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Reed Dickerson

*Indiana University School of Law*

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CONSUMER PROTECTION AND THE PUBLIC INTEREST†

(Incidentally, herein, of the consumer stake in labor problems)

By Reed Dickerson*

An adequate history of the ever-shifting position of the consumer has yet to be written. When it is, several facts will stand out.

Of these the most important will be the emergence of a significant parallel between the positions of the unprotected consumer and the unprotected laborer. Both, it seems, have come to exist in an economy dominated by huge concentrations of capital born of the so-called Industrial Revolution. More specifically, the growth of modern technology and the rise of complex fabrication and mass production into "clusters of private collectivisms" have meant that any supposed balance of power between the economic entities whose interplay of mutual demands and concessions gave to Adam Smith's self-regulating economy its motive power has been drastically upset. Realization of this fact has been manifest on labor's part by the rapid growth of unionization. Of greater interest to the consumer have been such projects as the consumer cooperative or the Temporary National Economic Committee's recent investigation of the concentration of economic power in private hands.¹

The effects on the consumer of the new technology and of its attendant conglomorations of capital have been manifold. One crucial development since World War I has been the emergence of an acute merchandizing era in which the dominant concern of industry is no longer with production for human need but with the distribution of products on terms dictated largely by industry for its own ends. As competition has declined, the ultimate consumer has been persuaded to take not so much what he would otherwise have preferred as what the business man has guessed he wanted or ought to want, or in many cases merely what the business man has had to dispose of. This has come in large part as a natural accompaniment of production for an indefinite and impersonalized market where frequent over-production

† This paper grew out of a project undertaken at Columbia University in connection with Professor Patterson's graduate seminar in Legal Philosophy. Professors Llewellyn, Lynd, Handler and Alexander, (of Columbia) and Asher Isaacs (of the University of Pittsburgh) will recognize here and there the budding of more recent suggestions. The helpfulness of these men is gratefully acknowledged.

* Senior Attorney, Office of Price Administration. The opinions expressed are, of course, personal.

or the use of dated obsolescing models has resulted in forced distribution through such persuasions as the high-pressured encouragement of installment credit, or where on the other hand underproduction is oftentimes motivated by a desire to maximize profits rather than to satisfy human want.

Not only has this disparity in collective strength militated against the individual unorganized consumer but the very technological forces which have produced for him in many cases a superior product have in the same stroke rendered him correspondingly less capable, as compared with those with whom he must deal, in differentiating the better from the worse. This lag of consumer literacy behind technological advance is found, for example, in the replacement of simpler ingredients by synthetics (rayon, plastics, etc.) and in the development of elaborate goods like vacuum cleaners, packaged foods, and box spring mattresses, with their many technical qualities well concealed from the consumer. Added to this, the uninhibited creation of superficially unique “kinds” of products through the exploitation of minor differences, distinctive packaging and brand names together with the endless multiplication of unstandardized grades and sizes have made consumer confusion the worse confounded.

The net result has been a David and Goliath relationship—but minus the slingshot. It poses the complex social problem whether David is to be protected by attempting to increase his collective girth, by arming him more adequately, or by furnishing him with a governmental bodyguard, or by destroying or disarming Goliath, or by some combination of these measures. Yet, one thing is clear. The ultimate consumer's welfare cannot be left wholly to the tender mercies of much stronger private interests whose normal profit objectives are only partially concerned with the fulfillment of his needs.

Of course, the plight of the consumer has hardly gone unrecognized. An inventory of the multiform protections already available to the consumer makes an almost impressive aggregate. Besides such extra-legal helps as the co-operative, the magazine “institute”, the advisory facilities of professional associations like the American Medical Association, the Better Business Bureau, and “confidential” services like Consumer's Research and Consumer's Union, there are many legal protections. On the directly regulatory side are state and federal food, drug and cosmetic laws; safety and sanitation regulations in connection with the manufacture of clothing, bedding and electrical equipment; licensing laws regulating on the one hand the production of such commodities as spirituous liquor, bakery goods and milk or on the other hand the vending of articles by auctioneers, brokers and peddlers; statutes regulating advertising and labeling; statutes governing the possession and sale of dangerous commodities like gasoline and firearms; laws protecting trade marks and guarding against the passing off of one's articles as those of another (“unfair competition”); and in war time emergency, measures like rationing. On the money side are anti-trust
legislation, installment sale and usury restrictions, and, with the coming of war, direct price control.

In addition to statutes whose main purpose is direct protectory regulation by the state, the law has furnished certain weapons and protections to be wielded by the consumer himself. Thus in private legal controversy, he has the advantage of doctrines of negligence, fraud and deceit, duress and undue influence, the law of warranty, laws protecting in some instances the title of the bona fide purchaser for value and doctrines of rescission and avoidance in cases of incapacitation through infancy, insanity and sometimes marriage.

Some of these laws are designed primarily for the protection of the consumer; others benefit him only incidentally. But each poses a special problem in social engineering where economist and lawyer and sociologist must work hand in hand to produce a socially satisfactory result. Unfortunately, consumer protection has been sporadic, a series of mostly unrelated attempts to deal with only the more acute instances of consumer vulnerability. Legal protection of the consumer has developed now to the point where it is pertinent to inquire whether a more articulate and unified philosophy of consumer protection is not now needed. Legislatures need social criteria in framing wise legislation, and judges much guidance in interpreting ambiguous statutes or in "making" law where legislation affords no specific answer. Particularly is wisdom desired where sound statutory construction is meaningless except in terms of recognized aims. Some appreciation of the needs of the consumer has made itself felt, for example, in the courts' construction of §15 of the Uniform Sales Act, a section dealing with implied warranties generally and presuming in its intricacy a certain minimum of deliberation by seller and buyer that exists in many sale-types but hardly in all. Sound results are being achieved in the highly informal and casual transaction which is typical of the sale of food at retail, where contrary consequences might well be found to flow from the application of the self-same provisions of the Sales Act to articles purchased less frequently or purchased by a type of buyer more sophisticated than the ultimate consumer. But hunch judgments leave the course of decision haphazard and, where inarticulate, give small guidance to the less intuitive tribunal.

Nor is the broad problem one merely of extending and unifying a fragmentary movement avowedly on the consumer's behalf. While a great deal has been done to bolster his position, much has been contrived to undercut it. Over-protection of patents, protective tariffs and resale price maintenance laws are symptomatic of legislative attitudes which have been sharpened by pressure groups in an attempt not only to give full preference to business demands but even to identify business with the public interest itself. How recently the billboards proclaimed, "What's Good For Business is Good for Your Family." Likewise, labor pressures have focused only on immediate labor objectives, in even greater disregard of consumer welfare.
Realizing, therefore, that the strength of the consumer position is only relative, we must go beyond the mere consideration of positive consumer aids and weigh with similar scales business and labor measures which ultimately affect the all-important consumer bargaining ratio.

The most elementary of consumer philosophies should take into account two fundamental factors: 1.) the normal adverse disparity of bargaining power between the individual consumer and those with whom he deals, and 2.) the nature of the consumer interest, an interest which analysis shows to be complex rather than simple, and one which is thus variously exposed to injury. On the assumption that the former aspect is either self-evident or already adequately documented, and without essaying the development of a comprehensive philosophy of consumer protection, I propose to consider some of the main features of an adequate consumer rationale, principally the second of these two main considerations, the nature of the consumer interest.

The slow development of the cooperative movement tends to confirm the suspicion that the spending aspect of economic life, being little induced by technological or monetary pressures to form into units and patterns under conscious leadership, is organized with greater difficulty than the earning side. For one thing, the universality of the general interest in consumption has largely resulted either in its being taken for granted or never being completely understood. So long as buyer and producer supposedly met face to face and on even terms in a local economy where personal reputations were of paramount importance, the antagonisms of their immediately conflicting positions were resolved without undue injustice to either. But in a world in which an organized all-powerful production now deals with the ultimate consumer only as a nonhuman abstraction, and in which the minute division of individual responsibilities forms only a tenuous thread for his protection, it becomes of first importance to know and understand the precise nature of, so that we may adequately protect, the “consumer” of whom it is usual to speak so glibly.

Who is “The Consumer”?

Is the consumer merely one who uses? A distinction is normally taken between those material wants which are termed “consumer” wants (“economic goods that directly satisfy human wants”) and those which are called “capital” wants (“economic goods destined for use in production”). And yet, whether a man buys a set of golf clubs or a lathe for his machine shop, he buys to satisfy a material human want. In recognition of this fact, the differentiation is frequently phrased in terms of “ultimate consumer” and “industrial (or commercial) consumer.” But even this terminology misleads. To say that the industrial consumer of a lathe is not in the realest sense the ultimate consumer of the lathe is to confuse the lathe with what the lathe helps to produce. Literally, the “ultimate
"consumer" would seem to include any buyer who uses an article in accordance with its various utilities.

For present purposes the significant differentiation is found in the differing degrees of sophistication and bargaining strength of these buyers as compared to their respective sellers. We don't indulge our sympathies quite so much for the industrial purchaser of capital goods because generally speaking he is supposed to know what he is about. Thus, so far as the broad problem of consumer protection is concerned, it is only the crude correlation between commercial use and buyer sophistication that gives validity to a consumer classification phrased in terms of use, a classification however which in practice has been worked out largely in accordance with actual needs for protection. Confirmation of the latter point is found in those marginal commodities like fountain pens and passenger automobiles, which, though they may only play integral parts in the production of other specific commodities, are universally classed as "ultimate consumer" goods. Although this betrays the present inadequacy of a "use" differentiation, most of what follows is considered nevertheless in terms of the "non-commercial" or "non-industrial" consumer (even using those words accurately) because it is true that consumer vulnerability lies predominately in that area. Nonetheless, it will be apparent that in many instances what is said of the "ultimate consumer" is equally pertinent to the commercial and industrial buyer.

The second peculiarity of "the consumer," whether we speak in terms of economics or of law, is that he is not merely one who "ultimately" consumes, nor can he be defined solely as one who consumes what another has produced. In fact, one could hardly name a law which enures to the benefit solely of the consumer as consumer, except in so far as his consumption is somehow ancillary to a contract of purchase and sale in which the consumer is an active participant or its immediate beneficiary. Similarly, the science of price economics finds itself confined largely to studying the consumer at the point where he impinges upon the rest of the economic system, a contact which occurs where the seller matches the buyer's wit and a sale is accomplished. In short, our "consumer" is for most practical purposes nothing more than the buyer for consumption, whether it be his own or that of an immediate beneficiary; and his wants are considered only as of the moment of sale.

It is interesting to note in this connection that the limiting effect on the usage of the word "consumer" caused by the necessity of concentrating protective attention in the non-commercial area has narrowed the connotations of the word to the point where in the minds of most laymen "consumer" is synonymous with the narrower concept of "ultimate consumer."

"It is in the capacity of 'chooser' rather than as 'user' that the economist . . . becomes interested in the consumer." Kyrk, The Economics of Consumption (1923) 5. This does not mean that post-purchase enjoyment and the time dimension of use (durability, etc.) are ignored, but only that such qualitative aspects are viewed and controlled principally through the sale transaction.
This view of the consumer is not wholly arbitrary, because it defines not so much the interest in consumption as it does some practical considerations in social reckoning and control. As a consumer a man cannot ascertainably affect the economic system except as he also becomes a buyer or acts through one. Nor can the law adequately afford him the protection he requires without transactional handles to grasp.

And yet, is it true that he requires special protection? The knowledge that everyone is a consumer in some degree has encouraged the assumption that his interest as consumer requires no such consideration, and the position is supported by the argument that no one will consciously work against his own interests. N.R.A. Administrator General Hugh Johnson was said to have asserted that special consumer representatives were not really needed under the N.R.A., because the President himself represented the consumer!

The man who consumes, of course, has many other interests besides those immediately involved in satisfying his material wants. Many of

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4 Throughout the remainder of this discussion the word "consumer" will stand as a shorthand expression for "consumer-buyer".

5 Although this transaction is ordinarily a sale, it could be a gift, lease, or loan. But consider the existing law. It may be true that the injured donee of a gun which the donor had reason to believe had a defective barrel can recover in tort for negligence, and it is true that the donor is in a real sense a consumer as he shoots the gun. But since the donee would be as fully protected if he were only an innocent bystander (Restatement Torts (1938) §§405, 388, 408) the law in protecting the donee is protecting him as a man under general notions of culpability, and his capacity as consumer is only an incidental and indeterminate aspect.

Where money or other value passes in exchange for the transfer, the quality of the transferor's or supplier's conduct must be higher, it is said. But even where chattels are supplied under a contract not technically a sale (e.g., in many states food served in a restaurant, or chattels supplied by contractors for use by employees of others in work to be done under a contract) we have at most the near-sale and courts tend to predicate liability for injurious defects upon actual culpability. See Prosser, Torts (1941) 687; Restatement, Torts (1938) §§388 et seq. and §§405-8. But the law doesn't approach the protection of the consumer as consumer until with the sale it raises warranties of quality (not available to "bystanders") or absolute liability in tort under the guise of a pretended negligence (see especially the food cases). In this connection observe the gyrations of a Texas court straining in a recent decision to find consideration for a gift of a bottle of Coca-Cola by a retailer of gasoline to a prospective customer, in order that the strict accountability of warranty could be imposed on the bottler in favor of the injured donee. However, the strain was a little too much, and the court, after toying with the consideration idea, played safe and rested its decision on the more time-honored fiction of negligence. Coca-Cola Bottling Co. v. Kerlee, (No. 14156, 2nd Sup. Jud. Dist. of Texas, 12–20–40), CCH Food, Drug and Cosmetic Service, p. 18, 377.

Thus consumers (in the broadest sense of the term) are ordinarily protected by law in two ways: (1) incidentally, through laws designed to protect the public in general from certain risks, and (2) specifically (so far as possible), through laws effecting transactions leading up to consumption (the law: warranty, or negligence; the transaction: sale).

6 Lynd, The Consumer Becomes a "Problem" (1934) 173 Annals 1, 3. For a criticism of this viewpoint, see Campbell, Consumer Representation in the New Deal (1940) pp. 263 et seq.
the matters which occupy him in his non-consuming phases are either directly antagonistic to, or have some ultimately injurious effect on, his interests as a consumer. The trite example is the retail merchant whose family and financial responsibilities are large and whose immediate concern, therefore, is not so much the quality of meat he vends as the probability he will be able to keep his children's stomachs full without missing the monthly rent. True, the food he saves for himself is adequate, but what of the unappreciated retribution in the form of a broken connecting rod or a shirt that shrank too much? Or consider the over-reaching labor union which pursues only immediate labor gains in disregard not only of comparatively minor quality or price disadvantages which these union members may have to accept as future consumers of the article they make, but also of the large cumulative losses in satisfaction and purchasing power to be suffered reciprocally in the purchase of many articles fabricated by similarly shortsighted groups.

The surest key to clear thinking on this score is the realization that in the broadest sense of the word the “consumer” is not a differentiated man or group of men but the abstraction of a generalized class of interests which is common to all men and which, being but partial, far from represents their total individual orientation. Whole men do not behave in real life as one-sided abstractions in the theoretical ether and the consumer interest is hardly intelligently served without special isolation and representation. I am a “consumer” at breakfast and as to my clothes and pen at eleven, but in another aspect I am also a “producer” or “laborer” contributing to forces which, through a causal nexus too tenuous specifically to forecast, may well be insuring for me some ultimate consumer disappointment. And so, although it may be true that no man “will consciously work against his own interests,” it certainly does not follow that none will unconsciously do so.

“Consumer” denominates not a particular man, nor moreover even a constant aspect of a man, but a role in the relationship between buyer and particular products which he wants. No one is a consumer in vacuo except in the sense that the term may serve in broad economic discussion to sum up the individual’s interest as buyer in the aggregate of his then wants. Where particular controversies are involved, however, the real man wears

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7 Kyrk, supra note 3, pp. 1-2. "Any economic system or process of making a living is a part or aspect of the organic life of the individual person or groups involved. It is not a separate mechanism or arrangement designed or constructed or operated by anybody to supply a group of people called consumers with goods or services, or to distribute to a group called employees amounts of money called wages or salaries, or to provide a group called investors with dividend or interest checks, or to pay taxes to a group called government officials. Neither such a mechanism nor these groups of people really exist at all. (italics supplied) . . . People, individual human persons, are the only things there are in any economic system and in any political system. Apart from them there is no such thing as “business” or “government,” or even “society.” See National Industrial Conference Board, Studies in Enterprise and Social Progress (1939) p. xii.
his consumer guise in the market only by virtue of the fact that he bears the relationship of buyer or potential buyer to an individual product. In particular situations, therefore, the consumer interest is always a relational one.

When we say, on the one hand, that “everyone is a consumer”, we mean only that everyone wants at least something which is purchasable, though not necessarily the same thing or things. Here the consumer class is a wholly undifferentiated group with no peculiarities whatsoever. As such an undifferentiated everybody-capable-of-buying, the “consumer” has little or none of the group self-consciousness possessed by the “laborer” or “producer”, who unlike the consumer are groups apart. In particular controversies, however, the consumer interest is always a relational one where the “consumer” is differentiated from the “non-consumer” by virtue of the fact that the latter has no desire for the kind of product in question. But even a differentiation by product gives to the consumer no such common-adhesive, necessary to group self-assertion, as it gives through intimate personal association to the laborer or producer or seller. Hence it must be plain that if the consumer group is not to be broken faggot by faggot in the bargaining struggle, its interest in procuring the given product upon equitable terms must be protected by safeguards imposed in large part from without.

In any discussion of consumer problems, therefore, it is necessary sharply to distinguish four useful but overlapping concepts, all of which unfortunately have been associated with the tag “consumer”:

1.) “The consumer”

Under one scheme of economic analysis, the consumer is a differentiated group, distinct therefore from a residual group of “non-consumers.” Wyand, *The Economics of Consumption* (1937) pp. 97-102. Its basic assumption is that people are ordinarily classified in terms of their major interest or function (e.g., “doctor,” “preacher,” or “stenographer”). If this generality is raised to the dignity of a principle of classification, “consumer” becomes the name for that group of real persons whose general roles as buyers for consumption are more important to them than their roles as producers. Mr. Wyand himself prefers to emphasize dominant function rather than dominant attitude. “Thus the individual who creates as much as or more than he personally consumes is functionally a producer. Conversely, those whose consumption exceeds their productivity are consumers.”

For some purposes, such a definition has undoubted merit. For one thing, it tags those persons who are most likely to be self-conscious about their interests as buyers for consumption. But in the general matter of the protection of buyers for consumptions the validity of this kind of definition would depend on the questionable assumption that we needn’t worry too much about such “non-consumer”-buyers of consumer goods because if gyped or otherwise adversely affected, their losses are more than compensated for by their gains as producers. Such an assumption is unwarranted because it distinguishes the “consumer” from the “non-consumer” buyer of the same product solely on the basis of differences in purchasing power. Despite our dearth of tears for the well-heeled sucker, we must remember that there are disappointments other than mere money ones. Not even the rich “producer” wants his belly tainted with malta fever germs or otherwise to be disappointed with the quality of the product he buys, be it replaceable or not. And even from the pure money angle, there is no reason why we shouldn’t protect Wyand’s “producer”-buyer along with the “consumer”-buyers, assuming the seller’s or manufacturer’s conduct to be economically or socially unjustifiable.
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(usual relational sense) comprising all those who want a particular product;
2.) "The consumer" (broad economic sense) comprising all those who have
wants satisfiable by purchase, without regard to nature of want or product;
3.) "The individual consumer", meaning any person who is a member of
either of the two foregoing consumer classifications; 4.) "The real man",
meaning human beings as such in the totality of their interests, consump-
tive and non-consumptive.

In this discussion, the word "consumer" will be used primarily in its
relational sense, except where the context indicates otherwise. This
approach accords with the fact that in the market most men act like con-
sumers only when they are buying or contemplating buying particular
products. The broader concept is frequently helpful, but the unfortunately
indiscriminate use of a single label on several referents carries danger of an
inadvertent transfer of connotations.\textsuperscript{9} Since we have but one word for two
of our four concepts, we proceed at some risk.

"THE CONSUMER" IS NOT "THE PUBLIC"

Not only is there a tendency to confound consumer interest with the
extra-consumptive interests of particular human beings, but a similar con-
fusion exists between the consumer interest and what may be termed
"the public interest."

One of those who proclaim that the consumer interest coincides with
that of the public is Professor Ben W. Lewis. Says he, "Of course, any
single consumer has a special personal interest as well as his interest as one
of the body of consumers in general in defending his position in given
transactions against overreaching pressure and demands from other special-
interest groups, but any positive special interest of consumers can at most
relate only to an immediate, short-run concern of individual consumers or
particular goods in particular transactions.\textsuperscript{10} But, he adds (concerning
goods produced by child labor) "It is difficult for me as a consumer to distin-
guish between my satisfaction in obtaining goods of the desired quality and my
satisfaction in obtaining goods produced under conditions of which I approve.
I doubt whether the first is to be denominated a 'consumer' satisfaction,
and the second, properly, a 'public' satisfaction."

There is some naivete, of course, in assuming that the purchaser of
Bubblemeyer's Supreme Baloney on a rainy Wednesday is carefully
balancing social interests as he pays over his money. Consumer's Union
may be otherwise, but it is safe to say that the average consumer cares
very little whether his whiskey is bottled by child labor or sweatshop
slaves, and he cares still less when he can get it at a bargain. But Mr. Lewis

\textsuperscript{9} See Chafee, The Disorderly Conduct of Words (1941) 41 Col. L. Rev. 381, 387.
\textsuperscript{10} 'Consumer' and 'Public' Interests under Public Regulation (1938) 46 J. Pol. Econ. 97, 102.
\textsuperscript{11} Id. at p. 102. (Italics supplied.)
was probably asserting only that we may pass over immediate consumer
demands to what in the long run is objectively “good for him” as a con-
sumer and identify only the latter with the “good of society”. Even if
this be his position (more on this in a moment) it is difficult to justify his
subsequent assertion that “the consumer” is entitled to equal representation
in the bargaining struggle with producers, owners and laborers only to the
extent that his immediate wants are consonant with those of society. This
contention is unfortunate, because as a practical matter individual con-
sumers will hardly be found running to any governmental or private con-
sumer advocate so unbiased that it will first perform the self-same job of
measuring the limits of socially legitimate demands that belongs properly
to the legislature or court or administrative tribunal itself. A more
“realistic” approach would recognize that the minimum consumer pro-
tection is necessarily based on a frankly partisan assertion of the consumer’s
position, not only as regards what consumers “ought” to want but also as
to what they are actually demanding.

But quite apart from the practical requirements of adequate consumer
representation, any view which purports to identify the consumer with
the public appears to be misconceived. The kind of consumer to whom we
can give best practical consideration is the buyer for consumption and his
immediate beneficiaries. Again, he is only an economic abstraction and
the actual interests he represents include but a part of the total range of
human values. To identify him with the public at large, as Lewis does,
is to lose the interest in consumption in the larger whole, leaving it in-
adequately understood and inadequately represented. On the other hand,

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12 “We would never think it appropriate for a man placed in the position of protecting
the public interest to act primarily as an agent for labor against the owners, or for him to
act primarily in the interests of an owner against labor. We would call on him to balance
the two interests against each other as the case for each was argued before him (italics supplied)
... to place any Government official in the position of having to represent both the public
interest and the consumer interest of the public is to make him both judge of all parties
and prosecutor for one of the parties at interest. Probably no single element in the thinking
of the past year has done more damage to the consumer than this confusion.” Means,
The Consumer and the New Deal (1934) 173 Annals 7, 14. See further Campbell, supra
note 6, p. 264 et seq.

13 When he asserts that “It is difficult to discover any divergence between the interests
of the public and those of the total consuming group” (supra, note 11) (italics supplied)
Lewis is talking of consumers-in-the-abstract, which of course includes everybody (Definition
No. 2). But, as Means points out (see infra, note 15) there is still a difference between
the interests of everyone as consumers and their total interests as real persons. Moreover,
Lewis’ analysis gives no weight to the fact that in particular controversies (the only kind
practical economists are interested in) “the consumer” who seeks representation is never
larger than the existing market for the article in question (Definition No. 1). Comprising
normally a much smaller group than “the public” this body may have interests quite
adverse to those of the public. Furthermore, I can’t see how merely representing “the total
consuming group” is representing anybody at all as consumer. What kind of “represent-
ative” is it that is “for you” in the abstract but unwilling to assert the only phase of your
interest which is exposed in the particular controversy?
to confuse the public interest with the narrower interest of society in material consumption is to close one’s eyes to other interests of equal validity. It is all very well to say that the thing which gives meaning in the first instance to invention and research, as well as to the more prosaic “job”, is the fulfillment of material human needs. But it is something else again to assert with Adam Smith that these activities are pursued only as means and not also as more immediate ends in themselves. The laborer is entitled to enjoy his work and the producer to exist as something other than a slave to the consumer.

It seems appropriate at this point to attempt a tentative formulation of the consumer interest as related to the public interest.

Practically, it is essential to know first the nature and scope of the actual demands of particular buyers for consumption, whether or not those demands be consonant with their own long-run interests as persons or consumers, or with like interests of fellow consumers of the particular product, or with the interests of “non-consumers.” This short-run interest of particular individuals in the given product we may term “actual buyer demand.” It is also necessary to consider the consumer interest in this product in its ordinary consumer-in-the-aggregate sense, usually implying some degree of mutual concession by individual consumers (e.g., standardization for mass production). This is the normal “short-run” consumer interest. Further, assuming full enlightenment as to the ultimate effects of fulfilling immediate demands without reservation, we may assume a number of “long-run” interests possessed by the consumer. Thus, individually and in the aggregate, consumers of the given product should, as real persons, consider their interests as possible future consumers of the same product, their several interests present and prospective in other products, and severally their manifold interests of a non-consumptive nature. Tempered then with one or more of these considerations, a short-run consumer interest becomes a “long-run” consumer interest.

14 “Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.” Smith, *The Wealth of Nations* (Cannan’s ed., 1937) p. 625.

15 Means expresses this viewpoint emphatically. “In meeting any specific situation it is essential to recognize that the public interest and the consumer interest are not identical. First the public interest covers all spheres of human activity—religious, political, economic, social—while the consumer interest is purely in the economic sphere. Second, the consumer’s interest is only one of the many interests involved in our economy; it is the interest of buyers rather than of owners, or workers, or producers, or sellers. To confuse the public interest with the more specific interest is to lose sight of the even-handed balance which is implicit in the term “the public interest.” True, all persons are consumers, and also, the public; but the public interest embraces the whole. Even as it applies to the economic field alone, the public interest calls for the protection of the owners of industry, the managers of industry, and the workers of industry as well as the consumer.” *The Consumer and the New Deal* (1934) 173 Annals 7, 14. Also: Campbell, *supra* note 6, pp. 109-110, 263 et seq. Lewis’ theory, of course, would also protect the laborer. “Consumer” and “Public” (which includes *inter alia* “Laborer”).
The "public interest," which is in itself a long-term interest, is that calculus of long and sometimes short-run interests which produces the maximum of value for society. It is indefinite in content, but it is far from being a meaningless generality. A proper balance of conflicting general interests is a necessary goal, and the mere fact that precision is impossible in effectuating a workable result in no way detracts from the desirability of making the best compromise possible in a world of human fallibility. But even if "consumer" is substituted for "public," the problem of reconciling immediate demands with what is ultimately for the best still remains, if only on a smaller scale.

Let us examine, therefore, the actual immediate demands of buyers for consumption to discover if possible the extent to which they must yield to some long-run consumer interest and to which, in turn, the latter may successfully be reconciled with that most inclusive of interests, the "good of society."

WHAT THE CONSUMER WANTS

(WHAT HE OUGHT TO GET IS A DIFFERENT STORY)

Generally speaking, the first of the two primary concerns of the ultimate consumer, his "substantive" stake, is the interest in satisfying by purchase (and within his resources) the material wants which at the time prompt him to act. Here we could list all of the consumable goods now produced and many others besides. For the present, it is sufficient to classify them roughly into (1) food, drugs, and cosmetics, (2) clothing, household goods, luxuries, and personal devices used in business or sport, (3) gas, water, light, and telephone, and (4) miscellaneous items, including such quasi-goods as insurance, loans, and securities purchased for investment. This classification, a loose but useful one from a lawyer's standpoint, is made according to the nature of the goods sought. Economists and psychologists like to go further and carve the consumer himself.\(^\text{16}\) For present purposes, however, we are not interested in how or why a man wants what he wants. The question is, what does he want and to what extent is he entitled to get it?

\(^{16}\) Wyand, for example, finds the consumer with needs, which produce wants (feelings on the part of an organism that something is lacking and a vague groping after what is missed). Wants are primary (essential to survival) and secondary (cultural). From wants sprout desires (want focusing itself on specific areas of satisfaction). These are "biological", "technological," and "sociological," and, needless to say, myriad. Among the advertising and selling experts, Cowrie likes his consumer in three chunks, while Starck finds sixteen pieces more digestible. For the psychologists, Jung sees three complexes of instincts: (1) self-development, (2) social welfare, and (3) continuance of race. Laird, taking a curbstone position, says that men are ultimately motivated by the unconscious desires for adequacy, romance, life, and masculinity. And so on without apparent limit. See Wyand, supra note 8, pp. 3 (note), 120-122, 139, 152, 154. For Lough's analysis and a combination of Dunlap's and Poffenberger's lists, see Waite and Cassady, The Consumer and the Economic Order (1939) pp. 134-135.
But the satisfaction of the immediate material need hardly exhausts the interests of the buyer for consumption. With an eye on the possibility of saving something for future purchases, he is equally desirous of attaining his present wants at the cheapest price he can gracefully get away with paying. If he is not always as heartless as this might seem to imply, he is at least extremely careless about inquiring into the circumstances surrounding the manufacture of the article in question or as to those matters which now induce the retailer to offer it at a higher price than he may feel inclined to pay. Here is the second primary consumer demand in the transaction which makes him a consumer-buyer and it will be termed his "pure price interest."

It should be clear that neither of the consumer-buyer's two primary demands is fully compatible with "the good of society" or with the long-run interests comprising it.

For one thing, there are a number of consumer demands which in their very inception are considered to be incompatible with the public interest. Among the socially illegitimate wants, for example, narcotics, alcoholic liquors, tobacco, firearms, contraceptives, abortifacients, pornographic literature, gambling apparatus, and slaves have at various times been included. Also, otherwise proper demands are sometimes held to be unfulfillable, wholly or to a degree, for reasons growing out of special circumstance. So with rubber needs in a nation at war.17

And in a number of respects, even from their own selfish point of view, consumers must compromise immediate wants in favor of more permanent enjoyments. Standardization, though neglecting the quality refinements of minority and individual needs, must be condoned in the interests of meeting the demands of quantity and general "knowability."18 Moreover, particular consumers can hardly insist that desirable quality standards be enforced faster than technology can meet them for consumers-in-general of that product. Meat and milk, for example, might be more impure than one theoretically ought to consume, and yet any statute seeking to prevent their sale before the large mass of farmers and packers were practically able to meet the legal requirements would drive these items from the menu (and both farmer and packer into insolvency).

The public interest restricts the consumer's interest in buying the given article at the lowest price quite clearly in the case of sales and luxury

17 If we treat the government as consumer, this is an inter-consumer (individual) problem, resolved in favor of the government for reasons of obvious public policy. War-time hoarding is likewise an inter-consumer problem.

18 It is interesting to note, however, that this "concession" may be more theoretical than actual in view of the finding of a Hoover-appointed commission that under mass production the consumer has a wider selection than ever. Recent Social Trends, Report of President Hoover's Research Committee, Vol. II, p. 858.

19 Distinguish sharply here the pressure which stops the sale from that which furnishes only a moderate incentive to comply with desirable standards.
stamp taxes, although in these cases the added burden on the consumer, except for some inconvenience, is probably slight; of graver concern to him are "hidden taxes." Also there are tariff acts which not only maintain higher price levels for both domestic and competing foreign goods but in some cases preclude altogether the consumer from purchasing a superior article. The consumer's desire for a low price makes him a party in interest also in problems of wage and hour legislation.

All this is significant because it shows a clear necessity for some sacrifice of actual buyer demand to the general short-run consumer interest as well as for concessions by the consumer not only to his own long-run interests but to the interests of the producer and laborer and the public at large.

More difficult are those broad areas where policy considerations are diffuse and where the extent to which mutual concessions must be made by the consumer, producer, owner, and distributor is subject to wide differences of opinion. What, for example, is the legitimate consumer stake in the Miller-Tydings Act and the state "fair trade" laws, which permit the enforcement of resale price maintenance? Is it overbalanced by any legitimate interest of the retailer, wholesaler, or manufacturer?

Further, to what extent is the consumer entitled to a true and full disclosure of facts concerning the article he purchases? The buyer, at all odds, is not interested in every detail which may have affected the composition or manufacture of his product, and it would be placing an impossible burden on the seller to require the inclusion of a case history with each sale. At the other extreme, public policy clearly forbids the use of explicit and deliberate falsehoods as selling inducements. Between these extremes, we are faced with the more controversial puffing, the material failure to disclose, and the false implication. These matters include broad questions as to the kind and amount of descriptive matter labels should contain and as to whether the deception implicit in false and misleading containers and in goods whose pleasing exteriors belie their general inferiority are to be permitted. On the side of the seller, the interest is partly one of the practical feasibility of disclosure and partly one of the legitimacy of withholding information. Should the manufacturer of Aunt Melinda's Pies be compelled to print his recipe on the label and thereby divulge to his competitor a valuable trade secret? On the side of the consumer, the immediate concern is to guard the usual expectations of the consumer class represented in the sale, in order that deception may be avoided.20

Because of the seller's and producer's inherently superior capacity to know the ingredients and the capacities of elaborately fabricated commodities, the consumer's vulnerability on this score has greatly increased since the last century, and it is in the face of subtle institutional shifts like

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20 A possible compromise: Filing of the recipe or formula with a governmental or responsible private agency for secret test and published approval or rejection. Compare the compromise achieved under the Food, Drug and Cosmetic Act of 1938.
this increasing lag in consumer sophistication that the consumer turns to the law for new protections. One of the broader questions thus raised is how far the law ought to go beyond the mere prohibition of positive deception and impose on the seller or manufacturer a duty of educating the consumer in the character and utility of his product. Further, to what degree should the law require the seller to step beyond affirmative disclosure and subsidize, upon pain of absolute liability, the normal expectations of the consumer in the transaction? Courts are having such an issue thrust squarely upon them in “food suits” brought by the consumer against the manufacturer. In states in which contractual privity requirements are fatal to warranty claims, suits sounding in “negligence”, where actual culpability or due care is impossible of ascertainment in the given case, raise the practical if not legal issue whether the court, after due lip service to unworkable principles, is to leave the loss where it fell or place it on a normally careful producer who is nevertheless in a better position to guard against such risks or to effectuate a sort of consumer insurance by increasing prices to cover the costs of absolute liability.

Producer, seller and buyer have legitimate interests here and these interests must somehow be reconciled “in the public interest.”

Perhaps the fiercest consumer antagonisms are to be found in the second principal phase of consumer interest, the interest of consumers in paying as little as possible for the satisfaction of their wants. Here, again, the public has an interest in reconciling the desire of the producer or retailer to get the highest price for the least value given with the desire of the consumer to get as much as he can in return for as little as possible. Reconciliation of these interests does not necessarily spell price fixing, but even those economists who disclaim all affiliation with “fair price” theories must concede the social desirability of spreading the effective purchasing power over as wide a base as possible, as well as of keeping the productive agencies of economic society profitable and otherwise attractive enough to assure their continued existence.

**The Consumer has a Dual Personality**

(As HAVE THE SELLER, MANUFACTURER and LABORER)

In resolving the enumerated issues, it is important to keep in mind the difference between those issues touching substantive consumer needs and those which involve only the prices at which those needs are met. In the former cases, it is useful to recall Adam Smith’s observation that “consumption is the sole end and purpose of all production” and to remember, therefore, that with the reservations already made (and with some to follow) the needs of the consumer should be the principal test. But to the extent that pure price questions are involved the consumer’s claim to preferment ordinarily disappears and the issue between buyer and seller becomes one of spreading purchasing power and fairly apportioning the revenue burden. Let us examine these notions a little more fully.
Parenthetically, it should be stated that the present discussion does not purport to be a sociological description of what is involved in every sale or in every economic issue affecting a sale, or involved to the same degree in all cases where descriptively it has some measure of aptness. As such it would be, if not largely misinformation, at least unverified assumption without the buttressing of statistical and factual data which are not now available. What is attempted however is a functional analysis, by types, of ultimate poles and frames of reference which, though they are not always reached in actual circumstance, are almost always in some measure approached. Such a study of tendencies and potentialities gives us valuable standards against which to measure the concrete and actual. If such a project is unwarrantably abstract, let the mathematician put aside his probability curves and the philosopher his schemes of ethics.

In ideal, the ultimate function of the legal order is to facilitate the achievement for society of the maximum of satisfaction for its individual constituents. In pursuance of this goal the law should encourage the fulfillment of “legitimate” human desires, including those desires which fall within the scope of the present inquiry. It seems, therefore, that the heavy burden of proof should be upon him who would impede the commercial flow of satisfactory goods to the ultimate consumer. Most manufacture, commerce, and business enterprise are devoid of ultimate meaning except in terms of material human needs to be satisfied. On this score, then, the interest of the consumer, if not fully synonymous with the public interest, is at least almost wholly consistent with it and, it would seem, as little compromise as possible should be called for.

In short, so far as the substantive needs of the consumer depend upon the respective purchases by which those needs are to be satisfied, the buyer and seller should stand in the relationship, metaphorically speaking, of master and servant, and not in any sense on a parity. In the hierarchy of values involved in this dimension, the consumer’s wants are the central value and any conflicting value or demand should be required to “show cause.”

Contrast the wholly different economic relationship between consumer-buyer and seller in matters purely of price. Here their positions are not complementary in the great division of effort. Service and subservience ought to disappear. For within the area of price differential which measures their initial disagreement and below that figure at which the consumer would be discouraged from buying, buyer and seller stand in the relationship of active competitors, in the true sense of that word. The haggling buyer and seller “bargain”, true, but in the very act of bargaining the parties are competing with each other within the price differential for a division of purchasing power available for use in future transactions.

21 As future buyer, the real man will step into a new and distinct role in which he will be a “consumer.” But even in the immediate transaction in which this person is a “seller”, he has an interest as potential buyer.
Buyer and seller are not competitors in the sense that they compete as potential buyers for the product of the same or even similar sellers (the buyer may want to win the price differential to use to purchase a radio, seller to buy a water softener or to give to a church). However, they are competitors in the accurate sense of that term in that each wants the same thing (as much of the price as possible) for the same general purpose (to strengthen his position as buyer or donor in future transactions). Thus in much of the bargaining struggle there is a strain of pure competition.

Briefly to summarize, the seller is servant to the buyer in one aspect of the relationship, because it is the very essence of his social function to minister to the buyer's material needs. In another aspect, the seller is competitor to the buyer because being a person and not merely an abstraction, the seller is also, even in this transaction, acting as a potential consumer-buyer-in-future-transactions and has, therefore, the same interest as the buyer in procuring the price differential for himself.

If this analysis is sound, it follows that the consumer has no such claim to have preferment where price alone is at the root of the issue in question. Issues between buyer and seller on this plane become those of finding a fair balance between persons who, in the absence of qualifying circumstances, should be treated as equals.

What has been said in connection with the buyer-seller relationship is applicable also to the relationship between the consumer-buyer and those persons who stand behind the seller (middleman, manufacturer, employees of seller and middleman and manufacturer, and owner). As to the consumer's substantive needs, not only the seller, but the manufacturer, laborer, and owner, stand subservient to the consumer, because relative to these goods and their flow to the consumer their only economic and social function is to serve his needs.

Again, contrast their relationship in the closely related but quite distinct pure price plane. On this level qualitative differences disappear. It has been aptly said that seller, middleman, manufacturer, worker, and owner

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23 The line between matters involving immediate "substantive" needs and those involving only "pure price" demands is sometimes difficult to draw. At least, superficial appraisals here are treacherous. For example: What about the suit made of inferior cloth? This looks at first like a matter involving consumer's substantive need. Look again. If the only result of the inferior quality of the article is the shortening of the useful life of the article and the buyer can (and probably will) make a satisfactory replacement in the market when it wears out at a price he feels able to afford, the significant loss, it can be argued, will be only a money one. Of course, this will not excuse a seller or manufacturer who has actively deceived the buyer, but such an analysis puts the consumer in a different frame of reference from that to which superficial examination would have placed him. Such possibilities as embarrassment or disappointment would seem to be truly "substantive." It is another question of course, as to how much weight they should be given in the particular case.
all compete with each other for the consumer's dollar. This statement becomes a truer picture of the situation when we say that seller, middleman, manufacturer, worker, owner, and consumer all compete for the consumer's dollar. Although with reference to a particular commodity their respective roles are defined in terms of "labor," "capital," and so forth, yet with reference to what each party seeks out of the transaction pattern in its money phase the parties stand in the true relationship of active competitors for a given quantum of purchasing power. In such a contest why should one party be given any ultimate preference?

Let us see how specific problems may be approached in the light of this analysis.

**The Consumer Stake in Labor Problems**

*Situation No. 1.* Suppose a labor union goes out on strike for the sole purpose of blocking the adoption by their employer of a process that means a commodity better suited to the needs of consumption, but which also means an appreciable amount of at least temporary technological unemployment. According to the notion of public interest developed, this issue, involving the qualitative aspects of the commodity is, presumptively at least, 24

How can this analysis be justified, it may be asked, in view of the obvious fact that the consumer is not so likely to deal with single individuals as with impersonal enterprises like chain stores, department stores, mail order houses, and supermarkets? How, likewise, can the large manufacturing corporation compete in price matters with the consumer as potential consumer-in-future-transactions when obviously, not being a real person, it has no interest in consumption? But such an objection looks at form rather than substance. The policies of even "soul-less" corporations are directed by individuals for whom the maintenance or increase in the corporate receipts means the ultimate maintenance or increase in their compensation. Such persons are "potential-consumers-in-future-transactions," and such persons are for all present purposes "the corporation."

Thus, even that traditional arch defender of the free competitive system, the Supreme Court of the United States, not long ago vindicated the notion that the consumer is not always entitled to the lowest price he can squeeze out of his producer. In *Appalachian Coals, Inc. v. United States*, 288 U. S. (1933) it permitted a large number of producers in the buyer-dominated coal industry to band together in a price-and-production-affecting scheme designed to protect the industry from chaos.

Some of these cases are complicated by the fact that the union made its demand in the alternative: either don't use the improved technology or use it and pay the same number of laborers as before. If the former alternative is taken by the employer, the consumer's substantive needs are affected; if the latter, his pocketbook only (see infra). But until the employer acts, how shall we classify the controversy?
to be resolved in favor of the consumer, him who is the ultimate end of business and commerce. The burden of proof, therefore, should be upon the union to show why the strike should not be considered as being for an unlawful purpose. How much the consumer should be forced to compromise temporarily or permanently, should depend upon the difficult question of degree of hardship threatened and the means actually available for alleviating that hardship. Especially if oiled by an improved system of vocational training, the very imperfect working of the principle which holds that technological progress provides its own compensatory opportunities may help in the given instance to solve the long-run difficulty caused by technological unemployment, perhaps with the aid of public or private (possibly union-sponsored) employment services geared especially for the purpose. Sometimes the difficulty can be minimized even beforehand by attempted forecasting of technical change and the attendant degree of displacement to be expected, as well as by a better timing of the introduction of revolutionary technical improvements to periods of comparative prosperity. The more acute short-run hardship can oftentimes be alleviated by other means than consumer compromise, as for example through the dismissal wage or outright unemployment compensation.27

It is not the purpose of this discourse to answer all the difficult questions which arise in any balancing of economic and social interests. However, the suggestion is thrown out for what it is worth that temporary or even semi-permanent unemployment compensation is a sounder alternative than keeping men at work on jobs which have no further social function than to furnish an excuse for paying them a dole, especially when the latter manner of distributing purchasing power means the unnecessary compromise of those ultimate material values which it is the primary duty of the economic system to serve. Unemployment compensation is more forthright than a "sales tax" on the consumers of affected articles. Furthermore, it is less expensive because it is not intended to be a permanent solution and its costs can be more equitably spread in the form of taxes than can the costs of fortifying a status quo against the push of technological progress. But the wisdom or folly of this suggestion is beside the point for present purposes because whatever the means of alleviation adopted it is true that to the extent that such palliatives fail to remove socially undesirable labor hardships, the consumer can be required to practice patience and perhaps even a degree of permanent forbearance. Beyond this, however, the consumer’s needs alone should control.

Situation No. 2. But suppose, instead, that the union strikes for the sole

purpose of securing a wage increase (or of blocking a wage decrease) an objective which has obvious relationship to the price at which the consumer will have to buy. The relation of consumer to adversary in this case, it is readily seen, is in sharp contrast to that involved under the first hypothesis. Here the substantive needs of the consumer are not at stake, and the problem is quite different one of equitably apportioning purchasing power between consumer, worker, manufacturer, and the others, all competing as potential buyers-in-future-deals.

In making such an apportionment some difficulty is encountered in the fact that with most widely sold articles “the consumer” is an unwieldy heterogeneous animal composed of persons who in this role remain largely anonymous and whose money needs as real persons are hardly to be individually appraised, let alone generalized. The worker, on the other hand, is identifiable as comprising that much narrower and more uniform group of real persons who have worked on this article. Such a group, as a group, may be aptly characterized in terms of purchasing power as “needy” or “well off”.

The solution of the apportionment problem in the particular case would seem to depend upon our judgment of how high proportionately the wages of this particular group ought to be, as compared with the returns of the seller, manufacturer, middleman, and people in general. No comparison can be made with the consumer in most cases because of the consumer’s

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28 I assume here, perhaps too readily, that an increase in wages means a necessary increase in price to the consumer. This is not an inevitable consequence, of course, because the wage raise may be absorbed out of the employer’s profit, if any. This is likely to be true in the case of many ten cent or even seventy-five cent articles. Whether the rise in labor cost is passed on to the consumer will probably be determined in large part by the quality of competition in the field and the extent to which retail prices have become institutionalized. The rationale of existing law is apparently that the blood of the consumer (in case the retail price is increased) is in all cases on the hands of the employer rather than the striking employee, since there is almost universally approval of the wage strike, or else that we have no remedy that is not worse than the disease. Keller, Labor Disputes and Collective Bargaining (1940) §85. However, generally speaking, I believe my assumption to be substantially correct wherever labor costs represent a large factor in cost of production, especially with goods priced at more than a dollar and where like labor pressure is being brought throughout the industry more or less simultaneously. In any event, I can raise a clean-cut “pure price” issue between consumer and laborer by supposing that the union tries directly to affect the price at which the employer sells. See, e.g., Standard Engraving Co., Inc. v. Volz, 200 App. Div. 758, 193 N. Y. Supp. 831 (1922) where such an attempt was held unlawful under the local anti-trust law.

29 I am supposing a case in which the price difference involved threatens no change in the scope of the market for the article. Cases involving such a change are considered later.

30 This is not always true. Consider, for example, the matter of consumer credit. Installment buying is done in large part by those whose general purchasing power is modest (81,000 to 2,000 yearly income), so that to a limited extent installment buyers can be tagged in terms of price needs. See Sienkiewicz and Vergari, Regulation of Consumer Installment Credit (1941) 16 Temp. L. Q. 6. Something similar can be said of the caviar lover.
normally heterogeneous makeup. Therefore, the consumer as such can ordinarily be omitted from the estimate wherever the problem is purely one of distributing purchasing power, because lacking uniformity of need the consumer group taken as a whole cannot be said to possess proportionately either too much purchasing power or too little. That is not to say that there is no legitimate consumer claim to a low price. The very breadth of the consumer group in respect to any given commodity makes it a most desirable recipient of price advantages after obvious discrepancies in particular adversary groups have been taken care of, because in most cases it means the widest possible diffusion of purchasing power. Thus, the wider the existing market for the article, the more reason there is for giving the price advantage to the consumer, especially where a necessity is involved. This is possibly one explanation why the Department of Justice has kept so busy with milk and bread anti-trust prosecutions.

Having made this general qualification let us vary our second situation slightly. Suppose the union strikes to block the adoption of a process that means a commodity equally suitable to the consumer's needs but a cheaper one by virtue of the fact that a certain number of laborers may now be dispensed with (again technological unemployment, as in our first case, but this time with a different value to the consumer). As in our unmodified second situation, the qualitative needs are not at stake,

31 For example, see United States v. Carozzo, 37 Fed. Supp. 191 (N. D. Ill. 1941). The truckmixer not only made a better quality of concrete but made it more cheaply because it reduced labor costs. See also Hopkins v. Osley Stave Co., 83 Fed. 912 (C.C.A. 8th, 1897), where an injunction was granted against striking employees of a barrel company seeking to eliminate the use of machines for hooping barrels, which materially lessened costs. In Dubrow Pure Food, Inc. v. Glazel, 263 N. Y. 589, 189 N. E. 712 (1933) the court held it unlawful for unions to picket an employer who had discontinued his restaurant in favor of a cafeteria, thus dispensing with the services of waiters. Accord: Welinsky v. Hillman, 185 N. Y. Supp. 257 (Sup. Ct. 1920). On the other hand, in C. B. Rutan Co. v. Local Union, No. 4, Hatters' Union of America, 97 N. J. Eq. 77, 128 Atl. 622 (1925) the court declined to enjoin a strike by hat finishers to force the re-establishment of an unprofitable "making" shop shut down by the employer when he discovered it cheaper to buy hat bodies than make them. These cases are cited not for their holdings but to show that such controversies are not purely hypothetical. The ironical fact is that in almost none of the reported cases (see also cases cited in note 26) are the interests of the consumer even mentioned, let alone weighed. Certainly where quality of article is at stake, it would seem fair to recognize that the consumer has at least some stake in the controversy inasmuch as the whole purpose of business in its employment of labor is to serve his needs. Instead, so long as labor doesn't monkey directly with prices, the courts treat the labor controversy as a sort of football game against capital, against the consumer at best a paying spectator.

32 Same assumption as in note 29. In order to avoid other confusing complications in the text, I have skirted several problems which may have occurred to the reader. For example, I have just assumed a cheaper product but one equally good in quality. Of course, if the technological device or process struck against means a better product, we have a combination of hypothesis No. 1 and hypothesis No. 2, as modified (this, indeed, was the very situation in U. S. v. Carozzo, 37 Fed. Supp. 191 (N. D. Ill. 1941). Suppose, however, that the device or process means not only a cheaper product but a poorer one. This frequently arises in the analogous situation of the "sale" of entertainment, where
and the problem is again one of apportioning the available purchasing power between consumer, worker, and the others, all as potential buyers-in-future-transactions.

The solution of such a problem is not so easy as it might first appear. On the side of the union the obvious argument is that it is absurd to argue about apportionment of purchasing power when the obvious and immediate result of taking away a man's job is to strip him altogether of the power to purchase his needs. But there is also a respectable argument for the consumer. On his behalf it can be contended that the price reduction resulting from the technological advance, with its attendant "temporary" unemployment, means actually more purchasing power for existing customers for this kind of article released for filling other needs. The argument is completed by the contention that the laborer is a person and being a person will also be benefited as a consumer or potential consumer of this article, so long of course as we can help him across the unemployment canon with such aid as may be necessary. Of course, what he may gain as a future consumer of this article will be very slight, but he will be buying many articles and although no assurance can be given of definite economic compensation to specific individuals, the cumulative savings to him and to other labor groups resulting from a general application of this policy may on the average be considerable. In short, the argument is that in the aggregate of such changes of employment the affected laborers as persons stand to gain in the long run more purchasing power as consumers than they lose as laborers.

If such a solution were arrived at and labor were required to capitulate in a pure price matter, how could we rationalize this with the notion that, as competitors for purchasing power, consumer-buyer and worker, et al, stand on a parity? Let us scrutinize our concepts a little more closely.

"Consumer," by definition, is a concept which encompasses all buyers and would-be buyers of this article, which the worker has made and the typical case is the strike to compel the management to employ live musicians instead of mechanical ones (Opera on Tour, Inc. v. Weber, 285 N. Y. 348, 34 N. E. (2d) 349, cert. denied 62 S. Ct. 477 (1941) or to employ a "full" orchestra instead of a skeleton one (Haverill Strand Theatre, Inc. v. Gillen, 229 Mass. 413, 118 N. E. 671 (1918). See also Motion Picture Machine Projectionists Protective Union v. Rialto Theatre Co., 17 Atl. (2d) 836 (Del. 1941). If you talk price, you find the consumer interest at odds with the union. If you talk quality, the consumer and striker would seem to be on the same side of the fence. The immediate issue, it seems to me, is only to determine the consumer's net interest, in order to know what is at stake. This tussle, then, is not consumer-labor, or even inter-consumer, but rather intra-consumer in the sense that it involves the conflict of the consumer's predominating substantive wants in this entertainment or these goods as against those extremely speculative and much diversified (consumer by consumer) substantive future wants which will be frustrated to the extent of the price increase. After making this somewhat uncertain determination of what the "average" individual consumer's long run interest is, you come out with either a net price interest threatened by the union (cf. note 28) or a net substantive interest threatened by the employer. From there on the text analysis is applicable.
seller has sold. This includes, of course, the man who is here playing the role of worker. Thus the real man's divergent interests split, appearing in economic discussion as included on the one hand in the abstract concept "worker" and on the other in the abstract concept "consumer." And like the "consumer" concept, the "worker" concept is two-fold. It includes the real man's interest in the substantive aspects of his job (satisfactory working conditions) and also the money aspect, which represents his weapon for doing battle as buyer in future transactions.

Observe that there is no overlapping of the "consumer" and "worker" concepts here. To the extent that the real man's interest as a future buyer rests on his wages, the wherewithal to buy any article, his interest is protected as part of a more inclusive "worker" interest. To the extent, however (and watch closely here) that this same man's interest as a future buyer of this article (which he has helped to make) is concerned with its good quality or low price, his interest is protected as part of the broadly inclusive "consumer" interest. "Hairsplitting" or no, the distinction has firm root in usage and failure to recognize it means only prolonging an unfortunate confusion. The distinction is interesting because it means that the numerator of the wages-price ratio which represents actual purchasing power is weighed in the "worker" category while the denominator is lumped under the "consumer" heading. (Here is further proof that one must never confuse the real man with any of his several and simultaneous abstractions or groupings of "him").

Thus where the issue is "fair price" versus "fair wages," consumer faces laborer as a competitor for a given quantum of purchasing power, so far as purchasing power is dependent upon the wherewithal to buy (i.e., the numerator in future transactions). Where on the other hand the worker is asked to surrender his job so that the consumer may have a cheaper article, provision having been made for a new job or for unemployment compensation or other substitute, the decision is made on the assumption that the consumer interest is paramount, i.e., that in the aggregate of such shifts of employment the average individual laborer as a person stands to gain in the long run more purchasing power as a consumer than he loses as a laborer. In such a controversy consumer and laborer groups are not competitors.

But there is also an added reason why the worker might be required to yield to the consumer interest in the case supposed, if another factor is present. In case the difference in price means the widening of the market for the article so as to make it available for the first time to a substantial number of persons who have heretofore been consumers only in the potential sense that they desired this general type of article but felt unable to afford it, or involves the narrowing of an existing market, we have on the con-

33 In the immediate tug of war, the buyer views the differential as denominator (price), the seller as numerator (profit). But each hopes to use it in the future as numerator.
34 Compare the situations supposed in notes 29 and 32.
sumer side not only the interest of actual buyers in future purchasing power, but also a substantive consumer interest. This substantive interest is, of course, the interest in procuring this article for the satisfaction of existing wants.

Again, the difference between the consumer's substantive wants and his pure price demands is not always obvious. If the consumer is already purchasing the article, his only interest in its price is the interest of one who is thinking in terms of his position in future transactions. If, however, the consumer has been persuaded that he cannot afford the article, that part of the price differential which means the difference between buying and not buying represents his substantive interest, for at least as disappointing as a defective article is no article at all. Thus, where the extent of the market is substantially affected, our situation is thrown back to that extent to become substantially like our hypothesis No. 1. (strike against the use of work-saving device for improving quality of product.)

As to those commodities which are already available to almost everyone, slight fluctuations of price involve probably only that aspect of the consumer interest which is competitive with like interests of seller, manufacturer and worker. The same is probably true of even less widely enjoyed articles, where the price differential involved is not large enough to entail an appreciable change in the breadth of the market. Where the price differential is so large, the consumer stake is both "substantive" (as to those individuals who may now be buying or kept from buying this article for the first time) and a "pure price" consideration (as to those who will purchase anyway).

This illustrates the important fact that even though they are quite distinct there is an intimate relationship between substantive and pure price considerations. The consumer's original desire for the article in question as well as his later satisfaction with it are functions both of quality and price. If the price of a particular grade persuades him that he cannot afford it after unavailing attempts to wangle a price compromise, he will choose an inferior grade within his minimum requirements which he can afford, and will try to forget what he could not attain. If price is no object he will consider only his substantive needs. In most cases, however, price is important, and since the fulfillment of future wants will be threatened by too generous spending in the present transaction, the consumer's immediate concern is to balance competing wants, present against future, in making the determination of that top price he can "afford" to pay in the present transaction. That tentative estimate made, the bargaining may proceed. At any one moment, however, the consumer is likely to have one

35 Supra, note 23.
36 "Once a certain scale of living has been attained, the average consumer evidently prefers, when income decreases, to spread his expenditures over a wide variety of low-quality goods rather than to concentrate his buying power on fewer items of higher quality" Waite, and Cassady, The Consumer and the Economic Order (1939) 57, and see pp. 53-58.
of his two basic interests tentatively fixed in his mind, the other elastic.\textsuperscript{37}

**The Laborer, also, has His Substantive Needs**

*Situation No. 3.* Suppose a labor union goes out on strike for the purpose of blocking the adoption of a process that means a commodity equally suitable to the needs of the consumer but a much cheaper one by virtue of the fact that certain costly mechanical precautions whose principal purpose is to insure the safety or health of the worker have been dispensed with.\textsuperscript{38} Here, again, the consumer's qualitative needs are not at stake, assuming no appreciable widening of the market, but only his interest as potential buyer-in-future-transactions. The difference between this hypothesis and the preceding one lies in the nature of the adversary interest at stake. Here the worker's interest is not merely one in future purchasing power (i.e., wages) but in his immediate substantive needs. The worker is demanding a due consideration of his immediate health, safety and happiness, to the extent that they are dependent on his work. In this respect he is no mere competitor for the consumer's dollar. This is our first hypothetical situation in reverse, and a like principle ought to govern: Substantive needs should presumptively prevail over antagonistic pure price wants. This, of course, is no more of an absolute rule than it was in our first application of it. If the price differential at stake is considerable and the worker hazard is slight, it may be for the best interests of all, as real persons, to swing the balance in favor of the consumer. Otherwise the worker reigns supreme.

\textsuperscript{37}This is due partly to the fact that one factor is normally more important to him at any given moment and partly to the fact that the human mind prefers to deal with one variable at a time. Thus if the prospective buyer determines that he cannot afford more than $150 for a radio-phonograph but that that amount is about the minimum a high fidelity machine can be bought for, he will tend to peg $150 in his mind and hunt for the best machine he can at that price. However, if he sees what he wants for $165, he will momentarily put quality questions aside and concentrate on driving a bargain for that machine at $150.

\textsuperscript{38}Suppose for example that the employer is a paint maker who persists in using as a solvent the highly dangerous benzol (benzene) \( \text{C}_6\text{H}_6 \) instead of substituting a much less harmful but more expensive benzol derivative like toluol \( \text{C}_8\text{H}_8\text{CH}_3 \), which is much less toxic and volatile, or xylo (\( \text{C}_8\text{H}_4\text{CH}_3 \)), which is very toxic but much less volatile.

The possible situations here are myriad. To get a fair idea of the potential dynamite here, see Read and Harcourt, *The Essentials of Occupational Diseases* (1941) and appended bibliography. Examine especially the chart insert at p. xiv for a picture (industry by industry) of potential health hazards. For a labor slant on the problem, read Burnham, *Dangerous Jobs* (1933) International Pamphlets, No. 34.

But why are there few if any reported labor disputes raising this issue? Are all employers altruistic? Or do the selfish ones yield readily to union pressure in order to forestall adverse publicity? At least such controversies do arise. Experts of the Industrial Hygiene Foundation tell me that a Pittsburgh steel company only recently yielded to strike pressure to submit to an expensive investigation and reduction of a serious lead hazard. The *Bayer* case, (supra note 26) might well have involved this problem, since paint spraying usually entails substantial health hazards.
Unfortunately, what should be only an occasional exception to a rule favoring the worker's substantive welfare has in too many cases been itself the rule. Here, it seems to me, is a place where the consumer may well have been receiving more than his due. Silicosis, mine-burials alive, sewer asphyxiations, and other occupational hazards of a serious or substantial kind have too long been accepted complacently. On the one hand, it is good to know that such institutions as workmen's compensation are an established reality, despite the fact that too few of these remedial statutes provide compensation for occupational diseases and even though their added costs are in large part passed on to the consumer. But unfortunately mere money, whether received in the form of compensation or in the form of wages made sufficiently high to offer a persuasive economic lure, is hardly a satisfactory answer to crippled bodies and lives in any society in which economic compulsion continues to play a disproportionate role in the selection and retention of jobs.

It is the principal purpose of this discussion to define the consumer's substantive wants, to distinguish them from his pure price demands and to point out that either or both may have to risk compromise with the substantive as well as pure price demands of the employer, seller, middleman, manufacturer, owner and employee. In such a project I can do little more than suggest that, like the consumer, each of his adversaries has both his substantive as well as his money demands. The latter are probably self-evident, but the job of defining the worker's, et al, substantive wants needs doing. For present purposes I merely suggest that there are such substantive wants and that generally speaking they are as valid as those of the consumer.

Situation No. 4. Suppose, then, that substantive wants are at stake on both sides. That is, suppose that the elimination of precautionary devices means not merely a cheaper article for the consumer but rather a better one. Should it make any difference whether the worker's physical and mental welfare is asked to bow to the consumer's substantive needs rather than to his mere price demands? Probably. At least we can say that of the consumer's two principal interests the former deserves the stronger protection, other factors constant. In this, then, we have a fourth and distinct situation: consumer's substantive needs versus adversary's sub-

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39 This situation arises comparatively infrequently, since the typical case of serious occupational hazard is usually avoidable at some increased expense (which may or may not be passed on to the consumer) without necessarily sacrificing the quality of the end result desired. But it is far from rare. For example, the milling of flour under the processes used today to achieve a finer quality of flour than was obtainable with the old water-driven grinding mill entails a serious flour-dust explosion hazard that appears at present to be unavoidable. Viscose rayon workers are exposed to two substantial poison dangers. “So far, however, it has not been possible to eliminate these dangers completely even with the best efforts of the engineers.” Survey of Carbon Disulphide and Hydrogen Sulphide Hazards in the Viscose Rayon Industry, Com. of Pa., 193, Dept. of Labor and Industry, Occupational Disease Prevention Division, Bulletin No. 14, p. 5.
stantive needs. Here the elements which made for competition in the second situation are wholly lacking. Who should yield here?

In the abstract, the parties stand again on equal footing. However, this time they face each other not as mere economic competitors for a quantum of economic power, but as man and man, each seeking immediate want fulfillments incompatible with those of the other. There is no problem of apportioning purchasing power; rather, the analogous one of distributing immediate substantive satisfactions. In such a struggle the worker has as much right to fit working conditions as the buyer has to a fit product. But no simple yardstick can be laid down. A just result here depends upon making a common sense estimate of the respective hardships. Thus, if the advantages to the consumer are slight and the dangers to the worker great, the solution seems obvious. Likewise, in the converse situation. Where the scales are evenly poised, you flip a coin or contrive a compromise. In between there is every gradation.

**Consumer vs. Manufacturer or Producer**

What has been said above with specific reference to issues that find the consumer at odds with labor is in large part applicable whoever may be the consumer's adversary in the particular controversy. In the case of the manufacturer we have, as in the case of the laborer, not only the competitive aspect in respect to pure price factors, but also the substantive interest. What we called "fit working conditions" for the laborer may well be expanded into the more inclusive though somewhat effete concept of "fit conditions of endeavor." Though it may be argued that the typical manufacturer hardly cries for "fit working conditions" in the same sense and degree as the laborer, it is nevertheless legitimate to point out that he is entitled at least to a certain minimum of what in fact he has been taking. Actually, this substantive interest is rarely at stake in controversies involving the consumer and, on the other side, the consumer has no interest except to the extent any excess in the manufacturer's enjoyment comes out of the consumer's pocket.

Most of the consumer's antagonisms with the manufacturer involve on the manufacturer's side the money aspect alone, *i.e.*, his interest as a future consumer-buyer or donor (or in economic prestige). On the consumer's side, however, it may typically be either quality or price of article which is threatened by the manufacturer's attempts to enhance his own purchasing power. Thus the manufacturer may find a greater profit available in an inferior article than in a better one, or a greater profit in an expensive article available to a few than in the same article available at a lower price to many. In this latter situation, as has been previously pointed out, the individual consumer's interest threatened may be one either of price or of substance. If he can afford the article and buys, his loss is only a price one. However, if he is persuaded that he cannot afford the article, his sub-
stantive interests are affected, because he has had to forego the article altogether.

One particular issue between the consumer and the manufacturer that needs further exploration is the legitimacy of burying patents, as well as the broader problem of delaying the exploitation of technological improvements. (The problem of technological unemployment is not necessarily involved here.) As presently protected, moreover, patents raise monopoly and restraint-of-trade issues in which consumer gouging has been a frequent result. Some of the problems of standardization have already been alluded to. Likewise, the practical problem of the adoption of desirable technological improvements to the demands of mass production.

With regard to such problems it is apparent that to an extent they raise only the problem of compromise between individual short-run consumer demands or the problem of ascertaining in the given case the long-run consumer interest. And to an extent they raise a real issue between consumer substantive needs and manufacturer price wants.

In this connection a complication is presented. In many cases, the ostensible issue between consumer and manufacturer may in reality be only a discrepancy between actual buyer demand and the aggregate short-run consumer interest in the article or a discrepancy between short-run and long-run consumer interest. This is because the manufacturer is in a sense a "trustee" of the consumer's long-run interest. Thus even the "perfect" manufacturer, seeking for himself no more than his just economic due, would nevertheless find himself frequently in a tug of war with particular consumers concerned only with their immediate demands, as for example on a matter of standardization. To a degree, the consumer must depend upon the manufacturer's more sophisticated judgment to determine the best ways of getting the most satisfactory products to the greatest number of people needing that type of product. Standardization, withholding patents, et cetera, may under certain circumstances be for the best long-run interest of the consumer and of particular consumers. In other circumstances, on the other hand, they may not. These practices may benefit only the manufacturer's pocketbook at the expense of the consumer. Under the first supposition, the manufacturer should "win." There everybody "wins." Under the latter supposition, the situation is this:

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the consumer's side, substantive (and perhaps price) needs; on the manufacturer's, pure price. Therefore, under our rationale the consumer presumptively wins unless the manufacturer can "show cause," which seems highly improbable.

One problem here which may strongly affect the public interest, but which is too complex for extended treatment here, is the extent to which the manufacturer, seller, et cetera, may be allowed to create consumer want for what they have to sell rather than simply to provide what it is assumed that the consumer already wants. To assume that it is the seller's and manufacturer's job to provide only for a long list of static wants uncreated and unconditioned by seller manipulation is naive, because it is the very essence of the seller's attempts at persuasion to make the prospective buyer want to buy this article. The total bargaining process is one partially of adjusting product to need and partially of adjusting need to product.41 But the question of degree remains, the degree of desirability of having this kind of want satisfied. Extreme example: It is against public policy to permit the seller to persuade the buyer that he wants slaves or abortifacients. More difficult example: Assuming that it is desirable to permit the fulfillment of existing liquor wants, is it socially desirable to permit the seller to create through advertising new appetites? Respectable arguments could be made for the negative. Still more difficult example: Is it socially desirable to permit sellers and manufacturers to cultivate snob attitudes, a love of glitter without substance, and so on?42 It appears that Consumer's Research, for one, thinks not.

On the pure price plane, there is the matter of consumer credit, including the installment sale. For the one party we have an extra profit. For the other, a possible invasion of his long-run interest through an overbuying resulting in a substantive need filled but at the expense of other and perhaps greater future needs. Here is partly a case for protecting the consumer from himself and partly one for protecting him from the seller. The public interest, of course, is especially strong here in view of the high inflationary potential inherent in uninhibited consumer credit.43

Note that although in a very superficial sense there is in these cases an issue of consumer versus seller or manufacturer, the real issue in most of them is one mentioned earlier: consumer versus the public, but this time with the seller pulling the consumer's wires. So, if it be determined that it is inconsistent with the public welfare to have a certain kind of a want satisfied (e.g., abortion) or a certain kind of want satisfied to a certain degree (e.g., intoxicating liquor, or rubber and chromium in a nation at war) then it should be equally against the public interest to permit the

41 For factors affecting consumer choice, see Wyand, supra, note 8, Part III.
42 Consumer demand manipulation is considered in Waite and Cassady, supra note 16, Chap. XI.
seller or manufacturer to attempt a seduction. Although such a generality can be swallowed with the greatest of ease, it is of course another matter to digest the content of the term "public interest" in specific cases.

But the foregoing issue is not economic at all. It is a moral and social one which it is not the province of price economics to answer.

**After "Free Enterprise,” What Then?**

Does the rationale of this analysis presuppose a capitalistic system, one of "free enterprise," or any system? Is it applicable in a socialistic regime or in a system not dependent upon the profit motive? What amendments in our analysis will have to be made in case we are to be engulfed by some economic "wave of the future"?

I believe that, as already stated, the consumer rationale is substantially correct for either or any economic system. However, on the side of the various adversary groups, some allowance must be made on behalf of any system which is dependent for its functioning upon the profit motive. If the only way to induce the seller to sell, the manufacturer to make, the owner to lend, or the worker to work, is to allot him a certain quantum of purchasing power, then to that extent the money element must be classed as a fundamental *substance* which economically the adversary has a right to demand. It is only over and above that minimum inducement necessary to set the various transaction patterns in motion that we have the area in which it can be truthfully and accurately said that consumer, seller and worker are competitors. This competed-for "price differential" belabored above is not the difference between what the seller would like to be paid for the article (i.e., the asking price) and zero, but the difference between what the seller would like to be paid (or that figure which would discourage the particular buyer from buying, whichever is lower) and some figure hovering a little higher than cost. The difficulty of ascertaining this figure of minimum inducement as well as the point of consumer discouragement makes it difficult to determine the exact price area within which the parties are competitors. Yet competitors they are.

Even the consumer's substantive interests are sometimes sacrificed to the demands of the profit motive. The patent monopoly, for example, is offered as a money lure, which means in many cases a price administered beyond the means of many who could otherwise afford to buy.

Suppose a regime of governmentally regulated production and prices. Actually, this would make little difference. Even though competition were gone in the economic sense, the consumer still would compete with the lobbies of his adversaries as to the price differential in legislative or administrative halls, and unless and until men are assigned to their jobs through governmental compulsion, the profit motive is still present. In any event, legislators and administrators, and yes, even dictators, seeking economic justice must weigh the consumer's interests against those of his economic adversaries and must distinguish the immediate substantive
satisfactions sought in the given transaction from those price wants whose only connection with this transaction is that they offer an opportunity for increasing or maintaining bargaining power in future transactions.

SUMMARY

As a solution to specific consumer-adversary problems much of the foregoing analysis may well be ignored. The principal purpose of that analysis is rather to set up and illustrate the four-fold frame of reference from which problems involving the consumer ought to be approached. It postulates a fundamental distinction between two wholly different kinds of interests possessed by each individual party involved in the dispute. First, the immediate substantive interest. With the consumer, it is a fit product; with the seller, producer or worker, it is fit working or operating conditions. Second, the pure price or money interest, where there is no interest in the present transaction beyond the fact that it offers an opportunity to each to improve his position as buyer in future transactions. With a two-fold interest on the part of the adversary, as well, it becomes apparent that any given dispute involving the consumer must fall within one or more of four possible frames of reference, each presenting an entirely different hierarchy of interests to be adjusted. When this is fully appreciated much confusion can be avoided. Here is brief are the four planes on which the consumer may have to expose his interests to compromise:

A. As to quality of the goods.
   1. The consumer’s substantive needs must be balanced against the substantive needs of his adversary, equally valid in the abstract.
   2. The consumer’s substantive needs should presumptively prevail over adversary money demands which go beyond that minimum price concession which may be necessary to make workable any economic system that is dependent upon the profit motive.

B. As to price of the goods.
   1. The consumer’s “pure price” demands presumptively yield to the substantive needs of his adversary.
   2. The consumer’s “pure price” demands are in the abstract just as valid as those wages, salary, and profit claims which go beyond the minimum inducement necessary to the functioning of any economic system dependent upon the profit motive. In the area of this price differential, the parties are true competitors. Caveat: Above the price which discourages the consumer’s purchase of that type of article a substantive or qualitative consumer need is involved. To that extent the problem is thrown back to plane A(2).
In actual circumstance, controversies tend to fall into more than one of these overneat compartments. Thus a dispute over a wage and hour law affecting only the price of the article involves, from the consumer's point of view, first, on the wages side, a problem of apportioning purchasing power, and on the hours side, principally one of securing to the worker substantial safety and of facilitating his health and happiness in his role as worker, with the heavy burden of proof on the consumer to show that the advantages to him outweigh an allegedly slight hardship on this particular worker group. Of course, if the proposed law affects also the quality of the article, the consumer stake in the controversy becomes much more complex. However, whatever the specific problem, it should be valuable to know what interests are at stake and where the burden of persuasion lies within the frame of reference in which various segregated elements of the composite problem fall.

In actual circumstance, moreover, controversies tend to involve more interests than those at stake in the two-sided illustrative situations given above, which were consciously oversimplified for the purpose of deferring confusing complications. However, there seems to be no reason why the analysis developed here is not adapted as well to the balancing of interests in any multi-partied controversy.

**CONCLUSION**

With a new understanding of the nature of the consumer interest and an appreciation of the fact that the "consumer" is a human activity taken in abstraction, rather than a whole man, it becomes apparent why the consumer interest is at present inadequately protected. While civilization rested upon a discrete and localized economy, there existed no great disproportion of economic forces detrimental to the consumer. With the industrial revolution, however, and the huge concentrations of capital in the hands of organized productive groups, a great disparity arose. Because the necessity of attracting the consumer produced liberal concessions in his behalf, the economic pains were soonest felt elsewhere. The worse disease demands the earlier cure, and today we see substantial progress toward creating, perhaps for the first time, a parity of bargaining power between worker and employer. But the less acute plight of the consumer has been until recent years neglected.

44 Remember that our primary interest here is the consumer. Provisions as to hours of labor involve the welfare of the worker in his job, and the consumer has a direct interest in so far as his quality or price wants are affected. But hours-of-labor problems involve also, as an inter-worker problem, the aspect of distributing purchasing power with a view to removing discrepancies internal to labor. This invites the extension of the type of analysis developed here to controversies between seller and manufacturer, manufacturer and laborer, and so forth, which do not appreciably affect the consumer. But that is beyond the scope of this paper.

The first step in achieving comprehensive consumer protection is the ascertainment of those areas in which there exists a serious economic inequality of bargaining power. Adjusting remedy to particular need, such an approach tends to break down arbitrary distinctions between commercial and non-commercial use, distinctions which fall short of separating the consumer who needs protection from the consumer who is able to look out for himself. To repeat, the social problem is not so much "ultimate"-consumer protection as it is helpless-consumer protection, and each situation-type which it is feasible to treat should first be measured for the degree of economic disparity to be dealt with before specific solution is sought.

Won piecemeal at best, bargaining equality is achieved in various ways and the means most suitable should depend upon the needs of the immediate economic area dealt with. The least universally satisfactory method seems to be consumer cooperation. The negligible growth of the cooperative (in the United States at least) suggests that the adhesive necessary to group collaboration is somehow lacking, although organization should certainly be encouraged where it shows promise of growth. At the opposite pole the praiseworthy but modest success of the trust-busting facilities of the Department of Justice makes it equally doubtful whether consumer protection is to be comprehensively assured by any wholesale atomization of existing Big Business, a process which, even if feasible, would have doubtful desirability if carried to a point where the return to a more primitive standard of living might become imminent.

In between these more extreme measures, positive protection of the consumer takes two general forms; direct regulation and penalization (i.e., legal "disarmament" of the adversary) and secondly, consumer implementation designed to enable him to protect himself. Public policy and practical considerations of feasibility largely determine the question as to which attack is the more desirable in particular cases. Although some combination of both is usually inevitable, it is suggested that in a legal order still sworn in large part to the maintenance of free competition the organization and legal and educational arming of the consumer interest is to be given preference (wherever workable) over regulation from overhead. Nor is this merely a matter of ideology. For example, when it can be concentrated, the cumulative effect of individual civil actions is capable of exerting a force fully as persuasive as that of government enforced regulations, and it does not depend upon the aggressiveness of officials whose incentives to action grow mainly out of the duties of office. Investigation leads me to believe that this is true at least of the food business.

Finally, consumer protection of a more subtle but no less vital sort can and should take the form of adequate consumer representation in all governmental and administrative matters in which the consumer has a substantial

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46 I reread this sentence with some misgivings.
stake, whether or not he is a nominal party in interest. If there be any
juice left in Adam Smith's pronouncement on the place of consumption in
the economic order it would seem wise to assure some guarantee that the
consumer should receive adequate partisan representation in a political
and legal order so responsive to business and labor pressure groups, groups
whose normal aims are only partially concerned with the welfare of the
consumer.

The immediate objectives, therefore, would seem to be as follows: (1) to
emphasize the true nature of the consumer interest and the necessity for
its protection and implementation, (2) fully to discover and explore those
legal and social issues in which the consumer has a vital stake, (3) to
establish frankly partisan administrative agencies to study consumer
problems, and to represent the consumer viewpoint in administrative
affairs, (4) to encourage the organization of private agencies to study and
assert the consumer interest, (5) to foster the establishment of public and
private research agencies for the development of quality standards, for the
testing of existing consumer goods, and for specific advisory purposes, (6)
adequately to arm these agencies for attack upon illegal practices by pro-
ducers and distributors (e.g., Printer's Ink statutes), (7) to educate in-
dividual consumers so far as feasible in consumer economics, and (8)
adequately to arm individual consumers in their dealings with retailer or
producer so as to make redress an effective actuality in those cases where
the consumer has suffered wrong. Finally, in limiting the field of risk in
the worst areas it may be necessary to supplement the foregoing with direct
regulative legislation and criminal sanctions, but only to the extent that the
consumer himself, individually and collectively, is powerless to give himself
the desired protection. In tailoring particular measures to particular situa-
tions, of course, our two fundamental considerations will not be ignored:
the degree of bargaining inequality present and the nature of the consumer
interest involved.

Altogether, the consumer seems to demand a great deal. But all he asks
is the legal and social aid necessary to restore his voice and place him on a
parity with his brothers in the bargaining struggle.

47 E.g., The Department of Agriculture maintains a Consumers' Counsel. See further,
supra, note 10, p. 97.
48 In this connection consider the conclusions found in Campbell, supra note 6, pp.
262-278.
49 Consumer education is considered in Sorenson, supra note 45, Chap. III.
50 For a summary of the legal protections now afforded the consumer consult Waite and
Cassady, supra note 16, Chaps. VII and VIII. A critical analysis of the consumer move-
ment as viewed by the retailer is found in Gabler, supra note 45.
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