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Jan Narveson

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## Consumers' Rights in the Laissez-Faire Economy: How Much *Caveat* for the *Emptor*?

Jan Narveson\*

### I. INTRODUCTION

What are the Consumer's rights in a free enterprise economy? It is tempting to supply a one-word answer: None. After all, the Consumer has the final word: "No!" What more do we need? But to say this would be misleading. To begin with, the right to say No! is itself a major right, more important perhaps than anything else. And it is a right; so the answer "none" is misleading, indeed just false. Further thought suggests that the situation is quite a bit more complicated than that. When the would-be Consumer becomes a customer, she needs to exercise judgment and caution. But the thesis that *all* the responsibility rests on the Consumer's shoulders must be rejected, despite the plausibility of a simple invoking of *caveat emptor* ("Let the buyer beware!"). This essay will propose a general criterion as being the basically right one to apply.

### II. RIGHTS IN GENERAL

#### A. What Are They?

To begin with, perhaps we had better make clear what rights are. To have a right is to have a status that somehow imposes *requirements* on others. In the case where these are legal requirements, they would be enforceable either by the institutions of the civil law or even by those of criminal law. A theory about rights is a theory about the "somehow": it would tell us how it is that the people who (so the theorist claims) earn the

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\* Professor of Philosophy at the University of Waterloo, Ontario, Canada. He is the author of several books including *The Libertarian Idea*, *Moral Matters*, and *Respecting Persons in Theory and Practice*, as well as some hundreds of articles and reviews, mostly on ethical and political theory or applications, in anthologies and journals. He has appeared at some hundreds of colloquia and meetings in his career, and is also a music enthusiast and patron, especially of chamber music, which he promotes in many concerts in his home and elsewhere. For these and other activities, he has recently been made an Officer of the Order of Canada.

status of rightholder do, in fact, earn it—what are the characteristics of the rightholder and his or her relation to others that leads to the fixing of duties on the part of those against whom these rights are held. All rights entail duties to *refrain* from certain actions, namely those that would render it impossible for the agent to do what he or she is being said to have the right to do. Another sort of right, one that additionally entails positive requirements to act on the institutions of the law to provide protections to the rightholder, is also conceptually definable. The general point, then, is simply that when we talk of someone's rights, we are thereby talking of someone else's duties. In the case of Consumers and Sellers, the Consumer's right is, in some way or another, the Seller's duty.

Let's begin the present inquiry, then, by pointing out that everyone has rights—consumers and producers alike. (And let's not forget that all of us are both.) Whether there are “consumer's rights” is then a question of whether we have, in our *capacity as consumers*, any *special* rights, over and above what we already have generally as people. And the answer to this too, I shall argue, is in the affirmative. However, I shall also argue that we can, given a suitably normal description of the situations of consumers in relation to suppliers, deduce consumer rights from a more general thesis not confined to consumers.

#### B. Why?

We need to make clear, in a general way, what rights people have, *qua* people. Therefore, we need a deep inquiry, for there is little point in mere proclamations. Such an inquiry would also explain *why* we should even have the rights proposed. But, while we hardly have the space to undertake such an inquiry here, a few general things can be usefully said. The viewpoint of this essay is straightforward and classically liberal: We all have the right to do whatever we wish, with the very substantial exception that we may not, in doing what we wish, *impose* (significant, avoidable) *costs* on others.<sup>1</sup> This is a slightly more precise way, perhaps, of expressing the original Hobbesian Law of Nature: That we are always to “seek peace” and to use force *only* for self-defense, noting that we may also assist in defending from attack whoever voluntarily enlists us to do so.<sup>2</sup>

The same view can be expressed in terms of liberty, a fact that has given rise to the contemporary use of the term

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<sup>1</sup> THOMAS HOBBS, *LEVIATHAN* 92-93 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); JAN NARVESON, *THE LIBERTARIAN IDEA* 7 (1988).

<sup>2</sup> HOBBS, *supra* note 1, at 92.

“libertarianism” to designate that general outlook. The view, so expressed, is that we all have a general right to liberty, which means that we must respect that right on the part of everyone else, just as they must respect it in relation to us.<sup>3</sup> Hobbes expressed this idea in his Second Law of Nature: That we are “*to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.*”<sup>4</sup>

Why should we accept this general outlook? I have in various writings defended libertarianism in much the same way as Hobbes and the other classic writers seem to want to defend it: namely, as the *maximally rational arrangement for interpersonally regulating the activities of people in society.*<sup>5</sup> It is the view that commends itself to us on the broadest interpersonal basis. In that sense, this Libertarian Principle may also be claimed as identifying the common good for the general case of human interaction. The common good is, in effect, liberty.

The reasoning begins with people as they are. What are they? First, people are possessed of a very wide range of interests and abilities. Second, they are capable of understanding and exchanging ideas about practical matters and of reacting to the deliberations and decisions of their fellows. Practical thinking addresses the interests and values we have at the time and our resources for advancing these, and allows us to decide what to do in light of this information (including the decision to seek more information). While each of us operates in an environment that includes physical things and situations, such as weather, our environment also includes other people. We know some people in our conscious neighborhood, but we also have the knowledge that there are many more not so much farther on and a very great many more still farther on.

Some of these people will be ones with whom we *interact* more or less. The special feature about interaction with fellow humans is that it can be, and often is, *strategic*—A reacts to B’s reaction to A—and how we act toward another person is a function in part of what we think the other person will do. That, in turn, is a function of what we take his reasoning processes to be, including how we expect him to react to our own behavior.

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<sup>3</sup> See J. Charles King, *Moral Theory and the Foundations of Social Order*, in THE LIBERTARIAN READER 16, 27 (Tibor R. Machan ed., 1982). See generally JAN NARVESON, THE LIBERTARIAN IDEA (Temple Univ. Press 1988).

<sup>4</sup> HOBBS, *supra* note 1, at 92.

<sup>5</sup> JAN NARVESON, THE LIBERTARIAN IDEA (Temple Univ. Press 1988); Jan Narveson, *Contracting for Liberty*, in JUSTICE: ALTERNATIVE POLITICAL PERSPECTIVES 55, 55-65 (James P. Sterba ed., 4<sup>th</sup> ed. 2003); Jan Narveson, *Libertarianism*, in THE BLACKWELL GUIDE TO ETHICAL THEORY 306, 306-24 (Hugh LaFollette ed., 2000).

While that may sound complicated, the very truth of this fact can be made to work in favor of relatively simple principles. All of us, potentially, have much to fear from our fellows who can, at the worst, kill or do other terrible things to us. But we also all have, potentially, much to gain from our fellows, even though their tastes and specific abilities vary so widely. Such wide variation is important, for it means that *helping* our fellows, especially in major respects, is likely to be difficult and to require subtle and detailed knowledge of others that we do not typically have. On the other hand, it is fairly easy to know what would hurt, damage, or kill others.

The stage is set, then, for a sort of “deal”—the “social contract” in its classic form. The main agreement point calls upon all to refrain from harming, injuring, and generally interfering with each other, except only in the case where the other party is actively attempting to hurt or injure us. But with regards to helping others, here we rely on specific arrangements made between interested parties. The principle for those, then, is simply to keep one’s agreements once made. Between the two, what we have is a fully cooperative society—a society in which we all cooperate in supporting the conditions in which we can each work or play or interact with others to maximum, mutual advantage. Non-aggression underpins society; cooperative mutually advantageous action via specific negotiation, agreement, and contract propels it forward to the general betterment, in the end, of all. Law has its place in this, providing structure where needed to promote this cooperative state of affairs. Both criminal and civil law work to curb our tendency to bypass cooperation (by larceny, violence, or fraud) for our own personal gain. Civil law especially works to enable us to redress damages in arrangements gone awry.

It is, I think, extremely difficult to improve on this general structure of basic rights. And it is that structure that enables us to focus specifically on the rights of the Consumer in the extremely important area of commercial transactions.

### C. Property

Probably the most vexing single question about social matters, and especially about economic matters in society, is whether individual ownership of things—private property—is justifiable. To see why it plausibly is, we need but appreciate that the right to property can be seen as a spin-off from the general libertarian outlook. The right of property, if it is one,

exists antecedently to any acts of any governments—it is not identified, informed, or legislated by governments.<sup>6</sup> If a government passes a piece of legislation about property, our question is: does it act consistently with the *antecedently knowable* right of property? The word of government is not what establishes the property right. Or, to put it in stronger terms, governments have *no authority whatsoever* that they do not have purely by virtue of being formulators and perhaps enforcers of the “natural” law—the moral rules that pass muster with rational agents generally.<sup>7</sup>

So, is there a right to property or not? I side with Locke on the matter in holding that there is, though not quite exactly for his stated reason.<sup>8</sup> Still, his reason is pretty good. Property, in Locke’s view, is the result of somebody’s efforts, somebody’s labor. His right of property is nothing more than his right to *do* the things he has done and wants to continue to do in relation to the items in question.<sup>9</sup> That is what property is: the right to use and to continue using the thing in question as one wants. More generally, it is the right to determine the disposition of the thing owned; others must clear any proposed uses of it with the person said to be the “owner.” If our state-of-nature Crusoe, as it were, has plowed up some ground or hacked a table out of a tree, with a view to planting or playing gin rummy or whatever, then if anyone comes along and undertakes some other use of that item, a use incompatible with Crusoe’s purposes, then that person is an aggressor. He has, by his actions, intervened to upset the pattern of Crusoe’s own activity—the very thing that our general right of liberty forbids. Once initial possession is clear, we proceed by exchange as well as by work. Once anyone owns something and anyone else owns something else, they are morally in a position to make an exchange if they so desire.

The classical liberal tradition has it, in Locke’s terminology, that we “own ourselves.”<sup>10</sup> Discussants have attached all sorts of exotic meanings to this phrase, but, in fact, its meaning is quite straightforward and yields a result that is simply identical with the Libertarian Principle. To “own” something is to be in a position of authority over its use, so that anyone else who wants to use it in some way must, in principle, obtain the permission of the owner. In short, owners are people with the right to *exclude*.

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<sup>6</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>7</sup> See generally Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL’Y 77 (2002).

<sup>8</sup> LOCKE, *supra* note 6, at 287-88.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

And so self-ownership is the right to exclude others from the use of oneself: if they want you to do something, or to do something to you, they must *ask*. That is exactly what the libertarian principle asserts. Ownership of things outside the self is, in effect, an application of the rights termed “self-ownership” to such things by virtue of the agent’s self-initiated actions involving those things.

Obviously, any rights identified in this way are subject to the restriction that they are exercised during “good behavior”: that is to say, that the exerciser has not done anything that would warrant abridging his right in some way. Thus, the thief does *not* have the right to what he has taken, and others *may* seize it by force if need be (and collect costs of apprehension and perhaps also to provide some extra disincentive for doing such things in the future. Just how to adjust these disincentives is a difficult matter that, fortunately, we will not need to go into here.)

In short, property rights in things outside ourselves are a subset of liberty rights—the general right of liberty being the basic right from which all other legitimate ones are derived, given appropriate descriptions of the relevant circumstances. It may perhaps be unnecessary to add that this basic right is what we nowadays call a “negative” right (a right that others *not* do something to the rightholder), not a “positive” right (a right that the rightholder be in some way *assisted* in doing the things he has this right to do). If I want your help, I have to ask for it, or make an offer for it, and I get the help only if this request or this offer is accepted.

#### D. Realism

It may certainly be suggested that this program is, in these days of big government, *unreal*. After all, we all live in an environment in which governments, at many levels, have immense powers going far beyond anything that the classical libertarian rights endorse.<sup>11</sup> If we start with the premises of classical liberalism, we appear to be saying that virtually everything done by virtually every government is immoral and should be illegal.<sup>12</sup>

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<sup>11</sup> See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ch. 6 (1974); AMERICAN RADICAL THOUGHT: THE LIBERTARIAN TRADITION (Henry J. Silverman ed., 1970); TIBOR R. MACHAN, INDIVIDUALS AND THEIR RIGHTS 100-102 (1989) (discussing the libertarian view of individual rights).

<sup>12</sup> See generally L. T. HOBHOUSE, LIBERALISM (1964) (discussing the classical traits of liberalism); THEODORE MEYER GREENE, LIBERALISM: ITS THEORY AND PRACTICE (1957) (discussing modern misconceptions of classical liberalism).

There are two very different ways to respond to such an objection. On the purely theoretical front the only acceptable response is to pick up the glove and say to the defenders of big government, "Prove it!" I think we are in a position to guarantee that they will be unable to do this, but perhaps it does not matter for present purposes.

Another, perhaps more pertinent response, is to say that it is still worth finding out what consumer (or other economic) rights are as issuing from the libertarian view *because it is the general view underlying our economic system*. This person we are calling "the consumer" is operating in a market environment. In the free economy no one is required to be a producer. Those who produce typically act with a view to profit, and consumers consume with a relentless eye to their own satisfaction and no sense of obligation to the people who supply their needs. Therefore, the converse is true: We are to presume that a given firm is after our dollars—not our health, education, welfare, or happiness. *We are out for those things and many more—notably our comfort and our entertainment. We do not need any other justification whatsoever for spending our dollars as we do.* We "Consumers" are, in this system, *sovereign, king*. The Consumer calls the shots. Nobody may tell him what to buy or why. Nobody may dictate prices to him. He makes his own decisions, and that is the end of the matter.

### III. CONSUMER RIGHTS

#### A. The Basics

Nevertheless, it is useful to spell out a bit more precisely what follows in the way of rights specific to consumers from the thesis that the consumer shares with all the general right to be and do whatever he or she wishes to be and do, subject to the constraint of respecting the same right for all others. For this purpose, we first need to look at a matter of fundamental importance to any theory of rights of this general type: the *baseline of interaction*. For present purposes, that baseline is our *encounter in the marketplace*, an encounter between two free beings. However, we will stipulate here that this encounter is not only between "free" beings, but also *innocent* beings, in the sense that we are presumed not to have done anything previously that would justify curtailment of the standard rights. If we are guilty of some punishable failing in the past, that may impugn our status as free-market participants. But we shall take it that few persons are guilty in that way, and our question is: What is owed to persons in this normal case, where relevant innocence



characterizes the parties?

On this libertarian view, everyone is subject to a general requirement, or obligation, to respect the freedom of all others. There is a more precise way to summarize this general obligation, which has been admirably formulated by David Gauthier in what he calls the "Lockean Proviso."<sup>13</sup> The Gauthier version says: "Don't better by worsening. Do not make yourself better off than you would have been in someone else's absence, by making that person worse off than he would have been in your absence."<sup>14</sup> In short, *do not worsen* the net situation of the person with whom you interact. ("Net" is needed here: the dentist's benefits come at some cost in pain and discomfort, but on the whole she leaves her patient better off.) It will be appreciated that the "Proviso," so conceived, is really another restatement of the Libertarian Principle. I believe we can also see that it provides a fruitful key to the matter of consumer rights.

#### B. Describing the Goods

Transactions in the business society are *voluntary*. The potential purchaser is under no general obligation to buy, and the seller is under no obligation to sell. (Of course, either may be under such obligations from, say, a spouse or friends or other persons with special involvements, but that lies beyond our purview.) Both agents, then, are in the marketplace because they have interests, wants, desires, and values that they hope to satisfy by their market activities. And that's it. But while this is true and fundamental, we must also appreciate an important basic aspect of any exchange: that the parties proceed on the basis of *descriptions* of whatever is being exchanged. One party, the seller, in effect starts the ball rolling by making an offer. The other party is presumably in search of some or other good or service: she contemplates the offer in question and decides to take it or not. How does she do this? She must have some information prior to purchase or rejection, and this information must, in the nature of the case, come at least in part from the seller. Simply by recognizing that the other party is a seller with something to sell (and the seller recognizing a buyer with intent to buy), a fair amount of information has already been processed,

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<sup>13</sup> The expression is rather misleading, since it has little to do with the "proviso" urged by Locke to limit our acquisition of property. It is, accordingly, to be understood here as simply Gauthier's coined phrase for the principle he adumbrates, *not* as a reference back to the very disputable and disputed phrase in Locke's writings that stimulated its recent prominence. DAVID GAUTHIER, *MORALS BY AGREEMENT* 205-11 (1986).

<sup>14</sup> David Gauthier, *Uniting Separate Persons*, in *RATIONALITY, JUSTICE AND THE SOCIAL CONTRACT* 176, 182 (David Gauthier & Robert Sugden eds., 1993).

of course. But getting us to the point where the consumer says "Yes" and hands over his money and the seller hands over the goods or performs the contracted-for services requires more. The "more" in question is in effect or (more usually) in fact a description of what is to be sold.

In a sense, there are two other sources of information for this description. First, there is previously acquired information or background information that potential purchasers are free to acquire by doing whatever homework they may like and be able to do. They might read *Consumers' Reports*, talk with acquaintances, and so on. But second, there is what the seller *says* about his product in his sales pitch or in the labeling of that product. (It can even be nonverbal: he can hold up the goods for the potential buyer to see for himself, or feel, or even sample.) What is easily overlooked or underestimated in this process is that information is *conveyed by standard usage of whatever terminology is employed*. When the merchant describes the goods in some way or another, he employs a language, one spoken in common by himself and the buyer.<sup>15</sup> In both cases, then, there is a communicative process, one that can be misused, derailed, or otherwise go wrong.

### C. Caveat Emptor?

When there is a description of the goods, even one so simple as applying a familiar single common noun to it, the consumer gets a *message*. Which message? There is the one the consumer infers from that structure of words (or whatever mode of communication is employed), and then there is what the purveyor intended to convey. The first is a potential problem because the consumer may get information from two different sources: the public rules of the language (the "standard meaning" of the terms), and, in addition, from a body of impinging information that may indefinitely modify his interpretations. The second presents a different problem since we must expect that the seller will want to bias the information in such a way as to increase the likelihood of turning the potential buyer into an actual buyer to the seller's profit. A satisfactory theory of consumer-seller relations needs to cope with both sources of "noise."

Here is where a first important entry into what we may consider to be consumer rights takes place. Words are *public*,

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<sup>15</sup> If their languages are not the same, they must work through interpreters, of course, but this only complicates the same process, for the interpreter attempts to match the vocabulary of the one language with a vocabulary from the other for the purposes at hand.

and for that very reason, they are mostly *standard*. If the seller employs a special word, say a technical term or even one contrived by the seller for the purpose, then the consumer will need to have this explained somehow. The process of doing so will again employ standard language and may again run into noise from the consumer's peripheral sources of information/misinformation.

Still, we can already see that this is where *Caveat Emptor* breaks down. The idea behind it is that the Consumer bears *all* the risk in an exchange. But for it to be reasonable to hold that he does bear it, Consumer must know what he is getting into. But knowing that requires some kind of language, and language is intrinsically not the sort of thing that the consumer by himself *can* control. Language is not two Humpty Dumptys deciding to use words however they wish. The need to communicate makes that idea a non-starter. It has become commonplace in philosophy nowadays that the idea of a "private language" is impossible,<sup>16</sup> but that need not concern us here. All that matters to us, in this hands-on, arms-length world of business relations, is that for carrying on transactions in the marketplace, a public language is indispensable. In communications, the risks are shared. I decide how to interpret you, you decide how to interpret me. Neither of us can do that unless we have *some* basis for interpretation—and neither of us as individuals supplies that basis. Instead, the public rules of language do that. All speakers must take responsibility for what they mean, and that responsibility is rooted in public meanings.

#### D. Three Components of Meaning

So, what exactly does "standard language" convey in its designative capacity? Enormous amounts of philosophizing about language could leave one thoroughly confused on that subject, but it had better not be that difficult. We may here distinguish three components likely to enter into the structuring of these messages. First, there will be what we will call "dictionary meanings." True, we can then ask, "Which dictionaries do we go by? What do dictionary compilers think they are doing?" But while those questions are askable, legitimate, and important, it remains that dictionaries do get written and people do make use of them for the very good reason that we do have problems, and we know that solving them requires public rules. It makes sense to try to codify those. Dictionaries are attempts at such codification, articulating the

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<sup>16</sup> For the classic argument, see Ludwig Wittgenstein, *Philosophical Investigations*.

standard meanings of the day. They help. Second, there are informal accretions to meaning from community experience—but communities vary. One such community may attach a rather different accretion of meaning than another, thus complicating life for the would-be student of commerce. And finally, what can be regarded as a special subset of the previous category, there is the fund of *commonly known information* in the consumer community. This last is not strictly “part of the meaning of the word” and yet, there it is—typically both the consumer and the seller know it.

All of this enables us to make a suggestion. Consumer goods are typically designated by some one or some very few words in a phrase standardly applied to the items in question. The word or label, “F,” when it denotes some usable thing, ordinarily conveys the sense that the thing *will serve a certain purpose or purposes*—the one or ones familiarly implied by the name in question via any or all of the three sources of meaning mentioned above. If I say this is a “rake” I am conveying to you the information that it will be useful for raking, say leaves or other such things. If it is a potato peeler, I convey that it will be useful for that. Such functional description is pervasive in Consumerland for the obvious reason that the Consumer is here in the marketplace precisely because he or she is in search of something that will serve some purpose or purposes known especially to her or him. Thus, it is those purposes that need to be known so that they can be catered to by the manufacturer and then by the retailer of those items. The development of a vocabulary that more or less precisely conveys the functions in question is, thus, an essential for efficient market exchange.

#### E. Criteria and Standards

The relevant criteria for assessing performance of a consumer good are based on the good’s purpose(s). But then the question arises, how well will it serve that purpose? Given that the consumer must act on information at hand, that question is, in effect, how well can we *expect* it to serve that purpose given the description under which it is being proffered? Here we get into what could be a delicate issue. But there is a plausible, indeed arguably indispensable, general condition that we can invoke: If Seller doesn’t *qualify* the description, then Consumer legitimately assumes that it will perform *at least normally* for the purposes in question. No precise definition of “normal” is intended, or perhaps possible, for this purpose; nevertheless, the point is that if what Consumer gets under the description “F” performs so miserably as to be unrecognizable, then he has a

complaint. Consumer is *entitled* to descriptions employing normal language, in the absence of special cues or qualifications, and normal language carries with it connotations of normalcy in performance *unless* qualifications are explicitly invoked—a process that can easily be initiated given the ready availability of more language. It is easy for Seller to alter his claim, after all. If what he is selling is *substandard* and known to be, he can *say* so. He often does: one can often find a “substandard” rack at much reduced prices. That is as it should be. No wrong is done by Seller in offering low-quality goods so long as he does not describe his offerings in such a way as to lead a normal user of the language to believe they are standard or better. It is when he does not, and yet his goods are indeed below normal performance levels, that the consumer has a beef.

As a rule of thumb, we may suggest that goods found to be substandard when they are not explicitly billed as such may be returned to Seller for a full refund. Should this be a *right*? It is a strong presumption, and any company that does not do this will soon get a reputation for unreliability. It may be best to leave it at that.

We can invoke our third identified source of information as well. In addition to the very meaning of the words we use, there is the fairly closely related matter of what we may call Community Information. It is often reasonable to assume that Consumer “knows” certain things, and it would be a bore—even insulting perhaps—to mention the facts in question. But, of course, in different communities different things will be items of familiar knowledge. So it might be possible to seriously mislead customers in place A with descriptions that would cause no problems at all in place B. Sellers need to be (and almost always are) aware of these disparities in background information-levels and must act accordingly.

How does all this accord with our starting point of general rights of freedom? The answer is found by identifying the *status quo* of Consumer vis-à-vis Seller at the point of exchange, the marketplace. Seller presumes certain general things about Consumer. Specifically, he presumes that Consumer is “in the market for” an item of type “F,” and that he has a “normal” level of information about Fs and, for that matter, normal interests in using his F when he gets it. Seller’s function in selling is that Consumer’s acquisition of an F *leaves Consumer better off than in the status quo*, this being why he is there at all.

## F. Making the Consumer Happy?

Now, part of this would get us into Subjectivity Land in a way that no sane code of consumer law could tolerate. Did Consumer make a “good buy?” That’s for Consumer to decide. It is certainly not rational to *require* Seller to provide Consumer with something that he will be “happy” with. Seller surely *hopes* to do this and would love it if he succeeded, for to succeed at this is to leave a Consumer who is ready to come back for more. But meanwhile, there is a question of where to set the bottom line: At what point does Consumer actually have a *complaint*? When do we reasonably judge that his *rights* have been infringed or violated? To make such a judgment, we need to know whether the objective facts about the particular sample of F that Consumer acquired on the basis of the description provided by *the Seller* live up to what is *reasonably* understood to have been *conveyed* by that information. And that is something we can find out, albeit at the level of imprecision that it is reasonable to expect in such matters.

“Here: you said this was a ‘toy submarine.’ But it doesn’t submerge! I want my money back!” It is no good, at this point, for Seller to respond, “But I didn’t *say* it would submerge.” The language used is such that he didn’t *need* to say that. On the contrary, the language used is such that he *did* have to say that it would *not* submerge if indeed he knew it would not. What if he didn’t know it wouldn’t submerge, but nevertheless, the fact remains that it doesn’t? Here we get into the question of what degree of epistemic responsibility for product performance do we members of the broader community reasonably expect of our Seller? This is no trifling matter nowadays when sales persons typically sell all manner of immensely complicated things whose inner workings are a complete mystery to the consumer, the seller, and even the defense lawyer. Again, it is the seller’s description of the goods that licenses certain general expectations. If the product does not live up to those expectations, then *whether or not* Seller knew or *had reason to know* of its actual performance characteristics, his description *commits him* to a certain standard of performance. If it fails, he must take responsibility for that—again, *unless* he *explicitly qualifies this in advance*. The Consumer needs to know what he’s getting into in order for his purchase to be rational. But often he doesn’t know, and neither does Seller. So for second best, Consumer *reasonably expects* a certain level of performance, and Seller knows that he has this reasonable expectation—knows it because he knows the meaning of the language in which he describes the product and, in addition, the typical array of

information that any consumer in that market would be expected to have. Given all this, it is reasonable to hold the seller to what his description conveys.

#### G. How Much Information?

Another basic question that arises here is: How much information about his products does the seller need to *supply* to pass muster, morally speaking? It would be easy to overstate this and to say, "the whole truth." But that is *not* reasonable. We must distinguish between the Whole Truth, on the one hand, and Nothing But the Truth on the other. It is the latter, *not* the former, for which Seller is responsible. If Seller says what is *false*, he is liable. *Not saying all that is true*, however, is quite another matter. Not the least of the reasons why it is unreasonable to make Seller responsible for the *whole truth* is that neither he nor anyone else actually *knows* the whole truth—about *anything*. No doubt there will always be further information turning up about any given thing, product or otherwise. Moreover, some of this information just might turn out to be quite pertinent. Who can know? But whatever Seller *does* say about it, he can be held to account for. If he does not know, all he has to do is confess his ignorance. At some point, of course, his ignorance may be below the minimum required to participate in the sale of the item in question. But above that line, ignorance is not surprising and is forgivable.

However, Seller might know something of importance to a purchase of the particular item in question, and *not* say so. Then there can be an issue whether he had a responsibility to say *that*. Now, the fundamental line is the status quo of our rational consumer at the time of purchase. Will purchase of the item being sold leave the consumer better off than if he'd just stayed home and kept his money? If not, and if the reason was not some change of taste or interest on the part of Consumer but was due instead to the performance of the purchased item in ways known to Seller but not revealed to Consumer, then Seller is at fault. On the other hand, if the item is, say, just mediocre and Seller knew that but did not volunteer the information, then, while it would have been virtuous for Seller to pipe up and volunteer this possibly useful further information, he is not guilty of fraud but merely of sharpish practice. That should not surprise anyone, including Normal Canny Consumer. Seller may live to regret it: the competitor down the street may be more forthright, and Seller's former customers may flock to the competitor's store and desert the tightlipped merchant. Fair enough.

Suppose that Consumer can get the same item down the street at Ziggy's for 40% less: Is Seller responsible for providing this information? Surely not. There needs to be a fair division of labor, as it were, regarding the discovery and supplying of information. And, of course, Consumer, who has many advantages over Seller, has this one in particular: He can put Seller on the spot by simply *asking*. Then the requirement that Seller, whatever else he does, not intentionally produce *false* information covers the Consumer very well. Consumer uses his own judgment in deciding how to interpret *non-answers*, but our principle protects him in the case of *false* answers.

In noting that Consumer "can put Seller on the spot by simply asking," we enter into another of those difficult areas of modern life. For in modern Consumerland, asking is not so easy after all, as anyone with an obscure computer problem who attempts to query the manufacturer can testify. Indeed, there needs to be much thought about just how "simply" the consumer should be able to ask.

Meanwhile, we can differentiate this type of case, of non-culpable ignorance on the part of the Seller, from the preceding one, in which Consumer is deliberately misled, by suggesting that while the consumer may not have a *right* to Seller's acting on the basis of common knowledge, it would nevertheless be a very good idea for the company to take the familiar attitude (or at least, an attitude that once was familiar) that "The customer is always right." This puts the onus on Seller, even though it must be admitted that customers can have rather bizarre ideas about expected performance. Still, good business is one thing and what we may insist on as a matter of right is another. The customer whose expectations are well out of line with standard meanings and normally known information is, in truth, wrong. But a company that extends the benefit even of unreasonable doubt to such customers may well win many more customers.

#### H. How Fine the Print?

There often are things Seller needs to make clear. As such, how easy must it be for Consumer to get the message in order for us to rule that Seller has done his duty? A small page covered with microscopic print might be good enough if Consumer is most unlikely ever to need the information; not so, however, if it's something he really should be aware of before going further, with significant risk to himself if he is not. Here again, it is difficult to formulate a precise standard that would cover all or even most cases. What we can say is that this is a relevant variable—that the complaint, "but it was practically indiscernible!" is often a



justified complaint. Perhaps we had best settle for the suggestion that Consumer is entitled to have necessary information conveyed in such a way as to be absorbable without major effort, and let it go at that.

#### I. Health and Safety

One of the most important areas for applying our libertarian non-harm principle is that of health and safety. We want what we buy to do us good, not harm. We want it to leave us in a state of health *no worse than when we began*. If the product is sold as a health-*enhancement* product, then we have a right to expect that it will leave us not only no worse off, but actually better off, in the specific ways that the manufacturer claims, while leaving us *no worse off in any other way*. This expectation is, again, *prima facie*: A health-enhancing product might have known negative side effects, and Seller must duly warn Consumer of these facts when known. Our non-harm criterion, however, continues to apply regarding things *not* mentioned on the list of known side effects.

But all these are questions of degree, and what is more, the degree is especially that of *probability*. Simply, few products will *make* you sick or not. Almost all will increase or decrease the *probability* that you will become sick with this, that, or the other. The big question, then, is: What reasonable standard is there for determining merchant liability if things go wrong? *How* wrong must they go before Seller is liable?

#### J. Liberty and Risk

The first point I would make on this matter of risk is that the consumer should *have his choice* about this. In so saying, I appear to be taking a position radically at odds with current trends in consumer law and the mores of commercial life as I understand them. According to these trends, risk is borne virtually entirely by the Seller. Consumer is protected not only from defects in products, including ones that may have been unpredictable by the Seller, but also from Consumer's own poor judgment. For instance, Consumer might buy a product which he knows is dangerous in some way—the case of cigarette smoking obviously comes to mind. May a consumer sue a cigarette manufacturer when he gets lung cancer from regularly smoking the latter's product, even though fully informed about likely risks of doing so? My answer is a flat negative. *Unless* some manufacturer was so foolish as to assure the purchaser that *no* damage to his health would be forthcoming, the current (and long-standing) climate of information is such that a consumer

voluntarily purchasing a pack of cigarettes may be safely assumed to know what the risks are. There *could* still be places in the world where that is not so, I suppose, and in those few cases, we may agree that the smoker could have a case. And in any case, the manufacturer could (and is now legally required to) issue a clear warning. If Consumer buys nonetheless, then the only reasonable view is that the case is closed. With consumer rights should come consumer responsibilities. If we walk in voluntarily and with our eyes open, then we take responsibility for the consequences of our actions, so long as there is not actual malice on the part of the other party.

One of the most colossal extravagances of the American government today is found in its elaborate requirements for pharmaceuticals. For such things to make it to the market an ordeal awaits; new drugs are subjected to onerous testing procedures that take many years to complete and increase the cost of development by a huge factor. During these many years, many people die because they cannot acquire drugs that would have likely saved their lives. The lives that are saved by the extensive testing must be set against the lives that would have been saved by earlier access to the drugs, and it is widely held that the second set of deaths vastly outnumbers the first.<sup>17</sup> This is a major-league denial of Consumer liberty. It is an implicit assumption that consumers do not know what they are doing. And, insofar as manufacturers are held to the standards of the FDA, it is an assumption of unconcern by manufacturers. All this goes against the environment of freedom to which, I think, we people are entitled.

Were there no FDA, it would be easy enough for private companies to set up in business appraising and testing drugs; those which passed to a very high standard would be rated as such, and the rating company could assume liability for error. Pharmaceutical companies would advertise the ratings earned in this way as a selling point for their products; products that did not pass specific tests would have to be described as such. The consumer wanting more protection could look to this "pharmaceutical Underwriter's Laboratories" and pay the price; others could take greater risks and pay less. Consumers knowingly buying less-tested products would not be able to sue; consumers buying more-tested products that nevertheless fail

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<sup>17</sup> Daniel B. Klein & Alexander Tabarrok, *Is the FDA Safe and Effective?*, The Independent Institute, at <http://www.fdareview.org/fda.pdf> (last updated Sept. 26, 2001); Sam Kazman, *Deadly Overcaution: FDA's drug Approval Process*, 1 J. REG. & SOC. COSTS 35 (1990), available at <http://www.cei.org/gencon/019,03887.cfm> (last visited Mar. 11, 2004).

could sue. (And companies implicated could sue the Underwriters if the latter were found to have done inadequate or improper testing when proper testing was promised.) You would pay your money and take your choice. As things now stand, you only pay your money, or do without, or try to get it from a foreign source. The consumer deserves better than that.

#### K. Managing Risk

Two questions arise. First, how much risk should be taken to be “normal?” And second, how thorough and how precise does Seller have to be about what he puts on his labels by way of warning the customer of risks?

Regarding the first: nothing that anyone does is risk-free. To live is to be subject to risk. Some of our activities *elevate* the level of risk we face in some respects: driving a car incurs a risk of having some kind of accident, skiing can be lethal, and so on. Common sense is enough to identify some of these, but assorted products entail risks that common sense would not know about. The unobvious surely needs mentioning. But at what point does the obvious need noting? Parents may need to be warned about toys that might be risky for children. But there's not much point in manufacturers trying to warn the children themselves, and what parent is unaware of the dangers of childhood activities? How risky do things need to be before the user even needs to be warned? It would be nice to be able to say something more interesting than “significantly risky”—but still, that is the right answer. The risk must be more than is obvious to common sense and significantly greater than the normal risks of everyday activity. (The two sets are not quite coextensive.) Further, to be significant, it must be at least discernible. If the probability of breaking your leg or getting killed from using product X is about the same as what it would be if you stayed home and watched TV, it does not need to be mentioned. If it is a thousand times higher, it probably does. But if it's only three times as high? Or seventeen? Seventeen times .00001 is still very small. But a thousand times that is .01, which is not.

When warning is needed, because the risks involved are larger than the background ones just noted, how large does the print have to be? How precise does the information need to be? These are not easy issues, but neither are they imponderable. The print has to be at least *normally* legible and the information can be *quite* approximate in normal cases—but, if you're selling it to scientists, it had better be much more precise. Buying and selling take place in a particular market environment, and the levels of these variables—print-size, size of background risk, and,

hence, need to warn—require adjustment to suit. In the U.S. today, a new factor in our legal environment is the apparent willingness of courts to protect the consumer against himself in tort cases—\$2.9 million for a cup of too-hot coffee spilled on an irate lady, for example.<sup>18</sup> The courts now proceed on a principle having virtually nothing to do with the original purpose of torts, namely to compensate victims of injuries that were fairly clearly the fault of some other party. But in so doing, they “protect” people at the expense of all the rest who have to pay the higher prices necessary to sustain the damage suits imposed by some few careless or malicious persons with the aid of the courts.

Just what is the right solution to risk problems? That is a much investigated question, and rightly so. The suggestion here is fairly rudimentary: What Seller basically owes to Buyer is *not to significantly increase his marginal involuntary net risk*. Estimating that is not easy, and the fact that it is not (when it is not) is itself relevant and can be made part of the information package. But it is the right idea.

#### IV. THE BOTTOM LINE: CONSUMER SOVEREIGNTY

The maxim *Caveat Emptor* has much to be said for it. Provided it is understood how and when the merchant can be in the wrong, there must be a region in which the consumer makes his own decisions and takes responsibility for them. If there is no misdescription of the goods, if there is no reason to expect net damage to health from her purchase, then the consumer’s final protection does indeed lie in the fact that she can, as noted at the outset, simply say No. The wise merchant will do his best to see to it that the consumer says Yes—after all, that’s how he makes his living. But his “best” after all has to be compatible with making a profit, and this means among other things keeping costs down. Absolute certainty that the customer is going to be happy is not to be had and attempts to achieve it would make all goods prohibitively expensive. That, of course, does no service to the consumer either. A happy medium is needed, and that medium is best understood as an understanding, between seller and buyer, that is rational from both points of view. In that respect, the proposals in this essay have merely been faithful to the idea of the market. And that idea is a good one—the market answering to that idea is by far the best institution we can have for such things.

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<sup>18</sup> *Big Jury Award for Coffee Burn*, N.Y. TIMES, Aug. 19, 1994, at D5.