

## BOOK REVIEW

PRODUCTS AND THE CONSUMER: DEFECTIVE AND DANGEROUS PRODUCTS.

By Page Keeton and Marshall S. Shapo. Mineola, New York: The Foundation Press, 1970. Pp. xiviii, 1269. \$15.00.

In this book, twelve hundred pages devoted to the law of goods-quality control, the authors did not do what they did not set out to do. They did not provide materials out of which a thorough course on "consumer transactions" might be taught. So far as I can tell, however, that wilful, knowing, and intentional "failure"<sup>1</sup> is the only one of which the authors are "guilty," for the book itself is a dazzlingly successful execution of their more restricted design. Thus for me, whose mode of teaching is characteristically both synoptic and pretentious, it seems most relevant to spend some time considering the place of "consumer transactions" in law and law schools, and the place of a book like this in that broader context. For I think the question must be asked: given the interest in and importance of "consumer law" to modern law and the modern law school curriculum,<sup>2</sup> can one justify even a book as good as this if it serves only to generate but another narrowly fragmented and basically misleading view of legal and alegal reality? Or, to ask it another way, is this book one peculiarly fitted to have applied to it the famous little girl's one-line book report: "This book told me more about penguins than I really wanted to know"?

Consumer transactions encompass substantially all retail transactions, that is, all deliveries of goods and services to someone who does not intend to retransfer what he gets (with or without transformation) to someone else.<sup>3</sup> If all those transactions which take place at the end of the production-distribution river may legitimately be placed in the

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<sup>1</sup> The authors do intend to widen the scope of materials available to the beleaguered teacher of consumer transactions by producing in the near future a companion volume tentatively entitled *PRODUCTS AND THE CONSUMER: DECEPTION* (p. 41).

<sup>2</sup> A growing number of schools already have general survey courses called "Consumer Protection" or some such thing. Others teach a good deal of the material under the rubrics "Poverty Law," "Products Liability," or "Consumer Credit." In still other schools I suspect that large discrete chunks come in hidden under nondisclosive labels like "Torts II," "Contracts III," "Procedure IV," or even "Contracts I." See, e.g., M. BENFIELD, JR., *SOCIAL JUSTICE THROUGH LAW: NEW APPROACHES IN THE LAW OF CONTRACTS* (1970). And in still others I bet there are seminars with many different official names which are popularly understood as "Ripping Off At Retail" and "Hock and Schlock."

<sup>3</sup> Even this definition is both over- and under-inclusive. Many consumers, for instance, buy goods for transfer to family and household members. And all consumers acquire money "at retail" in order to acquire goods or services with it. Moreover, real property acquired (fee or lease) for present use is usually considered a different species of transaction, and not lumped with cars and household goods except analogically. Nonetheless, the text description will most likely do for all present purposes. Cf. *UNIFORM CONSUMER CREDIT CODE* §§ 2.104, 3.104 (Official Text 1969) [hereinafter cited as UCCC]; *NATIONAL CONSUMER ACT* § 1.301 (8)-(13) (First Final Draft 1970).

same estuarial swamp, that means a lot of transactions. Moreover, the category is so inclusive that it subsumes a vast variety of vastly different *kinds* of dealings. The sale of a car is not the same as a loan of cash, or as the collection of damages for the car's failure, or as the collection of a debt once defaulted, but they are all reasonably classified as "retail" or "consumer" transactions. Thus given the number of subclasses of "deal" within the "consumer deal" category, the number of possible approaches, even if one (wrongly and unhelpfully) thinks only in terms of legal responses, often appears quasi-infinite.

Consumer deals are a species of exchange. Passing for the moment (but only for the moment) the question of what business the law has meddling with the exchange mechanism at all, if the law is going to interfere, there are only three regulatory foci: the people, the product, and the deal that gets the product between the people. All of these foci are already in use in the consumer areas. Not only are the professionals in consumer transactions often highly regulated (e.g., small-loan-company licensure), the consumers themselves are also the focus of regulation: they are regulated by crude subcategorization (for instance, no one under twenty-one may contract to buy most goods), and they are also sometimes regulated as a gross homogeneous class—no consumer, for instance, can buy goods on time at a rate of interest exceeding a particular percentage.<sup>4</sup>

As for the things which pass between the parties, regulation is extensive and historically well established. The law of warranty, which is, after all, a goods-quality control device, predates Ralph Nader by about a millennium, and even if one overlooks Guild-based "governmental" quality controls, foods, drugs, and life insurance policies have been subject to state-mandated quality minima for quite some time.

Transaction regulation has its genesis so far back in human history that its absence is unimaginable except as some Hobbesian construct.<sup>5</sup> Every actual polity, at least to some extent, protects the possession and use of at least some goods from violent transfer,<sup>6</sup> and I would also guess that most polities interdict or at least seek to impede transfers activated by lies. But whatever the age and range of such transaction-control devices, it is clear that in this country, now, there are a vast variety of fraud and quasi-fraud, duress and quasi-duress concepts running through the civil and criminal law to control the manner in which property changes hands.<sup>7</sup>

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<sup>4</sup> See, e.g., UCCC § 2.201.

<sup>5</sup> If even then, for even looters seem quickly to set rules. In fact (to go back some way to the Bronze Age) it was because of the highest-handed violation of one of those looting rules that Achilles retired to his tent to sulk.

<sup>6</sup> That may be the way you know you *have* a polity, i.e., the regulation of force directed at goods (in the expansive sense) may be a definitional element in the concept.

<sup>7</sup> It also aims to protect its own credibility and vindicate its own norms as a polity, but those aims of law enforcement, thank God, are beyond the compass of this essay.

All right. So the law presently confronts all three elements of the exchange mechanism—people, things, and mode of transfer. But that just starts to indicate the complexity. Having indicated the normatives, the law is polymorphous in the means it uses to tuck a little immanence into them. The whole spectrum of social response, from raised eyebrows and non-invitations to dinner through injunction, imprisonment, and death is used to regulate the exchange mechanism. But there is one common subcategorization of these responses that is, it seems to me, quite useful in talking about them—quite in spite of the fact that any sharpness in the distinctions can be a product only of sloppy thought or a very high conscious inconsistency tolerance.

It is, nevertheless, possible to distinguish among nonlegal remedies, private legal remedies, and public legal remedies. The center of gravity of the first category is the discipline of the market, notably the tendency (imperfect as it might be) not to deal with someone whose deals do not attract. If the goods or the deals look lousy, or were lousy last time, one *does* frequently go elsewhere to trade. This mechanism brings in the past *as information* to bear on the future, while abandoning it as the ground of past-rectifying action.

The second category, “private legal action,” while not necessarily eliminating that use of the past, adds to it another function: it becomes that which “buys” the state’s power to enforce redress. Example: if Hondling Harry lied to you about the newness of the television set you just bought, you might do nothing except resolve never to buy from him again. But you might, in addition to making that resolve, sue Harry for the difference between what you got and what he said you were getting. You would, of course, not *always* do so. It would all depend on the ratio of your “loss” to the cost of the lawsuit, and you might abandon rectification as too expensive, resting merely on your bitterly expensive but personally effective expanded information.<sup>8</sup> But you might learn *and* sue.

The third regulatory approach, “public legal action,” differs from the first two not so much in whether it converts the past into future-modifying information or past-rectifying action (for under the public approach one again can do either or both), but in the fact the cost of the action is allocated differently, in response (but only rough response) to a perceived difference in the constituency being served. If the State (on the complaint of a deceived party or merely upon its own perception of the deception) brings an action sounding in fraud (civil or criminal), it may incidentally aid the defrauded party, but it aims to stop the “illegal” activity for all who might be affected in the future. It thus charges the cost of its activity to its own tax constituency, work-

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<sup>8</sup> See Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

ing on the implicit assumption that that group is in some sense coextensive with the benefitted group.

Neither these three non-exclusive but roughly distinguishable gross categories of activity type, nor the earlier mentioned three regulatory foci, are relevant *only* to consumer transactions. If there were a course in, say, manufacturer-distributor transactions, the same analytic set, while not the only useful one, would certainly be one of the useful ones. What makes the consumer field so much more interesting (for me, at any rate) is its massness, multiplicity, and partial amateurity. For a typical consumer transaction entails the acquisition by a nonprofessional dealmaker of one of a huge number of different items and different versions of a particular item from a professional deal and/or goods maker who makes a lot of them. Any particular one of these transactions is therefore exceedingly sensitive to the effect of transaction costs including, notably, information costs. And even if one views only the gross result on the market of the summation of all of these individual transactions as the only important issue (that is, one restricts one's interest to the general welfare, and eschews concern with "interior" injustices and inefficiencies), the final result, the summary vector, will be tilted in response to the transaction-cost deflections of all the little transactional vector diagrams. These little inefficiencies and misallocations literally add up (and more interestingly, "subtract up" too) so as very clearly to illustrate the *practical* weaknesses in America's two great (and sometimes antithetical) overmechanisms for the regulation of the exchange mechanism—the economic market (cognate to capitalism), and the political market (cognate to democracy).

Thus consumer transactions may easily become the central illuminating focus not only for a study of retail exchanges, but for a study of the kinds of inefficiencies which beset all control devices in the country, whether they are applied to the distribution of goods and services, or to housing, welfare, civil rights, or what have you. For one of the things that clearly happens in America is that in an effort to overcome the unavoidable frictional imperfections in capitalism and democracy in their actual application to any particular concrete problem, these two grand control devices are made to interpenetrate in a particularly devious (and sticky) way.

Hence consumer transactions can be made the focus and medium for a vast variety of what in novels or plays would be called "set pieces." Among the ones I like to do in my course with quite obnoxious multi-contextual pertinacity and repetition (and at various levels of explicitness) are, in addition to the central democracy/capitalism—political market/economic market interaction:

1. The complex fungibility of price and quality (of goods or deals),<sup>9</sup> such that (a) many decisions which look like risk controls are in reality decisions to impose insurance coverage upon the endangered or badly served group; (b) many decisions that look like impositions of minimum quality standards (again of goods or deals) are really selective disenablements of some discernable group from dealing at all.
2. The resiliency of complex systems, such that when one has control over only one or two variables, the result of any partial intervention via that control is at best unpredictable and sometimes grossly counterproductive.<sup>10</sup>
3. The way in which the "information" and "freedom" requisites for *market* optimality have generated *legal* correlatives through the ages, which take the form of fraud and quasi-fraud doctrines (from the interdiction of intentional lying through mandated volunteering of information) and duress and quasi-duress doctrines (from the gun at the head through "contract of adhesion").
4. The tendency in times of legal stress and change for "fraud," "duress," and the capitalistically anomalous doctrine of illegality ("against public policy") to come together to identify transactions that are pretty clearly impermissible even though no one can quite say why.<sup>11</sup>
5. The role of threat and spite in actual dealings, *i.e.*, the role that an announced willingness to impose injury beyond the benefit to the injurer, beyond even his cost recapture, plays in pre- and post-default dealing.<sup>12</sup>
6. The legal process significance of *legal* transaction costs, *i.e.*, the cost of getting the use of state puissance, when only in the aggregate is the "harm" or "evil" of any economic significance.<sup>13</sup>
7. The illuminating very close similarity between clearly licit and unquestionably illicit activities as two different kinds of entrepreneurs attempt to deal with identical economic problems.
8. The exceeding difficulty of answering, once it is closely ad-

<sup>9</sup> See Leff, *Contract As Thing*, 19 AM. U.L. REV. 131 (1970).

<sup>10</sup> See G. CALABRESI, THE COSTS OF ACCIDENTS 86-88 (1970) for the vocabulary of "second best" as a way of expressing some of these problems.

<sup>11</sup> See Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

<sup>12</sup> See Leff, *supra* note 8.

<sup>13</sup> See *id.*; Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970).

dressed, the question of which Pilate so ostentatiously washed his hands, what *is* truth—especially when asked of spiels, labels, advertisements, scientific reports, and such like things.<sup>14</sup>

As is perfectly clear (if from nothing else from my lamentable tendency to cite my work, my whole work, and nothing but my work), these are not the only issues of interest in the world; they are just some of the ones that both interest me right now *and* are open to very full exploration in terms of consumer transactions. That is, given my personal inclinations, this is how I spend much of *my* teaching time, and I have found that several different areas of consumer law provide particularly rich agar dishes for growing particular awarenesses.

For instance, focusing on consumer credit transactions one can study a market which *in theory* should be optimized without *any* political intervention, a market in fungible goods, delivery of which should be instantaneous, and the entry to which should be almost without barrier. Moreover, the pricing in such a market of infinitely divisible fungible goods should be cream-of-wheat, and, for competitive shopping purposes, the units of price should be capable of perfectly comparative statement. In fact, however, the present consumer credit market behaves with no such optimality, and the government frequently intervenes in divers ways, from disclosure regulation and mandatory comparability of language, all the way to rate and entry regulation. Thus one can in this context explore not only the exceedingly nice questions of whether market imperfections (collusion, stupidity, etc.) cause and justify political-market interventions, or whether the latter cause the former. But better still, one can begin to see not only how both explanations can coexist, but how it is more likely than not, perhaps even unavoidable, that they *will* coexist, that imperfections and external corrections *will* cause each other, even in *this* kind of market. In other words, the theoretical abstract purity of the consumer credit market exposes simultaneously the necessary (in both the logical and practical senses) counterproductivities of mixing capitalism and democracy in the control of any particular real problem, *and* the necessity of doing the mixing.

Similarly, I like to use the doctrine of unconscionability to illustrate the creation of categories of clear but analytically mysterious legal naughtiness (item 4 above), and I find in the great classic swindles and bunco schemes (the Ponzi, the Spanish Prisoner, the Gypsy Switch) some of the centrally illuminating explanations of many facets of

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<sup>14</sup> Compare Jones, *The Cultural and Social Impact of Advertising on American Society*, 1970 LAW & THE SOCIAL ORDER 379, with Leff, *The Cultural and Social Impact of Society on American Advertising*, 1970 LAW & THE SOCIAL ORDER 397.

modern merchandising, all the way from the clearance sale to bait-and-switch (item 7 above).

Thus when I first thought about this book, admirable as it seemed to me, I didn't think it was for me—or for anyone else who tended to teach the area the way I did. Now I'm not so sure. Having studied the book more closely<sup>15</sup> two things occurred to me: (1) the narrower focus of the book does not *necessarily* preclude doing one's set-piece thing; and (2) to the extent doing it is made harder (or in a few instances, impossible) there is a compensating gain, that the students in the course of exploring my kind of beloved aetheria might also learn a little law.

For goods-quality control, as a subfocus of consumer protection law, is by itself shaped by almost all the mechanisms that give shape to the larger consumer-transaction field. The primary control device is still the market. There too, perhaps most notably and thoroughly, the market-discipline system is supplemented by private past-rectifying actions (negligence, warranty, strict liability) *and* by direct statist interventions, notably in foods and drugs, but of late in free-market ubiquities like automobiles. And in the goods-control area, especially insofar as health and safety are concerned, the weaknesses of the market as a sole control device are indeed shown in a clarifying high relief, for if information cost takes the form of death or a severed leg, the impetus toward recompense for the past *and* sure prevention for the future is justifiably accelerated. That is, the interplay between control through information (warnings, labels, disclaimers) and control through freedom restriction (drug safety standards, auto seat belts) can be shown in a very rich context. And in that context insurance (even when disguised as risk shifting rather than risk spreading) becomes a more generally comprehensible and comprehensive device.

Moreover, the authors facilitate grand-design building with the organization of their book. It comes in two parts, the first (something over 400 pages) being devoted to "Government Regulation of Dangerous and Defective Products." They first give a brief stage-setting introduction (involving a typical couple, birth control pills, headache remedies, and throat lozenges), a more or less successful attempt to get a little recognizable reality referent into the student's picture. Then

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<sup>15</sup> By this point it should have occurred at least to some of the more suspicious types to wonder whether I have read the book under review. The answer, of course, is no. I suppose it is conceivable that one could sit down and read a casebook from cover to cover; after all that's what law students are frequently asked to do over a semester, and one must assume that some, say 2%, actually do it. But I find reading a casebook through, word by word, not in connection with a course (as teacher or student), inconceivable. It would be like cuddling up with a cookbook for a nice evening's read. What I have done is leafed it through page by page, reading what interested me and noting what I had already read, seeing what it all was and how it all fitted together, testing an occasional recipe to see if it worked. That may be insufficient, but it will have to do.

they launch into the main battlefield, with long sections on governmental information regulation (labelling and advertising, with a nice short treatment of the cigarette flap), on banning and seizing, and on standards for safety and usefulness short of total interdiction. Notably the authors include materials on negotiation pressure, and publicity.<sup>16</sup>

Then the authors address more directly and in much greater detail the problems of judicial and administrative process necessarily implicated in the earlier materials. The problem of formulating criteria and then proving facts relevant to them are given a gorgeously full exploration, jurisdictional conflicts (intra-federal, state-federal, and state-state) are explored, and other administrative-process horrors like ripeness, fairness, and due process are given a detailed run through in the goods-control context.<sup>17</sup>

The second part of the book, roughly twice the length of the first part, is devoted to a similarly esurient consideration of the private actions arising out of goods-quality deficiencies. Notably, the authors begin with the critical moment when the desire to buy is created. They then go on to consider the sale, the source of liability (including the warranty-tort welter and the inconceivably difficult concept of "defect" in a market with normal price-quality trade-offs), and the abnormally hideous problems of putting together "defect" with its "results" so that "remedy" can have some meaning.

So what the authors have chosen to do is tell, from a legal perspective, almost all of the American goods-quality-control story. In the twelve hundred-odd pages of that telling one finds not only this intelligent organizational pattern, but that the materials themselves are immeasurably enriched over standard casebook fare. Not only are there mini-essays, and tickling, poking, and even gouging questions, but all manner of the fugitive ephemera of which the goods-control field is really constructed—agency reports, scientific documents, legislative committee reports, newspaper stories, and so on. In brief, this monstrous book is like *Pantagruel's* giantess: there's a lot there, but every part is independently interesting, and it is all put together on a strong and well articulated skeleton such that the final arrangement, as a single holism, is at least as interesting as the separate fascinations.

Given all this, it seems to me that even if one is, like me, more interested in the basic design of consumer transactions than in particular legal responses to particular problems, many of those "set pieces"

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<sup>16</sup> They even reprint *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) thus opening up the question of the relationship between economic and other liberties, for instance freedom of speech. Watching Judge Bazelon sweat through why it is that when the government sanctions "truth" in *this* speech context there is no first amendment violation is in itself almost worth the price of admission, at least for those with rather cruel tastes in sport.

<sup>17</sup> It is notable that the authors do not disdain to consider "products" potentially so macroharmful as to be "environmental-law" grist, atomic installations for instance.



can be done with these materials alone. If you look back at my eight examples, it will be clear that one desiring to explore almost any one of them can at least get a handle on it in this expanded products liability context. I don't want to oversell this. Some materials *not* provided in this book *are* better loci for some messages. For example, the consumer credit market is a better context in which to discuss the complex interaction of the economic market and the political market than the goods-distribution market, where problems of nonfungibility, non-comparability, entry barriers, and so on muck up matters quite a lot. And contract unconscionability is *sui generis* as a situs for discussing the fraud-duress-illegality axis upon which much of the common law turns. But one can do many of these things to some extent with these materials, and many others as well as or better with these than with any others. To the extent one can, one *additionally* presents the student, finally, with a more internally reverberating picture of the interconnections among the "set pieces," by doing it all within a narrower compass than consumer protection in general.

So now we can get back to the little girl and her penguins. Is it possible to justify a course to which are allocated sufficient hours in which to teach twelve hundred-odd pages devoted to just these materials, with no development of consumer credit, no collection law, no really full development of fraud and the quasi-frauds, duress and the semi-duresses, unconscionability, swindling or hondling? In other words, are the penguins interesting enough to justify disregarding all the fish, seals, and polar bears while devoting a whole four hour course to their strutting? I think yes.<sup>18</sup>

Finally. Can you teach consumer protection out of this book? You cannot; there's a lot more to it than that. Can you teach many of

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<sup>18</sup> But if that makes you nervous, if you think students ought to meet, say, collection law and consumer credit too, you don't *have* to teach the whole book, word by word. Indeed the publisher, in what seems to have been a nervous moment of his own, has sent around a sheet of assignment instructions for two hour and three hour courses that can be carved out of the bulk of the book, and I assume that the selection, since it was done by the editors, is perfectly sensible. The only suggestion on the flyer with which I flatly disagree (one that echoes a suggestion in the Preface to the book, at p. xiv) is that Part I or Part II of the book be taught separately, in two or three hours. I think that such a gross division between public and private remedies is so arbitrary (given the unavoidable interconnections in a single legal-economic system between those two routes) as to be seriously misleading, doctrinally and practically.

My own inclination, however, if faced by the need to teach a shorter course, would be subtly different. Even in a three hour course, even in a two hour course, I would *assign* the whole book; I would just not try to *teach* every bit of it. In fact, I would even let large gobs of it go unmentioned in my class. There is a pervasive feeling among law teachers, not shared by many other kinds of teachers, that whatever "they" read "we" have got to talk about. Nonsense. "They" are big boys and girls, and there's no real reason we cannot demand that when we and they do get together to talk about what there is time to talk, we can do it unhindered by a pre-prepared and carefully dessicated field of reference; I cannot see how one meets the danger of classroom superficiality by assuring superficiality in preparation.

the important basic issues framing consumer protection out of this book? You certainly can. Can you at the same time convey much of the complex reality of a real legal response to a real problem in the real world? Absolutely. It would be, I think, on the dementia edge of greediness to ask for much more.

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