PERFORMANCE-BASED REMEDIES: ORDERING FIRMS TO ERADICATE THEIR OWN FRAUD

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I
INTRODUCTION

The twenty-first century has brought with it new tools for influencing consumer behavior, and thus new tools for both fair sales practices and unfair, deceptive, and abusive means of parting consumers from their money.[1] In the twentieth century, firms had two avenues for influencing consumers—inexpensive but fairly uniform advertising delivered in mass media or salesperson pitches tailored for each consumer one at a time. In contrast, technology today allows firms to personalize their interactions with consumers in real time and at low cost. The firm can set its performance goals, such as maximizing profit or increasing market share, and then engage in rapid iterative testing of consumers' responses to different designs of websites, apps, pricing structures, sales and return processes, and even products and services themselves. Computer analysis of the results of these design changes allows each firm to continually adapt its interactions with each consumer in pursuit of the firm's goals.[2]

Consumer-law enforcement today remains stuck in the twentieth century. Though there are many reasons for this, three stand out. First, enforcement resources have not grown with the scope of consumer fraud.[3] Second, financial penalties have not increased to meet the scale of today's defendants.[4] Third, the injunctive relief ordered in these cases has changed little since the twentieth

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1. Of course, the gap between swindling and selling has never been wide. *See generally* ARTHUR LEFF, SWINDLING AND SELLING (1976).

2. *See. e.g.*, Thomas H. Davenport, *How to Design Smart Business Experiments*, HARV. BUS. REV. (Feb. 2009), https://hbr.org/2009/02/how-to-design-smart-business-experiments [https://perma.cc/8XPY-N3NL]; Wes Nichols, *Advertising Analytics 2.0*, HARV. BUS. REV. (Mar. 2013), https://hbr.org/2013/03/advertising-analytics-20 [https://perma.cc/L3UK-XCN2].

3. In the interests of brevity, this article uses "fraud" to refer collectively to unfair, deceptive, or abusive practices.

4. In the interest of brevity, this article uses "defendants" to refer to both defendants in judicial proceedings and respondents in administrative proceedings.

century. Typically, only two remedies are imposed to prevent defendants from continuing to defraud consumers: information injunctions, which require defendants to make or refrain from making particular representations, and practices injunctions, which enjoin defendants from committing specific acts. Both remedies are too narrow, uniform, and static to counter twenty-first century fraud.

The first two reasons that consumer-law enforcement cannot keep pace with today's fraud—inadequate enforcement resources and weak penalties—are essentially political problems. The third reason, ineffective injunctive relief, is the result of rote repetition of prior enforcement agency practice, perhaps tinged with disinterest in acknowledging past failure; this article provides some overdue reflection and imperative ingenuity. To address unfairness, deception, and abuse of consumers, this article advocates two performance-based remedies: confusion injunctions, which have been ordered at least once before in a consumer case, and consequences injunctions, which have long been used in other contexts. These remedies order defendants to eliminate the confusion and ill consequences induced by defendants' fraud. To comply with these injunctions, defendants must reduce the confusion and ill consequences borne by their customers down to prescribed levels within a prescribed time period. Defendants bear the costs of demonstrating, through independent third-party audits, their compliance.

Customer confusion and consequences injunctions are modeled on modern business management and marketing techniques. Rather than dictating the processes by which firms produce outcomes, performance-based remedies set performance goals and give firms the flexibility and the responsibility to meet those goals. Additionally, making defendants pay for their own performance audits internalizes the bulk of enforcement costs and frees enforcement agency resources to pursue other fraudsters. Moreover, the cost of compliance with performance-based remedies can serve as an additional fraud deterrent.

This article proceeds as follows: Part II surveys recent revolutionary changes in the methods available to firms for influencing consumer behavior, for both good and ill. Part III catalogues and critiques the provisions typically found in remedial orders and consent decrees by which consumer law violations are resolved today. Part IV describes customer confusion and consequences injunctions and explains why today's fraud demands these remedies. The article concludes that consumer law enforcement in the twenty-first century can be effective and cost-effective only by enlisting defendant firms to eradicate the effects of their own fraud.[5]

5. In related work, I discuss how similar methods could be used in consumer protection regulation. *See generally* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015); Lauren E. Willis, *The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 74 (2017).

II

TWENTIETH- AND TWENTY-FIRST-CENTURY TOOLS FOR UNFAIRNESS, DECEPTION, AND ABUSE

The techniques applied to influence consumer behavior—making arguments on the merits, appealing to emotions, invoking social norms, and requisitioning consumers' limited perceptual and cognitive capacities—have changed little over the centuries.[6] But, due to recent changes in technology, social practices, and business management, the methods used to deploy, hone, and redeploy these techniques have qualitatively changed.

A. Twentieth-Century Fraud And Fair Sales

In the twentieth century, firms marketed products and services through two channels: a salesforce or mass marketing. Both could be used for fair sales or for unfairness, deception, and abuse. Both have their advantages and disadvantages.

The in-person, salesforce channel has at least three advantages. First and foremost, it allows for dynamic customization—the influencer can tailor the message and delivery to what the influencer knows and learns about the consumer's situation, values, personality, and capabilities, and can change course as the consumer reacts to the influencer's pitch.[7] Second, the human-to-human connection of a live messenger can inspire feelings, moods, and social norms that affect consumer behavior. One salesperson advises, "Make a friend . . . . You can't do it en-mass; you can't do it by formula, by rote or by script. That's why it works."[8] Third, to the benefit of firms engaged in fraud, these interactions are usually ephemeral and private, leaving little trace for enforcement authorities.

The main disadvantage of one-on-one pitches by salespeople is the time and expense for all involved, which makes this channel worthwhile only for high-profit-margin transactions. When Encyclopedia Britannica went from an expensive physical set of books to an inexpensive CD-ROM, its distribution switched from door-to-door sales to mass-market retailing.[9]

Mass marketing channels allow marketers to reach many consumers for pennies apiece, meaning that they can profitably be used for low-margin transactions. But in the twentieth century, mass marketing could be tailored only crudely, for a few roughly-estimated demographic segments, and thus could not affect consumers as strongly as salesperson interactions. Further, twentieth-century mass marketing changed slowly. A physically published advertisement

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6. *See generally* ROBERT CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION (6th ed. 2006) (recounting the techniques used to influence people).

7. *See, e.g.*, Steli Efti, *10 Steps For Giving A Convincing Sales Pitch*, FORBES (Apr. 18, 2014), http://www.forbes.com/sites/theyec/2014/04/18/10-steps-for-giving-a-convincing-sales-pitch/#285d6d2f3efe [https://perma.cc/D5DJ-NJLY].

8. Bob Phibbs, *Retail Sales Training: 9 Ways To Get Better At Selling*, THE RETAIL DOCTOR'S BLOG (Nov. 11, 2015), http://www.retaildoc.com/blog/retail-sales-training-9-ways-to-get-better-at-selling [https://perma.cc/JYW7-DDYN].

9. PHILIP EVANS & THOMAS S. WURSTER, BLOWN TO BITS: HOW THE NEW ECONOMICS OF INFORMATION TRANSFORMS STRATEGY 2–4 (2000).

cannot be altered until the next edition of the publication. Packaging design can only be changed in the next production run of the product. In addition, mass communication and production methods leave a plain evidence trail—tangible copies or audio or visual recordings of the marketing.

Both in-person sales and mass marketing can be used for fair advertising or for illegal practices. An example of in-person fraud is door-to-door sales of poor quality "home repairs," made infamous in the movie Tin Men.[10] An example of illegal deception in mass marketing comes from the case of Hawaiian Punch. For decades, the product was promoted using advertising and packaging that falsely implied that the beverage was made primarily from fruit.[11] This mass deception was remarkably successful; in 1974, consumer testing showed that more than 80% of Hawaiian Punch purchasers falsely believed that Hawaiian Punch contained over 20% fruit juice.[12] But the deception was also easy to detect; the Federal Trade Commission (FTC) merely examined Hawaiian Punch advertisements and packaging.[13]

The methods used to develop sales techniques and marketing in the twentieth century were unscientific, slow, and crude by today's standards. Individual salespeople might rely on stereotypes and salesperson lore,[14] and refine their pitches through transaction-by-transaction trial and error.[15] Mass marketing was likewise often built on stereotypes[16] or "gut-instinct voodoo."[17]

Data-driven marketing development began in the twentieth century, but was hampered by then-existing limitations on data collection, storage, and analysis. Consumer testing of ad copy, showing advertisements to consumers and asking for their reactions, became increasingly common,[18] but what consumers say they will do and what they actually do can diverge markedly.[19] Market segments were defined by rough demographic data, such as gender, religion, income level, or zip

10. TIN MEN (Touchstone Pictures 1987).

11. In the Matter of RJR Foods, Inc., et al., 83 F.T.C. 7, *2–*3 (1973).

12. Thomas C. Kinnear et al., *Affirmative Disclosure: Long-term Monitoring of Residual Effects*, 2 J. BUS. POL'Y & MKTG. 38, 40 (1984).

13. *RJR Foods*, 83 F.T.C. at *2.

14. As one salesman puts it: "Every person who sets foot on a car lot is instantly "pre-qualified"—judged—based on their car, their race, and their appearance." Mark McDonald, *Car Salesman Confidential: Race and Stereotypes in Car Sales*, MOTOR TREND (July 24, 2015), http://www.motortrend.com/news/car-salesman-confidential-race-and-stereotypes-in-car-sales/ [https://perma.cc/8JVB-U2VA].

15. *See, e.g.*, Phibbs, *supra* note 8 (advising salespeople to "[t]ake note of how various kinds of people react differently to sales approaches, and alter your techniques accordingly").

16. *See, e.g.*, Charles R. Taylor et al., *Portrayals of African, Hispanic, and Asian Americans in Magazine Advertising*, 38 AM. BEHAV. SCIENTIST 608 (1995).

17. Lisa Morgan, *9 Reasons Why Personalized Marketing Still Isn't Accurate*, INFORMATIONWEEK (Jan. 8, 2016), http://www.informationweek.com/big-data/big-data-analytics/9-reasons-why-personalized-marketing-still-isnt-accurate/d/d-id/1323736?print=yes [https://perma.cc/BCS6-HKVM].

18. *See, e.g.*, Richard W. Pollay, *The Subsiding Sizzle: A Descriptive History of Print Advertising: 1900–1980*, 49 J. MKTG. 24, 34 (1986).

19. *See, e.g.*, Niraj Dawar, *When Marketing Is Strategy*, HARV. BUS. REV. (Dec. 2013), https://hbr.org/2013/12/when-marketing-is-strategy [https://perma.cc/S92E-LJLP].

code.[20] Mass marketing advertisers could tailor their materials only grossly, such as for a magazine's entire readership, a television show's viewing audience, or a billboard's passerby population.

The biggest advance came in direct mail mass marketing, which pioneered the modern experimental, performance-based approach to marketing development. Even a single experiment can reveal ways to significantly affect consumers' responses. One experiment with mass-mailed postcards advertising small loans found that adding a small photo of an attractive woman to the postcard increased men's loan uptake by roughly the same amount as a 2% reduction in the loan's monthly interest rate.[21] Another example of the use of experimental methods, albeit used to hide information from customers rather than reaching them, comes from the telecommunications company AT&T. Before adding to the fine print of its customer contracts "a series of provisions designed to limit customers' rights and remedies in the event of a dispute with AT&T,"[22] the firm engaged in repeated performance-based testing, experimenting with the envelope, the cover letter, and the fine print itself until the firm hit upon a combination that would result in virtually no customers reading and understanding the new contract terms.[23]

But data about consumer reactions to stimuli sent through the postal system trickled in slowly and physical production of new tangible media for each round of testing was costly. Moreover, statistical analysis methods most easily facilitated by existing computing power generally restricted testing to an examination of one variable at a time.[24] Finally, the hierarchical business management practices common in the twentieth century meant that firms acted upon the incoming data through slow sequential human management decisions.[25]

B. Twenty-First-Century Fraud And Fair Sales

Technology in the twenty-first century gives those seeking to influence consumer behavior new tools that combine the strengths of the in-person sales approach with the strengths of the mass marketing approach.[26] Marketing can be done on a mass scale at low cost, while simultaneously being dynamically customized for each target consumer and leaving only an opaque trail of

20. *See, e.g.*, Philip Kotler, *From Mass Marketing to Mass Customization*, 17 PLANNING REV. 10, 12–13 (1989).

21. Marianne Bertrand et al., *What's Advertising Content Worth? Evidence From A Consumer Credit Marketing Field Experiment*, 125 Q.J. ECON. 263 (2010).

22. Ting v. AT&T, 319 F.3d 1126, 1133 (9th Cir. 2003).

23. *Id.* at 1134.

24. *See* Gordon H. Bell et al., *Experimental Design on the Front Lines of Marketing: Testing New Ideas to Increase Direct Mail Sales*, 23 INT'L J. RES. MKTG. 309, 318 (2006).

25. *See, e.g.*, Ravi S. Achrol & Philip Kotler, *Marketing in the Network Economy,* 63 J. MKTG. 146, 146 (1999).

26. As one marketing services company explains, "[r]eal-time personalization is the process by which companies simulate the in-store process of customer interaction and engagement ... to drive [online sales]." *Marketing Secrets - Real-Time Personalization*, SELLIGENT.COM, http://www.selligent.com/content/real-time-personalization [https://perma.cc/NDG2-JB4Y].

computer code. Alternatively called "data-driven marketing," "personalized marketing," or "real-time marketing," it is all of these, and more.[27]

The data driving marketing is obtained today not by slow tests using tangible media but by rapid, iterative, online tests. Social-networking service Facebook hosts thousands of experiments daily.[28] Experimental redesigns of online and other electronic marketing can be accomplished with a few mouse clicks. Today's data analysis methods are multi-factorial, meaning these experiments can examine many variables at once.[29]

Testing is key, because which designs will be most effective is difficult to predict. Sometimes changes in content, format, and text have no effect on sales. In one study of credit card offers, personalized messages appealing to the consumer's known interests produced no greater response rate than generic marketing.[30] Sometimes, as explained in the well-known book *Nudge*, tiny changes have huge effects on consumer behavior.[31] For example, one company changed its "ADD TO CART" button from blue to green and saw an immediate increase in sales of over 35%.[32] Other changes have unexpected effects. In one case, moving a button from the top to the bottom of a webpage tripled the number of consumers who clicked the button.[33]

Moreover, today's data-driven experimentalist methods can be used to design more than marketing. Firms routinely test pricing structures to determine which generate the most profitable result, considering take-up, use, and income generation.[34] The processes consumers use for opening and closing accounts, for buying and returning products, for accessing customer service, and the very structure of products and services themselves can all be all designed and redesigned using the same methods.[35] The CEO of financial conglomerate Capital One has described the credit card business as "a scientific laboratory where every decision about product design, marketing, channels of communication, credit lines, customer selection, collection policies and cross-

27. *E.g.*, Susan Taplinger, *DMA and Neolane Study Reveals Digital Channels are Crucial for Real-Time Marketing*, THE DMA (July 17, 2013), https://thedma.org/news/dma-and-neolane-study-reveals-digital-channels-are-crucial-for-real-time-marketing/ [https://perma.cc/E5NU-6J4N] (using and quoting marketers using all of these labels).

28. Eytan Bakshy, *Big Experiments: Big Data's Friend for Making Decisions*, FACEBOOK (Apr. 3, 2014), https://www.facebook.com/notes/facebook-data-science/big-experiments-big-datas-friend-for-making-decisions/10152160441298859/ [https://perma.cc/VD2Z-EYM2].

29. *E.g.*, Bell et al., *supra* note 24, at 309–10.

30. *Id.*

31. *See generally* RICHARD THALER & CASS SUNSTEIN, NUDGE (2008).

32. Neil Patel, *Click Here: 16 Hacks That'll Get Your Call-to-Action Buttons Clicked*, NEIL PATEL BLOG (Nov. 15, 2015), http://neilpatel.com/2015/11/15/click-here-16-hacks-thatll-get-your-call-to-action-buttons-clicked/ [https://perma.cc/7DTQ-SFTN].

33. *Id.*

34. *E.g.*, Bell et al., *supra* note 24, at 309–10.

35. *See, e.g.*, Davenport, *supra* note 2 (suggesting that business organizations "as a whole" will shift to "a test-and-learn mind-set"); Peter VanRysdam, *The New Blurred Lines Between Marketing and Development*, 352 INC. (Apr. 2, 2014), https://www.352inc.com/blog/the-new-blurred-lines-between-marketing-and-development/ [https://perma.cc/KV9M-PKJV].

selling [can] be subjected to systematic testing using thousands of experiments."[36] Continual experimentation and computer analysis of results allows firms to keep up as consumers' beliefs, knowledge, norms, habits, and environments evolve. Methods of measuring the influence of each redesign on consumer behavior remain imperfect, but are improving as technology enables firms to track individual consumers over time to observe their actual purchases rather than looking only at mediators such as product recall or emotional valence.[37]

Evidence of experimentation could be less accessible when performed in the virtual environment rather than the physical one. Records of the aforementioned AT&T tests of postal mailings were discovered in litigation and used to substantiate a claim for unfair and deceptive practices.[38] Comparable records of online marketing tests might more likely be swept into the sea of electronic data, drowning enforcement agencies before they find it.

Thus, firms' interactions with consumers today share another feature of one-on-one sales—ephemeral evidence. A human salesperson's forearm can "casually" cover information that could reduce the probability of a sale, while leaving scant evidence of deception and an easy defense of unintentional action. Similarly, a drop-down screen on a website could cover crucial information and be difficult to attribute to intentional action by the firm.[39] These website and app designs intended to unfairly manipulate consumers are common enough to have a name, "dark patterns."[40]

A recent example of a dark pattern is online payments system operator PayPal's alleged use of various features of webpage design to trick consumers into signing up for and using PayPal Credit when they thought they were using their existing free PayPal transaction accounts.[41] PayPal also automatically enrolled these customers in electronic billing, and the emails containing the bills were treated as junk by common email filters, such that many customers never saw the bills. Only months later, when dunned by a bill-collector, would the customer realize that she had been signed up for a credit account and now owed months of interest and fees to PayPal.[42]

This fraud continued for many years yet might only have been apprehended due to the sheer volume of PayPal customers—over fifty million in the United States.[43] Only a small fraction of customers needed to complain to draw the

36. Davenport, *supra* note 2 (quoting Capital One CEO Rich Fairbank).

37. WILLIAM D. WELLS, MEASURING ADVERTISING EFFECTIVENESS 319–21 (2014).

38. Ting v. AT&T, 319 F.3d 1126, 1133 (9th Cir. 2003).

39. Manuel Da Costa, *Ryanair's New Website – Still Hiding Some Mean Tricks with Dark Patterns*, DIGITAL TONIC, http://www.digital-tonic.co.uk/digital-tonic-blog/ryanairs-new-website-still-hiding-mean-tricks-dark-patterns/ [https://perma.cc/LGR3-24WB] (last visited Mar. 1, 2017).

40. *See* Saul Greenberg et al., *Dark Patterns in Proxemic Interactions: A Critical Perspective*, PROC. OF 2014 CONF. ON DESIGNING INTERACTIVE SYS. 523, 524 (June 2014).

41. Complaint at ¶¶ 28–29, Consumer Fin. Prot. Bureau v. PayPal, No. 1:15-cv-01426 (D. Md. May 19, 2015) [hereinafter PayPal Complaint].

42. *Id.* at ¶¶ 30–31.

43. *More Payment Options Means More Sales*, GLOBALPAYMENTS, https://www.globalpayments

attention and resources of the Consumer Financial Protection Bureau (CFPB). A firm with fewer customers or a shorter-duration fraud might not attract scrutiny.

Increasingly, algorithms analyze the data generated by experiments and then dictate the marketing, sales and return processes, pricing permutations, and product and service designs to deploy.[44] Machine-learning reduces expense and increases speed,[45] but also attenuates the involvement of the influencer's intentions and potentially obscures any evidence trail more so than when a human is more intimately involved.

The experience of the technology company Google with its advertising algorithm provides an example of potential dangers posed by machine control of firm activity. Google displays ads based in part on a user's search terms, and which search terms trigger which ads depends on the click behavior of prior users. Advertisements selling criminal records first appeared on computer user screens randomly. However, over time as more users clicked on those advertisements when searching for black race-associated names than when searching for white race-associated names, future users who searched for "black" names were more likely to be shown advertisements for criminal records than users who searched for "white" names. Until an academic researcher discovered it,[46] Google presumably did not even know that its algorithm created a racially biased pattern of advertising.

A chain of events similarly unmediated by illegal intent could easily lead to other types of unfair, deceptive, or abusive practices. As one marketing blog explains:

> There is a tension for marketers between persuasion and deception. Few people intentionally decide to mislead, which is a much clearer moral issue, but decisions on content are often made based on immediate concerns of effectiveness and expediency; the issue of unintentional deception is overlooked, ignored, or rationalized as within acceptable tolerances.[47]

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inc.com/en/us/accept-payments/in-person/paypal-discover [https://perma.cc/NV4X-2XZ3] (last visited Mar. 1, 2017).

44. *See, e.g.*, Elizabeth Dwoskin & Craig Timberg, *For Advertisers, Algorithms Can Lead to Unexpected Exposure on Sites Spewing Hate*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/business/technology/for-advertisers-algorithms-can-lead-to-unexpected-exposure-on-sites-spewing-hate/2017/03/24/046ac164-043d-11e7-b1e9-a05d3c21f7cf_story.html?wpisrc=nl_mostdraw16&wpmm=1 [https://perma.cc/QE97-AL54] (reporting that "[a]lgorithms decide where to place ads, based on people's prior Web usage, across vastly different types of sites" and that as a result "ads for Allstate, IBM, DirectTV and dozens of other household brand names [have appeared] on websites with content containing racial and ethnic slurs, Holocaust denial and disparaging comments about African Americans, Jews, women and gay people").

45. Long-Ji Lin, *How Machine Learning Drives Better Ad Performance*, BUS. INSIDER (Mar. 5, 2014), http://www.businessinsider.com/how-machine-learning-drives-ad-performance-2014-2.

46. Latanya Sweeney, *Discrimination in Online Ad Delivery*, 56 COMMUNICATIONS ASS'N COMPUTING MACHINERY 44, 48–49 (2013).

47. Bryan Dwyer, *Categorizing Unintentional Deception*, [INSERT MARKETING HERE] (Sept. 23, 2012), https://insertmarketinghere.wordpress.com/2012/09/23/categorizing-unintentional-deception/ [https://perma.cc/JCL8-TBLY].

If a firm's marketing algorithm is optimized only for profit, then where unfair, deceptive, and abusive acts and practices are profitable and no human intervenes, fraud is the predictable, if not inevitable, result.

Experimentation in today's data-rich environment enables personalization never before possible outside of expensive, in-person interactions. Advertising can be tailored at the individual or near-individual level, hyper-segmented by precisely-estimated demographics, psychological and behavioral profiles, and known needs. Television ads and billboards once fashioned for all viewers expected to see them can now vary with the specific identity of the person who is watching or just walking by.[48] Prices once set in gross or, for financial products like mortgages and insurance, adjusted for the risk to the firm, can now be "optimized" (from the seller's point of view) by the estimated elasticity of demand of each potential customer.[49] In one analysis, price discrimination based on the crude demographic segmentation possible in the twentieth century increased firm profits by only about 0.3%; twenty-first-century price personalization based on individual web-browsing data boosted profits by 14.55% overall, with some individual consumers paying prices more than twice what others paid for the same product.[50]

While by no means there yet,[51] twenty-first century marketing is moving toward targeting right down to the individual consumer in real time. Big data and algorithmic analytics allow firms to target the individual by channel, time of day, week, or year, geolocation, and activity.[52] Department stores, for example, can track cellphone locations to know whether the consumer is in the men's shoes department or in housewares and can use facial analytics software to assess consumer mood.[53] Advertising content in online gaming can even vary based on whether the player is winning or losing the game.[54] Truly, any data point that can

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48. *See* Danny Bradbury, *Yahoo Wants to Spy On You Through Advertising Billboards*, NAKED SECURITY (Oct. 11, 2011), https://nakedsecurity.sophos.com/2016/10/11/yahoo-wants-to-spy-on-you-through-advertising-billboards/ [https://perma.cc/4BNS-ARQ8]; Gerry Smith, *TV Ads Are About to Get Personal With New Targeting Tools*, BLOOMBERG TECH. (Sept. 29, 2015), https://www.bloomberg.com/news/articles/2015-09-29/tv-ads-are-about-to-get-personal-with-new-targeting-tools [https://perma.cc/CPQ2-3JWE].

49. *E.g.*, *Predict Demand*, EARNIX, http://earnix.com/why-earnix/predict-demand/ [https://perma.cc/ESM6-AAZW] (last visited Mar. 1, 2017) ("With the ability to analyze and predict demand as the foundation, Earnix enables insurers and banks to optimize products and prices at every touch point with new and existing customers.").

50. Benjamin Reed Shiller, *Personalized Price Discrimination Using Big Data*, 108 BRANDEIS WORKING PAPER SERIES 1, 1 (2016), *available at* http://www.brandeis.edu/departments/economics/RePEc/brd/doc/Brandeis_WP108.pdf [https://perma.cc/NQD2-R3MM].

51. *See* Morgan, *supra* note 17 (describing inaccuracies in personalized marketing).

52. *See* Judy Lee, *Personalized, Real-Time Ads Are Now a Reality*, FORBES (Nov. 4, 2015), https://www.forbes.com/sites/teradata/2015/11/04/personalized-real-time-ads-are-now-a-reality/#c55df5711fbf [https://perma.cc/VV9D-ZDNW]; Taplinger, *supra* note 27.

53. *See* Stephanie Clifford & Quentin Hardy, *Attention, Shoppers: Store Is Tracking Your Cell*, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/business/attention-shopper-stores-are-tracking-your-cell.html?smid=pl-share [https://perma.cc/BTN6-LLQ6].

54. *See* Martin Williamson Smith et al., *In-Game Advertising Influencing Factors: A Systematic Literature Review and Meta-Analysis*, 3 COMPUTER GAMES J.: STUDENT ED. 102, 102–04 (2014).

be collected can be used to tailor interactions and influence consumer actions, both in ways that increase consumer welfare and in ways that do not.

The cutting edge today is data-driven, personalized, real-time marketing deployed alongside mood manipulation to not merely catch consumers at the moments when they happen to be most receptive or vulnerable, but to put them in mood states that create this receptivity or vulnerability. Thus, the computer can now achieve what the very best one-on-one human influencers can. For example, marketers might rig a video game to dictate whether the player wins or loses, whichever is most useful for the marketer. One former Facebook data scientist explains:

> "The fundamental purpose of most people at Facebook working on data is to influence and alter people's moods and behaviour. They are doing it all the time to make you like stories more, to click on more ads, to spend more time on the site. This is just how a website works . . . ."[55]

While some information that can be used to increase the effectiveness of fair or fraudulent sales is more seamlessly observed by a human—for example, a consumer's body language or the identity of a physical book she is holding—more and more can be observed through software and sensors. The eBook a consumer is reading and the pace at which she is reading it are collectable data points.[56] Moreover, algorithms are in many cases superior to human judgment—even the expert judgment of a seasoned salesperson—in their estimations and behavioral predictions.[57] Further, people often respond to machines in the same way they respond to humans, such that machines can invoke feelings, moods, and social norms just as human influencers do.[58] Machines might have an advantage if consumers do not put up defenses they normally use when dealing with a human they know is trying to influence them.

As with all tools of influence, twenty-first-century tools can be used for both fair marketing and fraud. For example, website and app content and format can be optimized to highlight or obscure legally-required disclosures; to facilitate transactions for consumers or foist transactions on them; and to clear or obstruct the path to closing an account. Personalization and targeting can help consumers meet their needs and preferences, alerting a consumer when mortgage rates have dropped sufficiently to make refinancing her mortgage worthwhile, for example. But personalization and targeting can also be unfair, deceptive, and abusive.

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55. Kashmir Hill, *Ex-Facebook Data Scientist: Every Facebook User Is Part Of An Experiment At Some Point*, FORBES (July 7, 2014), http://www.forbes.com/sites/kashmirhill/2014/07/07/ex-facebook-data-scientist-every-facebook-user-is-part-of-an-experiment-at-some-point/#219ce34f6e0b [https://perma.cc/CH7E-5FQG] (quoting former Facebook data scientist Andrew Ledvina).

56. Alexandra Alter, *Your E-Book Is Reading You*, WALL ST. J. (July 19, 2012), https://www.wsj.com/articles/SB10001424052702304870304577490950051438304.

57. *See* James Max Kanter & Kalyan Veeramachaneni, *Deep Feature Synthesis: Towards Automating Data Science Endeavors*, IEEE (2015), *available at* http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=7344858 [https://perma.cc/S6S9-D2ZB].

58. *E.g.*, Liz C. Wang et al., *Can a Retail Web Site Be Social?*, 71 J. MKTG. 143, 154 (2007) ("We were able to show that some of the expected responses to customer–employee interactions found in bricks-and-mortar stores can be induced by using social cues on Web sites as well.").

Pricing can be tailored to exploit the likelihood that the consumer will fail to price-shop.[59] Firms can identify and take advantage of consumer susceptibility to fraud.[60] Even inebriation can be detected based on online behavior.[61] Inebriated consumers make excellent prospects for sales of certain types of products[62] and presumably for certain types of fraud as well. Moreover, targeting can help firms selectively avoid marketing to the few consumers who, if defrauded, would likely pursue a fraud complaint against the firm.[63]

In sum, firms in the twenty-first century increasingly can achieve the influential power of twentieth-century one-on-one salespeople—real-time personalization and mood manipulation—for the price of twentieth-century mass marketing. Big data, automated analysis, and the virtual environment facilitate continual experimentation and adjustments that increase the likelihood that consumers will respond in ways that profit firms well beyond what twentieth-century sales techniques could achieve. Moreover, the velocity of change, ephemeral nature of electronic interactions, and substitution of machine learning for human deliberation can render today's unfair, deceptive, and abusive practices as difficult to pinpoint and prove as in-person fraud. Finally, firms have adopted processes by which performance data on the effectiveness of attempts to influence consumers drives the continuous evolution of fair and fraudulent consumer interactions.

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59. *E.g.*, Tracy Samilton, *Being a Loyal Auto Insurance Customer Can Cost You*, NPR (May 8, 2015), http://www.npr.org/2015/05/08/403598235/being-a-loyal-auto-insurance-customer-can-cost-you [https://perma.cc/7PLR-AV9F] (reporting that insurance companies often base decisions to increase premiums on an algorithm that determines which customers are least sensitive to price increases); *Predict Demand*, *supra* note 49.

60. *Cf.* APPLIED RESEARCH & CONSULTING LLC, FINANCIAL FRAUD AND FRAUD SUSCEPTIBILITY IN THE UNITED STATES: RESEARCH REPORT—PREPARED FOR THE FINRA INVESTOR EDUCATION FOUNDATION 3 (2013), *available at* https://www.saveandinvest.org/sites/default/files/Financial-Fraud-And-Fraud-Susceptibility-In-The-United-States.pdf [https://perma.cc/4W7K-AJJV] (identifying demographic and personality factors that correlate with susceptibility to fraud).

61. L. Giancardo et al., *Psychomotor Impairment Detection via Finger Interactions with a Computer Keyboard During Natural Typing*, 5 SCI. REP. 1, 2 (2015); *Machine-Learning Algorithm Identifies Tweets Sent Under the Influence of Alcohol*, MIT TECH. REV. (Mar. 16, 2016), https://www.technologyreview.com/s/601051/machine-learning-algorithm-identifies-tweets-sent-under-the-influence-of-alcohol/ [https://perma.cc/8RQE-QAUL].

62. Stephanie Clifford, *Online Merchants Home In On Imbibing Consumers*, N.Y. TIMES (Dec. 27, 2011), http://www.nytimes.com/2011/12/28/business/online-retailers-home-in-on-a-new-demographic-the-drunken-consumer.html?smid=pl-share.

63. *See* APPLIED RESEARCH & CONSULTING, *supra* note 60, at 3–4 (finding most respondents who appear to have been victims of fraud did not identify themselves as having been defrauded and even those who self-identified as fraud victims usually did not pursue any complaint against the fraudster); Devesh Raval, *What Determines Consumer Complaining Behavior?* 19–25 (July 2016), https://www.ftc.gov/system/files/documents/public_events/966823/raval_whatdeterminesconsumercomplainingbehavior_0.pdf [https://perma.cc/K8DB-GKPJ] (comparing demographics of victims who raised complaints about particular fraudsters and demographics of victims who did not complain but were identified by law enforcement through those same fraudsters' records, and finding that victims living in zip codes with higher proportions of African-Americans or Hispanics or in zip codes with lower proportions of people with college degrees were much less likely to complain about fraud than victims living in predominantly white or more-heavily college-educated zip codes).

III
TWENTIETH-CENTURY REMEDIES

When firms are found to have engaged in deceptive, unfair, and abusive practices, there are a variety of remedies that have traditionally been imposed, including: criminal prosecution or banning the defendant or its principals from the business; money damages to redress consumer injury (or disgorgement of defendants' ill-gotten gains); direct financial sanctions such as fines and reputational sanctions with indirect financial effects; information injunctions (misrepresentation prohibitions or disclosure requirements); and practices injunctions. More recently, independent third-party audits have been introduced as remedial enforcement mechanisms to support information and practices injunctions.

In theory these remedies can redress past consumer injury, halt further injury, and deter firms from committing future violations. But as investors know, twentieth-century remedies alone usually impose little cost on defendant firms; on average, stock market returns barely budge when enforcement agencies announce that they are pursuing a firm for deceptive advertising.[64] In practice, twentieth-century remedies routinely fail to fully compensate consumer victims, do not incapacitate firms from continuing to harm consumers, and produce insufficient specific or general deterrence.

A. The Nuclear Options

Enforcement agencies have a pair of extremely powerful remedies for dealing with unfair, deceptive, and abusive practices—enforcers can criminally prosecute fraudsters or ban them from the industry altogether. However, these nuclear options are rarely used unless the firms have no legitimate business purpose (such as fake charities[65] and Ponzi schemes[66]) or have a business model grounded exclusively in illegal practices (such as debt collection firms that use abusive collection methods[67] or so-called "debt relief services" that do not actually provide services[68]).

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64. *See* Michael A. Wiles et al., *Stock Market Response to Regulatory Reports of Deceptive Advertising: The Moderating Effect of Omission Bias and Firm Reputation*, 29 MKTG. SCI. 828 (2010) (finding average abnormal return reductions of less than 1% associated with regulatory reports of deceptive advertising).

65. *See, e.g.*, *Former NBA Player Indicted on Charity Fraud Scheme*, STOPFRAUD.GOV (May 25, 2016), https://www.stopfraud.gov/iso/opa/stopfraud/former-nba-player-indicted-charity-fraud-scheme.html [https://perma.cc/7KCA-EYRR].

66. *See, e.g.*, Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 29, 2009), http://www.nytimes.com/2009/06/30/business/30madoff.html?smid=pl-share.

67. *See, e.g.*, *Banned Debt Collectors*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/banned-debt-collectors [https://perma.cc/T9AH-JX92] (list of cases in which the FTC has obtained orders banning individuals from the debt collection industry).

68. *See, e.g.*, *Banned Mortgage Relief and Debt Relief Companies and People*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/banned-mortgage-relief-debt-relief-companies-people [https://perma.cc/YL2E-SLPR] (last visited Apr. 14, 2017) (list of cases in which the FTC has obtained orders banning individuals from the mortgage and debt relief industries).

Most defendants caught engaging in unfair, deceptive, or abusive practices are not even threatened with criminal prosecution or an industry ban. In the Hawaiian Punch deception case, the FTC undoubtedly never considered using these remedies against the product's manufacturer, which at that time was RJR Foods, Inc. RJR Foods was a subsidiary of what was then a giant tobacco and food industry holding company, RJ Reynolds Industries, Inc.[69] Similarly, there has been no hint that the CFPB referred PayPal to the Department of Justice for criminal prosecution after discovering that the firm was, among other things, charging customers' purchases to PayPal Credit accounts when the customers attempted to select or even had affirmatively selected their PayPal transaction accounts.[70] Companies of these sizes are considered too big to fail and too big to jail.[71] The nuclear options thus have little deterrence value.

B. Damages And Disgorgement

In contrast to the nuclear options, damages or, where damages are difficult to calculate, disgorgement, are standard remedies for fraud. Enforcement agencies routinely tout the sticker price of the cases they resolve.[72] But though recoveries may sound high, they systematically understate the true amount by which fraudsters benefit from their unfair, deceptive, and abusive practices and they do not account for the probability of non-detection.

A preliminary concern with using damages as a remedy is that logistical hurdles prevent complete recovery. Because the government bears the burden of proving the amount of damages or ill-gotten gains, awards are biased downward.[73] Further, for defendant firms that are no longer operating, there are rarely sufficient assets to provide complete redress, and once the firms' principals have spent or hidden the funds, complete recoupment is rare.[74] Thus, the amounts

69. *RJ Reynolds Tobacco Holdings, Inc. History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/r-j-reynolds-tobacco-holdings-inc-history/ [https://perma.cc/2AF7-ZFS5] (last visited Apr. 9, 2017).

70. PayPal Complaint, *supra* note 41, at ¶ 29.

71. *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

72. The CFPB website's homepage, for example, announces: "Standing up for you—We hold companies accountable for illegal practices—**$11.8 billion** in relief to consumers from our enforcement actions." CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/?gclid=CKfLhNXN79ICFQuifgodWw0C4Q [https://perma.cc/MB3X-N99S] (last visited Apr. 9, 2017) (emphasis in original).

73. Under the preponderance of the evidence standard applicable to damages in unfair, deceptive, or abusive practices litigation, when the evidence is in equipoise as to any part of damages, the factfinder must find against the enforcement agency.

74. *See, e.g.*, Stipulated Final Order for Permanent Injunction and Settlement of Claims, Fed. Trade Comm'n. v. Asset & Capital Mgmt. Grp., No. 8:13-cv-01107-DSF-JC, 13–24 (C.D. Cal. May 19, 2014) (imposing judgment of over $89 million based on damages to consumer victims and then suspending all but $4 million of that judgment—presumably the amount of assets that the FTC believed it could actually recover); Michael Rothfeld & Brad Reagan, *Prosecutors Are Still Chasing Billions in Uncollected Debts*, WALL ST. J. (Sept. 17, 2014), http://www.wsj.com/articles/prosecutors-are-still-chasing-97-billion-in-uncollected-debts-1410984264 (reporting on the billions of dollars in judgment debts that have not been collected by the government, much of which stems from restitution ordered in fraud cases).

collected are routinely lower than the amount by which the defendant firm benefitted.

A more fundamental problem is that compensatory damages and disgorgement are by their very nature ineffective at remedying and stopping fraud. Damages and disgorgement figures are based on calculations approximately as of the date of the remedial order, but the effects of the firm's practices often linger. False beliefs instilled by deceptive advertising persist, likely motivating consumers to buy the product even after the defendant's misrepresentations cease. For example, one study found that six months after pharmaceutical firm Novartis Corporation ceased falsely advertising that its product, Doan's back reliever, was better than other pain relievers for back pain, 77% of Doan's users and 45% of consumers who did not use Doan's but were aware of the brand continued to be so misled.[75] Nearly a decade after the remedial order enjoining further misleading advertising in the Hawaiian Punch case, about 33% of Hawaiian Punch purchasers continued to inaccurately believe that the drink contained more than 20% fruit juice.[76]

Moreover, given that the probability of detection and pursuit is nowhere near 100%, even full damages or complete disgorgement cannot effectively deter unfair, deceptive, and abusive practices. The FTC estimates that over 10% of the adult population in the United States—over 25 million people—are victimized by fraud every year.[77] But the most comprehensive reporting of consumer fraud complaints to federal and state authorities and private organizations tallied only 1.8 million complaints in 2011.[78] Few of these complaints result in enforcement actions. For example, the FTC's Consumer Protection Bureau, which runs the consumer complaint system that received those 1.8 million complaints in 2011, brought a grand total of 83 administrative, federal court, and civil penalty cases between March 16, 2011 and February 29, 2012.[79] Recent revelations that enforcement agencies failed to take action against Wells Fargo Bank until over 5,000 employees over the course of more than five years had opened 1.5 million unauthorized accounts is a reminder of the low probability of civil prosecution of

75. *See* Novartis Corp. v. Fed. Trade Comm'n, 223 F.3d 783, 788 (D.C. Cir. 2000) (referencing study).

76. Kinnear et al., *supra* note 12, at 42, Fig. 1.

77. Keith B. Anderson, *Consumer Fraud in the United States, 2011: The Third FTC Survey*, BUREAU OF ECON. FED. TRADE COMM'N 1 (2013).

78. FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2011 2 (2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/consumer-sentinel-network-data-book-january/sentinel-cy2012.pdf [https://perma.cc/HV2V-ECGY].

79. FED. TRADE COMM'N, FEDERAL TRADE COMMISSION ANNUAL HIGHLIGHTS 2011: STATS & DATA, *available at* https://www.ftc.gov/reports/annual-report-standard/ftc-2012/stats-data [https://perma.cc/WGY6-TBYU] (last visited Apr. 9, 2016). Although these cases sought remedies for many more than 83 victims, including many victims who never complained, the cases did not seek remedies for anywhere near all 25 million victims.

even widespread, long-term, systematic fraud.[80] If damages and disgorgement are the only remedies, it is profitable for firms to violate the law.

C. Financial And Reputational Sanctions

Deterrence is a function of both the size of the penalty and the probability that the penalty will be imposed. In theory, therefore, large financial sanctions could deter fraud, despite the low probability of detection and successful prosecution. But sanctions imposed today are rarely large enough to deter.[81] Moreover, even "large" sanctions are ineffectual if they are uncollectable.

Civil penalties may seem high to the average consumer, but firms in the twenty-first century, particularly multinationals and financial firms, are often so large and profitable that the penalties are but a minute cost of doing business. For example, the CFPB's 2015 settlement with PayPal required the firm to pay $10 million in civil penalties.[82] This figure sounds large compared to, for example, the 2015 U.S. household median gross income of $54,000.[83] However, it was less than .003% of PayPal's 2015 gross income of $3.82 billion.[84]

Drastically-insufficient enforcement resources drive enforcement agency unwillingness to demand larger fines. An agency that refused to settle would have to abandon the case or go to trial. The expense of trial would leave too few resources for the agency to pursue many other meritorious cases,[85] creating a politically unpalatable lottery effect. Trial also poses a risk to the agency of a humiliating courtroom loss.

Agencies therefore generally choose to file more cases and settle them cheaply rather than demanding larger fines. Once the agency has negotiated a fine that sounds large in absolute terms, thus satisfying the agency's public relations needs,[86] the agency is better off using its next dollar to pursue another case than it would be going to trial against the prior defendant in search of a higher, deterrent-level fine.

80. *See* Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html.

81. *Cf. Fine and Punishment: The Economics of Crime Suggests That Corporate Fines Should Be Even Higher*, THE ECONOMIST (July 21, 2012), http://www.economist.com/node/21559315 [https://perma.cc/G475-V2LE].

82. Stipulated Final Judgment and Order, Consumer Fin. Prot. Bureau v. PayPal, No. 1:15-cv-01426, 2015 WL 3995264, at *¶ 29 (D. Md. May 21, 2015), [hereinafter PayPal Order].

83. *US Household Income*, DEP'T NUMBERS, http://www.deptofnumbers.com/income/us/ [https://perma.cc/FT5S-AM84].

84. *PayPal Holdings Inc.*, MARKETWATCH, http://www.marketwatch.com/investing/stock/pypl/financials [https://perma.cc/M2F7-BH54].

85. *See* Michael Corkery, *Wells Fargo Offers Regrets, But Doesn't Admit Misconduct*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/10/business/dealbook/wells-fargo-apologizes-but-doesnt-admit-misconduct.html ("It could take years of court battles for regulators to prove that every one of the 1.5 million accounts that Wells said may have been unauthorized was indeed phony.").

86. *See id.* ("Some Congressional officials and governmental watchdog groups say regulators may be too eager to extract a headline-grabbing fine and to settle a case quickly [rather] than to prove a bank's guilt in court.").

Reputational sanctions can be effective, but frequently are not.[87] Sometimes consumers cannot vote with their feet; if a loan servicer is engaging in unfair practices in collecting loan payments, a consumer might refinance with another lender, but the new lender might employ the very same servicer to collect the new loan payments.[88] Even when consumers can boycott a firm, they face a collective-action problem in doing so. Further, many consumers, due to over-optimism and the illusion of control, do not fear being defrauded themselves.[89] They may hear that a defendant firm's advertising was found misleading but believe that they were unaffected.[90] If they do realize they have been defrauded, they often blame themselves and are too embarrassed to tell their friends and neighbors about the episode.[91] As previously noted, few victims file complaints.

The aftermath of the PayPal case provides an example suggestive of little or no reputational sanctions. The case and resulting consent decree were widely reported in the news in May 2015.[92] Nonetheless, the defendant's net payment volume, number of transactions, and total customer base all increased steadily every quarter in 2015,[93] and in 2016 the defendant announced that its business had been growing at a greater rate than the payment products market as a whole.[94] One cannot be sure without a control, but these numbers suggest no adverse consumer response to the news of PayPal's alleged unfair, deceptive, and abusive practices. PayPal's credit product payment volume grew at an especially

87. *Cf.* Judith van Erp, *Reputational Sanctions in Private and Public Regulation*, 1 ERASMUS L. REV. 146, 157–60 (2008) (explaining why reputational sanctions are unlikely to be effective in the public regulation sphere).

88. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, PUTTING THE "SERVICE" BACK IN MORTGAGE SERVICING *available at* http://files.consumerfinance.gov/f/201208_cfpb_mortgage_servicing_fact_sheet.pdf [https://perma.cc/T28B-QGSE] ("In the vast majority of cases, consumers do not choose their mortgage servicer. Because the lender employs the servicer, not the consumer, servicers have had little incentive to meet consumer needs.").

89. *See generally* MARIA KONNIKOVA, THE CONFIDENCE GAME: WHY WE FALL FOR IT . . . EVERY TIME (2016).

90. *See* James T. Tiedge et al., *Discrepancy Between Perceived First-Person and Perceived Third-Person Mass Media Effects*, 68 JOURNALISM & MASS COMM. Q. 141, 141–42 (1991).

91. *See* Linda Ganzini et al., *Victims of Fraud: Comparing Victims of White Collar and Violent Crime*, 18 BULL. AM. ACAD. PSYCHIATRY L. 55, 56 (1990).

92. *See, e.g.*, *Feds Accuse PayPal of Engaging in Deceptive Advertising*, NBC NEWS (May 19, 2015), http://www.nbcnews.com/business/consumer/feds-accuse-paypal-engaging-deceptive-advertising-n361376 [https://perma.cc/9ZMU-DAR7]; Jonnelle Marte, *CFPB Seeks to Fine PayPal $25 Million Over Credit Allegations*, WASH. POST (May 19, 2015), https://www.washingtonpost.com/news/get-there/wp/2015/05/19/agency-wants-to-fine-paypal-25-million-to-settle-credit-allegations/?utm_term=.0a822a314ff7 [https://perma.cc/4FG4-ZRYA]; Kevin McCoy, *PayPal to Pay $25M in Refunds and Penalties*, USA TODAY (May 19, 2015), https://www.usatoday.com/story/money/2015/05/19/pay-pal-cfpb-penalties/27579087/ [https://perma.cc/2CWY-XN6A]; Alain Sherter, *Feds Say PayPal Illegally Signed Consumers Up For Credit*, CBS NEWS (May 19, 2015), http://www.cbsnews.com/news/feds-say-paypal-illegally-signed-consumers-up-for-credit/ [https://perma.cc/Z2AN-4DJN].

93. *PayPal Q4-15 and Full Year 2015 Investor Update*, PAYPAL (2016), http://files.shareholder.com/downloads/AMDA-4BS3R8/0x0x871870/9563A23D-53A8-4641-BC7A-C495B16E715C/Q4_15_Investor_Update.pdf.

94. Berkeley Lovelace Jr., *PayPal Payments Business is Growing Faster than the Market as a Whole, CFO said*, CNBC (Oct. 21, 2016), http://www.cnbc.com/2016/10/21/paypal-payments-business-is-growing-faster-than-the-market-as-a-whole-cfo-said.html.

fast rate every quarter in 2015, even though—or, more ominously, because—it was the very product that, as news reports explained, the defendant had been tricking consumers into using.[95]

Moreover, while enforcement agencies issue press releases to ensure that the public knows the agencies are putting taxpayer dollars to good use, defendants can allocate much more substantial resources to build counter-narratives. For example, after the FTC order requiring Hawaiian Punch packaging and advertising to disclose the product's limited fruit juice content, its manufacturer, RJR Foods, took steps to ensure that consumers would continue to perceive the product as healthy. The firm added to the product's label, in larger and more eye-catching print than the 10% fruit juice content statement, a proclamation that the juice contained 100% of the recommended daily allowance for Vitamin C.[96] A few years later, the firm hired pop singers Donny and Marie Osmond, cultural symbols of wholesomeness at that time, as Hawaiian Punch spokespeople.[97]

In the twenty-first century, firms can move more quickly to counter any reputational effects of enforcement actions. PayPal, as it was settling the CFPB's unfair, deceptive, and abusive practices allegations, pushed a campaign in which it branded itself a "Customer Champion Company."[98] Its website today touts that "the highest ethical standards" and doing "what's right" are "the guiding light for how we operate."[99]

Reputational sanctions are thus rarely sufficient to deter unfair, deceptive, and abusive practices. Until enforcement agencies have the resources to demand sufficiently large financial penalties or to dramatically increase the number of cases they pursue, other remedies are necessary.

D. Information Injunctions

Information injunctions—prohibiting defendants from making specific misrepresentations or requiring defendants to make specific disclosures,

95. *See* Leena Rao, *This Is One of PayPal's Fastest Growing Businesses*, FORTUNE (Dec. 24, 2015), http://fortune.com/2015/12/24/paypal-credit-growth/ [https://perma.cc/A9HK-75NV].

96. *Compare* Hawaiian Punch Label 1969–1970, https://www.flickr.com/photos/wafflewhiffer/8933344964 (last visited Feb. 7, 2017), *with* Hawaiian Punch Label 1970s after the FTC Order, http://farm4.static.flickr.com/3565/3332188514_e0fd5c6411.jpg (last visited Feb. 7, 2017). Note that the product today contains 5% juice. *Hawaiian Punch Product Info*, HAWAIIAN PUNCH.COM, http://www.hawaiianpunch.com/productinfo.php [https://perma.cc/7ACZ-XPY2] (last visited Feb. 7, 2017).

97. Norm Clarke, *Bodacious Moved For Decency's Sake*, LAS VEGAS REV. J. (Mar. 16, 2008), http://www.reviewjournal.com/norm-clarke/bodacious-moved-decencys-sake [https://perma.cc/Q2NB-E8V9] (describing the pair as "paragons of wholesomeness"); *History*, HAWAIIAN PUNCH, http://www.hawaiianpunch.com/history.php [https://perma.cc/H78J-S88E] (last visited Feb. 7, 2017); *see also Donny and Marie Osmond Biography*, ENCYCLOPEDIA WORLD BIOGRAPHY, http://www.notablebiographies.com/supp/Supplement-Mi-So/Osmond-Donny-and-Marie.html [https://perma.cc/LZP2-WGW2] (noting the pair's "distinctively wholesome public images").

98. ANALYST DAY 2016, PAYPAL 6 (2016), http://files.shareholder.com/downloads/AMDA-4BS3R8/3922159541x0x892591/1A709918-00B0-4440-ADDF-CCEB083CE80E/PayPal_AnalystDay_2016.pdf [https://perma.cc/4V7B-3X2Y].

99. *Responsible Practices*, PAYPAL, https://www.paypal.com/us/webapps/mpp/about/responsible-practices [https://perma.cc/W28C-VBQN] (last visited Feb. 7, 2017).

disclaimers, or corrective statements—are another twentieth-century remedy ordered in cases of unfairness, deception, and abuse. For example, the aforementioned order in the Hawaiian Punch case required the manufacturer to add a disclosure of the product's actual fruit juice content to the product's advertising and labels.[100] Along the same lines, in the PayPal case the defendant was ordered to, "[c]learly and prominently disclose, through a method, such as a pop-up box, that PayPal Credit is a line of credit and may be subject to interest and that consumers will receive their billing statements electronically at the email address designated by the consumer."[101]

In some cases, defendants have been required to engage in corrective advertising campaigns, disseminating statements that are intended to correct prior misrepresentations. For example, in the Doan's back reliever case, the FTC ordered Novartis Corporation, as a remedy for deception, to add a corrective statement to its product's packaging and written advertising stating: "Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain."[102]

Mounting evidence indicates that these information injunctions are ineffective.[103] Nearly a decade after the FTC ordered that a statement about Hawaiian Punch's 10% fruit juice content be added to the product's label, about 33% of Hawaiian Punch purchasers still believed that the drink contained more than 20% juice.[104] The proportion of purchasers who continued to be deceived about the product was slightly higher than the proportion of non-purchasers who continued to be deceived, even though the purchasers by definition had in their possession Hawaiian punch cans with labels disclosing "Contains 10% fruit juice."[105] Corrective advertising can even backfire, reinforcing the original false message, if not done well.[106]

The problem is not that enforcement agencies have not found the perfect disclosure; it is that information injunctions are inevitably weak as compared to the marketing they are up against. The disclosures mandated by these orders are uniform for all consumers, even though marketers know that different consumers—and a single consumer at different moments in time—are best reached in different ways.[107] The prescribed messages are static, rather than

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100. *See* In the Matter of RJR Foods, Inc., et al., 83 F.T.C. 7, *4–*5 (1973).

101. PayPal Order, *supra* note 82, at *¶ 17A.

102. Novartis Corp. v. Fed. Trade Comm'n, 223 F.3d 783, 786 (D.C. Cir. 2000) (upholding FTC order).

103. *See, e.g.*, G.V. Johar & C.J. Simmons, *The Use of Concurrent Disclosures to Correct Invalid Inferences*, 26 J. CONSUMER RES. 307 (2000); Fred W. Morgan & Jeffrey J. Stoltman, *Television Advertising Disclosures: An Empirical Assessment*, 16 J. BUS. & PSYCHOL. 515 (2002).

104. Kinnear et al., *supra* note 12, at 42, Fig. 1.

105. *Id.*

106. *See, e.g.*, Ian Skurnik et al., *How Warnings About False Claims Become Recommendations*, 31 J. CONSUMER RES. 713 (2005).

107. On occasion, the orders have required lightly personalized disclosures that reflect information specific to a consumer, such as the financial effect of borrowing money to attend a for-profit educational institution or the graduation rates for the particular field of study the student intends to pursue. *See*

updated to respond to changing context, background social knowledge, or consumer habituation. Information injunction provisions are based on predictions about how consumers will react, but marketers do not develop a campaign, launch it, and stay the course.[108] In the twenty-first century, they use iterative testing to continually adapt the message to best reach each consumer.

Just as testing is crucial for marketing because it is not obvious what will and will not affect consumers, so too testing is crucial for disclosures. The FTC knows this well. Several years ago, the Commission hired consumer survey experts to experiment with three different advertisements for windows, with copy stating:

i. "PROVEN TO SAVE 47% ON YOUR HEATING AND COOLING BILLS!";

ii. "PROVEN TO SAVE UP TO 47% ON YOUR HEATING AND COOLING BILLS!" ; and

iii. "PROVEN TO SAVE UP TO 47%* ON YOUR HEATING AND COOLING BILLS!" followed by a disclaimer in readily readable font, emphasized by a surrounding box, stating: "*The average [windows brand] owner saves about 25% on heating and cooling bills."

The first ad was false and the second two were true. But subjects reading the second, "up to" ad were just as likely to believe they would save 47% on their bills as subjects viewing the first ad, and the third ad's additional "clear and conspicuous" disclaimer did not significantly reduce this confusion.[109]

These results were obtained in lab testing, where subjects have nothing to do but examine the advertisements. In the distracting environment of the real world, consumer confusion would likely be higher still. The FTC will not disclose whether it has performed any consumer surveys to evaluate the effects of the corrective advertising orders it has entered against defendants.[110] The most natural explanation for such secrecy is that the Commission has engaged in such testing and found that information injunctions did not dispel consumer confusion.

In an attempt to increase the effectiveness of disclosures that defendants are ordered to make, enforcement officials have attempted to micromanage the disclosures' text, placement, font, size, color, and delivery volume and speed.[111]

Consent Decree at ¶¶ 17 & 71, State of Washington v. Educ. Mgmt. Corp., No. IE-2-27G23-9 SEA (King Cty. Super. Ct. Nov. 16, 2015) [hereinafter Educ. Mgmt. Corp. Consent Decree].

108. *See* Nichols, *supra* note 2, at 9 ("Gone are the days of setting a marketing plan and letting it run its course—the so-called run-and-done approach.").

109. MANOJ HASTAK & DENNIS MURPHY, EFFECTS OF A BRISTOL WINDOWS ADVERTISEMENT WITH AN "UP TO" SAVINGS CLAIM ON CONSUMER TAKE-AWAY AND BELIEFS (2012), https://www.ftc.gov/sites/default/files/documents/reports/effects-bristol-windows-advertisement-savings-claim-consumer-take-away-beliefs/12 0629bristolwindowsreport.pdf [https://perma.cc/DU2P-67SA].

110. Telephone interview with Michael Ostheimer, Deputy, Division of Advertising Practices, Consumer Protection Bureau, FTC (July 7, 2016). I asked Mr. Ostheimer whether the FTC's own testing had found that the corrective statements it had ordered firms to employ were effective or ineffective. He would not confirm whether the FTC had even performed such testing.

111. *E.g.*, Decision and Order, In the Matter of Lord & Taylor, LLC, No. C-4576, *2–*4 (F.T.C. May 20, 2016) (containing lengthy list of specifications for ordered disclosure).

But an information injunction can never control the full context in which the consumer perceives and interprets a disclosure. A defendant could easily comply with the letter of an injunction ordering a disclosure found effective in the lab, and then nullify the disclosure's effects with delays, distractions, time pressure, or any number of other ploys.

One study found a disclosure that, in experimental conditions, was truly effective—it changed subjects' immediately subsequent actions. But when just a fifteen-second delay was added between the disclosure and the loading of the next webpage, the effect of the disclosure was eliminated entirely.[112] Drug makers, which are required to list side effects in their television and radio advertising for prescription medications, have perfected strategies—for example, boring or soothing voice tones—to ensure that consumers do not absorb the information.[113] Each context is different, but, through experimentation, a defendant can determine which tactics most effectively undermine any particular information injunction.

Even if it were possible to specify every aspect of a remedial disclosure such that defendants could not outfox the injunction, micromanagement of this sort is an inefficient way to eliminate customer confusion. Monitoring costs are likely to be high, requiring enforcement agencies to check details down to font size and delivery speed. More importantly, left to their own devices, defendant firms could almost certainly find less expensive ways to achieve whatever level of consumer understanding that these enforcement-agency-designed disclosures obtain.

In sum, information injunctions do not correct consumer confusion induced by unfair, deceptive, and abusive practices. Moreover, even if this remedy were effective, it is unlikely that it would be the most efficient way to correct consumer confusion.

E. Practices Injunctions

Practices injunctions are a standard remedy imposed in cases of unfairness, deception, or abuse. Although enforcement agencies and courts are permitted to order prophylactic measures "to close all roads to the prohibited goal,"[114] practices injunctions typically only erect a few posts to maneuver around. Defendants are not seriously fenced in by these remedies.

112. Idris Adjerid et al., *Sleights of Privacy: Framing, Disclosures, and the Limits of Transparency*, SYMP. USABLE PRIVACY & SECURITY 1, 2 (2013).

113. Megan Thielking, *Drug Makers Have a Sneaky Way of Describing Side Effects in TV Ads*, BUS. INSIDER (Feb. 18, 2016), http://www.businessinsider.com/how-drug-ads-describe-side-effects-2016-2 [https://perma.cc/BP9U-GWGB].

114. Litton Indus., Inc. v. Fed. Trade Comm'n, 676 F.2d 364, 370 (9th Cir. 1982) ("Fencing-in provisions serve to close all roads to the prohibited goal, so that [the FTC's] order may not be by-passed with impunity."); *see also* Fed. Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374, 395 (1965) ("The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. Having been caught violating the [FTC] Act, respondents must expect some fencing in.").

Practices injunctions commonly prohibit the precise unfair, deceptive, or abusive acts the firm was caught doing. For example, the PayPal decree prohibited the defendant from processing a consumer's payment through PayPal Credit if she chose another payment option[115] and from pre-selecting PayPal Credit as the default payment method unless the consumer had previously consented to PayPal Credit as her payment method for future transactions.[116]

Practices injunctions can also affirmatively mandate that the defendant take specific acts designed to prevent further fraud. The PayPal decree contains several of these, each designed to control the process by which the defendant obtains consent from consumers. For example, the decree orders PayPal to ensure that when a consumer applies for PayPal Credit or selects PayPal Credit as the customer's default method of payment, the customer affirmatively indicates consent through a means that is labeled to convey consent or that discloses that the consumer is consenting.[117]

Like detailed information injunctions, detailed practices injunctions attempt to micromanage defendants' interactions with consumers to prevent further fraud. But fraud can be achieved in many ways, particularly in the electronic transaction environment. For example, pre-checking a box is one method, but screen placement of messages and tick-boxes can lead consumers to blindly check the same box out of habit.[118]

A failed regulatory effort to control banks' interactions with their accountholders provides a cautionary tale. Regulators, concerned that consumers were unwittingly and repeatedly incurring bank account overdraft fees, began requiring banks to provide specified disclosures and obtain accountholder consent to being enrolled in an overdraft program before charging accountholders overdraft fees.[119] Banks then used a variety of ploys to confuse their accountholders into taking actions that appeared to demonstrate the required consumer "consent."[120] In reality, many of these consumers did not understand that the box they were checking would allow the bank to charge them overdraft fees.[121]

Practices injunctions are bound to fail because the defendant will always be the last mover, able to comply with the injunction and then do other things that affect consumer perception and action. As a result, practices injunctions do not prevent defendants from engaging in further deception, unfairness, and abuse.

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115. PayPal Order, *supra* note 82, at *¶ 17B.

116. *Id*.

117. *Id.* at *¶¶ 17A & 17B.

118. *Cf.* Serge Egelman et al., *You've Been Warned: An Empirical Study of the Effectiveness of Web Browser Phishing Warnings*, INST. FOR SOFTWARE RES. (2008) (documenting that computer users habitually click to clear pop-up boxes, even when those boxes contain important warnings).

119. *See* Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1174–81 (2013).

120. *Id.* at 1185–1200.

121. *See id.* at 1189–90.

F. A Turn-of-the-Century Addition: Audits In Support Of Information And Practices Injunctions

Whereas at one time, enforcement officials themselves attempted (or at least intended) to periodically review compliance with information and practices injunctions, remedial orders have begun to demand that defendants hire independent experts to assess compliance through audits. Although the effectiveness of these audits is limited by the nature of the underlying injunctive provisions, audits are a move in the right direction.

These types of audits are routinely ordered in discrimination, environmental, and institutional reform litigation. For example, defendants have been ordered to hire auditors to periodically perform mystery shopper testing to assess defendants' compliance with practices injunctions prohibiting disability or race discrimination.[122] In cases of environmental law violations, courts have entered orders requiring defendants to employ new technology to prevent further environmental damage and to hire an independent auditor to monitor whether the firm has properly installed, operated, and maintained this technology.[123] In police department reform litigation, the use of auditing to monitor and reduce civil rights violations has been so effective as to be called "transformative."[124]

Similar audits are just now being employed in cases of unfairness, deception, or abuse. In one case where enforcement agencies charged Education Management Company and related entities with deceptive and abusive enrollment and retention practices at a chain of for-profit post-secondary schools, the defendants were ordered to pay a third-party auditor to review their activities to ensure compliance with the decree's information and practices injunctions.[125] To facilitate the auditor's review, defendants were required to record all telephone conversations between the defendants' employees and current and prospective students as well as install an automated voice interaction analytics platform to permit remote auditing of those conversations.[126] Consumer cases brought by private parties have similarly been resolved with audit provisions.[127]

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122. *See, e.g.*, Order, Disabled in Action of Metro. N.Y. v. Duane Reade, Inc., No. 01 Civ. 4692 (S.D.N.Y. Oct. 28, 2005) (ordering third-party mystery shopper testing of a cross-section of defendant's stores to assess compliance with injunction ordering defendant to limit the time during which obstructions prevent wheelchair users from accessing the aisles); Consent Order, United States v. Chevy Chase Fed. Sav. Bank et al., No. 1:94-cv-01829-JLG, ¶ 4.3.9.5 (D.D.C. Aug. 22, 1994) (requiring bank to hire mystery shoppers to engage in ongoing testing of mortgage lending officers for race discrimination).

123. *See, e.g.*, Consent Decree, United States v. S. Coal Co., No. 7:16-cv-00462-GEC, ¶¶ 39–41 (W.D. Va. Sept. 30, 2016) [hereinafter S. Coal Consent Decree].

124. Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113, 128 (2016). The auditing structure in police department reform cases can involve internal and external auditing. For example, to remake the Los Angeles Police Department after the Ramparts scandal, an internal Audit Unit was tasked with performing stratified, randomized audits to determine whether the Department was meeting performance targets for various police practices. The Audit Unit's audits were then audited by independent court-appointed monitors. *Id.*

125. Educ. Mgmt. Corp. Consent Decree, *supra* note 107, at ¶¶ 34 & 40.

126. *Id*. at ¶ 95.

127. *See, e.g.*, Class Action Settlement Agreement, Spann v. J.C. Penney Corp., 314 F.R.D. 312,

For example, to resolve claims of false advertising, beverage seller Naked Juice Company agreed to hire an independent auditor to substantiate the non-GMO statements on its product labels. The class action settlement required the auditor to test samples of the company's raw materials and finished products and examine production sites and ingredient suppliers' supply chains for three years.[128]

If performed well, audits do two things. First, they better ensure that the defendant will obey the specific injunctive terms of the decree. Second, they internalize a substantial portion of the costs incurred due to defendant's violation of the law by having the defendant, rather than the taxpayer, bear monitoring costs.[129] Given the opacity of internal firm practices and the limited resources and expertise of enforcement agencies, independent third-party audits are essential.[130] In the case against Education Management Company, the decree required the defendants to pay the third-party auditor up to one million dollars annually for three to five years.[131]

Audits alone are not enough to ensure that information and practices injunctions eliminate consumer confusion and ill consequences wrought by unfair, deceptive, and abusive practices. A defendant might pass an audit that examines only technical compliance with these injunctions while continuing to defraud consumers.[132] Nonetheless, the growing use of audits in support of information and practices injunctions demonstrates that audits can feasibly and legally be ordered as part of a remedial decree. Audits recognize the principle that once a defendant firm has been caught defrauding consumers, that defendant ought to bear the burden of demonstrating compliance with the remedies ordered against it, rather than the government having to prove that the defendant violated the decree. The customer confusion and consequences audits proposed below rely on and extend this principle.

¶ 6.1.7 (C.D. Cal. 2016) (agreeing to periodic auditing to ensure the reference prices used to advertise sales are accurate); Class Action Settlement Agreement and Release, Garofalo v. Recreational Equip., Inc., No. CIVDS 1416513 (Cal. Super. Ct. Nov. 4, 2014) (agreeing to two years of mystery shopper testing to demonstrate that firm employees were no longer engaging in the alleged prohibited practices).

128. Stipulation of Settlement at ¶ 50(a), Naked Juice Cases, No. 2:11-cv-08276 (C.D. Cal. Jul. 2, 2013) [hereinafter Naked Juice Settlement].

129. Not all monitoring costs are borne by the firm; the enforcement agency must audit the auditors with sufficient frequency to ensure against auditor corruption or incompetence. *Cf.* Audit Requirements for Third Party Conformity Assessment Bodies, 16 C.F.R. § 1112 (2013) (setting forth regulations according to which the Consumer Product Safety Commission will audit third parties that test children's products to ensure that the products comply with applicable child safety rules).

130. *See, e.g.*, Ariane Hegewisch et al., *Ending Race and Sex Discrimination in the Workplace*, INST. FOR WOMEN'S POL'Y RES. 1, 7 (2011) (finding that external monitors are key to the effectiveness of consent decrees in sex and race discrimination and harassment cases).

131. Educ. Mgmt. Corp. Consent Decree, *supra* note 107, at ¶¶ 39 & 49.

132. In theory, a remedial order might broadly prohibit firms from engaging in tactics that undermine the effectiveness of information and practices injunctions. But to identify such tactics, an auditor would need to impose an expensive and intrusive bureaucratic layer upon many firm activities. This layer would interfere with and slow down both fraud and fair sales.

IV

PERFORMANCE-BASED REMEDIES: ORDERING FIRMS TO ERADICATE THEIR OWN FRAUD

To meet the challenge of twenty-first-century fraud, courts and enforcement agencies must adopt the same performance-based approaches firms now use to hone fair sales and fraud. Two are advocated here: confusion injunctions and consequences injunctions. Confusion injunctions prohibit firms that have unfairly, deceptively, or abusively exploited customer confusion from continuing to do so. Consequences injunctions prohibit firms from continuing to unfairly, deceptively, or abusively inflict ill consequences on their customers.

Defendants must demonstrate compliance with confusion and consequences injunctions through customer audits—random sample testing by independent third-party experts hired by the defendant firm to determine whether the firm's customers remain deceived about their transactions with the firm or are still suffering ill consequences from the firm's practices. Defendants must substantially eradicate the customer confusion and ill consequences wrought by their fraud or face penalties for violating a court order.

After describing past experience with performance-based remedies, the following explains the mechanics of implementation of these remedies and the reasons they are likely to be more effective than twentieth-century remedies in the fight against twenty-first-century fraud.

A. Past Uses Of Performance-Based Remedies

Performance-based remedies were developed to address cases where courts or enforcement agencies discovered that practices injunctions were futile. For example, after *Brown v. Board of Education* in the mid-1950s, courts and enforcement agencies attempted in vain to use practices injunctions to achieve desegregation of segregated school systems.[133] When these failed, courts and agencies turned to ordering defendants to meet specified racial-integration benchmarks, upheld as an equitable remedy for prior race discrimination in *Swann v. Charlotte-Mecklenburg Board of Education*.[134] Injunctions giving defendants both the responsibility to meet measurable benchmarks and the flexibility to determine how to reach these benchmarks continue to be imposed as remedies for discrimination today.[135]

In 2011, in *Brown v. Plata*, the U.S. Supreme Court reaffirmed the propriety of performance-based remedial orders.[136] The Court upheld a district court order

133. *See, e.g.*, J. Harvie Wilkinson III, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485 (1978).

134. 402 U.S. 1 (1971).

135. *See, e.g.*, Stipulation and Order of Settlement and Dismissal, United States v. Westchester, No. 06-2860, *6 (S.D.N.Y. Aug. 10, 2009) (ordering the defendant county to "within seven (7) years of the entry of this Stipulation and Order, ensure the development of at least seven hundred fifty (750) new affordable housing units").

136. 563 U.S. 493, 541–45 (2011).

giving California two years to lower its inmate population density to 137.5% of prison design capacity.[137] The order did not specify how the defendant was to reach this benchmark. Instead, the State of California was given the freedom and the responsibility for determining the best way, given its particular circumstances, to do so.[138]

Performance-based remedies were birthed from the challenge of recalcitrant defendants in civil and constitutional rights cases, but have since been extended to other contexts. Cases involving violations of environmental laws are often resolved through the use of performance injunctions, coupled with audits monitoring whether defendants have complied with the injunctions' benchmarks for emissions.[139] The benefit of performance-based remedies for environmental cases is that they give defendants flexibility to determine how best to meet the goal of the law and to adapt their activities over time as new technology develops to reduce emissions.

The first instance of a performance-based remedy in the consumer fraud context appears to have been in the Hawaiian Punch case. The remedial order in that case ordered the manufacturer to add a disclosure of the product's actual fruit juice content to advertising and labels, but permitted the defendant to remove the disclosure after one year if it had substantially eliminated consumer confusion about the fruit juice content of the product.[140] To substantially eliminate consumer confusion, the order gave the defendant two options. One option was to reformulate the product to contain primarily fruit juice, thus bringing it into conformity with the mistaken consumer beliefs that defendant's deception had engendered. The other option was to demonstrate through consumer survey evidence that no more than specified benchmark proportions of consumers were confused about the drink's fruit juice content.[141]

Not only do courts and enforcement agencies have experience with performance-based remedies, but many firms themselves have employed performance-based approaches in various aspects of their businesses. Thus, using performance benchmarks to change business practices will come quite naturally to most twenty-first-century firms.

As previously explained, firms today increasingly take a performance-based approach to the design of everything from websites to products, setting performance goals and experimenting to improve and adapt marketing, pricing, product design, etc. Paralleling this change in design practices has been the adoption of performance-based business management practices. To achieve "a

137. *Id.* at 538–41.

138. *Id.* at 500 (stating "[t]he order leaves the choice of means to reduce overcrowding to the discretion of state officials," and suggesting that the state would likely employ new construction, out-of-state transfers, and early release).

139. *See, e.g.*, S. Coal Consent Decree, *supra* note 123, at ¶¶ 39–41 (ordering defendants to hire a third-party environmental auditor to assess defendants' compliance in meeting specified environmental performance benchmarks set forth in the order).

140. In the Matter of RJR Foods, Inc., et al., 83 F.T.C. 7, *4–*5 (1973).

141. *Id.*

state of more or less continuous adaptation to fluid environments," business management has evolved from a hierarchical system to one that facilitates dispersed decisionmaking accountable to measurable performance outcomes.[142] "What you measure is what you get" has been an accepted principle in the business management world for some time.[143] More recently, the American Management Association found that one of the key drivers of high performing businesses is clearly defined performance measures.[144] These measures are accompanied by incentives to encourage employees or units within firms to creatively experiment to discover the best ways to meet them.[145]

Performance-based remedies similarly set performance goals but operate at the firm level rather than the employee or business-unit level. These remedies provide defendant firms with the incentives and flexibility needed to meet those goals. In fact, complying with customer confusion and consequences injunctions might well lead firms to set their own internal performance targets and assign employees or business units the task of meeting those targets.

B. Mechanics

How can enforcement agencies and courts construct customer confusion and consequences benchmarks, structure audit procedures, and ensure compliance? The following answers each of these questions in turn.

1. Benchmarks

A performance-based remedial order must select a benchmark against which the defendant's performance in eradicating the effects of its fraud is assessed. In cases of unfair, deceptive, or abusive practices, a total prohibition on customer confusion or ill consequences—in effect a benchmark of zero—might seem attractive. Courts and enforcement agencies are likely to be uncomfortable admitting that their orders may not remedy the harm inflicted on some customers by defendants. Moreover, substantial reductions in erroneous consumer beliefs are possible when a party with good access to the affected consumers is committed to addressing the problem. An example occurred when Consumer Reports released erroneous information about some children's car seats. The organization's subsequent effort to correct misimpressions among car seat purchasers was quite successful.[146]

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142. Achrol & Kotler, *supra* note 25, at 148.

143. *See, e.g.*, Robert S. Kaplan & David Norton, *The Balanced Scorecard: Measures that Drive Performance,* HARV. BUS. REV. (Feb. 1992), https://hbr.org/1992/01/the-balanced-scorecard-measures-that-drive-performance-2 [https://perma.cc/S7N8-YAUT].

144. *How to Build a High-Performance Organization*, AM. MGMT. ASS'N 1, 23 (2007).

145. *See, e.g.*, Marcus Buckingham & Ashley Goodall, *Reinventing Performance Management*, HARV. BUS. REV. (Apr. 2015), https://hbr.org/2015/04/reinventing-performance-management [https://perma.cc/V9GJ-8D4S] (explaining nonfinancial performance measures successfully used by a major accounting firm).

146. *See generally* Uri Simonsohn, *Lessons From an Oops at* Consumer Reports*: Consumers Follow Experts and Ignore Invalid Information*, 48 J. MKTG. RES. 1 (2011).

In the Consumer Reports case, the misinformation was spread for only two weeks. When a defendant has engaged in unfair, deceptive, or abusive practices for months or years, eradicating all customer confusion and ill consequences is not realistic, and likely poses more costs than it is worth. Some consumers who view the most convincing marketing will not buy, and some consumers who play the most educational video game will remain stubbornly confused. Even the most consumer-friendly website design could allow a distracted, multitasking consumer to click the wrong button and thereby mistakenly enroll in a service or purchase a product.

The FTC's order in the Hawaiian Punch case is also not particularly helpful for selecting performance benchmarks. That order required defendants to meet at least one of three benchmarks regarding the proportion of consumers who knew that the drink contained less than 20% juice: 67% of all fruit-drink consumers, 80% of prospective Hawaiian Punch customers, or 95% of customers who had purchased Hawaiian Punch in the last month.[147] However, the Commission provided no public rationale for the benchmarks selected. It is also unclear why one of the benchmarks included all fruit-drink purchasers. Though a firm's deception of its own customers might unintentionally benefit its competitors, the firm has ample incentive to remedy that deception without a court order. Only a firm's actual customers ought to be the subject of a performance benchmark.

A more justifiable benchmark for a customer confusion injunction could be borrowed from Federal Trade Commission Act deception cases[148] and Lanham Act deceptive trade practice cases.[149] In FTC Act cases, the FTC need not provide survey evidence to prove deception, but where it does provide such evidence, courts have generally found that if a firm misleads 10% to 15% of consumers, the firm has engaged in deception.[150] In Lanham Act cases, a plaintiff competitor must demonstrate through consumer surveys that consumers have been misled by the defendant firm's practices. The Lanham Act cases have roughly settled on a 7.5% to 15% consumer confusion rate as being an acceptable benchmark for plaintiffs to demonstrate before courts will impose liability on defendant competitors for deceptive trade practices.[151] These benchmarks could transfer well to the performance-based remedy context.

Another benchmark might be the median market-wide consumer confusion or ill-consequences rate for the type of product, feature, or process at issue.[152]

147. In the Matter of RJR Foods, Inc., et al., 83 F.T.C. 7, *6 (1973).

148. 15 U.S.C. § 45(a)(1) (2012).

149. 15 U.S.C. § 1125(a) (2012).

150. *See. e.g.*, Firestone Tire & Rubber Co. v. Fed. Trade Comm'n, 481 F.2d 246, 249 (6th Cir. 1973) (upholding FTC's finding of deception where "15% (or 10%) of the buying public" was misled by the defendant's marketing).

151. *See, e.g.*, Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms. Inc., 19 F.3d 125, 134 (3d Cir. 1994) (using a 7.5% benchmark); Novartis Consumer Health, Inc. v Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 594 (3d Cir. 2002) (using a 15% benchmark).

152. This rate would need to be established through market-wide consumer testing. *Cf.* Amy

More aggressively, an enforcement agency might identify top industry performers, those firms with relatively few customers who are confused about or who are suffering ill effects from the product or process at issue, and demand that firms caught defrauding their customers minimize their customers' confusion or ill consequences to a similar extent. This is akin to environmental regulations, which are often set based on the performance achievable by the currently best available technology.[153]

Selecting a performance benchmark for a remedial order is more of an art than a science. In the California prison unconstitutional conditions case in which the Supreme Court recently upheld a performance-based remedy, the lower court ordered the state to achieve an inmate population density of 137.5% of prison design capacity within two years, but admitted that the benchmark that would satisfy the Constitution was not capable of scientific determination.[154] Nonetheless, any of the performance benchmarks discussed above are more justifiable than an information or practices injunction that sets no benchmark for the reductions in customer confusion and ill consequences that the defendant must achieve.

2. Audits

Once a benchmark is selected, establishing an audit scheme for enforcing a confusion or consequences injunction is straightforward. Confusion audits are routinely used in Lanham Act cases, following the same generally accepted practices used in the consumer studies field.[155] As explained in the Federal Judicial Center's Manual on Scientific Evidence, these practices include proper sampling techniques, clear and precise non-leading questions and answers, rotating question and answer orders, avoidance of nonresponse bias, and robust statistical analysis.[156] The questions themselves might be true/false, fill-in-the-blank, or multiple-choice tests; a consumer survey expert would need to determine the right type of questions to use in each case.[157] Valid inferences will often be possible with small random samples of the defendant's customers.[158]

Customer consequences audits will vary depending on the manner in which those consequences can be observed. Sometimes a consumer survey would reveal

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Kapczynski & Ian Ayres, *Innovation Sticks: The Limited Case for Penalizing Failures to Innovate*, 81 U. CHI. L. REV. 1781, 1830 (2015) (proposing a median market-wide performance measure be imposed on car manufacturers with respect to accidental deaths of or serious injuries to car occupants).

153. *See, e.g.*, Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 819 (2005).

154. Three-Judge Court Opinion and Order, Plata v. Schwarzenegger, No. C01-1351 THE, *124–*30 (N.D. Cal. Aug. 4, 2009), http://cdn.ca9.uscourts.gov/datastore/general/2009/08/04/Opinion%20&%20Order%20FINAL.pdf [https://perma.cc/3VKH-YZCX].

155. *See generally* Kenneth A. Plevan, *Recent Trends in the Use of Surveys in Advertising and Consumer Deception Disputes*, 15 CHI-KENT J. INTELLECTUAL PROP. 1 (2016).

156. THE FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 387–89 (3d ed. 2011).

157. *See, e.g.*, Plevan, *supra* note 155, at 84–88 (citing cases).

158. *Id.* at 81–82.

the pertinent consequences; sometimes defendant's records alone would show whether the defendant's illegal practices continued to harm its customers. In the example of a defendant that has tricked customers into unwittingly purchasing a product or service, a consequences audit could involve reviewing the defendant's records to observe whether customers who bought the product or service used it as that product or service is normally used, thereby demonstrating an intent to have purchased it. The audit could also include surveying a random sample of the defendant's customers to assess whether the customers intended to buy the product or service.

Auditors must be qualified independent third-party experts approved by the enforcement agency and paid for by the defendant, the same process used for information and practices injunction auditors.[159] Auditors might include consultants or academics who currently perform similar testing for research, marketing, or litigation purposes. Enforcement agencies would need to perform some auditing of these auditors,[160] but auditors should be professionals self-interested in maintaining a reputation for accuracy and independence.

3. Ensuring Compliance

To ensure compliance with customer confusion and consequences injunctions, remedial orders must give defendants an incentive to meet the benchmarks expeditiously. The effectiveness of the Hawaiian Punch remedial order was impaired by a lack of such an incentive. As discussed above, the order required the defendant to disclose the drink's fruit juice content in advertising and on product labels for one year, after which the firm had three options: continue to make the fruit juice content disclosures; reformulate the product to contain 100% fruit juice; or demonstrate through audits that consumers were no longer confused about the product's fruit juice content.[161]

Apparently adding the fruit juice content disclosures was not particularly onerous, giving the defendant no incentive to reformulate the product or disabuse consumers of the false beliefs instilled by the defendant's previous deceptive advertising. Unsurprisingly, the order failed to wipe out the lingering effects of the company's deception; nearly ten years later, after significant publicity about the paucity of fruit juice in "fruit drinks," only about 70% of Hawaiian Punch purchasers realized that the product contained less than 20% fruit juice.[162]

Remedial decrees in the environmental area have aggressively managed the potential for noncompliance by setting stipulated penalties, sometimes thousands of dollars a day, for failures to meet ordered performance benchmarks.[163] Courts

159. *See, e.g.*, S. Coal Consent Decree, *supra* note 123, at ¶ 30.

160. *Cf.* Audit Requirements for Third Party Conformity Assessment Bodies, *supra* note 129 (explaining that third parties audit children's products to ensure that the products comply with applicable child safety rules, and that the Consumer Product Safety Commission audits these auditors).

161. In the Matter of RJR Foods, Inc., et al., 83 F.T.C. 7, *4–*5 (1973).

162. Kinnear et al., *supra* note 12, at 40.

163. S. Coal Consent Decree, *supra* note 123, at ¶¶ 85–89.

and enforcement agencies fashioning confusion and consequences injunctions might adopt a similar approach. For deterring noncompliance in the consumer fraud context, stipulated non-financial penalties might be more effective and a better fit than fines. For example, a defendant might be prohibited from selling the products or services or using the marketing channels implicated in the defendant's wrongdoing until it meets its benchmark. Alternatively, a defendant might be required to disgorge profits each month from sales of the products about which it had deceived consumers or sales made through the channels through which it had engaged in unfair or abusive practices, until the defendant meets its benchmarks.

In addition, remedial orders should specify that defendants must pay not only for third-party audits necessary to assess compliance with confusion and consequences injunctions, but also fees and costs enforcement agencies incur to enforce the orders.[164] Defendants must pay these expenses to internalize the cost of their wrongdoing to the greatest possible extent.

Finally, past experience with performance-based management and regulation has demonstrated the importance of selecting the right performance measures. Business scholars have discovered that performance measures must be difficult for managers and employees to game and should be as close as possible to the end goal desired by the firm.[165] The same lesson was learned by the Environmental Protection Agency when it first began requiring that factories keep within specified emissions performance limits. Firms built higher smokestacks so that the emissions monitors at ground level would produce lower pollution level readings, allowing the firms to pass the tests without reducing their emissions. Regulators responded by changing testing methods to take both ground level emissions readings and smokestack height into account.[166]

In light of these experiences, courts and enforcement agencies ought not to rely exclusively on audit results to assess compliance with performance-based remedies. Defendants should be required to report the changes they made that led to the improved performance, so that the agencies can check whether any performance measures have been gamed.

C. Advantages Of Performance-Based Remedies

Confusion and consequences injunctions are likely to be more effective and more efficient than information and practices injunctions. Firms today have the skills, tools, and access necessary to influence their customers' beliefs and actions. Confusion and consequences injunctions give defendants the incentive to

164. *Cf.* Consent Decree of Civil Penalty and Permanent Injunction, United States v. Gerber Legendary Blades, No. 3:14-CV-2061-KI, ¶ III.H (D. Or. Jan. 6, 2015) ("The United States may seek reasonable costs and attorneys' fees upon succeeding in a suit to enforce this Decree.").

165. *See, e.g.*, John R. Hauser & Gerald M. Katz, *Metrics: You Are What You Measure!*, 16 EUR. MGMT. J. 517 (1998).

166. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, AIR QUALITY: INFORMATION ON TALL SMOKESTACKS AND THEIR CONTRIBUTION TO INTERSTATE TRANSPORT OF AIR POLLUTION 2 (2011).

redeploy these capabilities from committing fraud to eradicating the confusion and ill consequences wrought by their fraud. Performance-based remedies are also likely to have deterrent value in addition to remedial value, and the deterrent effects are likely to be well-calibrated to the quantum of harm caused by the defendants.

Confusion and consequences injunctions are likely to be more effective than information and practices injunctions because they flip defendants' incentives from undermining to achieving the remedial order's goal of eradicating the effects of defendants' fraud. These remedies also put defendants, parties much better-suited than courts or enforcement agencies to the task, in charge of determining how to eliminate the confusion and ill consequences those defendants have wrought.

For example, recall that the PayPal Credit case was resolved with a twentieth-century consent decree, containing only fines, disgorgement, and information and practices injunctions, all of which seemed unlikely to have much effect. In particular, the information PayPal was required to disclose and the practices it was required to engage in were uniform for all types of customers and static for the duration of the order. But influencing consumers' beliefs and actions is best achieved using the real-time, personalized, experimentally based, evolving approach perfected by twenty-first century fair and fraudulent sales practices. A remedial order enjoining the defendant from charging more than a de minimis proportion of its customers' payments to PayPal Credit accounts without those customers' knowing consent would have given the defendant the incentive to continuously redesign a variety of personally targeted payment interfaces to prevent its customers from using PayPal Credit unwittingly.

Another benefit of performance-based remedies is that they give defendants the flexibility to find the most cost-effective way to eliminate their customers' confusion and ill consequences. In confusion cases, the defendant can select whether to bring the product into conformity with its customers' beliefs or to bring its customers' beliefs into conformity with the existing product. In cases where ill consequences are the problem, the defendant can select whether, for example, to do more to help consumers self-select the product appropriately, to stop offering the product to consumers for whom the product is unsuitable, or to sell the product to all consumers but to then unwind a transaction if the customer's use demonstrates the product's unsuitability.

For example, in a situation like the Hawaiian Punch case, where a defendant has deceived its customers about the ingredients in its product, an apt remedy would be to require the defendant to end that confusion by ensuring that substantially all of its customers know the truth about those ingredients. One technique a defendant might use would be to inform its customers about the ingredients in creative ways—contests or catchy advertising jingles, for example—continually experimenting to find the best way to tailor its method of informing each customer. If the product is sold online, a defendant might even create a "find-the-ingredients" video game or an "ingredient-smarts" quiz and redesign the purchase process so that customers must play the game or pass the quiz along the way to buying the product. Alternatively, or in addition, a defendant that has deceived its customers about the ingredients in its product could reformulate the product to contain the ingredients the defendant had led its customers to expect.[167]

In the PayPal case, a customer consequences injunction would have given PayPal the flexibility to select ways to eliminate unintentional uses of PayPal Credit that might vary by customer. For some customers, the defendant's testing might have found the pre-existing payment interfaces to be sufficient. For other customers, PayPal might have developed payment interfaces that by their design were more informative or made it easier for the customer to select her transaction account rather than a credit account. For those customers who continued to unwittingly select credit—perhaps customers who mistakenly tap the wrong button on a small device screen when trying to make purchases using a transaction account—the defendant might have found that the most cost-effective alternative was to stop offering credit as a payment option on devices with small touch screens.

Firms have better information about their own products, processes, and customers than do enforcement agencies, and thus can find the most efficient mix of techniques to eliminate their customers' confusion and ill consequences. Just as marketing, purchase and return processes, price structures, and products and services themselves can be designed to maximize firm profits, so too can all of these be designed to dispel consumer confusion and minimize ill consequences and, within those constraints, maximize firm profits.

Economic modeling broadly supports this conclusion with respect to consumer confusion. One scholar recently demonstrated that requiring firms to narrow the gap between consumers' beliefs about credit card and mortgage terms and the true terms of those products, under plausible conditions in most consumer markets, likely increases both social welfare and consumer surplus.[168]

A recent settlement agreement in a private class action is also instructive here. A class of customers sued Naked Juice Company for misrepresenting that its juices were "non-GMO" and "all natural" when they allegedly contained genetically modified ingredients and synthetic vitamins.[169] Presumably using its own calculations about how to maximize its profits without deceiving consumers, the defendant in settlement negotiations agreed to different remedies for the two

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167. Recall that these were two of the defendant's options in the Hawaiian Punch case, but they were not binding because the defendant was able to select a third option of disclosing the product's fruit juice content on advertisements and product labels instead. The option selected by the defendant—a twentieth-century information injunction—was not very effective.

168. Alexei Alexandrov, *Making Firms Liable for Consumers' Mistaken Beliefs: Theoretical Model and Empirical Applications to the U.S. Mortgage and Credit Card Markets* 2–3, 16, 17 & 29 (Sept. 22, 2015), https://ssrn.com/abstract=2599424 or http://dx.doi.org/10.2139/ssrn.2599424.

169. *Pepsico To No Longer Call Naked Juices 'Natural,'* USA TODAY (July 26, 2013), https://www.usatoday.com/story/money/business/2013/07/26/pepsi-co-naked-juice-not-natural/2589717/#, [https://perma.cc/7TSH-ERYR].

misrepresentations it had allegedly been making. For the "non-GMO" false claim, the firm agreed to a practice injunction forbidding it from using GMO ingredients.[170] In effect, the defendant agreed to eliminate customer confusion by bringing the product into conformance with the previously mistaken (but now true) beliefs of its customers. As previously noted, the company also agreed to hire an independent third-party expert to perform audits to ensure that the defendant was no longer putting GMO ingredients into the product.

To address the second misrepresentation, the defendant agreed to change the false "all-natural" representation rather than changing the product. It agreed to an information injunction requiring it to remove the "all-natural" claim from its labels.[171] Presumably, the defendant performed calculations about how demand would be affected by removing the "all-natural" false claim and the cost of changing to all-natural vitamin sources, and decided that removing the claim was the more profitable course of action. A customer confusion injunction would almost certainly have been more effective at eliminating lingering false customer beliefs about the source of the vitamins in the defendant's juices because the injunction would have given the defendant an incentive to affirmatively correct the misimpression its deceptive label had created. But that aside, the lesson from the Naked Juice settlement is that a firm has better access than do enforcement officials to information needed to decide which strategies to employ to reduce customer confusion and ill consequences at the least cost to the firm.

In addition to being effective and efficient at preventing defendants from continuing to confuse and inflict ill consequences on their customers, customer confusion and consequences injunctions prevent defendants from continuing to benefit from the lingering effects of their past illegal practices. Performance-based remedies thus have not only direct incapacitation value, but also deterrence value because they deflate the predicted returns to defendants of committing unfair, deceptive, or abusive practices.

Moreover, the cost of complying with these remedial provisions could itself be a deterrent to committing fraud. Third-party expert auditors are not free; recall that the price of the auditor in the case against Education Management Services for student enrollment fraud was expected to be as much as one million dollars annually for three to five years.

Disabusing customers of erroneous beliefs previously instilled by the defendant is likely to be as costly if not more costly than the marketing the defendant previously used to instill those false beliefs. Altering firm culture and habits—and the algorithms employed to design marketing, sales and return processes, pricing, and products—to prioritize minimizing customer ill consequences over immediate sales and profits is unlikely to be cheap.[172]

170. Naked Juice Settlement, *supra* note 128, at ¶ 50(a).

171. *Id*. at ¶ 50(d).

172. *See, e.g.*, John P. Kotter, *Leading Change: Why Transformation Efforts Fail*, 59 HARV. BUS. REV. 1 (1995), *reprinted at* HARV. BUS. REV. (Jan. 2007), https://hbr.org/2007/01/leading-change-why-transformation-efforts-fail [https://perma.cc/9PK2-RLLV] (documenting difficulty of changing corporate

Sometimes small, inexpensive changes can have large effects. But finding those small changes is not easy because the effects of many changes are not predictable without testing. Compliance costs for performance-based remedies, therefore, will often be high enough to have some deterrent value themselves.

Finally, recall the normatively suspect lottery effect that would occur if only those few firms that enforcement agencies have the resources to pursue were faced with large, deterrent-level fines. This is one reason fines imposed in cases of unfair, deceptive, and abusive practices are too low to deter. In contrast, performance-based remedies—enjoining defendants from continuing to take advantage of their customers—are normatively justified. The punishment fits the crime, so to speak.

Customer confusion and consequences injunctions are well-calibrated remedies because compliance costs are likely to be proportional to the ill-gotten benefits that defendants previously reaped from their fraud. The cost of undoing the effects of a brief deceptive marketing campaign is likely to be at the lower end of the spectrum. In contrast, a defendant that has spent decades engendering and exploiting its customers' confusion will need to spend serious time and money enlightening its customers.

Customer consequences injunctions are likely to be similarly well-calibrated. For example, redesigning purchase processes that were previously honed to trick customers into undesired transactions is likely to be quite expensive when the website or application platforms on which the purchase process was running were optimized along many dimensions, adaptively personalized in real time to trick a range of consumers. In contrast, a simple pre-checked box is likely to have tricked fewer consumers and to have been less lucrative for the defendant, but eradicating erroneous customer transactions resulting from a pre-checked box is also likely to be inexpensive to do.

Change is always difficult. Business managers had to push back against entrenched internal constituencies when they shifted from hierarchically managed, highly controlled firm operations to flexible performance-based management.[173] But changing to performance-based systems has been worth the transition costs for firms. So too replacing information and practices injunctions with performance-based customer confusion and consequences injunctions will be worthwhile for courts and consumer protection enforcement agencies committed to redressing and deterring fraud.

V

CONCLUSION

Performance-based remedies to address twenty-first-century unfair, deceptive, and abusive practices are overdue. A firm today would never set the design of marketing, sales and return processes, pricing, or products in stone.

culture and habits).

173. Achrol & Kotler, *supra* note 25, at 147.

Courts and enforcement agencies today ought not to be satisfied with remedial orders that dictate static changes in a defendant's marketing, processes, pricing, or products either.

Performance-based remedies enlist defendants to eradicate the confusion and ill consequences their illegal practices have created. By giving defendants the flexibility and the responsibility to meet required benchmarks in whatever way they see fit, confusion and consequences injunctions requisition the very twenty-first-century tools and capacities defendants use to defraud, and redeploy these tools and capacities to end and reverse the fraud's ill effects. Requiring defendants to pay for audits to demonstrate their compliance with these remedies makes defendants pay much of the law-enforcement costs occasioned by their violation of the law.

As a recent book by Nobel-prize winning economists George Akerlof and Robert Shiller has explained, "[C]ompetitive markets by their very nature spawn deception and trickery, as a result of the same profit motives that give us our prosperity."[174] Consumer protection law is one of the few bulwarks society has against this cost of a largely free market.

Increasing enforcement agency resources could go a long way toward making consumer-law enforcement more effective, thereby reducing unfairness, deception, and abuse. But given limited resources, customer confusion and consequences injunctions monitored through third-party audits paid for by firms are a promising solution.

174. GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION 165 (2015).