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Foreword

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"DO-GOODERS on Capitol Hill plan to make this 'the year of the consumer.' "[1] This beneficent attitude is not confined to Capitol Hill. "A series of consumer protection bills pending in Lansing . . . unnecessary in theory, but required by reality . . . are aimed at the shysters and dishonest sellers whose caveat 'Let the buyer beware' is the most hoary of warnings to the consuming public."[2] Governor Rockefeller has sent to the New York legislature a package of bills developed by his Committee on Consumer Borrowing set up last December; the bills are "designed to protect the average wage-earner from the possible 'tragedies' of borrowing money or buying on credit."[3] Similarly, a comprehensive retail installment sales act appears to be on its way to enactment in Massachusetts,[4] and the National Conference of Commissioners on Uniform State Laws will consider, at its annual meeting in August, a draft of a Uniform Consumer Credit Code.[5]

As will be evident by the time this symposium on consumer protection appears in print, not all the proposals that have been made on behalf of the consumer will pass this year; some, perhaps, will never be enacted in anything like their present form. However, both opponents and proponents of this spate of legislative proposals should recognize the timeliness and importance of the discussions presented in this issue of the *Michigan Law Review*.

A recurrent theme of the views presented in this symposium is that the consumer interest is not being adequately served by our competitive system, and that a larger role must be vouchsafed the

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1. Wall Street Journal, Feb. 25, 1966, p. 1, col. 1.

2. Ann Arbor News, April 5, 1966, p. 4, cols. 1-2.

3. N.Y. Times, April 26, 1966, p. 49, col. 3.

4. Letter to Author From Professor William F. Willier, Boston College Law School, March 8, 1966.

5. *Report of Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury*, 1965 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 40.

government and the law in order to assure the consumer the protection to which he is entitled. The maxim that freedom of private enterprise is the best servant and safeguard of the consumer's interest is subject to the acknowledged qualification that consumers must be informed of available alternatives. But the American consumer is undoubtedly the best fed, best clothed, best housed, and generally the best provided for of all the world's consumers. He is, of all consumers, certain to be the best informed and in the best position to protect himself by exerting an influence on producers and distributors. These industry groups are subject to a pervasive "public consensus" which impels them to heed the consumer's interest in order to avoid "political intervention by the State, usually in the form of investigation, enactment of a relevant statute, or emergence of a new rule through the common law courts."[6] What then is the nature of the American consumer's problem? How can the law contribute effectively to an improvement of his condition?

Professor Barber contributes a comprehensive study of the role of government in protecting the consumer. He reviews the history of efforts to enlarge this role, which he finds haphazard and inadequate. Critics of the operation of the market have been numerous and voluble, but the remedies they have proposed range from the extreme and fundamental change of transferring control of all production to consumers, on the one hand, to narrow statutes dealing with particular problems, on the other. Meanwhile, consumers have become utterly dependent on advertising and on package labels in an economy which has depersonalized distribution and which avoids price competition. Professor Barber advocates the establishment of a new consumer agency in the federal government. In his view, only an agency whose primary responsibility is the protection of the consumer can be relied upon to insist that the consumer's interest be considered in the formulation of governmental economic policy.

Professors Boyd and Claycamp examine the question whether in the absence of governmental intervention it is reasonable to expect the consumer's interest to be adequately protected by industry. Their answer is negative. To one who is neither cynical of the motivations and representations of industrial spokesmen nor under any illusion that governmental intervention is necessarily wise and fruitful, the logic of the position of Professors Boyd and Claycamp is

6. BERLE, POWER WITHOUT PROPERTY 114 (1959). Professor Berle appropriately adds: "These standards some of us have christened 'inchoate' law—rules of conduct whose disregard entails consequences almost as foreseeable as does violation of specific statutes such as the antitrust laws." *Ibid.*

persuasive. They offer a realistic appraisal of the prospects that industry, the universities, funded agencies, and government will act effectively, together or alone, to assure that the consumer's interest will prevail over competing considerations. These two authors conclude that voluntary efforts to deal with intractable problems, particularly in areas where any significant change may have grave repercussions for an industry, must be supplemented by governmental action.

Senator Hart asks whether federal legislation affecting consumers' economic interests can be enacted. He acknowledges that if history is the proper indicator, the correct answer is negative. Tragedies that have dramatized the need for regulation to protect the health and safety of consumers have typically preceded enactment of federal food, drug, and cosmetic legislation. No development of comparable impact has galvanized public support for legislation to protect the economic interests of consumers, and none is to be anticipated. Nevertheless, Senator Hart draws courage to reject the lessons of history from the counsel of the intellectual progenitor of conservative thought, Edmund Burke,[7] and from Victor Hugo's epigram on the strength of an idea whose time has come.[8]

Mr. Kintner, a former Chairman of the Federal Trade Commission, reviews the role of the Commission in regulating advertising. He points out a fact which many people have either forgotten or never realized: the FTC's jurisdiction over advertising was a "fortuitous by-product" of the congressional grant of power to the Commission to deal with unfair methods of competition. In retrospect, however, the assumption of jurisdiction in this area seems an almost inevitable response to the developing awareness of the need for legal sanctions against false and misleading advertising.

Professors Jordan and Warren contribute a careful analysis of the problem of disclosing financing charges to consumer debtors. They examine critically the objective of compulsory disclosure legislation to enable prospective borrowers or buyers on credit to determine readily the real cost of the credit so that they can intelligently choose among competing lenders or sellers or perhaps opt to pay cash or, indeed, to make do without borrowing or buying anything. Their article is a convincing presentation of the need for a discrimi-

7. *Compare* Burke's statement that "you can never plan the future by the past," quoted in Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255, 1256 (1966), *with* Henry Ford's remark that "history is more or less bunk," quoted in Jovanich, *The Misuses of the Past*, Saturday Review, April 2, 1966, p. 21.

8. See Hart, *supra* note 7, at 1268.

nating evaluation of the means for attaining the objective, and their conclusion is cogent in its emphasis on the limitations inherent in disclosure legislation. Imposition of disclosure requirements would be a doubtful gain if it should diminish or divert efforts to obtain needed protection of consumers from sales of shoddy merchandise and services at inflated prices, extortionate deficiency claims following upon repossessions, oppressive use of wage garnishments, and other unconscionable practices of aggressive credit merchants.

The appositeness of this symposium appears most graphically in the article written by Mrs. Peterson, President Johnson's Assistant for Consumer Affairs and chairman of his Committee on Consumer Interests. She sees "the federal government . . . today on the threshold of an entirely new era with respect to its responsibilities to consumers."[9] She also feels that a consumer's right to be informed is no less important than his rights to be safe, to choose, and to be heard, and that all of these rights should be regarded as pillars for the federal consumer policy evolved during this decade. However, while Mrs. Peterson has no doubts concerning the Government's commitment to the consumer, she acknowledges that differences of opinion over the means of assistance may delay realization of the rightful role for the consumer in the formulation of national economic policy.

Judges as well as legislators and policy makers in the executive department are sensitized to the rising demand for extension of the scope of legal protection accorded consumers. One of the most dramatic demonstrations of the viability of the common law is the diminution during the past decade of the roles of fault and privity in the determination of liability to consumers injured by products and services. These developments are the concern of the three student comments included in this symposium. The comments show these developments to be a remarkable instance of the interaction and "organization of judge-made law and statute law into a coordinated system," for which Mr. Justice Stone called thirty years ago.[10]

Dean Keeton assays in his article the significance of recent judicial developments in the disposition of consumers' claims arising out of injuries and losses attributable to products purchased for use or consumption. A reexamination of the rules and premises of products liability has led to an increasing recognition that the justification for shifting losses from consumers and users to producers

9. Peterson, *Representing the Consumer Interest in the Federal Government*, 64 MICH. L. REV. 1323, 1324-25 (1966).

10. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936).

and distributors is the ability of these industry groups to pass on the losses from the relatively small number of injuries to all purchasers in the form of higher prices. Dean Keeton suggests that this rationale, notwithstanding its general validity, should not relieve the courts from considering whether there may be better ways of shifting losses from innocent victims of injuries caused by products.

It is not far-fetched to suggest that the *Michigan Law Review* has presented an appropriate focus and content for a new law school course. The growing law of products liability is an embolus in the mainstream of the new courses on commercial transactions.[11] Although the aggregate of consumer debt now exceeds eighty-five billion dollars[12] and ninety per cent of all bankrupts are consumers,[13] the problems of the consumer as a debtor have been largely ignored in law school courses. Recent developments in constitutional law are reflected in the new casebooks, whose editors have curtailed the sections allocated to constitutional limitations on taxation and economic regulation in order to devote appropriate attention to the constitutional aspects of criminal procedure and civil rights.[14] In contrast, the private legal rights of the ordinary citizen not engaged in business remain a sizable lacuna in law school curricula and legal literature generally, as conscientious counsel who man the offices that have been established across the land to make legal services more available to the poor have been discovering to their dismay. The pressures on curricular planners to find room for new courses are persistent, and a course in consumer law would not have the kind of appeal and justification that characterize new courses in estate planning, international trade, and securities regulation. Nev-

11. Professor Lattin's *Cases on the Law of Sales*, published in 1947, devoted over 250 pages of a thousand-page casebook to the subject of warranty and included a sixty-page section under the heading, "The Matter of 'Privity of Contract' in Warranty and Comparable Tort Cases." The new Farnsworth-Honnold casebook, *Cases on Commercial Law* (1965), allocates fewer than 100 pages of an eleven-hundred-page volume to warranty, and an eighteen-page subsection is concerned primarily with the privity problem in tort and warranty cases. No criticism is intended of the allocation made in either book.

12. O'Riley, *Appraisal of Current Trends in Business and Finance*, Wall Street Journal, Feb. 7, 1966, p. 1, col. 5.

13. Jackson, *Trends and Developments in Bankruptcy Administration*, 40 REF. J. 10 (1966).

14. In Dodd's Fifth Edition of *Cases on Constitutional Law*, published in 1954, nearly forty per cent of the 1400 pages were allocated to limitations on the regulatory and taxing powers, while civil rights and civil liberties were accorded a little over 150 pages. In the same publisher's latest entry in this field, LOCKHART, KAMISAR & CHOPER, CASES ON CONSTITUTIONAL LAW (1965), the materials related to the regulatory and taxing powers are cut to thirty-three per cent of the total pages, but one half of the work is allocated to civil liberties and civil rights, including over two hundred pages on the rights of an accused.

ertheless, there are encouraging signs of an increasing concern on the part of lawyers, law teachers, and law students, as well as lawmakers, with the role of the law in serving the needs of those who do not enter lawyers' offices.[15] This symposium focuses on problems that have not sufficiently engaged our attention and energies in the law schools. The distinguished panel of participants here brought together have made a significant contribution to the literature of a new legal orientation.

15. "Today it is very much in vogue to stand up on behalf of the consumer. But when Attorney General Lefkowitz started the first state consumer frauds bureau nine years ago, he exercised great courage and foresight. Last year the Bureau [of Consumer Frauds and Protection of New York] . . . succeeded in recovering for aggrieved consumers over a million dollars." Mindell, *Some Major Legal Problems in the Installment Sales Field*, 20 PERS. FIN. L.Q. REP. 52 (1966). See also Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381 (1965); Cohen, *Law, Lawyers, and Poverty*, 43 TEXAS L. REV. 1072, 1080-82 (1965); Fritz, *How Lawyers Can Serve the Poor at a Profit*, 52 A.B.A.J. 448 (1966); McEwen, *Theft—Pure and Simple*, 23 LEGAL AID BRIEF CASE 245 (1965); Penn, *The Law & the Poor*, Wall Street Journal, Sept. 13, 1965, p. 1, col. 1; Porter, *New Legal Services Help Fight Poverty*, Detroit Free Press, March 3, 1966, p. 14-B, col. 1; Willging, *Installment Credit—A Social Perspective*, 15 CATHOLIC U.L. REV. 45 (1966); Witcover, *Poverty's Neglected Battlefront*, Saturday Review, Sept. 11, 1965, p. 29; Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution*, 26 U. PITT. L. REV. 811 (1965); Schutzbank, Book Review, 13 U.C.L.A.L. REV. 491 (1966).