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Morality in the Marketplace: Consumer Protection, Regulatory Policy, and Jewish Law

ARTHUR GROSS SCHAEFER* AND BEVERLY BICKEL**

I. INTRODUCTION

A recent article discussing consumer protection predicted, “[i]f this country ever fights another civil war, it will be retailers versus consumers.”¹

Modern consumers need protection more than ever due to the increasing complexity of information available in today’s market. In the nineteenth century, innovation and technical changes were usually concerned about improving existing products rather than creating new products.² Around the turn of the century, dramatic changes took place.³ Innovations such as telephones, motorcycles, and canned foods appeared. By the 1950’s, the introduction of new items escalated; televisions, synthetic fibers, detergents, frozen foods, long-playing records, color film, ballpoint pens, and plastics were introduced.⁴ Today, in the age of the microchip, new products seem to be introduced daily.⁵ Along with these new products, the amount of information is increasing at an amazing speed. So much information exists about so many things that it is impossible to be fully informed about everything.⁶ There are almost 850,000 new publications released each year throughout the

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1. Lee Green, *Service with a Scowl*, L.A. TIMES MAG., Mar. 5, 1989, at 24, 25.

2. ROSS CRANSTON, CONSUMERS AND THE LAW 1 (1978).

3. *Id.*

4. *Id.*

5. *Id.*; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 304-39 (1988).

6. IAIN RAMSAY, CONSUMER PROTECTION TEXT AND MATERIALS 46 (1989).

world.⁷ Simply put, providing more information does not necessarily mean that the consumer will be able to understand the information and use it to make an informed decision.⁸

This Article suggests that current U.S. legislation is inadequate to protect consumers in an increasingly confusing and complex marketplace and offers ancient Jewish law as a model for more comprehensive regulation.

Some might argue that ancient legal systems, especially if religiously-based, are interesting but largely irrelevant to the current debate over consumer protection. One author asserts: "Any attempt to correlate a secular system with a religious legal system risks serious anachronism, may give rise to individious [sic] comparisons and the importing of alien categories of thought from one system to another."⁹

Comparative studies are an essential tool in legal analysis. Moreover, although legal systems may differ, they also have substantial commonalities. It has been stated that "[t]he goal of law in every civilized society is for the most part the same, namely, the insurance of order, peace and the protection of the individual in his person and property against the onslaughts of others . . ."¹⁰ This underlying function of preserving order¹¹ makes legal theories from different legal structures generally relevant to one another.

This Article will offer a model for consumer protection regulation in the United States, based on ancient tenets of Jewish Law. This Article will first present a general introduction to Jewish law. This Article will then discuss the modern free market system and the lack of "perfect information" in the marketplace. Next, this Article will examine regulation in general, focusing specifically on the debate over how much information should be provided to consumers. This Article will then offer examples of Jewish regulation of the marketplace, emphasizing the role of morality in consumer protection. Finally, this Article will discuss

7. BILL MOYERS, A WORLD OF IDEAS 183 (1989).

8. Green, *supra* note 1, at 24, 25.

9. Ronald Warburg, *Child Custody: A Comparative Analysis*, 14 ISR. L. REV. 480, 503 (1979).

10. BOAZ COHEN, JEWISH AND ROMAN LAW at xii (1966).

11. MICHAEL B. METZGER ET AL., BUSINESS LAW AND THE REGULATORY ENVIRONMENT 11-12 (6th ed., 1986); Rudolf Dolzer, *New Foundations of the Law of Exploration of Alien Property*, 75 AM. J. INT'L L. 553, 571 (1981).

the goals and values of consumer protection, concluding that Jewish law provides a more effective and ethical standard for consumer protection in the marketplace than current U.S. legislation.

II. GENERAL INTRODUCTION TO JEWISH LAW

Although early Jewish law deals primarily with agricultural society, it comprises a highly sophisticated system. The Jewish system "presents one of the most striking examples in human history of social evolution . . . from the rude and savage to the refined and humane."¹² Thus, the Bible and early Jewish legal writings can serve as significant teachers from the past regarding consumer protection.¹³

Leviticus stated that "when you sell property to your neighbor, or buy any from your neighbor, you shall not wrong one another."¹⁴ This biblical verse stands for the proposition that one should not use "sharp" or deceptive practices in business. Specifically, the Bible prohibits such activities as overcharging¹⁵ and using false weights and measures.¹⁶ It is clear from these general prohibitions that deceitful practices by sellers¹⁷ are not "permitted and must be differentiated from fair business practice[s] and fair competition."¹⁸

Thematically, Jewish law recognizes the possibility that sellers might use their superior bargaining position to take advantage of buyers. Accordingly, the rabbis expanded and interpreted the

12. GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 1 (1953).

13. Instead of examining the entire body of Jewish law, only the earliest codes of the Mishnah (approximately 200 C.E.), the Tosefta (approximately 200 C.E.), and the Babylonian Talmud (approximately 475 C.E.) are considered. These earlier codes reflect a more pristine view of society's attempt to codify its religiously-based understanding of "consumer law" prior to the significant influence of the dominant non-Jewish legal and political systems. The Mishnah is a codification of oral law compiled by Rabbi Judah the Patriarch (HaNasi). The Tosefta is a supplement to the Mishnah, organized in a similar fashion and edited around 200 C.E.

14. TANAKH, *A NEW TRANSLATION OF THE HOLY SCRIPTURES* 196 (The Jewish Publication Society, 1985).

15. *Leviticus* 25:14.

16. *Deuteronomy* 25:13-16.

17. While the Mishnah states that many of these laws apply to both buyers and sellers, most prohibitions are directed toward regulating sellers. *THE MISHNAH, SEDER NEZIKIN, Baba Metzia* 4:4 (Herbert Danby trans., 1933).

18. EDWARD ZIPPERSTEIN, *BUSINESS ETHICS IN JEWISH LAW* 36 (1983).

Mishnah, Tosefta, and the Talmud to regulate sellers.¹⁹ The rabbis presumed that sellers were in positions to use deceit, falsehood, misrepresentation, or ambiguity to financially harm consumers. Jewish law challenges the notion that the free marketplace guarantees fair prices and eliminates fraud and deceit.²⁰

III. LACK OF PERFECT INFORMATION IN THE FREE MARKET SYSTEM

Advocates of the free market system believe that "the individual is a rational maximizer of satisfaction" and that the market correctly rewards individual initiative.²¹ Many supporters of unrestricted competition see Jews as role models of successful private enterprise.²² Their conclusions, however, focus on the practices of Jews in largely non-Jewish environments and ignore the abundant amount of Jewish source material that places substantial restraints on the free market structure.²³ Indeed, Jewish law rejects the notion of a "free" marketplace and substantially regulates prices, profits, competition, and sellers' practices.²⁴

Scholars continually debate whether the marketplace sufficiently establishes fair price controls and prevents unreasonable business practices.²⁵ Jewish law supports the implementation of legislative guidelines to control the marketplace.²⁶ Jewish law questions the notion of "consumer sovereignty," which states that producers automatically adjust to meet consumers' changing preferences.²⁷ The rabbis further challenge the assertion that a "free market system 'gives people what they want instead of what

19. See HOROWITZ, *supra* note 12, at 1-3, 367.

20. LEO JUNG & AARON LEVINE, BUSINESS ETHICS IN JEWISH LAW 198 (1987).

21. CRANSTON, *supra* note 4, at 21.

22. See MEIR TAMARI, WITH ALL YOUR POSSESSIONS 1-2 (1987).

23. *Id.*

24. See *infra* section IV for a discussion of the specific details of these restrictions. For a general discussion, see RICHARD HIRSCH, THE WAY OF THE UPRIGHT 63-92 (1973); JUNG & LEVINE, *supra* note 20, at 224-51; TAMARI, *supra* note 22, at 83-125; Arthur Gross Schaefer, *Differing Concepts of Adequate Consideration from Common Law and Talmudic Law: De Minimis Versus Equity*, 2 NAT'L JEWISH L. REV. 79 (1987).

25. David A. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 284 (1986).

26. 3 JOHN MICKLEBURGH, CONSUMER PROTECTION 4 (1979).

27. BRIAN W. HARVEY, THE LAW OF CONSUMER PROTECTION AND FAIR TRADING 11 (1978).

a particular group thinks they ought to want.”²⁸ As suggested by one contemporary Jewish scholar, the free enterprise system is not free due to the following factors: “the manipulation of consumer ‘needs’ by advertising and merchandising techniques; the fostering of a consumption-oriented life style bolstered by a psychology of obsolescence and easy credit; the power and abuses of giant corporations and conglomerates; and the political implications of a military-industrial complex.”²⁹

These factors undermine the underlying tenets of the free market approach, which assume that consumers possess perfect information and that price acts as an effective mechanism to reflect consumer preferences.³⁰

The theory that consumers possess perfect, or even adequate, information about their business transactions assumes that consumers have access to all relevant information and that the information obtained can be reasonably understood.

New products incorporating modern technology can be so complex that it is impossible for an ordinary consumer to make any reasonable judgments regarding the quality of these products.³¹ Moreover, most of the information provided by the manufacturers and retailers is provided by advertising agencies, which are more concerned with selling the product than providing consumers with useful information that would allow product

28. *Id.* at 11-12.

29. HIRSCH, *supra* note 24, at 63.

30. *Id.* See, e.g., W. KIP VISCUSI & WESLEY A. MAGAT, LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSE TO HAZARD INFORMATION 83-97 (1987). The notion persists that the “invisible hand” of consumer preferences will drive out seriously defective products, though some studies support the contrary conclusion in certain markets. For example, studies have shown that where quality is not easily observable, as in the used-car market, price becomes merely a function of the product’s outward appearance. George Akerlof, *The Market for ‘Lemons’: Qualitative Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970). The result is that, without regulation, defective products actually dominate such markets, driving out quality. *Id.* Thus, regulatory controls are necessary in such markets to provide producers with incentives to sell quality goods. *Id.*; see also Richard L. Oliver & Russell S. Winer, *A Framework for the Formation and Structure of Consumer Expectations: Review and Propositions*, 8 J. ECON. PSYCH. 469, 490-91 (1987) (stating that people make pessimistic predictions about product quality when information is inadequate or unavailable).

31. Congress expressly acknowledges this complexity in the “findings and declaration of purpose” of the Consumer Product Safety Act. See Consumer Product Safety Act, Pub. L. No. 92-573, § 2(a), 86 Stat. 1207, § 2051(a)(2) (codified as amended at 15 U.S.C. §§ 2051-2084 (1994)).

comparisons.³² The agencies want consumer purchasing preferences to outweigh any negative information about the product.³³

Finally, it is virtually impossible for any consumer to possess *all* current and relevant information.³⁴ Accordingly, in our society, it is unreasonable to accept the general notion that consumers possess the necessary information to make informed decisions.³⁵

The most striking way in which the market theory diverges from actual consumer practices is that the market theory presumes that "price" is an accurate indicator, of consumer preference for a particular product.³⁶ Price, however, is often an inaccurate indicator of consumer preference for a number of significant reasons. First, many of the larger retailers and producers are able to influence prices.³⁷ Second, a buyer may purchase an item out of habit or may purchase a less attractive product at a higher price due to the seller's reputation.³⁸ Third, manufacturers' advertising, guarantees, trade names, availability, and financing options cause price to be only one of many factors consumers use to judge whether or not to buy a particular product.³⁹ Fourth, retailers may charge exorbitant prices for a product with the intention of increasing its attractiveness to a particular socio-economic group.⁴⁰

Additionally, the market theory has indirect detrimental effects on consumers. For example, supply and demand do not

32. HARVEY, *supra* note 27, at 12.

33. Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 2 YALE J. ON REG. 159, 165 (1984). Despite "truth in advertising" legislation, advertisers continue to find ways to minimize the realities of dangerous products. See JEF I. RICHARDS, DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT 48-50 (1990) (discussing the advertising industry's "safe harbor" of deceptive, but unregulated, "nonfactual implied claims," e.g., advertisements that manipulate consumer anxieties).

34. Adler & Pittle, *supra* note 33, at 166. Some relevant information includes warranty and guaranty terms, financing options, reputation of manufacturers, and future availability of spare parts. RAMSAY, *supra* note 6, at 46.

35. See, e.g., Marlene Cimons, *Poll Finds Birth Control Pill Risk Highly Overestimated*, L.A. TIMES, Mar. 6, 1985, at 25 (citing a Gallup poll that shows that Americans greatly overestimate the risks and underestimate the effectiveness of birth control pills).

36. ECONOMICS OF CONSUMER PROTECTION 10-11 (David Morris ed., 1980).

37. *Id.* at 12-16.

38. *Id.* at 13, 17-18.

39. *Id.* at 16-17.

40. See Nichola Zaklan, *High Artistic Slick Advertising Campaigns Sell Luxury Vodka to the Image Conscious — And They're Lapping it Up*, CHI. TRIB., Nov. 15, 1989, at 34.

sufficiently take into account the social and environmental costs to society.⁴¹ Decisions to manufacture a particular product using non-recyclable elements may have long-term environmental costs that the price may not adequately reflect.⁴² Furthermore, consumers possess different levels of individual knowledge and sophistication. The professional buyer is more capable of judging the multiplicity of factors when making a buying decision.⁴³ The affluent buyer can afford to acquire newspapers or buyer's guides and can travel to various and distant locations for the best products and the best prices.⁴⁴ The less affluent buyer, on the other hand, often has far fewer options.⁴⁵

Problems that exist in a free market system, such as disparate market power and the lack of adequate or comprehensible information, offer a basis for understanding the rabbis' rejection of this system in favor of heavy regulation of market activities.

V. GENERAL DISCUSSION ON REGULATION

A. *Movement Away From Regulation—Providing the Consumer With More Information*

In addition to arguing that self-regulation in the market-place is insufficient to protect consumers, many critics have sharply attacked the ability of legislation to accomplish the stated goal of consumer protection.⁴⁶ The general criticism of consumer-related legislation is that it fails to offer solutions that reflect adequate research.⁴⁷ Critics point to faulty assumptions or flawed

41. For example, the marketplace welcomed convenient disposable diapers, which are not recyclable, thus filling up landfills and reducing the appeal of reusable regular diapers. See, e.g., *Washington Citizens for Recycling Foundation: Questions of Disposable Diaper Recyclability Raised in Suit of Anderson*, PR NEWSWIRE, June 29, 1992, cited in STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 97-98 n.112 (1993).

42. See *id.*

43. *ECONOMICS OF CONSUMER PROTECTION*, *supra* note 36, at 16.

44. RAMSAY, *supra* note 6, at 50.

45. *Id.* Several price surveys indicate that identical products often sell for higher prices in less affluent areas because consumers are unable to effectively compare prices and are also unable to easily travel outside of their immediate areas. CRANSTON, *supra* note 21, at 400.

46. James O'Grady, *Consumer Remedies*, 60 CAN. B. REV. 549, 561 (1982); MIKELBURGH, *supra* note 26, at 4; CRANSTON, *supra* note 2, at 25.

47. BREYER, *supra* note 41, at 42.

estimates upon which legislative solutions are sometimes based.⁴⁸ Critics also contend that the legislature inadequately monitors the effectiveness of consumer-based legislation.⁴⁹ Due to these perceived shortcomings, critics hold that consumer legislation has been ineffective.⁵⁰

There are strong indications that consumers are harmed by current consumer legislation.⁵¹ First, regulation is expensive for consumers. Taxpayers must bear the high costs associated with passing, implementing, and enforcing government consumer protection laws.⁵² Additionally, consumers ultimately pay for the additional costs that are incurred by the business community for compliance with relevant legal provisions.⁵³ Finally, increased costs of compliance may harm the overall United States economy if American products cannot compete in overseas markets, where product standards may be lower.⁵⁴ Reflecting on these increased costs, one commentator speculated that consumer protection is a luxury that the United States cannot afford in the world market economy.⁵⁵

Using a cost-benefit analysis to illustrate their point, those opposing regulation reason that, unless the benefits of consumer protection clearly outweigh all of its costs, consumer regulation is inappropriate.⁵⁶ This view supports the inclusion of an economic

48. *Id.* at 48.

49. *See id.* at 12-13 (citing the futility of mandating asbestos removal, based on the belief that "undamaged white asbestos left in place is virtually harmless . . . removal is likely more dangerous than doing nothing"), 21-23 (stating that auto fuel-consumption standards encourage manufacturers to market lighter, less crash-resistant cars, contributing to hundreds of deaths per year).

50. Audiamur, *The Menace of Consumerism*, 131 SOLIC. J. 1173 (1987).

51. *Id.*

52. BREYER, *supra* note 41, at 13, 15, 17 (stating that the cost of asbestos removal ranges from \$53 to \$150 billion; the cost of implementing benzene emission standards was over \$200 million; the cost of regulating transformers using PCB was \$140 million).

53. HARVEY, *supra* note 27, at 22.

54. *Id.* This notion is weakened, however, when one observes that U.S. trading partners also have product standards, so that eliminating United States standards may actually put the United States in a worse trading position. *See, e.g.*, Peter B. Edelman, *Japanese Product Standards as Non-Tariff Trade Barriers: When Regulatory Policy Becomes a Trade Issue*, 24 STAN. J. INT'L L. 389, 389 (1988).

55. Grether et al., *supra* note 25, at 287.

56. One scholar, perceiving that the public finds risk-benefit analysis a distasteful approach to public policy, offered as a solution the idea that public officials practice "a little dissembling" when presenting their positions to the public. Steven E. Rhoads, *How Much Should We Spend to Save a Life*, in VALUING LIFE: PUBLIC POLICY DILEMMAS 285, 305 (Steven E. Rhoads ed., 1980).

analysis to indicate costs and benefits in any proposed regulation or agency action.⁵⁷ Rather than attempting to institute a particular policy based on generally perceived needs or notions of "fairness," statistical evidence could clearly demonstrate the effectiveness of proposed solutions, and the costs to manufacturers as well as to consumers.⁵⁸ As one author recently wrote:

Expenditure on consumer protection has to be met from somewhere and in order to justify it we must be able to show that the net benefits to society as a whole of such activity are greater than the net benefits to society from allocating the resources elsewhere. At the very least we should be able to show that the net benefit is positive, that is, that the value of consumer protection activity to society exceeds its resource cost.⁵⁹

While these scholars find ethically-based regulatory standards to be too restrictive on business, others consider the regulatory mechanism to be too lax. These critics focus on the weak authority given to the various governmental agencies charged with enforcing the consumer protection laws. The effectiveness of consumer protection legislation is directly tied to the effectiveness of enforcement agencies.⁶⁰ Presently, consumer agencies are not sufficiently staffed, and their resources are severely limited.⁶¹ Consequently, consumer agencies are unable to police violations

57. Timothy J. Muris, *The Consumer Protection Mission: Guiding Principles and Future Direction*, 51 ANTITRUST L.J. 625, 628 (1982). Cost-benefit analysis is not the norm in court remedy decisions because courts reject the economic view that the optimal level of harmful negligence can be greater than zero. DOUGLAS LAYCOCK, REMEDIES 607, 612 (1985). Federal consumer protection legislation, however, often requires a cost-benefit approach. See, e.g., 15 U.S.C. § 1193(j) (1988) (the Flammable Fabrics Act); 15 U.S.C. § 2058(f) (1988) (the Consumer Product Safety Act); 15 U.S.C. § 1262(i) (1988) (the Federal Hazardous Substances Act). See also James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 271-72 (1990) (asserting that the risk-benefit test is fast becoming the primary theme in design defect laws nationwide).

58. Muris, *supra* note 57, at 628. It is difficult to construct a cost-benefit analysis of this nature where the exact risk is hard to measure, the population affected is unknowledgeable, and the long-term damages are unforeseeable; it is a heavy burden on those who would bring claims to court. See *Gulf South Insulation v. U.S. Consumer Prod. Safety Comm'n*, 701 F.2d 1137 (5th Cir. 1983) (stating that product safety regulation would only be enforced if the total harm outweighed the benefit that the product provided). In *Gulf South Insulation*, plaintiff showed that the use of urea-formaldehyde foam insulation caused acute irritant effects, including cancer, but failed to demonstrate the *likelihood* of the occurrence of acute symptoms, thus failing to demonstrate a net harm.

59. ECONOMICS OF CONSUMER PROTECTION, *supra* note 36, at xi.

60. ROSS CRANSTON, REGULATING BUSINESS 168 (1979).

61. *Id.*

and often favor negotiated settlements, or mere advisory action, without fully pursuing civil and criminal remedies.⁶² While negotiated settlements may resolve individual complaints, they generally do not have a deterrent effect on unsafe commercial practices.⁶³ Thus, the agencies appear ineffective and are unable to substantially impact the behavior of manufacturers and producers.⁶⁴ In addition, several authorities note that consumer agencies often develop a close working relationship with those businesses they monitor.⁶⁵ Some agencies tend to support the industries they are regulating and cease to represent the community's interest in product safety.⁶⁶

Increasing the quantity of legislation in order to protect consumers also raises concerns about the disproportionate cost of regulation on the poor and the movement toward a planned, centralized economy. Because consumers ultimately pay the bill for costs associated with consumer protection, critics argue that the cost of consumer protection works to the detriment of the poor and may even price certain products beyond their means.⁶⁷ Furthermore, critics contend that increased consumer protection could require excessive governmental intervention, which is characteristic of a planned, centralized economy.⁶⁸

Clearly, those who worry about too much government control of the U.S. economy might view increased consumer protection as a dangerous intrusion into the free market system. Rather than regulate, some critics argue that the "government should inform and educate the public about the risks associated with various hazards and let individuals choose whether or not to take the risks."⁶⁹

62. Several agencies believe that compliance with consumer laws can be achieved more efficiently by advice and persuasion rather than by threats and court proceedings. *Id.* at 168-69.

63. *Id.* at 170.

64. According to a recent survey, forty percent of respondents trust non-governmental groups more than they trust the federal government to ensure that the food they eat is consumable. Wirthlin Poll, Mar. 1994, para. 1, available in WESTLAW, Poll Library.

65. See Teresa Moran Schwartz, *Punitive Damages and Regulated Products*, 42 AM. U. L. REV. 1335, 1346 (1993) (discussing the bribery scandal at the FDA in the late 1980's).

66. CRANSTON, *supra* note 2, at 406. See CRANSTON, *supra* note 60, at 3, 30, 169.

67. CRANSTON, *supra* note 2, at 4.

68. HARVEY, *supra* note 27, at 20.

69. Adler & Pittle, *supra* note 33, at 159-60.

B. Argument in Favor of Information Rather Than Regulation

The basic presumption that supports increased information over additional regulation is the belief that consumers are “astute enough to be able to make their own decisions if they can be provided with sufficient accurate information.”⁷⁰ Providing consumers with warning labels, nutritional information, and other useful information does not impose an unreasonable burden on, or create a significant cost to, either manufacturers or consumers.⁷¹

While there is some concern that product information can cause confusion,⁷² other scholars assert that there is no proof showing that excess information is harmful.⁷³ These same scholars contend that, although consumers may become frustrated with excessive information, this does not mean that the consumer will make the “wrong” purchase decision.⁷⁴ Furthermore, these scholars assert that consumers want more information on which to base their choices, regardless of whether consumers actually use all of the available information.⁷⁵

Many people believe that providing more information is the most cost-effective way to help consumers because it bypasses the need for agency regulation.⁷⁶ Substantial savings can be realized by reducing the need for regulatory agencies.⁷⁷ Conversely, very

70. O’Grady, *supra* note 46, at 551.

71. Henderson & Twerski, *supra* note 57, at 297.

72. *Id.* at 296-97 (stating that too many warnings lead to both higher accident costs because some consumers come to ignore or discount warnings, and to excessive loss of business because some consumers will overreact to warnings of even very remote risks).

73. Grether et al., *supra* note 25, at 278, 284-85.

74. *Id.* at 285.

75. *Id.* Consumers attempt to use whatever product information is available to them. A recent poll showed eighty-six percent of respondents read the nutrition label, at least occasionally, the first time they buy products, and seventy-five percent of the respondents stated that this information influences their buying decisions. Wirthlin Group Poll, Apr.-May 1993, para. 1, *available in* WESTLAW, Poll Library.

76. Grether et al., *supra* note 25, at 287-88.

77. *Id.* at 287. Informational requirements such as labeling are useful when consumers perceive a risk that the government considers negligible or nonexistent. An example of this situation is the recent controversy over irradiated foods. Sixty-eight percent of respondents in a recent survey believed that irradiated food is a health hazard. Opinion Research Poll, Jan.-Feb. 1994, para. 1, *available in* WESTLAW, Poll Library. A public outcry might have resulted if the government had ignored this widespread perception; agriculture would have suffered substantial losses if the government had banned irradiation. Thus, the decision to simply label such food was an efficient and inexpensive solution.

little cost is added to the retail price of the product as a result of increased disclosure requirements.⁷⁸ Additionally, educational programs limit government involvement in the economy, preserve individual choice, and do not overburden American manufacturers who need to remain free to effectively compete in the world market.⁷⁹ Finally, those who favor more education argue that regulation is incapable of preventing all injuries or deceptive practices.⁸⁰

C. Movement Toward Regulation and Away From Simply Providing More Information

Proponents of regulation argue that "the complexities of the market are now beyond the grasp of any individual consumers [sic]."⁸¹ Some proponents believe that businesses need outside regulation because they resist self-regulatory measures that will control their actions and have adverse effects on their own interests.⁸² Some proponents believe that self-regulation only

78. Grether, et al., *supra* note 25, at 287.

79. Adler & Pittle, *supra* note 33, at 159-60.

80. *Id.* at 160.

81. O'Grady, *supra* note 12, at 551.

82. CRANSTON, *supra* note 60, at 4. The tobacco industry provides a clear example of the need for outside regulation. See, e.g., THE TOBACCO INSTITUTE, THE TAX BURDEN ON TOBACCO at iii (1988) (giving examples of the benefits society reaps because the tobacco industry is heavily taxed); UNITED STATES DEPT. OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE: A REPORT OF THE SURGEON GENERAL (1985); UNITED STATES DEPT. OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING — A REPORT OF THE SURGEON GENERAL (1986) (reporting results of research concerning third-party smokers); UNITED STATES DEPT. OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL (1988) (declaring the nicotine found in cigarettes is as addictive as heroin).

A regulatory compliance defense permits the tobacco industry to continue to legally sell their products; the federal regulation of tobacco specifically provides that, as long as tobacco is properly labeled, it is effectively immune from tort action. RESTATEMENT (SECOND) OF TORTS, § 402A cmt. i (1977) (stating that the extent to which one assesses whether tobacco has a product defect will only be with respect to whether it is "good" tobacco or tainted tobacco). Federal Cigarette Labelling & Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-41 (1988)). Tobacco may eventually be regulated as an addictive drug if great consumer pressure encourages Congress to take action. James T. O'Reilly, *A Consistent Ethic of Safety Regulation: The Case for Improving Regulation of Tobacco Products*, 3 ADMIN. L.J. 215, 253 (1989).

works when businesses are threatened with government regulation or legal action.⁸³

Arguments in support of regulation also incorporate the concept that the market system does not adequately reward producers that are concerned about the environment or safety issues.⁸⁴ Often, it is less expensive to manufacture new products than to use recycled products; it is easy to ignore the possible consequences the production process may have on the environment.

Although some manufacturers emphasize the safety features of their products, marketing surveys suggest that "safety" does not sell.⁸⁵ "While consumers will often avoid products they believe to be unsafe, they will rarely go out of their way to seek goods reputed to be particularly safe."⁸⁶ Advocates of regulation assert that safety and environmental concerns can only be effectively advanced through government intervention.

Another argument in support of government regulation contends that, because people expect the government to ensure the fairness of the marketplace, the government must fulfill this expectation.⁸⁷ Thus, consumers that are at the greatest disadvantage—the ill, elderly, or poor—are in the most need of legislative protection. This argument operates on the premise that a moral society should protect the most vulnerable members of society.⁸⁸

Another argument in favor of regulation contends that even moral businesses make unethical decisions due to the pressure to make profits.⁸⁹ The profit expectations placed on businesses are

83. CRANSTON, *supra* note 2, at 399.

84. See *supra* text accompanying note 30 for a discussion of the inadequacy of the free market system.

85. Adler & Pittle, *supra* note 33, at 163.

86. *Id.*

87. For a discussion on the need to legislate fair business practices, see *supra* notes 81-83.

88. *Id.*

89. The long-term potential damage of a defective product in the marketplace is often outweighed, in the corporate world, by the potential for short-term profit. For example, over two million women in the United States have received breast implants, most of which are silicone gel implants manufactured by Dow Corning Corporation. James F. Johnson, *American Briefing*, 14 PROD. LIAB. INT'L 5 (1992). In 1992, a federal jury awarded \$7.34 million, including \$6.5 million in punitive damages, to a woman whose silicone breast implant had ruptured. *Id.* The jury found that the implant was designed and manufactured defectively, that the manufacturer, Dow Corning, had failed to warn women of the risks of the device, had breached its warranty, and had committed fraud. *Id.* Dow

so oppressive that they are unable or unwilling to make decisions that might reduce profits.⁹⁰ Profitability is their primary motive to the exclusion of almost all other considerations.⁹¹ Regulation is necessary because it will force corporations to act responsibly despite the overpowering pressures on them to make a profit at any and all costs.⁹²

Furthermore, courts often interpret consumer legislation according to the strict standard used in reviewing criminal laws rather than the more lenient interpretation allowed in civil law.⁹³ While some courts may protect consumers from boiler plate contracts, generally a consumer will be bound to the terms of the signed contract.⁹⁴ It is often irrelevant to the court that the contract may be a standard form, provided by the seller, containing unfavorable terms for the consumer.⁹⁵ Thus, many consumers have no ability to effectively protect themselves and must therefore rely on government intervention.

Corning has since become the subject of immense litigation; approximately 11,800 lawsuits are currently pending against Dow Corning as of January 20, 1994, many involving multiple plaintiffs. As a result, Dow Corning has suffered falling share prices, loss of consumer confidence, and bad publicity. *Report Worldwide*, 14 PRODUCT LIABILITY INT'L 6 (1992); Dow Corning Corporation disclosure statement, Dec. 31, 1993, at 7, available in LEXIS, Company database, Company file, "U.S. Co. Profiles" Group. Moreover, on September 1, 1994, Dow Corning agreed to pay \$2 billion of a \$4.25 billion settlement between women and breast implant makers. *Judge Oks \$4.25 Billion Implant Pact*, PRESS-TELEGRAM (Long Beach), Sept. 2, 1994, at A1. This settlement is the largest product liability settlement in U.S. history. *Id.*

90. An illustration drawn from bankruptcy law demonstrates the counter-productivity of this focus on profit. Product liability for unknown risks does not increase the average amount of research in a particular industry, but it does reduce the number of firms in that market. Alan Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689, 698-705 (1985). In other words, where the investment required for product safety may be considerable, some firms will go bankrupt rather than try to ensure that the product they sell is safe. *Id.* This situation reveals the self-defeating effect of corporate aversion to increasing safety research. *Id.*

91. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981) (involving the decision of Ford executives to forgo a safety measure that, at a cost of two to ten dollars per car, would have eliminated the tendency of the 1972 Pinto's fuel tank to explode on impact).

92. CRANSTON, *supra* note 2, at 21.

93. *Id.*

94. *Sheean v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 469 (9th Cir. 1987).

95. *Powers v. Detroit Auto. Ins. Exch.*, 398 N.W.2d 411, 432 (1986).

D. Movement Away From Information As a Preference Over Regulation

Informational programs are popular because of their cost efficiency and limited government involvement in the private sector. Many critics argue, however, that informational programs do not improve the consumer's ability to make informed buying decisions.⁹⁶ Moreover, there is no guarantee that better-informed consumers will actually change their buying behavior. Information rarely encourages consumers to adopt new buying patterns.⁹⁷

Furthermore, consumer protection should attempt to assist the most vulnerable consumers. Increased information will not meet this goal. Educational campaigns in lower socio-economic groups have limited effectiveness.⁹⁸ Consumers in less affluent areas appear to be "less influenced by information and educational messages."⁹⁹ These consumers, and many others, do not read or understand warning and nutrition labels.¹⁰⁰ Excessive information can divert the consumer from finding and understanding truly significant information.¹⁰¹ Accordingly, the best way to protect these consumers is through government regulation. This goal is consistent with Jewish law, which emphasizes heavy regulation of the marketplace.

VI. JEWISH REGULATIONS OF THE MARKETPLACE

While Jewish sources may hold differing points of view regarding specific regulations, all sources underscore the need for control of the marketplace. The Jewish system does not set forth generally accepted rules of law; rather, much of Jewish law takes the form of a discussion that includes minority and majority opinions. Regardless of the source used, however, Jewish law clearly asserts the need for regulation of the market system through legislation rather than through private law or additional consumer information.

96. Adler & Pittle, *supra* note 33, at 159-60.

97. *Id.* at 163.

98. *Id.* at 167.

99. *Id.*; RAMSAY, *supra* note 6, at 50, 70.

100. Adler & Pittle, *supra* note 33, at 165. Over 40% of consumers do not read warning labels. Grether et al., *supra* note 25, at 284 n.13.

101. See, e.g., *supra* note 72; Grether et al., *supra* note 25, at 277.

A. Regulations to Ensure Fair Comparison Shopping

While Jewish law provides consumers with legal recourse in the event of misrepresentation,¹⁰² the Mishnah provides detailed regulations that prohibit merchants from deceiving buyers through intentional or unintentional misrepresentation.¹⁰³ The Mishnah prohibits mixing old and new produce or mixing different types of produce because merchants may hide old produce within new, hoping that consumers will not be able to tell the difference.¹⁰⁴

Moreover, one cannot mix the new produce of one field with the new produce of another field, as one may only want to buy produce from a certain field that is known to have a better quality.¹⁰⁵

The Tosefta expands the Mishnah's prohibitions by restricting the mixing of wines: "And they do not commingle wine, not new with new, or old with old, and it goes without saying, new with old or old with new, or strong with weak."¹⁰⁶

According to the Tosefta, Rabbi Judah allows strong wines to be mixed with weak wines if the mixture will improve the strong wine.¹⁰⁷ Although Rabbi Judah is often overruled by other rabbis, his teachings provide insight into the rabbinic mind. Rather than presenting a single solution to a particular problem, the rabbis also present minority views to teach important lessons. Accordingly, Rabbi Judah states "if there are two types [of wine] which improve one another, [mixing them is] prohibited."¹⁰⁸ The

102. In the case of innocent misrepresentation, U.S. courts will give redress to a party who is injured by reasonably relying on the statement of another. The Mishnah set forth a similar remedy in a case involving a man who sold grain and mistakenly said that it was "garden seed." THE MISHNAH, SEDER NEZIKIN, *Baba Bathra* 6:1 (Herbert Danby trans., 1933). According to the Mishnah, the person making the false representation is held accountable if the grain does not "spring up." *Id.* In Jewish law, a person will be held liable for statements that are later found to be false. There is no legal requirement that a misrepresentation must be intentional. The only requirement is that the statement, which was made and relied upon, was false. The Mishnah illustrates this point in the case of a man leasing an "irrigated field." THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 9:2 (Herbert Danby trans., 1933). If it turns out that the spring dries up and the field is no longer "irrigated," then the person making the representation will not be entitled to full rent. *Id.*

103. See generally THE MISHNAH, *supra* note 14.

104. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:11 (Herbert Danby trans., 1933).

105. HANOKH ALBECK, THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:11, 83 (1930).

106. THE TOSEFTA, SEDER NEZIKIN, *Baba Mesia* 3:26 (Jacob Neusner ed., 1981).

107. *Id.*

108. *Id.*

majority view, however, allows the seller to mix strong wine with mild wine "since this improves it."¹⁰⁹ Rabbi Judah sets forth the general proposition that consumers need absolute protection from potential abuses while other rabbis are not as concerned if wine is mixed for a valid reason. Both the Mishnah and the Tosefta state that an individual seller may not mix the lees (the sediment or dregs)¹¹⁰ of one barrel of wine with the lees of another.¹¹¹ These regulations prohibit the mixing of products, fearing that buyers may be deceived because they will not be able to tell exactly what they are buying.

The rabbis are not as concerned if goods are mixed when the consumer is fully aware that the goods have been mixed.¹¹² The rabbis do not consider this practice deceptive, and the merchant may sell a mixed product.¹¹³ In addition, a merchant can sell adulterated wine if this fact is made known to the customer, and if it is the local custom.¹¹⁴ Where buyers are aware of local customs, the Mishnah presumes no deception exists.¹¹⁵ The Mishnah, however, prohibits the selling of mixed produce or adulterated wine to a merchant, even if the merchant is informed of the mixture, because of a concern that this sale may ultimately lead to deception.¹¹⁶ If a merchant buys articles and produce for resale, the merchant could resell the merchandise without disclosing that it is mixed.¹¹⁷

Although merchants cannot combine merchandise, the Mishnah generally allows wholesalers to buy produce from a

109. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:11 (Herbert Danby trans., 1933); TEXT OF THE TALMUD 95 n.30 (Hyman E. Goldin trans., 1933) (based on Rashi to Gemara 60a) [hereinafter Goldin]. Goldin suggests that the vendor can mix strong wine with mild only if an agreement calls for mild wine, but the vendor cannot mix strong with mild wine if the agreement calls for strong wine.

110. MISHNAYOTH, SEDER NEZIKIN, *Baba Metzia* 4:11, 119 (Philip Blackman ed., 2d ed. 1990) [hereinafter Blackman].

111. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:11 (Herbert Danby trans., 1933); THE TOSEFTA, SEDER NEZIKIN, *Baba Mesia* 3:26 (Jacob Neuser ed., 1981).

112. THE TOSEFTA, SEDER NEZIKIN, *Baba Mesia* 3:27 (Jacob Neuser ed., 1981); Goldin, *supra* note 109, at 95 nn.31-32.

113. Goldin, *supra* note 109, at 95 nn.31-32; THE TOSEFTA, SEDER NEZIKIN, *Baba Mesia* 3:27 (Jacob Neuser ed., 1981).

114. THE MISHNAH, SEDER NEZIKIN, *Baba Mezia* 4:11 (Herbert Danby trans., 1933).

115. Blackman, *supra* note 110, at 119 n.5.

116. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:11 (Herbert Danby trans., 1933); see also ZIPPERSTEIN, *supra* note 18, at 36.

117. ZIPPERSTEIN, *supra* note 18, at 36.

variety of sources and recognizes that keeping this merchandise separate would be an unreasonable burden.¹¹⁸ Furthermore, consumers know that merchants buy from various dealers¹¹⁹ and that they often store large quantities in a single large cask.¹²⁰ Accordingly, the Mishnah states that a "merchant may buy from five threshing-floors and put the produce into a single store-chamber."¹²¹ Nevertheless, the Mishnah continues to be concerned about deception and allows the merchant to mix produce on the condition that "there was no intention to mix them for purpose of fraud."¹²² A merchant would not be allowed to mix good and bad produce because the intent seems deceptive.¹²³

The Mishnah expresses its concern over deception through discussion of the sifting of beans.¹²⁴ Although the majority of rabbis allow the merchant to sift out small stones and other debris, a merchant "must not sift the beans only from the top of the bin, because this tends to deceive the eye [of the purchaser]."¹²⁵ The concern of the Mishnah is that the consumer may assume that the entire bin contains sifted beans when it does not. Furthermore, while there is a market value for unsifted beans, there is no fixed market price for sifted beans.¹²⁶ Although a merchant could charge more for beans that are separated from waste, the customer would be unable to compare the value of the sifted beans to the market price.¹²⁷ Therefore, sifting beans could lead to deception.¹²⁸ Consequently, the sages permit only a limited amount of sifting on the top of a bin so the buyer can know the quality of the sifted beans.¹²⁹ The rationale of the Mishnah is that a buyer should be able to compare the prices of similar products in a comparable state of preparation.

118. *Id.*

119. Goldin, *supra* note 109, at 96 n.32.

120. *Id.* at 96. For a description of the type of "cask" mentioned in the Mishnah, see THE MISHNAH, SEDER MOED, *Rosh Hashannah* 3:7 (Herbert Danby trans., 1933).

121. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:12 (Herbert Danby trans., 1933).

122. *Id.*

123. Blackman, *supra* note 110, at 119.

124. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:12 (Herbert Danby trans., 1933).

125. Goldin, *supra* note 109, at 97.

126. *Id.* at 96-97 n.35; see also ZIPPERSTEIN, *supra* note 18, at 37.

127. Goldin, *supra* note 109, at 96-97.

128. *Id.*

129. *Id.* at 97 n.35.

B. Regulation of Deceptive Practices

The Mishnah states: "One may not give a deceptive appearance to a human being, or cattle, or implements."¹³⁰ A human being's appearance should not be embellished by dying one's hair.¹³¹ A cow's appearance should not be altered by drugs that raise and stiffen its hair.¹³² Implements should not be made to look better by painting them.¹³³ The Tosefta adds that one cannot put meat in water to increase its sale weight.¹³⁴ The Mishnah and the Tosefta clearly set forth the concept that a seller is under a duty to present the true appearance of merchandise.¹³⁵ The seller has a duty to disclose to the buyer any blemish or defect in the object of sale.¹³⁶

C. Regulations on Unfair Competition

In addition to deceptive practices, unfair competition is discussed in the Mishnah. For example, Rabbi Judah discourages shopkeepers from giving out "parched corn [popcorn] or nuts to children."¹³⁷ He is concerned that the children will become accustomed to buying merchandise at the place where the shopkeeper gives out treats.¹³⁸ Further, he states that merchants engage in non-price competition such as giving gifts to customers.¹³⁹ This type of competition may confuse consumers and induce them to buy products for reasons other than price or quality. The majority of the rabbis disagree with this approach. Apparently, they believe that gift-giving an appropriate practice because it creates a warm and inviting atmosphere.¹⁴⁰

The approaches of Rabbi Judah and the other rabbis are consistent if they are understood to apply in different circumstances. Rabbi Judah's prohibition should only be applied when a

130. Blackman, *supra* note 110, at 120.

131. *Id.* at 120 n.8.

132. Goldin, *supra* note 109, at 97 n.36.

133. *Id.*

134. THE TOSEFTA, SEDER NEZIKIN, *Baba Metzia* 3:29 (Jacob Neuser ed., 1981).

135. Zipperstein, *supra* note 18, at 35.

136. *Id.* at 37.

137. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:12 (Herbert Danby trans., 1933).

138. Blackman, *supra* note 110, at 120.

139. *Id.*

140. *Id.* at 120 n.4.

practice stifles competition by inducing the buyer to purchase goods from a particular retailer.

Rabbi Judah prohibits shopkeepers from lowering prices to attract customers.¹⁴¹ He worries that sales can be specifically timed and aimed to hurt a particular competitor.¹⁴² Again, the majority of rabbis during the time of the Mishnah disregarded Rabbi Judah's anxieties and allowed such practices.¹⁴³ The sages even praise a person who lowers prices by stating that "he is to be remembered for good."¹⁴⁴ The Sages, aware of the benefits of competition, do not want to stop merchants from earning profits and competing effectively.¹⁴⁵

Once again, Rabbi Judah's pronouncement does not conflict with the views of the other rabbis. Rabbi Judah's ruling is directed at stronger merchants who are able to force others out of business by the use of "predatory pricing,"¹⁴⁶ while the majority of rabbis favor sales that benefit the consumer when there is no attempt to impede competition.

D. Regulation of Fair Prices for Consumer Products

Jewish law rejects the self-regulating market model as an effective method to ensure fair prices.¹⁴⁷ Jewish law attempts to ensure a "fair" deal by limiting profits to less than one-sixth of the purchase price.¹⁴⁸ This limitation on profits does not cover all transactions. The Mishnah specifically excludes slaves,¹⁴⁹ bonds

141. *Id.* at 120 n.5.

142. *Id.*

143. *Id.*

144. *Id.*

145. ZIPPERSTEIN, *supra* note 18, at 37.

146. Predatory pricing occurs when competitors cannot match the reduced price and consequently fail in their business.

147. Tamari, *supra* note 22, at 87.

148. "Ona'ah" takes place when a merchant charges "four pieces of silver out of the twenty-four pieces of silver that make up sela, or one-sixth of the purchase-price . . ." THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:3 (Herbert Danby trans., 1933). Although the actual weight of a sela, relative to modern standards, is not known, it is believed that a sela would be approximately 14.4 grams. Blackman, *supra* note 112, *Zeraim* at 18-24. While the term ona'ah is most commonly translated as "fraud" or "overreaching," the usage of this term in Jewish law carries no suggestion of an attempt to "intentionally" take advantage of another person. See ZIPPERSTEIN, *supra* note 18, at 29. Rather the "overcharge" is viewed simply as a mistake without a declaration of evil intent.

149. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:9 (Herbert Danby trans., 1933). There are many references to slaves being a part of the Palestinian economy. See, e.g., THE MISHNAH, SEDER NEZIKIN, *Baba Bathra* 4:7 (Herbert Danby trans., 1933); THE

of indebtedness,¹⁵⁰ real estate,¹⁵¹ and anything belonging to the Temple.¹⁵² The general rationale¹⁵³ for these exclusions is that the items are unique because they are not interchangeable,¹⁵⁴ or have unlimited lives.¹⁵⁵ Eventually, the rules of overcharging applied only to basic necessities with a ready market value.¹⁵⁶

Because fair price is an important and essential element of any agreement, the communities established and enforced just prices through the use of market commissioners.¹⁵⁷ Regulations adopted by these commissioners attempted to prevent unscrupulous practices such as a situation where an unethical merchant withholds his goods until the bulk of a product has been sold and then raises his prices.¹⁵⁸

E. Regulation on Fair Weights and Measures

The Bible specifically directs the instruments used for business transactions must be accurate: "You shall not have in your pouch a weight and a weights—a large one and a small one. And you shall not have in your house a measure and a measure—a large one and a small one. A perfect and honest weight shall you have, a perfect and honest measure shall you have" ¹⁵⁹

The Bible and the Talmud repeatedly warn merchants to have accurate weights and measures.¹⁶⁰ Within this context, the rabbis understood the necessity of establishing local rules that may differ

MISHNAH, SEDER NASHIM, *Kiddushin* 1:3 (Herbert Danby trans., 1933); BABYLONIAN TALMUD, SEDER MO'ED III, *Yoma* 35b (I. Epstein trans., 1935); BABYLONIAN TALMUD, SEDER NASHIM I, *Yebamot* 48b (I. Epstein trans., 1935); BABYLONIAN TALMUD, SEDER NASHIM IV, *Gitten* 40a (I. Epstein trans., 1935). There are no grounds, however, for thinking that the agricultural economy of Jewish Palestine was based on slave labor to any great extent or that the slave trade was a major source of profits. See GEDALIAH ALON, *THE JEWS IN THEIR LAND IN THE TALMUDIC AGE* 160 (Gershan Levi trans., 1980).

150. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:9 (Herbert Danby trans., 1933).

151. *Id.* For a discussion of the strong Jewish tradition of clinging to the land of one's ancestors, see ALON, *supra* note 149, at 156-68.

152. THE MISHNAH, SEDER NEZIKIN, *Baba Metzia* 4:9 (Herbert Danby trans., 1933).

153. For a more detailed discussion, see Schaefer, *supra* note 24, at 89-91.

154. 2 ISAAC HERZOG, *THE MAIN INSTITUTIONS OF JEWISH LAW* 122-23 (1967).

155. See Blackman, *supra* note 110, at 118 n.1.

156. HIRSCH, *supra* note 24, at 69.

157. *Id.*

158. BABYLONIAN TALMUD, SEDER NEZIKIN II, *Baba Bathra* 90b (I. Epstein trans., 1935); Tamari, *supra* note 22, at 90.

159. *Deuteronomy* 25:13-15.

160. *Leviticus* 19:35-36; *Proverbs* 11:1; BABYLONIAN TALMUD, SEDER NEZIKIN II, *Baba Bathra* 88a, 88b, 89b (I. Epstein trans., 1935).

from the universal standards. As the Talmud stated, "the exact weight must not be given where the practice is to allow overweight, and that overweight must not be allowed where the practice is to give the exact weight."¹⁶¹

F. Regulation of Verbal Indiscretions and the Legislation of Morality in the Marketplace

Although verbal indiscretions may not be punishable, "the Rabbis considered such actions contrary to ethics and moral norms."¹⁶² The Mishnayoth states: "Just as there is [fraud by] overreaching in buying and selling, so there is wrong done by words."¹⁶³ The Tosefta adds: "Just as a claim of fraud applies to buying and selling, so a claim of fraud applies to spoken words."¹⁶⁴ Accordingly, traditional Jewish sources sound a warning about the power of words: "Thus, one may not say to another, 'What is the price of this thing?' if he do [sic] not wish to purchase it."¹⁶⁵ This passage suggests that it is unfair to take the merchant's time if there is no real possibility of a sale; the merchant could spend time with other customers who may make a purchase. In addition, merchants may expect a sale when a consumer asks for a price. The rabbis considered it unfair to increase the merchant's expectations when the consumer, in fact, never intended to purchase the item.¹⁶⁶ The rabbis expressed their concern for speaking carefully with regard to financial matters and many other areas of personal interaction.¹⁶⁷ Thus,

161. BABYLONIAN TALMUD, SEDER NEZIKIN II, *Baba Bathra* 89a (I. Epstein trans., 1935).

162. ZIPPERSTEIN, *supra* note 18, at 35.

163. Blackman, *supra* note 110, at 118.

164. THE TOSEFTA, SEDER NEZIKIN, *Baba Metzia* 3:25 (Jacob Neusner ed., 1981).

165. Blackman, *supra* note 110, at 118.

166. *Id.*

167. The Mishnah also warns against reminding a person of former improper deeds. If a person is not allowed to forget the past, then that person may believe that there is no benefit to self-improvement. Albeck, *supra* note 107, at 83; Blackman, *supra* note 110, at 118-19. The Mishnah also deals with converts in this manner. The Mishnah states: "If a man was descended from proselytes, they may not say to him, 'Remember the deeds of thy forefathers.'" *Id.* at 119. "And a stranger shalt thou not wrong, neither shalt thou oppress him." *Exodus* 22:21. The Tosefta provides more detail as to what should not be said: "[If] one saw a proselyte come to study Torah, he should not say to him, 'Look who's coming to study Torah-this one who ate carrion and teref- meat, abominations and creeping things.'" THE TOSEFTA, SEDER NEZIKIN, *Baba Metzia* 3:25 (Jacob Neusner trans., 1981). The Tosefta warns of additional situations when people can be oppressed by words: "[If] there were ass-drivers seeking [to buy] wine and oil, one should not say to

these passages demonstrate the rabbis' attempts to take into account the feelings of others when prescribing moral actions.

VII. GENERAL DISCUSSION ON ACHIEVING THE GOALS AND VALUES OF CONSUMER PROTECTION

A. *Some Basic Assumptions of Consumer Protection*

Consumer protection laws reflect more than a socio-political decision. Legislation of the marketplace reflects moral and religious ethics, which presume disproportionate bargaining power between sellers and buyers.¹⁶⁸ Jewish law clearly suggests the need for controls over the activities of sellers, who are generally believed to be in a stronger bargaining position.¹⁶⁹ Today's advocates of consumer protection agree that "[a] completely unregulated laissez-faire system is unacceptable . . ." because the strong will necessarily dominate the weak.¹⁷⁰ Therefore, most proponents support pragmatic regulations that redress the perceived inequality of bargaining power and increase information to benefit consumers. Their goal is to reduce the ability of the manufacturers and retailers to manipulate consumers, thus assisting consumers in making prudent decisions.¹⁷¹ Proponents also aim to provide consumers with the ability to enter into fair bargains rather than ones that place consumers at a disadvantage.¹⁷²

The biblical directive that the disadvantaged need additional protection underscores the perceived inequality between the buyer and the seller.¹⁷³ Some current scholars consider the poor to be at a disadvantage, evidenced by the fact that less affluent individu-

them, 'Go to So-and-so,-who has never [previously] sold wine or oil. If there was a sickness and it came upon someone or it came upon his [child] and he buried his son, one should not say to him in the manner that Job's friends spoke to him: 'Is not your fear of G-d your confidence, and the integrity of your ways your hope? Think now, who that was innocent ever perished? Or where were the upright cut off?' (*Job* 4:6-7)." THE TOSEFTA, *Seder Nezikin, Baba Metzia* 3:25 (Jacob Neusner trans., 1981).

168. Tamari, *supra* note 22, at 49, 88; ZIPPERSTEIN, *supra* note 18, at 30.

169. Tamari, *supra* note 22, at 49, 88; ZIPPERSTEIN, *supra* note 18, at 30.

170. HARVEY, *supra* note 27, at 18.

171. CRANSTON, *supra* note 2, at 4.

172. "[T]here has been a growing recognition that the individual, even in a free and competitive economy, lacks an awareness of the available alternative methods of financing acquisitions, has insufficient expertise to choose between [various alternatives], and in any event is in an inferior bargaining position which forces him into disadvantageous transactions." MICKLEBURGH, *supra* note 26, at 3.

173. *Deuteronomy* 10:18; *Jeremiah* 7:6; *Zechariah* 7:10.

als generally pay more for what they consume¹⁷⁴ and tend to be less aware of their rights.¹⁷⁵ Reports have demonstrated that questionable marketing techniques more effectively manipulate less affluent consumers than the general population.¹⁷⁶ The poor are less informed about prices, less informed about costs of credit and product variations, and pay more for what they buy.¹⁷⁷ Thus, consumer protection legislation is often supported because it is designed to help the economically and socially disadvantaged members of our society.¹⁷⁸

Jewish sources state that the regular remedies for misrepresentation and other private redresses are insufficient. The multiplicity and detail of the laws found in the Talmud and the Mishnah clearly articulate the need for government regulation of the private sector. Modern consumer advocates echo this belief.¹⁷⁹ Many consumers are ignorant of their legal rights, lack the assertiveness to complain, and are generally unwilling or unable to pursue legal remedies.¹⁸⁰ Secure in the knowledge that few consumers will pursue the matter, some businesses feel that they can produce defective products and engage in unfair business practices.¹⁸¹ Government regulation may be the only way to guarantee that consumers will be protected.¹⁸²

Unfair business practices are hardly a new phenomenon, with roots as old as human nature. As the father of the great American jurist, Oliver Wendell Holmes, Jr., stated over one hundred years ago:

When legislators keep the law,
When banks dispense with bolts and locks,

174. CRANSTON, *supra* note 2, at 4.

175. Typically white, middle-class individuals most often complain to consumer agencies or take legal action to protect their consumer rights. *Consumer Reports* and other consumer-focused publications have readerships from the white middle class. *Id.* at 6.

176. CRANSTON, *supra* note 2, at 5.

177. *Id.* at 4.

178. *See generally* CRANSTON, *supra* note 2, at 3-4.

179. *Id.*

180. Many national surveys conclude that most consumers who have experienced problems fail to complain due to a lack of a rudimentary knowledge of their legal rights. *Id.* at 23.

181. "It appears clear that certain businesses find it acceptable to commit a number of consumer offenses instead of changing their trade practices . . ." Fines and legal expenses can just be viewed as another expense of doing business. CRANSTON, *supra* note 60, at 8. For examples of this view, see *supra* text accompanying notes 84, 89.

182. CRANSTON, *supra* note 2, at 3.

When berries, whortle- rasp- and straw-
 Grow bigger *downwards* through the box,
 When he that selleth house or land
 Shows leak in roof or flaw in right,
 When haberdashers choose the stand
 Whose window hath the broadest light,
 When preachers tell us all they think,
 And party leaders all they mean,
 When what we pay for, that we drink,
 From real grape and coffee-bean,
 When lawyers take what they would give,
 And doctors give what they would take,
 When city fathers eat to live,
 Save when they fast for conscience' sake,
 When one that hath a horse on sale
 Shall bring his merit to the proof,
 Without a lie for every nail
 That holds the iron on the hoof,

...
Till then let Cumming blaze away,
 And Miller's saints blow up the globe;¹⁸³
 But when you see that blessed day,
Then order your ascension robe!

- Oliver Wendell Holmes, Sr.¹⁸⁴

Jewish tradition presumes the need to create a moral and fair market system without regard to economic costs and benefits. In fact, Jewish sources never refer to the economic costs of consumer protection as being more significant than the overall functioning of such a system. Moreover, Jewish law rejects some of the basic assumptions supporting the cost-benefit analysis that is currently popular. Cost-benefit analysis is necessarily classified as a utilitarian system, which focuses on the needs of the majority.¹⁸⁵

183. John Cumming and William Miller, popular 19th-century preachers who claimed that the millenium had arrived. See 5 *DICTIONARY OF NAT'L BIOGRAPHY* 297, 297 (Leslie Stephen & Sidney Lee eds., 1917); 6 *DICTIONARY OF AM. BIOGRAPHY* 641, 642 (Dumas Malone ed., 1933).

184. Oliver W. Holmes, Sr., *Latter-Day Warnings*, in *THE AUTOCRAT OF THE BREAKFAST-TABLE* 24, 24-25 (Houghton, Mifflin & Co. 1892) (1858).

185. Bill Shaw & Art Wolfe, *A Legal and Ethical Critique of Using Cost-Benefit Analysis in Public Law*, 19 *HOUS. L. REV.* 899, 903 (1982). See TOM L. BEAUCHAMP & NORMAN E. BOWIE, *ETHICAL THEORY AND BUSINESS* 21 (1983) ("This theory is rooted in the thesis that an action or practice is right when compared to any alternative action or

In this regard, Jewish law is often characterized as a deontological¹⁸⁶ system, which focuses on affirming its principles rather than supporting the majority's best interests.¹⁸⁷ For example, Jewish tradition views an individual as a unique creation of G-d with infinite value.¹⁸⁸ Assigning a monetary value to an individual minimizes the sacred character of the human spirit. Accordingly, Jewish law asserts that the cost-benefit analysis is inappropriate when dealing with human beings.

When applied to economic conditions, cost-benefit analysis has been criticized for several reasons. While proponents suggest that cost-benefit analysis incorporates objective measurements, the assignment of costs and benefits is necessarily subjective. Furthermore, costs and benefits are often based on short-run considerations, which do not give full credit to long-term effects. Thus, although a useful tool when measuring economic activity, cost-benefit analysis is often an inappropriate measure when applied to values or when used to determine a means of improving the human condition.¹⁸⁹

Finally, Jewish law assumes that providing information may not be a sufficient alternative to consumer protection regulation. In Jewish law, product information is insufficient unless the individual receiving the information possesses enough sophistication to fully utilize, and thus be protected by, the information.¹⁹⁰ Critics who oppose consumer information laws as the most effective way to protect consumers observe that determining the appropriate level of consumer sophistication in a given situation

practice if it leads to the greatest possible balance of good consequences or to the least possible balance of bad consequences in the world as a whole.”)

186. BEAUCHAMP & BOWIE, *supra* note 183, at 31. “Deontologism (derived from the Greek for ‘duty’) maintains that the concept of duty is independent of the concept of good, and that actions are not justified by their consequences.” *Id.*

187. See Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 324 (1961) (contrasting the “duty” orientation of Jewish law with the common law focus of “rights”).

188. Chaim W. Reines, *The Self and the Other in Rabbinic Ethics*, in CONTEMPORARY JEWISH ETHICS 162 (Menachem Mark Kellner ed., 1979).

189. See *supra* discussion accompanying note 47; HARVEY, *supra* note 27, at 21; Shaw & Wolfe, *supra* note 183, at 903.

190. An example of this principle is the voluntary waiver of the protection of ona'ah by a knowledgeable buyer, generally another merchant. THE TOSEFTA, SEDER NEZIKIN, *Baba Mezia* 3:22 (Jacob Neusner trans., 1981); BABYLONIAN TALMUD, *Baba Mezia* 51a (I. Epstein trans., 1971).

can be difficult.¹⁹¹ Even if all information about a product is available, products are so complex that it may be impossible to fully understand their qualities prior to purchase. Flaws may not become apparent until the product has been used for quite some time. These observations, taken together, clearly support a strong regulatory system as the best way to protect consumers. Moreover, Jewish law may provide guidance for current regulation.

B. Suggestions For Areas of Regulation From a Jewish Perspective

1. Helping to Ensure Fair Comparisons

When a consumer does comparison buying, rules against mixing different quality items insure that consumers have a better chance to know exactly what they are buying. Simplifying price comparison can serve as a basis for additional consumer legislation.¹⁹² Thus, incorporating Jewish law, legislation requiring equivalents in packaging sizes and weights should aid the consumer in comparing prices and improve the welfare of the community.¹⁹³ Certainly, some stores put markers on their shelves showing equivalent weights. This practice, however, is not prevalent as many stores make no attempt to aid the consumer's buying decisions.¹⁹⁴

2. Reducing Deceptive Practices

Jewish law prohibits merchants from using deceptive practices to the detriment of consumers. Rabbi Judah worried that retailers would give popcorn to children to entice them into the store; the Tosefta condemns situations where merchants sprinkle wine on the

191. Grether, et al., *supra* note 25, at 277; MICKLEBURGH, *supra* note 26, at 3.

192. In fact, simplifying price comparison was the express goal of Congress when it drafted the Fair Packaging and Labeling Act. Fair Packaging and Labeling Act, § 2, Pub. L. No. 89-755, 80 Stat. 1296 (codified as amended at 39 U.S.C. §§ 1451-1461 (1988)). Stores are largely exempt, however, from the provisions of this law, so cross-product comparisons are not mandated. 39 U.S.C. § 1452(b). Also, the Act only requires disclosure of the product's net contents, not a more useful measure such as price per pound; nor are standard package sizes or standard weights required. *Id.* §§ 1453, 1454(c)(1).

193. ECONOMICS OF CONSUMER PROTECTION, *supra* note 36, at 54.

194. See *supra* text accompanying note 190.

ground to arouse the customers' senses when walking by the store.¹⁹⁵ Examples of the rabbis' desire to control practices that confuse buyers already in the store include the regulations against selling sifted grain and mixing produce, as discussed earlier.¹⁹⁶ Jewish law does not hesitate to regulate certain practices that clearly cause confusion.

The language that retailers use to encourage consumers to shop at their stores presents another significant problem. Terms such as "sale," "sale price," "special purchase," "close out sale," "50% off," "going out of business," "everything must go," and other similar phrases, are often used without any uniform meaning. Public hearings clearly show that both retailers and consumers are unclear about the definitions of these terms and that these terms have been used by retailers to intentionally deceive consumers.¹⁹⁷ As Jewish law regulates the use of deceptive words, so the legislature should consider standardizing or banning misused and deceptive terms.¹⁹⁸

Jewish law places a duty on sellers to inform potential buyers of all defects and blemishes in their merchandise.¹⁹⁹ Media advertisements, however, generally supply superficial information that exclusively points to the positive qualities of a particular product.²⁰⁰ Advertisers motivate consumers to purchase their products rather than provide consumers with essential information.²⁰¹ Advertisers do not design advertisements to underscore

195. THE MISHNAH, SEDER NEZIKIN, Baba Mezia 4:12 (Herbert Danby trans., 1933); THE TOSEFTA, SEDER NEZIKIN, Baba Mezia 3:27 (Jacob Neusner trans., 1981).

196. See *supra* notes 104-29.

197. See Transcript of Proceedings of the California Attorney General's Public Hearing on Retail Advertising of Sale and Comparative Prices held Aug. 23 and 29, 1983, in Los Angeles, California. Some sellers interpreted the term "sale" as an item for sale and not necessarily item(s) sold below their normal price. Eighty-two percent of respondents to a Gallup poll say the product labels or reports they read are sometimes contradictory. Gallup Poll, Jan.-Feb. 1993, para. 1, available in WESTLAW, Poll Library.

198. SIR GORDON BORRIE, THE DEVELOPMENT OF CONSUMER LAW AND POLICY-BOLD SPIRITS AND TIMOROUS SOULS 128 (1984). The author also discussed the problem of "price comparisons," that usually show a particular product being sold for less than its competition. Although there is a requirement to provide the consumer with the sources of information used in the comparison, a general feeling still exists that price comparisons are easily manipulated and are intentionally arranged to confuse consumers. *Id.* at 128.

199. HOROWITZ, *supra* note 12, at 367.

200. Grether et al., *supra* note 25, at 2.

201. For example, a manufacturer of shallow above-ground swimming pools was promoting its product by illustrations of people diving into the pools from well above the water. *Koenig v. Muskin Corp.*, No. 701, A-1973 (Pa. Ct. C.P. Nov. 8, 1982). Such diving

product defects or consumer dissatisfaction.²⁰² Current law permits some advertising that is deceptive without being false.²⁰³

Jewish law prohibits merchants from disguising defects,²⁰⁴ hiding old produce under new produce,²⁰⁵ and engaging in other practices that make it difficult for consumers detect poor quality. Jewish law supports regulations aimed at providing consumers with complete information about the quality of items being purchased. Consequently, measures should be adopted to redress the imbalance of one-sided promotional messages.²⁰⁶ One way to redress the imbalance is to require a percentage of all judgments for false advertising to be placed in a public fund to provide media-time for consumer-based organizations.²⁰⁷

caused one user to become a quadriplegic. *Id.*

202. Labeling requirements can only counteract the seductions of advertising when those labels provide complete and consistent information, are read and understood, and are powerful in their effect on the consumer. Even then, consumers may succumb to skillful marketing. See EDWARD M. SWARTZ, *SLAUGHTER BY PRODUCT* § 7.52 at 72-73 (1993 Cum. Supp.) (suggesting a defense against the toy industry's "megabuck marketing" by featuring dangerous toys in "wanted posters" that would be distributed through the media and in public places).

203. CRANSTON, *supra* note 60, at 137. Section 43(a) of the Lanham Act, codified as amended at 15 U.S.C. § 1125(a), confers a private right of action on "any person who believes that he is or is likely to be damaged by the use of any . . . false description or representation" in connection with goods or services in commerce. 15 U.S.C. § 1125(a) (1989). In addition, plaintiffs can sometimes bring suit based on the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging the false advertising as the "pattern of racketeering activity". 18 U.S.C. §§ 1961-68 (1989); KENNETH A. PLEVAN & MIRIAM L. SIROKY, *ADVERTISING COMPLIANCE HANDBOOK* 90-92 (2d ed. 1991).

Sections 5 and 12 of the Federal Trade Commission Act prohibit false, deceptive, or "unfair" advertising. 15 U.S.C. § 45(a), § 52(b) (1989). This Act lost much of its enforceability because of changes in FTC policy during the Reagan era that raised the required evidentiary threshold. See *FTC's Policy Statement on Deception, sent to Chairman of Senate Commerce, Science and Transportation Committee and House Energy and Commerce Committee, reprinted in* 45 *ANTITRUST & TRADE REG. REP.* (BNA) 689 (1983) and its dissent, *published in* 46 *ANTITRUST & TRADE REG. REP.* (BNA) 372 (1984).

204. THE MISHNAH, *SEDER NIZIKIN, Baba Mezia* 4:12 (Herbert Danby trans., 1933).

205. *Id.* at 4:11.

206. Examples of measures aimed at this goal include the *RESTATEMENT (SECOND) OF TORTS* § 388(c) (1977) (imposing liability for failing to warn product users); *RESTATEMENT (SECOND) OF TORTS* § 402A (1977) (imposing a duty to warn users of risks of product).

207. *ECONOMICS OF CONSUMER PROTECTION*, *supra* note 36, at 9. In *General Nutrition, Inc.*, an advertiser had made false health-related claims in connection with food and vitamin products. In lieu of redress, the advertiser agreed to pay \$600,000 to be equally divided between the American Diabetes Association, the American Cancer Society, and the American Heart Association. *In re General Nutrition, Inc.*, 111 F.T.C. 387 (1989).

3. Limiting Profits for Consumer Goods

Jewish law regulates the amount of profit that retailers can make on consumer items.²⁰⁸ Instead of trusting the marketplace to set fair values, Jewish law suggests the need for a regulator and even allows the use of a commissioner to enforce fair prices.²⁰⁹ Perhaps courts should assume the role of regulator and be trusted to balance freedom of contract with a doctrine of a fair exchange. Specialized administrative courts for consumer complaints could speedily deal with these issues and not unduly burden the general court system. To promote fair policy, an implied warranty of adequate consideration should be added to existing implied warranties of merchantability, fitness for a particular purpose, and good title. To ensure a fair marketplace, courts should be encouraged to examine the fairness of consumer transactions.

4. Altering Legal Presumptions to Benefit Consumers

Courts play a significant role in defining the rules and the assumptions that govern business transactions. Legal outcomes often favor business due to the influence of the traditional notions of "caveat emptor" and "freedom of contract." Jewish law rejects this bias, as do many individuals in our society who expect the courts to protect the less powerful. Jewish law strongly encourages modern-day judges to realize that these notions have placed consumers at a disadvantage. Courts should consider that an increase in consumer protection legislation signals a new consciousness in our society to protect consumers.²¹⁰ Historically, retailers and manufacturers have held legally dominant positions.²¹¹ Courts should adjust existing legal presumptions to protect consumers against retailers and manufacturers.²¹²

208. Schaefer, *supra* note 24, at 80.

209. HIRSCH, *supra* note 24, at 69.

210. According to a Roper poll, eighty-three percent of respondents believe that business has a "definite responsibility" to make products safe for use. Roper Poll, Dec. 1986, para. 1, available in WESTLAW, Poll Library.

211. "Given the imbalance of knowledge and resources between a business enterprise and each of its customers, . . . it is more rational . . . to require a manufacturer to confirm his affirmative product claims rather than impose a burden upon each individual consumer to test, investigate, or experiment for himself." *In re Pfizer Inc.*, 81 F.T.C. 23, 62 (1972).

212. For example, the court could impose a duty on the seller to inform the buyer of all defects without concern as to whether the defect is reasonably discoverable by the buyer or whether the buyer is relying on misinformation. Currently, the common law only

5. Taking Violations of Business Practices Seriously

The number of Jewish laws and rabbinical pronouncements regulating businesses, and emphasizing the significance of business' actions, indicate that violations of business practices must be taken seriously.²¹³ Many U.S. courts, however, do not appear to recognize the anti-social nature of offenses that violate consumer law and do not treat breaches of consumer regulations seriously.²¹⁴ Unaddressed offenses against consumers undermine a basic trust in the fairness of the marketplace and, ultimately, adversely affect commercial morality. Rather than support the creative entrepreneur that practices deceptive advertising, courts need to support the aggrieved consumer.

In addition to courts taking consumer rights violations more seriously, enforcement agencies should deal strictly with those who take advantage of consumers. Some consumer agencies have adopted the approach of educating and advising consumers about how to deal with their individual problems.²¹⁵ Critics of this approach argue that placing the burden of enforcement on the consumers is ineffective.²¹⁶ These critics contend that agencies must actively enforce the various rules to effectively impact the business environment.²¹⁷ For example, an individual can write letters begging companies to follow a particular policy, but one prosecution will make all the difference.²¹⁸ Prosecutors are reluctant to use criminal law because they assume that the stigma of a criminal conviction is somehow inappropriate for consumer

prohibits misinformation and imposes a duty to disclose defects that are not reasonably discoverable by the buyer. *Griffith v. Byers Const. Co. of Kansas*, 510 P.2d 198 (1973).

213. BABYLONIAN TALMUD, SEDER MO'ED, *Shabbat* 31a (I. Epstein trans. 1935).

214. For example, Richard Posner describes the function of the tort system negligence standard as being merely "deterrence of inefficient accidents." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 187 (3d ed. 1986).

215. A major function of the United States Office of Consumer Affairs is to publish the "Consumer's Resource Handbook" that provides the consumer with a list of statewide agencies that may, or may not, be of assistance.

216. CRANSTON, *supra* note 2, at 3-6; CRANSTON, *supra* note 60, at 5-7.

217. CRANSTON, *supra* note 2, at 3-6; CRANSTON, *supra* note 60, at 5-7.

218. *See, e.g., Carter v. Rand McNally & Co.*, No. 76-1864F (D. Mass. 1980) (discussing a children's chemistry textbook with confusing and misleading experiment directions caused experimenter to suffer serious burns; a lawsuit resulted in a rewritten text and warnings).

rights violations.²¹⁹ For effective consumer protection, prosecution and other enforcement tools should be used. Agencies that are prosecution-minded seem to be taken more seriously. They tend to discover more consumer offenses and have greater social impact.²²⁰

Despite the favorable impact that prosecution may have on business behavior, consumer advocates are concerned that negative publicity associated with violations of consumer rights may not always deter violations. Advocates assert that people soon forget the offense but remember the name of a company or a product that is mentioned in the news.²²¹ Furthermore, the publicity of a single prosecution hardly dents a business' favorable image, especially in light of the resources allocated to the public relations departments of major corporations.²²²

Publicity may also backfire. If publicity discloses that the only penalty for a consumer rights violation was a small fine or publicly reveals that a company successfully avoided complying with a particular regulation, this information may encourage other firms to emulate the "negative" example of the publicized firm.

To reverse the benefit of publicity relating to violations, consumer advocates should encourage courts and legislatures to levy fines significant enough to deter inappropriate action by businesses.²²³ Accordingly, legislators may consider using puni-

219. BORRIE, *supra* note 198, at 128. In contrast, "[i]t is arguable that those firms which knowingly market unsafe products produce societal harm eclipsing street crimes." Rustad, *supra* note 12, at 6.

220. CRANSTON, *supra* note 60, at 144-45, 170. See LEE IACOCCA, IACOCCA, AN AUTOBIOGRAPHY 161 (1984) (asserting that "the damage to [Ford Motor Company] was incalculable" when the company was charged with reckless homicide in a 1978 Pinto case in Indiana).

221. CRANSTON, *supra* note 60, at 144-45.

222. For example, Lee Iacocca, who authorized a criteria standard for the Ford Pinto that included no reference to safety, invoked the motto, "safety doesn't sell." Mark Dowie, *Pinto Madness*, MOTHER JONES, Sept./Oct. 1977, at 21-23. Fired by Ford when the Pinto was recalled, Iacocca went on to become president of Chrysler and author of the best-selling autobiography in the history of U.S. publishing. IACOCCA, *supra* note 220, at 145, 162; FRANCIS T. CULLEN, WILLIAM J. MAAKESTAD & GRAY CAVENDAR, CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND 297 (1987).

223. The Ford executives' decision to forgo certain safety measures on the Pinto was predicated on an assumption that the decision would result in "affordable" court judgments of \$200,000 per life lost, and \$67,000 per injury. STUART M. SPEISER, LAWSUIT 357 (1980), Speiser was counsel for the plaintiffs in *Grimshaw*. *Grimshaw*, however, resulted in a \$125 million jury verdict, which was later reduced to \$3.5 million as a condition of denying the manufacturer's motion for a new trial. *Grimshaw v. Ford Motor*

tive damages to deter future violations by the offending party.²²⁴ Moreover, remedies should go beyond fines to include imprisonment²²⁵ as well as remedial action that incorporates court-approved advertisements,²²⁶ delineates distribution requirements, and clearly states the violation. Ultimately, publicizing well-considered regulations and advertising enforcement efforts may be the best ways to mobilize a market structure that treats consumers fairly.²²⁷

6. Further Suggestions

Jewish law regulations, usually sufficiently detailed to encourage self-regulation, rarely set forth general standards that require judicial interpretation. Similar to U.S. criminal law, which is aimed at the individual rather than the judge, an underlying

Co., 174 Cal. Rptr. 348, 358 (1981). *Grimshaw* resulted in a recall and new California legislation. See IACOCCA, *supra* note 220, at 162; CAL. PENAL CODE § 387 (West Supp. 1994) (imposing criminal sanctions on any corporation or corporate manager who acquires "actual knowledge of a serious concealed danger" in a product that the company sells and then fails to notify appropriate regulatory authorities).

This "cost-benefit analysis" still occurs today. In a 1993 trial involving a defectively designed trailer, the manufacturer knew of the defect, and yet chose not to correct a defect that could have been remedied at a cost of \$5 per trailer. The plaintiff, who suffered brain damage, was awarded \$9 million, \$2.5 million of the award constituted punitive damages. Robert D. Kolar, *American Briefing*, 15 PROD. LIAB. INT'L 10, 11 (1993).

224. Jewish law contains a number of examples of multiple damage remedies for offenses such as stealing and usury. See, e.g., *Exodus* 22:1, *Exodus* 22:9. Punitive damages award tort victims monies beyond the normal compensatory damages and punish flagrant wrongdoers. Yet, studies by legal scholars and the Government Accounting Office have reported that punitive damages in the United States are rarely awarded, even more rarely paid, and when awarded, are frequently reduced after trial. James F. Johnson, *American Briefing*, 14 PROD. LIAB. INT'L 28 (1992).

225. Imprisonment of up to one year is possible under the Federal Trade Regulation Act, where false advertising threatens public health or is intended to defraud or mislead. 15 U.S.C. § 54 (1989). No federal opinion in the last 15 years has discussed this code section. See *Porter & Dietsch, Inc. v. F.T.C.*, 605 F.2d 294, 309 (1979); *Shepard's U.S. Citations: Statutes* (checked through Aug. 1994 by author).

226. See SCHWARTZ, *supra* note 201, § 7.41 at 359.

227. While there are differing ideas as to what constitutes "fair" treatment for consumers, President John F. Kennedy's charter is now widely accepted in Europe and America. PUB. PAPERS, *The Kennedy Special Message to the Congress on Protecting the Consumer Interest*, Mar. 15, 1962, 263 (1963). Kennedy's charter of consumer rights includes the right to choice, safety, information, and protection from fraudulent or misleading product information. *Id.* "[The] often overlooked 'educational' function of products liability claims is a major benefit of our tort system." SWARTZ, *supra* note 203, § 12.02.

belief of Jewish law is that specific rules are more effective than unclear standards.²²⁸

While not all activity can be controlled, Jewish law generally attempts to protect those consumers in most need of protection. When allocating its limited resources the government must place a high priority on the needs of the poor, disabled, and elderly consumers who are most vulnerable.²²⁹

Finally, the rabbis of the Mishnah and Talmud practiced other trades and, generally, were not affluent.²³⁰ Accordingly, first-hand experience of commercial abuses gave the rabbis insight in advocating policies. Today, many agencies directed to protect the consumer receive no actual consumer input. Consumers should be consulted to help formulate policy so that the people who are affected are involved in the decision-making process.²³¹

VIII. CONCLUSION: THE NEED FOR REGULATION

Businesses will not voluntarily introduce reforms unless there are adverse consequences for them.²³² Businesses know that very few consumers complain and that fewer still initiate civil proceedings. Businesses can be non-responsive to legal influences when indifference is seen as economically advantageous.²³³ Businesses must be made aware that there is a substantial cost to practices which that consumers and that they will be held responsible for the harms they create.

Businesses should welcome rather than oppose strong enforcement. With strong enforcement, both consumers and businesses would know the rules and that violations will be punished. In our competition-driven society, where many rules are thrown out in the quest for profit, a sense of trustworthiness

228. Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 324, 324 (1961).

229. Ralph Nader suggests that legislators should aim primarily to prevent practices that endanger health and physical safety and then to assist the poor. EDWARD F. COX, *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* 44 (1969).

230. SOLOMON SCHECTER, *ASPECTS OF RABBINIC THEOLOGY* 110 (Schocker Books, Inc. 1961) (1972).

231. See Nancy H. Steorts, *New Directions in Product Safety Regulation*, 8 DIRECTORS AND BOARDS 28 (1984); CRANSTON, *supra* note 21, at 407.

232. CRANSTON, *supra* note 60, at 31.

233. *Id.* at 140.

should be introduced.²³⁴ Instead of the current atmosphere of distrust in which the consumer is encouraged to assume that every retailer will mislead him or even defraud him, a system of clear regulation would help produce mutual trust and confidence.²³⁵

While there is no claim that the Jewish legal system is perfect, or that it resolves issues more effectively than the current U.S. legal structure, Jewish law emphasizes the individual obligation to build a just society. Jewish law forbids all deception and limits the economic benefits that a person may obtain at the expense of others. Jewish law sets forth the basic ethical standard of absolute honesty and fairness. Jewish law supports specific regulation of the marketplace to provide needed protection for the consumers. Finally, Jewish law provides consumers, businesses, and legislatures with a useful guide to assist in further developments of consumer law.

234. For this reason, nations now entering the market system are beginning to recognize the importance of strong consumer protection regulation to ensure a stable market economy. See James P. Nehf, *Empowering the Russian Consumer in a Market Economy*, 14 MICH. J. INT'L. 739, 739-40 (1993).

235. *Id.*

