

1969

The Consumer as King: The Economics of Precarious Sovereignty

Robert L. Birmingham

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Robert L. Birmingham, *The Consumer as King: The Economics of Precarious Sovereignty*, 20 Case W. Rsrv. L. Rev. 354 (1969)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol20/iss2/5>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

The Consumer as King: The Economics of Precarious Sovereignty

Robert L. Birmingham

My answer to the question, "Is the consumer sovereign?" is that the consumer is at least as much a sovereign as Queen Elizabeth II of England.

Katona, Long-Range Changes in Consumer Attitudes, in *Dynamic Aspects of Consumer Behavior* 95, 103 (C. Lininger ed. 1963).

There is something sacred about big business. Anything which is economically right is morally right.

Henry Ford, quoted in A. Sinclair, *Prohibition: The Era of Excess* 369 (1962).

Thru business, properly conceived, managed and conducted, the human race is finally to be redeemed.

Purinton, Big Ideas from Big Business, *The Independent*, April 16, 1921, at 395, quoted in *The Twenties — Fords, Flappers & Fanatics* 3-4 (G. Mowry ed. 1963).

I. INTRODUCTION

RECENTLY the Magazine Publishers Association, an association of 365 leading United States magazines, has sponsored a group of advertisements advertising advertising. One of the most

THE AUTHOR: ROBERT L. BIRMINGHAM (A.B., LL.B., Ph.D. in Economics, University of Pittsburgh; LL.M., Harvard University) is an Assistant Professor of Law at Indiana University.

popular of these, which appeared in many mass-consumption magazines in the spring and summer of 1967, is a Feiffer-like series of sketches set at a cocktail party.¹ A professorial and hence hardly

virile-looking simpleton is depicted expounding his views on economic planning to a young woman obviously drawn to illustrate the ease of combining sexual attractiveness with the responsibilities of motherhood:

Professor: Our economy is like a great complicated machine that has too many moving parts!

¹ See, e.g., NEWSWEEK, April 10, 1967, at 101.

Matron: We used to have a car like that.

Professor: I say *simplify*! Give the public *one* good TV . . . *one* soap . . . just *one* brand of *everything*.

Matron: I do hope it's a pink soap or maybe a nice yellow or . . .

Professor: *Think* what we'll *save* on promotion . . . advertising . . . wasteful competition! The mind boggles.

Matron: When that happens to me, I take an aspirin or an "em-pirin" or an "alka-seltzer." It depends.

Professor: Of course the *government* would see to it every product met a certain *standard*.

Matron: And if they didn't, I'd simply switch to a better brand!

Professor: *No, no!* Thousands of brands screaming to be bought is a thing of the *past*. We must go *beyond* that.

Matron: You mean I couldn't choose things to buy the way I pick a movie or a . . .

Professor: You wouldn't need to choose.

Matron: My husband and I passed through a *charming* little country just like that.

Professor: Really, which one?

Matron: Albania.

Elaboration is provided in text at the bottom of the page, apparently to aid those missing the point but nevertheless literate:

If you're laughing at that fellow up above, we've got news for you. He's serious!

There actually are people — well-meaning people — in this country today who think the government should regulate the number of brands on the market.

Mrs. Smith is confused by all the varieties of soap on her supermarket shelf, they say. It would simplify things if there were only four or five, they claim. Making shopping a whole lot quicker and easier.

Of course, poor, little, mixed-up Mrs. Smith won't get to choose which soaps go and which soaps stay. Seventeen years of sharp-eyed, close-fisted comparison shopping and product testing apparently have left Mrs. Smith incapable of that judgment.

So, now she'll have friends in high places to do her shopping for her. Lucky Mrs. Smith.

Let's hope they know Mrs. Smith has a 12-year-old with dry skin. And a mauve bathroom.

Even disregarding the permissibility of travel through Albania at the time of the trip, this advertisement raises interesting problems. Our ideology asserts that maximization of satisfaction can best be attained through vigilant protection preventing regulatory adulteration of a largely mythical but nevertheless sacred market mechanism.² Consumer choice is held to be inviolable.³ We blindly

²"The ideology of laissez-faire outlived the structural reforms which changed

assume that each person is endowed with an immutable set of preferences dictating degrees of satisfaction associated with the acquisition and use of various combinations of goods. Since discovery of such pleasure schedules cannot be disassociated from individual selection among proffered bundles of products, interference with this selection is generally deemed to reduce community utility. Claims of efficacy, however, do not stop here: "[W]ithin the model of the free market lies one good chance of smoothing the frictions which develop between men on the score of religion, race, colour or social values. 'The market is a great civilizer.'"⁴

The increasing complexity of the modern market place has rendered the unaided individual almost defenseless against modern merchandising techniques. The head of a large department store has stated: "God created the masses of mankind to be exploited. I exploit them; I do his will."⁵ In a message to Congress delivered February 5, 1964, President Johnson noted that "for far too long, the consumer has had too little voice and too little weight in government. As a worker, as a businessman, as a farmer, as a lawyer or doctor, the citizen has been well represented. But as a consumer, he has had to take a back seat."⁶

In spite of our ideological bias toward nonintervention, concern for consumer impotence has inspired recent legislation designed to redress the imbalance of power. In this article selected superstitions underlying our economic value judgments are briefly examined. Next, attention is focused on two statutes, the Fair Pack-

uncontrolled market economy. Indeed, the discrepancy between what many think we ought to do — *laissez-faire* — and what we in fact are doing — creating a welfare state — has not yet entirely disappeared in the United States." Dalton, *Primitive, Archaic, and Modern Economies: Karl Polanyi's Contribution to Economic Anthropology and Comparative Economy*, in *ESSAYS IN ECONOMIC ANTHROPOLOGY* 1, 9 (J. Helm ed. 1965).

³ It can . . . be affirmed that thanks to the nonintervention of the state in private affairs, wants and satisfactions would develop in their natural order. . . . Away, then, with the quacks and the planners! Away with their rings, their chains, their hooks, their pincers! Away with their artificial methods! . . . Let us cast out all artificial systems and give freedom a chance — freedom, which is an act of faith in God and in His handiwork. F. BASTIAT, *The Law*, in *SELECTED ESSAYS ON POLITICAL ECONOMY* 51, 53, 96 (G. de Huszar ed. 1964).

See U.S. DEP'T OF COMMERCE, DO YOU KNOW YOUR ECONOMIC ABC'S? — PROFITS AND THE AMERICAN ECONOMY 11-12 (1965).

⁴ J. JEWKES, PUBLIC AND PRIVATE ENTERPRISE 71 (1965).

⁵ Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1135 n.7 (1931).

⁶ Address by President Johnson, H.R. DOC. NO. 220, 88th Cong., 2d Sess. 1 (1964).

aging and Labeling Act and the National Traffic and Motor Vehicle Safety Act of 1966. After briefly describing each, I will attempt to evaluate its purpose and impact in the light of economic theory.

II. EQUILIBRIUM AND OPTIMALITY

Pareto optimality — economic equilibrium such that with given community resources no person can be made better off without injury to another — will result if: perfect competition prevails; there are constant returns to scale; and there are no external economies or diseconomies with respect to production or consumption.⁷ The Platonic ideal of a perfectly competitive commodity market requires that:

- (1) firms produce a homogeneous commodity, and consumers are identical from the sellers' point of view, in that there are no advantages or disadvantages associated with selling to a particular consumer;
- (2) both firms and consumers are numerous, and the sales or purchases of each individual unit are small in relation to the aggregate volume of transactions;
- (3) both firms and consumers possess perfect information about the prevailing price and current bids, and they take advantage of every opportunity to increase profits and utility respectively;
- (4) entry into and exit from the market is free for both firms and consumers.⁸

Perfectly competitive factor markets must satisfy similarly rigorous conditions. All markets must be linked by perfect knowledge of the characteristics of their products or factors.

The basic assumptions of the model inherently connote a lack of realism. Not only are its requirements unattainable, but attempts to avoid unnecessary divergence from its norms cannot be justified without further detailed argument. If some aspects of a system are constrained to non-maximizing levels, there is no a priori basis for asserting that satisfaction of other conditions of optimality will necessarily prove advantageous.⁹

The optimality of competitive equilibrium merely assures efficiency. In the general case welfare will not be maximized:

Perfect competition represents a welfare optimum in the narrow sense of fulfilling the requirements of Pareto optimality. . . . An

⁷ See P. SAMUELSON, *The Economic Role of Private Activity*, in 2 COLLECTED SCIENTIFIC PAPERS 1419, 1422 (J. Stiglitz ed. 1966).

⁸ J. HENDERSON & R. QUANDT, *MICROECONOMIC THEORY* 86 (1958).

⁹ Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

additional difficulty is introduced by the fact that the analysis of Pareto optimality accepts the prevailing income distribution The problem of finding an optimal income distribution is not considered. . . . The analysis of welfare in terms of Pareto optimality leaves a considerable amount of indeterminacy in the solution: there are an infinite number of points . . . which are Pareto-optimal. . . . In order to judge the relative social desirability of alternative points . . . society must make additional value judgments which state its preferences among alternative ways of allocating satisfaction to individuals. Value judgments are ethical beliefs and are not the subject of economic analysis.¹⁰

Our interest concentrates on the ability of the consumer, assuming satisfaction of other conditions necessary for optimization, to choose from the available goods that combination which, given his income, will yield him the most pleasure. Plot quantities of two desired goods, G_1 and G_2 , along the horizontal and vertical axes of Figure 1. Then any point (for example, point A) within the quadrant will denote a unique combination of the two goods having a definite value to an individual. The individual, offered a choice between combinations of goods represented by any two points, will either prefer one to the other or be indifferent as to which he obtains. Ordinarily, we would expect a person to value the combination designated by point B more highly than that of point A , because the former contains more of each good. The locus of all combinations of goods from which the consumer derives equal satisfaction is called an indifference curve. Assuming infinite divisibility of both goods, each point along or between the axes will lie on some indifference curve. Three such curves, I_1 , I_2 , and I_3 , are drawn in Figure 1. The individual will prefer a position on I_3 to one on I_2 , and would rather be on I_2 than on I_1 .¹¹

Limited resources normally prevent the consumer from obtaining satiating amounts of the goods in question. Combinations available to him will be limited to those on or below and to the left of a budget constraint, such as line xy in Figure 1. From the combinations which he can afford the individual will choose that usually unique one which will yield him the greatest satisfaction. If choice is unhampered, he will locate at point A , where budget

¹⁰ J. HENDERSON & R. QUANDT, *supra* note 8, at 208. See also P. SAMUELSON, *Modern Economic Realities and Individualism*, in 2 COLLECTED SCIENTIFIC PAPERS 1407, 1410 (J. Stiglitz ed. 1966).

¹¹ The curves are convex to the origin because acquisition of increasing quantities of a good will normally render it less valuable in terms of other goods possessed in unchanging amounts.

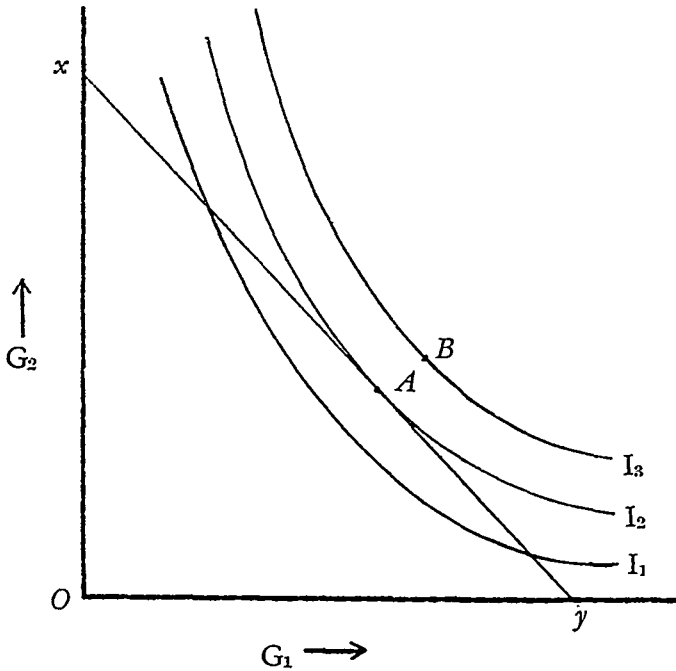


FIGURE 1.

constraint xy is tangent to indifference curve I_2 , the highest indifference curve he can reach.

Since goods are valuable for the enjoyment they yield, it is possible to consider them merely combinations of qualities which themselves form more basic units of personal satisfaction. Consumer behavior, therefore, can be explained with reference to choice among combinations of these qualities in a manner paralleling our analysis of choice among combinations of goods. Thus we can measure quantities of two desired qualities rather than quantities of two desired goods along the horizontal and vertical axes of Figure 1. Assuming perfect information concerning the qualities associated with each good, unrestricted consumer choice will by a now familiar process again yield equilibrium at point A .¹²

¹² See Fels, *Hedonistic Calculus as Seen from a Distance*, 91 WBLT WIRTSCHAFTLICHES ARCHIV 101, 108 (1963). "Instead of assuming that we have built-in schedules upon which all existing or potential objects are listed in order of preference, let us think of the individual having 'wants.' These 'wants' are not specific, but specific objects and services fulfill them to varying degrees." G. TULLOCK, *TOWARD A MATHEMATICS OF POLITICS* 7 (1967).

III. INFORMATION

A. Legislation

The Fair Packaging and Labeling Act,¹³ the product of partially abortive efforts by Michigan's Senator Hart and others to reduce consumer confusion caused by misleading marketing practices, became effective on July 1, 1967. Some indication of the anticipated impact of the regulations as originally formulated can be garnered from the ferocity of industry opposition to their enactment. The Michigan Chamber of Commerce stated:

Inescapably, one concludes the Hart bill is not really aimed at consumer protection, for that's already available in existing law. The measure is little more than a federal grab for power to make decisions that heretofore have been made by consumers and by business — a power grab based on the fallacious concepts that the consumer is Casper Milquetoast, Business is Al Capone, and government is Superman.¹⁴

A representative of the National Association of Manufacturers argued that "[t]he inevitable effect of the bill will be to roll back the packaging and marketing revolution of this generation. Had we lived in recent years under such a law, we would not buy our products as fresh, as clean, as unbroken or unspoiled, as accurately measured, as easily handled or as cheaply as we do today."¹⁵ Such resulting national disasters as a requirement that the holes in "Life Savers" be filled were predicted.¹⁶ A resolution against passage was adopted by the American Bar Association, whose seven-man Advisory Committee of the Food, Drug, and Cosmetic Division of the Corporation, Banking, and Business Section included several attorneys associated with the food industry.¹⁷

¹³ 15 U.S.C. §§ 1451-61 (Supp. 1967).

¹⁴ MICHIGAN CHAMBER OF COMMERCE, FEDERAL LEGISLATION REPORT 2 (1965). "What Salem did for its witches in 1692 may yet become a minute affair in comparison to the trial taking shape for the food industry." A. MOWBRAY, THE THUMB ON THE SCALE: OR THE SUPERMARKET SHELL GAME 159 (1967).

¹⁵ *Hearings on Packaging and Labeling Legislation Before the Senate Subcomm. on Antitrust and Monopoly*, 88th Cong., 1st Sess., pt. 2, at 565 (1963).

¹⁶ *Hearings on Fair Packaging and Labeling Before the Senate Comm. on Commerce*, 89th Cong., 1st Sess. 639 (1965).

¹⁷ Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255, 1266 (1966). The bill which became the Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301-92 (1964), was subjected to similarly vituperative attacks. A spokesman for the Proprietary Association asserted: "The only manner in which the present bill could be properly amended is to strike out all after the enacting clause I have never in my life read a bill or heard of a bill so grotesque in terms, evil in its purposes and vicious in its possible consequences as this bill would be if enacted." *Hearings on Food, Drugs, and Cosmetics*

Section 1451 recites the sources of congressional inspiration:

Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods.¹⁸

The means used to effectuate this policy, significantly less drastic than those initially proposed,¹⁹ seem hardly calculated to destroy even those surviving fragments of our capitalistic system. The Act subjects to control "consumer commodities," broadly defined by section 1459 to include:

any food, drug, device, or cosmetic . . . and any other article, product, or commodity . . . customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use²⁰

Among goods specifically excluded from regulation are meat, poultry, tobacco products, and rat poison.

Section 1454 vests regulatory power in the Secretary of Health, Education, and Welfare, when the consumer commodity is a food, drug, device, or cosmetic, or the Federal Trade Commission, if it is not. These authorities are directed by section 1453 to promulgate regulations providing that:

- (1) The commodity shall bear a label specifying the identity of the commodity and the name and place of business of the manufacturer, packer, or distributor;
- (2) The net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label²¹

Before a Subcomm. of the Senate Comm. on Commerce, 73d Cong., 2d Sess. 172 (1933). The Drug, Chemical, and Allied Trade Section of the New York Board of Trade proclaimed: "The 'Tugwell' Food and Drug Bill is anti-NRA. It will seriously affect employment and morale in the industries indicated. It will put thousands of men and women out of work. It will close dozens of manufacturing plants and hundreds of stores. It will hurt thousands. It will help none." Id. at 471. See Hart, supra at 1264-65.

¹⁸ 15 U.S.C. § 1451 (Supp. 1967).

¹⁹ "[T]he battle ended in victory for the food manufacturers." A. MOWBRAY, *supra* note 14, at 5.

²⁰ 15 U.S.C. § 1459 (Supp. 1967).

²¹ 15 U.S.C. § 1453(1)-(2) (Supp. 1967).

Additional paragraphs seek to avoid consumer confusion through establishing standards of clarity. Thus quantities contained "shall appear in conspicuous and easily legible type in distinct contrast . . . with other matter on the package,"²² and "shall be so placed that the lines of printed matter . . . are generally parallel to the base on which the package rests as it is designed to be displayed"²³ In some cases decimal fractions of a pound may not be carried out to more than two places.²⁴

If compliance is impracticable or unnecessary, section 1454 allows the authorities to exempt classes of commodities from requirements of section 1453. Additional duties include prevention of "nonfunctional-slack-fill of packages" when "necessary to prevent the deception of consumers or to facilitate value comparisons as to any consumer commodity" A package is to be considered "nonfunctionally slack-filled" only "if it is filled to substantially less than its capacity for reasons other than (A) protection of the contents of such package or (B) the requirements of machines used for enclosing the contents in such package."²⁵

Section 1454(d) states:

Whenever the Secretary of Commerce determines that there is undue proliferation of the weights, measures, or quantities in which any consumer commodity or reasonably comparable consumer commodities are being distributed in packages for sale at retail and such undue proliferation impairs the reasonable ability of consumers to make value comparisons with respect to such consumer commodity or commodities, he shall request manufacturers, packers, and distributors of the commodity or commodities to participate in the development of a voluntary product standard for such commodity or commodities under the procedures for the development of voluntary products standards established by the Secretary Such procedures shall provide adequate manufacturer, packer, distributor, and consumer representation.²⁶

The absence of penalties for noncompliance assures that standardization programs are truly voluntary:

(e) If (1) after one year after the date on which the Secretary of Commerce first makes the request of manufacturers, packers,

²² *Id.* § 1453(3) (B).

²³ *Id.* § 1453(3) (D).

²⁴ "I remember telling [my mother's mother, Lady Stanley of Alderley] that I had grown 2½ inches in the last seven months, and that at that rate I should grow 4 2/7 inches in a year. 'Don't you know,' she said, 'that you should never talk about any fractions except halves and quarters? — it is pedantic!'" B. RUSSELL, *AUTOBIOGRAPHY* 33 (1967).

²⁵ 15 U.S.C. § 1454(c) (Supp. 1967).

²⁶ *Id.* § 1454(d).

and distributors to participate in the development of a voluntary product standard . . . he determines that such a standard will not be published . . . or (2) if such a standard is published and the Secretary of Commerce determines that it has not been observed, he shall promptly report such determination to the Congress with a statement of the efforts that have been made under the voluntary standards program and his recommendation as to whether Congress should enact legislation providing regulatory authority to deal with the situation in question.²⁷

Judicial review of regulations issued pursuant to the Act is authorized in section 1455. Section 1456 declares misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act "[a]ny consumer commodity which is a food, drug, device, or cosmetic . . . introduced or delivered for introduction into commerce" in disregard of established standards. Similarly, nonconformity in the packaging of other consumer commodities is to be deemed "an unfair or deceptive act or practice in commerce" in violation of section 5 (a) of the Federal Trade Commission Act.²⁸

B. *Theory*

Unfortunately equilibrium as depicted in Figure 1 is seldom achieved. Preference patterns which govern purchases are a combination of basic wants and beliefs concerning the characteristics of various products. Product purchases in turn are the means by which basic wants are satisfied. Selection of that combination of goods represented by point *A* in Figure 1 is axiomatic: argument for any alternative choice normally degenerates to an assertion that the relevant indifference curves should be differently drawn.²⁹ The

²⁷ *Id.* § 1454(e).

²⁸ 15 U.S.C. § 45(a).

²⁹ The problem is of course much more complex. See, e.g., Richter, *Revealed Preference Theory*, 34 *ECONOMETRICA* 635 (1966). Modern discussions of consumer behavior need not formulate a refutable concept of satisfaction:

Neoclassical "utility" was a kind of economic ether: an element whose assumed existence was merely a convenient medium for the analytical transmission of the observable phenomena of consumer choice. Since other means have proved capable of yielding the same predictions of these phenomena, the assumption of its existence is simply not needed. To assert this is not to deny that operational theorems about consumer behavior can be obtained from the neoclassical theory, nor that they can be tested against reality. We may merely derive most of these theorems without this subjective ether. R. KUENNE, *THE THEORY OF GENERAL ECONOMIC EQUILIBRIUM* 54 (1963).

Enjoyment as a goal is itself not unobjectionable:

Suppose that it were discovered that a state of pleasure is always associated with a particular kind of space-time pattern of electromagnetic field, or other physical system, and that we were capable of producing such patterns in the laboratory. . . . Would we be justified in spending a large part of the world's resources in producing pleasure-fields of high intensity? . . . Should

problem is that point *A* generally does not represent an optimum with respect to the satisfaction of underlying desires.

The assumption of perfect information required by the competitive model is obviously unrealistic. In a recent test, 33 young married women with at least 1 year of college and 1 year of regular shopping experience were given nearly 2½ minutes per item to select 20 best buys among items typically stocked by supermarkets. They chose incorrectly 43 percent of the time, spending an average of almost 10 percent more than necessary. Nevertheless, "the average shopper sweeps past the 8,000 products found in the store and buys 32 items in 15 to 18 minutes . . ."³⁰

The merchant is of course more interested in selling his product than in creating a knowledgeable noncustomer. A. C. Fuller, founder of the Fuller Brush Company, stated:

The American housewife is an intelligent buyer The greatest safeguard she has . . . is in shopping around from store to store

This shopping impulse arises the moment she considers buying anything, and the house-to-house salesman *must stifle it*, if he can. He is giving his customer no opportunity to compare values or to postpone buying. "Do it now," he tells her, "I won't be back this way for a couple of months." She buys, when she buys, against an inner voice of discretion which tells her to wait until she can compare values.³¹

we breed billions of rats and supply them each with a pleasure-producing machine? Good, *A Problem for the Hedonist*, in THE SCIENTIST SPECULATES—AN ANTHOLOGY OF PARTLY-BAKED IDEAS 199, 200 (I. Good ed. 1962).

As an alternative to altruistic hedonism that author suggests as a possible goal "that we should maximise the chance that the human race should be immortal." *Id.* at 200.

³⁰ 112 CONG. REC. 11,507 (daily ed. June 2, 1966). See *id.* at 12,169-72. Potato chips may be purchased in packages of 71 different weights, all under 3½ pounds. Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203, 1229 n.76 (1966). "A cursory review of packaged salted nuts in a neighborhood supermarket turned up two brands of different varieties, packed in net weights of 2¼, 2¾, 3¾, 4, 4¼, 5¼, 5¾, 5½, 6, 6¾, 7, 7½, 8, and 11 ounces, and all of them priced to end in 'nines'—at 29, 39, 49, or 59 cents a package." C. BELL, CONSUMER CHOICE IN THE AMERICAN ECONOMY 335 (1967).

Since inspection is normally cursory, advertisers frequently attempt to distinguish their product from those of competitors by stressing as implicitly unique qualities which all brands share.

Platformate is the ingredient which Shell says puts more mileage into the gasoline gallon. What Shell did not say is that Platformate, or its equivalent, is present in virtually every gasoline refined. When we asked about this, Shell spokesman said only: 'We have never claimed that Platformate was an exclusive ingredient.' Statement in Program on Gasoline Produced by National Educational Television, Dec. 1966, quoted in Sloane, *Advertising: Platformate Fuels German Tiff*, N.Y. Times, July 12, 1967, at 53, col. 3.

³¹ Fuller, *Where Are We Headed in House-to-House Selling?*, 52 MAGAZINE OF BUS. 703, 705 (1927), quoted in Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 781 (1967).

Packaging is definitely an important instrument of persuasion: "I'm like a child. If you fix things up pretty, I'll buy them."³² Opportunities for manipulation are not disregarded: "[T]hree motivating factors for a successful packaging program are consumer needs, desires and weaknesses. 'Consumer weakness includes the embellishments assigned to a package They add little or nothing to the functional aspects of the package, nothing to the product, but to a large measure they create the impulse for purchasing.'"³³

Unwillingness to seek information before purchase often seems condemned as almost immoral indifference on the part of the individual.³⁴ A possible consequence of such an attitude is the assertion that if consumers are foolish enough to purchase blindly they do not deserve legislation which attempts to relieve them of the consequences of their stupidity. Such an approach advocates a needless sacrifice of welfare. Also, it frequently disregards the fact that information, an economic good like any other, can usually be acquired only through relinquishment of some alternative value. Information concerning the optimal level of information one should seek is likewise not costless.³⁵

³² Statement by a housewife, *quoted in Nelson, Seven Principles in Image Formation*, 26 J. MARKETING 67, 69 (1962), *reprinted in CONSUMER BEHAVIOR AND THE BEHAVIORAL SCIENCES* 365, 366 (S. Britt ed. 1966).

³³ PRINTERS' INK, Oct. 18, 1963, at 20.

³⁴ "If anyone is so foolish as to enter into an agreement such as this, I do not know that his case can be considered harsh." Statement by a British judge, *quoted in M. MAYER, THE LAWYERS* 283 (1967). Admittedly ignorance frequently appears unwarranted:

Reporter: Twiggy, do you know what happened at Hiroshima?

Twiggy: Where's that?

Reporter: In Japan.

Twiggy: No. I've never heard of it. What happened there?

Reporter: A hundred thousand people died on the spot, all at the same time.

Twiggy: Oh, God! When did you say it happened? Where? Hiroshima? But that's ghastly. A hundred thousand dead? It's frightful. Men are mad.

Seventh Annual Dubious Achievement Awards for 1967, ESQUIRE, Jan. 1968, at 49, 53.

³⁵ Pathetic examples of consumer inefficiency abound:

Eight years ago, Mrs. Phillips sent a radio to be repaired. The bill came to \$8.90. Mrs. Phillips refused to pay — she thought it was going to cost only \$1. She sent her 20-year-old son to get the radio back. But John, an easy mark for a fast sales talk, came home with a new radio, for which he had agreed to pay in \$1.25 weekly installments. The radio-shop owner, chubby A. M. Pearson, got Mrs. Phillips to sign the contract.

When Mrs. Phillips fell into arrears on her payments, Radioman Pearson went to court and got a judgment which ordered her to give back the radio and pay him \$81.50 in court costs and collection fees.

Mrs. Phillips gave up the radio, but could not pay the rest. In August

Lack of full knowledge of product characteristics will normally prevent a consumer from acquiring that combination of goods of greatest benefit to him. An error in estimating the characteristics of a product will lead to preference patterns with respect to goods which do not accurately reflect preferences as to qualities. In Figure 2 the individual is shown initially to have achieved an equilibrium with respect to goods identical to that of Figure 1. He has selected that combination of products represented by point *A*, where indifference curve I_2 is tangent to budget constraint xy . If he is only imperfectly aware of the characteristics of the products,

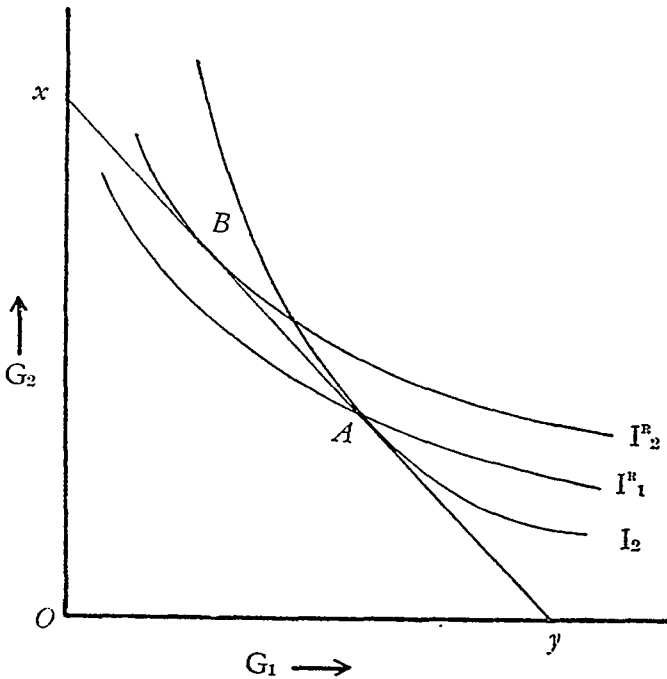


FIGURE 2

1943, Pearson had the city marshal sell off Mrs. Phillips' assets — her house and lot — to satisfy the court order. Pearson was the only bidder, and he offered \$26.50. A year later, as required by law, the marshal delivered the deed to Pearson. During these twelve months, Mrs. Phillips could have kept her home by paying the \$26.50 plus a \$25 marshal's fee. She says nobody told her that.

Last week Pearson had the unrepaired radio, the "new" radio which he sold her son, a still unsatisfied claim for \$55, and the house and lot. (He was willing to let Mrs. Phillips stay on — at \$10 a week rent.) *TIME*, March 28, 1949, at 23.

See also *Luck of Clarence Jackson*, *TIME*, Sept. 1, 1967, at 64.

however, he will generally not have succeeded in satisfying his more fundamental desires as fully as his income permits.

The purpose of the Fair Packaging and Labeling Act and similar statutes is to facilitate attainment of a higher level of consumer satisfaction. To accomplish this the government seeks to assure a supply of information which permits an individual to evaluate more correctly the goods available for purchase. Reduction of error in perceiving the qualities associated with various products will transform the preference pattern depicted in Figure 2, resulting in a set of revised indifference curves including, say, I^R_1 and I^R_2 . Point *A*, now situated on I^R_1 , is no longer an equilibrium position. Now the consumer will choose that combination of goods represented by point *B*, where a higher indifference curve, I^R_2 , is tangent to the budget constraint. The consumer's welfare has increased, since purchases now more nearly satisfy his basic desires.

IV. COERCION

A. Legislation

The National Traffic and Motor Vehicle Safety Act³⁶ became law on September 9, 1966. The preamble of the Act declares its purpose to be "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." In order to achieve this end section 1392 authorizes establishment of "appropriate Federal motor vehicle safety standards." This task, originally entrusted to the Department of Commerce, that traditional bulwark against the ravages of industrial octopi, has been transferred to the National Highway Safety Bureau, a division of the newly created Department of Transportation. The first set of safety standards, issued in early 1967, became effective January 1, 1968. The controls apply to all motor vehicles manufactured after December 31, 1967. Additional restrictions will be similarly imposed on 1969 and 1970 output.³⁷

Under section 1393 the Secretary is directed to form a National Motor Vehicle Safety Advisory Council.³⁸ The Secretary must

³⁶ 15 U.S.C. §§ 1381-1425 (Supp. 1967).

³⁷ Department of Transportation Act, 49 U.S.C. §§ 1651-57 (Supp. 1967); Exec. Order No. 11,357, 32 Fed. Reg. 8225 (1967); N.Y. Times, Jan. 10, 1968, at 31, col. 1; *id.* Dec. 27, 1967, at 14, col. 3.

³⁸ A majority of the Council must be "representatives of the general public, including representatives of state and local governments . . ." The balance of the Council comprises "representatives of motor vehicle manufacturers, motor vehicle equipment manufacturers, and motor vehicle dealers." 15 U.S.C. § 1393(a) (Supp. 1967).

consult with this body before issuing safety standards. A "research, testing, development, and training" program will provide him with an additional basis for decision.³⁹

Section 1397 provides:

No person shall . . . manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect . . . unless it is in conformity with such standard⁴⁰

A qualification exempts trade in used vehicles from this prohibition. Section 1398 establishes a civil penalty for violations not exceeding \$1000 per vehicle or piece of equipment involved, to a maximum of \$400,000 for any related series of violations. In addition, section 1399 permits the Secretary to apply to a United States District Court for an injunction restraining prohibited conduct. Section 1400 requires a manufacturer or distributor to repurchase offending vehicles from a distributor or dealer. Under section 1402 manufacturers must notify purchasers of defects in vehicles already sold within a reasonable time after their discovery. Of course, common law liability for defective products is not precluded by adhering to standards issued by the Secretary.

Special provisions promoting tire safety are designed to assure a supply of information to the consumer through controls similar to those of the Fair Packaging and Labeling Act. Thus section 1421 directs:

In all standards for pneumatic tires . . . the Secretary shall require that tires subject thereto be permanently and conspicuously labeled with such safety information as he determines to be necessary Such labeling shall include —

- (1) suitable identification of the manufacturer, or in the case of a retreaded tire suitable identification of the retreader, unless the tire contains a brand name other than the name of the manufacturer in which case it shall also contain a code mark which would permit the seller of such tire to identify the manufacturer thereof to the purchaser upon his request.
- (2) the composition of the material used in the ply of the tire.
- (3) the actual number of plies in the tire.
- (4) the maximum permissible load for the tire.
- (5) a recital that the tire conforms to Federal minimum safe performance standards, except that in lieu of such recital the Secretary may prescribe an appropriate mark or symbol for

³⁹ The establishment of such a program is required by the Act. *Id.* § 1395(a).

⁴⁰ *Id.* § 1397(a)(1).

use by those manufacturers or retreaders who comply with such standards.

The Secretary may require that additional safety related information be disclosed to the purchaser of a tire at the time of sale of the tire.⁴¹

Section 1423 adds:

In order to assist the consumer to make an informed choice in the purchase of motor vehicle tires, within two years after September 9, 1966, the Secretary shall . . . prescribe by order, and publish in the Federal Register, a uniform quality grading system for motor vehicle tires. . . . The Secretary shall also cooperate with industry and the Federal Trade Commission to the maximum extent practicable in efforts to eliminate deceptive and confusing tire nomenclature and marketing practices.⁴²

B. *Theory*

The principles underlying provisions of the National Traffic and Motor Vehicle Safety Act which promote consumer knowledge of tire characteristics parallel those generating the Fair Packaging and Labeling Act and require no further explanation. Sections compelling adherence by manufacturers to externally imposed construction standards, however, add an element of coercion inconsistent with reliance on competitive processes. In this section, I examine the reasons for, and impact of, such interference with market mechanisms.

Legislative motivation sufficiently strong to support passage may be isolated without appeal to economic analysis. Little thought is needed to construct a simplistic explanatory syllogism. Automobile accidents are the leading cause of death to Americans between the ages of 5 and 30;⁴³ resulting damage is estimated to have exceeded 2 percent of national income in 1964.⁴⁴ Safer automobiles can be produced: frequent impalement by tailfins can be avoided even without extensive sacrifice of aesthetic values. Yet manufacturers, more intent on stylistic modification,⁴⁵ seem unwilling voluntarily to adopt high safety standards. Therefore

⁴¹ *Id.* § 1421.

⁴² *Id.* § 1423.

⁴³ Boyd & Claycamp, *Industrial Self-Regulation and the Public Interest*, 64 MICH. L. REV. 1239, 1245 (1966).

⁴⁴ R. NADER, *UNSAFE AT ANY SPEED* at viii (Grossman Press ed. 1965).

⁴⁵ "Styling's precedence over engineering safety is well illustrated by this statement in a General Motors' engineering journal: 'The choice of latching means and actuating means, or handles, is also dictated by styling requirements. Changes in body style will continue to force redesign of door locks and handles.'" *Id.* at 211.

public action is required. On a more subjective level, the Act can be viewed as belated populist harassment of the corporate enemy or as symbolic rebellion against parental authority.

Nevertheless, there remains a sound basis in economic theory for legislative action. We have seen that the competitive model generally produces efficient equilibrium only in the absence of external economies or diseconomies. Such externalities "may be said to arise when relevant effects on production or welfare go wholly or partially unpriced."⁴⁶ "Under these conditions, since each individual's actions have effects on others which he does not take into account in making his decision, there is a *prima facie* case for intervention."⁴⁷ Environmental pollution currently furnishes the most important example of external effects. In the absence of legal controls the self-seeking entrepreneur of Smithian analysis may disregard the impact of emission of smoke and other waste on public sensibilities, because he need not compensate others for their discomfort.

Since an unsafe automobile endangers its owner, one would expect a prospective purchaser to balance safety considerations with other values, such as inexpensiveness and potency of sexual symbolism.⁴⁸ The worth of life is normally insufficient to motivate acquisition of a Sherman tank.⁴⁹ The individual will attempt to purchase equipment which, given his resources, will provide him the greatest satisfaction.

Externalities arise because an unsafe automobile threatens others besides its owner. While most persons would derive displeasure or at least inconvenience from causing injury to others, the extent of their disutility will hardly match that of their victims. Insurance costs or awards of damages are but imperfect attempts to incorporate diseconomies into driver preference functions and are mere transfer payments which distribute but do not eliminate the loss caused by accidents to society as a whole. The National Traffic and Motor Vehicle Safety Act can be deemed to serve a function similar to nuisance doctrines or smoke control legislation.

⁴⁶ E. MISHAN, *Reflections on Recent Developments in the Concept of External Effects*, in WELFARE ECONOMICS 98, 103 (1964).

⁴⁷ P. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 208 (1964).

⁴⁸ "One woman wrote to the company to confide that the 'Mustang is as exciting as sex.'" R. NADER, *supra* note 44, at 218.

⁴⁹ See generally Rottenberg, *Liability in Law and Economics*, 55 AM. ECON. REV. 107 (1965).

Regard for the safety of those other than owners undoubtedly played a role in its enactment.⁵⁰

The controls of the statute can be defended by arguing that the effects of individual ignorance can be counterbalanced at the least cost not by assuring a supply of information but by precluding deviation from that equilibrium which a person would select if he were informed. Such a technique would be merely an alternative means of achieving equilibrium at point *B* in Figure 2. As such it receives qualified support from the classical economists:

If either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty: for liberty consists in doing what one desires, and he does not desire to fall into the river.⁵¹

The legislation nevertheless seems partially a product of paternalistic concern that the consumer, no matter how well informed, is incapable of adequately defining his own preference function. There is some historical support for a claim that Americans have an irrational preference for speed over safety. In 1838 steamboatmen, admitting frequent negligence, nevertheless blamed consumer demand for many river accidents:

[T]he public have, themselves, contributed in no inconsiderable degree, to increase the evil, not only by newspaper puffs, but by the constant desire which a large portion of those who travel on steamboats, manifest to "go on the fastest" and even to urge an increase of speed. Is it wonderful then that under such circumstances some commanders should be induced to force their boats beyond the bounds of safety, when great patronage and applause are the rewards for the risk incurred? This morbid appetite among travelers for "going ahead" is probably one of the greatest causes of the evils.⁵²

Boorstin comments:

Apocryphal stories abounded; how passengers who had not yet paid their fare were sent to the after part of the vessel, where as assets, they would be least in danger from explosion; how Irishmen were preferred to slaves as firemen, because their deaths brought no financial loss to the management. Unembroidered reality was terrifying enough. In the twenty-five years before mid-

⁵⁰ "[O]ne of the problems we have is the pedestrian. . . . There are about 500,000 pedestrians injured; 8,000 pedestrians are killed every year." Statement by Senator Ribicoff, *quoted in* R. NADER, *supra* note 44, at 221.

⁵¹ J.S. MILL, *On Liberty*, in *ESSENTIAL WORKS* 249, 342 (M. Lerner ed. 1961).

⁵² *Quoted in* D. BOORSTIN, *THE AMERICANS — THE NATIONAL EXPERIENCE* 101 (1965).

century, there were at least one hundred and fifty major explosions on steamboats on western rivers, in which altogether no less than fourteen hundred people were killed.⁵³

By the middle of the 19th century the railroad had replaced the steamboat as the most dramatically destructive means of transportation. Some Americans appear to have accepted the dangers of technological progress with remarkable equanimity:

Alfred Bunn, an English theatrical manager traveling here in 1851, reported in amazement that a friend of his who had failed to unload a parcel from a train at the depot near his house was unperturbed, because he knew the train usually had an accident a mile farther on. Sure enough it did, and he unloaded his parcel then.⁵⁴

Many believe the modern driver a worthy successor to the early American traveler; observers have found "little evidence to suggest that consumers make brand choices on the basis of safety."⁵⁵ Promotional efforts stress other values: "Ever prodded a throttle with 445-pound-feet of torque coiled tightly at the end of it? Do that with one of these and you can start billing yourself as The Human Cannonball."⁵⁶ As Kessler notes, "marketing techniques attempt, on the whole successfully, to make sure that fear of accidents does not influence consumer choice."⁵⁷

Nineteenth-century libertarians sharply criticized government controls preventing purportedly irrational individual behavior. John Stuart Mill asserted as a fundamental maxim "that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance . . . are the only measures

⁵³ *Id.*

⁵⁴ *Id.* at 104. See J. VERNE, *Round the World in Eighty Days*, in 7 WORKS 153, 295-98 (C. Horne ed. 1911).

⁵⁵ Boyd & Claycamp, *supra* note 43, at 1246. "Chevrolet general manager Edward Cole said in 1959, 'One of the startling problems so far as crash injury is concerned is the utter refusal on the part of the American motorists to be strapped into a seat by a safety belt or a shoulder harness. . . . [T]he sale of these safety features is practically nil, indicating a real disinterest on the part of the public in their own safety.'" R. NADER, *supra* note 44, at 119. Such attitudes have been celebrated as products of personal liberty: "[I]n a democracy, a citizen has an inalienable right to be different; and, in this instance, the difference is the consumer's deviation from rationality as the foundation of her buying decisions The facade of complete rationality seems to be gone forever — whether we like it or not." Statement by Roy King, *quoted in* A. MOWBRAY, *supra* note 14, at 127.

⁵⁶ Advertisement for Buick Skylark Gran Sport, *quoted in* R. NADER, *supra* note 44, at 309. "This is a status symbol. . . . Plymouth Satellite's a decidedly undemocratic machine. Power-hungry people are the ones it really goes for." Advertisement, *quoted in id.* at 213.

⁵⁷ Kessler, *Product Liability*, 76 YALE L.J. 887, 926 (1967).

by which society can justifiably express its dislike or disapprobation of his conduct."⁵⁸ He argued:

[A]ll restraint, *quâ* restraint, is an evil [W]hen there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk [H]e ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.⁵⁹

Such conclusions are the logical product of utilitarianism. Assume that, "[o]n the occasion of every act he exercises, a human being is (inevitably) led to pursue that line of conduct which, according to his view of the case, taken by him at that moment, will be in the highest degree contributory to his own greatest happiness."⁶⁰ Then the individual should not be hampered by legislation designed to protect him, except possibly where the law-giver is more capable than the individual of discerning his true interests: "If I am to seek my pleasure, it must be left to me to judge concerning my pleasure"⁶¹

This position receives less support today. Hart states: "[P]aternalism — the protection of people against themselves — is a perfectly coherent policy. Indeed, it seems very strange in mid-twentieth century, to insist upon this, for the wane of *laissez faire* since Mill's day is one of the commonplaces of social history, and instances of paternalism now abound in our law, criminal and civil."⁶² He notes "a general decline in the belief that individuals know their own interests best,"⁶³ which he attributes to an increased awareness that

⁵⁸ J.S. MILL, *supra* note 51, at 340.

⁵⁹ *Id.* at 341-42.

⁶⁰ J. BENTHAM, CONSTITUTIONAL CODE, *quoted in* J. NARVESON, MORALITY AND UTILITY 58-59 (1967).

⁶¹ F. BRADLEY, ETHICAL STUDIES 101 (2d ed. 1927), *quoted in* J. STONE, HUMAN LAW AND HUMAN JUSTICE 137 (1965). "[T]he individual knows what is good for him. . . . His own valuations are likely to be only an imperfect projection of what is good for him. But it is likely to be a closer approximation than an outsider can give [T]he set of individual preferences becomes accepted as the arbiter of their own welfare." Rothenberg, *Values and Value Theory in Economics*, in THE STRUCTURE OF ECONOMIC SCIENCE 221, 240-41 (S. Krupp ed. 1966).

⁶² H. HART, LAW, LIBERTY, AND MORALITY 31-32 (1963). Rudolph von Ihering claimed: "I know of no example of a legal rule which has as its purpose to force an individual against his own will, in his own interest, for his own good. Where it appears to do so, it is always in the interest of society." *Quoted in* J. STONE, *supra* note 61, at 149. To the extent this is true it is trivial, contributing little more than the observation that society has an interest in the welfare of the individual.

⁶³ H. HART, *supra* note 62, at 32.

[c]hoices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court.⁶⁴

The tastes of the consumer are of course not immutable: "We may regard him as experimenting, learning, and possibly even deteriorating as a decision-making mechanism."⁶⁵ Nevertheless Scitovsky argues that the economist "cannot question and must accept as given"⁶⁶ whatever wants the individual manifests. Willingness to view preferences as parameters without examining their variability is a result of mesmerization of economic theorists by the internal logic of indifference analysis.⁶⁷ Means selected to satisfy basic drives are largely determined by acquired tastes: "It is impossible to understand the wants of the individual without knowing the society within which he lives, for all of his specific wants are determined by that society. . . . Even the iconoclast has his images chosen for him."⁶⁸ Since, as Galbraith notes, "[t]he further a man is removed from physical need the more open he is to persuasion — or management — as to what he buys,"⁶⁹ disregard of consumer preferences need not always be deemed desecration.

That community welfare can be increased through selective interference with consumer sovereignty does not, of course, necessarily justify legislative intervention in general. As the history of the

⁶⁴ *Id.* at 33. "Bentham, as we know, held that every man is the best judge of his own interest. Taken as it stands, this simply isn't true." J. NARVESON, *supra* note 60, at 84. "[T]here is the almost overwhelming weight of evidence . . . that people are often confused about their own feelings, do not know what they want, etc." Churchman, *On the Intercomparison of Utilities*, in *THE STRUCTURE OF ECONOMIC SCIENCE* 243, 251-52 (S. Krupp ed. 1966).

⁶⁵ Peston, *Changing Utility Functions*, in *ESSAYS IN MATHEMATICAL ECONOMICS* 233 (M. Shubik ed. 1967).

⁶⁶ T. SCITOVSKY, *WELFARE AND COMPETITION* 29 (1951).

⁶⁷ [I]t is only comparatively recently that economists have unfrozen those preference-and-indifference fields and recognized — and incorporated in their theories — that people learn from experience; that tastes and habits are not just there, but are acquired, developed; that utilities change; and that they change in an influenceable and predictable way. . . . [Q]uite typically all kinds of functions are made to change, but not tastes. In short, cognitive structures are thought of not as acquired but simply as possessed. . . . Such a view collides of course rather sharply with the thesis that "all behavior [is] scanning or sensory search." Fels, *supra* note 12, at 115.

⁶⁸ G. STIGLER, *THE THEORY OF PRICE* 90 (1947).

⁶⁹ J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 202 (1967).

American prohibition movement dramatically demonstrates,⁷⁰ there is no reliable means of determining when controls will prove beneficial: "[T]he 'incalculability' of the 'calculus' of the greatest happiness of the greatest number is a strong and constant temptation to those in power to practise . . . moulding and manipulation."⁷¹ Gain from measures such as the National Traffic and Motor Vehicle Safety Act would nevertheless appear worth the risk of occasional abuse of the power to restrict.

The impact of the prohibitory provisions of the National Traffic and Motor Vehicle Safety Act is illustrated in Figure 3. Here we measure safety and a composite of other desirable characteristics, denominated power, along the vertical and horizontal axes respectively. If choice is unimpeded, the consumer will as before select that combination of qualities represented by point *A*, where indifference curve *I*₂ is tangent to budget line *x**y*.

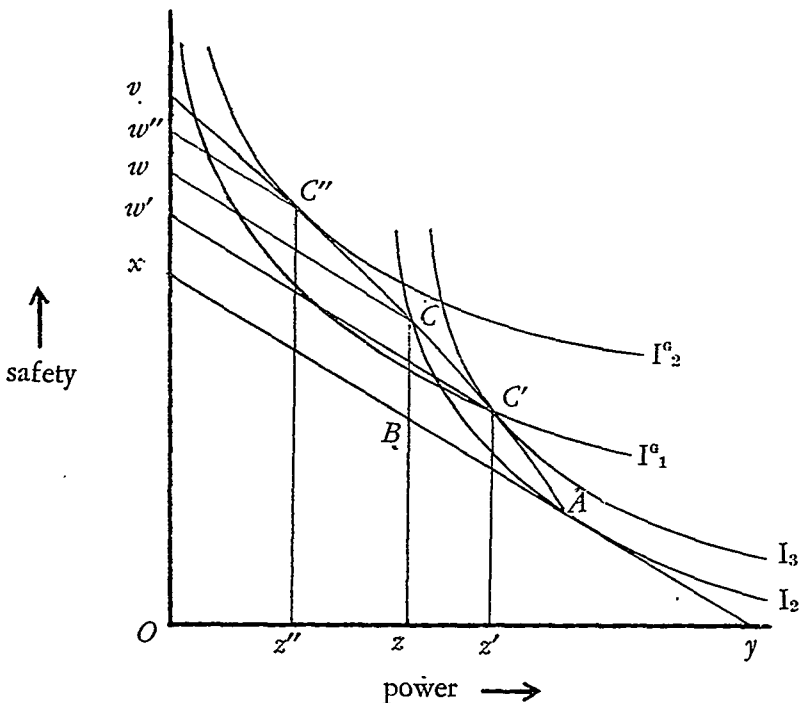


FIGURE 3

⁷⁰ See A. SINCLAIR, PROHIBITION: THE ERA OF EXCESS (1962).

⁷¹ J. STONE, *supra* note 61, at 139.

Suppose government controls preclude purchase of speed characteristics in amounts greater than Oz . If the effect of regulation on other drivers is for the moment disregarded, choice will be restricted by constraint xz and the individual will attempt to maximize his satisfaction by location at point B . However, similar restrictions on all other automobile purchases create advantageous externalities. Therefore, each individual will benefit from increased safety at whatever quantity of power he may select. Government intervention limiting power to Oz will thus shift the budget constraint from xy to wz . Consumer equilibrium is now at point C , arbitrarily placed on indifference curve I_2 .

Safety at any level of power selected is a function of the strictness of government standards. If indifference curves have their customary shape and regulation requires a reduction in power, the individual will always locate at the kink in the budget line. By varying the severity of controls the government can thus establish equilibrium at any point on the curved line vA . Assume all consumers have identical tastes and income and can accurately specify their preference patterns. Then the government can maximize satisfaction by limiting power to Oz' , establishing budget constraint $w'z'$ and causing selection of point C' , where vA is tangent to indifference curve I_3 , the highest indifference curve the individual can reach. Consumer nonhomogeneity will require legislative compromise but will not destroy the optimization principle.

However paternalism may prevent Congress from accepting manifested consumer preference patterns at face value. The National Traffic and Motor Vehicle Safety Act appears premised in part on the assumption that, even disregarding externalities, the individual will be better off with greater safety and less power than he would select if unconstrained. This view implies that there exists a second set of indifference curves, including, say, I_1^0 and I_2^0 , which represents the true preferences of the consumer. The aim of the legislation is to manipulate options available to the individual so that in attempting to maximize satisfaction as represented by his presumably mistaken ideas of what is good for him he actually achieves the highest possible level of welfare as determined by government insight. In Figure 3 point C' , the optimum position if consumer preferences are considered controlling, lies on indifference curve I_1^0 . By further restricting maximum permissible power to quantity Oz'' , however, equilibrium can be shifted to C'' ,

on budget constraint $w''z''$, where vA is tangent to I^2 , the highest attainable new indifference curve.

V. CONCLUSION

The Fair Packaging and Labeling Act and the National Traffic and Motor Vehicle Safety Act of 1966 are attempts to increase the value of community consumption by restricting the freedom of the producer. As such they are based on reasoning antithetical to the principle of nonintervention of classical economic theory. In this article I have attempted to demonstrate that their effect will be not to impede attainment of ideal equilibrium but rather to increase welfare by tending to correct imperfections in the market mechanism. Thus, they correctly implement the overriding Smithian standard that "[c]onsumption 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. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it."⁷²

⁷² A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 625 (Modern Library ed. 1937).