

Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation

IAIN RAMSAY*

Abstract

This article relates developments in consumer law to the 'new learning' about regulation. The new learning describes the growth of decentred regulation associated with the use of instruments of regulation that harness market factors and incentives to the regulatory project. At the same time there is also increased monitoring within government of regulatory initiatives, and more international influence through standards, and regulatory networks. This article explores these developments initially by probing the growth of the conception of the consumer as a regulatory subject and examining the influence of international and regional influences on consumer law. It then analyses several areas of contemporary regulation of consumer markets through the lens of the new learning. The article concludes that the new learning does further our understanding of consumer regulation but that the state still plays a significant role. The distributional impact of the new consumer regulation remains contested. Further empirical research of particular regimes is necessary to determine this impact.

1. Introduction

Consumer law is an instrumental form of law, organised around achieving the goals of efficient and fair consumer markets. Originally developing from the concept of inequality of bargaining power, contemporary consumer law is best conceptualised as the regulation of consumer markets and includes analysis of the relative role of public, private and self-regulatory techniques, the study of agency discretion and the problems of ensuring effective and accountable rulemaking, standard setting and enforcement.¹ This regulatory perspective cuts across traditional distinctions between private and public law and includes soft law, moral

* Professor, Osgoode Hall Law School, York University, Toronto, Canada. President, International Association of Consumer Law. Thanks to Colin Scott, Toni Williams and two anonymous referees for comments on an earlier draft. David Harland was a pioneer in the development and implementation of consumer law, particularly at the international level, where he played an important role in promoting the role of consumer law in developing countries. He was a stalwart as a member of the Board of the International Association of Consumer Law and he was a friend.

¹ The two texts that adopt this approach most consistently are Colin Scott & Julia Black, *Cranston's Consumers and the Law* (3rd ed, 2000) and Iain Ramsay, *Consumer Protection* (1989); see Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2nd ed, forthcoming 2006).

suasion and other ‘non-legal’ techniques within its scope. It permits the assessment of these and other regulatory techniques by reference to both their effectiveness in achieving economic and social goals and their legitimacy and public accountability. This instrumental conceptualisation undermines the autonomy of legal reasoning since analysis of consumer protection law and policy draws on disciplines such as economics and sociology that contribute to understanding of consumer behaviour and the consequences of different policy choices.²

As with other regulatory fields, developments in consumer law depend in part on prevailing ideas about the institutional capacities and legitimate roles of the state and the market. The past two decades have witnessed a transformation in thinking about the role of the state in regulating the economy and in the role of the market as an institution and an ideology,³ a transformation that has accompanied state actions such as large scale privatisation and deregulation of markets and trends towards global economic integration. The concept of government failure was developed to describe the inherent limitations of government regulation,⁴ including perceived constraints on its ability to achieve redistributive goals. Political theorists argued that the attempt by governments to bring about substantive social objectives through legal regulation could only be made at the cost of ‘overlegalisation’⁵ of social relations and would be ultimately ineffective. The apparent failure of public regulation had led, it was argued, to ‘a crisis of the regulatory state’, in that it was unable to deliver its promises to correct the problems generated by the capitalist economic system.⁶ Gunther Teubner articulated his famous regulatory ‘trilemma’ of ‘circumvention, perversity and negative feedback’ that resulted in a pathology of increasingly elaborate and legalised regulation that was ultimately ineffective.⁷ Julia Black summarises these critiques of regulation:

[t]he instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), ... government has insufficient knowledge to be able to identify the causes of the problems, to design solutions that are appropriate, and to identify non-compliance (information failure), ... implementation of the regulation is inadequate (implementation failure) and/or ... those being regulated are insufficiently inclined to comply (motivation failure).⁸

2 See the general discussion on the regulatory perspective in Christine Parker, Colin Scott, Nicola Lacey & John Braithwaite (eds), *Regulating Law* (2004).

3 For the UK see, for example, Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (2003).

4 For the early economic critique see George Stigler, *The Citizen and the State: Essays in Regulation* (1975).

5 See Claus Offe, *Contradictions of the Welfare State* (1984) at 280.

6 Juergen Habermas, *Legitimation Crisis* (1975) (translated by Thomas McCarthy) at 68.

7 See Gunther Teubner, ‘Juridification, Concepts, Aspects, Limits, Solutions’ in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate Antitrust and Social Welfare Law* (1987) at 3–48. Albert Hirschman refers to these arguments as ‘the rhetoric of reaction’: see Albert Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (1991).

These critiques have stimulated a 'new learning' on regulation that has influenced innovation in a variety of regulatory fields.⁹ In this article I explore and assess some of the implications of this 'new learning' for consumer law and policy through analysis of selected consumer regulatory developments. I initially outline in Part 2 the general characteristics of this learning, focusing in particular on the conceptualisation of the consumer as a regulatory subject and the increasing interweaving of national, regional and international dimensions of consumer law and policy. Part 3 examines briefly five areas of consumer regulation: changes in self-regulation in the United Kingdom (UK), the role of the Office of Fair Trading (OFT) in regulating unfair terms, harnessing market gatekeepers in consumer credit, the development of financial services Ombudsmen and the United States (US) *Community Reinvestment Act* (1977). These areas illustrate regulatory innovation and attempts to harness both public and private actors in achieving an efficient and fair marketplace. The *Community Reinvestment Act* also illustrates the significance of social exclusion to consumer policy making in the area of consumer credit law. The majority of my examples are drawn from the UK, partly because, along with Australia, it has been a major site of regulatory innovations in recent years. Finally, Part 5 provides a general discussion of themes raised by the examples and suggests some further lines of research.

2. *The New Regulation and the New Learning*

Critical scholarship on contemporary economic developments commonly associates globalisation with neo-liberalism and the retreat of the state. There is a belief that globalisation and in particular financial globalisation restricts the ability of states to redistribute income and achieve social goals. At the same time it is recognised that states and regions still play an important role in facilitating industries that are perceived to be hotwired to international competitiveness and this results in a 'highly politicised' international economy.¹⁰ A growing literature suggests that despite the prevailing rhetoric of neo-liberalism, privatisation and deregulation, in many countries there has been significant re-regulation. David Levi-Faur and others argue that there is emerging a new global order of regulatory capitalism that is not captured by descriptions such as the 'retreat' of the state. This new regulation is characterised by (1) increased delegation of regulation through

8 Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54 *Current Legal Problems* 103 at 106; Julia Black, *Mapping the Contours of Contemporary Financial Services Regulation: Discussion Paper* (2003).

9 The new learning includes in addition to Black, the work of the Australian school of regulation as represented in Parker et al above n2; Neil Gunningham, Darren Sinclair & Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (1998). See the review of the better regulation movement in the UK by Robert Baldwin, 'Is Better Regulation Smarter Regulation' (2005) *Public Law* 485. For a critique of the discourse of regulation associated with the new learning see Bronwen Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (2003).

10 For an excellent account of the growth of neoliberalism see David Harvey, *A Brief History of NeoLiberalism* (2005).

varieties of self-regulation accompanied by (2) greater regulation within government to prevent the classic problem of regulatory ‘capture’ and to maintain public trust, (3) the use of new instruments of regulation that involve increased internal monitoring by corporations, (4) increased international regulation through technical standards, (5) the diffusion of regulatory ideas worldwide through regulatory networks¹¹ and (6) international regulatory competition through increased international benchmarking. In addition, new regulatory agencies have been created, often in response to public anxieties or outrage, in areas such as food safety, privacy and the environment as well as in the privatised utilities.

Levi-Faur’s analysis is compatible with the influential idea that regulation is becoming increasingly ‘decentred’, and as such is best viewed as a process of ‘steering not rowing’, ‘coordinating, steering, influencing, and balancing interactions between actors ... and ... creating new patterns of interaction which enable social actors/systems to organize themselves ... the normative aspect of the new understanding of regulation is that intervention in the self-regulation of social actors ... has to be indirect’.¹²

Influenced by systems theory,¹³ this decentred model of regulation represents a response to the critiques of ‘command and control’ regulation. In the area of consumer policy decentred approaches appear in a heightened emphasis on self-regulation, the creation of greater opportunities for consumers and others to participate in policy making and implementation, a larger role for information as a consumer policy ‘and its explicit recognition as a regulatory tool’.¹⁴ The extent of this decentring might depend on the particular policy area. Threats to physical safety and health are likely to result in demands for direct government action.¹⁵

A decentred regulatory approach might include initiatives that aim to ‘responsibilise’ both the supply and demand side of consumer markets, such as the current reforms to consumer credit law in the UK and Europe that are based on the

11 David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598 *Annals of the American Academy of Political and Social Science* 12–32. See also Bengt Larsson, ‘Neo-Liberalism and Polycontextuality: Banking Crisis and Re-regulation in Sweden’ (2003) *Economy and Society* 428. See also Sol Picciotto, ‘Introduction: Reconceptualizing Regulation in the Era of Globalization’ (2002) 29 *Journal of Law and Society* 1.

12 Black, ‘Decentring’ above n8 at 126.

13 See Gunther Teubner & Zenon Bankowski (eds), *Law as an Autopoietic System* (1993) (translated by Anne Bankowska & Ruth Adler).

14 Black, ‘Decentring’ above n8 at 127.

15 Ralph Nader’s claim in the early 1960s that the Corvair was ‘unsafe at any speed’ was a powerful stimulant to modern consumerism. The Mad Cow Disease (BSE) scandal that revealed UK food regulatory failure was a catalyst for change and the creation of a regime of food regulation that would not be as prone to regulatory capture. Weatherill notes that the BSE crisis resulted in the new Directorate General for Health and Consumer Protection gaining ‘sufficient staff to wield real clout’. Stephen Weatherill, ‘Consumer Policy’ in Paul Craig & Gráinne de Burca (eds), *The Evolution of EU Law* (1999) 693. Braithwaite and Drahos argue that in all the regulatory regimes that they studied ‘during the twentieth century anxiety among mass publics, triggered mostly by reading stories of disasters in the mass media, had substantial effects in globalizing new forms of regulation’: see John Braithwaite & Peter Drahos, *Global Business Regulation* (2000) at 500.

twin pillars of 'responsible lending' and 'responsible borrowing'.¹⁶ Corporate social responsibility norms may contribute to the responsabilisation of suppliers. Responsibilisation of consumers seeks to reconstruct the consumer as a regulatory subject, a project that is both innovative and complicated. Within the traditional market model, consumer sovereignty was the goal of consumer policy. However there was little concern for how consumers exercised their sovereignty.¹⁷ By contrast, the new learning on regulation positions the consumer as an important regulatory subject perceived as crucial to achieving national goals such as greater competitiveness.¹⁸ The 'responsibilisation' of the consumer is being pursued in areas such as credit and financial services, where governments are investing heavily in projects to ensure that individuals become responsible consumers through the use of information, the development of financial capability, and financial literacy programs. These programs often make heroic assumptions about the ability of consumers to use and process information on market choices¹⁹ and their ultimate results remain uncertain and difficult to measure.

The consumer will also have a civilising influence on markets within this responsabilisation approach. The recent consumer strategy document in the UK notes that consumers have responsibilities as well as rights and consumer policy should ensure that 'consumers are able to understand the impacts of their own consumption'.²⁰ Consumers are to be 'citizen consumers', a model of the consumer that recalls the US new deal where consumers would not follow solely their private interest at the expense of the public interest.²¹ European Union (EU) consumer policy adopts a variation of this model where the responsible consumer has the mandate to ensure a competitive marketplace — a mandate not necessarily compatible with public goals such as sustainable consumption.²²

While decentred regulation seeks to harness individuals in civil society as part of the regulatory project — essentially a move downwards from direct state

16 See in the UK, Department of Trade and Industry, *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century* (2003). The proposed EU Directive on Consumer Credit includes provisions on responsible lending as well as disclosure provisions that are intended to ensure responsible borrowing.

17 This is perhaps an overstatement since taxation systems might attempt to affect consumer buying habits and controls on credit restrict the extent of consumption, particularly among lower income groups. However, the general objective was within these limits to leave the consumer free to exercise their preferences.

18 This has stimulated work on the role of consumers in competition policy and the impediments on the demand side, such as switching costs, that might reduce the effect of competition. See, for example, Janet Bush, *Consumer Empowerment and Competitiveness: a report prepared for the National Consumer Council* (2004).

19 The literature of behavioural economics draws attention to many of the irrationalities in consumer choice. Pensions Commission, *Pensions: Challenges and Choices: The First Report of the Pensions Commission* (2004) at 208–210 provides a useful catalogue of them in relation to consumer saving behaviour. For a recent survey see Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law & Society* 349. See also Toni Williams, *Empowerment of Whom and for What? Critical Reflections on the 'New' Regulation of Consumer Financial Services* (unpublished, on file with author).

20 See Department of Trade and Industry, *A Fair Deal for All: Extending Competitive Markets: Empowered Consumers, Successful Business (Consumer Strategy)* (2005) at 3.

regulation — another product of the ‘new learning’ on regulation highlights the influence of transnational and international norms and institutions over domestic consumer protection policy.²³

David Harland charted in 1999 the international organisations and norms that affect consumer policy including, in addition to the United Nations (UN) Guidelines on Consumer Protection that have had significant impact in Latin America and developing countries,²⁴ organisations such as the United Nations Commission on International Trade Law (UNCITRAL), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the ISO.²⁵ The OECD has developed influential guidelines for consumer protection in several areas such as e-commerce and cross border fraud,²⁶ and sponsored fora for the exchange and development of ideas. It is also a forum for the nurturing of epistemic communities in consumer and competition policy.²⁷ Braithwaite and Drahos define an epistemic community as ‘loose collections of knowledge-based experts who share certain attitudes and values and substantive knowledge, as well as ways of thinking about how to use this knowledge’.²⁸ While the idea of an epistemic community seems particularly applicable to networks of regulators who share values, it may also bring together adversaries. Thus business, consumers and regulators meet within the umbrella of the OECD. Epistemic communities may be significant in constructing global norms or a shared ‘commonsense’²⁹ about methods of regulating consumer markets, a commonsense that influences national norms. These norms may strengthen the position of a national regulator in influencing

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- 21 See Lizabeth Cohen, ‘Citizens and Consumers in the United States in the Century of Mass Consumption’ in Martin Daunton & Matthew Hilton (eds), *The Politics of Consumption* (2001) at 205–211. See also Lizabeth Cohen, *A Consumers’ Republic: The Politics of Mass Consumption in Postwar America* (2003). See also Patricia Maclachlan & Frank Trentmann, ‘Civilising Markets: Traditions of Consumer Politics in Twentieth-Century Britain, Japan, and the United States’ in Mark Bevir & Frank Trentmann (eds), *Markets in Historical Context: Ideas and Politics in the Modern World* (2004).
- 22 See Commission of the European Communities, ‘Consumer Programme 2007–2013 COM’ (2005) 115 *Final* at 9 ‘Adequate consumer protection is necessary for growth and competitiveness.’ Micklitz states: ‘EC consumer law is ... instrumentalised in a very particular way, The key figure is the responsible, maybe the confident, consumer ... to whom European integration has given a mandate ... The consumer has to behave in a particular way so as to comply with the mandate entrusted to him or her. The mandate is to support, to foster, and to enhance the completion of the Internal Market, maybe an internal market with a social outlook. The emphasis is on market integration, not social protection’: Hans Micklitz, ‘The New German Sales Law: Changing Patterns in the Regulation of Product Quality’ (2002) 25 *Journal of Consumer Policy* 379 at 385.
- 23 Colin Scott describes these tendencies in online regulation of consumer to business contracting, outlining a variety of both international initiatives to combat cross-border fraud and market based remedies such as those associated with the E-Bay ‘community’ See Colin Scott, ‘Regulatory Innovation and the Online Consumer (2004) 26 *Law & Policy* 477.
- 24 See David Harland, ‘The United Nations Guidelines for Consumer Policy: Their Impact in the First Decade’ in Iain Ramsay (ed), *Consumer Law in the Global Economy—National and International Dimensions* (1997) 1.
- 25 See David Harland, ‘The Consumer in the Globalised Information Society — the impact of the International Organizations’ in Thomas Wilhelmsson, Salla Tuominen & Heli Tuomola (eds), *Consumer Law in the Information Society* (2000) at 3.

policy at the national level. The Canadian Competition Bureau recently justified legislation permitting the Bureau to obtain redress for consumers in cases of misleading advertising as a measure that would bring Canada into line with other OECD countries.³⁰

Writers on competition policy argue that networks provide the potential for development of uniformity without centralisation as well as facilitating the export of more developed countries models of regulation. Imelda Maher underlines the central role of the OECD as the locus for the interaction of technocrats and policy makers from the developed countries in formulating international competition law norms and coordinating enforcement.³¹ In addition, the 'outreach' programs developed by the International Competition Network attempt to harness business and consumer constituencies by convincing them of the benefits of competition policy.³²

There is a marked growth in networks of regulators in consumer policy.³³ The International Consumer Protection Enforcement Network (ICPEN) is a global network of national consumer agencies formed in 1992. The agencies share information and best practice, assist each other in investigations to the extent permitted by national law, maintain a database of case materials, and organise coordinated global sweeps against false and misleading claims on the internet. Within the EU networking will be intensified through the *Regulation on Consumer Protection Cooperation* that requires national agencies to have common investigative and enforcement powers, to share information, and to have the power to seek and obtain action from their counterparts in other Member States.³⁴ In addition to these formal initiatives there are exchanges of personnel between agencies. These networks provide not only a forum for the diffusion of ideas and influence but also the creation of an important constituency with an interest in regulation.

26 OECD, *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* (2003).

27 See the discussion of its role in fostering the convergence of consumer laws in Timothy Muris, 'The Interface of Competition and Consumer Protection' (2002): <<http://www.ftc.gov/speeches/muris.htm>>.

28 See Braithwaite & Drahos, above n45 at 501, citing Peter Haas, 'Do Regimes Matter' Epistemic Communities and Mediterranean Pollution Control' (1989) 43 *International Organization* 377.

29 The Gramscian undertones of the use of quotation marks around commonsense are intentional.

30 Cited in OECD, 'Background Report' in OECD Committee on Consumer Policy, *OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace* (2005) at 33. See OECD Canada – Report on Competition Law and Institutions (2004) at para 67.

31 See Imelda Maher, 'Competition Law in the International Domain: Networks as a New Form of Governance' (2002) 29 *Journal of Law and Society* 111.

32 See for example, International Competition Network, *Subgroup 2 – Consumer Relations: Consumer Outreach* (2005).

33 For discussion of networks see Kai Raustala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 *Va J Int'l Law* 1; Ann Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stan J Int'l Law* 283.

34 Regulation available at <http://europa.eu.int/comm/consumers/prot_rules/admin_coop/index_en.htm>.

International benchmarking is increasingly built into the work of regulators and policymaking. In the UK, the OFT reports that it has received a ‘four star plus’ in the Global Competition review and aims for a similar rating for its consumer framework.³⁵ This use of benchmarking may have a significant impact on policy. The UK Department of Trade and Industry withdrew its opposition to the idea of a general unfair trading clause in the European Unfair Commercial Practices Directive when it discovered that the Federal Trade Commission (FTC), in its view the premier global consumer protection enforcement agency, operates with a general clause on unfair trade practices.

The EU has been a significant influence in re-regulation where EU directives often create new regulatory responsibilities,³⁶ such as in the field of misleading advertising and unfair contract terms. The EU harmonisation project in consumer law has resulted in the development of approaches that represent influential models of consumer protection in areas such as product safety standard setting,³⁷ product liability,³⁸ and the control of unfair contract terms. Although US ideas may have influenced the early development of modern consumer protection in Europe,³⁹ during the past two decades the EU has provided many of the regulatory innovations. That this should be so is not solely because of the rise of the EU, and there thus seems to be a contingency to the development of consumer policy. Vogel explains the European developments in health and safety during the 1990s as occurring because of ‘a series of regulatory failures and crises: broader citizen support for more risk-averse regulatory policies within Europe; and the growth of the regulatory competence of the EU.’⁴⁰

Product and service standards are established at the regional and international level in areas such as consumer safety, food, and financial services through private

35 See OFT, *Annual Report 2003–04* (2004) at para 1.1.

36 See Giandomenico Majone, *Regulating Europe* (1996).

37 See discussion of European Product Safety Law in Geraint Howells & Stephen Weatherill, *Consumer Protection Law* (2nd ed, 2005) at 462–468; Geraint Howells, ‘The Relationship between Product Liability and Product Safety — Understanding a Necessary Element in European Product Liability Through a Comparison with the US position’ (2000) 39 *Washburn L J* 305.

38 See for example, David Harland, ‘Some Reflections on the Influence of Outside Europe of the EC Directive on Products Liability’ in Ludwig Kramer, Hans Micklitz & Klaus Tonner (eds), *Law and Diffuse Interests in the European Legal Order: Liber Amicorum Norbert Reich* (1997) at 681. Although the EU directive on product liability has been a remarkable transplant in terms of its adoption throughout the world, it seems to have had little influence in practice with indigenous systems continuing to be used by litigants. See Mathias Reimann, ‘Product Liability in a Global Context: The Hollow Victory of the European Model’ (2003) 11 *Eur Rev Private L* 128.

39 See Wolfgang Wiegand, ‘The Reception of American Law in Europe’ (1991) 39 *American Journal of Comparative Law* 229. Wiegand argues that the idea of consumer protection developed from ideas in product liability such as the Escola decision in 1944: *Escola v Coca-Cola Bottling Co* P2d (Cal 1944) and that ‘the idea of compensating users of mass products for damages caused by defects ... later formulated as consumer protection found sympathy in all parts of the world’ at 241.

40 See David Vogel, ‘The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe’ (2003) 33 *British Journal of Political Science* 557.

standard setting bodies with a public mandate. European standards now represent 90 per cent of the output of national standards institutions within the EU.⁴¹ Standard setting is both a technical and a political process. The need for expert knowledge that is often in the hands of industry and the desirability of securing voluntary compliance with standards mean that private groups have always played a central role in standard setting.⁴² The EU in its approach to technical harmonisation and product safety harnesses the 'private' resources of European industry standard setting bodies. These bodies in turn cooperate with international standard setting bodies such as the ISO to avoid creating barriers to trade. This form of decentred regulation raises important questions of democratic accountability and consumer participation.⁴³ Broadening participation in regulatory processes can serve to make standard setting more democratic, responsive to wider forms of knowledge, and ensure greater likelihood of acceptance by all groups. However, these objectives are often difficult to achieve in practice. Recent research in developing policy advice on food safety concludes that groups with superior knowledge such as regulators and business interests, are often able to shape the agenda and outcome.⁴⁴ At the international level, Consumers International claims that business interests dominate standard setting within bodies such as the WTO and the Codex Alimentarius.⁴⁵

Consumers International (CI) is the largest and best known international consumer group. It has promoted ethical trading practices and sustainable consumption and acted as a forum that has brought together the interests of developing countries' consumers with those of developed countries. It has often worked through networks on single issues such as the International Baby Food

41 See Consumers International, *Decision Making in the Global Market: Trade, Standards and the Consumer* (2005) at 46.

42 See Ramsay, above n1 at 489.

43 See discussion in Howells, above n37. See also Julia Black, 'Proceduralizing Regulation: Part 1' (2000) 20 *Oxford Journal of Legal Studies* 597. The EU provides funds to the European Association for the Coordination of Consumer Representation in Standardisation (ANEC), to represent consumer interests in the European standardisation process. ANEC 'represents consumer organisations from the European Union Member States and the European Free Trade Association (EFTA) countries. Our General Assembly is composed of one national member per country, nominated jointly by the national consumer organisations in their country. ANEC is funded by the European Commission and EFTA, while national consumer organisations contribute in kind. Its Secretariat is based in Brussels.' It provides technical expertise based on a network of consumer representatives across Europe who contribute to the work of technical standards setting organizations: <<http://www.anec.org/anec.asp?rd=53342&ref=01-01&lang=en>>.

44 See Henry Rothstein, 'Precautionary Bans or Sacrificial Lambs? Participative Risk Regulation and the Reform of the UK Food Safety Regime' (2004) 82 *Public Administration* 857. Rothstein concludes that 'representations of policy processes and decisions as open, independent, and consumer-focused may have rhetorical purchase, but meeting such objectives in practice is more difficult' at 878.

45 See above n41. The Codex Alimentarius Commission is established by the Food and Agriculture Organisation and the World Health Organization. It establishes international food standards that are used by the World Trade Organization in determining whether a national standard is justified and not a technical barrier to trade.

Action Network and has linked a politics of affluence with a politics of necessity.⁴⁶ There is also the Transatlantic Consumer Dialogue and specialist groups such as the Global Fair Banking initiative. The EU has subsidised consumer group representation through the European Consumers' Organisation (BEUC) and the European Consumer Law Group (ECLG) as well as specialised groups such as European Association for the Coordination of Consumer Representation in Standardisation (ANEC). Louise Sylvan argues that many Non Government Organisations (NGOs) moved from an oppositional model to one of engagement in the 1980s and 90s not merely in relation to governments, but also with industry, sometimes by passing governments.⁴⁷ She also argues that they are increasingly professional, work within a national-global framework, and use the global media creatively.

The distributional effects of this new architecture of regulation remain contested. Braithwaite and Drahos in their magisterial survey of global business regulation argue that although there are opportunities for 'liberalising populism' within the new global order, business influence through states or international standardisation bodies is often disproportionate to that of consumers in the development of regulation.⁴⁸ In contrast, Levi-Faur argues that 'regulatory capitalism is much more open to collective action' and that 'the growing reliance on regulation as a mode of governance reopens the field for a more balanced approach to the distribution of power and resources'.⁴⁹ These contrasting hypotheses suggest the need for further empirical testing of the distributional effects of particular regulatory regimes.⁵⁰ It may be necessary to distinguish the different architectures of the political economy of particular consumer sectors such as financial services, pharmaceuticals, etc. rather than generalise across sectors.

3. *Decentring Regulation?*

A. *Transforming Self-regulation*

Self-regulation, a venerable tradition in UK consumer law,⁵¹ is now the *plat du jour* in studies of regulation and a central focus in the new learning. Recent changes in the approach to codes of practice by the OFT and the continuing evolution of advertising self-regulation provide an opportunity for assessing the influence of the phenomena outlined by Levi-Faur as well as the applicability of the decentred metaphor.

In the field of consumer policy, the OFT historically favoured informal methods of regulation and its main output during the 1970s and early 80s was codes of practice—a form of self-regulation.⁵² This was partly in response to the

46 See further Matthew Hilton, *Consumerism in 20th Century Britain* (2003) at 313.

47 See Louise Sylvan, 'Social Movements and Their Influence' (2005) 64 *Australian Journal of Public Administration* 83.

48 See Braithwaite & Drahos, above n15 at 620.

49 See Levi-Faur, above n11 at 28.

50 See for example, Rothstein, above n44.

limits of its legal rule-making powers. It also reflected the historical importance of private groups in implementation of government policy in the UK where a generalist civil service often worked closely with 'responsible' trade associations to facilitate implementation and compliance with government policies. In the language of economics, self-regulation offered the possibility of reducing information, rule-making and enforcement costs if the resources of a trade association could be harnessed. Although the legislative mandate to encourage the development of codes of practice was a legislative afterthought in the *Fair Trading Act 1973* (UK) that established the OFT, codes of practice were introduced in many sectors such as new and used cars, funerals, mail order, shoes, travel agents and electrical goods, double glazing and residential estate agents. By 1998, 49 trade association codes had been approved.⁵³

The development of codes emerged from a process of bargaining between the OFT and the industry. There was no formal process for approval of a code and the Office did not initially issue guidelines for trades interested in developing a code, although it did develop 'best practices' in the early 1990s that were publicised in Annual Reports. An assessment of codes of practice in 1982 did not find evidence of capture of the agency by an industry in this bargaining process, but did comment that 'some traders argued that the close involvement of business and the OFT in developing the codes and monitoring their success has led to a greater understanding of each other's viewpoint [and one trader commented that] the trade quickly learned how to handle OFT officials'.⁵⁴

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- 51 The following section on self-regulation draws on material in Ramsay, above n1. Bagott describes the UK as a 'haven for self-regulation': see Robert Baggott, 'Regulatory Reform in Britain: the Changing Face of Self-Regulation' (1989) 67 *Public Administration* 435 See for example, OECD, Regulatory Reform in the United Kingdom. *Government Capacity to Assume High Quality Regulation* (OECD, 2002) at 8; Hans Micklitz, 'The Necessity of a New Concept for the Further Development of the Consumer Law in the EU' (2003) 4 *German Law Journal* 1043. A 'dominant feature of the legal landscape has long been a preference for and support of widespread self-regulation'. Stephen Weatherill, 'United Kingdom' in Reiner Schulze & Hans Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices* (2003). See also National Consumer Council, *Models of Self-Regulation: An Overview of Models in Business and the Professions* (2000). See also Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994); Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97; Robert Baldwin & Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) at Ch10.
- 52 For an account of the development of the Office of Fair Trading in the 1970s and 80s see Ramsay, above n1 chapter 7; Iain Ramsay, 'The Office of Fair Trading: Watchdog of the Consumer Marketplace' in Robert Baldwin & Christopher McCrudden, *Regulation and Public Law* (1987).
- 53 Codes would normally cover the following areas: the specification of the legal rights and obligations of firms and consumers; procedures for the resolution of complaints; controls on the form of advertising and the provision of adequate and clear information; the specification of performance levels, for example, in relation to service calls; the promotion of good business management, for example, proper staff training; the provision of publicity through an association symbol; and provisions for investigation and enforcement.
- 54 See John Pickering & D Cousins, 'The Benefits and Costs of Voluntary Codes of Practice' (1982) 16 *European Journal of Marketing* 31.

During the 1970s, trade associations had been eager to sign on to codes as a defensive strategy to the possibility of legal regulation and as a method of raising the trade's image. OFT approval could also exempt codes from the scrutiny of the Restrictive Practices Court. From the mid 1980s, there was increasing dissatisfaction by the OFT with the performance of codes, as well as their ability to negotiate further codes in a deregulatory climate where the threat of regulation had little force. In addition, given the potential anti-competitive nature of codes, OFT economists and competition analysts were skeptical of their effectiveness.

In 2001 the OFT withdrew support from all existing codes and adopted a new approach that emphasises the role of codes in enhancing competitiveness and includes a significant role for the OFT in the marketing of an approved code.⁵⁵ The OFT will now provide a quality logo for codes that meet the requisite standards and will market such a code through publicity campaigns.

This new approach adopts a more standardised, transparent and measurable process for developing codes that is more demanding than the old process. Consumer groups, enforcement agencies and advisory services must be adequately consulted and codes of practice must deliver benefits to consumers beyond the law. A more stringent monitoring process will exist and performance of codes will be subject to review by the National Audit Office.

Several points are of interest in this new approach. First, there is the greater transparency and accountability in the process of developing codes with monitoring by public interest groups and auditing by government agencies. Second, there is a perceptible change in the rationale for regulation. The new emphasis on regulation for competitiveness differs from the old consumer protection rationale in its move away from regulation as a restriction that redistributes resources to consumers to regulation that benefits all through its contribution to competitiveness. The codes project is influenced by Michael Porter's ideas of global competitiveness, where a regulatory agency helps to drive national firms to achieve higher standards of quality that will make them more competitive in the global economy.⁵⁶

Self-regulation has been a characteristic of the regulation of advertising in the UK and contrasts with greater reliance on legal regulation in the US and other EU countries. The UK system has developed in the continuing shadow of potential legal regulation since its inception as a response to the threat of legal controls being recommended by the Molony Committee in 1962. The Advertising Standards Authority (ASA) system was revised in 1974 to include better funding

55 The *Enterprise Act* 2002 (UK) s8(1) under the heading 'Promoting Good Consumer Practice' confers power on the Office of Fair Trading to 'make arrangements for approving consumer codes and ... in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code.' For the process of approval see OFT, *Consumer Codes Approval Scheme, Core Criteria and Guidance* (2004).

56 Michael Porter, *The Competitive Advantage of Nations* (1990). Porter's ideas have influenced the general approach of the New Labour government to consumer policy. See generally Iain Ramsay, 'Globalization, The Third Way and Consumer Policy in the UK' (forthcoming, 2006 in Jane Winn (ed), *Consumer Protection in the Age of the Information Economy*).

through an automatic levy on display advertising after adverse comments on its operation by the Director General of Fair Trading, and after the Secretary of State for Trade and Industry signalled the threat of legal regulation. In the 1980s the fear that the proposed *EU Directive on Misleading Advertising* would require the substitution of legal controls for self-regulation provided a strong incentive for the ASA to demonstrate its effectiveness to government. It appears to have succeeded since the UK Government lobbied for the recognition of self-regulation in the *EU Directive on Misleading Advertising*, and complied with the Directive by maintaining self-regulation, with a back-up injunctive power being conferred on the Director General of Fair Trading. In 1990 the ASA was held to be subject to judicial review.⁵⁷ In 1995 the ASA introduced the possibility of appeals against adjudications. These were initially handled by the Chair of the ASA, but in response to a perceived conflict of interest, an independent reviewer was appointed in 1999.

The most recent development is the extension of the ASA's mandate to include regulation of broadcast advertising under a co-regulatory contract with the Office of Communications (Ofcom), where the ASA will have primary responsibility for regulation with Ofcom having a similar backstop power to the OFT.⁵⁸

Given the current structure and role of the ASA, it would be misleading to describe it as 'industry self-regulation'. The existence of judicial review, oversight mechanisms such as an independent reviewer of its adjudications, and an independent consumer panel to provide advice on the development of the advertising codes suggest that it is more similar to 'mandated self-regulation'⁵⁹ where an attempt is made to 'make associative, self-interested collective action contribute to the achievement of public policy objectives'. The UK model of advertising regulation is now being promoted by the European Association of Advertisers as a model for pan-European regulation of advertising under the *EU Unfair Commercial Practices Directive*.

Both these examples of self-regulation indicate a movement towards greater formality, transparency, and accountability in both rule making, monitoring and enforcement of self-regulation so that within the decentred metaphor of steering not rowing, the rowers are subject to greater control. They illustrate a combination of delegation and increased accountability through independent third parties.

B. Changing Market Norms? The Office of Fair Trading and the Control of Unfair Contract Terms

Since 1973 there has been a statutory prohibition in the UK on contracting out of the implied terms in relation to goods in most consumer supply contracts, and since 1977, a ban on exclusion clauses for physical injuries caused by negligence, with other exclusion clauses being subject to a reasonableness test.⁶⁰ However, many

57 See *R v Advertising Standards Authority Ltd, ex parte Insurance Service plc* (1990) *Tr LR* 169.

58 This delegation is accomplished under the *Delegation and Contracting Out Act 1994* (UK) that permits a Minister or regulator to delegate specific functions to another person.

59 See Wolfgang Streeck & Phillippe Schmitter, *Private Interest Government: Beyond Market and State* (1985) at 17.

businesses continued to use exclusion clauses in their contracts. This may have been because of ignorance by businesses of the law, or because inserting these clauses in contracts would provide them with bargaining power in relation to complaining consumers unlikely to be aware of their rights. Businesses might exercise discretion to determine whether to provide a concession to a consumer and ensure that such discretion would be exercised at managerial level rather than by individual salespersons. In response to the continued use of exclusion clauses a statutory order was introduced making it a criminal offence to insert a void clause in a consumer sale and requiring businesses that provided consumers with a statement that sets out their rights, for example in a guarantee, to include a statement that this did not affect their rights.⁶¹ It is not clear whether this 'command and control' technique was effective: few prosecutions were brought and statements in contracts or a guarantee that 'your legal rights are not affected' are probably meaningless to many individuals.

In 1995 the OFT assumed responsibility for considering complaints under the *Unfair Terms in Consumer Contracts Regulations* 1994 (hereafter *UTCC regulations*), enacted to give effect to the *EC Directive on Unfair Terms in Consumer Contracts*. The regulations conferred power on the OFT to seek undertakings, and if necessary, an injunction against a company that contravened the regulations. The Office was initially surprised by evidence of what seemed the continued widespread use of unfair terms which contravened the *Unfair Contract Terms Act* 1977 (UK) (UCTA)⁶² and there seemed to be limited awareness of the law, particularly among small businesses. By the end of 2002 the OFT had decided almost 2,000 cases of alleged unfair terms. The approach taken by the OFT was to require the deletion of unfair terms or to negotiate redrafting of the terms of the contract in clear language. In a number of industries, such as mobile phones and car rentals, they negotiated with trade associations a new model contract for the industry.

Informal negotiation with individual firms or trade associations dominates the work of the OFT in addressing unfair terms. Almost all investigations are settled by advice or undertakings by business with only one case resulting in court action.⁶³ There is significant documentation of the informal undertakings and results of this negotiation in case reports and there are published guidelines on the approach taken by the agency to particular clauses. The Office considers that a sectoral approach is the most cost effective method of bringing about change. The types of terms that have been challenged under the regulations, in addition to

60 See *Unfair Contract Terms Act* 1977 (UK) ss6 and 7 (hereafter *UCTA*).

61 See *Consumer Transactions (Restrictions on Statements) Order* 1976.

62 OFT, Bulletin 2 *Unfair Contract Terms – A Bulletin issued by the Office of Fair Trading*, Issue No 2 (1996) 'our experience in the first months leads us to believe that the use of unfair terms is widespread and amounts to a serious problem in the UK. This was contrary to our expectations'. OFT 1997, 'contracts tend to incorporate far more defensive material than traders legitimate interests require ... Moreover many terms not only contravened the Regulations but also would have been ineffective under the UCTA'.

63 See *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481. The OFT lost this case.

exclusion clauses, include: late payment penalties, excessive periods for consumer cancellation, suppliers' right to vary terms or change what is supplied, suppliers' right of final decision, entire agreement clauses that exclude liability for salespersons' statements, transferring inappropriate risks to consumers, and excluding the consumer's right to assign the contract.

Commentators are generally favourable in their assessment of the work of the OFT in securing the removal and redrafting of terms.⁶⁴ Some criticism was made by the National Audit Office of its lack of use of the power to take traders to court, thus undermining its bargaining credibility, as well as increasing the length of time for negotiations,⁶⁵ but overall the judgment is favorable. Interviews by the National Audit Office with firms that had amended their mobile phone contracts indicated that the revised contracts had made their services (mobile phones) more attractive to consumers and that the work of the OFT in securing industry wide changes to mobile phone contracts had led to a better deal for consumers and resulted in earlier change than would have occurred due to market forces alone.

The dominance of negotiation in the work of the OFT suggests that one role of the OFT is that of a bargaining agent for consumers. John Wightman has argued that standard form business contracts that contain draconian clauses are often 'tamed' by customary understandings between firms that a literal or full enforcement of the term will not be applied.⁶⁶ The absence of a similar shared understanding between businesses and consumers means that there is a role for the OFT to ensure a 'reasonable' understanding of a term that reserves a blanket discretion to a business. For example a term stating 'We reserve the right to hand over a boat to any person who, in our opinion is not suitable to take charge of it' was changed to 'any person who, in our reasonable opinion' followed by a list of examples that would be regarded as reasonable for the company to act on. It is possible that this will alter the bargaining power of consumers at the level of two party disputing where the great majority of consumer disputes end.⁶⁷ Existing empirical evidence suggests that consumers do not bargain in the shadow of the law and are less likely to seek third party advice than in other everyday problems; there is only modest juridification of this sphere of market activity. The work of the OFT may help to embed reasonable expectations within these market interactions without the necessity of excessive juridification. The effectiveness of changing terms will of course depend on whether they are incorporated into the everyday working practices of salespersons dealing with complaints.

64 See, for example, Susan Bright, 'Winning the Battle Against Unfair Contract Terms' (2000) 20 *Legal Studies* 331; The Law Commission, Consultation Paper No 166, *Unfair Terms in Consumer Contracts: A Joint Consultation Paper* (2002) at para 5.6 page 125: 'the work of the OFT's Unfair Contract Terms Unit has had a major impact on the market'.

65 See National Audit Office, *Protecting the Consumer from Unfair Trading Practices* (1999); Committee of Public Accounts, *The Office of Fair Trading: Protecting the Consumer from Unfair Trading Practices: 37th Report 2000–2001* (2000); National Audit Office, *The Office of Fair Trading: Progress in Protecting Consumers' Interests* (2003); Richard Colbey, 'Unfair Terms and the OFT' (1998) *New Law Journal* 46.

66 See John Wightman, 'Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings' in David Campbell, Hugh Collins & John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003).

There may also be a reflexive element to the negotiations with businesses. This recognises that the requirement for an individual business or trade association to examine its terms of business may result in critical reflection and the opportunity to see positive aspects from developing a consumer-friendly model standard contract.

This observation links once again to a role identified for regulation by Michael Porter in *The Competitive Advantage of Nations*⁶⁸ namely, cajoling industries to achieve higher quality terms and compete around quality; a role attributed to the OFT by mobile phone companies that negotiated new model terms with the agency. The work of the Office may be conceptualized, therefore, as part of an attempt to convince businesses to draft contracts that take into account such preferences rather than solely short term profit. A final role for the agency is simply that of an enforcer, ensuring that businesses cannot rely on void terms to scare off complaining consumers.

There is the issue of ensuring the right balance of court cases and negotiation. In this respect the possibility of consumer groups having the power to bring actions may be important and since 2001 the *UTCC regulations* have conferred power on the Consumers Association to apply for an injunction. In addition, the ability of other sectoral regulators such as the Financial Services Authority to apply for injunctions under the regulations creates the potential for regulatory competition in enforcement.

The *UTCC regulations* would not have been introduced in the UK but for the requirement to implement the EU Directive and the EU monitors the performance of states in implementing the regulations through periodic reviews: the European Court of Justice ensures uniform interpretation of the directive. There is thus an increasing national and regional web of institutions involved in monitoring the regulation of unfair consumer terms in the UK.

C. Harnessing Gatekeepers: Credit Card Chargeback Policies⁶⁹

Payment intermediaries can play an important role in consumer dispute settlement through the use of ‘chargeback’ procedures, ‘remedies provided by payment card issuers to consumers for unauthorised or disputed charges on their payment cards’.⁷⁰ These are of great significance in cross-border and online disputing where other remedies may be unavailable or impractical.

67 See for example, Iain Ramsay, ‘Consumer Redress Mechanisms for Defective and Poor Quality Products’ (1981) 31 *University of Toronto Law Journal* 117. Pascoe Pleasance, Alexy Buck, Nigel Balmes, Roife O’Grady, Hazel Genn & Marisol Smith, *Causes of Action: Civil Law and Social Justice: Final Report* (2004) at 57. Bhatia argues that return policies may increase profits because risk averse consumers will be willing to pay a higher price if they know that they can return the product and it may also create a spillover demand for other products in a department store when the consumer returns the original product. Bhatia quotes a Wall Street Journal article for the statistic that more than 6 per cent of all retail purchases are returned every year: see Namita Bhatia, ‘Return Policies for Customer Purchases’ PhD Thesis UCLA 2004 at 1–2, 5. She notes increasing restrictions on these policies in response to perceived opportunistic behaviour by some consumers.

68 See Porter, above n56.

69 See OECD, *Report on Consumer Protection for Payment Cardholders: Final Report* (2002).

There is significant variation among jurisdictions in the extent of the legal obligations imposed on payment intermediaries for consumer problems with purchases financed by a payment card. While there is generally legal protection for credit card holders in the case of fraudulent use or stolen cards, there are differences in legal protection for non-delivery or non-conforming goods or services. The most stringent laws are in the UK where credit card companies are jointly and severally liable with suppliers for defective goods and services and there is no cap on the amount of the credit card companies' liability.⁷¹ The large growth in the worldwide use of debit cards with generally more limited protections for consumers means that there is a patchwork of regulation depending on the form of payment.⁷²

The rationales for imposing liability on payment intermediaries include both efficiency and distributional arguments. Consumers may face high costs in obtaining redress against a supplier, particularly in cross-border transactions, and transferring these costs to a trusted gatekeeper with the power to control entry to the system may reduce levels of undesirable market activity. There is also a risk spreading argument; the gatekeeper is in a better position than a consumer to spread the costs of losses from fraudulent uses of a card among all users. This argument is similar to risk spreading arguments that were used to extend liability for defective products to manufacturers in the Fordist era of mass production. In the new era of network capitalism, the financial network that is the credit card system is not merely an intermediary: it is often driving the development of consumer markets and is in a strong bargaining position in relation to merchants.

The global credit card market is dominated by the international networks of Visa, MasterCard and American Express. The credit card associations are an international private government network.⁷³ Their rules are enforced through contracts with banks and merchants who may be 'fined' if they do not follow the association rules. For example, acquiring banks may be fined up to \$500,000 if credit card data is compromised. Only a company such as Wal-Mart or the US government is in a position to challenge the power of the card networks.⁷⁴ The card payment networks have developed internal policies imposing obligations on their issuers that in some cases exceed legal obligations.⁷⁵ These may differ within

70 Sarah Andrews, 'Background Report' in OECD Committee on Consumer Policy, *OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace* (2005).

71 See *Consumer Credit Act 1974* (UK) s75. In the US there is under the *Fair Credit and Billing Act* (1974) a cap on the amount of liability of the credit card company.

72 For a valuable overview see Benjamin Geva, 'Consumer Liability in Unauthorised Electronic Funds Transfers' (2003) 38 *Canadian Business Law Journal* 207, 252.

73 For a brief description of their role in the US see David Snyder, 'Private Lawmaking' (2003) 64 *Ohio St LJ* 371 at 399–402.

74 See *United States v Visa USA, Inc*, 163 F Supp 2d 322 (2001); *Wal-Mart Stores, Inc v Visa USA Inc* 396 F3d 96 (2005). The latter was a class action led by Wal-Mart and other national retailers that resulted in the largest settlement in the history of anti-trust class actions.

75 See comments of Mark MacCarthy, Senior Vice President for Public Policy Visa USA Inc, 'The role of business resolving consumer disputes' paper presented before the OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19 April 2005.

different international regions. In the US Visa and other payment systems operate a \$0 liability policy for fraudulent transactions on both credit and debit cards notwithstanding the absence of any legal obligation. This followed the practice of some individual issuers that had offered zero liability and Visa claims that this is because of competition for consumer business.⁷⁶ Using the rules of a dominant jurisdiction in an adjacent jurisdiction may also reduce operating costs. American Express appears to follow in Canada the requirements of the US *Fair Credit and Billing Act* in relation to disputed card billings. This provides higher protection to Canadian consumers than is required by Canadian law and this practice may be driven both by the cost reductions from applying a standardised procedure and reputation effects.

The largest category of complaints to card companies concern fraud and unauthorised use. The stringent \$50 liability introduced in the 1970s has stimulated substantial investments by the payment system companies in fraud control and information security. Individual issuers may also provide additional protections through automatic purchase insurance and warranty protections. The chargeback protections in the US are provided for national and international purchases. In contrast, in the UK, banks that issue credit cards have challenged successfully the imposition of liability for foreign purchases.⁷⁷ Notwithstanding this legal success, the banks state that they will continue to chargeback on a case-by-case basis up to the limit of the credit used by the consumer.

The increasing use of debit cards complicates issues of liability. Visa applies similar rules for credit cards in Canada and the United States but not similar rules for debit cards. Visa International (the operating organisation outside North America) does not seem to insist on uniform rules throughout the world, so that those countries with weak consumer movements and the absence of a strong institutional framework of regulation may experience lower levels of protection.

The credit card networks are an important conduit for the diffusion of international standards of protection. At present, however little is known about the dynamics of this private rulemaking. Braithwaite and Drahos argue that an important strategy for consumer groups should be to ratchet up standards by targeting gatekeepers in global webs of regulation.⁷⁸ There are several sites of regulation here: national, where regulators such as the OFT may press for high levels of consumer protection; the EU level, where the European Commission has proposed a legal framework for payment arrangements that would provide for the possibility of chargebacks for goods that are not delivered or non-conforming goods irrespective of the form of electronic payment. Finally, there is the role of the OECD. The OECD has played an active role as a forum for developing standards in relation to chargeback liability. The challenge for consumer interests

76 For the history of the development of this practice see Jane Kaufman Winn, 'Clash of the Titans: Regulating the Competition between Established and Emerging Electronic Payment Systems' (1999) 14 *Berkeley Tech LJ* 675.

77 See *Office of Fair Trading v Lloyds TSB Bank plc and others* [2004] All ER (D) 224 (currently under appeal by the OFT).

78 See Braithwaite & Drahos, above n15 at 612.

in this area is to harness 'best practices' within one global region and develop it as a global standard that is subject to continuous improvement. This may require consumer groups to bypass national governments and work with credit card companies within an international site such as the OECD.

D. Access to Justice and The Financial Ombudsman Service

The issue of access to justice has been an important theme in consumer protection. Effective redress institutions may further the objectives of compensation, dispute settlement, behaviour modification, and norm development, as well as providing confidence to consumers and businesses in a market. There has been continuing experimentation with a variety of institutions. The development of small claims courts was one response but evidence suggests that they continue to be colonised by a relatively narrow group of consumers.⁷⁹ Decisions in these courts rarely have an impact on the normative order and are unlikely to result in widespread behaviour modification. A business may continue to use an unfair term in its contract even if it has to occasionally deal with a consumer that challenges it in small claims court. Class actions are another alternative which I do not have space to investigate here.

The Financial Ombudsman Service (FOS) in the UK, created in 2001, has the potential for achieving a number of access to justice objectives.⁸⁰ The FOS represents the merger in a statutory scheme of the former sector based Ombudsmen. The FOS is an independent company created by the Financial Services Authority that reports annually to Parliament. The use of the Ombudsman is free to consumers, financed by a levy on the financial services industry. Individuals are required to exhaust the internal complaint handling procedures of firms before turning to the Ombudsman but the Ombudsman may intervene to attempt early resolution if a consumer contacts them. In 2003–04 out of a total of 548,000 complaints received by the FOS, 97,901 were referred to adjudicators. These adjudicators may make awards up to £100,000 that are binding on firms (they can be enforced if necessary through the courts) who are expected to cooperate fully with the Ombudsman, including prompt compliance with an award. Businesses cannot appeal from the decision of the Ombudsman except on

79 See for example, John Baldwin, *Small Claims in the County Court in England and Wales: The Bargain Basement of Civil Justice?* (1997); Seana McGuire & Roderick MacDonald, 'Small Claims Court Cant' (1996) 34 *Osgoode Hall L J* 509.

80 There are many excellent articles on the development of the ombudsmen in the UK financial sector: see for example, Philip Morris, 'The Banking Ombudsman' (1987) *Journal of Business Law* 131; Philip Morris & Gavin Little, 'The Ombudsman and Consumer Protection' in Peter Cartwright (ed), *Consumer Protection in Financial Services* (1999); Philip Rawlings & Chris Willett, 'Ombudsman Schemes in the United Kingdom's Financial Sector: the Insurance Ombudsman, the Banking Ombudsman and the Building Societies Ombudsman' (1994) 17 *Journal of Consumer Policy* 307. See generally Rhoda James, *Private Ombudsmen and Public Law* (1997). On the background to the Financial Ombudsman Service see Rhoda James & Philip Morris 'The New Financial Ombudsman Service in the United Kingdom: Has the Second Generation Got it Right?' in Charles Rickett & Thomas Telfer (eds), *International Perspectives on Consumers' Access to Justice* (2003); Rhoda James, 'The New Dispute Resolution System in the UK Financial Services Industry' (2002) *Journal of International Financial Markets* 191.

the very limited grounds of judicial review.⁸¹ Consumers remain free to take the case to court if they wish although this is likely not to be a practical alternative.

The Ombudsman adopts a document-based inquisitorial approach, and may decide cases based on what is fair and reasonable in all the circumstances.⁸² He or she may award remedies that would not be awarded by a court such as substantial awards for distress and inconvenience (although 'naming and shaming' are not part of the repertoire of remedies). The Ombudsman also addresses group claims by taking 'lead' cases and providing a view on how it would handle the case. The Ombudsman has issued guidance to firms for handling patterns of complaints, such as in the case of endowment mortgages, and may discuss with the industry, regulators, and consumer bodies the approach to be taken to important questions, something that would not be possible for a court.⁸³ The Ombudsman is required to notify the regulator, the Financial Services Authority (FSA), of issues that have regulatory implications thus providing early intelligence to the regulator of patterns of problems. Financial institutions must keep records of complaints and file reports on them to the FSA. In addition, their internal complaints procedures must take into account BS standards on complaint resolution. The FOS is itself monitored by an independent assessor whose role is to consider complaints about the FOS handling of cases.

A review of the work of the FOS found that most cases are resolved within six months and that overall satisfaction levels of consumers and firms that had been subject to complaints was generally high.⁸⁴ Although it would be too early to view the FOS as a success without a systematic empirical assessment of its work, the FOS represents the potential of a model of responsive law that addresses the limitations of courts in terms of costs and enforcement, while formulating best practices through a critical dialogue with an industry, and rendering private bureaucracies more responsive. The introduction of an Ombudsman recognises that private power, like public power, can often be a source of maladministration and injustice and should be subject to accountability: mechanisms such as the market (exit) and the courts may not be adequate or appropriate when an individual faces a large bureaucracy. The FOS may therefore achieve the goals of dispute settlement, compensation, and behaviour modification as well as developing norms within the financial services industry. It is probably misleading to describe it as ADR since, given the difficulties that an individual faces in suing a large

81 See Richard Nobles, 'Keeping Ombudsmen in their Place — the Courts and the Pensions Ombudsman' (2001) *Public Law* 308.

82 The terms of reference of the FOS indicate that in considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice at the relevant time. The Ombudsman may order a firm 'to take such steps in relation to the complainant as [he or she] considers just and appropriate'.

83 See Walter Merricks, 'The Jurisprudence of the Ombudsman' (2001) *Journal of Business Law* 654.

84 See Elaine Kempson, Sharon Collard & Nick Moore, Personal Finance Research Centre, *Fair and Reasonable: An Assessment of the Financial Ombudsman Service* (2004).

financial institution, ombudsmen are, as several writers have suggested, the only option for the consumer.

The growth of the institution of ombudsmen in the financial services industry was driven by a combination of defensive action by business as well as some thought that their introduction might provide a competitive edge to particular sectors of the financial industry. Like the development of codes of practice however the FOS is now part of a statutory scheme. This was created partly to ensure the independence of the Ombudsmen which had been questioned under the previous non-statutory schemes.

E. Financial Exclusion and Access to Credit: The US Community Reinvestment Act

Consumer credit performs increasingly a central public function in many countries. The financial liberalisation and deregulation of credit markets in the 1980s coupled with reductions in public support mean that consumer credit is often used to pay for health services and education as well as providing income smoothing during periods of unemployment or reduced employment. Access to affordable credit is an important part of being able to function in contemporary societies.⁸⁵ Consumer credit policy must now address issues that were previously addressed in Countries of the North as part of public welfare and the social safety net.⁸⁶ This view of consumer policy results in increasing links with consumer policy in Countries of the South which have never experienced a welfare state and where credit is used for accessing services such as schooling and education.⁸⁷

The role of consumer policy in achieving equitable goals is illuminated by the modern concept of social exclusion and is illustrated by Amartya Sen's work on development. Sen argues that policy debates in economics have been distorted by too much emphasis on income poverty rather than other forms of deprivation that impair individuals' capabilities to fully take part in the life of the community. Thus being relatively poor in a rich country may be a significant handicap even though one's financial income is high in terms of world standards. The need to take part in the life of the community results in a demand for televisions, video and DVD recorders, cell phones etc that place a burden on the finances of those who are relatively poor and that may result in difficulties in paying for services such as fuel and food that are traditionally regarded as necessities.⁸⁸ In a recent study in the UK, Williams and Windebanks found that consumers define themselves as excluded when they do not have easy access to mainstream outlets for acquiring

85 See further Iain Ramsay, 'Consumer Credit Regulation as the Third Way?' in Elizabeth Lanyon (ed), *Australian Credit at the Crossroads: Looking for Landmarks. Essays in Australian Consumer Affairs: An Occasional Series* (2005).

86 For example the growth of consumer bankruptcy as a safety net for overindebtedness may be partly related to the decline of the public safety net. See generally, Johanna Niemi-Kiesilainen, Iain Ramsay & William Whitford, *Consumer Bankruptcy in Global Perspective* (2003).

87 See Department of Trade and Industry, South Africa, *Making Credit Markets Work: A Policy Framework for Consumer Credit* (2004) at 4 discussing the role of credit in paying for university and school fees.

88 See Amartya Sen, *Development as Freedom* (1999).

goods.⁸⁹ Exclusion from mainstream credit might result in a similar sense of financial exclusion, underlining the important role of access to finance and credit as a means to secure both private and public goods in contemporary societies and to fully participate in society.

Current consumer credit policy in many countries attempts to ‘responsibilise’ both the supply and demand side of the market. On the supply side the concept of responsible lending is an increasingly powerful idea that links consumer policy to debates on corporate social responsibility and the attempts to harness the internal bureaucracies of corporations to achieve public policy goals.⁹⁰ This is not a simple task in the highly competitive consumer credit industry, where companies may commit themselves to principles that are not necessarily followed at the ground level. Changes at this latter level may require changing the structure of employee incentives. The difficulties in achieving effective compliance is illustrated by a pilot study for The Financial Services Authority in the UK. of the policies and practices of six large retail investment sellers. This study found that although firms recognised the importance of treating customers fairly in their policies the controls on the ground were not always consistent with this objective.⁹¹

The Australian ‘school’ of regulation has pioneered the study of ‘meta-regulation’—the relationship between different layers of regulation—in particular the relationship of external (eg, law) and internal compliance mechanisms. Christine Parker suggests that a corporation should draw up a ‘Justice Plan’ that would identify its obligations under the law and other standards that it wished to adopt and that this plan could be used by external groups to contest corporate action.⁹² This is an area that is a work in progress: Parker argues that ‘the methodologies for evaluating corporate compliance management are critically underdeveloped at present’.⁹³

An intriguing model of responsible lending is the US *Community Reinvestment Act* (hereafter *CRA*), enacted in 1977 as a response to the practice of ‘redlining’ that is to say, drawing a redline around an area and refusing to provide credit or financial services within that area. The Act requires that banks meet ‘the credit

89 See Colin Williams & Jan Windebank, ‘The “Excluded Consumer”: A Neglected Aspect of Social Exclusion’ (2002) 30 *Policy and Politics* 501.

90 For example, the initial draft of the EU Directive on Consumer Credit required lenders to choose the most appropriate type and amount of credit for a consumer, given the financial situation of the consumer and weighing the advantages and disadvantages associated with the product proposed and the purpose of the credit. The provision has antecedents in legislation in the Netherlands and Belgium. The amended draft has reduced the lender’s obligation. See Commission of the European Communities, *Modified Proposal for a Directive of the European Parliament and of the Council on Credit Agreements for Consumers Amending Council Directive 93/13/EC* COM (2005) 483 final art 5.5.

91 See Financial Services Authority, *Annual Report 2003–04* (2004) at 26.

92 See Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002); John Braithwaite, ‘Meta-Regulation for Access to Justice’, paper presented at University of California, Berkley, GALA Seminar Series, California, 2003.

93 Christine Parker, ‘Is There a Reliable Way to Evaluate Organisational Compliance Programs?’, paper presented at the Australian National Institute of Criminology and RegNet Conference 2–3 Sept 2002 at 17.

needs of its entire community, including low and moderate income neighbourhoods, consistent with the sound and safe operation of a bank'. Banks are evaluated by banking agencies on their performance in achieving this goal. The ultimate sanction for an unsatisfactory performance is that a financial institution may be prevented from an expansion through merger or acquisition. Agency hearings on a bank's performance are public, community groups have standing to participate and since 1989 have been able to access data on the race and income of applicants for home mortgage loans.⁹⁴ The *CRA* ratings of 'need to improve', 'satisfactory' and 'outstanding' are made public and some government agencies and states will only bank with institutions that receive a higher than satisfactory rating.

Recent research concludes that the Act has on balance been beneficial.⁹⁵ It has not only resulted in an expansion of home purchase loans to low and moderate income households but also has stimulated banks to develop community based lending and investment schemes. The programme resulted in some innovative forms of expanding community lending, for example, through the provision of financial education, matching funds for Individual Development Accounts, and donations of computers in lower income neighbourhoods, that might stimulate the use of internet banking. The relatively vague performance standard in the Act permitted evaluation of a bank to take into account its individual circumstance and had not resulted in rent-seeking by community groups. The Act has also created groups within banks that have developed knowledge of lower income credit markets, overcoming some of the information asymmetries that mainstream institutions face in lending to lower income consumers. It had also facilitated collaborative work with community groups.

The *CRA* is an example of a strategy that harnesses legal powers, reputational incentives and social pressures (through community activists) to achieve its objectives. It does not require the making of unprofitable loans or result in significant cross-subsidisation by shareholders or middle income consumers. It has undoubtedly promoted reflection within the banks on how best to serve lower income consumers and may have helped to change some cultural perceptions of the profitability of lower income markets. It has the potential for achieving what Parker describes as 'open self-regulation' that brings together management responsibility and the law and increases democratic social responsibility through accountability to external community groups; it may be a small step in deepening democracy.⁹⁶ While aspects of the *CRA* may relate to the particular circumstances of credit provision in the US, the animating ideas have relevance beyond the US.

4. Discussion

The increased functional differentiation that is characteristic of modern societies is reflected in the landscape of regulation of consumer markets. Regulators such as

94 See the *Federal Home Mortgage Disclosure Act* (1975).

95 See Michael Barr, 'Credit Where it Counts: the Community Reinvestment Act (2005) 80 *NYU L Rev* 513.

96 See Archon Fung & Erik Wright, 'Deepening Democracy: Innovations in Empowered Participatory Governance' (2001) 29 *Politics and Society* 5–41.

the OFT attempt to harness responsible supplier behaviour in relation to standard contract terms or encourage competitiveness through codes of conduct. Increased delegation of regulatory powers to the advertising industry is coupled with greater monitoring and accountability. In some respects the contemporary developments in UK consumer law described in this article are part of a continuing tradition of regulators harnessing a variety of actors and techniques to achieve the objectives of regulation.⁹⁷ The ‘decentring’ metaphor helps us to see more clearly the potential regulatory roles of state and non-state actors and to assess issues of effectiveness, accountability and legitimacy in regulation. The contemporary developments in UK regulation that stress greater formality, transparency and mechanisms of accountability in regulation reflect also Levi-Faur’s description of re-regulation where state actors both act and are acted on.

The state still plays a significant role within this decentred model. Even in the case of credit card chargebacks, the law provides basic ground rules of protection from which the card companies compete. Although the government in the UK believes that globalisation constrains social policy development, many of the recent consumer initiatives in the UK would not have occurred but for the increased interest of the New Labour government in rejuvenating consumer policy and the increased financial resources allocated to the OFT. These developments in turn provided a greater window of opportunity for consumer groups.

The critiques of instrumental law drew attention to the limits of legal regulation and the danger of assuming a hierarchical model of state law that minimised the role of other forms of social regulation. Perhaps an apt metaphor for the role of law in consumer regulation is provided by Braithwaite and Parker who suggest that the regulatory project is a ‘web of regulatory controls where different branches of legal institutions are among the strands in the web’.⁹⁸ Thus, harnessing the private government of international credit card companies involves regulation in a number of national, regional and international sites. It may involve consumer groups convincing one card system of the competitive advantage of generous chargeback policies that then becomes a standard for competition; alternatively the work of a national regulator may promote higher standards. To the extent that redress for a consumer depends on the internal operating procedures of the card company then these might be made subject to the control of a Financial Services Ombudsman that could act to prevent bureaucratic maladministration and suggest methods of improving industry norms.

The case studies represent attempts to fashion responsive and effective regulation that also respect ideas of accountability. They include the control of private power in the case of financial services markets dominated by large bureaucracies where the transplant of a public law model of accountability through the Ombudsman seems justified. There is the attempt to achieve fairness in the consumer credit market through developments such as the *CRA* that harness legal, reputational and social incentives. It is clear that in the area of consumer credit the

97 See my conclusions on the role of the Office of Fair Trading in the 1970s and 1980s at Ramsay above n1 at 305–308.

98 See Parker et al, above n2 at 274.

contemporary objectives of consumer law should not merely be seen as ensuring 'value for money'; the initiatives in credit represent attempts to achieve 'value for people'. They are part of a distributive programme of positive welfare.

The linkages between the national, regional and international are illustrated by the OFT regulation of unfair contract terms and self-regulation which are subject to international benchmarking, the influence of regional norms such as EU Directives and often framed within the goals of global competitiveness. Within the EU, the UK attempts to export its model of regulation of advertising to the EU and also, more generally, its particular vision of market regulation. This is part of regulatory competition within the politics of the EU. It can lead to intriguing results where, for example, a model of regulating unfair contract terms influenced by continental ideas has transformed the UK approach to regulation of consumer contracts and made it an influential model in the global marketplace of ideas on regulation of consumer markets.

Recent international reviews of consumer policy indicate that there remains substantial variety in the institutional framework of consumer law.⁹⁹ Even within the EU there are differences between countries in the framework for regulating unfair contract terms. The existence of regulatory networks and the increasing internationalisation of the politics of consumer regulation will undoubtedly stimulate increasing comparative institutional analysis and regulatory competition. Just as there are 'varieties of capitalism' we should not expect a convergence around a single model of regulation.¹⁰⁰ In order to understand the diffusion of particular consumer regimes it will also be necessary to examine the particular industry sector (e.g. financial services, pharmaceuticals) and the relative power of different countries, regions, corporations and other groups in these areas and the relative prestige of any regime that is proposed to be transplanted.

I have in this article said little about the role of private law as a mechanism of regulation. Private law does matter to those who can use it effectively, for example businesses that incorporate judicial rulings in standard terms or that seek judicial rulings as a framework for structuring their business methods.¹⁰¹ Consumers have rarely been able to harness private law to have such systemic effects.¹⁰² Arthur

99 See Department of Trade and Industry, *Comparative Report on Consumer Policy Regimes* (2003).

100 See in relation to the need for experimentalism in consumer law Thomas Wilhelmsson, 'The Paradox of the Risk Society and the Fragmentation of Consumer Law' in Iain Ramsay (ed), *Risk and Choice in Consumer Society* (forthcoming, 2006).

101 For example, in the area of consumer credit see cases such as *Helby v Matthews* [1895] AC 471 (HL) and for further discussion see Iain Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177 at 183–184. The judicial development of the concept of negotiability in promissory notes in late 19th century USA reflected, in, Grant Gilmore's view the needs of 'a powerful group of entrepreneurs who were embarking on the new and untested project of lending money to poor people': Grant Gilmore, 'Formalism and the Law of Negotiable Instruments' (1979) *Creighton L Rev* 441.

102 I exclude here the specific role of class actions in the US where there is increasingly 'regulation through litigation' in areas of toxic torts, a phenomenon that raises its own problems of accountability.

Leff argued in 1970 that ‘in dealing with mass vices in mass contracts, administration by the litigation bureaucracy is likely to have only trivial impact, for good or evil’.¹⁰³ And the experience of the OFT in regulating unfair terms seems to confirm this argument. This has international significance since a private litigation model of control of unfair terms based on broad standards continues to dominate in the US.¹⁰⁴ There is now a significant difference between the substantive rules and institutional approach to standard form consumer contracts in Europe and North America. Standard form consumer terms that are used in North America would not be permitted in Europe and the proactive approach adopted by the OFT is currently unknown in North America.¹⁰⁵

Private law may be important as a source of values and ideologies. Ideologies such as freedom of contract do have instrumental significance because they result in a tendency to view regulatory regimes such as consumer protection, as an encroachment of freedom. Yet most of the regulatory examples I have discussed will generally increase the autonomy of the individual consumer in their dealings with business. Moreover, the values developed may have greater democratic legitimacy than common law judicial constructions.

There is still a tendency to conceptualise consumer law as private law with the practical consequence that students study regimes of regulation interstitially as modifications of, or exceptions to the common law. This is particularly true in the US and Canada where law schools primarily prepare students for the private practice of law. A study of consumer regulation, however, problematises the private law of contract because it reveals not only the limits of private law in effecting behaviour, but also the variety of institutional ground rules within which markets may operate efficiently. Private law rules are simply one framework that was constructed by judges on their views of what might be an efficient and fair framework.

My article also carries a plea for future research on consumer law and policy. Given the instrumental nature of consumer law there continues to be a very modest amount of empirical work on consumer law and institutions and their relationship to market behaviour. Legal centralism is still influential in consumer law and ‘high law’ as represented by decisions of appeal courts or the European Court of Justice continue to be the focus of attention. The vast amount of ‘low law’ that is generated in small claims courts, administrative tribunals, ombudsmen, and the private complaint handling practices of firms remains relatively unstudied. A central role

103 See Arthur Allen Leff, ‘Unconscionability and the Crowd: Consumers and the Common Law Tradition’ (1970) 31 *University of Pittsburgh L Rev* 349 at 357.

104 See for example, Robert Hillmann & Jeffrey Rachlinski, ‘Standard Form Contracting in the Electronic Age’ (2002) 77 *NYUL Rev* 429. For a comparative critique see James Maxeiner, ‘Standard Term Contracting in the Global Electronic Age: European Alternative’ (2003) 28 *Yale Journal of International Law* 109.

105 See discussion in Maxeiner, *id* at 171–176. One caveat is that a careful review of state legislation in the US and Canada will reveal controls on certain terms in specific industries such as fitness clubs, the travel industry, motor vehicle repairs. In addition the Federal Trade Commission can act through rulemaking proceedings in relation to specific industry practices.

of consumer law is to affect the norms of the marketplace, but there is only modest in-depth study of the overlapping role of market, social and legal norms in consumer markets.¹⁰⁶ It would be useful to have some further study of consumer market norms and practices, particularly since major European harmonisation efforts are premised on the (somewhat dubious) empirical assumption that differences in consumer law affect the development of cross-border shopping.

Finally, in assessing the distributional impact of the new consumer regulation, the idea of the responsible consumer requires further analysis. If consumer regulation benefits the developed world consumer at the expense of workers in the third world or the environment then we cannot say that global society is better off. Taking the model of the responsible consumer/citizen seriously could have significant implications for policy making. If one role of consumer policy is to foster consumer reflection on preferences, then greater attention might be given to information policies that address such issues as the sourcing of products.¹⁰⁷ It is not possible within the confines of this article to explore the complex and tantalising relation between consumerism and citizenship that is historically complex and related to particular national traditions. Consumerism has addressed both the politics of affluence and the politics of necessity and the recent critiques of globalisation have revived critiques of consumer culture from earlier generations. It would therefore be dangerous to assume that the contemporary focus on the consumer can be dismissed as simply another part of neo-liberal responsibilisation.

106 An exception is Hugh Collins, *Regulating Contracts* (1999). For a valuable analysis that combines quantitative and qualitative analysis of how individuals address everyday problems and the role of the law in this process see Patricia Ewick & Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (1998). For an overview see Iain Ramsay, 'Consumer Redress and Access to Justice' in Charles Rickett & Thomas Telfer, above n81 at 26–35.

107 See for example, David Doorey, 'Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation' in forthcoming *Osgoode Hall Law Journal*.

