IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

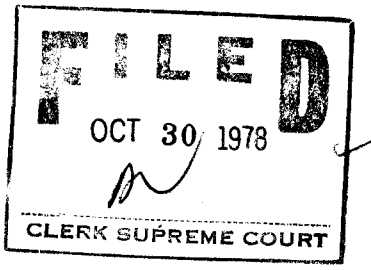
vs.

ROSEMARY W. FURMAN, d/b/a
Northside Secretarial Service,

Respondent.

51,226

Case No. ~~51,266~~



BRIEF OF AMICUS CURIAE

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INTRODUCTION

This brief is filed by the undersigned as amicus curiae for the purpose of bringing to the Court's attention background material in the form of economic analysis and other information which has a bearing on the Court's resolution of the issues, but which might not otherwise be available to it. The brief is divided into three parts. The first part discusses occupational licensing as an economic problem and describes three different categories of government control of occupations. It suggests that one of the categories, certification, provides the public with all the benefits of licensing, but does not carry with it the economic disadvantages of licensing. The second part of the brief points out that historically the unauthorized practice of law doctrine was treated by the courts as a kind of certification. It did not evolve into full-fledged licensing until the Depression when it was expanded through efforts of the organized Bar. The third part of the brief deals with the Constitutional issues.

I. Occupational Licensing as an Economic Problem.

Although occupational licensing is usually justified on grounds that it provides protection to the public, it has been recognized by careful observers that licensing adversely affects the very persons it is supposed to protect.

Two justifications exist for the licensing of lawyers. The oldest is that the courts constitute a scarce resource which should be used as efficiently as possible. Since access to the courts is given to litigants virtually without cost, some machinery is needed to make sure that court time and judicial effort is not wasted by people who are unfamiliar with established procedures. Setting minimum standards of qualification for persons who appear for others in judicial proceedings is one way to reach this goal. Nothing in the economic literature cuts against this justification for licensing.

The second justification for licensing lawyers is to protect consumers of legal services. The validity of this justification is the subject of considerable controversy. The hypothesis underlying this reason for licensing is that law is a complicated business, a mystery to most people in need of legal services. Without some procedure for examination and licensing, consumers have no way of knowing whether a person who holds himself out as a lawyer is in fact competent. Apart from the issue of competence, there is apparently a widespread belief that persons who

seek legal advice are particularly vulnerable to dishonest advisers or perhaps that persons who give legal advice are prone to take advantage of people who use their services. In either event, it is argued that licensing can protect consumers against incompetent and dishonest advisers and, at the same time, improve the image of the legal profession.

Substantially the same arguments are made in support of laws licensing a variety of other professions or occupations. Although more justification exists for licensing lawyers than for licensing many other callings, it is nonetheless appropriate to consider the issues in this case in the overall context of occupational licensing as an economic problem.

The seminal analysis of occupational licensing and its consequences appears in Professor Milton Friedman's classic work, Capitalism and Freedom, Chapter IX of which is devoted to occupational licensure.[1]

Dr. Friedman begins his treatment by noting that the "overthrow of the medieval guild system was an indispensable early step in the rise of freedom . . . ." For the first time "men could pursue whatever trade or occupation they wished without the by-your-leave of any governmental or quasi-governmental authority." However, "in more recent decades, there has been a retrogression, an increasing

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1 Friedman, Capitalism and Freedom (University of Chicago Press, 1962, pp. 137-160, hereinafter cited as Friedman)

tendency for particular occupations to be restricted to individuals licensed to practice them by the state."[2]

Professor Friedman talks about the genesis of regulatory measures. Although arguments in favor of licensing are justified by the need to protect the people, the pressure to license an occupation rarely comes from members of the public who have been mulcted or in other ways abused by members of the occupation. It almost always comes from the profession itself. The result is almost invariably control of the licensing process by members of the occupation which is to be licensed.

Quoting from a book by Walter Gelhorn, another student of licensing, Professor Friedman observes:

> Seventy-five percent of the occupational licensing boards at work in this country today are composed exclusively of licensed practitioners in the respective occupations. These men and women, most of whom are only part time officials, may have a direct economic interest in many of the decisions they make concerning admission requirements and the definition of standards to be observed by licensees. More importantly, they are as a rule, directly representative of organized groups within the occupations. Ordinarily they are nominated by these groups as a step toward gubernatorial or other appointment that is frequently a mere formality. Often the formality is dispensed with entirely, appointment being made directly by the occupational association . . . .[3]

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2 Ibid., p. 136.

3 Ibid., p. 140, quoting from Gelhorn, Individual Freedom and Governmental Restraints (Baton Rouge, Louisiana State University Press, 1956), chapter entitled "The Right to Make a Living," p. 140-141.

The effect of licensing has been to re-establish the "medieval guild" kind of regulation which was abandoned many years ago.[4]

How does such legislation come to be enacted? It comes about because producers have a much more substantial interest in passing the legislation than consumers have in opposing it. Producers spend the major portion of their lives at work. Their livelihood is their most important interest. Consumers spend only a minor fraction of their time and money dealing with members of any particular occupation. The result is that producers are concentrated politically while consumer interests are diverse. As a result, producer groups will always have a stronger influence on legislation than widely spread consumers.[5]

Professor Friedman's view is that the political advantage of producer groups can be neutralized only if the burden of proof is "put strongly against" licensing and similar measures.[6]

Professor Friedman distinguishes three different levels of government control of occupations: registration, certification and traditional licensing.

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4 Ibid., p. 141.

5 Ibid., p. 143.

6 Ibid., p. 144.

Regulation merely requires individuals who engage in a particular trade or occupation to list their names and addresses in some official register. Anyone who registers may engage in the trade or occupation. Registration may be justified on grounds that it facilitates pursuit of other aims, such as gun control or taxation or even, possibly, the prevention of fraud. Registration of taxi drivers may, for example, be justified on this ground.[7]

Under some laws the agency merely certifies that particular individuals have the requisite skills to practice a particular profession. This is certification. Certification differs from licensing in that, after government puts its imprimatur on qualified individuals, it takes no action to prevent uncertified persons from engaging in the activity. The most common example of certification is in accountancy. The state certifies accountants. Only those accountants who have passed the official examination may refer to themselves as "certified public accountants," but anyone can do accounting work. Private certification is also common. The "Good Housekeeping Seal" is an example of private certification. The publications of the Consumer's Union provide another example. Large department stores like Sears Roebuck search out and, in effect, certify the products they sell.

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7 Ibid., pp. 144-146.

Membership in voluntary professional organizations, such as the American Appraisal Institute, is still another kind of private certification. Since private certification is an important and effective method of providing information to consumers, Professor Friedman finds government certification more difficult to justify than registration. Nevertheless, he concedes that for several reasons, certification by government could, on balance, be desirable.[8]

Licensing is drastically different from certification. It confers on licensed persons the exclusive right to engage in the licensed activity. Although Professor Friedman finds licensing more difficult to justify than certification because it goes "still further in the direction of trenching upon the rights of individuals to enter into voluntary contracts," he recognizes that licensing may be needed where reliance on free choice would create adverse third party effects. An incompetent physician could, for example, produce an epidemic.[9] Time wasted in court by incompetent lawyers might be this kind of third party effect which would justify licensing those who appear in court on behalf of others.

But, Professor Friedman notes that in practice the major argument for licensing is that "individuals are

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8 Ibid., pp. 144, 146-147.

9 Ibid., p. 147.

incapable of choosing their own servants adequately . . . ."[10] This amounts to saying that "we in our capacity as voters must protect ourselves in our capacity as consumers against our own ignorance, by seeing to it that people are not served by incompetent physicians or plumbers or barbers."[11]

Although licensing may provide benefits to some consumers,[12] its social costs are enormous. The main adverse effect of licensing is that control over entry restricts supply, reduces competition which is necessary to force reductions in price, increases the price consumers must pay and, in the case of some marginal consumers, protects them completely from being able to utilize services they need.

Professor Friedman observes that professionals rationalize licensing restrictions on the ground that they are necessary "to raise the standards of the profession." However, although this rationalization is common, it fails to take into account the crucial distinction between technical efficiency and economic efficiency. A process is technologically efficient if it maximizes some

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10 Ibid., p. 148.

11 Ibid.

12 The benefits of licensing flow mainly to wealthy consumers. See Alchian and Allen, Exchange and Production (Belmont, California, Wadsworth Press, 1977), pp. 35-36.

particular aspect of the outcome. Quality is an example of a factor that may be maximized; but one factor cannot usually be maximized except at the expense of others. Thus, the tradeoff for increased quality is almost always increased cost. Economic efficiency involves achieving an optimal balance between quality and cost. The optimal relationship between quality and cost is not the same for everyone. It varies from one transaction to another and from person to person depending upon the resources of the individual, his particular needs, and any other factors which bear on his evaluation of whether and how to acquire a service or product under consideration. Professor Friedman gives the following example:

> A story about lawyers will perhaps illustrate the point. At a meeting of lawyers at which problems of admission were being discussed, a colleague of mine, arguing against restrictive admission standards, used an analogy from the automobile industry. Would it not, he said, be absurd if the automobile industry were to argue that no one should drive a low quality car and therefore that no automobile manufacturer should be permitted to produce a car that did not come up to the Cadillac standard. One member of the audience rose and approved the analogy, saying that, of course, the country cannot afford anything but Cadillac lawyers! This tends to be the professional attitude. The members look solely at technical standards of performance, and argue in effect that we must have only first rate physicians <u>even if this means</u> that some people get no medical service--though of course they never put it that way. (emphasis added)[13]

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13 Friedman, p. 153.

The consumer protection problem is a problem of information. We recognize that people who need goods and services should be free to choose their own optimum balance between quality and cost. This means that, ideally, they should be free to choose among competing suppliers, but we suspect that, when the service requires specialized or complex knowledge, most consumers lack information or understanding sufficient to enable them to make an intelligent choice. Under a system of certification, the regulating agency provides information about who it considers to be qualified; however, the law still leaves consumers free to deal with uncertified persons. Licensing, on the other hand, goes much farther than providing information. It makes it unlawful for persons who have not met agency standards to engage in the regulated occupation. In doing so, it not only excludes unlicensed suppliers, but it also deprives consumers of the right to deal with persons whom they may prefer to have as their advisers. The preference of consumers for unlicensed advisers may be entirely rational. Most people understand well enough that, even though a long, arduous education may be required before a person has the broad knowledge required to understand and practice all aspects of a particular profession, not everything the professional does requires that kind of knowledge. In fact, many of the tasks professionals perform in any field can be learned and performed quite well by laymen. A layman may not understand all the reasons

for what he does, and he may not always recognize when a particular situation calls for greater knowledge than he possesses. But, professionals are not infallible either. Rational consumers faced with the prospect of paying a relatively high fee for professional advice may prefer to pay less and take the risk.[14] Licensing denies them this choice.

One of the most important ways in which competition controls economic activity is to create pressures to reduce cost. When higher costs are due to inefficient management or inefficient production techniques, the pressure of competition requires firms to perform more efficiently or go out of business. Licensing restricts market entry, diminishes competition and prevents it from performing the socially useful function of reducing costs.

The effect of licensing is thus to increase prices to monopoly levels, exclude qualified persons from perform-

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14 A dramatic example of this occurred in Arizona in 1962. In 1961, the Supreme Court of Arizona decided State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), modified on rehearing, 91 Arix. 293, 371 P.2d 1020 (1962). In that case, the Court enjoined title companies and real estate brokers from performing 45 different acts which they had long been free to do. The response of the real estate brokers was an initiative petition to reverse the decision by an amendment to the Arizona Constitution. The initiative was successful and, in 1962, the amendment passed overwhelmingly. Less than 22% of the voters cast a ballot favorable to the lawyers. Marks, The Lawyers and the Realtors: Arizona's Experience, 49 A.B.A.J. 139 (1963).

ing tasks that do not require professional knowledge and to "protect" many marginal, low income consumers from obtaining advice and services they need.

Professor Friedman concludes that certification is a "half-way house that maintains a good deal of protection against monopolization." The usual arguments for licensure, particularly the paternalistic arguments, "are satisfied almost entirely by certification alone. If the argument is that we are too ignorant to judge good practioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business; we cannot complain that we did not have the information."[15]

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15 Friedman, p. 149.

II. The Unauthorized Practice of Law Doctrine; From Certification to Licensing.

Prior to the Great Depression, use of the unauthorized practice of law doctrine was limited to preventing unlicensed persons from holding themselves out as attorneys.[16] Thus, prior to 1930, the licensing of lawyers, insofar as it applied to out of court activities, had the same effect as certification does in Professor Friedman's classification system. During the depression, however, the organized Bar, responding to encroachments by banks, accountants, insurance companies, real estate brokers, and others, began a campaign to expand the scope of the doctrine.[17] As a result of this effort, the doctrine was changed from a doctrine which had the effect of certification to one which had the full effect of licensing. In many states,

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16 See, discussion in Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 104 (1976), at 110-111. A review of the cases cited in the Unauthorized Practice Handbook, The American Bar Foundation (1972), reveals almost no cases in this area prior to 1933. The earliest Florida decision was Keyes Co. v. Dade County Bar Ass'n., 46 So. 2d 605 (1950), in which the Supreme Court entered a jurisdictional order dividing the market occupied by lawyers and real estate into two separate spheres of competitive activity. See particularly, Justice Terrell's dissent. A History of the Unauthorized Practice of Law Doctrine appears in footnotes to Chace and Daniel, Real Estate Brokers and the Unauthorized Practice of Law, 4 Fla. L.Rev. 285 (1951).

17 Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 104 at 111, n. 29.

the "practice of law" was defined to include giving legal advice, providing information on legal rights and obligations, and preparing documents that require knowledge of legal principles not possessed by ordinary laymen. In some states it grew to a point where lawyers not only had the exclusive right to represent clients in court, but the exclusive right to perform virtually all of the activities common to a lawyer's office.[18] In other states, the doctrine was narrower. Activities by laymen were prohibited only if they could be considered "complex" or "incidental" to some other legitimate business.[19] This narrowing was manifestly necessary. Virtually everyone in business gives legal advice every day on simple matters. Banks must explain the legal effects of signature cards. Real estate brokers cannot avoid explaining the sales agreements they prepare. Policyholders expect insurance agents to explain the legal effect of insurance policies. Accountants must inevitably give advice on various kinds of tax problems. Architects and engineers give advice on construction contracts. And so on, ad infinitum. The world could not go on if only lawyers could give legal advice.

The doctrine as applied in Florida was relatively liberal even before this Court's decision in The Florida

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18 Unauthorized Practice Handbook, p. 125, et seq.

19 Unauthorized Practice Handbook, pp. 129, 132 and 144.

Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). Real estate brokers could as an incident to their work prepare sales agreements (but not deeds, which are far simpler documents).[20] Title companies could prepare the documents and conduct the closing of transactions which they insured.[21] But the Court has never been called upon to make an in-depth analysis of the factors which must be considered in determining whether, and under what circumstances, "giving legal advice" falls within the exclusive province of members of the Bar. As a result, as the Court acknowledged in Brumbaugh, the line between legal and illegal activities has been blurred at best.[22] Wherever the line should properly be fixed, it is clear that the very existence of the line has created substantial popular controversy.[23] The fact that the line is so difficult to draw may suggest the absence of a principled reason for the state to draw it at all.

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20 Keyes Company v. Dade County Bar Assn., 46 So. 2d 605 (Fla. 1950).

21 Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954).

22 The Florida Bar v. Brumbaugh, 355 So. 2d 1186 at 1192 (Fla. 1978)

23 See news story dealing with legal clinics, prepaid plans and divorce kits, The Wall Street Journal, October 18, 1978, p. 1.

III. The Constitutional Issues.

In Brumbaugh, the Court recognized that a person has a constitutional right to represent himself. It also announced that it would not enforce unnecessary regulations that have the effect of hindering individuals in the exercise of this right. It observed in Brumbaugh that persons who decide to represent themselves need access to information to prepare their cases. Obtaining this information does more than benefit individuals who choose to handle their own cases. It makes court proceedings more efficient. It would, of course, be better for the courts if people were represented by competent counsel, but if they have decided to represent themselves, access to information enables them to do so with considerably less confusion. In Brumbaugh, the Court pointed out that persons who want to represent themselves can go to law libraries and read books containing the kind of information they need even though there is no guarantee that the information is accurate. They may also buy and use forms and printed materials, but they may not receive "legal advice" from nonlawyers. Accordingly, the Court held that Ms. Brumbaugh could not make inquiries or answer questions from her clients about which forms to use, how to fill them in or where to file them. In other words, she could give only generalized advice in the form of printed material. She could not give or receive information designed to personalize the advice and take into

account the particular circumstances of her customers.

In Brumbaugh, the Court was faced with a difficult dilemma. It recognized that under Bates v. State Bar of Arizona, 433 U.S. 305 (1977), Ms. Brumbaugh probably had a constitutional right to sell printed materials and legal forms containing information people needed to handle their own divorces. The Court obviously wanted to protect that right and, at the same time, preserve the traditional idea that when a layman "gives legal advice" he is engaging in the unauthorized practice of law. The result was a line drawn between generalized written advice and personalized assistance. The Court suggested that this distinction is appropriate because people who seek legal assistance are likely to place more trust in individual advisers than in printed materials.[24]

Giving and receiving personalized information designed to assist people who have decided to represent themselves is obviously a form of communication. As the Court has recognized, information is vital to an individual's exercise of his constitutional right to handle his own case. The Court was correct in observing that persons seeking this kind of information place more trust in individual advisers than in written materials. But this is not a reason for prohibiting lay advice. Individuals place their trust in advisers because most people, particularly

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24 Brumbaugh, supra, 355 So. 2d 1186 at 1193.

those in the socio-economic classes most likely to seek advice from lay persons, can learn more easily through face-to-face, oral communications. Advice given by non-lawyers like Ms. Brumbaugh or Ms. Furman may not be as complete or accurate as it would be if it were given by an attorney, but it is much more likely to provide the needed information. People who go to Ms. Furman for advice surely get more and better information from her than they could get through the sterile process of reading through divorce books in a law library.

People are more likely to put trust in personalized advice than in written information because they can understand it better. It does not follow, however, that personalized advice is likely to be more harmful to them than written information. Under Brumbaugh, Ms. Furman is entitled to sell standardized forms and printed material containing generalized legal advice. People who are not accustomed to reading technical material may have difficulty understanding the material she sells. It is difficult to see why oral explanation to consumers of how printed material should be used is likely to do more harm than consumers' use of the printed material by itself. The only way many consumers can effectively absorb the information they need is through an oral exchange of information with someone who knows more than they do. Even if consumers could find a lawyer who would be willing to give them this kind of

advice, no principled reason is apparent why the law should prevent them from seeking oral advice from the adviser of their choice. It is respectfully submitted that although the rule in Brumbaugh was an important milestone the distinction it draws between general and personalized information effectively deprives people who wish to represent themselves of the only reasonably available source of the information they need to enable them to do so.

Giving legal advice and assistance to people who wish to represent themselves is clearly a kind of commercial speech. In the past it was thought that commercial speech stood on a different footing than speech of other kinds. It is now recognized that even commercial speech is protected by the First Amendment. Bates v. State Bar of Arizona, supra; In re Primus, ____ U.S. ____, 56 L.Ed. 2d 417, 98 S.Ct. ____ (1978); Cf. Ohralik v. Ohio State Bar Ass'n., ____ U.S. ____, 56 L.Ed. 2d 444, 98 S.Ct. ____ (1978). See also Coase, Advertising and Free Speech, 6 Journal of Legal Studies 1 (1977), copy attached.

Although the ultimate contours of the constitutional protection afforded to commercial speech cannot be known at this time, it seems clear from the cases cited that the state may not prevent or regulate commercial speech unless it carries the burden of showing that the restraint imposed is narrowly drawn and reasonably necessary to protect against serious potential harm. The Court recognized

this principle when it decided the Brumbaugh case.

Professor Friedman's prescription for dealing with the licensing issue is to put the burden "strongly upon" those who seek to justify restrictions of the type involved in this case. Where the restraint affects the free flow of information, as it does if the right to give and receive "legal advice" is limited, the Constitution creates the strong burden of proof which must be carried by those who seek to sustain the validity of the restraint.

The Florida Bar made no effort to carry its burden in the Brumbaugh case. That case did not arise out of any consumer complaints. Despite the voluminous record in this case, no harm and no tendency to produce harm has been shown. The only empirical study of whether the use of divorce kits has had adverse effects concludes that kit users derived about the same benefits as persons who used lawyers. No greater adverse effects were reported. Nevertheless, the study found that although kits were effective, their use had been artificially restricted by "difficulties inherent in unassisted kit use." The report said:

> The conclusion is inescapable that the formalities requisite to divorce need not be the exclusive domain of lawyers. From this flow two corollaries. The first is that the public should not be denied access to lay divorce assistance. Laymen can safely be permitted to offer personalized form preparation aid and to publish kits. If

> abuses develop, the states retain the option to impose civil liability or institute licensing requirements.[25] (Emphasis added.)

CONCLUSION

This brief is not intended to cast doubt on the motives, sincerity or good faith of members of The Florida Bar who honestly believe that people who rely on legal advice given by unlicensed persons will suffer serious damage. No one can deny that damage is a possibility. On the other hand, we all know that the process of rationalization unconsciously motivated by natural self interest often results in a quite honest exaggeration of risk.

The law is a great and honored calling. Our function as members of the legal profession is to do what we can to see that law, as it develops, promotes rather than restricts human freedom. As lawyers we cannot afford to make it appear that we feel so insecure in our own professional worth that we must use the force of the state to prevent our would-be clients from going elsewhere for advice.

In the words of a recent article on this subject:

> In the long run, the legal profession will not thrive and prosper by indicting, prosecuting, convicting, enjoining, and issuing orders to show cause to those laymen and lay organizations that, in their ordinary day-to-day business, are involved with people and the law. The legal profession

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25 The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 104 at 165.

> will thrive and prosper if, by its deeds, it can cause a now skeptical public to believe that it has something more and better to offer than even the best intentioned amateur.[26]

The Court should exercise its policy making responsibility to relax substantially that aspect of the unauthorized practice of law doctrine which prevents lay persons from giving "legal advice."

Respectfully submitted,

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26 Hyrne, Unauthorized Practice in Estate Planning and Administration: A Mild and Temperate Dissent, 29 Fla. L.Rev. 647 (1977), at 673.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Amicus Brief have been mailed to Lacy Mahon, Jr., Attorney for Petitioner, Mahon, Mahon & Farley, 350 East Adams Street, Jacksonville, Florida 32202, H. Glenn Boggs, Attorney for Petitioner, Assistant Staff Counsel, The Florida Bar, Tallahassee, Florida 32304, Albert J. Hadeed, Attorney for Respondent, Southern Legal Counsel, Inc., 115-A, Northeast 7th Avenue, Gainesville, Florida 32601, and Alan B. Morrison, Attorney for Respondent, Harvard Law School, Cambridge, Massachusetts, this 27th day of October, 1978.

Attorney

6 Journal of Legal Studies 1 (1977).

ADVERTISING AND FREE SPEECH

*R. H. COASE**

I. Free Speech

In a paper which I presented to the American Economic Association at their meeting in December, 1973, I outlined my approach, as an economist, to the problems of freedom of speech and registered my astonishment at current attitudes.[1] The argument of that paper did not command universal assent and as some, at least, of the objections involved a misunderstanding of my position, it seemed to me that I should begin this paper by re-stating my argument, in a way which, I hope, will make my position clearer.

Belief in free speech is embodied in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." The clear purpose of the First Amendment is to limit severely the power of the government to regulate what has been termed the market for ideas—broadly speaking, what is written or spoken. In words that have often been quoted, and with approval, Justice Holmes described the fundamental belief which finds its expression in the First Amendment. It is that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[2] A statement such as this displays an extreme faith in the efficiency of competitive markets and a profound distrust of government regulation. The First Amendment prohibitions on government action have received, and continue to receive, the strongest support from the intellectual community.

This same intellectual community has, of course, in general been very anxious that the government should extensively regulate activities not covered by the First Amendment and rarely a day passes without new proposals for further regulation. This striking difference in the policies espoused when dealing with speech or written material, which I will refer to for shortness as

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This article will appear in Advertising and Free Speech, Allen Hyman and M. Bruce Johnson, eds. (Lexington Books, D.C. Heath & Co. 1977), and is printed here with permission of the publisher.

[1] R. H. Coase, The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev., pt. 2, at 384 (Papers & Proceedings, May 1974).

[2] Abrams v. United States, 250 U.S. 616, 630 (1919).

the market for ideas, and those which are thought appropriate for the ordinary market for goods and services is clearly something which calls for an explanation. It is not easy to find.

In the market for ideas, consumers are assumed to be able to choose appropriately between what they are offered without serious difficulty. As Milton said (and this has been repeated many times since), "Let [truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"[3] But in the market for goods, we do not seem to believe that consumers are able to make such a fine discrimination and it is deemed necessary to regulate producers with regard to what they tell consumers, how goods are to be labelled and described, and so on, lest consumers make the wrong choices. It is perhaps merely an extension of this assumption about consumer behavior in the two markets that whereas in the market for goods, producers are thought to be unscrupulous in their dealings, in the market for ideas fraud is not treated as a serious problem—which is at least consistent, since in a market in which consumers effortlessly detect false claims, what motive could there be for politicians, journalists or authors to attempt to make false or misleading statements?

But perhaps even more extraordinary is the difference in the view held about the government and its competence and motivation. I assume that support for the First Amendment prohibitions on government action—and the support is widespread—is based on beliefs about what the effects would be if the government intervened in the market for ideas. It seems to be believed that the government would be inefficient and wrongly motivated, that it would suppress ideas that should be put into circulation and would encourage those to circulate which we would be better without. How different is the government assumed to be when we come to economic regulation. In this area government is considered to be competent in action and pure in motivation so that it is desirable that it should engage in the regulation, in the minutest detail, of the goods and services which people buy, the terms on which they buy, the prices which they can pay, from whom they should be allowed to buy, and so on. Since we are concerned with the activities in these two different markets of the same government, why is it that it is regarded as incompetent and untrustworthy in the one market and efficient and reliable in the other?

So far as I know, no answer has ever been given—which, I hasten to add, may in part be due to the fact that the question is not normally raised. This does not mean that no justification is ever given for this difference in the role assigned to government in the two markets. But it has a very curious quality. It is held that things spiritual are more important than things material,

[3] John Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing 6 (H. B. Cotterill ed. 1959).

that the mind is more important than the body. This is what I have termed the assumption of the primacy of the marketplace for ideas. Milton believed this:

> Truth and understanding are not such wares as to be monopolised and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks. . . . Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.[4]

John Stuart Mill adopted a similar position. He explains that

> the so-called doctrine of Free Trade . . . rests on grounds different from . . . the principle of individual liberty . . . . Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, *quâ* restraint, is an evil: but the restraints in question affect only that part of conduct which society is competent to restrain, and are wrong solely because they do not really produce the results which it is desired to produce by them. As the principle of individual liberty is not involved in the doctrine of Free Trade, so neither is it in most of the questions which arise respecting the limits of that doctrine; as, for example, what amount of public control is admissible for the prevention of fraud by adulteration; how far sanitary precautions, or arrangements to protect workpeople employed in dangerous occupations, should be enforced on employers.[5]

Aaron Director showed the fallacy of the belief in the primacy of the market for ideas:

> [For] the bulk of mankind . . . freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.[6]

And, as is to be expected, Adam Smith, always sensible and shrewd, makes the same point when discussing the laws of settlement which impeded the mobility of labor, but which, he said, had not been denounced in the same way as had general warrants, which directly affected only the intellectual community.

> Though men of reflection . . . have sometimes complained of the law of settlements as a public grievance; yet it has never been the object of any general popular clamour, such as that against general warrants, an abusive practice undoubtedly, but such a one as was not likely to occasion any general oppression. There is scarce a poor man

[4] *Id.* at 29, 44.

[5] John Stuart Mill, On Liberty, in Utilitarianism, Liberty, and Representative Government 150-51 (Everyman ed. 1951).

[6] Aaron Director, The Parity of the Economic Market Place, 7 J. Law & Econ. 1, 6 (1964).

in England of forty years of age . . . who has not in some part of his life felt himself most cruelly oppressed by this ill-contrived law of settlements.[7]

There is simply no reason to suppose that for the great mass of people the market for ideas is more important than the market for goods.

But even if the market for ideas were more important, it does not follow that the two markets should be treated differently. Support for the First Amendment is dependent on the view that government intervention in a particular market would be bad. Why not, then, be consistent and apply this view of government intervention more widely? If we want the First Amendment to be strictly observed, and believe therefore that limitations should be placed on the activities of the government in the marketplace of ideas because of the greater importance of that marketplace for the working of our society, why deny the same advantages to those whose welfare depends on the lesser market, the market for goods? As things stand, it seems as though it is desired to make the markets which cater to ordinary people less responsive to their needs. Certainly most intellectuals in the Western world, when comparing countries which abolish both the market for goods and the market for ideas with those which abolish the market for ideas but retain a modicum of freedom in the market for goods, seem to prefer those which eliminate both markets—which assigns a negative value to an efficient market for goods.

The present attitude toward the market for goods and the market for ideas is a mass of contradictions. Consumers and the government (as well as producers) are assumed to act in one way in one market and in another way in the other market. There does not seem to be any justification for this assumption. There may be implicit in this attitude a preference for an inefficient market for goods, though it embodies a belief which most intellectuals would reject, were it made explicit.

My discussion up to this point has proceeded on the basis that the assumption underlying the support for the First Amendment is correct, namely, that markets operate better if government intervention is strictly limited. But now let us suppose that the assumptions underlying the case for economic regulation are correct, that the government is competent to regulate and is so motivated as to do so properly, with the result that the regulation enables the market to work better. If we make such assumptions, it is immediately apparent that the case for government intervention is very much stronger in the market for ideas than it is in the market for goods. The market for ideas is one in which property rights are difficult to define or to enforce, and in which, according to the argument normally employed by economists, the market is bound to work badly, and in which, therefore, government action

[7] Adam Smith, The Wealth of Nations 141 (Edwin Cannan ed. 1937).

of one sort or another is desirable. And yet despite the fact it is in this market, in which, according to the view I describe, its potentialities for good seem so great, that government action is to be prohibited. The inconsistency in the policies recommended for the two markets remains.

II. Regulation

Economic regulation is the establishment of the legal framework within which economic activity is carried out. The term "regulation" in the United States is often confined to the work of the regulatory commissions; but regulation is also the result of legislative and judicial actions, and it seems ill-advised not to take these into consideration. The First Amendment does not, of course, prevent the passage of any laws relating to "speech or the press" but only those which "abridge" their freedom. Since any law will be likely to affect the relative profitability of different activities, encouraging some and discouraging others, and since it is inconceivable that no laws will be passed which affect speech or the press, the courts inevitably face a difficult task in deciding when a law "abridges" freedom of speech or of the press.

The modern theory of regulation tends to stress that regulation comes about as the result of the desire of producers to restrict competition and that in consequence regulation leads to a worsening in the economic situation. To the extent that this is true, it would be better to have less regulation. There is a great deal of evidence to support this position. In fact, that regulation makes things worse or, at the best, makes very little difference, seems to be the usual finding of studies which have been made in areas ranging from agriculture to zoning, with many examples in between.

Most of the studies relate to the activities of regulatory commissions, but there can be no doubt that many statutory provisions have similar results. One example very relevant in assessing the likely consequences of regulating advertising is the regulation of whiskey labelling. The control of whiskey labelling by the Federal Alcohol Administration was supposed to prevent fraud and promote competition. In fact, a recent study concludes that the kind of labelling regulations that were made led to deception and restricted competition. The authors of the study conclude by asking a general question: "will implementation of . . . proposals for additional consumer-protection legislation necessarily lead to a rise in consumer's welfare?"[8] I would add that since people do not consume the same mix of products and services, so-called consumer organizations are likely to promote the interests of particular groups of consumers and will thus bring much the same kind of harm

[8] Raymond Urban & Richard Mancke, Federal Regulation of Whiskey Labelling: From the Repeal of Prohibition to the Present, 15 J. Law & Econ. 411, 426 (1972).

as do the activities of producer organizations. Thus, lower utility prices may benefit those who are already consuming but may deny a supply to those who are not; pollution controls may provide additional recreational facilities, at the cost of higher prices for electricity, oil or chemicals, perhaps largely paid for by those who do not enjoy the recreation.

But whether as a result of pressure from producers or consumers, it is clear that regulation will often be inimical to the interests of the community as a whole. There seems to be some inclination to argue that all regulation would have this consequence. But I believe this would be wrong. No one emphasized more strongly than Adam Smith that the regulations of commerce are a result of the political pressure of those who stand to benefit from them. But his treatment is more comprehensive (in this as in other respects) than that of most contemporary economists:

> The interest of the dealers . . . in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it. . . . The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention.[9]

As Adam Smith indicates, producers are certainly interested in narrowing the competition but they also have an interest in widening the market. Producers, that is, have an interest in the passage of laws which lower the costs of carrying out transactions and in removing restrictions on trade. And this means that they have an interest in bringing about the kind of regulation which would improve the working of the economic system. So we cannot assume that all regulation will make things worse although proposals for regulation made by any given group of producers should no doubt be examined "with the most suspicious attention." One problem is that proposals for a change in the legal framework are likely to have a mixed character, simultaneously widening the market in one respect and narrowing the competition in another. And, of course, we should always have regard to how the regulation will be applied in practice, and this will depend on the circumstances of each case.

I have been puzzled as to why the studies of regulation show, I think without exception, that regulation either makes little difference or makes things worse. Somewhere one would have expected to find a regulation which did more good than harm. It may be that we are misled because our

[9] Adam Smith, *supra* note 7, at 250.

studies have concentrated so heavily on the regulatory agencies, which are often merely the political arm of a cartel, and act accordingly. I have come to the tentative conclusion that an important reason may be that the government at the present time is so large that it has reached the stage of negative marginal productivity, which means that any additional function it takes on will probably result in more harm than good. It does appear that the governmental machine is now out of control. If a federal program were established to give financial assistance to boy scouts to enable them to help old ladies cross busy intersections, we could be sure that not all the money would go to boy scouts, that some of those they helped would be neither old, nor ladies, that part of the program would be devoted to preventing old ladies from crossing busy intersections and that many of them would be killed because they would now cross at places where, unsupervised, they were at least permitted to cross.

When I put forward my view that the market for goods and the market for ideas should be treated in the same way, it was assumed by some that what I had in mind was that the market for ideas should be subject to government regulation. That was certainly true in an article which appeared in *Time*.[10] The belief that I was advocating regulation of the press seems to have been clinched by a remark I made to a reporter that "buying harmful ideas is just as bad as buying harmful drugs." Since it was assumed that harmful drugs must be regulated, it seemed to follow that I wanted the same thing in the market for ideas. My supposed conclusion was answered by arguing that harmful ideas were difficult to discover but that this was not so for drugs: ". . . it is relatively easy to get an objective consensus on, say the toxic effects of thalidomide." In fact, it was not easy to foresee what the effects of thalidomide would be before it had been used, and a study of the new drug regulation in the United States (made in part because of the thalidomide experience) indicates that the main effect has been to decrease the supply of new drugs without any reduction in the proportion of inefficacious drugs among the smaller number that are now introduced.[11] So it is fairly clear that we would be better off without this new drug regulation. Experience with regulation in the market for goods suggests not the desirability of regulation in the market for ideas but the dangers of introducing regulation, anywhere.

However, this should not conceal from us that there is in fact regulation of the market for ideas. I gave education and broadcasting as examples in my paper to the American Economic Association. But an even more interesting example, since it directly affects freedom of speech and of the press, is the

[10] Ideas v. Goods, Time, January 14, 1974, at 28.

[11] Sam Peltzman, An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments, 81 J. Pol. Econ. 1049, 1076-1086 (1973).

control exercised by the courts over what can be said or written in connection with the conduct of a trial. This has mainly attracted attention because of the conflict with the doctrine of freedom of the press resulting from the courts' attempting to control what can be reported in the press. But the procedures followed by the courts have a much more direct and more interesting relation to the problem we are discussing. In a court, it is of the utmost important that the truth be discovered. Whatever lawyers say when talking at large about freedom of speech, when it comes to their own affairs, they display great anxiety when truth and falsehood are grappling in a free and open encounter about the possibility that truth may be put to the worst. The result is the most highly regulated marketplace for ideas that it is possible to imagine. Who can speak, when they can speak, what they can speak about, the order in which people can speak, who is allowed to question them, what questions can be asked and much more are all determined by the regulations of the courts.[12] It is apparent that lawyers believe that, in their own business, it is only through a highly controlled marketplace for ideas—the absence, that is, of free speech as it is generally understood—that truth can be established. Whether all these regulations really do enable us to determine the truth with greater certainty, as against increasing the incomes of lawyers, I do not pretend to know. But I would be willing to accept that some of these regulations do have the effect of making it more likely that we will discover the truth. If this is so, it suggests that there may, on occasion, be advantages in a regulated marketplace for ideas.

What this comes down to is that we cannot rule out regulation in any market as being undesirable on an *a priori* basis. But the studies to which I have referred suggest that caution should be exercised in instituting new regulation since in practice the results of the regulation may be very different than those which the advocates of the regulation claim that it would bring. One of the problems at the present time is that the government is so overextended that any additional function which government undertakes, of whatever kind, is liable to do more harm than good. But this does not mean that we would be better off if all regulation were abandoned. This would, after all, be the equivalent of abolishing the legal system. Nor does it mean that in that happy but perhaps unattainable world in which we have vastly less regulation than at present, we would not have some regulation of the market for ideas, including perhaps some that does not now exist.

III. Advertising

Advertising, the dissemination of messages about the goods and services which people consume, is clearly part of the market for ideas. Intellectuals

[12] For a discussion of this subject, see John Henry Wigmore, Evidence in Trials at Common Law, at Book I (1940).

have not, in general, welcomed this other occupant of their domain. And the feeling of antipathy has been shared by economists, who, until comparatively recently, have tended to deplore rather than to analyse the effects of advertising. In recent years advertising has been studied more rigorously, and this has been accompanied by, or perhaps we should say has resulted in, a more sympathetic attitude to advertising. However, this work, though enlightening, is by no means decisive when we deal with the question of how advertising should be treated under the First Amendment.

Advertising may provide information or may change people's tastes. Normally, firms incur advertising expenditures because of the additional profit which results from the increased demand to which the information or the change in tastes leads. Advertising may also on occasion have as its motive to affect the attitudes of workers, making them, for example, more willing to work for the firm concerned. And it may also be used to influence public policy in a direction favorable to the firm's operations, presumably by affecting the behavior of people acting in the political system. Economists have always tended to look kindly on informative advertising, although since the information given is selective, it is admitted that on occasion it may lead people to make worse choices than they would without it. Recent work has shown that the informative content of most advertising must be large, as is shown by the fact that, for example, new products are advertised more heavily than old ones. Persuasive advertising, which conveys no information about the properties of the goods and services being advertised but achieves its effect through an emotional appeal, is commonly disapproved of by economists. It is not clear why. Any advertisement which induces people to consume a product conveys information, since the act of consumption gives more information about the properties of a product or service than could be done by the advertisement itself. Persuasive advertising is thus also informative. Advertising of new products, I suspect, normally informs the consumer not through the facts and figures in the advertisement itself (the facts presented may indeed be as much an appeal to the emotions as the figures which are so commonly found in advertisements) but achieves this end through inducing the consumer to try the product and thus informing him in the most direct way.

Advertisements may also change people's tastes. No one doubts that tastes can change, although it is possible to describe what is commonly meant by a change in tastes without using the word. Given that an individual's tastes will usually be determined by a large number of factors other than advertising, *e.g.*, by family influences, religion, education, genetic factors, and by the particular experiences which befall every individual, it is not to be expected that the effect of advertising on taste will normally be great, particularly as much advertising is not designed to change tastes and presuma-

bly does not. But this does not mean that the effect of advertising on taste is negligible, even if its only consequence is to speed up a change in taste which is occurring for some other reason.

Most economists seem to have thought that advertising which brings about a change in tastes is necessarily bad—either because advertising tends to corrupt our tastes or because, if it does not do this but merely produces a new set of demands no better than the old, advertising expenditures clearly represent a waste of resources. The possibility that advertising might serve, even in a small degree, to elevate tastes never seems to be considered. Yet, once we decide to take changes in tastes into account in assessing the worth of advertising (and I think we should) we need to decide whether the new tastes are better or worse than the old ones. Professor Phillip Nelson, who emphasizes, no doubt correctly, the informative aspects of advertising, tells us that he finds

> the hypothesis that advertising changes tastes intellectually unsatisfactory. We economists have no theory of taste changes, so this approach leads to no behavioral predictions. The intuitions of one group of economists are matched against the intuitions of other economists with no clear resolution.[13]

I would have thought that the belief that advertising had some effect on tastes, perhaps minor but not zero, was shared by everyone who is willing to agree that tastes can change. No doubt Professor Nelson is correct when he says that we do not have a theory of tastes. But ignorance about a subject seems an inadequate reason for not studying it.

The right way to think about this question is, in my view, that advocated by the greatest Chicago economist, Frank H. Knight. He points out that we have "a tendency to regard the growth of wants as unfortunate and the manufacture of new ones as an evil; what have not advertising and salesmanship to answer for at the hands of Veblen, for example!"[14] Knight's own attitude to wants is very different:

> Wants . . . not only *are* unstable, changeable in response to all sorts of influences, but it is their essential nature to change and grow; it is an inherent inner necessity in them. The chief thing which the common-sense individual actually wants is not satisfactions for the wants which he has, but more, and *better* wants.[15]

Knight rejects the idea that "one taste or judgment is as good as another, that the fact of preference is ultimately all there is to the question of wants." On the contrary:

> The consideration of wants by the person who is comparing them for the guidance of his conduct and hence, of course, for the scientific student thus inevitably gravitates into a *criticism of standards,* which seems to be a very different thing from the comparison of given magnitudes. The individual who is acting deliberately is not merely and perhaps not mainly trying to satisfy given desires; there is always really present and operative, though in the background of consciousness, the idea of and *desire for a new want* to be striven for when the present objective is out of the way. Wants and the activity which they motivate constantly look forward to new and 'higher,' more evolved and enlightened wants and these function as ends and motives of action beyond the objective to which desire is momentarily directed. The 'object' in the narrow sense of the present want is provisional; it is as much a means to a new want as end to the old one, and all intelligently conscious activity is directed forward, onward, upward, indefinitely. Life is not fundamentally a striving for ends, for satisfactions, but rather for bases for further striving; desire is more fundamental to conduct than is achievement, or perhaps better, the true achievement is the refinement and elevation of the plane of desire, the cultivation of taste. And let us reiterate that all this is true *to the person acting,* not simply to the outsider, philosophizing after the event.[16]

What this means is that we have to judge an activity such as advertising, which influences tastes, by deciding whether it tends to produce good men and a good society, or, at any rate, better men and a better society. It is not easy to gauge the effect of advertising on taste, in part because it is obviously not great, but judging by the emphasis in advertisements on convenience, cleanliness and beauty, such effect as it has is presumably generally in the right direction. The effect on society which has attracted most attention, at any rate among economists, is its influence on competition. It used to be thought by many that advertising promoted monopoly but it is now becoming apparent as a result of recent studies that advertising tends to make the economic system more competitive. An extremely interesting study, and one which has had important repercussions on the formation of policy, is that by Professor Lee Benham on the effect of advertising on the prices of eyeglasses. Professor Benham compared the prices of eyeglasses in states which prohibited advertising relating to eyeglasses and eye examinations with the prices in states which allowed such advertising. The conclusion was clear: prices were lower in those states which allowed advertising. This study suggests that advertising tends to make the system more competitive, and this is consistent with other evidence.[17]

Of course, the conclusion that overall, advertising tends to improve the performance of the economic system or that it leads to an improvement in our tastes, does not determine whether advertising ought or ought not to be regulated. Few people, I suppose, would wish to abolish advertising al-

[13] Phillip Nelson, The Economic Consequences of Advertising, 48 J. Bus. 213 (1975).

[14] Frank Hyneman Knight, The Ethics of Competition and Other Essays 22 (1935).

[15] *Id.*

[16] *Id.* at 22-23.

[17] Lee Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972).

together. Even though most advertising elevates taste to some degree, there is presumably some which corrupts it and though most advertising conveys information which makes the system more competitive, there is also no doubt some which, either because the information is misleading or fraudulent, worsens the performance of the economic system. Regulation, if it merely eliminated those advertisements which make things worse while retaining those that made things better (or even reducing their quantity slightly) would clearly be desirable.

We can form some idea as to whether regulation of advertising is likely to lead to an overall improvement by considering the work of the Federal Trade Commission regarding deceptive practices. Professor Richard Posner has made such a study and shows that many of the cases in which the Federal Trade Commission took action did not involve serious deception or even did not involve deception at all. For example, they objected to certain information not being supplied even in cases in which it was fairly clear that it was information the consumers did not want. And in other cases, the advertising was objected to even though it would be perfectly well understood by consumers. Professor Posner points out that it is unbelievable that an appreciable number of consumers would be (or even were intended to be) fooled in such cases as those in which the Federal Trade Commission ordered

> a seller of dime store jewelry to disclose that its 'turquoise' rings do not contain real turquoises, a toy manufacturer to disclose that its toy does not fire projectiles that actually explode, a maker of 'First Prize' bobby pins to change the name lest a consumer think that purchase would make him eligible to enter a contest, and a manufacturer of shaving cream to cease representing that his product can shave sandpaper without first soaking the sandpaper for several hours.[18]

The Federal Trade Commission also took action in cases when there were adequate alternative legal remedies. There were, of course, cases of fraud in which action by the Federal Trade Commission was appropriate—but these represented in all the periods sampled a very small proportion of the total number of cases. Professor Posner summed the position for the fiscal year 1963 (and the results for the other periods sampled were not dissimilar) in the following words:

> . . . the FTC bought little consumer protection in exchange for the more than $4 million it expended in the area of fraudulent and unfair marketing practices, and the millions more that it forced the private sector to expend in litigation and compliance. Besides wasting money on red herrings, it inflicted additional social costs of unknown magnitude by impeding the free marketing of cheap substitute products, including

[18] Richard A. Posner, Regulation of Advertising by the FTC 18-19 (American Enterprise Institute Evaluative Studies, no. 11, Nov., 1973).

> foreign products of all kinds, fiber substitutes for animal furs, costume jewelry, and inexpensive scents; by proscribing truthful designations; by harassing discount sellers; by obstructing a fair market test for products of debatable efficacy; and by imposing on sellers the costs of furnishing additional information and on buyers the costs of absorbing that information.[19]

The results of this study of the regulation of deceptive practices is much the same as other studies of regulation: there is no reason to suppose that whatever good was accomplished was sufficient to offset the harm that the regulation brought with it.

IV. The First Amendment, Advertising and Legal Opinion

Lawyers, like most other groups in western intellectual society, strongly believe in the doctrine of free speech, which, in the United States, is enshrined in the First Amendment. They have not been in agreement as to its reach nor as to those special reasons which make it important to preserve the kind of freedom protected by the First Amendment above all others. It is sometimes said that freedom of speech and of the press are essential for the proper working of a democratic society. No doubt they are. But this hardly gets to the heart of the matter. Surely such freedoms would be valuable in a nondemocratic society. Were the United States ruled by a king and an aristocracy, the value of freedom in the market for ideas would not disappear and might very well be increased. It is not without significance that Milton's *Areopagitica*, so much quoted by those who advocate free speech, was published in 1644, long before modern notions of democracy came into existence. We are, I believe, forced to reject the idea that belief in freedom in the market for ideas is dependent on a belief in democracy, or self-government, to use Meiklejohn's word. Indeed, as the range of activities grow to which the courts have extended the protection of the First Amendment, it becomes increasingly implausible to tie First Amendment rights to the working of the political system. Nude dancing is now covered, or uncovered, by the First Amendment and it would be difficult to argue that this activity, so dependent on the existence of adequate heating, is vital to the working of a democratic system. If we are to justify these rights, we must rely on values inherent in a system in which individuals are able to choose what they do (in this case, to speak, write or engage in similar activities) without direct government regulation.

I mentioned earlier the paradox that, while freedom from government regulation is considered essential in the areas of speech and writing, this is not true in the market for goods and services. So far as I know, no satisfac-

[19] *Id.* at 21.

tory reason has ever been given as why the market for ideas should be beyond the reach of government intervention. Thomas I. Emerson, in his book, attempted to justify this privileged position but I need not conceal that I consider his attempt to be unsuccessful.[20] He first points out, correctly, that "no really adequate or comprehensive theory of the First Amendment has been enunciated, much less agreed upon." He then attempts to fill the gap. According to Emerson, the "fundamental purpose of the First Amendment" is "to guarantee the maintenance of an effective system of free expression."[21] This emphasis on "free expression" requires him to make a distinction between "expression" and "action." He argues that,

> in order to achieve its desired goals, a society or the state is entitled to exercise control over action—whether by prohibiting or compelling it—on an entirely different and vastly more extensive basis. But expression occupies a specially protected position. In this sector of human conduct, the social right of suppression or compulsion is at its lowest point, in most respects nonexistent.[22]

Emerson's distinction between "expression" and "action" is roughly the distinction between the market for ideas and the market for goods. Maintenance of free expression is justified because (1) it assures individual self-fulfilment, (2) it enables us to attain the truth, (3) it secures the participation of members of the society in social, including political, decision-making, and (4) it maintains the balance between stability and change.[23] It seems to me that the arguments which Emerson uses to support freedom in the market for ideas are equally applicable in the market for goods.

Emerson lays great stress on freedom of expression as leading to self-fulfillment. No doubt it does. But freedom to choose one's occupation, one's home, the school one (and one's children) attends, what is studied at school, the kind of medical attention one receives, how one's savings are to be invested, the equipment one uses or the food one eats are surely equally necessary for self-fulfillment—and for most people are considerably more important than much of what is protected by the First Amendment. A similar point can be made about the other advantages which Emerson finds in freedom of expression. If freedom in the market for ideas enables us to discover and choose the truth, why would not freedom in the market for goods enable us to discover what is available and to choose more wisely what we purchase? Emerson speaks about participation in decision-making in political affairs. But why should people not be free to participate directly in economic affairs by competing in the market? As for the accommodation to

[20] Thomas I. Emerson, Toward a General Theory of the First Amendment (1966).

[21] *Id.* at vii-viii.

[22] *Id.* at 6.

[23] *Id.* at 3-15.

change, there is surely no more delicate mechanism for adjusting to changing conditions than the market.

Why is it that intellectuals who, one might think, would be made uncomfortable by such inconsistency seem to be unaware that there is any inconsistency in their views, or that their justification for the special position accorded freedom of expression is little more than phrase-making "full of sound and fury, signifying nothing"? Aaron Director has given the answer to the question.[24] It is self-interest. The market for ideas is the market in which the intellectuals operate. They understand the value of freedom where their own activities are concerned. "Freedom of expression" is freedom for them. The market for goods is however, the market in which the money-making businessman operates. Regulation in this case is directed at the activities of another group and is, no doubt, made more attractive because intellectuals see themselves as doing the regulating. Furthermore, although, in general, intellectuals gain from freedom from direct government regulation in the market for ideas, since it generates controversy and therefore increases the demand for their services, in at least one area (and there are undoubtedly others) which one would normally consider as part of the market for ideas, education, such regulation has been welcomed, no doubt because it is seen to be accompanied by government financial support.

Advertising is in a curious position. On the one hand, it takes the form of speech or writing and one would expect therefore to find it protected by the First Amendment. It involves "expression" rather than "action," and, one would think, should obtain the same protection using Emerson's approach as other parts of the market for ideas. But, of course, advertising is connected with the market for goods, the domain of the businessman, which is treated as "action." Emerson himself has no doubt that advertising should not be brought within the protection of the First Amendment: "Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression."[25] But the question is not as clearcut as this and it is to be expected that a good deal will be revealed about the criteria which the courts use in deciding whether an activity is protected by the First Amendment by examining how they handle the boundary case of advertising. How the courts have, in fact, treated this problem is the subject of the next section.

V. Advertising and the First Amendment: The Cases

The view that commercial advertising is not included in the First Amendment prohibitions is normally traced to the case of *Valentine v.*

[24] *Supra* note 6, at 6.

[25] *Supra* note 20, at 105n.

Chrestensen decided in 1942.[26] The Supreme Court's opinion, as we shall see, does not illuminate the subject, but the facts of that case and the arguments made in the progress of the case through the courts resulted in most of the important questions being presented. Consideration of this case suggests to me that the questions posed but left unanswered by the Supreme Court could not be suppressed forever and the disintegration of the Supreme Court's ruling in that case, which we can now see to be occurring, appears as an almost inevitable development.

The facts are simple. Mr. Chrestensen had acquired a Navy submarine which he exhibited, charging an admission fee. The submarine was moored at a pier in New York City. He had printed a handbill advertising the exhibition. On attempting to distribute the handbill in the city streets, he was told by the Police Commissioner that this was illegal since the Sanitary Code prohibited the distribution in the streets of commercial and business advertising matter. Mr. Chrestensen was, however, told that handbills solely devoted to "information or a public protest" could be distributed. He then had printed a double-faced handbill, on one side of which was printed the original advertisement (in a slightly modified form) and on the other side a protest against the action of the city in not allowing him to use a city pier. This was a genuine grievance, since the city's refusal had resulted in Mr. Chrestensen having to moor his submarine at a state pier, which was less accessible to the public. The police, however, prohibited the distribution of the double-faced handbill. As a result Mr. Chrestensen took action in the courts and the case finally went to the Supreme Court. The Court held that while "the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion" and that this is a privilege that government "may not unduly burden or proscribe . . . [w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." Mr. Chrestensen, of course, argued that he was engaged in "the dissemination of matter proper for public information, none the less so because there was inextricably attached to the medium of such dissemination commercial advertising matter." To this, the Supreme Court gave not so much a reply as a rebuff:

> It is enough . . . that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.[27]

[26] Valentine v. Christensen, 316 U.S. 52 (1942) *rev'd* 122 F.2d 511 (2d Cir. 1942).

[27] *Id.* at 54-55.

In the United States Circuit Court of Appeals, Mr. Chrestensen was successful in obtaining a decision to the effect that the police action infringed the First Amendment but this was accompanied by a very detailed dissenting opinion. And before the Supreme Court, the New York City Committee of the American Civil Liberties Union, among others, filed an Amicus Curiae brief. So the issues were fully ventilated. The majority opinion in the United States Circuit Court of Appeals was mainly concerned with the argument presented on behalf of the Police Commissioner, that the handbill, although on one side it contained material protected by the First Amendment, was "primarily" commercial. This, it was argued, was determined by the extent to which the material could be considered commercial and by the motive of the advertiser, whether, that is, he was actuated by pecuniary gain. But, said the majority, acceptance of such a point would result in the police becoming the arbiters of "the quantum of advertising as against protest and of the purpose of the citizen in speaking and writing." If the police weigh "purpose and intent, as well as the effect of the literary product," this "will pretty surely result in prohibiting freedom of expression in ways and to an extent quite unconnected with city sanitation." The majority commented:

> Plaintiff's handbill furnishes a good example of the uncertainty, not to speak of unreality, of the suggested distinctions. Sheer number of words favors the protest as against all the rest of the handbill, whether it be considered advertising or mere factual information concerning the submarine. Spacing and display give at least equal place to the protest. But if intent and purpose must be measured, how can we say the plaintiff's motives are only or primarily financial? Is he just engaged in an advertising plot, or does he really believe in his wrongs? We know how opposition to oppression, real or fancied, grows upon a person, and we suspect that by now plaintiff regards himself as a crusader against injustice. If so, he is in the democratic tradition and within the protection of the Bill of Rights. . . .

It will be observed that the majority do not here deal with the question of whether commercial advertising is protected by the First Amendment. They therefore added:

> To avoid misunderstanding, perhaps we should say that, while absolute prohibition of commercial handbills seems to us of doubtful validity, yet we need decide no more here than that at least it cannot extend to a combined protest and advertisement not shown to be a mere subterfuge.[28]

The long dissenting opinion argued that the main fallacy in the majority opinion arose out of its assumption that it was dealing with a non-commercial handbill "which contains some related and incidental commercial or business advertising." One side of the handbill certainly contained a protest, which was protected, but there was no reason why this had to be

[28] 122 F.2d 511, 515-16.

printed on the same piece of paper as the advertisement. "It is as if the suit related to a handbill advertising an automobile for sale which also included an attack on Nazism or a protest against the tax on cigarettes." The question, to the dissenting judge, was: "Is that separable handbill . . . wholly commercial?" On this, the judge had no doubt:

> . . . the dominant purpose of most men, *when engaged in business,* is to seek customers and make profits. . . . Chrestensen being a business man, we are more than justified in concluding that, as his sole purpose in connection with his original handbill was unquestionably commercial, his purpose in trying to distribute the [second] handbill . . . was the same. We know that his business is that of showing his submarine for profit . . . we know that he does not display his submarine for educational or propaganda purposes. Why, then, should we refuse to recognize that the handbill [in question] was commercial?

He found little difficulty in holding that the motive was pecuniary.

> Suppose that a department store, whose owners were recognized as not being in business for their health, were to attempt to distribute . . . a handbill saying nothing but this: 'We have on display at our store many copies of beautiful early American furniture.' If the store owners sought an injunction to restrain the city from preventing the distribution on the streets of such an advertisement, a court surely would not grant the injunction because the handbill itself contained nothing which disclosed a commercial intention. It would not say that, as the advertisement was silent as to sales, it must be assumed that there was little or no profit motive behind it, but merely a desire to educate. The judicial vision is not so feeble that it cannot look beyond the contents of such a paper.[29]

The dissenting judge then turns to the majority's clear indication that it would have found the ordinance unconstitutional, even if the handbill had been wholly commercial:

> . . . the majority finds it difficult to see why (a) if . . . a business man may not constitutionally be prevented from circularizing, in public places, a protest against official action affecting his business, he must not also (b) be similarly protected in distributing business circulars wholly designed to procure public patronage for profit.

Such a distinction seems to him easy to make:

> . . . the historical events which yielded the constitutional protection of free speech and free expression do not by any means compel or even suggest the conclusion that there is an equally important constitutional right to distribute commercial handbills—for the purpose of profit-making—so imperative that the city's 'police power' must similarly be reduced (from prevention to punishment after the fact) when pieces of paper, devised for business purposes, may litter its streets to the injury of public health or safety. . . . Such men as Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising . . . . [A]s ours is a profit economy, no business man need apologize for seeking personal gain by all legitimate means. But the constitutional limitations on legislation affecting such pursuits are not as specific and exacting as those imposed on legislation interfering with free speech. To prevent the peddling of business handbills on the street still leaves the businessman at liberty to use other modes of advertising, as in newspapers, for instance.[30]

[29] 122 F.2d 517, 519, 521.

In the briefs submitted to the Supreme Court, the two parties largely relied on the opposing judicial opinions. The lawyers for the Police Commissioner argued that the addition to the handbill was a mere subterfuge. The concept of freedom of the press required them to make a distinction between commercial advertisements and "opinion or protest literature":

> Commercial advertisements do not serve to aid the public in the discovery of 'political and economic truth'; they serve only to make known to the public what the advertiser seeks to sell. Their motive is not 'public education'; it is by definition always one of personal profit . . . . to deny the City the power to remedy a patent evil by the only effective means of doing so is . . . to exalt the business interests of the few above the welfare of the many.[31]

The brief submitted on behalf of Mr. Chrestensen argued that there was no constitutional justification for the distinction between commercial or non-commercial advertising:

> The alleged distinction between so-called property rights and so-called personal rights is a superficial play on words. Property rights are not limited to inanimate matter, as land and chattels. The most sacred rights of merchant, mechanic, and farmer, of master and servant, are, when analyzed, personal rights of individuals and most of them relate to their interest in securing for themselves some form of property.

The brief had earlier pointed out that newspapers were commercial enterprises, operated to make a profit.[32]

The amicus brief of the New York City Committee of the American Civil Liberties Union was more thorough-going in its support of Mr. Chrestensen's position. It claimed that

> it is impossible to make a philosophically sound distinction between commercial and non-commercial handbills. . . . If lines are to be drawn we submit that the basis of the distinction should be, not whether the matter distributed attracts attention to an article of commerce, but whether it is itself such an article or is a means of conveying information and opinion. For while the First Amendment is not designed to protect

[30] *Id.* at 522, 524.

[31] Brief for Petitioner at 16, 24-25.

[32] Brief for Respondent at 14.

the sale of merchandise, we believe it covers all dissemination of 'information and opinion'. . . . And information and opinion can relate to articles of commerce as well as to political or philosophical concepts.

They also pointed out that although Mr. Chrestensen aimed to make money exhibiting the submarine, the exhibit

clearly had an educational and informative value. . . . If the distribution of a leaflet advertising this exhibit can be banned . . . then, with equal logic, a leaflet could be banned which announced the holding of a lecture on some literary or artistic subject at which an admission fee was to be charged. For in such case it would be reasonable to suppose that the management of the lecture expected to make money out of it.

They also pointed out that the use of handbills was a means of advertising for small businessmen who could not afford radio or newspaper advertising.[33]

There are a series of questions involved in a case such as this. Is advertising, which is invariably either speech or writing or its equivalent, covered by the First Amendment? If the touchstone for protection under the First Amendment were that the message had to be spoken or written, there would be no problem: all advertising would be covered by the First Amendment. But if it is decided that advertising (or some advertising) is not covered by the First Amendment, it becomes necessary to distinguish between the uncovered messages and those other messages that are covered by the doctrine of freedom of speech. An advertising message in one designed to increase the sales or decrease the costs of providing some other service. Defined in this way, a speech by a lawyer, whether on a legal topic or not, made in order that potential clients should become aware of him or an article written by a professor in order to attract attention to himself and enable him to obtain a better position, or even the provision of a television program (say on public television) as a result of sponsorship by a firm would also be advertising. Economically, they *are* advertising and would be analyzed by an economist as such. But presumably the examination of motives which such a distinction would require would in general make it an impossible basis on which to found a legal distinction. Presumably the only advertising which potentially could be excluded from the protection of the First Amendment would be that which directly affected the sales of the product or service, or its costs. But this immediately raises the question of whether such advertising would be covered by the First Amendment when the business wishes to affect its sales or costs by obtaining a change in the law or in the regulations of some regulatory agency, or is directed to altering the attitude of workers by, for example, decreasing their willingness to strike, or by increasing the votes

[33] Brief of N.Y.C. Comm. of the A.C.L.U. as Amicus Curiae, at 2, 3, 5.

cast for a candidate thought to support a law favorable to the business. If such advertising messages are protected, this would leave unprotected only messages which directly affected sales. But in such a category, would advertising designed to sell a newspaper, a book, an educational program or a religious emblem be protected by the First Amendment not because the advertising as such was covered but because what was being sold was covered? Or would the advertising be covered if the product was sold by a not-for-profit organization? If advertising for such products and by such organizations were protected by the First Amendment, this would only leave without protection advertising by profit-making organizations which directly affected sales of products not covered by the First Amendment. But even in such cases, would the motive of the buyer rather than the seller be relevant? It is possible to buy something which itself seems to have no relationship at all to the concerns of the First Amendment, but whose purchase is clearly to further some end which is normally protected by the First Amendment. Take, for example, Mr. Chrestensen's submarine. Surely someone might wish to inspect the submarine in order to be able to come to a better opinion on defense expenditures and defense policy—a newspaper article which described the submarine and which was read with the same aim in view would clearly be protected. If the purpose for which the product is demanded is relevant, it becomes very difficult to put any bounds on the products the advertising of which could be brought within the protection of the First Amendment, since at one time or another almost any product will be necessary for facilitating the creation or spread of ideas. Unless the courts adopt the position either that *all* advertising or that *no* advertising is within the protection of the First Amendment, they face an almost insuperable task in deciding where to draw the line. At the same time, it is hardly possible for the courts to hold that no advertising is protected by the First Amendment. An erosion of the ruling in *Valentine v. Chrestensen* ultimately could hardly be avoided. And so it was to prove. But is there any resting place before reaching the point at which all advertising is covered by the First Amendment? That we have to discover.

The first questioning of the ruling in *Valentine v. Chrestensen* in the Supreme Court came in *Cammarano v. United States*.[34] The question involved in this case was whether the owners of a wholesale beer business could deduct from income for income tax purposes sums spent for advertisements which were designed to persuade voters to vote against a proposal which would have placed the retail trade in wine and beer in Washington exclusively in the hands of the State and which would have adversely affected and might indeed have destroyed their business. It was argued that

[34] Cammarano v. United States, 358 U.S. 498 (1959).

the inability to deduct the full expenses for these advertisements raised a constitutional issue under the First Amendment, but no great stress was laid on this argument and *Valentine v. Chrestensen* does not seem to have been mentioned in any of the briefs. In any event, the Supreme Court rejected the view that the tax procedures violated the First Amendment. Justice Douglas, however, in a concurring opinion, took advantage of the opportunity to repudiate the Court's opinion in *Valentine v. Chrestensen,* of which he had himself been a member. The ruling, he said, "was casual, almost offhand." And it had not "survived reflection." Justice Douglas argued that the First Amendment is not "confined to discourse of a particular kind." It has been considered "essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters," but "it has not been restricted to them." Protests against actions which would produce monetary loss come within the protection of the First Amendment, for example, picketing.

> A protest against government action that affects a business occupies as high a place. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.

As a result, Justice Douglas found it "difficult to draw a line between that group and those who in other lines of endeavor advertise their wares by different means." In effect, what Justice Douglas seemed to be saying was that in his view, all advertising is protected by the First Amendment.[35] This is the position which the majority in the United States Court of Appeals seemed to hold when they tried *Valentine v. Chrestensen* and it was certainly the view expressed by the New York City Committee of the American Civil Liberties Union in their amicus brief.

In *New York Times v. Sullivan,*[36] a police commissioner in Alabama sued the New York Times (and others) for statements appearing in a paid advertisement which he alleged to be libellous. He won his case in the Alabama courts but lost in the Supreme Court, in part, because, unless it could be shown that there was "actual malice," the making of false statements about public officials was protected by the First Amendment. The lawyers for the police commissioner had argued that the First Amendment did not apply to a "commercial" advertisement, relying on *Valentine v. Chrestensen.* This argument was rejected since the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives

[35] *Id.* at 514.

[36] New York Times v. Sullivan, 376 U.S. 254, 266 (1964).

are matters of the highest public interest and concern."[37] The fact that The Times "was paid for publishing the advertisement" was considered as "immaterial." This presumably established that "non-commercial" advertising, or at least some categories of it, is protected by the First Amendment and also that the question of whether the publication was undertaken for a profit was irrelevant. This ruling also makes clear that the constitutional protection afforded to "non-commercial" advertisements applies even though what it says is false. The opinion quotes with approval an earlier statement of the Supreme Court, to the effect that the constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." It even states that "a false statement may be deemed to make a valuable contribution to public debate, since it brings about," quoting Mill " 'the clearer perception and livelier impression of truth, produced by its collision with error,' " thus exhibiting great confidence in the ability of people to distinguish truth from falsehood.[38] Justice Black in a concurring opinion states that an "unconditional right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment" and regrets that the Court stopped short of saving this. Justice Goldberg expressed the view that the theory of the Constitution was that

> every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious,

which comes to the same thing as saying that on "matters of public concern," people should be allowed to speak or write things which are unwise, unfair, false or malicious.[39]

The next important case was *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* decided in the Supreme Court in 1973. An ordinance of the Pittsburgh Commission on Human Relations was interpreted to mean that, a few exceptions apart, newspapers could not have sex-designated columns in "help wanted" advertisements. The issue was whether an ordinance which told a newspaper how it should arrange its advertisement pages infringed the First Amendment. Five justices decided it did not; four that it did. The majority relied on the ruling in the *Chrestensen* case. The advertisements were described as "classic examples of commercial speech,"[40] thus distinguishing the case from *New York Times v. Sullivan.* The argument that "commercial speech" should be given a higher level of

[37] *Id.* at 226.

[38] *Id.* at 271, 279 n.19.

[39] *Id.* at 297, 299 (Black & Goldberg, JJ. concurring).

[40] Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

protection than had been suggested by *Chrestensen*, that "the exchange of information is as important in the commercial realm as in any other," was found "unpersuasive" by the majority: "Discrimination in employment is not only commercial activity, it is *illegal* commercial activity. . . ." The majority ended their opinion by emphasizing that their decision did not give the government authority

> to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment. Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press.[41]

The other four Justices were not convinced. Mr. Chief Justice Burger, in his dissent, said that the decision

> launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions newspapers are 'sufficiently associated' with the 'commercial' parts of the papers as to be constitutionally unprotected and therefore subject to governmental regulation. . . . the First Amendment freedom of press includes the right of a newspaper to arrange the content of its paper, whether it be news items, editorials, or advertising, as it sees fit."

Justice Douglas repeated his view that commercial materials also have First Amendment protection. Mr. Justice Stewart said the question is whether the government

> "can tell a newspaper in advance what it can print and what it cannot. . . . The Court today holds that a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out governmental policy. After this decision, I see no reason why government cannot force a newspaper publisher to conform in the same way in order to achieve other goals thought socially desirable. And if government can dictate the layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?[42]

The next case, *Bigelow v. Virginia*,[43] decided in 1975, was to shatter whatever reliance may have been placed on the earlier cases but if it extended the protection afforded to advertisements, it also made the boundaries more indefinite. Bigelow was editor of a newspaper which carried an

[41] *Id.* at 391.

[42] Quotations from dissents will be found in 413 U.S. 393-95, 400, 403-404.

[43] Bigelow v. Virginia, 421 U.S. 809 (1975).

advertisement for an abortion service in New York. A Virginia law made it a misdemeanor to "encourage or prompt the procuring of abortion" by means, among other things, of an advertisement. Bigelow was convicted and his conviction was upheld by the Virginia Supreme Court, which largely relied on *Valentine v. Chrestensen*. The case against Bigelow, in the light of the earlier cases, was clearly strong: the business which advertised was a profit-making organization; the advertisement involved a commercial transaction, not a discussion of public policy; the market in medical services is commonly, and extensively, regulated by the government. The decision in the Virginia courts was, however, reversed, but in an opinion whose exact meaning is difficult to discern. The comment made by Justice Rehnquist, in a dissenting opinion (with which Justice White concurred), seems well taken:

> The Court's opinion does not confront head-on the question which this case poses, but makes contact with it only in a series of verbal sideswipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.[44]

That part of the majority opinion which deals with the application of the First Amendment to Bigelow's advertisement is as follows:

> The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at issue and those involved in *Chrestensen* and in *Pittsburgh Press*. The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message, most prominently the lines, 'Abortions are now legal in New York. There are no residency requirements,' involve the exercise of the freedom of communicating information and disseminating opinion.
>
> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity [abortion] advertised pertained to constitutional interests. . . .
>
> Moreover, the placement services advertised . . . were legally provided in New York at that time. . . .
>
> We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit. . . .

[44] *Id.* at 829-30.

. . . To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

. . . The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.[45]

Justice Rehnquist comments that if the advertisement was protected by the First Amendment,

the subject of the advertisement ought to make no difference. It will not do to say, as the Court does, that this advertisement conveyed information about the 'subject matter of the law of another State and its development' to those 'seeking reform in Virginia,' and that it related to abortion, as if these factors somehow put it on a different footing from other commercial advertising. This was a proposal to furnish services on a commercial basis, and since we have always refused to distinguish for First Amendment purposes on the basis of content, it is no different from an advertisement for a bucket shop operation or a Ponzi scheme which has its headquarters in New York. If Virginia may not regulate advertising of commercial abortion agencies because of the interest of those seeking to reform Virginia's abortion laws, it is difficult to see why it is not likewise precluded from regulating advertising for an out-of-state bucket shop on the ground that such information might be of interest to those interested in repealing Virginia's 'blue sky' laws. . . .

Assuming *arguendo* that this advertisement is something more than a normal commercial proposal, I am unable to see why Virginia does not have a legitimate public interest in its regulation. The Court apparently concedes . . . and our cases have long held, that the States have a strong interest in the prevention of commercial advertising in the health field—both in order to maintain high ethical standards in the medical profession and to protect from unscrupulous practices.[46]

Justice Rehnquist considers the advertisement "commercial advertising" and holds that such "commercial advertising" does not enjoy constitutional protection. It seems clear that much of our economic regulation is concerned with the provision of information to consumers and, if it is to be effective, also requires advertising to be regulated. Justice Rehnquist would presumably hold that there would be no constitutional bar to such regulation. We may regret both the original regulation and the regulation of advertising to which it leads but Justice Rehnquist's position, unlike that of the majority, is at least understandable. However, if the various statements about regulation

[45] *Id.* at 821-22, 825-26.

[46] *Id.* at 831-32.

made in the majority opinion come to be treated as of secondary importance, and emphasis is placed on their statement that "the advertisement conveyed information of potential interest and value to a diverse audience" and this is regarded as enough to afford First Amendment protection, then, given modern economists' findings about the informational value of advertising, we may expect to find in future a much greater range of commercial advertising brought within the scope of the First Amendment.

The regulations of the Federal Trade Commission which have as their aim the preventing of "false and misleading" advertising would seem to impinge directly on activities of a kind which normally would seem to come within the protection of the First Amendment. The determination by a government agency that a statement is false is completely alien to the doctrine of free speech and of freedom of the press.

The rationale of the First Amendment is that only if an idea is subject to competition in the marketplace can it be discovered (through acceptance or rejection) whether it is false or not. The viewpoint which underlies the giving of authority to the Federal Trade Commission to determine by an administrative procedure whether a statement is false or not has a very different character. It substitutes a government decree for the working of an uncontrolled marketplace. The contrast between the philosophy which supports the First Amendment and that which gives such authority to the Federal Trade Commission is even more striking when it has to decide not whether a statement is false but whether it is misleading. This means that the Commission has to inquire into the way in which information will be used before deciding whether it will allow it to be disseminated, the very kind of activity which the First Amendment is supposed to discourage the government from undertaking. And when in the performance of its task the Federal Trade Commission has to judge between conflicting scientific views (as may also be true when it is investigating alleged "false" advertising), the actions of the Commission, as Professor Posner remarks, are inconsistent with the spirit of the First Amendment. Nor does an investigation of the actual performance of the Commission, such as that undertaken by Professor Posner, allay our anxieties. And to judge from a recent staff memorandum of the Federal Trade Commission (issued December 4, 1974), which argues that the Commission has the power to regulate at least some kinds of corporate image advertising, that is, advertising not directly related to the sale of the firm's products or services, some within the Commission claim that it has powers which go far beyond what we would ordinarily think of as regulation of advertising.[47] Similarly, the recent decision of the Federal Trade Commission to proceed against firms, not because their advertising is "false" but

[47] Federal Trade Commission, Statement of Proposed Enforcement Policy regarding Corporate Image Advertising (December 4, 1974).

because it incorporates claims without there being a reasonable basis for them, will involve a government determination of what is a reasonable basis for holding an opinion, something on which normally there will be no possible basis on which people could agree, as well as an enquiry into the beliefs of those making the claim. It will involve the very kind of governmental action which it is the purpose of the First Amendment to prevent.[48]

We may see what the present situation is by considering some of the cases. Two cases, dealing with the dissemination of the same information (or misinformation) carried out in two different ways, in one of which it was decided that the Federal Trade Commission could regulate but not in the other, illustrate the way in which the American legal system handles the problem and the paradox to which it leads. In the first case, *Perma-Maid Co. v. Federal Trade Commission,* decided in June 1941 by the Circuit Court of Appeals, it was held that it was legal for the Commission to prohibit a firm manufacturing stainless steel utensils from representing "that food prepared or kept in aluminum utensils was detrimental to health," and that the preparation of food in aluminum utensils "caused formation of poisons and that the consumption of such food would cause ulcers, cancers, cancerous growths and other ailments, afflictions and diseases."[49] The Commission had concluded that these representations were both false and misleading, that aluminum cooking and storage utensils were quite satisfactory and did not produce poisons or cause diseases. The special interest of the case from our standpoint comes from the fact that the representations to which the Commission objected were found in pamphlets and circulars which were not written was published by Perma-Maid but were merely distributed by them, presumably because the information (or misinformation) contained in them would increase the demand for their products, in much the same way as a baby food manufacturer might distribute a book on the joys of motherhood. However, the Commission was not content to leave the matter there. It also proceeded against the author of the pamphlets and the firm which published and sold them in *Scientific Mfg. Co. v. Federal Trade Commission.*[50] The pamphlets were written by a chemist, Force, who wished "to propagate his own unorthodox ideas and theories." Neither Force nor the company of which he was president and which published the pamphlets had any interest in the manufacture or sale of cooking utensils. The Commission found the statements in the pamphlets "false, misleading and disparaging" and held that the pamphlets were an "instrumentality by means of which uninformed or unscrupulous manufacturers, distributors, dealers and salesmen may deceive or mislead members of the purchasing public and induce them to purchase utensils made from materials other than aluminum."[51] The Commission therefore ordered Force and his company to cease and desist from distributing the pamphlets. The Circuit Court of Appeals held (in October 1941) that, according to their reading of the Federal Trade Commission Act, the Federal Trade Commission did not have the authority to enjoin the distribution of the pamphlets because Force and his company were not "engaged or materially interested in the cooking utensil trade." But they also indicated that the Federal Trade Commission was barred from preventing the distribution of the pamphlets by the First Amendment:

> Surely Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's business of voicing opinion. The same opinion . . . [may become] enjoinable by [the Federal Trade Commission] if . . . it is utilized in the trade to mislead or deceive the public or to harm a competitor.[52]

The result is paradoxical in the extreme. If "false and misleading" information is disseminated by a firm with a clear economic interest in deceiving or misleading consumers, and about whose statements on the subject, therefore, consumers are likely to be most suspicious and least likely to be deceived, the distribution of the "false and misleading" information can be prevented. However, someone without any economic interest is disseminating "false and misleading" information and whose statements therefore consumers are more likely to believe is allowed to distribute the misinformation.

The regulations of professional associations, such as those of doctors, lawyers, pharmacists and opticians (which have often been given the force of law by making conformity to them a condition for state licensing to practice) commonly prohibit advertising by members of the association. So far as I know, the early cases which challenged these regulations did not lay great stress on the First Amendment. This is, however, in process of change.

In 1975, in the United States District Court, Virginia, as a result of a case brought against the State Board of Pharmacy, it was held unconstitutional, under the First Amendment, to prohibit price advertising by pharmacists.[53] The argument against the law was that the advertising was informational, that to prohibit price advertising made it more difficult for consumers to discover where drugs could be purchased at least cost and that this caused greatest hardship to the elderly and poor. It was further argued that "the First Amendment assures its freedoms to the auditor and reader as stoutly as

[48] See Gerald J. Thain, Advertising Regulation: The Contemporary FTC Approach, 1 Fordham Urb. L. J. 349, 376-81 (1973).

[49] Perma-Maid Co. v. Federal Trade Commission, 121 F.2d 282, 284 (6th Cir. 1941).

[50] Scientific Mfg. Co. v. Fed. Trade Comm'n, 124 F.2d 640 (3d Cir. 1941).

[51] *Id.* at 641-42.

[52] *Id.* at 644-45.

[53] Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (1974), *aff'd,* 425 U.S. 748 (1976).

it does the speaker and writer." The State Board of Pharmacy relied on the ruling in the *Chrestensen* case that commercial speech or writing is not protected by the First Amendment. The court rejected this argument: "The right-to-know is the foundation of the First Amendment. . . . Consumers are denied this right by the Virginia statute." They also argued that the "belief that price advertising will inflate the market for the drugs is wholly untenable, since the medicine is controlled by prescriptions of physicians and so the sale of the drugs is not even at the druggists' will."[54] This is an awkward and potentially very dangerous qualification. It suggests that advertising would only be protected by the First Amendment when it did not lead to behavior regarded as undesirable by the government. In this case, advertising is desirable because government regulation has made sure that drugs are only demanded in circumstances in which they ought to be used and the lower prices benefit the elderly and poor.

This case was followed by another quite similar case in California, *Terry v. California State Board of Pharmacy*.[55] Shirley Terry was a recipient of public assistance who would have to take drugs for the rest of her life. The issue before the court was narrowly circumscribed. The injunction sought only applied to price advertising. "The plaintiffs are not asserting a right to receive information concerning the quality, effectiveness or capabilities of the drugs, information which tends more directly to promote the product . . . the narrow issue before this court is whether low-income consumers of prescription drugs are entitled under the First Amendment to receive information consisting of the retail price at which pharmacies sell prescription drugs."[56] Relying on recent Supreme Court decisions, such as *Pittsburgh Press* and *New York Times v. Sullivan*, the court notes that commercial speech has been given some First Amendment protection. The advertising in this case could be distinguished from advertising "designed to promote the sale of a product," to which the doctrine of *Chrestensen* applied.

> While [price] information is commercial in that it consists of data upon which a consumer may base a decision to purchase, it is not promotional in the same sense as the advertising of cigarettes or submarine tours. Prescription drugs may only be purchased when medically necessary. The consumer does not freely choose to buy the product; he is directed to do so by his physician. The information sought here will make it more likely that plaintiffs will be able to purchase these health essential items. The promotional advertising of cigarettes and submarine tours seeks to generate new demand for goods by consumers who had expressed no previous interest in the products. By touting the virtues of the product, the advertising is intended to create a commercial transaction that would not otherwise occur.

[54] *Id.* at 685, 687.

[55] Shirley Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (E.D. Va. 1975), *aff'd*, 96 S. Ct. 2617 (1976).

[56] *Id.* at 99.

In the present case, if commercial transactions are created,

> the health needs of the society are served, since a physician has already determined that the prescription drug . . . is medically necessary to the well-being of the consumer-patient. Further, the advertising sought here is limited to price and does not extend to promotional gimmicks extolling the product and generating artificial demand.[57]

The reasons urged for supporting the prohibition on price advertising were four in number: (1) that it would "generate artifical demand for prescription drugs," (2) that it would mislead consumers, (3) that it would facilitate the forging of prescriptions and (4), that it "would tend to lower the standards of the profession of pharmacy." The first reason, the court answered by pointing out that the prescription was subject to the control of the physician. The court also said that the posting of prices need not be deceptive and that the prohibition of price advertising was a "very indirect method of combating [forgery]." As for price advertising lowering the professional standards of pharmacists, the court said that such advertising "will not compel any pharmacist to lower the level of his professional practice."[58] No attention was given to the possibility that greater price competition might reduce the willingness, indeed ability, of the pharmacists to supply services such as advice on the proper use of drugs or the interaction of drugs taken on prescriptions from different doctors (to use examples given by the court), the argument being essentially the same as the so-called "service argument" for resale price maintenance. It was the court's view that the state's interests were only minimally advanced by prohibiting price advertising and the injunction requested by the plaintiff was therefore granted.

It is apparent that the development of the argument in both the Virginia and California cases is very similar. The decision in both cases was that the rationale of the First Amendment included a "right-to-know" and that therefore a prohibition on price advertising was unconstitutional. But the way in which this conclusion was reached is disquieting. While recognising the informational value of advertising in the case of price advertising, the opinions seemed to deny a similar informational value to advertising when it related to the "quality, effectiveness or capabilities" of drugs. However, once the informational value of price advertising is recognized, it seems difficult to deny all value to the advertising of other qualities of the drug or to pretend that all increases in demand brought about by advertising are "artificial," an adjective which seems to be used to denote "undesirable." It would seem probable that these decisions do not define the outer bounds of the applicability of the First Amendment to advertising but merely mark a stage in a

[57] *Id.* at 102.

[58] *Id.* at 105-106.

gradual expansion of the kinds of commercial speech which will be brought within the protection of the First Amendment by the courts.

VI. Concluding Remarks

It is not easy to describe the present position of legal opinion on advertising and free speech. Only a poet can capture the essence of chaos. Nor is it easy to foresee how things will develop. Lacking any rationale for the First Amendment, with the courts depending on time-honored slogans to sustain conclusions, there is no obvious resting-place, from the moment the slogans cease to work their magic. At the present time, the courts are tending to bring a greater proportion of advertising within the protection of the First Amendment. And cases now proceeding through the courts, such as the litigation concerning what egg producers can say about the relationship between the consumption of high-cholesterol foods and heart disease, and by food concerns, on what can be said about margarine in advertisements, will undoubtedly continue the process.[59] Where will it end?

To express an opinion on such a question is obviously perilous but will be attempted as the basis for discussion. Strange though the workings of the legal system may be, they are not devoid of sense. I have argued, in my "Problem of Social Cost,"[60] that rights to perform certain action should be assigned in such a way as to maximize the total wealth (broadly defined) of the society. The same is true when we come to what are termed personal rights or civil liberties, the kind of activity covered by the First Amendment. Some legal writers have sought to treat First Amendment rights as being, in some sense, absolute and have objected to what is termed the "balancing" by the courts of these rights against others. But such "balancing" is inevitable if judges must direct their attention to the general welfare. Freedom to speak and write is bound to be restricted when exercise of these freedoms prevents the carrying out of other activities which people value. Thus it is reasonable that First Amendment freedoms should be curtailed when they impair the enjoyment of life (privacy), inflict great damage on others (slander and libel), are disturbing (loudness), destroy incentives to carry out useful work (copyright), create dangers for society (sedition and national security), or are offensive and corrupting (obscenity). The determination of the boundaries to which a doctrine can be applied is not likely to come about in a very conscious or even consistent way. But it is through recognition of the fact that rights should be assigned to those to whom they are most valuable that such boundaries come to be set.

[59] Fed. Trade Comm'n v. Nat'l Comm'n on Egg Nutrition, 517 F.2d 485 (1975), *cert. denied*, 96 S. Ct. 2623 (1976); and Anderson, Clayton & Co. v. Washington State Dep't of Agriculture, 402 F. Supp. 1253 (W.D. Wash. 1975).

[60] R. H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

As we have seen from our discussion of the cases, it is only in recent years that there has been any serious consideration of the relation of advertising to freedom of speech and of writing. Now that the value of advertising in providing information has been accepted, it seems improbable that it will long be thought that this is true only for price advertising. And the action of the Federal Trade Commission in treating prohibitions by professional associations of advertising by their members as anticompetitive will bring greater awareness of the informational role of advertising. Similarly, the many studies of the failures of governmental regulatory agencies which have been made in recent years, are bound to make the courts somewhat reluctant to expand and more willing to take advantage of opportunities to contract the regulation of advertising. Where will it end? It seems likely that the law will be interpreted to allow the Federal Trade Commission to continue to regulate false and deceptive advertising, but with greater freedom for what can be said in advertising than now exists, and with somewhat diminished powers for the various government agencies which regulate advertising.

Addendum

In the concluding paragraphs of my paper, I indicated the direction in which I thought the courts would probably move. A recent Supreme Court decision has confirmed the correctness of my general conclusion.

The case, discussed earlier, which involved the power of the Virginia State Board of Pharmacy to regulate the advertising of drug prices, was taken to the Supreme Court.[61] In an opinion which avoided those contortions which would have been necessitated by pretending that its earlier decisions were correct, the Supreme Court embraced, with little qualification, the doctrine that commercial speech was covered by the First Amendment. They note "in past decisions the Court has given some indication that commercial speech is unprotected" but this was the result of a "simplistic approach." With *Bigelow* "the notion of unprotected 'commercial speech' all but passed from the scene." In holding that commercial speech is protected by the First Amendment, they explain that they are not saying "that it can never be regulated in any way."

> What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.[62]

Now that it has been decided that commercial speech is covered by the

[61] Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). 1830, 1831 (1976).

[62] *Id.* at 773.

First Amendment, consideration of the limits of its application, the inevitable "balancing," can proceed in a sensible manner, a process in which the studies by economists of the effects of advertising may be expected to play a useful role.