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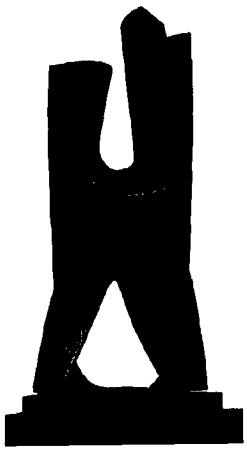

The New Consumerism and the Law School

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The Law School has numerous open secrets. One is that many of the projects undertaken by the lawyers on our faculty can be traced to seminal ideas floated by colleagues in other disciplines. Let me cite two examples close to home. Harry Kalven and I were much influenced by the thinking of Henry Simons when we wrote *The Uneasy Case for Progressive Taxation.* Later we were heavily indebted to the notions of Aaron Director when we prepared our essay on auto compensation plans—a piece which we unwisely buried under the brainstorm title of *Public Law Prospectives on a Private Law Problem.*

I am now ready to build upon the insights of still another economist associated with the Law School. George Stigler has recently announced some arresting conjectures about how certain doctrines espoused by the new consumerism might apply to the knowledge industry. My interest is more specific. I am wondering about the application of these doctrines to our Law School. What follows are some very fragmentary speculations on this important subject.

I begin with the matter of truth. Under the received doctrine of the new consumerism, all things not demonstrably true may be false; and falsehood must be extirpated whenever the behavior of any consumer conceivably might be adversely affected by its continued existence. What bearing, you might properly ask, can this draconian principle possibly have on the operation of our Law School—which has always been engaged in the search for truth (as well as for the good and the beautiful)? At least three aspects

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of this field for inquiry deserve attention.

One concerns that which the School publicly says about itself. Last year's Announcements provide illustrations. It contains an important representation: "The total student body numbers about 500. . . . and is deliberately kept rather small to maximize the opportunities for close contact with the faculty and for individual or small-class study in the second and third years." About twenty years ago the Announcements carried a slightly different statement. To convey the message that the institution was not very large, readers were then informed that "emphasis . . . is placed on individual instruction through a legal writing and research program which is required of every student," and that "opportunity for specialization is provided in the second and third years of each student's program." That Announcement noted that the total enrollment was then 240. The point should be clear. Apparently, as in the case of automobiles, a compact model is a compact model even when it more than doubles in size.

Before the advent of the new consumerism, no one would have worried much about this situation. But soon someone is sure to demand that the terms of measurement, as used by law schools, be defined with precision. Do not be surprised to see our future Announcements displaying, in the manner of labels on olive cans, the official standards for determining what constitutes a small student body, a rather small class, and so forth. A proper remedy naturally will have to be prescribed for violation of these standards. Mere tuition refunds would seem to be too trite. Cease and desist orders might be more in keeping with the times. Perhaps some audacious court will direct the School to divest itself of enough students so as to come within the advertised size. In extreme situations it might even be necessary to order busing among law schools.

Another aspect of truth concerns the description of our courses of instruction. Again I turn to the current Announcements and select one item at random. "Regulated Industries. An in-

quiry into the legal and economic principles governing public utility and common-carrier regulation, with special emphasis on the tele-communications and health-care industries." Very interesting. The food industry once put on the outside of cereal boxes such disclosures as: "Contains proteins and vitamins, especially those which are good for your health." Obviously the wave of new consumerism will demand that the contents of each law school course be disclosed in considerable detail. Such an advance, I fear, will pose a difficult question of ethics for those of my colleagues who never get beyond the first chapter of the casebook they purport to use. Relief in this area might have to rely heavily on the use of interrogatories and discovery procedures to ascertain what in fact they teach—and this development causes some members of the faculty considerable embarrassment. A simpler solution would be to cut down on the size of casebooks by an arbitrary seventy-five percent. This, incidentally, would bring them back to the sensible norm which prevailed when I was a law student.

Perhaps a more important aspect of truth concerns that which the School tells others about its students. It is strange that in an age of consumerism we have moved in the direction of hiding more from prospective employers and others. As compared with earlier practices we now reveal much less about grades, class standings and other indicia of student performance. At a time when an increasing number of retail goods are packaged in transparent plastics, we have intentionally obscured the view of performance records—under certain pressures from students, to be sure. If, as some believe, anyone is now entitled to know everything about everyone, surely those who wish to hire our students can lay claim to seeing their official histories. The appropriate remedy here would seem to be a form of mandamus, possibly served on the Dean. Or maybe we will arrive at the point where compulsory disclosure of student grades will be coupled with mandatory disclosure of faculty incomes. I personally would be much interested in seeing how

these two revelations might interact on each other.

Enough of truth; I turn to another main wing of the new consumerism—that of righting the wrongs of product defects. The received doctrine again is simple and basic. A consumer who comes by a defective product has been wronged; and for every wrong there must be a remedy—although maybe not until the wrong-doing has been sensationalized in the mass media. How might our School be affected by the principle that a wrong inflicted on a consumer automatically creates a legal right?

To analyze this question we must note that several different products are involved: the School turns out its graduates; the faculty publishes its scholarly works; and the professors profess to impart knowledge. Each of these products, it must in candor be admitted, can be defective.

First let us consider the defective graduate (or should I say alumnus?) of our Law School. This species, obviously very rare, might provisionally be defined as embracing all those who in fact completed the prescribed program but are incompetent to practice law and are unable to get a job teaching it. In the past, malpractice actions and bar examinations have been the mechanisms relied upon to deal with this danger to society. The new consumerism is most unlikely to be satisfied with these incomplete protections. Many signs already suggest there will be a push to always hold the producer liable for flawed products. It takes no great strength of the imagination to realize that the Law School, by putting its imprimatur on its graduates, will be said to be impliedly warranting their fitness as lawyers.

There doubtless will be some cautious voices urging that this is most unfair because lack of competence is to be associated with the individual graduate rather than the school which helped shape him. A good point, indeed. But I remind you that no-fault auto insurance and no-fault divorce are already on the scene and are gaining in popularity. Is no-fault legal education so very different?

Next we come to defective scholarship by members of the faculty. Since there is no possibility of reaching agreement on the meaning of legal scholarship, I will be generous and include in this category almost all published pieces on law purporting to be of a scholarly nature. A minimum of seven footnotes per printed page might be imposed as a threshold, especially if they are set in small enough type. It must be conceded, however, that any other definition of scholarship in law would be equally suitable, at least for purposes of exploring the delicate matter now under consideration.

Over the years there has developed a widely accepted set of conventions for dealing with errors in legal scholarship. They either go undetected, which is the usual case; or they are repeated by other purported scholars, which is a frequent happening; or they are pointed out and challenged by those who aspire to be recognized as scholars, which usually also serves to make better known the author of the error; or they are cited by judges in support of their opinions. I have been unable to locate a single instance in which the defective product resulted in an action at law against the perpetrator. This tradition—the essence of which boils down to the law shielding its own guildsmen—is obviously incompatible with the precepts of the new consumerism. In time, the tradition of immunity is most likely to give way. But it will do so only if a proper remedy can be devised.

That remedy is already near at hand—although this fact was not recognized until my colleague at the University, George Stigler, started his pioneering work in the field. If a scholarly publication is found to contain a defect, the appropriate corrective would seem to be to compel the creator to recall the item and repair the flaw! Given the use of modern computer techniques, an operating procedure for the law world could be designed along the following lines: (1) Readers would be urged to notify the publisher of all detected errors; (2) after receiving a specified minimum of complaints, the publisher would inform the au-

thor about the situation and require that he prepare a suitable correction; (3) the author, as usual, would turn this matter over to his research assistant; (4) after receiving the revised material from the assistant, the publisher would use its best efforts to notify all owners of the product of the defect and request them to send or bring in their copies for repair—at no extra charge, of course.

Although I have major reservations about the regime of new consumerism in general, I can see some advantages in this particular application of its aspirations. A compulsory recall plan is likely to reduce significantly the quantity of scholarly legal publications; it certainly will cut down the number of footnotes; it will greatly help our Law School in reducing the annual deficit; it probably will induce faculty members to spend more time in the classroom; it surely will give a large boost to the sale of paper shredding machines; it could well lead to the recycling of most legal publications; and, who knows, it might even hold down the number of errors in legal scholarship. In time the whole recall arrangement conceivably could be adapted for application to reported judicial opinions. Are you listening, West Publishing Company?

I am aware that some skeptics will object to this prescription on the ground that it presupposes agreement on a definition of defectiveness in legal scholarship. There is something of a problem here. We surely do not want to load up our already crowded courts with the task of deciding what constitutes scholastic error—especially if trial is to be by jury. Arbitration seems inappropriate for the reason that there appears to be a lack of recognized experts in the field of defining rather than making errors in scholarship of a legal nature. Possibly a new administrative agency (or even a reconstituted American Bar Foundation) would be whipped up to deal with the problem. I can, but only dimly, visualize such an agency issuing declaratory rulings or even no action letters. And as an aficionado of our federal income tax system, I can see the agency try-

ing to handle much of its really important business by way of private rulings—although the new consumerism will fight against that method of avoiding the heat.

Finally, we come to defects in teaching. I am confident that our Law School has a remarkably good record on this track—provided only that the ancient standards are applied. The new consumerism, however, is insisting upon much higher levels of performance on the part of producers. It is not enough that a product was carefully and well designed at the time of its inception. To be free from liability under the new commandments, the producer must have incorporated in the product the most advanced features and most advanced designs either known to him or knowable by him at the time he acted. Moreover, he cannot escape this responsibility by demonstrating his inability to peer into the future of the technology or of the art.

At this point I shudder—and the Dean may well be quaking. I vividly recall that when I was a student in the School in the late thirties, William Crosskey refused in his Taxation course to discuss any cases decided after 1921. In his Constitutional Law course, the cut-off date was apparently 1811. Sheldon Tefft in real property rarely mentioned any statute enacted after the 17th (or was it the 16th) Century. The leading precedents for Malcolm Sharp in any of his courses always struck me as being timeless. In my own current teaching, I am not quite certain that I remember all the changes made by the Tax Reform Act of 1969, to say nothing of the Revenue Act of 1971. As regards taxation, only the New York University School of Law, with its faculty containing more than 57 varieties of tax experts, can feel reasonably comfortable under the performance standard that may be derived from the canons of the new consumerism.

To implement this standard, there once again remains only the challenge of providing a proper remedy to redress the wrong. I have little doubt what that remedy eventually will turn out to be. Surely if there ever was a perfect situation for

relying on a class action, this is it. At last we will have found a class action for a law class; indeed, one might term it a genuinely classic case of a class action. Our alumni should consider the implications of this outlook. Old class notes at long last might acquire some value--provided, of course, that the statute of limitations has not run.

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