Consumer Protection in the Affluent Society

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I. *"Who is to be Protected from What?"*

The U.S. Special Committee on Retail Instalment Sales, Consumer Credit, Small Loans and Usury, appointed by the National Conference of Commissioners on Uniform State Laws, in 1965 commenced their report with this question. With the plethora of "reforms" in the area of consumer protection which have been either enacted or proposed in recent years, one might have supposed that this question is now rather prosaic. It is, of course, clear that present reforms do reflect a recognition by the State of the need to protect the consumer, but simply to say this is not to have identified the underlying philosophy of consumer protection, if any. Why protect the consumer? Against what? What goal do these reforms represent a step towards? These questions are not as prosaic as they look. They have, however, to be clearly answered both in order to evaluate progress to the present, and to determine what remains to be done for the future.

The U.S. Special Committee, in pursuing the question it framed for itself, said:

> It is fair to ask precisely what it is that the consumer is to be protected from. Must he be protected from his own lack of knowledge or discipline which leads him to take advantage of easy credit to buy things he does not *need* or *cannot afford*? Is he to be protected from the "fringe" operator who may take advantage of the ignorance and gullibility of the consumer to cause him to *overbuy* or *pay too much*?[1]

The Committee took the view that consumer protection is a problem of many facets and that no one approach can solve all facets. However, the Committee's formulation of possible answers to the question it put itself is interesting. If one examines the words italicised, one notices that implicit in them is a concept of a *prudent* shopping decision. When can one say that a person through lack of knowledge or discipline has bought goods that he does not *"need"* or *"cannot afford"*? When can one say that the fringe operator has caused a consumer to *"overbuy"* or to *"pay too much"*? The need for action in a particular field can only be established, on this

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[1] At p. 9. (My italics).

approach, when these questions have been answered, and these questions can only be answered after a concept of a *prudent* purchase or a *prudent* shopping decision has been constructed. What is a *prudent* shopping decision? The question has only to be posed for some of the difficulties inherent in it to become apparent. However, if we assume, with the Committee, that the over-all objective of the law relating to consumer protection is to promote prudent shopping decisions, whether in relation to goods, services or credit, and whether this is sought to be achieved by the elimination of ignorance or lack of discipline or by the regulation of "fringe" operators or whatever, these difficulties have to be faced.

How the law defines it's concept of a prudent shopping decision will be of central importance on a number of issues. For example, in the regulation of advertising, should the law prohibit the advertisement which encourages me to buy *e.g.* a Ford Mustang by making an appeal to my need to feel masculine, to feel "a real man", or the advertisement which encourages me to smoke Marlboro cigarettes by appealing to my suppressed cowboy (masculinity?) complex? In both cases, it might be argued that the advertisements emphasize the irrelevant, appeal to unhealthy instincts, that a prudent shopping decision in the case of the car would turn on factors such as durability, economy, safety, etc., and in the case of the cigarette, perhaps levels of nicotine and tar content. Should the law therefore regulate advertising so as to prohibit advertisements which emphasize "irrelevant" considerations, and appeal to "unhealthy" psychological fears, needs and frustrations? What is "irrelevant"? What is "unhealthy"?

Similar issues would arise in relation to packaging, and other point-of-sale selling techniques. The law's concept of a prudent shopping decision would also control what kind of implied terms are read into transactions. For example, the implied terms as to *"fitness"* for purpose, and *"merchantability"*, inherited from 19th century days of *laissez-faire* and still retained in our law of sale of goods today would have to be re-examined to determine whether the utilitarian or functional values they reflect are any longer important elements in the modern concept of a prudent shopping decision. The trend has been recently toward making these terms, or terms closely derived from them, non-excludable in sales transactions.[2]

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[2] See ss. 17 and 18, U.K. *Hire-Purchase Act*, 13-14 Eliz. II, c. 66; s. 5, Australian *Uniform Hire-Purchase Aets;* U.K. Law Commission Report on Exemption Clauses in Contracts (No. 24) (1969); Adelaide Law School Report on Consumer Credit (South Australian Gov't. Printer, 1969) (Chaps. XII and XIII).

Before this is done, one would have thought that an inquiry would have to be made as to whether these terms (and the values inherent in them) provide the kind of assurances that people now want. Perhaps, for example, a non-excludable implied term, in the case of some cars at any rate, that such a car will make a buyer feel like "a real man", might represent a more relevant guarantee today that the buyer is getting what he expects, and needs (*i.e.* what is prudent for him).

The problem pervades the whole of the bargaining process in the consumer market place. Should manufacturers' guarantees be standardised? Should they be made mandatory? Who should they protect? Most important of all, *what* should they guarantee? That a washing machine will last 20 years, 10 years, 1 year, will wash clothes brighter than brand new, will retain it's gleaming enamel finish, for how long?

Again, in relation to products liability, who should be protected against what? If, for example, cars are not sold for durability, but for looks, ride, acceleration, etc., why should a buyer, say, of a two-year old car be protected against defects at all? It may no longer be "prudent" to buy for durability. Why should a consumer be allowed to complain if he does not get it?

Sooner or later in this kind of inquiry, the relation of the law to the whole current social and economic norm of expanding production and consumption has to be faced.

II. *A State-Planned "Good Life"?*

If one examines the views of those who are critical of modern advertising and selling techniques that encourage so-called "irrational" consumption by appealing to status or psychological needs etc., and who would wish these kinds of practices to be regulated by the law, it is clear that their views are premised on a particular conception of what are sound consumption patterns. This conception emphasizes utility, durability, economy, etc., and decries consumption for other purposes.

For example, to cite a popular writer in the field, Vance Packard, in his various books,[3] attacks the factors in our society and our economy that have produced planned obsolescence and buying for status; he applauds such efforts as he has been able to discover which have been made by industry towards what he calls "Restoring

[3] *The Hidden Persuaders*, (1957); *The Status Seekers*, (1959); *The Waste Makers*, (1960).

Pride in Quality";[4] for example, better manufacturers' guarantees, better product testing before sale, and more stringent quality standards. In the concluding chapter of his book, *The Waste-Makers*, called "Achieving An Enduring Style of Life", he applauds signs of increasing interest in cultural pursuits, he admires the life-style of an old woman in a lonely New England coastal cottage who has virtually no wordly possessions and spends her time making greeting cards out of sea mosses. His philosophical base is well revealed in the dedication of the book, "To my Mother and Father who have never confused the possession of goods with the good life". Packard's whole campaign for closer regulation of advertising, selling techniques, product quality, etc., is premised on this philosophy of the personal and social good and before the law decides whether to impose the regulations that Packard advocates, it must also decide whether it accepts the same non-materialist philosophical premise.

Even the much more sophisticated analysis of production-consumption patterns in modern society advanced by J. K. Galbraith in *The Affluent Society*[5] and *The New Industrial State*[6] does not avoid a commitment to the same kind of philisophical standpoint adopted by Packard and other critics of the consumption ethic.[7] However, Galbraith at least perceives the tactical dangers involved in this:

> To have argued simply that our present preoccupation with production of goods does not best aid the pursuit of happiness would have got nowhere. The concepts to which one would have been committed would have been far too vague.
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> Any direct onslaught on the identification of goods with happiness would have had another drawback. Scholarly discourse, like bullfighting and the classical ballet, has it's rules and they must be respected. In this arena nothings counts so heavily against a man as to be found attacking the values of the public at large and seeking to substitute his own. Technically his crime is arrogance. Actually it is iguorance of the rules. In any case, he

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[4] *The Waste Makers*, ch. 22.

[5] J. K. Galbraith, *The Affluent Society*, (1958).

[6] J. K. Galbraith, *The New Industrial State*, (1967).

[7] From a wider sociological standpoint, see *e.g.*, Thorstein Veblen, *The Theory of the Leisure Class*, (1899); Erich Fromm, *The Revolution of Hope*, (1968), also, *Escape from Freedom*, (1941) and *The Sane Society*, (1955); Herbert Marcuse, *One-Dimensional Man*, (1964); Jacques Ellul, *The Technological Society*, (1964).

From a more specific "consumer" standpoint, see *e.g.*, Senator Warren G. Maguuson, *The Dark Side of the Marketplace*, (1968); James Bishop Jr. and Henry W. Hubbard, *Let the Seller Beware*, (1969); Sidney Margolius, *The Innocent Consumer* v. *The Exploiters*, (1967); Ralph Nader, *Unsafe At Any Speed*, (1965).

> is automatically removed from the game. In the past this has been a common error of those who have speculated on the sanctity of present economic goals — those who have sought to score against materialism and Philistinism. They have advanced their own view of what adds to human happiness. For this, they could easily be accused of substituting for the crude economic goals of the people at large the more sensitive and refined but irrelevant goals of their own. The accusation is fatal.
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> The reader will now appreciate the care with which the defences against such an attack have been prepared ...[8]

It is certainly true that Galbraith's basic thesis is not that consumption patterns today are necessarily bad, but rather that most consumer wants are artificially contrived by the process of production itself, either negatively by emulation and suggestion or positively by advertising and salesmanship. The conventional wisdom that holds that production must be maximized so as to cater for existing consumer wants is proved fallacious once it is shown that the process of production creates it's own wants — that the wants have no existence independent of the process of production that creates them. Galbraith argues that, in contrast with the position in the private sector, production in what has traditionally been regarded as the public sector is notoriously deficient (*e.g.* schools, roads, hospitals, etc.) and that our goal should be to devise means of transferring some of our productive capacity, and necessarily also a proportionate amount of consumer demand, from the private sector to the public sector. He advances various proposals to this end.

Even on this approach, however, the "accusation" of having aligned oneself with a particular concept of the "good life" cannot be avoided. Galbraith's general thesis turns on the proposition that we are over-supplied with the commodities customarily provided by the private sector and under-supplied with the commodities customarily provided by the public sector. To assert this necessarily involves an espousal of a particular concept of the good life; this appears clearly from two of Galbraith's key chapters in *The Affluent Society* called appropriately "The Theory of Social Balance" and "The Redress of Balance".

Apart from this, it is clear that his recognition of the dangers of launching a direct onslaught on the identification of goods with happiness is a recognition merely of the tactical dangers involved, nothing more. Moreover, quite early in the development of his general thesis, he contests vigorously the "conventional wisdom" that holds that the urgency of consumer wants does not diminish appre-

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[8] J. K. Galbraith, *The Affluent Society*, at pp. 270-271 (Mentor ed.).

ciably as more of them are satisfied, that the relative worth of goods cannot be related to any given criteria, *e.g.* that psychological needs may be as urgent as physical needs.[9] Galbraith clearly supports the application of the doctrine of diminishing marginal utility to consumer wants:

> With increasing per capita real income, men are able to satisfy additional wants. These are of a lower order of urgency. This being so, the production that provides the goods that satisfy these less urgent wants must also be be of smaller (and declining) importance.... In the contemporary United States, the supply of bread is plentiful and the supply of bread grains even redundant.... And having extended their bread consumption to the point where it's marginal utility is very low, people have gone on to spend their income on other things. Since these goods entered their consumption pattern after bread, there is a presumption that they are not very urgent either — that *their* consumption has been carried, as with wheat, to the point where marginal utility is small or even negligible. So it must be assumed that the importance of marginal increments of all production is low and declining. The effects of increasing affluence is to minimize the importance of economic goals. Production and productivity become less and less important.... The notion that wants do not become less urgent the more amply the individual is supplied is broadly repugnant to common sense.[10]

Thus, however carefully Galbraith may have sought to avoid any particular premise as to how human happiness is best promoted, his starting point is really remarkably similar to that of Packard: that the possession of goods is not the same thing as the good life — in contemporary terms, essentially a non-materialist philosophy.

The opposing philosophy to that of Packard, Galbraith, etc. emphasizes, of course, the importance of production in maintaining a high standard of living. An expanding economy and increasing output puts more goods into more people's hands and thus improves the material lot of the average man and reduces inequality. An

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[9] Argued by *e.g.*, Martin Mayer, *Madison Avenue, U.S.A.*, (1958) (Harper Row) at p. 315; *cf.* Erich Fromm, *The Revolution of Hope*, (1968) (Bantam ed.) at pp. 122 *et seq.*, also Galbraith, *The New Industrial State*, (Signet ed.) at pp. 211, 212.

[10] *The Affluent Society*, (Mentor ed.) at pp. 118, 119, 124. While it makes obvious sense to say that a consumer satisfies wants in order of urgency, once his wants have moved beyond the area of basic physical needs and move closer to the area of subjective, psychological needs and desires, it becomes harder to assign any worth-while meaning to a concept of a "prudent" shopping decision. Should a consumer buy car X at $4,000 because it is sporty and appeals to his masculinity, or car Y at $3,500 because it is well-appointed and appeals to his sense of class and social status or car Z at $3,000 which is basic and durable and appeals to his sense of utility? Which decision should the law encourage or inhibit? *A fortiori* in the case of different commodity markets *e.g.* cars and trips abroad.

expanding economy assures fuller employment which in turn provides the means to consume the output of production. An expanding economy therefore ensures all-round economic security.[11]

According to this philosophy, anything that increases consumption and thus production is presumably good, anything that inhibits or retards consumption and production must be bad. Galbraith emphasizes the predominant position that we have come to accord to production by referring to the argument used by the Republicans in the 1954 Congressional elections that this had been the second best year in history. By this was meant, of course, that the Gross National Product in 1954 was the second highest in history. "No person in either party showed the slightest disposition to challenge the standard by which it is decided that one year is better than another."[12] Certainly when politicians today refer to a country's standard of living they are referring almost invariably to the level of production-consumption of goods *per capita* of population. No other measuring-stick is thought to be relevant.

Another example which reflects graphically the importance commonly attached today to production is an interview with President Eisenhower during the recession of the late fifties. Eisenhower was asked what the people should do to make the recession recede:

A. Buy
Q. Buy What?
A. Anything.[13]

Upon which philosophy of production the law chooses to align itself will depend a number of major decisions in the field of consumer protection.

On the philosophy which emphasizes the importance of expanding production, consumer protection, in the nature of things, is almost defined out of existence.[14] Any measures designed to protect a consumer against imprudent shopping decisions necessarily inhibit consumption and thus production, which is bad. Therefore, for example, we should not attempt in any way to regulate the want-producing processes, particularly advertising, packaging, salesmanship. We should not start implying into transactions terms which

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[11] This view is argued strenuously by Gunnar Myrdal in *Challenge to Affluence*, (1962). Myrdal contests the view that rapidly expanding production is no longer necessary and criticizes Galbraith for contributing to complacency about American economic growth (pp. 60, 61, Vintage ed.). However Myrdal concedes that a great deal of the expansion will need to be in the public sector.

[12] *The Affluent Society*, (Mentor ed.) at p. 101.

[13] Cited by Vance Packard, *The Waste Makers*, (Cardinal ed.) at p. 15.

[14] See Fromm, *The Revolution of Hope*, (Bantam ed.) at p. 38.

will guarantee utility or durability. We should not regulate interest rates and risk excluding possible areas of demand. We should not regulate remedies for default for the same reason. If it is argued that to adopt this course will be to encourage, or at least to acquiesce in, imprudent consumption, we must say, with President Eisenhower, that the utility of our purchases is no longer relevant. We must consume in order to produce and we must produce in order to provide employment in order to create economic security. What is produced and what is consumed is largely beside the point. Production is to be justified on other grounds. The law should not prevent any consumer from consuming anything. No matter how worthless the thing consumed, the act of consumption serves a higher social good. It is a case of having to be cruel to the consumer in order to be kind to him, a case of the consumer having to spend himself rich. Consumption becomes an end in itself.[15]

On the philosophy endorsed by Galbraith, Packard, etc., the law would probably arrive at opposing conclusions on the various issues instanced above. While, obviously, their goal of transferring some portion of production and consumption to the public sector might be achieved by economic measures (as argued by Galbraith),[16] it would not at least be inconsistent with this objective for the law extensively to regulate advertising, labelling and other point-of-sale selling techniques.[17] Indeed, it would be consistent with this goal for the law to ban a good deal of modern advertising altogether on the grounds that it is contriving wants artificially for goods of no or minimal utility and is therefore encouraging wastefulness of resources. In relation to the products themselves, the law would presumably impose or imply (as is already done in some cases)

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[15] Fromm, *The Sane Society*, (Fawcett ed.) at p. 123.

[16] *The Affluent Society*, chaps. XXI-XXV; *e.g.* by the imposition of heavy sales taxes on consumer goods.

In the *New Industrial State*, Galbraith develops a much more general thesis for increased State planning of the economy. He argues that the demands of modern technology involve a planned economy, whether it be planned by big business or by the State. Planning of the economy by big business has proved inadequate in that:

a) the market is not concerned with large areas of social need;

b) consumer demand is "managed" by business in its own interests, *i.e.*, the consumer is no longer "sovereign" in his wants and therefore production catering to a contrived demand does not necessarily serve any legitimate social interest.

Thus, some regulation by the State is required to ensure that legitimate social interests are promoted.

[17] Galbraith acknowledges this: *The New Industrial State*, at pp. 226, 228, 356, 357.

rigorous, minimum standards of quality and safety so as to reflect the utilitarian ethic. This, by itself, however, would not be enough because technically, at any rate, this might still be consistent with a norm of expanding production. Suppose that the law implies terms into sales of new cars that they are to last for thirty years. After the car market is (rapidly) saturated, productive capacity could then be diverted to producing a yacht for every member of the community, then a holiday cottage, etc. Thus, on the Galbraith premise, the law would have to concern itself with utility not only within a particular commodity market but also as between one possible commodity market and another, *i.e.* if a man already has a house and a car, does he also need a yacht and a holiday cottage?

Thus, it would seem consistent with the stated goal of this philosophy to ban products of little or no marginal utility (however this is defined). Where, for example, productive capacity is being devoted to producing products having little product differentiation one from another, some of these products ought to be banned and the productive capacity thus released be transferred to more socially useful ends (presumably in the public sector). The extreme form of this argument would have the State prescribe what goods are "best" for a consumer, these goods alone being available for consumption by him. This might presumably come close to a Soviet-style form of State planning. Few probably would opt for this in our particular social and economic context, but, nevertheless, the philosophical premise which underpins this end is the same philosophical premise upon which the State acts when, for example, it (with Ralph Nader) insists that all cars measure up to certain safety and pollution standards. Whether a consumer likes it or not, he is required to buy a car with certain safety features and pollution controls. We are now reaching the point where these are being insisted on at the expense of appearance and performance. Perhaps the ultimate would be for the State to prescribe one kind of car only — built like a tank for the sake of safety, designed to last thirty years for the sake of durability, and built to burn a minimum of fuel for the sake of economy and ecology. In this way, the motor-car would make the minimum imposition on the resources of the private sector because it would involve only one model and would require repair or replacement infrequently, and it would make a drastically reduced demand on the resources of the public sector in the form of hospitals for the maimed and government measures to purify polluted air and water. In addition (as is already being mooted), cars could be banned from our cities in the interests of cleaner air. The same arguments can be made about

a host of other products, from detergents and throw-away bottles to intoxicating liquors and fatty foods.

The criticism that State regulation of the consumer market-place, directed to these ends and however moderate, exposes itself is the criticism to which any form of State planning is subject, namely that State-prescribed values, priorities and goals are destructive of individual freedoms. This point of view was eloquently put in a recent editorial in a Chicago newspaper:

> We see evil in a viewpoint that regards the public as 'people who have neither taste, judgment, nor hope, but only a swollen and diseased desire for the accumulation of things that is constantly irritated and enflamed by forces of the conspiracy'. We prefer to regard the public as human in its desire for better things, yes, but also as independent-minded, discerning, quick to spot and reject fraud and, thanks to the competitive system, utterly free to do so. As to the viewpoint that the public is, indeed, a mass of guinea pigs meekly being herded to and fro, this has an unvarying corollary: That the herd needs constant tending, constant protection from the unspeakable folly of its own miserable judgment. In a word, the critics of the competitive system stand ready as Big Brother to usurp the decision-making function at every junction. If there is, indeed, an 'unholy conspiracy against the American public', perhaps here is a more logical place to look for it.[18]

The reply that the Packard, Galbraith forces must make to this charge of paternalism is that they are not seeking to impose their value system on a reluctant "herd", because the value system of the herd at present is that inculcated by a system of production which artifically contrives the wants to support it. In other words, the present value system of the herd is itself one which has been imposed on them. Ideally, the objective ought presumably to be to remove the present conditioning processes and leave the consumer free to form his own values and his own wants. Unfortunately, it is not easy to see how this can be achieved, by State regulation at least, without imposing another set of values on him. For example, if the law were to ban all "irrational" advertising, *i.e.* all advertising stressing non-functional considerations, the law would seem to have committed itself to the utilitarian ethic and to the inculcation of the values implicit in this into the community.[19] Some might indeed argue that to replace captivity to the whims of industry, in the

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[18] Chicago Daily News, November 22, 1965, p. 8, col. 2; cited by Prather, (1967), 8 Bost. Coll. Ind. § Comm. L. Rev. at p. 483.

[19] This dilemma is well perceived by Marcuse, *One-Dimensional Man,* (Beacon ed.), pp. 6, 7;

"In the last analysis, the question of what are true and false needs must be answered by the individuals themselves, but only in the last analysis; that is, if and when they are free to give their own answer. As long as they are kept incapable of being autonomous, as long as they are indoctrinated and manipulated (down to their very instincts), their answer to this question

wants created and satisfied, with captivity to the whims of the State is, in terms of the total impact on individual freedoms, only a marginal improvement. Indeed, Hayek, in *The Road to Serfdom,* argues that the position would, in these terms, be worse:

> There is no real freedom of thought in our society, so it is said, because the opinions and tastes of the masses are shaped by propaganda, by advertising, by the example of the upper classes, and by other environmental factors which inevitably force the thinking of the people into well-worn grooves. From this it is concluded that if the ideals and tastes of the great majority are always fashioned by circumstances which we can control, we ought to use this power deliberately to turn the thoughts of the people in what we think is a desirable direction.
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> Probably it is true enough that the great majority are rarely capable of thinking independently, that on most questions they accept views which they find ready-made, and that they will be equally content if born or coaxed into one set of beliefs or another. In any society freedom of thought will probably be of direct significance only for a small minority. But this does not mean that anyone is competent, or ought to have power, to select those to whom this freedom is to be reserved. It certainly does not justify the presumption of any group of people to claim the right to determine what people ought to think or believe. It shows a complete confusion of thought to suggest that, because under any sort of system the majority of people follow the lead of somebody, it makes no difference if everybody has to follow the same lead. To depreciate the value of intellectual freedom because it will never mean for everybody the same possibility of independent thought is completely to miss the reasons which give intellectual freedom its value. What is essential to make it serve its function as the prime mover of intellectual progress is not that everybody may be able to think or write anything but that any cause or idea may be argued by somebody. So long as dissent is not suppressed, there will always be some who will query the ideas ruling their contemporaries and put new ideas to the test of argument and propaganda.[20]

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cannot be taken as their own. By the same token, however, no tribunal can justly abrogate to itself the right to decide which needs should be developped and satisfied. Any such tribunal is reprehensible, although our revulsion does not do away with the question: how can the people who have been the object of effective and productive domination by themselves create the conditions of freedom? The more rational, productive, technical and total the repressive administration of society becomes, the more unimaginable the means and ways by which the administered individuals might break their servitude and seize their own liberation."

[20] *The Road to Serfdom,* (Phoenix ed.), at pp. 164, 165. The modern liberal is, of course, always faced with a dilemma on a question of State regulation. A philosophy of individualism has traditionally been a cornerstone of liberalism, and State planning necessarily circumscribes individual freedoms. The only justification a liberal can offer for supporting State regulation in any particular case is that, in that case, there is less *real* freedom when the matter is left to free enterprise. Those who (like Milton Friedman, *Capitalism & Freedom,* (1962), at pp. 5, 6) criticize modern liberals for having perverted the true concept of liberalism by supporting State regulation, in some cases

The Packard, Galbraith form of paternalism also runs into a dilemma when applied to the question of providing consumer protection for the poor. When one examines, for example, the case histories of the poor catalogued by Caplowitz in *The Poor Pay More*,[21] and the difficulties encountered by consumers in meeting credit commitments of the size necessary to support the desired level of consumption, two reactions are possible. First, one can say that credit should never have been extended to these people in the first place, and advocate regulation of interest rates and remedies for default so as to render it no longer economic for private enterprise to supply these people with credit, and exclude them from the market-place. But then the 20th century liberal says this is unfair. These people need credit more than anyone else in order to maintain an adequate life-style, and it is precisely the people most in need of credit who are now to be denied it. The argument that the credit is required for "luxuries" and is not therefore justified is rejected on the grounds that according to *current* social values, refrigerators, washing machines, television sets and motor-cars have become necessities. To deny people the opportunity of acquiring them is to induce an intolerable level of inequality and poverty in the community and to sow the seeds of major social discontent. Thus, so far from the State denying the poor credit, it should do nothing to impede the availability of credit to them and should even take positive steps to ensure that the means are available to them for maintaining an acceptable level of consumption, *e.g.*, by the State making low-cost loans available,[22] or by a negative income tax providing a guaranteed minimum income.

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overlook the fact that even in the heyday of 19th century laissez-faire liberalism, the classic, Mill-style philosophy of individualism was not maintained intact. For example, while there may have been individual freedom in the marketplace, there was not in the area of private morals. Today, the position has tended to become reversed. Which age promoted individualism most is not easily determined.

[21] Chaps. 10 and 11.

[22] So recommended by the Special Joint Committee of the Canadian Senate and House of Commons on Consumer Credit, 1967, at pp. 4, 21, 28. Proposals such as these re-emphasize that there is more than one way of approaching consumer protection through State regulation. It may be argued, for example, that the problems of the low-income or ghetto consumer do not raise problems essentially of "law reform" at all, that the way of dealing with the malpractices of neighbourhood merchants and peddlers of doubtful reliability is to reduce dependence on them. This involves increasing incomes to a point where it becomes expedient for consumers to go outside their neighbourhood and shop comparatively amongst better-class merchants. The problem thus posed is a social and economic one, not a legal one.

But then the other side of the 20th century liberal objects that all this will simply reinforce the current norm of expanding production and the consumption ethic, will escalate the dehumanising and de-individualising effect of mass advertising and mindless consumption and will render more remote the prospects of ever having surplus productive capacity available to employ in the public sector. Moreover, he will say that the exercise will be never-ending. Having made it possible for the poor to acquire the necessities of life as conceived by the current scale of values it will be found that he is still at the bottom of the social pyramid because the level of consumption of people one stage off the bottom will have moved up yet another stage in order to preserve their relative status.[23]

Thus the dilemma faced by the 20th century liberal in this context is whether to advocate the removal of inequality and poverty (as conceived by the current scale of social values) by promoting consumption at the bottom of the social scale (and consequentially throughout the social scale) or whether on the other hand to continue to maintain that the possession of goods is not the same thing as the good life and that the life-style to be admired is that of Packard's New England sea-moss gatherer. In this case the life-styles of the poor in our society ought to be the object of our envy rather than our sympathy.

One final argument which might be advanced on behalf of the Packard, Galbraith case for State ordering of priorities in production is sheer physical necessity. If we accept that total resources available to us for all purposes are limited and may ultimately be exhausted, then some kind of State planning to determine social priorities probably becomes inevitable. For example, we have seen that our resources of clean air and water are rapidly being exhausted. In the light of this, it will obviously prove necessary to prescribe, for example, what kind of vehicle will be allowed on the roads, what kind of manufacturing processes will be permitted in the factories, etc. This, sooner or later, becomes an issue not of what constitutes the good life, but of whether there should be life at all.

These, then, are the difficulties in the way of the law bestowing it's cachet upon any particular philosophy of consumption.

The question must now be asked, is it possible for the law relating to consumer protection to avoid a commitment altogether on these issues, and the regulation of the consumer market-place in the light thereof?

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[23] See Veblen, *op. cit.*, at pp. 31, 32, 102, 104; also Galbraith, *The Affluent Society*, at p. 125.

The only alternative would appear to be a system of protection based on information. In other words, the debate, put in traditional terms, would seem to be between regulation on the one hand, and information or disclosure, on the other. This is not, of course, to suggest that these are necessarily opposed alternatives or that were the law to opt for information, it would have entirely avoided the problems discussed above. The law's commitment to some regulation of the consumer market-place is now probably of too long a standing to be repudiated. For example, the various implied terms as to quality in sales transactions, products liability generally, and control of creditors' remedies are areas of regulation of long and respectable standing. The law here cannot avoid asking itself the question, what is it sought to achieve by these forms of regulation?

III. *An Informed Consumer in a Competitive Market-place?*

The consumer's right to be given the facts he needs to make an informed choice has been so frequently asserted in high places that it can now be taken to be established dogma. The last three American Presidents have formally espoused this principle in messages to Congress. Virtually every official committee of inquiry into consumer protection or consumer credit in the Western World in recent years has endorsed the consumer's right to information as the central philosophy governing reforms in this area.

A philosophy of information in this context has several advantages. First, it reduces the entanglements of the law in the issues canvassed in the earlier part of this article. Secondly, it is consistent with the traditional free-market theory of economics. Even the staunchest defenders of the free enterprise system and non-governmental interference with the operation of the market concede that for the market to operate as a just and efficient regulator of men's bargains, both parties to a bargain must be informed. For example, even so eloquent an advocate of 19th century *laissez-faire* liberalism as Milton Freidman acknowledges this:

> Fundamentally, there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of coercion — the technique of the army and of the modern totalitarian state. The other is voluntary co-operation of individuals — the technique of the market place. The possibility of co-ordination through voluntary co-operation rests on the elementary — yet frequently denied — proposition that both parties to an economic transaction benefit from it, *provided the transaction is bi-laterally voluntary and informed.*[24]

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[24] *Capitalism & Freedom,* (University of Chicago Press, 1962), at p. 13. The italics are Professor Friedman's,

The right of a consumer to be properly informed is now so widely acknowledged and casually argued that one might have supposed that either that state of affairs now exists or at worst is within easy striking distance. The thesis for much of the rest of the article will be that the consumer at almost every point in the bargaining process in a typical consumer transaction is at present grossly ill-informed and that furthermore the difficulties of remedying this deficiency, contrary to popular belief, and given the best will in the world, will prove immense.

Before examining the various stages in the consumer bargaining process, it may be useful to construct a model of the bargaining process as it commonly operates in a competitive market of a purely commercial character when business interests are involved on both sides of the bargain. Let us assume that a manufacturing enterprise is contracting to purchase in bulk the new materials and components it needs, say, to manufacture either television sets or motor-vehicles. First of all, it will not have to fight its way through an electronic barrage of highly sophisticated advertising emphasizing how sexy steel sheeting for motor-vehicle body work is, or how glamorous transitors for television mechanics are. Secondly, the manufacturer will have a highly qualified technical staff who will evaluate the quality of steel and transistors needed, and the quality offered. Information as to sources of supply and costing around the world will be available through trade networks, associations, technical literature and contacts. Highly expert negotiators will settle prices, delivery, quantity, quality, terms of payment, etc. Legal experts (probably house lawyers) will be retained to draw up contracts covering terms settled and all contingencies. Standard form contracts will not be treated as a formality and signed unread. The bargaining process from start to finish is an entirely real one involving highly informed parties who are both skilled in dealing in the commodity in question and experienced in the process of bargaining itself. Nothing is a formality. The argument for non-governmental interference in such a process is a formidable one. Let us now see what happens when the motor-car or television set, or whatever the case may be, is released into the consumer market-place.

(a) *Advertising*

The first stage in the bargaining process in the typical consumer transaction is the advertising stage.

No factor has had so profound an impact on the consumer bargaining process as modern advertising. In 1966, advertising was

running at about $16,500 million a year in the U.S., and at about $821 million a year in Canada. This represents an annual expenditure on advertising in the U.S. of over $80 *per capita* of population and in Canada of over $40 *per capita* of population.[25] The three leading soap companies in the U.S. spend $430 million a year on advertising. Bristol-Myers' annual advertising bill of $130 million exceeds the United Nations' entire annual budget of $117 million. The $17 billion dollars spent each year on advertising in the U.S. is equivalent to the total amount of government expenditure on medical, hospital and health services.[26] The consumer pays dearly for the benefit, if any, that he derives from being told what he wants.

The social and ethical issues raised by modern advertising have given rise to enormous debate. Modern media, particularly television, have made available to advertisers a large and captive audience which can be exposed to very sophisticated presentations of a product at very frequent intervals. At what point this becomes a socially unacceptable form of psychological conditioning is the essence of the debate. Some, like Packard and Galbraith, see advertising as artificially contriving many of today's consumer wants. This view is probably overstated because in a sense production almost always precedes and creates the corresponding wants. Presumably, there was not a widespread demand for bread, the staff of life, until someone produced it and its virtues were made manifest. Some, like Huxley, see modern advertising and the conditioning it involves as one of the fore-runners of the *Brave New World.*[27] One of Huxley's prescriptions for the ill, however, namely close legislative regulation of "psychological" advertising etc.,[28] may, on another view, itself involve the imposition of a value system, determined by the State, on the consumer which is equally destructive of individual freedoms. According to Hayek at least,[29] we may simply be setting off for the Brave New World by another route. Some, like Boorstin, argue that the world of images and illusions created by advertising and the media generally are alienating the individual from reality.[29a]

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[25] O.J. Firestone, *The Economic Implications of Advertising,* (Methuen, 1967), at p. 35.

[26] See Sidney Margolius, *The Innocent Consumer v. The Exploiters,* chap. 2.

[27] Aldous Huxley, *Brave New World Revisited.*

[28] *Ibid.,* at pp. 109, 110, (Perennial Library ed.).

[29] *Supra,* p. 273.

[29a] Daniel J. Boorstin, *The Image,* (Pelican ed., 1962): A world is created where "the Grand Canyon itself [becomes] a disappointing reproduction of the Kodachrome original" (at p. 25).

Others again, like J.A.C. Brown,[30] argue that modern advertising is not nearly as great a social evil as critics assert. Brown argues that a man's essential or "nuclear" personality is established at an early age and the kind of "conditioning" involved in advertising can rarely change this. It can only encourage him to indulge already existent psychological needs etc., and what is wrong with this?[31] Even if the premise here is sound, this view is still suspect in that it implies that a person should be entitled to indulge every psychological impulse that occurs to him. Has society yet become that permissive?

An interesting and rather unorthodox thesis in defence of modern advertising has recently been developed by an Italian writer, Giancarlo Bruzzi.[32] Bruzzi argues that advertising, so far from creating social values, simply reflects the values that already exist in society.[33] Those who wish to regulate advertising are really protesting (in a futile way) at the social values which it reflects:

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[30] *Techniques of Persuasion*, (1963).

[31] *Ibid.*, chap. 7. Martin Mayer, *Madison Avenue, U.S.A.*, (Harper, Row), argues a similar thesis: "Advertising is the wind on the surface, sweeping all before it when it blows with the tide but powerless to prevent a shifting of greater forces" (at p. 312).

Mayer also argues, rather more dubiously, that modern advertising finds a justification in the concept of an "added value":

"Whenever a benefit is promised from the use of a product, and the promise is believed, the use of the product carries with it a value not inherent in the product itself... The fact that the value is fictitious as *perceived* by the consumer does not mean that it is unreal as *enjoyed* by the consumer. He finds a difference between technically identical products because the advertising has in fact made them different" (at p. 311). "Many people will object that advertising creates "false" values for a product, but in an economic context, it is unimportant whether a use value enjoyed by a consumer is true or false. Outside standards of judgment cannot be applied to assess the reality of private gratifications. The history of human vice indicates that values most widely regarded as false will always seem real enough to command a price in the market place. The truth or falsity of advertising values is a matter of individual opinion, not a subject for objective analysis" (at p. 315).

[32] *Advertising; Its Cultural & Political Effects*, (University of Minnesota Press, 1968).

[33] Brown *op. cit.*, n. 30, at pp. 157, 310 *et seq.*, and Mayer *op. cit.*, n. 31, at pp. 315 *et seq.* argue the same point.

The point carries some force. The principal thesis of Thorstein Veblen in *The Theory of the Leisure Class*, written in 1899, revolves around his concepts of "pecuniary emulation", "conspicuous consumption", "the pecuniary standard of living" and "pecuniary canons of taste". Veblen complained, in much the same terms as modern writers such as Galbraith, Fromm, Packard, etc., about consumption for status. The paraphanalia of status may have been a little

> Advertising proposals made by those who want advertising to be truthful and honest — purely informative — are, in the last analysis, only compromises....[34] The compromise solution to the moral problems of advertising is dubious from every point of view, and especially the political one. Advertising that dissociates itself from the values of the society in which it acts — here neocapitalism with its faulty competition, its economy and mythology of welfare, its strong horizontal and vertical social statification — and at the same time tries to sell goods that are a direct result of this context, supports only the negative aspects of that society. It does so by allowing the values of the society to operate more insidiously and to persist longer....[35]
>
> We can rightly ask the advertiser to respect individual values in his messages if we can accept the fact that the individual we speak of is no longer the one delineated by humanistic culture. Moral complaints against advertising, based on individualistic ethics and making accusations against an instrument that works in a socially valued ethic, can only create confusion. To consider these complaints, advertising would have to reject the values of society, deny its own history, promote the reform of individualistic ethics, or revolutionize existing society.[36]

Bruzzi argues that advertising is neither licit nor illicit, good or evil, in itself, but only relative to a context or system of values.[37] He argues that the true social function of advertising should be seen as the wearing out, the consumption, of the values of the so-called "neocapitalist" system:

> Man must go on consuming the goods of the present, and many of those of the future; he must go on consuming the doubtful comfort, doubtful beauty, doubtful justice, and other new aspects, marked and insidious, of privilege. Man is engaged in a race that can end in his victory or his destruction. He must consume wildly, consume so frantically that he undoes the technocrat's arrogance, an arrogance most of us have assumed as our own. Man must show the technocrat how impotent he really is; the technocrat must have undeniable proof of his inability to "satisfy" in the serious sense of the word....[38]

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different — large mansions, liveries, servants, banquets, hunting, elaborate dress, etc. — but the psychology seems to have been the same. Veblen argues that the desire to consume for status is in fact traceable to the predatery instincts of ancient man. Certainly, it seems long to precede the advent of modern advertising. Bruzzi, *op. cit.*, n. 32, argues that what has made the consumption ethic more prominent today is not advertising but *the fact of affluence* itself. Modern technology has enabled people to indulge their desire to consume more easily than formerly.

[34] Bruzzi, *loc. cit.*, n. 32, at p. 28.

[35] *Ibid.*, at pp. 31, 32.

[36] *Ibid.*, at p. 124.

[37] *Ibid.*, at p. 140.

[38] *Ibid.*, at p. 137.

> Informed, courageous advertising men also look to this new man when they work to fulfill all the promises of technocratic society, helping to bring the moment of its death closer....[39]

On this view, advertising will destroy the value system upon which it is premised. The system destroys itself. A revolution in social values cannot be legislated. We must wait for the apocalypse.

A difficulty with all these views of the role of advertising in the formation of social values, and particularly of consumer wants, is that they tend in each case to be *a priori* in nature. Precisely what impact advertising has in this respect, and thus on the bargaining process in the consumer market-place, can only be determined by detailed empirical research. So far, speculation and dogma have been accorded a priority.[40]

However, we are not here required to come to a concluded view on this debate. The essential question that arises in relation to advertising when evaluating the viability of a philosophy of information as a basis for a programme of consumer protection is the *kind* of information modern advertising makes available to a consumer, and deficiencies in it.

One point about modern advertising which is beyond dispute is that for the most part it does not purport to be informative, that

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[39] *Ibid.*, at p. 141.

Others have seen the end of advertising in other ways. Galbraith in *The Affluent Society* writes (at p. 161):

"In a society where virtuosity in persuasion must keep pace with virtuosity in production, one is tempted to wonder whether the first can forever keep ahead of the second. For while production does not clearly contain within itself the seeds of its own disintegration, persuasion may. On some not distant day, the voice of each individual seller may well be lost in the collective roar of all together. Like injunctions to virtue and warnings of socialism, advertising will beat helplessly on ears that have been conditioned by previous assault to utter immunity. Diminishing returns will have operated to the point where the marginal effect of outlays for every kind of commercial persuasion will have brought the average effect to zero. It will be worth no one's while to speak, for since all speak none can hear. Silence, interrupted perhaps by brief, demoniacal outbursts of salesmanship, will ensue."

Marshall McLuhan in *Understanding Media*, (Signet ed.) at p. 202 states:

"When all production and all consumption are brought into a pre-established harmony with all desire and all effort, then advertising will have liquidated itself by its own success."

This view is, of course, inconsistent with the norm of expanding production which will always require new wants to be contrived to consume the additional consumption.

[40] The economic implications of advertising have been left out of account here because they do not bear directly on the question of the impact of advertising on the bargaining process. For a discussion of economic considerations, see O.J. Firestone, *op. cit.*, n. 25.

is, it does not convey information of facts about a product which are capable of verification by reference to any kind of objective criteria.[41] Today, I am encouraged to buy my breakfast cereal because it "snaps, crackles, pops", my Coke because it is "the real thing", my floor cleaner because it is a "white tornado", my Buick because it is "something to believe in". As Boorstin says, "Celebrity is made by simple familiarity induced and reinforced by public means. The celebrity [whether person or product] is the perfect embodiment of tautology: 'the most familiar is the most familiar' ".[42] Some goods, for example, now carry on their packaging: "As Advertised in Life". The depths of irrelevance have been plumbed.

The law has been slow to catch up with the realities of modern advertising. Even today, the burning question in law reform circles still seems to be, what is to be done about false and deceptive advertising in the traditional senses of those terms. Hence, the Canadian Minister of Consumer and Corporate Affairs has declared that the main objectives of recent false advertising legislation are the devices of bait and switch, "free" offers, deceptive use of contests,[43] etc. However, these represent an infinitismally small proportion of all modern advertising. The preoccupation of the law with them demonstrates once again its limitless capacity for making irrelevant responses to highly relevant problems. To quote Boorstin again:

> The broadest of the old distinctions which no longer serve us as they did is the distinction between 'true' and 'false'. Well-meaning critics (including many in the advertising profession) who say the essential problem is false advertising are firing volleys at an obsolete target. Few advertisers are liars. A strong advertising profession has its own earnest ethic. Lies are not so readily diffused through newspapers and magazines, over radio and television. They are not so eagerly believed. The 'evils' of advertising could be easily enough reduced if they came only from lies. The deeper problem is quite different. In some ways it is quite opposite. Advertising befuddles our experience, not because advertisers are liars, but precisely because they are not. Advertising fogs our daily lives less from its peculiar lies than from its peculiar truths. The whole apparatus of the Graphic Revolution has put a new elusiveness, irridescence, and ambiguity into every-day truth in twentieth-century America.[44]

If it is accepted that advertising today is either not at all or at least not fully informative about the qualities possessed by products, a philosophy of information would justify the intervention of the law to remedy this deficiency. What might be done?

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[41] See Boorstin, *op. cit.*, n. 29[a], Fromm, *Escape from Freedom* at p. 148 *et seq.*

[42] Boorstin, *op. cit.*, *n.* 29[a], at p. 70.

[43] Press Release, July 31, 1969.

[44] Boorstin, *op. cit.*, n. 29[a], at pp. 216, 217.

First of all, it should be noted that the law in redressing informational deficiencies is likely almost invariably to find itself on the side of utility. This is not because the law is committed to a utilitarian philosophy of consumption but because industry will almost never find it to its advantage to emphasize utility in its advertising. For example, it pays industry to emphasize the overwhelming beauty of the yearly styling changes in its motor-cars rather than to emphasize that a car will last thirty years — the former sells more cars. In the law's few ventures into the marketplace in this respect, this point has been borne out. For example, the law in many jurisdictions[45] now requires advertisements relating to the availability of credit in some cases to set out the effective interest rate on the credit available. Thus an airline or finance company can advertise the virtues of a holiday in Bermuda on a "fly now, pay later" plan, but it may have to point out at the same time the disagreeable fact that interest will be charged at 18% per annum effective. Similarly, some jurisdictions now require dealers in second-hand cars to furnish reports on their cars to consumers at the time of a sale.[46] These reports must disclose the state of repair of certain components, principally the safety components of the car. Thus, a dealer can advertise a car as the sexiest thing on four wheels but is required by the law at the same time to point out that the state of the steering system renders the car unfit to drive. Again, in the present anti-smoking campaign of the Canadian Government, television advertisements are shown depicting a woman in a gas mask in a smoky restaurant; these contrast with industry's representation of a blond in a woodland lighting up a Kool.

What are some of the problems involved in ensuring that advertising presents *all* the facts about a product with equal force so that an informed shopping decision can be made?

The Canadian Government's anti-smoking advertising campaign illustrates these problems well. If it is sought to emphasize the health hazards of smoking as strongly as industry emphasizes its attractions, then the State presumably has to be prepared to advertize as effectively — in terms of frequency, sophistication of presentation, exploitation of psychological fears, etc. Two consequences would then have to be contemplated. First, the advertising bill the consumer would directly or indirectly have to carry would double. Instead of paying perhaps 20 cents in the manufacturer's sales dollars, the

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[45] *E.g.*, all Canadian jurisdictions except Quebec, but see now Quebec Bill 45 (1970).

[46] *E.g.*, s. 19, Manitoba *Highway Traffic Act* 1966; s. 49, *Ontario Highway Traffic Act* 1968.

consumer would be paying 40 cents. But then, in that case, would it not be better simply to ban all cigarette advertising? However, this again would involve us in the issues raised in the first part of this article. Secondly, the process of conditioning and counter-conditioning the consumer, rather than enlightening him, may instead confuse him and, like Pavlov's dog, simply make him neurotic.

If these two factors rule out a counter-advertising barrage by the State, then retreating a stage, one might ask whether industry itself might be required to present more complete information about its product. This might be thought to be in line with requirements relating to advertising of credit terms and safety reports about second-hand cars. First, though, it would seem unrealistic to expect industry to present, side-by-side, two opposing characterizations of its product setting out vices and virtues. To require industry in its advertisements to depict at the same time the blonde in the woodlands lighting up a Kool and the woman in the gas mask in the smoky restaurant seems somehow repugnant to common-sense. On the other hand, to allow industry to include in its advertisements simply, *e.g.* a dessicated grade stamp indicating relative nicotine and tar content is to allow the virtues of the product to be presented much more forcefully than its vices. To that extent, the consumer is not as well-informed about some features of the product as others. To that extent his shopping decision will not be a fully informed one. Another solution may lie in the direction suggested by the so-called "fairness" doctrine applied by the U.S. Federal Communications Commission. This requires that the public media afford reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. The doctrine has recently been applied to commercial advertising for the first time, in the case of cigarette advertisements. Television stations have been required to donate "free" time to anti-smoking groups to broadcast anti-smoking advertisements.[46a] While this doctrine seems to meet some of the foregoing difficulties, the two objections to a counter-advertising barrage by the State which were noted above would seem equally to apply here. In addition, there is the problem of finding enough organizations (essentially non-profit making) who are prepared to counter-advertise in every case where an advertiser's information about his products is inadequate.[47]

[46a] *Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (D.C. Circ. 1968).

[47] A compromise position might be to argue that advertising should be purely informational. Bruzzi *op. cit.*, n. 32, at p. 28 *et seq.* argues that such a proposal is entirely unrealistic *a)* because it would involve repudiating social values reflected in products and would instead emphasize values which society at

Cigarettes have, of course, only been used as an example. The same problems arise right across the whole range of consumer products,[48] although obviously they increase in difficulty with the complexity of the product. For example, how is it to be ensured that I will be as well-informed about the utilitarian and functional aspects of my Buick as about the proposition that it is "something to believe in". The law can say, without detracting from the proposition that it is something to believe in, that you should, in order to make an informed decision, also know about X, Y, and Z. But how is this additional information to be got to a consumer? How are the technical details of the car's performance, durability, safety, economy to be presented to the consumer? Dramatically? Technically (and probably incomprehensibly)? Or by some system of general grading which, as in the case of cigarettes, would be shown in the advertisement. But who does the grading? Who establishes or verifies the criteria? On the other hand, to say that for this kind of information, the consumer must be resigned to consulting Consumer Reports, motoring magazines, or government Consumer Affairs Department hand-outs is to concede that in these matters consumers, generally, must be prepared to be less well informed. First, this kind of material, relative to commercial advertising, reaches only a very small section of the population. Second, that portion it does reach, because of its form relative to commercial advertising, it reaches much less effectively.[49]

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present regards as irrelevant; *b)* because information would be forced to deal with concepts which are not necessarily rational or objective anyway, *e.g.*, in the case of a car, functionality, efficiency, comfort, performance, economy, styling etc. How are variable and relative concepts such as these to be dealt with "rationally"? In other words, "facts", both in their statement and selection, cannot be "neutral" as between various values.

[48] It is difficult to understand how the Canadian government can justify its decision to isolate cigarette smoking for special treatment. Why not excessive eating, excessive drinking, driving at excessive speeds, excessive anything? Are the vices attaching to cigarette smoking any greater or any less well-known than those attaching to a host of other products?

[49] As writers such as Brown *op. cit.*, n. 30, and David Riesman, *The Lonely Crowd*, (1950) point out, group habits and values are far more important in shaping the life-patterns of people ("other-directed" people) than any influence the media is likely to have. The odd communique from the Consumer Affairs Department received by a small percentage of a given social group is unlikely to affect habits of that percentage significantly. Moreover, members of social groups least in need of assistance are those most likely to avail themselves of these information services.

The problems involved in effective communication of information to all relevant social groups in a community are well canvassed by the Canadian Federal Government's Task Force on Government Information in its Report, *To Know and Be Known* (1969), Vol. I.

Thus, looking at the advertising stage of the bargaining process in the typical consumer transaction, from the point of view of a philosophy of information, we find that the difficulties involved in remedying informational deficiencies are enormous. None of these problems, of course, arise in the model earlier constructed of a bargain struck in a purely commercial market-place.

At the first stage of the consumer bargaining process then, a major strike must be registered against a philosophy of information.

(b) *Point-of-Sale Informational Problems*

The next stage in the bargaining process occurs at the point of sale. Apart from the question of alluring packaging, which is, of course, simply a form of advertising and raises the same issues as have been dealt with in that context, the essential question here is whether, in the typical consumer context, a buyer at this stage in the bargaining process, is given enough information about competing products to make a discriminating choice.

Let us first consider fairly basic commodities such as might commonly be bought in a supermarket context. How well is the consumer able to discriminate between competing brands of *e.g.* breakfast cereal, soap powder, canned fruit, headache cures?

An initial problem of considerable magnitude is the quantity/price correlation. If, for example, competing brands of canned peaches are retailed as follows:

(i) Brand A 30 ounces for 50 cents
(ii) Brand B 28 ounces for 45 cents
(iii) Brand C 26½ ounces for 40 cents
(iv) Brand D 33 ounces for 60 cents,

how does the average consumer in the typical supermarket environment where protracted calculations are not feasible, determine the best quantity/price ratio? The answer is, of course, that he cannot efficiently do so. A recent New York City Consumer Affairs Department study indicates that experienced shoppers had been unable to choose the cheapest variety of products in more than 40 per cent of the cases tested, and that their errors had cost them more than 10 cents in the dollar.[50] Virtually nothing so far has been done by the law to meet this problem. The first faltering steps were recently taken by New York City where regulations have been passed requiring the price per pound or quart or unit to be stated on bread, meat, fresh cereals, cooking oils, soft drinks, beer, napkins

[50] New York Times, Jan. 25, 1970, at pp. 1, 33.

and facial and toilet tissues. These regulations have come under heavy attack from industry and their validity is at present the subject of a legal challenge.[51] Obviously, they only purport to cover a fraction of the total range of consumer commodities. Also, by requiring pricing per unit quantity instead of the standardising of packaging sizes,[51a] the position is made more complicated than it needs to be, and in some cases where a commodity shows both the price for the whole unit and the price per unit quantity (*e.g.* pound or ounce), the consumer may simply be confused.

However, assuming that the problem of the quantity/price correlation can be overcome, a further factor implicit in any prudent shopping decision must be considered — quality. A prudent shopping decision involves a three part correlation, that of quality, quantity and price. How then does the consumer fare for information in discriminating between the quality of competing brands of products? How does he know which breakfast cereal is most nutritious, which soap powder is most effective, which brand of canned fruit is the best quality, which head-ache cure is the most efficacious? It is no answer to say that often manufacturers set out on the packages the chemical or other components in their products, and that the law could perhaps insist on this. To tell the average consumer that X tooth paste contains "hexo-chlorophene for whiter teeth" (and four other named components), or that Y soap powder contains "bio-enzymes" (and other components) "for a cleaner wash" tells him nothing. A statement on head-ache cures of the chemical elements in their composition is meaningless to him; for example, if he was fully informed, instead of buying Bayer Aspirin at 54 cents a unit, he might buy the same product under its generic name for 14 cents a unit. The fact is, he generally doesn't.

Thus, if errors in the quality/cost correlation are costing consumers 10 cents in the dollar, errors in the much more difficult correlation of quality/quantity/price obviously must have a major multiplier effect on this figure.[52]

How can the law deal with this problem? The solution most frequently suggested is that of grading. Consistent with the thesis that the law is entitled to complete the deficiencies in the picture of his products left by the manufacturer — deficiencies which, as we have seen in the nature of things, will usually go to the question of utility — the law would seem entitled to insist on the grading

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[51] *Id.*

[51a] *Cf.* packaging legislation presently before the Canadian Parliament.

[52] Senator Philip A. Hart recently estimated that between $30 and $40 of every $100 spent by consumers is wasted: New York Times, March 8, 1970.

of products by reference to their nutritional value (in the case of foodstuffs), efficaciousness (in the case of soap powder, head-ache cures, tooth-pastes) etc.

However, there are a number of difficulties in the way of large-scale grading. The first is an organisational one. If the State itself is to undertake the task of doing the grading, a large bureaucracy would be necessary. Even if the State were to settle specifications, and leave industry to do its own grading, a large bureaucracy would still be necessary to formulate specifications and supervise their application.

Most importantly, the impact of such a system on individual freedoms would have to be evaluated. Commenting on a bill proposed by Senator Philip A. Hart in the U.S. in 1968 which would have set up a government consumer service foundation to rate products according to the results of government tests, and disseminate the information by means of a computerized vending machine, Bishop & Hubbard, writing from a consumer standpoint in *Let the Seller Beware,* state:

> By definition, the process is a discriminatory one, based on the judgments of human beings in a government lab. The possibilities of corruption are infinite. As one critic of the plan observed: 'A $10,000 bribe is still cheaper than a one minute spot on the Johnny Carson Show'. The possibilities for argument are also endless; there are limits on objectivity in rating products. Different consumers look for different things in their purchases.[53]

Even if the law confines its rating objectives to what may be termed utilitarian or functional considerations, which may be thought to be capable of some kind of objective measurement, and even in relation to quite basic commodities, the above objections can still be sustained. For example, in relation to breakfast cereals, what is the most nutritious combination of vitamins, proteins, etc.? Medical men doubtless differ. In relation to soap powders what tasks is it *fair* to ask a given soap powder to perform? Is it fair to compare an all-purpose soap powder with a specialised soap powder *i.e.*, when are we dealing with the same commodity line? In relation to patent head-ache pills, what kinds of headaches is it *fair* to expect the pills to cure?

These questions become much harder the more complex the commodity. For example, in relation to motor-cars, when is one dealing with comparable types of vehicle for the purposes of establishing a grading category? What driving treatment and conditions is it *fair* to subject a car to?[54]

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[53] *Op. cit.*, n. 7, at p. 190.

[54] See also on this point, n. 47 above.

Would we, in setting up a comprehensive government grading system, be creating a huge and largely non-accountable bureaucratic machine? Would this be part of the "new despotism" of which Lord Hewart once warned?[55]

One final difficulty with a grading system is that it only tells a consumer that there is *some* difference in quality between given products but not, directly at least, how much difference. If, for example, a consumer is faced with a choice between two five pound packets of soap powder, one Grade A at $1.00, one Grade B at 90 cents, which represents the best buy? Unless the consumer knows as well the difference, in terms of quality, between the two grades, he cannot solve this question. Moreover, it is impossible to conceive of any practical way in which this additional information could be conveyed to him.

None of these problems, of course, arise in a purely commercial transaction like the model earlier given, where both parties will generally have the expertise necessary to make an accurate quality/quantity/price correlation.

Let us now move briefly outside the supermarket context and investigate the consumer's position *qua* information in a large single-unit purchase on credit, as for example, in the purchase of a car. The same difficulties in the quality/price correlation as have already been examined again arise here. In the case of a second-hand car, the difficulties are compounded because the buyer will not even have material such as the *Consumer Reports* etc. available to him from which to obtain an assessment of the car's quality. A dealer derives his livelihood from selling cars and presumably knows a great deal more about a car's quality or condition than a consumer who generally professes no expertise in the matter. The parties are not equally well informed about the product. The argument that the consumer can take expert advice ignores the realities of the market-place. He is urged to "buy *now*, pay later", to "drive home in a new car *today*"; the need for independent initiatives is depreciated: "Our cars are production-line reconditioned and fully warranted for your complete protection".

These difficulties — which are not new ones to us — aside, additional difficulties arise in the present context out of the issue

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[55] *The New Despotism*, (1929). For more recent, empirical studies of regulatory agencies, see Cary, *Politics and the Regulatory Agencies*, (McGraw-Hill, 1967); Kohlmeier, *The Regulators*, (Harper & Row, N.Y., 1969). The very cogent arguments adduced by Milton Friedman, *Capitalism and Freedom* (Chap. IX), against occupational licensure or certification apply *mutatis mutandis* to a system of either minimum standards or grading for goods.

of when the bargain between the parties is really struck. Let us assume the case of a man considering the purchase of a second-hand car from a dealer. He will probably ask the dealer certain questions about the car and the price in the dealer's yard, and will receive certain assurances and representations. He will perhaps take the car for a short test drive, and then in effect he says, "I will take it". Psychologically, from the consumer's point of view, the deal is struck at that point, and it is struck on the basis of the various verbal assurances and representations that have passed between the parties. However, the bargain that the law recognises is not this bargain at all. It is the bargain which the consumer is conclusively presumed to have assented to when he subsequently signs a standard from contract which is the same for every transaction regardless of what individual assurances etc. that the dealer may have given and will indeed specifically exclude liability for these. The information about the car that the dealer has in fact given the consumer and upon which the consumer has in fact relied is treated by the law as totally irrelevant to the determination of the nature of the bargain. Legal rules here conspire against a philosophy of information: first, the law conclusively presumes a man to have assented to propositions in the written agreement[56] which as a matter of common, and indeed judicial observation,[57] he has not. Secondly, by means of the parol evidence rule, it steadfastly refuses to listen to evidence as to the real bargain struck between the parties. Clearly, if the law here was concerned to promote a philosophy of information, it would reverse the operation of the parol evidence. It would provide instead that wherever the written agreement contradicted the verbal bargain, the verbal bargain should prevail.

These problems again do not arise in our model of a commercial transaction. There both business parties, and their advisers, will ensure that the written agreement finally prepared reproduces exactly the terms which have been previously negotiated. This is in contrast to the standard form agreement in a consumer transaction which, as we have seen, is specifically designed *not* to reproduce the real bargain struck between the parties.

The importance of a realistic analysis of the bargain striking process in consumer transactions is also demonstrated in relation to the questions of disclosure of effective interest rates and dealers' commissions. At present those jurisdictions requiring disclosure of

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[56] *L'Estrange* v. *Graucob Ltd.*, [1934] 2 K.B. 394.

[57] See *e.g.* Lord Devlin in *McCutcheon* v. *David MacBrayne Ltd.*, [1964] 1 W.L.R. 125 (H.L.) at p. 133.

effective interest rates for the most part require this information to be disclosed in the formal contract between the parties. But if the point of the disclosure is to enable the consumer to shop comparatively for credit, the information comes too late. It is presented to the consumer after, to his way of thinking, the bargain has been closed. Industry can happily accede to disclosure requirements of this kind and cry all the way to the bank. It can be confidently predicted that this information will make almost no impact at all on consumers' shopping habits.

On the other hand, there is no easy way of ensuring that this information does play a part in the real bargaining process. How could this be done? It is not reasonable to require credit grantors to advertise their rates because they might, quite reasonably, wish to fix a rate in each case appropriate to a particular consumer's creditworthiness.[58] The law could scarcely require the whole range of rates, and the criteria applicable to each, to be set out in advertisements.

The same problem arises with the suggestion sometimes made that the way of dealing with dealers' commissions on consumer finance referrals is to require disclosure in the formal contract between the dealer and the consumer. This is too late, of course, for the consumer to know that the dealer's advice as to sources of credit was not disinterested. The deal is already closed, in the consumer's view. Again, though, what practicable means are there for conveying this information to him at an earlier stage?[59]

Even where the law has accepted that information by itself as a policy is inadequate and has adopted a policy of regulation, *e.g.* in relation to certain implied terms and in relation to creditors' remedies, the solutions adopted often ignore the realities of the market-place. For example, the British and Australian *Hire-Purchase Acts* imply certain non-excludable terms as to quality into hire-purchase agreements relating to new goods.[60] Finance companies, however, are not required in any way to inform consumers of their rights. Thus a standard clause in a hire-purchase agreement reads

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[58] Some jurisdictions now require advertisements which mention the rate at which credit is available, or part of the terms of a typical proposal offered, to set out the true rate and the full terms. However, credit grantors are still left free not to disclose their terms at all or to advertise only the general availability of credit.

[59] For a discussion of these problems, see the Adelaide Law School Report on Consumer Credit, *op. cit.*, n. 2, Chaps. IX and XI.

[60] U.K. *Hire-Purchase Act*, 13-14 Eliz. II, c. 66, ss. 17 and 18. Australian *Uniform Hire-Purchase Acts*, s. 5.

something as follows: "All conditions and warranties, express or implied, statutory or otherwise, except as may otherwise be provided by the *Hire-Purchase Act,* are hereby excluded". The hypotheses upon which the law's acquiescence in this state of affairs is based are staggering: (1) that the consumer who has bought defective goods will know that the terms "condition" and "warranty" and the clause containing them deal with the question of defects; (2) that having worked this out, he will understand that most of them have been excluded anyway; (3) that nevertheless he will understand that the *Hire-Purchase Act* may have salvaged some glimmer of hope for him; (4) that he will go to the Government Printer's office and buy a copy of the *Act*; (5) that he will be able to find his way through and understand what is essentially a lawyer's document, and discover that he may have a cause of action; (6) that he will then take his case to a lawyer.

These problems are neatly avoided by this legislation in the case of second-hand goods. There, the statutory implied terms as to quality may be excluded by a specific acknowledgment to that effect by the consumer in the agreement. The terms are, in practice, invariably excluded. The consumer signs the acknowledgment, as he signs the agreement itself, in the belief that the whole exercise is a purely formal tail-piece to a bargain struck some time before. The difficulty of coping with exemption clauses by a philosophy of information is further illustrated by the recent Manitoba *Consumer Protection Act (1969)*. S. 58(1) of the *Act* provides that "notwithstanding any agreement to the contrary", there is implied in every retail sale of goods "a condition that the goods are of merchantable quality, except for such defects as are described". S. 58(2) states that "it is not necessary to specify every defect separately, if the general condition or quality of the goods is stated with reasonable accuracy". On the face of it, these provisions look reasonable enough: disclose or perish. But, firstly, disclosure is provided for only in the standard form agreement and thus, no matter how detailed, comes after the event, so to speak. Secondly, what is a "defect"? In the case, for example, of second-hand cars, where does wear and tear stop, and where do defects start? A used car, by definition, must be more used than a new one. That the car will be worn in some, if not most, respects could not sensibly be required to be disclosed. Again, what is sufficient disclosure of a defect? *E.g.* that the clutch is "worn"? How "worn"? What of the case where the goods do not necessarily have defects but the seller suspects they could have (*e.g.* in the case of second-hand goods, fire stock, "seconds", etc.)? Can or should a seller be able to disclose and exclude liability for *possible* defects?

Would this, however, lead to general exclusions of liability such as occur at present?[61]

Apart from exemption clauses, the same unrealistic attitude to information is reflected, for example, in the Second Schedule notice, "Advice to Hirers", which, under the Australian *Hire-Purchase Acts*, must be given to a hirer shortly after entering into a hire-purchase agreement. This notice purports to summarize the principal statutory rights and obligations of a hirer. As an example of a piece of helpful advice, the following is worth study: "With the written consent of the owner you can assign your rights under the hire-purchase agreement and he may not unreasonably refuse his consent. For details of the procedure of Assignment see *Hire-Purchase Agreements Act*, 1960, section 9".

The foregoing legislation is, however, moderately progressive. By way of contrast, for example, the Ontario *Consumer Protection Act*,[62] 1966, which confers a right of cancellation on a consumer in respect of door-to-door sales, does not require any notice at all of this right to be given to him. This piece of legislation no doubt satisfies the honour of door-to-door salesmen while doing minimal damage to their pockets. The consumer is now fully protected; any further complaints that he has will necessarily be unjustified.

In evaluating the viability of information as the basic philosophy of consumer protection, it is of note that the law itself has, perhaps surprisingly, been known to accept that there are large parts of a so-called "bargain" in a consumer context which are not bargained about at all. Llewellyn has pointed out that "any contract with boiler-place results in *two* several contracts: the dickered deal, and the collateral one of *supplementary* boiler-plate".[63] The law has recognized this, and in consumer credit transactions, for example, has recognized that a consumer will rarely be sophisticated enough, or pessimistic enough, to bargain about the consequences of his own non-performance. Accordingly, now the law in almost every legal jurisdiction regulates the "supplementary boiler-plate" and prescribes, with greater or lesser strictness, a creditor's remedies conse-

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[61] For recommendations similar to the provisions of the Manitoba *Consumer Protection Act*, see the recent report of the U.K. Law on Exclusion Clauses in Contracts *op. cit.*, n. 2, and the Adelaide Law School Report on Consumer Credit *op. cit.*, n. 2, Chaps. XII and XIII.

Another defect in the Manitoba provisions is that they do not appear to cover limitations of liability as well as exclusions of liability.

[62] 1966 S.O., 14-15 Eliz. II, c. 23.

[63] Karl N. Llewellyn, *The Common Law Tradition*, at p. 371.

quent upon a consumer's default. The philosophy of information has here been found wanting.

Another problem which must be mentioned briefly in this context is that of suit. Whether rights possessed by a consumer are bargained for or conferred by statute, they will be of no practical value to him unless he has the ability to litigate them. All the information in the world cannot solve this problem. The reluctance of consumers to sue is notorious. Caplowitz, in his study,[64] asked all interviewees: "Where would you now go for help if you were being cheated by a merchant or salesman?" 64 per cent replied that they did not know. A recent study of cases in the inferior courts of Toronto showed that only 22 consumer credit claims out of a total of 186 were disputed in actions brought in the city's County Courts, and only 10 out of 110 in actions brought in the Division Court.[65] It is a mistake, moreover, to regard this problem as being a function only of poverty. While it is certainly more acute in that case, it pays *nobody* in our present system of administration of justice to litigate the usual kind of consumer claim. The costs of the action make it logistically pointless to pursue most claims. Despite the size of the amounts commonly involved, the claims may nevertheless in some cases be of great economic significance to the consumer involved. To a man who has bought a defective motor car which requires, say, $300 worth of repairs to put it on the road, the existence of a worthwhile claim against the seller may be a matter of financial life or death. Other factors, of course, besides the economic ones also explain the reluctance of consumers to sue — delay, the hazards and unpleasantness of litigation, the economic size of the opponent, the difficulty and expense of taking time off work to attend a hearing, etc. Few of these can be removed by any system of information.

The expense involved in so resolving this problem of suit that *everybody* finds it worthwhile to pursue a consumer complaint, whatever the detailed solutions adopted, is likely to be high. Could our social priorities justify this?

Before leaving the question of information as the basic philosophy of consumer protection, two general comments must be made. First, if a philosophy of information were to prove effective, this would necessarily mean the resurrection, in some measure at least, of the concept of utility as a social value. If more balanced information

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[64] *Op. cit.*

[65] Conducted by Professor W. A. W. Neilson, Osgoode Hall Law School, cited by Professor J. S. Ziegel, *Consumer Credit Regulation: A Canadian Consumer-Oriented View Point* (1968), 68 Columb. L.R. 488, at p. 515. See also the study undertaken in the U.K. by Susan Marsden-Smedley, *Focus*, July, 1969.

is furnished to a consumer and utility is stressed as strongly as non-utility, one would expect some change in the consumption patterns of consumers.[66] These changes in consumption patterns and the return to utility as a major criterion of consumption could have profound effects on production. A very large surplus of productive capacity in the private sector could be created which would in turn create the same problems of economic security, unemployment, etc., as were discussed earlier in this article. Thus the problems that were dealt with there are not entirely avoided by turning from a philosophy of regulation to one of information.

Secondly, as to whether a philosophy of information can be made effective, it is submitted that the conclusion must be that at almost every point in the bargaining process in the typical consumer transaction, it is impossible to devise ways of conveying to a consumer relevant information in a meaningful form. With the best will in the world, the model of the genuinely competitive marketplace cannot seem to be made to fit. The mechanism of the market does not seem capable of adaption so as to produce consumer transactions which are completely "bi-laterally voluntary and informed".

IV. *Conclusion*

This essay has sought to point to some of the difficulties involved in defining an effective and workable philosophy of consumer protection. It is not suggested for a moment that the approaches examined represent mutually exclusive alternatives, or that combinations or compromises amongst approaches are not possible. To acknowledge that, however, is not to minimize the importance of constructing an overall, long-term philosophy of consumer protection. If this is not done, we cannot hope for any direction in future reforms. Without constructing a model of an ideal consumer-market, we have nothing against which to evaluate the worth of existing or proposed measures nor any proper terms on which to rationalize them when attacked. Also, we risk internal inconsistences of policy within the law.[67]

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[66] Unless the thesis of Bruzzi, *supra*, at pp. 234 *et seq.* were to prove valid.

Economic measures directed to shifting production and consumption to other areas would, on this thesis, also fail unless they reflect a corresponding shift in social values.

[67] For example, for the law to condone a system of advertising which emphasizes only non-utilarian values is inconsistent with a policy of implying terms into consumer sales which emphasize only utilitarian values. If the attractions held out by advertising are an index of the buyer's expectations when he makes a purchase, these implied terms provide no protection at all for the only kind of expectations that the buyer himself has deemed relevant.

It has further been sought to show that many of the issues raised by consumer protection are not solely, or in some cases, even mainly, the preserve of lawyers at all. Consumer protection raises many basic economic, social and philosophical issues. On some views, our economic and perhaps philosophical precepts virtually define consumer protection out of existence. On other views, consumer protection could largely be achieved through economic measures. On yet other views, consumer protection can only be achieved, without State intervention, through a spontaneous revolution in social and cultural values. On any of these views, the role of the lawyer (and law reform) in the field of consumer protection would be a relatively minor one and might perhaps be confined (as it has tended to be until now) to preventing the traditional forms of fraud.

In closing, it is suggested that when the U.S. Special Committee on Retail Sales etc. asked itself the question, "Who is to be protected from what?", the instinctive reaction of the 20th century liberal that the question answers itself is not good enough. Examined more closely, it is seen to be a very good question indeed. That the massive and mostly miscellaneous "reforms" now being undertaken fail to articulate a coherent answer to it ought to be occasion for considerable disquiet.