... reality.”⁹⁷ Under the Wilkie view, traditional bait-and-switch regulation would certainly advance welfare.

Hess and Gerstner then answered this sharp rejoinder, reiterating and amplifying their original conclusion. They summarize:

In every condition in which a law “might” protect customers from bait and switch, market competition alone forces retailers to drop the practice as unprofitable, so the law is moot. In every condition in which the practice of bait and switch creates social value, market competition always transfers the value to the customers, so a law prohibiting the practice actually damages consumer welfare In a competitive market when stock outs and upselling occur, they create welfare gains; when they would create welfare losses, [stock outs and upselling] do not occur.⁹⁸

Wilkie et al. wrote a final response, emphasizing that all of the original modeling had focused on the impact of unavailability, ignoring scenarios where the bait and switch involved deliberate, naked deception.⁹⁹ This exchange reflects the entirety of the marketing economics literature on the subject, but when combined with Akerlof’s contribution to understanding markets and information asymmetry, it does seem that regulation of bait-and-switch practices would advance welfare.

The examples of traditional bait and switch that I explore more fully *infra* Part III.A demonstrate how the practice can create consumer injury. Questions remain about why certain bait-and-switch practices are regulated

⁹⁴ Wilkie et al. I, *supra* note 5, at 274–75.

⁹⁵ *Id.* at 275.

⁹⁶ *Id.*

⁹⁷ *Id.* at 281.

⁹⁸ Hess & Gerstner II, *supra* note 5, at 284.

⁹⁹ Wilkie et al. II, *supra* note 5, at 293.

more tightly than others, but Akerlof’s observation that bad actors can bring down marketplace standards and ultimately drive out good actors should be taken seriously.

Additionally, apart from the core welfare economics, there is still a question about what kind of commercial atmosphere regulators should foster. The very spirit of bait-and-switch regulation disfavors insincerity and tricks. Perhaps even if Gerstner and Hess were proven correct, regulators would still ignore that conclusion, emphasizing fairness and norms over welfare advancement.

Additionally, questions are raised about what kind of transactional environment consumers would want to experience. How should the marketplace “feel” or “look” to consumers? These are cultural questions, perhaps more so than welfare questions. Before moving to discussion of specific bait-and-switch tactics, in Part II, I provide some context about the interplay between culture, customs, norms, and welfare advancement. This enables a richer discussion of the range of tactics in Part III, and whether norms and customs trump welfare, and if so, whether they should.

II. CUSTOM, NORMS, AND WELFARE ADVANCEMENT

Commercial environments reflect broader underlying values and culture. Bargaining styles, for example, vary cross-culturally and these differences are even visible in childhood and adolescence. A study of children from Argentina, India, and the United States reveals that even at a young age, negotiating patterns differ dramatically.¹⁰⁰ Practical business literature offers observations about bargaining cultures and values. For example, a *Harvard Business Review* article attempted to explain the cultural roots of the Chinese approach to bargaining and compare it to the American approach:

Chinese negotiators are more concerned with the means than the end, with the process more than the goal. The best compromises are derived only through the ritual back-and-forth of haggling... While Americans tend to believe that the truth, as they see it, is worth arguing over and even getting angry about, the Chinese believe that the way is hard to find and so rely on haggling to settle differences.¹⁰¹

Regardless of whether this observation overly generalizes, it shows an instance where culture, norms, and custom *matter*—and they certainly matter

¹⁰⁰ See Daniel Druckman et al., *Cultural Differences in Bargaining Behavior: India, Argentina, and the United States*, 20 J. CONFLICT RESOL. 413, 413 (1976).

¹⁰¹ John L. Graham & N. Mark Lam, *The Chinese Negotiation*, 81 HARV. BUS. REV. 82, 84–85 (2003).

where values need to be reinforced with rules. If bargaining customs are ingrained in our values, then certainly custom might guide policymaking about trade practice regulation. If commercial culture eschews the practices associated with traditional bait and switch, perhaps that rejection reflects a collective belief that “truth” in the bargaining process matters as much as or more than the outcome. Another culture’s tradition might find traditional bait and switch to be a natural part of the haggling ritual—the American cultural custom apparently finds traditional bait and switch to be repugnant.

Custom and norms played an express role in the formation of commercial law and in the development of common law standards for other commercial behavior. Karl Llewellyn and the reporters who drafted the Uniform Commercial Code (UCC or the Code) expressed that they were aspiring to incorporate the best business practices and customs into the default rules governing sales transactions.¹⁰² Particularly among merchants, the UCC incorporates custom as a default standard for commercial behavior.¹⁰³

The role of custom in commerce also emerges in other jurisprudence. In the famous torts case, *The T.J. Hooper*,¹⁰⁴ Judge Learned Hand noted that trade custom could inform the standard of due care, and that reasonable care could be apart from established custom.¹⁰⁵ Indeed, the prevailing custom could merely reflect that an industry had simply fallen behind the times with respect to technological advances, and done so in lockstep.¹⁰⁶ Judge Hand presciently warned that adopting a trailing, but prevailing, custom would not necessarily provide an appropriate standard and advance welfare.¹⁰⁷

In his revisiting of *The T.J. Hooper*, Richard Epstein offers a “fresh view” of the role of custom in guiding the law of negligence.¹⁰⁸ He argues that “in [tort] cases that arise out of a consensual arrangement ... custom should be regarded as conclusive evidence of due care ... where consistent custom emerges, ... it should be followed.”¹⁰⁹ I contend that the importance Epstein attaches to custom in tort¹¹⁰ can be transplanted into the commercial, transactional zone explored here. For the purposes of this Article, however, I am less focused on Epstein’s overall conclusions about custom than I

¹⁰² See discussion *infra* Part II.A.1.

¹⁰³ See *id.*

¹⁰⁴ *The T.J. Hooper*, 60 F.2d 737, 737, 739–40 (2d Cir. 1932).

¹⁰⁵ *Id.* at 740. The court addresses custom among commercial actors, but could be generalized to include consumers.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4 (1992).

¹⁰⁹ *Id.*

¹¹⁰ See *id.* at 4, 6–11.

am interested in his framework that predicts when custom will emerge to guide formal rules.¹¹¹

Bait-and-switch regulation varies by context, and Epstein’s framework may provide insight into what drives the variance. It should be noted that Epstein expresses skepticism about the role of custom¹¹² in guiding development of contract law in a “new regulatory world” where custom “[might] be taken as evidence of the pervasive and illicit power of landlords, employers, manufacturers, or sellers of all sizes and descriptions.”¹¹³ Yet, as I demonstrate, custom, if defined as general expectations of market behavior, *does* explain the bait-and-switch regulatory approach, just as it expressly does within the confines of the UCC.¹¹⁴

Next, in Part II.A I describe how custom intertwines with commercial practices, using as fodder the drafting of the UCC and also Epstein’s framework for assessing the role of custom in consensual commercial relationships. In Part II.B, I discuss the implications of reinforcing custom through formal law. Finally, Part II.C explores the relationship between enforcing custom and norms, and advancement of efficiency and welfare.

A. Custom and Commercial Practices

As a custom, bait-and-switch tactics have been long regarded as a scourge in the commercial marketplace. Ralph Rohner and Fred Miller aptly describe bait and switch as aiming to subvert an “ancient but dishonorable practice.”¹¹⁵ This observation raises a question. If the practice is ancient, is the practice a custom? Or is the notion that it is “dishonorable” the custom? I would contend that the custom is reflected more completely in the “dishonorable” description. Theft is also ancient practice, but the taboo and dishonor of theft is as old as the underlying practice.

As I discuss in Part II.A.1, the drafters of the UCC embraced custom.¹¹⁶ For example, custom in the form of “usage of the trade” has been incorporated into the Code and provides standards for behavior for transactions between both merchants in a trade, and merchants and non-merchants.¹¹⁷ The Code drafters’ hidden agenda to embrace customs that

¹¹¹ See *id.* at 11–16.

¹¹² “[T]he role of custom is at best obscure.” *Id.* at 8.

¹¹³ *Id.*

¹¹⁴ See *infra* Part II.A.1.

¹¹⁵ RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING 752 (Robert A. Cook et al. eds., 2000).

¹¹⁶ See *infra* Part II.A.1.

¹¹⁷ *Id.*

would *elevate* standards, rather than just formally capture them, resembles the agenda of bait-and-switch regulators. As I discuss in Part II.A.2, in certain parts of the commercial environment, the asymmetry of transacting parties creates conditions unfavorable for the natural emergence of a stable custom, as Epstein would predict.¹¹⁸ Regulators overlay a rule when stable custom fails to emerge.

1. *The Uniform Commercial Code*

Article 2 of the UCC results from efforts by the American Law Institute to harness and embrace custom or “usage of trade” and practices among merchants into a uniform law that would promote expansion of commercial activity through application of evolving commercial standards.¹¹⁹ As Lisa Bernstein writes, the UCC was premised on urging courts to discern the “immanent business norms.”¹²⁰

The Code wastes no time in declaring its underlying aims, which are tightly tied to providing custom-based default rules for commercial relationships. UCC section 1-103, which covers “[c]onstruction of [the Code] to [p]romote its [p]urposes and [p]olicies,” guides that “[the Code] must be liberally construed and applied to promote its underlying purposes and policies, [among] which are ... to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties”¹²¹ The Code even defines “agreement” as “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade”¹²²

“Usage of trade” is also defined in the Code and presents a more inclusive and current view of custom than the old English common law, that is, holding that more recently created custom, rather than ancient custom could

¹¹⁸ See *infra* Part II.A.2.

¹¹⁹ See U.C.C. § 1-103 cmt. 1 (2012). The Code “is drawn to provide flexibility so that, since it is intended to be a semi-permanent and infrequently-amended piece of legislation, it will provide its own machinery for expansion of commercial practices.” *Id.* The structure of the Code should enable the law “to be applied by the courts in the light of unforeseen and new circumstances and practices.” *Id.*

¹²⁰ Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Norms*, 144 U. PA. L. REV. 1765, 1766 (1996) [hereinafter Bernstein, *Merchant Law*]. Bernstein challenges this “fundamental premise of the ... Code’s adjudicative philosophy,” noting that the drafters did not anticipate how incorporating norms could “alter the very reality they sought to reflect.” *Id.* at 1766, 1769.

¹²¹ U.C.C. § 1-103(a)(2) (2012). The other purposes are “(1) to simplify, clarify, and modernize the law governing commercial transactions; ... and (3) to make uniform the law among the various jurisdictions.” § 1-103(a)(1), § 1-103(a)(3).

¹²² U.C.C. § 1-201(b)(3); see Bernstein, *Merchant Law*, *supra* note 120, at 1768.

provide the standard.¹²³ UCC section 1-303(c) defines “usage of trade [as] any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.”¹²⁴ The Official Comments further elaborate on the definition and emphasize that the Code presents a formal break from the old English common law,¹²⁵ including a willingness to embrace merchant-created custom:

A usage of trade ... must have the “regularity of observance” specified. The ancient English tests for “custom” are abandoned in this connection. Therefore, it is not required that a usage of trade be “ancient or immemorial,” “universal,” or the like.... [F]ull recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree.¹²⁶

Key sections of Article 2¹²⁷ and the Official Comments¹²⁸ are laden with examples of the incorporation of commercial norms, as are the contemporaneous writings of Karl Llewellyn,¹²⁹ the principal drafter of the Code.¹³⁰ Llewellyn, in offering a critique of the Code’s predecessor, the Uniform Sales Act, noted “the amazing degree to which [the Uniform Sales Act] has failed

¹²³ For a summary of the old English law, see 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 34:12 (Supp. 2012).

¹²⁴ U.C.C. § 1-303(c).

¹²⁵ Though I am primarily concerned with the formal codification that embraces custom, note that modern common law, reflected in RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981) (“Usage of Trade”), also departs from the old common law rules requiring custom and usage of trade to have more established rooting. As § 222 comment b clarifies: “A usage of trade need not be ‘ancient or immemorial,’ ‘universal,’ or the like. Unless agreed to in fact, it must be reasonable, but commercial acceptance by regular observance makes out a prima facie case that a usage of trade is reasonable.” *Id.* at cmt. b. The common law is also “modernizing” custom by drawing upon more recent and local evidence to define it.

¹²⁶ U.C.C. § 1-303 cmt. 4.

¹²⁷ See Bernstein, *Merchant Law*, *supra* note 120, at 1766 n.2. For example, the sections on implied warranties invoke trade standards. See U.C.C. § 2-314(2)(a) (“Goods to be merchantable must ... pass without objection in the trade under the contract description”); U.C.C. § 2-314(3) (“[I]mplied warranties may arise from course of dealing or usage of trade.”). The section on adequate assurances of performance does as well. See U.C.C. § 2-609(2) (“Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.”).

¹²⁸ See Bernstein, *Merchant Law*, *supra* note 120, at 1766 n.3 (citing several examples).

¹²⁹ See *id.* at 1768 n.6, for examples of Llewellyn’s expressed point of view on the role of custom.

¹³⁰ *Id.* at 1768.

to reflect either commercial understanding or commercial need”¹³¹ This foreshadowed the custom-based approach he and the other drafters would later incorporate in the Code.¹³² The drafting of Article 2 of the UCC provides a primary illustration of the controversy of reinforcing custom.¹³³

In framing the newly crafted code for merchants, Llewellyn explained that the Code was

*not something new in the law [T]his is ... a bringing into clarity and explicit focus of a thing which is really there and which has been in the law of sales for something more than a hundred years The merchant appears in the present law without raising his head and letting it be known that he is there.*¹³⁴

A closer look reveals that Llewellyn’s assertion may not have reflected the whole truth. In examining the “merchant rules,” Ingrid Hillinger concludes that Llewellyn “invented” them.¹³⁵ Hillinger cites Llewellyn’s expressed drafting principle that “[s]impler, clearer, and better adjusted rules, built to make sense and to protect good faith, make for more foreseeable and more satisfactory results both in court and out,”¹³⁶ and his “passionate desire to make ‘commercial law and practice clear, sane, and safe.’”¹³⁷ Llewellyn’s expressive embrace of custom echoes throughout commercial regulation. Commercial regulation often applies custom and then stretches it for the same ends—clarity, sanity, and safety. This approach may or may not advance welfare, but it will create different atmospherics for market participants.

2. Custom and Commercial Negligence

From a different angle, torts jurisprudence can further illuminate the relationship between custom and commercial regulation. The enduring¹³⁸

¹³¹ Karl N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 389 n.124 (1937).

¹³² Bernstein, *Merchant Law*, *supra* note 120, at 1768 n.6.

¹³³ See Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1144–45 nn.16–18 (1985); see also Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 948 (1997).

¹³⁴ 1 STATE OF NEW YORK LAW REVISION COMMITTEE REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE 165 (1954) (emphasis added) [hereinafter N.Y. LAW REVISION REPORT]; see Hillinger, *supra* note 133, at 1141–42 n.4.

¹³⁵ Hillinger, *supra* note 133, at 1146.

¹³⁶ See *id.* at 1147; Karl N. Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 178 (1946).

¹³⁷ See Hillinger, *supra* note 133, at 1146–47; N.Y. LAW REVISION REPORT, *supra* note 134, at 112.

¹³⁸ “[T]he issue [in *The T.J. Hooper*] has arisen in thousands of tort cases” Epstein, *supra* note 108, at 4.

*The T.J. Hooper*¹³⁹ case demonstrates the special role of commercial custom in tort law. The case inspired Richard Epstein to offer a framework for identifying scenarios where custom should effectively emerge as a guiding standard for consensual commercial behavior.¹⁴⁰ “Virtually none of the case law on custom is directed to weak customs. The key question, then, is: What are the determinants for a customary practice to develop within a consensual situation?”¹⁴¹ Epstein sets out to identify them, and I set out to apply them to broader bait-and-switch scenarios.

Epstein first divides the commercial landscape into situations where the roles of the parties are either symmetrical or asymmetrical.¹⁴² Where the roles of parties are symmetrical, custom more easily emerges to serve as the rule, as the parties emerge from the same point of view and benefit from custom.¹⁴³ This dynamic is evident in the relationships between merchants that Llewellyn identified. The narrower and more symmetrical or identical the roles, the more likely it is that natural custom will emerge as a rule generator.¹⁴⁴ Cotton and diamond merchants, for example, have been found to operate under a well-established set of formalistic rules unique to their industries.¹⁴⁵

Where the parties lack symmetry, there is less common ground of custom. Custom is less likely to emerge to provide the ultimate rule because it would be the imposition of one party’s custom onto the other. Epstein posits that in this asymmetric zone, the frequency of the interaction of the parties

¹³⁹ In *The T.J. Hooper*, the court found that custom did not necessarily set the standard of care and that certain precautions must be taken to avoid negligence liability regardless of prevailing practices. 60 F.2d 737, 740 (2d Cir. 1932). In this case, the practices at issue involved the carrying of radio sets on tugboats. *Id.* at 737. Judge Learned Hand held:

[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

Id. at 740.

¹⁴⁰ Epstein, *supra* note 108, at 4.

¹⁴¹ *Id.* at 11.

¹⁴² *Id.* at 11–13.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 11–12.

¹⁴⁵ See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992); ERIC A. POSNER, LAW AND SOCIAL NORMS 151 (2000).

and the “severity” of the stakes would influence the level of the emergence of custom.¹⁴⁶ If the parties interact with high frequency for low stakes, custom may still forge workable natural rules.¹⁴⁷

In the categories of bait-and-switch practices that I examine in Part III, the parties are typically asymmetrical, often with a retailer-consumer relationship,¹⁴⁸ which likely attracts some of the regulatory attention. The asymmetric power imbalance should concern regulators. With traditional bait and switch, regulators focus on dominant retailers or aggressive sales representatives making big-ticket sales to consumers.¹⁴⁹ This would be a “low frequency, high severity” transactional zone. We would not expect custom to emerge here naturally because the seller’s interest in preserving the relationship is low, hence the need for heavier paternalistic regulation.

The carve-out exception for retail grocers within bait and switch, also discussed in Part III.A.4, typically sits in a “high-frequency, low severity” zone.¹⁵⁰ Custom would be expected to emerge naturally, if consumers are freer to break from a consensual relationship within this repeat-player environment.¹⁵¹ A weak bait-and-switch rule ultimately emerged in this sector because less formal custom is more likely to prevent bait-and-switch mischief.¹⁵²

With free offers, asymmetry should be expected because this is a marketing tactic large retailers deploy. All sorts of permutations of transactions along the frequency and severity dimensions can occur. As I describe in Part III.B, the custom and tradition of free-offer tactic is largely preserved by regulation, and tempered by disclosure.¹⁵³ The preservation of the seller’s custom naturally accrues to the benefit of the seller, yielding an inequitable outcome that also may fail to advance welfare.

The 2009 changes in credit card regulation discussed in Part III.C may have resulted from a dramatic change in underlying norms. Bank issuers and cardholders have asymmetric roles in the transactional relationship. Before 2009, whenever a credit card customer initiated a relationship with a bank, the bank had more subsequent ability to raise rates through aggressive

¹⁴⁶ Epstein, *supra* note 108, at 12–13.

¹⁴⁷ *See id.* at 13.

¹⁴⁸ Other examples include a bank/cardholder or school/student relationship.

¹⁴⁹ *See, e.g., infra* Part III.A.1.

¹⁵⁰ *See infra* Part III.A.4. If consumers are locked into a less competitive retail grocery marketplace, as one might find in low-income areas, the assumptions about custom might differ. The zone might be “high frequency, high severity,” as the important food purchases are concentrated and spent among fewer sellers.

¹⁵¹ *See infra* Part III.A.4.

¹⁵² *See infra* Part III.A.4.

¹⁵³ *See infra* Part III.B.

tactics.¹⁵⁴ This debtor-creditor relationship could be characterized as high frequency—and as bank tactics became more aggressive and as debt balances ballooned, increasingly high severity. The gap between expected custom and the regulated environment widened. This may provide a norms or custom-based explanation for why the law changed. Norms, mores, and associated customs can rise and fall quickly.¹⁵⁵

Law school merit scholarships, as I explore in Part III.C.2, presented a novel puzzle. To use the hunting metaphor of the Golden Gate student, if the students were participating in “fair sport,” the relationship between the school and student should appear to have more symmetry, and the emergent custom should suffice. If that were true, no corrective regulation about disclosure¹⁵⁶ or other reforms would have been needed. The students at Golden Gate claimed that they did not know that they were in a hunting game. If we accept the notion that they were in a “turkey shoot,” the relationship between student and law school was more asymmetrical—and could be categorized as existing in a “low-frequency, high severity” zone, if just examined as part of a singular transaction for a big-ticket purchase. The “turkey shoot” scenario would beg stronger regulation.

Epstein’s framework for explaining where custom should be expected to emerge in the absence of regulation shows us that when buyers and sellers have asymmetric roles, there is not common custom. Imposing a buyer’s custom or a seller’s custom on the market, as is the case in some bait-and-switch circumstances, may bring the marketplace more in line with our cultural expectations, but may not necessarily advance welfare.

The UCC drafting experience exemplifies one historic attempt to integrate existing customs into formal rules. Karl Llewellyn and the other reporters tried to reinforce custom through the Code, in an attempt not just to make standards more certain, but also in an attempt to elevate trade practices.¹⁵⁷ That may provide a helpful comparative backdrop for exploring policymaking in the bait-and-switch context.

Next, I discuss the reinforcement of custom through formal means. Generally, custom is more likely to emerge as a proper guide for regulation under certain conditions. Choosing to base law on custom—and choosing a custom—presents further challenges.

¹⁵⁴ See *infra* Part III.C.

¹⁵⁵ Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 392 (1997).

¹⁵⁶ See Standard 509(e), *supra* note 1.

¹⁵⁷ Hillinger, *supra* note 133, at 1158.

B. Reinforcing Custom Through Law

With regard to basing law on custom, Eric Posner observes that “the relevant normative question ... is whether government can improve on social norms in particular cases, or harness them in order to achieve desired policy outcomes at low cost.”¹⁵⁸ Of course, as Posner notes, it can be challenging to identify what the norm or custom is, or to discern distinctions between norms and mere conventions.¹⁵⁹ Certainly, the question of “whose” norm dominates may matter when the symmetry between parties that Epstein requires does not exist.¹⁶⁰

Posner observes that “[s]cholars waver between praising custom as the reflection of accumulating commercial wisdom, and condemning it as a drag on commercial advance.”¹⁶¹ These wavering views can surface when examining bait-and-switch regulation.

Traditional bait-and-switch regulation and free-offer regulation may reflect cultural and customary approaches that drag commercial advance, depending on one’s perspective. The commercial wisdom seems to be that bait-and-switch tactics run counter to our acceptable trade customs. Our customs, as embodied in our statutes and regulations, indicate that traditional bait-and-switch tactics are “dishonorable,”¹⁶² and this is reinforced by the law.

Free offers, on the other hand, are so ingrained in the commercial history of the English-speaking world that the tradition has been largely enshrined even though it may mislead consumers.¹⁶³ With free offers, could custom be the “drag on advance” about which Learned Hand warned?¹⁶⁴

Finally, the CARD Act example shows us that sleepy custom can be jolted by a dramatic shift in the environment. By 2009, the previous decades’ prevailing customary practices (which were “severe” in Epstein’s parlance) were upended by a populist wave that formally adopted consumer-friendly

¹⁵⁸ POSNER, SOCIAL NORMS, *supra* note 2, at xiii.

¹⁵⁹ *Id.* “For [some] scholars, there is an important distinction between mere conventions, which have no normative force, and social norms, which are sustained in part because they reflect attitudes about what is the right thing to do.” *Id.*

¹⁶⁰ See Epstein, *supra* note 108, at 11–12.

¹⁶¹ POSNER, *supra* note 145, at 165.

¹⁶² See ROHNER & MILLER, *supra* note 115, at 752.

¹⁶³ See *infra* Part III.B. I have previously made a case against free offers, in part by detailing the consumer cognitive error induced by the tactic. See generally Friedman, *Free Offers*, *supra* note 23. The comments received by the Federal Trade Commission in 1969 reflected strong arguments made mostly by advertisers and mass marketers supporting retention of the status quo. See *infra* Part III.B.

¹⁶⁴ The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

norms over the incumbent norms.¹⁶⁵ The custom that was ultimately enshrined with credit cards reflected rapidly accumulated wisdom—this custom displaced the previous custom. The law school merit scholarship dynamic also potentially resembles this scenario.

The law can also influence custom through its “expressive” function.¹⁶⁶ Symbolically, laws can communicate values that influence behavior beyond the zone where actors might be formally sanctioned for a violation.¹⁶⁷ The government can reinforce a “good” norm “merely by ‘expressing’ it.”¹⁶⁸ Antismoking ordinances, for example, may have played an expressive role in shifting smoking norms.¹⁶⁹ Legislation may not reflect a consensus about a behavior at the time of its passage.¹⁷⁰ It may reflect a bare majority or even something less than a majority.¹⁷¹ Legislation may instead reflect the magnification of the position of deeply committed or powerful interest groups combined with a level of media interest and publicity.¹⁷² The legislation may reflect the composition of a lawmaking body out of step with public opinion or may project a consensus that turns into a norm or custom.¹⁷³ Regulation crafted through administrative procedure may be even further insulated and attenuated from public consensus. Richard McAdams’s thesis is that people prefer the esteem of others, and that norms emerge as people pursue this esteem.¹⁷⁴ Creating a law enhances the notion that there is a norm or custom to pursue that will maximize esteem.¹⁷⁵

That said, this expressive function of the law that embodies and expresses norm and custom only has a positive effect on welfare if the norm or custom is the “correct” one. As noted, law can reinforce customs that reflect the past, putting the brakes on advancement.¹⁷⁶ The law can also reinforce controversial norms or customs. The debate about marijuana legalization can be largely viewed through this prism. Would the decriminalization of marijuana telegraph a new norm or new custom? Would it increase recreational usage? Those that oppose legalization efforts argue that decriminalization would reset the express cultural taboo and reduce the

¹⁶⁵ See *infra* Part III.C.1.

¹⁶⁶ McAdams, *supra* note 155, at 391, 397–408.

¹⁶⁷ *Id.* at 391.

¹⁶⁸ *Id.* at 397–98.

¹⁶⁹ *Id.* at 404–07.

¹⁷⁰ *Id.* at 403.

¹⁷¹ See McAdams, *supra* note 155, at 401.

¹⁷² *Id.* at 402–03.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 355–65.

¹⁷⁵ *Id.* at 397–407.

¹⁷⁶ See *supra* Part II.

risk that marijuana use would lead to a loss of esteem of others.¹⁷⁷ Marijuana legalization would not merely remove the legal sanction; it would diminish the social sanction.¹⁷⁸

The legal ban on traditional bait-and-switch tactics may serve an expressive function and elevate commercial behavior. One could ponder about whether the law produced the custom or vice versa, but the term bait and switch is a powerful pejorative that describes tactics that travel beyond the legal definition.¹⁷⁹ The expressive function of bait-and-switch regulation in credit cards may signal to banks, for example, that a mandate toward disclosure and transparency of terms supports a new norm for the industry to embrace rather than fight. The expressive function of bait-and-switch norms in other areas may spill over and affect the ultimate outcome of the nature of law school merit scholarship offers. Bait-and-switch regulation as a concept could give license to the public to identify other commercial behaviors that should be taboo.

If reinforced by commercial regulation, the economic impact of the law will reflect the impact of the custom. If a regulation rooted in custom (or notions of fairness) fails to advance welfare, the embrace of the values behind the custom will come at a social cost.

C. Custom, Norms, and Efficiency

Do naturally arising customs generate welfare? Would formal adoption of customs be necessarily efficient? According to Eric Posner, “the view that social practices and norms are efficient or adaptive in some way—is empirically false and methodologically sterile.”¹⁸⁰ Steven Shavell and Louis Kaplow note that norms often correspond with values of fairness, not in

¹⁷⁷ See, e.g., Robert L. Dupont, *Why We Should Not Legalize Marijuana*, *Marijuana & Money*, CNBC (Apr. 20, 2010), http://www.cnbc.com/id/36267223/Why_We_Should_Not_Legalize_Marijuana/.

¹⁷⁸ *Id.*; see Robert MacCoun & Peter Reuter, *Evaluating Alternative Cannabis Regimes*, 178 *BRIT. J. OF PSYCHIATRY* 123, 123–24, 126–27 (2001). MacCoun and Reuter link marijuana legalization to difficulties with partial legalization of other vices. *Id.*

¹⁷⁹ For an example of the FTC misusing bait-and-switch language broadly in public communications, see Press Release, Ticketmaster and TicketsNow Settle FTC Charges of Deceptive Sales Tactics, Refunds for Springsteen Concertgoers Provided; FTC Warns Other Ticket Resellers, Federal Trade Comm’n (Feb. 18, 2010) (“The Federal Trade Commission today announced it has settled charges that Ticketmaster and its affiliates used deceptive bait-and-switch tactics to sell event tickets to consumers.”). Note that although the press release uses “bait-and-switch” language, the complaint filed in the Northern District of Illinois does not use any bait-and-switch language. See Complaint at 13, *F.T.C. v. Ticketmaster, LLC* (N.D. Ill. 2010) (No. 10 Civ. 01093).

¹⁸⁰ POSNER, *supra* note 145, at 172.

promotion of welfare, which may explain why socially attractive feelings about fairness can trump arguments to promote efficiency.¹⁸¹ They provide further warning for policymakers that “social norms did not arise for the purpose of guiding formal policy analysis.”¹⁸²

Below, I examine the regulation of commercial customs associated with bait-and-switch tactics. As noted, some of these regulations appear to reflect a collective social custom, some the sellers’ custom, some an evolving social norm. If one accepts that these regulations reflect custom, it is difficult to say whether they are efficient or whether they even strive for efficiency.

Eric Posner suggests that:

norms ... should be understood as descriptions of equilibrium behavior in games in which people with private information interact with each other. Casual analysis of these games shows that social value will not necessarily be maximized and that state intervention can potentially improve payoffs for the players. Of course, whether state intervention really will make people better off, rather than worse off, depends heavily on circumstances.¹⁸³

Circumstances differ across categories of bait and switch that I explore next. Ultimately, state intervention that corrects or reinforces norms may or may not lead to welfare gains. This is not a new dilemma for those examining the role and impact of regulation.

III. ANALYZING BAIT-AND-SWITCH TYPOLOGIES

Why do we regulate certain trade practices that resemble bait and switch and not others? Is the purpose to advance welfare by simply eliminating deception? Or is the purpose also to halt a “race to the bottom” that would create a shark-tank marketplace replete with “turkey shoots”? Do regulators simply normatively reject these practices as “dishonorable”? Do regulators intend to send a more general expressive message to the market about deception? The common theme throughout these questions is whether custom

¹⁸¹ Kaplow & Shavell, *supra* note 6, at 1035.

[W]e would expect that notions of fairness, which correspond to social norms, will sometimes serve as helpful proxy tools for identifying legal rules that raise individuals’ [welfare], but we would also predict that there often will be an important divergence between rules that promote fairness and those that advance [welfare]. When there is a divergence, analysts should follow welfare economics rather than fairness-based analysis

Id.

¹⁸² *Id.*

¹⁸³ POSNER, *supra* note 145, at 179.

explains the regulatory approach more than welfare advancement. Though it is difficult to generalize an answer, exploring the different categories of bait and switch can surface what drives or explains policy.

In this Part, I examine and analyze different forms of the practice, mostly through case studies. In Part III.A, I examine traditional bait-and-switch regulation, as the FTC defines and enforces it,¹⁸⁴ and conclude that norms and customs play a dominant role in driving the regulatory approach. In Part III.B, I discuss free offers, which lure consumers with a tempting promise in order to induce them to pay for something else, and conclude that the cultural norms and customs prevail over welfare concerns, leaving the trade practice intact. I examine credit card rate switches in Part III.C and compare the regulatory and legislative environment for banks with that of law school merit scholarships, which some might argue operate in a similar manner. In Part III.D, I briefly glimpse at other common tactics that walk up to the line of bait and switch, but feel consistent with custom and norms and are, not surprisingly, lawful.

A. Traditional Bait and Switch

In Part III.A, I examine tactics that fall into the unlawful category of bait and switch. I discuss specific examples of enforcement actions. I first describe a highly disfavored flavor of bait and switch—the seller’s attempt to switch a buyer to another offering *after completing* a transaction by disparaging the initial purchased offering. Next, I describe a slightly less aggressive, but still unlawful, flavor of bait and switch, wherein the buyer is lured by the bait and the seller subsequently disparages the bait. I then focus in Part III.A.3 on the scenario where the “switcher” does not disparage anything, but merely has no sincere intent to sell what was initially advertised. Finally, in Part III.A.4, I describe the FTC’s carve-out for bait and switch in retail groceries and how the regulation evolved along with the norms and customs of the day.

The common thread that I follow through all these specific illustrations of bait and switch¹⁸⁵ is that custom tends to prevail, whether consistent with welfare advancement or not. Even when the language of economics is used, as it is in retail grocery regulation, it seems to be used strategically, selectively, and as a proxy for explaining the norms of the time.

¹⁸⁴ Using examples referenced in JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS 223–28 (3d ed. 1991).

¹⁸⁵ I drew from prototypical case examples selected in MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 75 (5th ed. 2009).

1. Disparagement of an Already Purchased Offering

An extreme example of seller “insincerity” would be where the buyer completes a purchase, and then the seller disparages the object of the original purchase and attempts to undo the deal in order to induce a different transaction more favorable to the seller. The tactics employed by the home improvement industry in the 1960s embraced this practice to the extreme.¹⁸⁶ The FTC did not merely pursue enforcement. The Commission brought the industry’s bait-and-switch tactics to the attention of Congress.¹⁸⁷

The FTC action in *All-State Industries of North Carolina v. FTC*¹⁸⁸ provides a basic illustration. *All-State Industries* involved a seller that would first close contracts for aluminum siding with consumers, pitching a cheaper, lower grade of aluminum material.¹⁸⁹ This cheaper grade of material was heavily advertised by the seller in marketing materials, with little or no mention of any higher grade of product.¹⁹⁰ The sales strategy was for the salesperson to generate interest for the cheap product through a variety of gimmicks and promotions.¹⁹¹

The court described the sales process as “set forth in the sales force’s training manual.”¹⁹² The All-State Industries salesperson would

attempt[] to pressure the prospect into signing a contract ... committing him to the purchase of [the cheaper] articles but leaving blank the monetary obligation. As soon as the contract is executed, the salesperson brings out a sample of the [cheaper material] and points out deficiencies in it, “whether real or imaginary”. The [more expensive, premium material] is then shown in contrast, to the detriment of the [cheaper material.] Whenever possible the [premium material] is then sold “at the highest price obtainable from the individual customer”. The salesmen ... receive no commission on [cheaper articles] but only on [premium] sales.¹⁹³

This tactic is classic, traditional bait and switch. A transaction reaches fruition, and under the pressure of having made a commitment to a purchase,¹⁹⁴ the customer feels compelled to switch to the “superior” product.

¹⁸⁶ See *Unfair Practices in the Home Improvement Industry and Amendments to the FTC Act: Hearings on S.J. Res. 130, S. 3065 and S. 3066 Before the S. Comm. on Commerce*, 90th Cong. 1–2 (1968).

¹⁸⁷ See *All-State Indus. of N.C., Inc. v. FTC*, 423 F.2d 423, 424 (4th Cir. 1970).

¹⁸⁸ *Id.* at 426.

¹⁸⁹ *Id.* at 424–25.

¹⁹⁰ *Id.* at 424.

¹⁹¹ *Id.* at 425.

¹⁹² *Id.*

¹⁹³ See 423 F.2d at 424–25.

¹⁹⁴ The sunk-cost mindset may provide the primary pressure source.

There is no doubt that with the aluminum sales process, the initial offer was insincere and part of a deceptive scheme.

From a custom perspective, this level of dishonesty offended all marketplace sensibilities. This sales process expressly builds on deception and outright lying. These aluminum-siding tactics could be described as legendarily outrageous,¹⁹⁵ and unfair to consumers and any honest competitors.

The restoration of the norm through regulation and enforcement may align with the result best suited to advancing welfare. The aluminum siding case provides an illustration where consumer cognition may be distorted at the time of the switch. The consumer is invested in the transaction and may be malleable enough to agree to buy a product that they did not need at a price that they might not have entertained without the tactic. The key here is that the consumer has reached a commitment level with the salesperson—and probably a connection of trust—that destroys the ability to make a rational, welfare-advancing deal.

Epstein's framework implies that custom in this particular market environment would not provide an efficient result. The seller (a large marketing organization with a detailed tactical sales strategy) and the homeowner are positioned asymmetrically in this transaction. The sale involves a one-time transaction and a large-ticket item: a "low frequency," "high severity" zone. Legal sanction may be required where nonlegal sanctions would fail. Here, imposing a legal structure serves an expressive function to discourage poor market behavior, a welfare-advancement function, and the purpose of reinforcing a strong social norm.

2. *Disparagement of Bait*

The classic bait-and-switch scenario begins with the seller's disparagement of the initial advertised offering (the "bait"), and results in a switch to a transaction that works to the seller's favor. Direct, express disparagement of an advertised item would certainly provide a basis for proving that the initial offer was "insincere,"¹⁹⁶ running against acceptable customary marketplace behavior. However, *express* disparagement is not a requirement. A deliberate effort to switch the sale by simply contrasting the initial offering with a superior offering can suffice to constitute unlawful deception.¹⁹⁷

¹⁹⁵ In fact, if one were to make a movie about bait-and-switch practices and their regulation, this would be the industry. *See* TIN MEN (Touchstone Pictures 1987) (illustrating the sales practices described in the All-State Industries case and accompanying efforts to curb them).

¹⁹⁶ *See* 16 C.F.R. § 238.0 (2012).

¹⁹⁷ 16 C.F.R. § 238.4.

*Southern States Distributing Company*¹⁹⁸ involved a seller of big-ticket household improvement items like carpeting, siding, and swimming pools.¹⁹⁹ Southern States promoted less expensive items through advertisements, but instructed the sales representatives, who personally visited homes, to present premium versions of a product alongside the lower-quality advertised product, typically with the use of physical models.²⁰⁰ The premium items were displayed in a dramatically superior and more attractive manner than the “bait” that generated the initial interest.²⁰¹ The FTC ultimately found that

the models ... distorted the real differences between bait items and switch items, to the detriment of the bait items. For instance, the deluxe pool model came in a black carrying case with a plexiglass cover, painted, landscaped, and filled with blue ersatz water, while the advertised pool model was made of unpainted wood, contained in an unpainted wooden suitcase, and came without simulated water, swimming pool ladder, or the same sort of luxurious landscape. Similarly, inspection and comparison of other models of advertised and deluxe products indicates that the deluxe model was invariably packaged to appear comparatively more attractive than it would if simply placed or installed side by side with the economy item in the same setting.²⁰²

The FTC concluded that although it was difficult to discern whether consumers decided to switch from the advertised cheaper product to the more expensive one due to quality, or due to the distorted mode of presentation, “[i]t [was] clear ... that consumers were induced by display of these models to depart from their previous intentions to purchase the advertised economy product and accept the more expensive one.”²⁰³ The FTC deemed these “embellishments” misleading.²⁰⁴

The practices described in *Southern States* might appear a degree less oppressive than the *All-State Industries* example above. Consumer cognitive error is still being induced, but perhaps the sunk costs are not as deep as when a contract has already been signed and a transactional relationship has formed. Nonetheless, just as in *All-State Industries*, the norm against the bait practices was violated and the transgression was corrected by the FTC through formal means. The social welfare impact in a case like this

¹⁹⁸ See *In re S. States Distrib. Co.*, 83 F.T.C. 1126 (1973).

¹⁹⁹ *Id.* at 2, 8.

²⁰⁰ *Id.* at 8–9.

²⁰¹ *Id.* at 10.

²⁰² *Id.* at 31 (internal citations omitted).

²⁰³ *Id.*

²⁰⁴ See *S. States Distrib. Co.*, 83 F.T.C. at *32.

one would depend on the degree of error that the consumer might make. The very same welfare concerns raised in the Alpha Autos hypothetical scenario in Part I.B would also appear here.

The next flavor of traditional bait and switch does not involve any express disparagement, but rather the plain use of an insincere offering to generate interest in a different transaction. In this next instance, the tactics ruled unlawful began to brush against other aggressive, but lawful, retail marketing tactics. Unlike the previous two illustrations, in a case where tactics are not as explicit, the FTC must rely more upon the actual outcomes of the marketing tactics rather than the mechanics per se.

3. *Bait and Switch Without Disparagement*

The FTC can question sincerity of the initial offer even without any measure of disparagement of the initial offer.²⁰⁵ If the larger picture shows that the initial offer is insincere, the FTC can deem the practices of the seller deceptive.²⁰⁶ Pursuit of these less obvious cases, like the next one, illuminates the norms that the FTC implicitly tries to promote. Within the context of its time, one can see how certain social trends supported a pronounced paternalistic effort to improve marketplace custom.

In 1966, the FTC filed a complaint against Leon A. Tashof, the operator of New York Jewelry Company, a retail store in urban Washington, D.C.²⁰⁷ Tashof, the sole proprietor, “advertis[ed], [and] offered for sale ... various ... goods, including ... watches, radios, rings, furniture, cookware, eyeglasses, television sets and other electrical appliances”²⁰⁸ The commissioner found that Tashof’s customers had low incomes and relied on credit for a substantial amount of store purchases.²⁰⁹ The store’s advertising and marketing tactics aggressively targeted consumers with credit difficulties.²¹⁰ At

²⁰⁵ 16 C.F.R. §§ 238.0–1 (2012).

²⁰⁶ 16 C.F.R. § 238.2.

²⁰⁷ See *In re Leon A. Tashof*, 74 F.T.C. 1361, 1361 (1968), *aff’d*, 437 F.2d 707 (D.C. Cir. 1970).

²⁰⁸ *Id.* at 1364.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1373. The store’s practices with respect to credit appeared predatory, and that appearance may have informed the whole of the FTC’s decision. The store handed cards out on the street that read: “*Because We Appreciate Your Business, Mr. Tash, the Mgr., Says: I’ll give credit to everybody even if you never had credit, Lost your credit, or others have turned you down.*” *Id.* at 1374. The store also freely handed out “credit cards” that read: “Certifies that BEARER is an AAA-1 Preferred Customer; Instant Credit—No Money Down; Make Your Own Terms; This card certifies that you have a preferred credit rating and attests to your character excellence.” *Id.*

specific issue in the FTC’s complaint were the store’s practices with respect to the advertising and selling of eyewear and related services.²¹¹

The store had repeatedly placed advertisements in newspapers that were typified by the following presentation:

DISCOUNT EYE GLASSES MADE WHILE YOU WAIT
Price includes lenses, frames and case—from \$7.50 complete²¹²

Radio advertising reinforced the notion that the *complete* package for eyeglasses would cost \$7.50:

I’ll protect your eyes and protect your pocketbook * * * eyeglass service at economy prices * * * complete eyeglasses, including lenses and frame, for as low as \$7.50 * * * Oculists’ prescriptions filled at low economy prices * * * be thrifty * * * protect your eyes and protect your pocketbook at the thrifty economical discount department of the New York Jewelry Company.²¹³

The FTC concluded that this advertising did not mean to communicate a “bona fide offer” to sell eyeglasses at a price significantly below that of competing retailers,²¹⁴ as part of a bait-and-switch scheme.²¹⁵ The store conditioned the offer on the purchase of an eye examination from the store’s oculist, or required customers to bring a prescription with them.²¹⁶ These tactics apparently generated confusion for customers because practically nobody paid \$7.50 for a pair of eyeglasses on a standalone basis. Out of 1400 pairs of eyeglasses sold by the store from 1964 through 1966, ninety-nine percent were sold at prices *exceeding* \$7.50,²¹⁷ “with or without an optical prescription, [and not] a single \$7.50 sale was made *any time regardless* of any extra charge for an eye examination.”²¹⁸ Instead, consumers were buying eyeglasses from the store at dramatically higher prices or as part of a different bundle.²¹⁹

Tashof argued that these factual findings were immaterial, arguing that no evidence emerged that the store “disparaged” the alleged \$7.50 bait

²¹¹ *Id.* at 1364.

²¹² *Id.*

²¹³ *See Leon A. Tashof*, 74 F.T.C. at 1374.

²¹⁴ *Id.* at 1379.

²¹⁵ *Id.* at 1375–79.

²¹⁶ *Id.* at 1375–76.

²¹⁷ The prices often well exceeded \$7.50 per pair. Seventy-two percent of glasses were sold at prices exceeding \$39. *Id.*

²¹⁸ *Id.*

²¹⁹ *See Leon A. Tashof*, 74 F.T.C. at 1377.

eyeglasses in an attempt to switch customers to more expensive lines.²²⁰ The FTC noted that though disparagement was indeed a frequently employed tactic to switch the consumer to a different product, it was not a necessary element for proving that a seller engaged in a bait and switch.²²¹ Bait and switch, the FTC argued, was more encompassing. What mattered was that “an offer [was] made which [was] not bona fide in that the seller [had] no intention to sell the advertised product at the advertised price but ... [used] the advertisement as a ‘come-on.’”²²²

The FTC considered other factors in ruling that the store had engaged in bait and switch, including the “economic feasibility” of the offering for the seller and the level of sales for the advertised offer.²²³ On its face, the totality of the entire scheme added up to evidence of bait and switch.²²⁴

Custom and norms were expressly involved in this case. The hearing officer in the initial (now reversed) dismissal of the *Tashof* matter noted: “This case was founded upon the premise ... that the problems involved in the complaint required that new ground needed to be plowed in order to right the wrongs of a part of our economic system particularly as they affect the low-income class of our society....”²²⁵ In dismissing the broad deception claims, the officer noted further that Congress had been wrestling with legislation about these sorts of practices for some time.²²⁶ The progressive norms were evolving into formal rules at the time of the *Tashof* case, and this evolution literally entered the narrative of the case. Further, the ultimate conclusions reached by the FTC and enforced by the D.C. Circuit aspired to raise commercial standards. They took the customs prevalent in the broader marketplace and used them as the benchmark to raise the standards in this low-income market.

Tashof effectively demonstrates the imposition of a new norm, and as noted in Part II, such an imposition of custom could potentially trade off advancements in fairness for a loss of efficiency.²²⁷ In drafting Article 2 of the UCC, Karl Llewellyn attempted to elevate practices by appealing to custom, but at the same time, believed that application of custom would elevate practices, rather than reinforce what was in place.²²⁸ In *The T.J.*

²²⁰ *Id.* at 1378.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 1378–79.

²²⁵ *See Leon A. Tashof*, 74 F.T.C. at 1372.

²²⁶ *Id.*

²²⁷ *See supra* Part II.

²²⁸ *See supra* Part II.A.1.

Hooper, Judge Learned Hand cautioned that reliance on custom as a commercial standard could be a drag on advancement.²²⁹ Here, had the incumbent custom been adopted, the standard for sincerity in the marketplace would be much lower than adopting the retailer standards in the broader market.

In assessing the social norms and customs of the *Tashof* case, a parallel appears in the well-known case about the doctrine of unconscionability that also emerged from the District of Columbia, *Williams v. Walker-Thomas Furniture Co.*²³⁰ Not only did *Tashof* and *Williams* emerge from the same city at roughly the same time, they emerged from the same Seventh Street neighborhood.²³¹

In *Williams*, the plaintiff had entered into a consumer installment sales agreement with a retailer that put her in the position of suffering a substantial forfeiture for a default.²³² The court recognized the validity of the unconscionability defense for plaintiffs situated like *Williams* and remanded the case accordingly.²³³

In rejecting *Williams*'s claim, the lower court, the Court of Appeals for the District of Columbia, expressed a stance about the morals of the marketplace, but did not see fit to recognize the defense. “We cannot condemn too strongly appellee’s conduct. It raises serious questions of sharp practice and irresponsible business dealings.”²³⁴ The D.C. Circuit repeated this concern but went on to argue that a statutory basis was not required to defeat the agreement.²³⁵ This norm, condemning the marketplace conduct of the retailer, would be enforced and enshrined through the ruling. Just as in *Tashof*, the emerging norm would be enforced.

The marketplace behavior on Seventh Street in Washington, D.C., in the 1960s appeared to involve routine employment of aggressive marketing tactics,

²²⁹ The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

²³⁰ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

²³¹ The New York Jewelry Company operated at 719 Seventh Street, NW. See *In re Leon A. Tashof*, 74 F.T.C. 1361, 1361 (1968), *aff’d*, 437 F.2d 707 (D.C. Cir. 1970). The Walker-Thomas Furniture Company’s place of business was at Seventh and L Street, NW. *Walker Thomas Furniture Sign*, WASHINGTON KALEIDOSCOPE (Sept. 22, 2012, 6:08 PM), <http://dckaleidoscope.wordpress.com/2009/03/13/walker-thomas-furniture-sign/>. These locations are a six-minute walk from each other, as confirmed through Google Maps. Walking Directions from 719 7th Street, NW, Washington, DC to 7th Street, NW & L Street, NW, Washington, DC, GOOGLE MAPS, <http://maps.google.com> (follow “Get Directions” hyperlink; select “Walking Directions” button; then search “A” for “719 7th Street, NW, Washington, DC” and search “B” for “7th Street, NW & L Street, NW, Washington, DC”; then follow “Get Directions” hyperlink).

²³² See *Williams*, 350 F.2d at 447.

²³³ *Id.* at 450.

²³⁴ *Id.* at 448 (citing *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. Ct. App. 1964)).

²³⁵ *Id.* at 448–49.

largely through the use of credit.²³⁶ Regulators and courts would attempt to change these dynamics through the reinforcement of new norms—norms that valued integrity of commercial behavior and consumer dignity for the economically disadvantaged over aggregate economic considerations.²³⁷ Confusing, disingenuous tactics would no longer be endorsed.

Williams raised the potential welfare impact of elevating standards. Judge Danaher, in his dissent, urged caution in deploying unconscionability and imposing a paternalistic norm to benefit those on “relief.”²³⁸ He implicitly argued that the imposition of the norm might have deleterious consequences for welfare: “Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk.”²³⁹

In *Tashof*, consumers were being served by a store that catered to a credit-poor market segment. Perhaps, one could alternatively argue that the aggressive nature of the sales tactics yielded more competition on Seventh Street, lowering prices and broadening product availability. The FTC only compared the pricing of the eyeglasses sold against the prices advertised. But if the prices for the goods sold were below that (or competitive with) other sellers in the market, were consumers injured?²⁴⁰ Were consumers diverted from better alternatives? The FTC did not entertain that inquiry, and it appears that that argument was never formally made. The underlying narrative of norms and insincere behavior prevailed over any discussion of welfare in *Tashof*. Judge Danaher’s specific concerns about consumers were swept aside in favor of instilling norms of sincere behavior.

Ultimately, these cases broadcasted that it was unacceptable for sellers to compete for business using these tactics, and that new norms needed to be enforced. The *Tashof* case, reviewed in conjunction with *Williams*, presents the larger debate about bait and switch. What are the norms? Should norms be reinforced through formal rules? What is the tradeoff, if any, between enforcing this paternalistic custom and welfare advancement?

²³⁶ The New York Jewelry Company engaged in aggressive credit plans, too. This was incorporated into the FTC’s larger complaint. See *In re Leon A. Tashof*, 74 F.T.C. 1361, 1366–70 (1968), *aff’d*, 437 F.2d 707 (D.C. Cir. 1970).

²³⁷ See Epstein, *supra* note 108, at 1–2.

²³⁸ *Williams*, 350 F.2d at 450 (Danaher, J., dissenting).

²³⁹ *Id.*

²⁴⁰ Perhaps *competitors* would be injured by loss of market share to the more aggressive marketer, but that would present a different issue. As noted *supra* Part I, Akerlof would predict that bad practices would drive out good. There may be room for competitors to seek remedies through the Lanham Act, 15 U.S.C. § 1125(a) (1976), or similar state statutes addressing injury from false advertising, but it may be more expensive to litigate than simply to cooperate.

4. *The Retail Grocery Carve-Out*

The exceptional rules for retail grocers also provide grist for understanding the roles of custom and norms. At first, stricter rules were directed at the industry to elevate the commercial behavior, reflecting the norms of the day.²⁴¹ Two decades later, the rules were weakened, also reflecting the norms of the day—but the norms had changed.²⁴²

In the late 1960s, the FTC began to scrutinize the marketing and pricing behavior of supermarkets, with a focus on low-income areas.²⁴³ Advertised low-price items (specials) concerned the FTC.²⁴⁴ In a 1966 study, the FTC found that specials lowered the average price for grocery store merchandise by five percent and that customers who could take “full advantage” of the promotions could reduce their grocery spending by ten percent.²⁴⁵ For aggressive, cost-conscious consumers, saving this much money on the food budget would be quite significant. However, the FTC study showed that in many cases, and certainly in the aggregate, that these potential savings were under-realized due to product unavailability or simple failure to match the in-store prices to the advertising.²⁴⁶

The study of supermarkets in Washington, D.C., revealed that twenty-three percent of advertised specials were not in stock in the low-income area stores, and in eleven percent of high-income locations.²⁴⁷ The numbers in San Francisco were lower in both categories, but significant nonetheless: seven percent and five percent.²⁴⁸ In both cities, the rate of mispricing of the offer when compared with the advertisement averaged seven to eight percent, with three-quarters of the mispricing skewing above the advertised price.²⁴⁹

The FTC Guides Against Bait Advertising, adopted in 1959, already required that all sellers keep adequate stock on hand to meet the demand of the items that they promoted.²⁵⁰ Industry-specific recommendations for retail grocery, however, were made in the study.²⁵¹ Along with suggestions

²⁴¹ Retail Food Store Advertising and Marketing Practices, 16 C.F.R. § 424 (1971).

²⁴² Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 Fed. Reg. 35,456, 35,458 (Aug. 28, 1989).

²⁴³ See ECONOMIC REPORT ON FOOD CHAIN SELLING, *supra* note 33.

²⁴⁴ *Id.* at 4–5, 26–35.

²⁴⁵ *Id.* at 4.

²⁴⁶ *Id.* at 4–5, 26–35.

²⁴⁷ *Id.* at 5.

²⁴⁸ *Id.*

²⁴⁹ See *id.* at 5.

²⁵⁰ *Id.* at 7.

²⁵¹ *Id.*

about price posting and modification to “raincheck” policies, the study recommended that grocery stores adopt additional controls and improve supervision over individual outlets.²⁵²

To establish a sense of the role of evolving norms in formally changing trade practices, reading the broader context of the FTC’s Economic Report on Food Chain Selling proves instructive. Once again, the focus coincidentally returns to 1960s District of Columbia.²⁵³ The study expressed general concerns about food distribution in low-income urban areas, noting that suburban areas did not suffer from the same problems.²⁵⁴ The Report noted that consumers in low-income urban areas transact in retail outlets that are “small, less efficient, and higher[-]price[d]” that sell “lower quality merchandise[,] and [offer] fewer services” out of “old and ... shabby” facilities.²⁵⁵

From an economic standpoint, in the District of Columbia, retail food store competition was highly concentrated at the time of the study, with the top four players holding eighty-three percent of the “inner-city” market share.²⁵⁶ In San Francisco, by comparison, the top four players controlled thirty-three percent of the market.²⁵⁷ The study partially attributes the mispricing and product unavailability problems to the absence of competition.²⁵⁸ This conjecture would offer an economic justification for providing a mechanism to change the norms and customs and elevate the marketing behavior of the grocers. During this era, the antitrust division of the FTC litigated the problems of concentration in the retail grocery sector, and then promulgated industry merger guidelines.²⁵⁹ But this refinement to the bait-and-switch rule attempted to correct economic behavior on a more micro level.²⁶⁰

In an attempt to elevate commercial custom, the FTC promulgated a rule directed toward retail food store advertising in 1971.²⁶¹ The so-called

²⁵² *Id.* at 7–8.

²⁵³ *Id.* at 4.

²⁵⁴ *Id.* at 3.

²⁵⁵ *Id.* at 3.

²⁵⁶ *Id.* at 4.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 8. “If the customers are dissatisfied, there is little they can do, as they cannot conveniently shift their patronage to another store.” *Id.*

²⁵⁹ *Id.*

²⁶⁰ *See, e.g.,* *United States v. Von’s Grocery Co.*, 384 U.S. 270, 273–75, 277–78 (1966); *In re Kroger Co.*, 74 F.T.C. 1129, 1129–31 (1968); *In re National Tea Co.*, 69 F.T.C. 226, 226–31 (1966). During the 1960s, the FTC entered into six agreements with large food chains about making future acquisitions. In 1967, the FTC issued food industry merger guidelines. *See The Need for Vigorous Antitrust Enforcement Before the Subcomm. of Antitrust, Consumers and Employment of the H. Small Business Comm.*, 95th Cong. Appendix 15–16 (1978) (statement of Willard F. Mueller, Professor, University of Wisconsin), available at <http://www.aae.wisc.edu/fsrg/publications/Archived/wp-18.pdf>.

²⁶¹ Retail Food Store Advertising and Marketing Practices, 16 C.F.R. § 424 (1971).

“Unavailability Rule” gave retailers rigorous administrative tasks to ensure that their inventory management and advertising practices passed muster.²⁶² The rule required that for a defense “against a charge of failure to have items available” the stores would need to “maintain[] records showing that the advertised items were timely ordered and delivered in quantities sufficient to meet reasonably anticipated demand.”²⁶³

In the two decades following the study and enactment of the new guide, technological advancements dramatically altered the industry’s approach toward inventory and labeling and pricing controls. The first Universal Product Code scanner was introduced in 1974.²⁶⁴ By the mid-1980s, half of the supermarkets in the United States deployed scanning systems.²⁶⁵ This technology should have made inventory management and pricing controls less expensive to administer. In 1986, however, another report by the FTC concluded that, in spite of this advancement, compliance with the 1971 Unavailability Rule was inordinately costly and might even injure consumers by making grocery items more expensive.²⁶⁶

Upon revising the Unavailability Rule in 1989, the FTC noted that “overall unavailability rates have been reduced by about 50 percent” since the introduction of the Rule in 1971.²⁶⁷ The FTC’s 1986 study revealed that although the technological advancements in “computerization” contributed to the reduction of unavailability, the measures taken to comply with the Rule (along with enforcement measures in the 1970s) were the primary drivers of the reduction.²⁶⁸ The FTC did not stop to pat its institutional self on the back for this accomplishment, however, and took a close look at the costs of this reduction, ultimately restructuring the rule.²⁶⁹

The FTC found that food retailers had taken an extremely defensive posture after the 1971 Rule was promulgated. The record revealed that “most food retailers feel compelled to take precautions that they would otherwise not take in the ordinary course of business to avoid inadvertent

²⁶² *Id.*

²⁶³ Advance Notice of Proposed Rulemaking; Request for Public Comments, 16 C.F.R. § 424, 76 Fed. Reg. 51,308 (Aug. 18, 2011).

²⁶⁴ Paul B. Ellickson, Presentation, From A&P to Wal-Mart: The Evolution of the Supermarket Industry, at A Conference on Grocery Store Antitrust: Historical Retrospective & Current Developments 7 (May 24, 2007), available at <http://www.ftc.gov/be/grocery/docs/ellickson.pdf>.

²⁶⁵ *Id.*

²⁶⁶ Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 Fed. Reg. 35,459, 35,460–61 (Aug. 28, 1989).

²⁶⁷ *Id.* at 35,459.

²⁶⁸ *Id.*

²⁶⁹ See 16 C.F.R. § 424 (1971).

violations of the Rule.”²⁷⁰ The retailers took “extraordinary measures” to comply, “includ[ing] maintaining inventory cushions over and above what is needed to meet reasonably anticipated demand, performing additional checks of retail shelves, and creating and maintaining records of their cumulative monitoring activities.”²⁷¹ When assessing the net impact of the Rule, the FTC concluded “the costs of complying with [the] Rule greatly exceed[ed] the benefits.”²⁷² The cost-to-benefit ratio of the Rule was characterized by FTC staff as “overwhelming” and ranged anywhere from 2.5:1 to almost 8:1.²⁷³

The revised 1989 Rule afforded bait-and-switch defenses that were much simpler for retailers to avail themselves, but not nearly as direct as requiring closer recordkeeping.²⁷⁴ The FTC, after the 1989 Rule, would not effectively compel the tracking of inventory in the way that the 1971 Rule did.²⁷⁵ The 1989 Rule offers looser avenues of protection for retail grocers attempting to comply with FTC guidelines, focusing on the stores’ ordering programs, raincheck policies, and willingness to discount substitute goods or offer other compensation upon stocking out.²⁷⁶

The 1986 report and subsequent rule change did not arrive without controversy, however.²⁷⁷ Federal Trade Commissioner Andrew J. Strenio, Jr., saw no “net consumer benefit” to the rule amendment, despite the “intuitive appeal” of the revisions.²⁷⁸ On the other hand, Commissioner Terry Calvani argued in a short but strong dissent that the FTC should have repealed the entire rule. “[I]n the highly competitive grocery store business, where consumers return week after week to the same store, any supermarket that frustrates its customers through unavailability of advertised items will not long keep those customers [E]xisting market forces adequately police unavailability ... therefore, no [FTC] rule is necessary”²⁷⁹

Though the FTC did not go as far as repeal, this change did present a regulatory zigzag. From the 1960s through the late 1980s, regulators cloaked their approaches in economics from start to finish. The 1969 FTC study was chock full of data, as were the findings that led to the 1989 rule

²⁷⁰ 54 Fed. Reg. 35,460 (Aug. 28, 1989).

²⁷¹ *Id.*

²⁷² 54 Fed. Reg. 35,461 (Aug. 28, 1989).

²⁷³ *Id.*

²⁷⁴ 54 Fed. Reg. 35,463 (Aug. 28, 1989).

²⁷⁵ *Id.*

²⁷⁶ 16 C.F.R. § 424.2 (1989).

²⁷⁷ Four leading consumer law scholars characterize it as such. *See SPANOGLE ET AL.*, *supra* note 184, at 227.

²⁷⁸ 54 Fed. Reg. at 35,468 (Aug. 28, 1989).

²⁷⁹ *Id.*

change.²⁸⁰ It could be discerned that the politics driving the 1969 Rule promulgation were about broader social norms, and the relevant economic data was drawn upon to support those politics, whereas the 1989 revision reflected the deregulatory atmosphere of the 1980s. In the 1969 report, the urban challenges of the time were a paramount part of the introduction:

Food pricing in inner-city poverty areas is a particularly critical question ... [G]rievances concerning unfair commercial practices were significant in over half of the [recently] riot-torn cities studied. The strength of this [retail grocery stores] grievance in Washington, D.C., poverty areas was revealed in a recent survey which showed that nearly nine out of every 10 black persons interviewed complained of the poor quality and high prices of the food available²⁸¹

Once again, the commercial customs and practices of 1960s Washington, D.C., coincidentally emerge as an inspiration for setting new rules. The District of Columbia of this era could be viewed perhaps as a proxy for the commercial culture in the urban environment throughout the United States. With the support of underlying economic data, the retail grocery store rule was first implemented.

Political norms also likely played a role in the FTC’s moderation of the rule in the late 1980s. To generalize, a deregulatory political ethos and culture was expressed throughout the Reagan presidency.²⁸² Deregulation was certainly in the political air, and President Reagan’s emphasis on “paperwork reduction”²⁸³ certainly was, too.

²⁸⁰ The 1969 Report collected data on “the general organization of food markets in metropolitan areas” and “survey findings on chainstore pricing in Washington, D.C., and San Francisco metropolitan areas....” ECONOMIC REPORT ON FOOD CHAIN SELLING, *supra* note 33, at 13–20, 25–39. *See generally* Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 Fed. Reg. 35,456 (Aug. 28, 1989) (employing numerous private and public empirical studies).

²⁸¹ ECONOMIC REPORT ON FOOD CHAIN SELLING, *supra* note 33, at 1.

²⁸² As President Reagan wrote to Congress in the transmission of his final Annual Economic Report:

While my Administration has been successful in reducing many regulations and intrusions into markets, much remains to be done. We must ... diminish the burden of Federal regulations....With few exceptions, the private sector is best able to allocate resources to their most highly valued uses, and it should be allowed to do so without excessive paperwork and restrictions. That is why privatization, deregulation, and private sector initiatives have been important elements of my economic program. I believe in the inherent dynamism of the private sector, and I believe that the most constructive thing government usually can do is simply get out of the way.

Ronald Reagan, U.S. President, Message to the Congress Transmitting the Annual Economic Report of the President (Feb. 19, 1988) (emphasis added).

²⁸³ *See id.*

The zigzag reflects that the social norms and prevailing culture drove the regulatory scheme. The sources of the proffered economic justification varied, but the evolution of the rule closely tracked the evolution of the political environment.

By the 1960s, it appeared that the FTC was, in effect, making the argument that the market structure in low-income grocery retail generated asymmetry between grocer and consumer.²⁸⁴ The absence of competition proved unfavorable for the emergence of custom, which created the need for closer regulation. Nonlegal sanctions from low-income consumers to correct bait-and-switch tactics were unavailable because dominant stores left few alternatives for consumers. The upper-income segment saw more competition, with consumers faring better on availability and pricing. Perhaps custom and non-legal sanction for unavailability, pricing, and other areas worked because consumers had more choices and were more mobile. Nonetheless, the FTC rule needed to address the entire sector. By the late 1980s, the FTC took the position that competition would ultimately provide the solution, substituting a new set of values in place of the 1960s cultural concern.

In sum, the desire to elevate marketplace standards provoked the FTC to regulate the supermarkets more tightly in the 1960s. The enthusiasm for deregulation possibly provoked changes in the other direction in the 1980s. Economics regarding the urban food market were cited to support the former change; the economics of supporting the regulation were cited to support the latter. One could surmise that the political narrative—and the norm of the day—may have mattered more than the economics, and if not, then at least as much. Norms and marketplace values trumped welfare concerns.²⁸⁵

B. Free Offers

I include “free offers” in the bait-and-switch family because in this instance, the seller lures the consumer to an offering of something free—in order to lead them to transact for something that is not free. The consumer is effectively baited in and switched, albeit in a different way. Free offers are lawful promotions if sellers meet certain criteria, and it is telling to explore why they remain lawful while traditional bait-and-switch tactics are not. Here, history and custom appear to have a heavy influence on the outcome—not advancement of welfare.

The free offer has a long heritage and is well-established in commercial culture in the United States and elsewhere.²⁸⁶ Since the nineteenth

²⁸⁴ See generally ECONOMIC REPORT ON FOOD CHAIN SELLING, *supra* note 33.

²⁸⁵ One also might surmise that industry concerns weighed heavily in the 1980s shift. See *id.*, Comments.

²⁸⁶ See Friedman, *Free Offers*, *supra* note 23, at 52 n.20.

century, free offers have been a part of the landscape.²⁸⁷ The prototypical free offer involved pubs, saloons, and grocery stores promoting free salty food to lure in customers in the expectation that they would buy alcoholic beverages.²⁸⁸ Nobel Laureate Milton Friedman’s famous aphorism, “[t]here’s no such thing as a free lunch,”²⁸⁹ originates from this custom of sellers offering food that appeared free, but in fact was conditioned on or heavily promoted another purchase.

Today, a free offer is lawful, provided that the conditions of the free offer are clearly disclosed.²⁹⁰ As the modern approach to modern free-offer regulation evolved, at least one regulator noted a contradiction inherent in permitting a seller to call an offering free while requiring them to disclose that it is not—and perhaps some measure of insincerity.²⁹¹ The custom that triumphed in this debate was the notion that caveat emptor would largely guide the use of the word “free.”²⁹² Perhaps looming larger than that was the well-established commercial custom of the free offer.

1. *The Regulation*

The FTC permits sellers to use the word “free” to induce a transaction, provided that the seller adequately communicate why the offer in fact, has a “catch.”²⁹³

When making “[f]ree” ... offers all the terms, conditions and obligations upon which receipt and retention of the “[f]ree” item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.²⁹⁴

²⁸⁷ *Id.* at 52–53.

²⁸⁸ See Robert E. Marks, *There’s No Such Thing as Free Lunch*, 31 AUSTRALIAN J. OF MGMT., no. 2, 2006, at 1; Giles MacDonogh, *Shaken and Now and Again, Stirred*, FIN. TIMES, Aug. 17, 2002, at FT Weekend 11; Graeme Phillips, *Milking a Good Story and Myth*, SUNDAY TASMANIAN, Oct. 6, 2002, at 60; Max Rudin, *Beer and America: It Came Over with the Mayflower and Stayed on to Be the Unchallenged Drink of Democracy*, AM. HERITAGE, June 1, 2002, at 28, 33.

²⁸⁹ See generally MILTON FRIEDMAN, *THERE’S NO SUCH THING AS A FREE LUNCH* (1975).

²⁹⁰ See 16 C.F.R. § 251.1(c) (2012).

²⁹¹ See Friedman, *Free Offers*, *supra* note 23, at 67–71 (2008) (discussing Commissioner James M. Mead’s observation that there is something paradoxical about the fact that it is lawful to offer something for free as long as the offeror adequately discloses why it is not); see also Comment to Federal Trade Commission, Publisher of the Journal of Consumer Affairs (Mar. 27, 1969) (on file with author).

²⁹² See Friedman, *Free Offers*, *supra* note 23, at 56.

²⁹³ For a detailed discussion, see *id.* at 53–55.

²⁹⁴ 16 C.F.R. § 251.1(c) (2012).

Under FTC guidelines about the “use of the word ‘free,’”²⁹⁵ a seller can label an offer “free” so long as nearby, the seller tells the consumer why it is *not* free.²⁹⁶ This commercial tradition survived direct challenges in the first half of the twentieth century. The current regulatory regime was effectively cemented by the FTC in *In re Walter J. Black*,²⁹⁷ which involved the use of the word “free” in the sale of novels through book clubs.²⁹⁸ Notably, in this matter, norms and traditions were given weight by the FTC:²⁹⁹

The practice in question [use of the word free with full disclosure that the free item is conditional on another purchase] is by no means new³⁰⁰ ... This continuous use, however, in and of itself, is not reason enough for [the FTC] to condone the practice if ... any law require[s] its discontinuance. *Absent such legislation, [no] ... administrative agency should take it upon itself to change a business practice which has been so long prevalent*³⁰¹

In this case, the FTC refused to change a regulation that was firmly rooted in tradition, regardless of welfare effects. Commissioner James Mead, dissenting in *Walter J. Black*, seemed intuitively to grasp that the incumbent regulatory approach enabled sellers to employ a deceptive bait and switch, even though he did not use bait-and-switch language.³⁰²

As Mead wrote about the “free” books:

The ... books are either free or they are not free. They cannot be both. The advertisements [represent that] the books are free. Elsewhere in the advertisements is the statement which indicates that such books are not free. At best, these statements are contradictory. One of the statements must be contrary to fact. This is obviously the statement that the books are free
*A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end.*³⁰³

²⁹⁵ See Commission Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1(e) (2012).

²⁹⁶ 16 C.F.R. § 251.1(e).

²⁹⁷ *In re Walter J. Black, Inc.*, 50 F.T.C. 225, 225 (1953).

²⁹⁸ *Id.* at 225.

²⁹⁹ See Friedman, *Free Offers*, *supra* note 23, at 65.

³⁰⁰ *Walter J. Black*, 50 F.T.C. at 232 (noting that this business practice “has been used by businessmen ... for almost 100 years”).

³⁰¹ *Id.* (emphasis added).

³⁰² For an analysis of Mead’s dissent, see Friedman, *Free Offers*, *supra* note 23, at 67–68.

³⁰³ *Walter J. Black*, 50 F.T.C. at 239 (Mead, Comm’r, dissenting) (emphasis added) (quoting Mead’s opinion in *In re Book-of-the-Month Club*, 50 F.T.C. 778 (1954)).

Mead not only identified the contradiction inherent in the free-offer tradition, he called out one of the core elements of the advertising tactic. The word “free” is used by sellers in advertisements to draw attention to an offer, only to reveal that the underlying deal is something different. The offeror is not *sincerely* desiring to provide the consumer with a gift; the offeror is attempting to use the free offer as “bait” to capture the consumer’s attention to generate a transaction.

The majority in *Walter J. Black* had offered the notion that the custom was prevalent, implying that consumers already had internalized the tactic through absorption of the practice.³⁰⁴ In an early free-offer case from 1925, *John C. Winston Co. v. FTC*,³⁰⁵ the Third Circuit firmly embraced this notion in a case where the FTC attempted to crack down on tactics involving the marketing of free encyclopedias associated with costly supplements.³⁰⁶ The Third Circuit pushed back on the FTC, stating that “[i]t is conceivable that a very stupid person might be misled by this method ... yet measured by *ordinary standards of trade and by ordinary standards of the intelligence of traders*, we cannot discover that it amounts to an unfair method of competition”³⁰⁷

Note that in the enforcement of traditional bait and switch, policymakers had been reluctant to embrace this notion of “ordinary standards of the trade” and “intelligence of the traders.” There was no discussion anywhere about the established tradition of bait and switch in the retail store, the grocery, or the home products salesman pulling off tactics that would fool “only the very stupid.” With free offers, however, this discussion was explicit. The free offer form of bait and switch was deemed acceptable, in spite of its internal contradiction and potential for deception.

Free offers tamper with the consumer’s ability to assess true prices of goods, with the value of bundled offerings, and with the consumer’s sociological impulse to reciprocate when given what appears to be a gift.³⁰⁸ The cognitive error that can be induced by these factors could diminish welfare. In this instance, tradition triumphs over economics and perhaps other moral marketplace values.

³⁰⁴ See *id.* at 234 (majority opinion).

³⁰⁵ *John C. Winston Co. v. FTC*, 3 F.2d 961 (3d Cir. 1925).

³⁰⁶ See *id.* at 962.

³⁰⁷ *Id.* (emphasis added).

³⁰⁸ See Friedman, *Free Offers*, *supra* note 23, at 72–73.

These other values were expressed in the comments provided to the FTC during the two-year notice and comment period³⁰⁹ that led the adoption of the modern *Guide Concerning Use of the Word “Free” and Similar Representations* in 1971.³¹⁰ The comments show that industry strongly backed the status quo, arguing that consumers enjoyed and benefitted from this promotional technique.³¹¹ The few consumer groups that participated in the comment period attacked the rule using moral language that critiqued the norm. The Council on Consumer Information³¹² returned to the basic question, “If I can’t get it without buying something, how can anyone by any stretch of the imagination call it free?”³¹³ and “encouraged ... the commissioners to do everything in [their] power to encourage *morality in the marketplace*.”³¹⁴ The Council concluded with this kicker: “I think it is too bad the marketers have *corrupted* the definition of the word free and I will be disappointed if the FTC *continues to allow this corruption*.”³¹⁵

However, one wishes to characterize the free-offer regulations—either a long prevalent business practice that would only “confuse the very stupid” or an immoral “corruption”—the FTC continued to allow the practice. Custom and the failure to win the argument on moral grounds trumped welfare advancement in this instance.

³⁰⁹ See Federal Trade Commission Guide Concerning Use of Word “Free” and Similar Representations: Notice of Opportunity to Present Written Views, Suggestions, or Objections, 34 Fed. Reg. 5444 (Mar. 20, 1969).

³¹⁰ 16 C.F.R. § 251 (2012). The author thanks Professor Chris Hoofnagle for sharing the fruits of his Freedom of Information Act request to the FTC. The comments are on file with the author.

³¹¹ Typifying the bulk of the comments, the Association of National Advertisers (ANA) argued that the consumer understood the tradition:

Free offers and similar representations have always ranked high in consumer favor among the promotional techniques commonly employed [I]t is only because of the strong positive consumer response to such offers that national advertisers choose to invest in them. In denying the consuming public the benefits of these forms of promotion, the Commission would in fact be acting contrary to the interests of those it is charged with protecting.

Comment to Federal Trade Commission, Ass’n of Nat’l Advertisers (May 15, 1969) (on file with author).

³¹² The Council appears to be governed by academics in the field of agricultural economics and home economics. See Comment to Federal Trade Commission, Publisher of the Journal of Consumer Affairs (Mar. 27, 1969) (on file with author).

³¹³ The Better Business Bureau of Metropolitan Chicago made similar points in its recommendations. “1. It should not be accepted if a person, in order to receive the free article, is placed under any contractual obligation or commitment. 2. A person should not be required to sign for, or purchase any other product, in order to receive the article described as ‘FREE.’” Comment to Federal Trade Commission, Better Bus. Bureau of Metro. Chicago (Apr. 25, 1969) (on file with author).

³¹⁴ *Id.* (emphasis added).

³¹⁵ *Id.* (emphasis added).

Distinct from free offers, but similar in nature, are advertising and sales tactics that lure consumers with low-priced initial offerings, only to have that price or rate hiked once locked in. I label these practices “teasers,” as they tend to unfold in a time sequence. They distinguish themselves from free offers, which involve a more instant bait and switch because the free offer and associated condition are absorbed by the consumer almost at the same time.

Arguably, consumers are more tightly tied into relationships with teaser credit card companies than they are with aggressive retail outlets. A retail customer can physically walk out even if there is a psychological pull, but a credit card customer cannot easily escape paying a new higher rate on a large balance.

Even though teasers are not covered by classic bait-and-switch regulation, I also include them in the bait-and-switch family, just like free offers. Consumers who have been teased by a credit card may feel “bait-and-switched.” The students at risk of losing their merit scholarships after their first year at Golden Gate University Law School articulated exactly that about their commercial relationship with the school. Beyond the formal walls of bait and switch, understanding which teasers have been held in disfavor by policymakers and which have not can further our understanding of the role of norms, custom, and welfare advancement.

C. Teasers: Credit Cards and Scholarships

In discussing teasers, I first describe the evolution and sudden regulation of the credit card industry. As I note, credit cards play a significant role in our consumer economy. Although the industry is well established, cultural change led to sudden changes in the credit card legal regime. I link and compare the credit card example with the complicated regime of law school merit scholarships. Some of these scholarship-losing law students described a similar feeling to that of credit card holders. Regardless of disclosures about retention of the scholarship being dependent on maintaining a level of academic standing, they were lured into an offering with a rate or pricing that they believed they had reason to be able to maintain, only to find that when the situation changed, they were trapped into paying more. Credit card regulations changed quickly and dramatically through private or public regulation, while law school merit scholarship practices have changed a bit more slowly. By understanding the role of culture and norms in bait-and-switch regulation, we can better comprehend the dynamics that drove those results. It might also help instruct aggrieved law students about what they should do to realize any further reforms they seek from law schools.

1. Credit Card Regulation

Credit cards emerged in primitive form in the 1920s,³¹⁶ but John C. Biggins, an enterprising executive at the Flatbush National Bank of Brooklyn, receives credit for inventing the modern card in 1947.³¹⁷ By 1958, American Express would issue its first piece of plastic.³¹⁸ As banks began to coalesce around Master Charge and BankAmericard during the 1960s, credit cards proliferated, with 29 million Americans having used a bank card on at least one occasion.³¹⁹ By 2008, roughly 177 million Americans would carry credit cards, constituting nearly eighty percent of consumers.³²⁰

Until 2009, however, banks were able to engage freely in certain credit card practices that can be labeled colloquially as “bait and switch.” During the sixty years prior to the passage of the CARD Act,³²¹ banks could increase rates on customer balances with little notice,³²² for hair-trigger customer missteps,³²³ and could revoke introductory and promotional rates quickly.³²⁴ Through the CARD Act, Congress bluntly impaired the ability of banks to use teasers or to bait-and-switch.³²⁵

In light of these manifold social welfare justifications, why did it take decades for Congress suddenly to curtail these practices? The economic rationale for the CARD Act was that before the regulatory intervention, banks misled consumers into a welfare-reducing transactional experience that was unanticipated at the time they entered into the credit card agreement. The distributive-based justification rests in the notion that those in

³¹⁶ Lauren Bielski, *Eight Tech Innovations That Took Banking into the 21st Century*, A.B.A. BANKING J. 87–88 (Nov. 2008).

³¹⁷ LEWIS MANDELL, *THE CREDIT CARD INDUSTRY: A HISTORY* 26 (1990).

³¹⁸ Ben Woolsey & Matt Schulz, *Credit Card Statistics, Industry Facts, Debt Statistic: History*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/credit-card-in-dustry-facts-personal-debt-statistics-1276.php> (last visited Mar. 23, 2013).

³¹⁹ JOSEPH NOCERA, *A PIECE OF THE ACTION: HOW THE MIDDLE CLASS JOINED THE MONEYED CLASS* 62 (1994).

³²⁰ KEVIN FOSTER ET AL., *THE 2008 SURVEY OF CONSUMER PAYMENT CHOICE*, FED. RESERVE BANK OF BOSTON 56 (2010), available at <http://www.bos.frb.org/economic/ppdp/2009/ppdp0910.pdf>.

³²¹ See Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734, 1735 (2009) (codified in scattered sections of 15 U.S.C.).

³²² See § 101(a), 123 Stat. at 1736–37.

³²³ An example of a misstep is the consumer’s failure to make the minimum payment within sixty days of the due date. See § 101(b), 123 Stat. at 1736–37.

³²⁴ See § 101(b), 123 Stat. at 1738 (adding limits on introductory and promotional rates).

³²⁵ See Credit Card Accountability and Disclosure Act of 2009. The Federal Trade Commission has its own guidance on “bait” within its jurisdiction. See 16 C.F.R. § 238 (2012). Banks are regulated by the Comptroller of the Currency and the states.

financial difficulty are affected more deeply than others when the balance rate suddenly changes.³²⁶ These economic justifications for regulation existed for many years, but the justifications became more visible during the onset of a financial crisis.³²⁷

One question to address is whether a custom should naturally emerge here, per Epstein’s model. In theory, custom should emerge more readily in the routinized world of credit transactions. Credit cards were commonly used by 2008.³²⁸ To the extent there was asymmetry prior to 2008, consumers were shopping with credit cards without factoring in the probability of events that would lead to rate hikes. When banks accumulated more leverage over individual consumers and were perceived to abuse their power over consumers, the custom failed, and a new set of norms led to the change in the law.

The sudden change in bait-and-switch regulation with consumer credit cards was rooted in the sudden cultural storm and populist revolt that accompanied the financial crisis. When the consumer economy was strong, the tactics employed by the banks might not have proven as visible or broadly impactful. However, trust in public institutions tends to be shaken by business cycle events.³²⁹ According to Gallup, the number of Americans saying “they have a great deal/quite a lot” of confidence in banks cratered from fifty-three percent in 2004 to twenty-three percent in 2009.³³⁰

By early 2009, an unmistakable political and social wave overwhelmed the established customs of retail banking and its regulation—the dramatic new norm drove a political effort to tighten controls on the financial sector,

³²⁶ People facing employment difficulty are more likely to be late on payments, as one would expect. See Saskia Scholtes, *Credit Card Delinquencies Climb to Record While Loan Write-Offs Soar*, FIN. TIMES (Feb. 5, 2009), <http://www.ft.com/cms/s/0/2325260c-f326-11dd-abe6-0000779fd2ac.html#axzz27pPg3uzX>. Access requires subscription.

³²⁷ By early 2009, while the CARD Act was being passed, the depth of the global crisis was apparent. The International Monetary Fund deemed the slowdown, “the deepest post-World War II recession by far.” WORLD ECONOMIC OUTLOOK APRIL 2009: CRISIS AND RECOVERY, INT’L MONETARY FUND xii (2009), <http://www.imf.org/external/pubs/ft/weo/2009/01/pdf/text.pdf>. The year 2009 witnessed a thirty-two percent increase in consumer bankruptcy filings. News Release, *Total Bankruptcy Filings Increase 32 Percent in 2009, Approach Pre-BAPCPA Levels*, American Bankruptcy Institute (Mar. 2, 2010), available at <http://www.abiworld.org/e-news/PRESSRELEASE4Q2010stats.pdf>.

³²⁸ FOSTER ET AL., *supra* note 320, at 56.

³²⁹ See generally Betsey Stevenson & Justin Wolfers, *Trust in Public Institutions Over the Business Cycle* 101 AM. ECON. REV. 281 (2011).

³³⁰ Dennis Jacobo, *Americans’ Confidence in Banks Falls to Record Low*, GALLUP ECON. (June 27, 2012), <http://www.gallup.com/poll/155357/Americans-Confidence-Banks-Falls-Record-Low.aspx>.

particularly in the face of a deep recession.³³¹ The CARD Act was part of this effort. Before the 2008 financial crisis, over half the public expressed confidence in banks, muffling any clarion call for regulating banking behavior. When public confidence in banks dropped through the floor, the political system absorbed the cultural change and, among a slew of other reforms,³³² cracked down on particular bait-and-switch-like practices in the credit card banking sector. These practices had accumulated over time but were shaken loose by this shift.

The CARD Act emerged from a scenario where culture and economic welfare interests suddenly aligned, but after a major cultural shock.³³³ In the end, cultural change motivated regulatory driven changes in industry custom—changes that may have aligned with consumers having more certainty about their credit card agreements and fewer surprises. Even if the practice *did* drive up rates, at the very least, consumers would have more certainty about their offering because it was less confusing. That alone could enhance welfare.

In many ways, the credit card changes reinforce the observations that emerged in the retail grocery bait-and-switch regulation. The initial regulation of bait and switch in retail grocery regulation was driven by the political wave of the War on Poverty, according to the FTC report that helped to inform the change.³³⁴ The loosening of the grocery store rules occurred in an era where a wave of deregulation pulled the regulation back. Both retail-grocery rule changes relied on economic studies, but the substance of the studies reflected political culture intersecting with custom. Here, the credit card changes reflected the fact that consumers were hurt more when the economy slowed down sharply.

³³¹ A vast amount of literature, academic and popular, supports this observation. For accessible examples, see Roger D. Congleton, *On the Political Economy of the Financial Crisis and Bailout of 2008*, 140 PUB. CHOICE 287, 312–13 (2009), available at <http://link.springer.com/content/pdf/10.1007%2Fs11127-009-9478-z>. See generally BETHANY MCLEAN & JOE NOCERA, *ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS* (2010).

³³² The dominant legislative response to the cultural and political shift was encompassed in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

³³³ Some have subsequently found a downside economic impact of the CARD Act. See, e.g., Curtis Arnold, *CARD Act May Have Cost Consumers Billions*, FORBES (Feb. 21, 2012), <http://www.forbes.com/sites/moneybuilder/2012/02/21/card-act-may-have-cost-consumers-billions/>. Others, led by the Consumer Financial Protection Bureau, have detailed the upside. See *CARD Act Factsheet*, CONSUMER FIN. PROTECTION BUREAU (Feb. 22, 2012), <http://www.consumerfinance.gov/credit-cards/credit-card-act/feb2011-factsheet/>. The economics, whatever they may be now, appear to be apart from the cultural conversation about this part of the market.

³³⁴ See generally ECONOMIC REPORT ON FOOD CHAIN SELLING, *supra* note 33.

2. Law School Merit Scholarships

Law school merit scholarships illustrate a potential difference between traditional bait and switch and teasers. Golden Gate University Law School,³³⁵ for example, may certainly have deployed merit scholarships to compete for better students³³⁶ with the lure of discounted first-year tuition and the promise that continued academic merit would ensure the continued discount.³³⁷ Disclosure of the basic conditions of scholarship retention renders unclear the notion of whether Golden Gate’s practices would meet traditional definitions of deception or insincerity.

In 2011, law students contended that they were not receiving what they had bargained for when they matriculated at Golden Gate—and that sunk costs were keeping them in a position where they had to pay full tuition for their remaining two years if they did not retain their scholarships.³³⁸ Further, some of them observed that law schools “offer more scholarships than [they] plan[] to renew,” which they deemed an insincere approach, even with disclosures that the scholarship must be earned to be retained in future years.³³⁹

Before the ABA reformed law school scholarship rules in August, 2012,³⁴⁰ merit scholarships involved a truthful but limited disclosure to a sophisticated group of consumers who remained prone to the optimism bias.³⁴¹ Generally, the disclosure pre-2012 focused on the conditional nature of the scholarship, specifically that the scholarship could only be retained after the first year if specific academic standards (grade point averages (GPAs)) were satisfied. The actual aggregate GPA distributions were not as clear, and a student might not be able to assess the likelihood of retaining the scholarship without that information. Further, the scholarship recipient

³³⁵ I only single out Golden Gate Law School and its students because of their prominence in the *New York Times* article referenced *supra* note 1. Segal, *supra* note 1, at BU1. Certainly, other law students and other institutions have faced the very same issue and controversy.

³³⁶ A law school may compete for better students to improve *U.S. News & World Report* rankings. Merit scholarships induce students with high LSAT and grade points to matriculate, boosting the school’s position in the *U.S. News* formula. See Jerome Organ, *How Scholarship Programs Impact Students and the Culture of Law School*, 61 J. L. EDUC. 173, 176 (2011). Another advantage of enrolling students with better profiles may be the true institutional benefit of having an academically stronger student body.

³³⁷ See Segal, *supra* note 1, at BU6.

³³⁸ See *id.*

³³⁹ See *id.* at BU1.

³⁴⁰ See Standard 509(e), *supra* note 1.

³⁴¹ The optimism bias reflects the irrational belief that a negative event is less likely to happen to oneself than to others. See David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 334, 337 (2002).

might have an unwarranted belief that a merit scholarship would indicate that the school had absolute confidence in the student's ability to succeed and surpass the GPA threshold.³⁴²

The critical part of the 2012 reform is the requirement that schools publicly disclose scholarship *retention* on the school website and distribute the information to all receiving a conditional scholarship.³⁴³ Even with this additional disclosure, however, students may still find themselves prone to the optimism bias, and feel like the pricing of their education was “switched” dramatically, if their GPAs did not meet the specified standard. Only an outright ban on conditional scholarships would fully eliminate this phenomenon.

The alternative to a merit scholarship regime does not necessarily increase welfare or accrue to the benefit of students. No matter how the analysis is sliced, the merit scholarship marketing tactic is ultimately a form of price competition for matriculants.³⁴⁴ Moreover, if law schools agreed not to compete on net price, they could be susceptible to an antitrust challenge;³⁴⁵ welfare would be affected in an unpredictable way.³⁴⁶

If all merit scholarships are banned, or even if merit offerings are dampened by the recent standards change, law school net revenue might be unaffected. Would schools then charge the same net tuition to all students, regardless of merit? Would schools shift more toward investing in guaranteed scholarships to support needs-based admission? Or would schools invest the resources in faculty salaries or facilities development? One can only speculate.

The dynamics of competition for the law school matriculant—a competition that might accelerate in a market where applicant numbers are dropping³⁴⁷—could have profound and broader effects than one might anticipate. The remedy that the Golden Gate Law School students are seeking through

³⁴² See Segal, *supra* note 1, at BU1.

³⁴³ Standard 509(e), *supra* note 1.

³⁴⁴ See Chelsea Phipps, *Law Schools Bargain with Students to Fill Seats*, WALL ST. J. L. BLOG (Jul. 30, 2012, 10:57 AM), <http://blogs.wsj.com/law/2012/07/30/law-schools-bargain-with-students-to-fill-seats/> (describing the competitive market for law students, the role of scholarships in competition for the students, and the magnitude of the growth of scholarship allocations over the past decade).

³⁴⁵ The closest analogue to such a challenge involved the FTC's investigation of the collusion of undergraduate schools on fixing needs-based scholarship awards. For a summary of the action, which led to a settlement in the form of a consent decree, but continued to be litigated by one defendant, see *United States v. Brown Univ.*, 5 F.3d 658, 661 (3d Cir. 1993).

³⁴⁶ See generally Caroline M. Hoxby, *Benevolent Colluders? The Effects of Antitrust Action on College Financial Aid and Tuition*, at ii (Nat'l Bureau of Econ. Research, Working Paper No. 7754, 2000) (discussing the ambiguous effect of eliminating collusion among elite colleges on needs-based financial aid).

³⁴⁷ See *LSAC Resources*, LSAC, <http://www.lsac.org/lisacresources/data/three-year-volume.asp> (last visited Mar. 23, 2013).

the ABA accreditation process, the legislative process, and civil redress, might have any number of unintended reverberations. The “sticker price” for tuition might drop for all students, but for merit students, it is possible that “meritocracy” in the form of financial reward would erode. Would this advance welfare? Would it enhance student capture of welfare?

The ultimate outcome here should reflect the nature and dynamics of the culture and custom more than welfare. As Epstein would predict, custom does not emerge to define roles well. A legal education is a one-time, big-ticket purchase (low frequency, high severity) with asymmetric positioning of buyer and seller.³⁴⁸ This dynamic might explain the Golden Gate law students’ surprise. In a custom “vacuum,” surprises like the loss of big-ticket scholarships emerge. Presumably, the extended campaign of the students may have generated pressure where there was a cultural vacuum, leading to modest reform.

Law students have indeed begun to find regulatory traction and achieve reform on this scholarship issue, and may find more gains in other areas.³⁴⁹ This reform effort took a great deal of time, even in the face of a crisis, possibly because it was challenging to obtain substantial cultural sympathy toward the plight of future lawyers. If culture drives regulation, there was only a weak culture backing reform of law school merit scholarship practices, even if other practices were under tighter scrutiny.³⁵⁰

Though there were some exchanges between elected officials and the ABA,³⁵¹ and now some mild disclosure reform, it does not appear that law students have broadly shocked the public conscience—or permeated

³⁴⁸ Although a law school arguably has incentive to maintain long-term good relations with students and alumni post-transaction.

³⁴⁹ Projects like Law School Transparency are attempting to gain traction in a lot of areas, most notably employment statistics reporting. See LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com> (last visited Mar. 23, 2013). The rest of Standard 509 requires more law school “consumer disclosure,” especially in the area of employment. See Standard 509(e), *supra* note 1.

³⁵⁰ Although the arguments about transparency about law school employment and other transparency has received substantial attention. For a scholarly view, see generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

³⁵¹ The concern from Congress about merit scholarships has been bipartisan. U.S. Sen. Barbara Boxer (D-CA) and U.S. Sen. Charles E. Grassley (R-IA) asked the ABA to respond to the merit scholarship issue raised in the *New York Times*. See Letter from Barbara Boxer to Stephen N. Zack, President of the American Bar Association (May 20, 2011), <http://boxer.senate.gov/en/press/releases/052011.cfm> (questioning gaps in ABA’s law school statistical reporting); see also Letter from Senator Charles E. Grassley to Stephen N. Zack (Jul. 11, 2011), <http://www.grassley.senate.gov/about/upload/2011-07-11-Grassley-to-ABA.pdf> (inquiring about law school accreditation and merit scholarships, among other accreditation issues).

regulatory consciousness—in the same way that the treatment of low-income consumers, or the victims of crafty aluminum siding salesmen, or sleazy retailers have.³⁵² The Federal Trade Commission and the Department of Education have been absent from the law school scene. As noted, private litigation may prove to be the ultimate vehicle to seek remedy and provide the publicity to drive change.³⁵³ Public statements of the legal advocates involved in class actions have certainly been strong, but such a message has yet to achieve tangible results in a courtroom or beyond.³⁵⁴

To conclude the merit scholarship analysis, the law students who lose these scholarships may indeed feel they were baited. This could certainly feel akin to having a low credit card rate on a large balance suddenly rise for an unanticipated but foreseeable reason. In both cases, exposure to disclosure, even the enhanced disclosure brought about in 2012, might have limited effect.³⁵⁵ The impact of being switched to a high rate on a credit

³⁵² The ABA changed its posture somewhat when it promulgated the new standard. Originally, in a response memorandum to Senator Grassley, the ABA had maintained that “the issue with merit scholarship retention is not based on any ‘bait-and-switch’ intention by law schools, but arises because of the affected students’ failure to maintain the required grade point average or class rank.” Bruce Buckley, *A Scholarship Bait and Switch?*, THE NATIONAL JURIST (Sept. 2011) at 16. The ABA noted that students had prior notice about scholarship retention guidelines, and further pointed out that in the aggregate, the number of scholarship recipients and allocated dollars had risen. Memorandum from the Section of Legal Education and Admission to the Bar to Senator Charles E. Grassley, ABA (July 20, 2011). From 2005 to 2010, scholarship recipients increased from 60,000 students to 69,000 students, while scholarship dollars increased sixty-seven percent. *Id.* at 2. Concededly, this is simply the ABA’s report. Further analysis might yield more nuances about these numbers. Again, the point is that the law students have struggled to capture the cultural high ground required on this issue to take on the legal education industry.

³⁵³ See Staci Zaretsky, *Calling All Disgruntled Law School Graduates: Will You Ring in the New Year by Suing Your School?*, ABOVE THE LAW (Dec. 14, 2011, 4:02 PM), <http://abovethelaw.com/2011/12/calling-all-disgruntled-law-school-graduates-will-you-ring-in-the-new-year-by-suing-your-school/>.

³⁵⁴ Plaintiffs’ attorney David Anziska said, “These law schools are using a Nuremburg defense. In the law, this isn’t a valid defense. When they try to make this argument saying, ‘[O]h, everyone else does it,’ it’s just an absurd argument.” *Id.* Whether this rhetoric will spark the cause or overstate it remains to be seen.

³⁵⁵ See generally Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (arguing that widespread mandatory disclosure has failed to protect consumers and may cause harm); Howard Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193 (1994) (arguing marginal information can prove insufficient to overcome the optimism bias). For the challenge presented by consumer optimism in the credit card context, see Oren Bar-Gill, *Seduction by Plastic*, 98 N.W. U. L. REV. 1373, 1375–76 (2004) (discussing the consumer’s optimism bias or estimation difficulties in the context of credit cards). Consumers tend to underestimate

card can be costly, even financially devastating, just as failing to renew a scholarship can be. Though some have filed lawsuits,³⁵⁶ raised questions,³⁵⁷ or called for specific action³⁵⁸ about regulating law school admissions and financial aid practices that have the “feel” of bait and switch, only modest reform in the nature of disclosure has resulted.³⁵⁹ This stands in sharp contrast to what happened with credit card regulation.

Custom and norms may serve to explain more crisply why law school merit scholarships have not historically been closely regulated, as opposed to credit card rate switches.³⁶⁰ Free offers may fall into the same trap—the economics are ambiguous at best, but the custom is cemented. The prescription for the perpetually churning group of law students in this position would be to find a way to lobby on a sustained basis to change the culture of the commerce of legal education—or perhaps to aim more

the probability and impact of a negative event causing unfavorable triggers to their balances; in the law school context, the blogosphere has offered a debate about merit scholarships, bait and switch, and disclosure. See Jeff Lipshaw, *The Irony of Requiring Meritorious Performance to Maintain a Law School Merit Scholarship*, LEGAL PROF. BLOG (May 1, 2011), http://lawprofessors.typepad.com/legal_profession/2011/05/the-irony-of-requiring-meritorious-performance-to-maintain-a-law-school-merit-scholarship.html (expressing skepticism about the effectiveness of disclosure on the cognitive biases of students). Cf. *Proposing a New Standard to Require Scholarship Retention*, LAW SCHOOL TRANSPARENCY BLOG (Apr. 30, 2011, 9:27 PM), <http://www.lawschooltransparency.com/2011/04/proposing-a-new-standard-to-require-scholarship-retention-information/> (offering proposed standards of disclosure for law schools in light of the author’s observation that “[i]ssues arise ... when the combination of opaque grading curves and conditions bound to that curve obfuscate the meaning of the terms and limit a prospective [student]’s ability to understand the expected value of [a merit] scholarship”).

³⁵⁶ See *Class Action Complaint*, *supra* note 26, at 2–4.

³⁵⁷ See, e.g., Letter from Senator Charles E. Grassley (R-IA), *supra* note 351; see also Letter from Senator Barbara Boxer (D-CA), *supra* note 351.

³⁵⁸ See, e.g., *Proposing a New Standard to Require Scholarship Retention*, *supra* note 355.

³⁵⁹ In this Article, I am neutral about the normative outcome of the merit scholarship debate. I merely seek to briefly describe the nature of the debate and explain the potential outcome.

³⁶⁰ Though it is tempting to explain the difference by pointing to the powerful accreditation tandem of the American Bar Association and the American Association of Law Schools, the influence of the law school education interests pales in comparison to the power of banking interests. For one recent political assessment, see, e.g., Paul Blumenthal & Dan Froomkin, *Auction 2012: How the Bank Lobby Owns Washington*, HUFF POST POLITICS (Jan. 30, 2012), http://www.huffingtonpost.com/2012/01/30/auction-2012-bank-s-lobby-washington_n_1240762.html (quoting Georgetown Law Professor Adam Levitin, “They make an awful lot of campaign contributions They aren’t making those just out of the goodness of their heart. They’re hoping that it gets them some influence. It certainly gets them an audience at the very least ... I think it’s hard for your average citizen to understand the intensity of lobbying of both people on the Hill and in government agencies.”).

broadly to address developing issues in the commercial structure of all higher education.³⁶¹

D. “Lawful” Bait and Switch

Many common marketing, advertising, and sales practices land just on the other side of lawfulness from traditional bait and switch. Exploring briefly why these common practices are lawful can also inform the weighing of the role of customs and norms.

“Lawful” bait and switch occurs with abundance. Virtually every flavor of retail environment consumers enter, physically and virtually, is designed to steer and route consumers to switch to buying more things or a more profitable item.³⁶² The walk through a supermarket to buy milk in the back aisle, through a maze of aisles and displays,³⁶³ is a walk that could have been engineered by the designer of a Las Vegas casino.³⁶⁴ The search for a book on an online store produces one-click icons to buy other books, presumably to lure the consumer to buy more inventory.³⁶⁵

A sales clerk might suggest that a customer try on a certain article of clothing first in order to contrast it subsequently against the article the store would really like to sell. Does this first “try-this-shirt-on” effort reflect the “sincerity” that the FTC seeks in assessing whether activity amounts to bait and switch? This instance shows that sincerity is a matter of degree, a matter of practicality—and a matter of custom. If the store is willing to sell that first item, that seems to obviate the need for inquiring

³⁶¹ These large issues abound and could become the focus of a broader populist-driven change in the commercial relationship between parents, students, and institutions of higher education. See, e.g., ANDREW DELBANCO, COLLEGE: WHAT IT WAS, IS, AND SHOULD BE 121–22 (2012) (warning that four-year liberal arts education is becoming available only to the very wealthy and that this phenomenon is unhealthy to American democracy).

³⁶² See PATRICK M. DUNNE ET AL., RETAILING 485 (2008).

³⁶³ See Arnold Anderson, *Retail Layout Strategies*, CHRON.COM, <http://smallbusiness.chron.com/retail-layout-strategies-11464.html> (last visited Mar. 23, 2013) (“The layout of aisles should be a horseshoe design that brings customers through the front door with impulse products and some high-demand items, works customers to the back of the store with higher-priced items and then allows them to exit through aisles of more impulse items at the cash register locations.”).

³⁶⁴ See Jonah Lehrer, *The Psychology of Casinos*, WIRED (Mar. 31, 2012), <http://www.wired.com/wiredscience/2012/03/the-psychology-of-casinos/>.

³⁶⁵ For Amazon.com’s patent on technology that pushes advertisements for sale of other books the customer might like, see United States Patent No. 7,113,917 B2, GOOGLE PATENTS (Sept. 26, 2006), available at http://www.google.com/patents?id=ntp6AAAAEBAJ&printsec=abstract&zoom=4&source=gbs_overview_r&cad=0#v=onepage&q&f=false.

about sincerity. The law does not require sincerity to rise to the level of insisting that the seller have equal enthusiasm for selling each of its wares.

Custom dictates that the marketplace expects some degree of mild bait-and-switch activity from retailers and custom influences the fact that this activity is lawful. Showing a customer one item to encourage the purchase of another, physically guiding a customer by an impulse-buy item on the way to a planned purchase, using a free offer—it all synchronizes within our norms, custom, and culture. Regulating this type of behavior would prove impossible, if not unthinkable, and would prove inconsistent with the FTC’s stated aspiration not to unduly burden commercial activity.³⁶⁶ In fact, generating these consumer transactions likely would produce the very exchanges that will advance welfare. Deception, in the spirit of section 5 of the FTC Act, does not really prowl near.³⁶⁷

Even though permitting these tactics puts the seller at some advantage, the tactics are within a familiar boundary of our culture and do not involve undue pressure. The symmetry between buyer and seller in most retail environments,³⁶⁸ and the ability to shop elsewhere with ease, reduces the impact of the sunk cost fallacy and involves low transaction costs that enable the consumer to escape.

In many bait-and-switch environments that are culturally unacceptable, the consumer has difficulty escaping because of the sunk cost fallacy or the absence of retailer choice. In those that are acceptable, like free offers, the consumer has comparatively more choice.

IV. IMPLICATIONS

A broad look at bait-and-switch practices reveals findings both about the regulatory approach to bait and switch and potentially for regulation generally. As I have described in detail and with specificity, custom and norms explain the orientation of the regulatory approach much more than welfare advancement. This same phenomenon can be observed in the drafting of the UCC and even in the development of torts jurisprudence.

For “traditional” bait and switch, the cultural custom and norms are reinforced through the regulatory approach. The anti-deception mandate in section 5 of the FTC Act rejects insincere offers designed to switch consumers

³⁶⁶ See *About the Federal Trade Commission*, *supra* note 9.

³⁶⁷ Federal Trade Commission Act, Ch. 311, § 5, 38 Stat. 717, 719–24 (1914) (codified at 15 U.S.C. § 45(a)).

³⁶⁸ Low-income area retailers should always be scrutinized, as the case studies in Part III demonstrate.

to other products.³⁶⁹ This aligns with welfare advancement, as transactions that are a byproduct of deception from the seller can destroy utility for the buyer and generate general distrust in the market. The regulatory disfavor for traditional bait and switch prevents a race to the bottom that would immerse the consumer in a marketplace of sharks. A market where traditional bait and switch prevails could function if consumers were on their guard. Perhaps such a market could function well in cultures that embrace aggressive haggling as part of the transactional process—but not in the American market culture.

Similarly, culture dominates in guiding permissive “free offer” regulation—as the tactic can confuse consumers, cause cognitive error, and destroy welfare. Some have argued that the tactic is inherently misleading.³⁷⁰ Nonetheless, the centuries-old tradition continues because it is deeply embedded in our commercial culture. Moving further on the spectrum, retail grocers were able to use promotions with almost no accountability until the culture changed in the 1960s, when the FTC promulgated special guidelines for the industry.³⁷¹ By the 1980s, the larger regulatory culture had taken a dramatic political turn, and the guidelines were significantly weakened.³⁷² Today, grocers have more room to aggressively deploy special deals to lure consumers than other retailers. Economics were used to explain both regulatory turns, but the thematic culture (attacking poverty in the 1960s and “paperwork” in the 1980s) played the dominant factor.

In the Introduction, I noted the hunting metaphor employed by the law student quoted in the *New York Times* article. As applied to sales and marketing, when is hunting fair sport? When is it an unfair “turkey shoot”? The cultural viewpoint on credit cards shifted, driving regulation that would prevent unfair manipulation of interest rates. The banks’ “hunting practices” with the use of low introductory rates as traps were no longer viewed as fair sport, but rather as a turkey shoot. Large numbers of trapped consumers fell victim³⁷³ to the banks’ hunting practices, to follow the metaphor leading Congress to intervene. With the law school merit scholarships, perhaps the

³⁶⁹ See FTC § 5, 38 Stat. at 719–20.

³⁷⁰ Namely, Commissioner James Mead and the consumer advocacy groups have argued the tactic is misleading.

³⁷¹ Robert Pitofsky et al., *Pricing Laws Are No Bargain for Consumers*, ANTITRUST MAG., Summer 2004, at 62, available at [http://www.arnoldporter.com/resources/documents/Article-Pricing_Laws\(7-04\).pdf](http://www.arnoldporter.com/resources/documents/Article-Pricing_Laws(7-04).pdf).

³⁷² *Id.* at 63.

³⁷³ The thirty-day credit card delinquency rate almost doubled during the period between May 2005 and February 2009, from 3.56% to 6.61%. *Historical Credit Card Interest Rates*, CARD HUB, <http://www.cardhub.com/edu/historical-credit-card-interest-rates/> (last visited Mar. 23, 2013).

law students need to make (or continue to make) more strenuous efforts to convince Congress and regulators that they are part of the turkey shoot, victims of unfair hunting practices.³⁷⁴

If the change in culture necessary for achieving regulatory reform requires the public to have empathy for law school graduates, it might be hard to achieve basic reforms. To the public at large, law school graduates, particularly those who were awarded scholarships, might not be the most compelling poster child for reform in a weak economy. Although this dynamic stands completely apart from the moral merits of the law students' position and fails to invoke welfare arguments, it may help explain the difficulty students are finding achieving reform of scholarship practices outside of challenges through class action lawsuits.

For regulatory change advocates, the broadest prescription one can make would be to control and influence the cultural dialogue. Arguments invoking welfare advancement do matter, and perhaps ideally should have primacy for the regulator. But for advocates, all such welfare arguments should always be couched within a cultural context. One can look beyond the sphere of commercial arguments to see these arguments at work. For one current example that may shed some final light on the previously described commercial dynamics, consider government regulation of marriage. Social norms have played a key role in preserving the status quo³⁷⁵ and in obstructing³⁷⁶ and driving change.³⁷⁷ The same forces of culture are at work in bait and switch, but with entirely different stakes.

Ultimately, in scenarios that are on the margin, policymakers face a difficult choice. In scenarios where welfare might not be advanced by regulation, would regulation be worth the cost? Other factors that policymakers might consider could include whether the regulation would mitigate harsh distributional outcomes, or whether the regulation, in reflecting a more

³⁷⁴ Lawsuits may provide a way to force the outcome sooner, both in terms of relief and publicity, but the risk of loss may yield a permanent setback.

³⁷⁵ See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1903–05 (2000).

³⁷⁶ See Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COL. J. GENDER & L. 236, 238 (2006).

³⁷⁷ See *Religion and Attitudes Toward Same-Sex Marriage*, PEW FORUM (Feb. 7, 2012), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religion-and-Attitudes-Toward-Same-Sex-Marriage.aspx> (“The public has gradually become more supportive of granting legal recognition to same-sex marriages over the past 15 years, with support increasing more steeply in recent years.”). Eight states currently recognize or will recognize same-sex marriage. See Kenneth Chamberlain, *MAP: Where Is Same-Sex Marriage Legal*, NAT’L J. (May 9, 2012), <http://www.nationaljournal.com/politics/map-where-is-same-sex-marriage-legal--20120509>.

“honorable” norm, might enhance confidence in the marketplace. Political expedience might pull regulators toward adopting the popular norm, but social costs should be carefully considered before so doing.

CONCLUSION

Bait-and-switch regulation provides an informative illustration for understanding the larger picture of the role of culture, norms, and custom in consumer regulation. Welfare arguments may carry some weight in regulation and may incidentally coincide with the interests driven by norms. But it is clear that culture, norms, and custom come first. If the purpose of regulation is to advance welfare, perhaps regulators should start with the premise that the power of culture generally has primacy.

This discovery about bait and switch should serve as a cautionary tale to lawmakers and regulators to ensure that they are restricting and permitting marketplace behavior for the proper reasons. Additionally, this observation should serve as a guide to those lobbying for tighter regulation, like the law school students, and for those lobbying for looser regulation, like the retail grocers, who managed successfully to communicate a change in norms using the economic ethos of the day.

In sum, in this corner of the commercial arena, culture, norms, and customs will generally predict the nature of regulation. In the commercial regulatory zones, the same broad guidance should apply.