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THE SOURCES OF NECESSARY RESTRAINTS

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I.

Individual freedom is meaningless if any individual is free to trample the rights of the many. Even a society dedicated to maximum individual freedom must give serious attention to the erection of restraints upon the abuse of freedom. A society cannot be free if only the strong and ruthless are free. Recognizing these fundamental precepts, the founders of our nation developed the concept of ordered liberty to guide us. From the beginning of our political life there has been a firm recognition of the fundamental fact that all free men must accept responsibilities or recognize restraints if all are to remain free.

The recognition that this fundamental fact forms the basis of our economic freedom as well as our political freedom came later. This lag is not surprising. The necessity for restraints is far less apparent in a primitive, unspecialized

economy than in a complex industrial structure. However, once the industrial revolution gained momentum the absence of restraints upon predatory economic conduct became intolerable. As the weapons of economic piracy grow sharper and inflict greater injury, the healthy conscience of a free society demands the imposition of more restraints of greater efficacy. Many illustrations of the operation of this principle can be taken from our economic history, but since all of us here are deeply concerned with the role of advertising in our economy, let us turn briefly to the history of advertising.

In the second half of the 19th Century two broad developments, long in coming, intersected. Revolutionary improvements in the national transportation net now provided the means for the widespread distribution of goods, and the tremendous growth of publishing media coinciding with the ability of a large portion of the citizenry to read meant that it was now feasible to market a branded consumer product on a nationwide basis. Modern advertising begins at this point.

To say that the advertisers of this period reveled in their new-found opportunities and power is to understate the case. Advertising became an indispensable tool in the development of the incipient but fast-growing nationwide consumer market, but in the process truth was trampled in

an outrageous fashion. A recognition of the necessity of some restraints against false advertising soon followed. Voluntary groups of advertisers who recognized the responsibilities of their growing industry were organized and partially filled the vacuum, but responsible members of the industry themselves realized that there must be some imposition of restraint by government if truth in advertising was to become a reality. Soon after the birth of the 20th Century, the drive for the Printer's Ink statutes was on. These state statutes were valuable in their time and place, but a national economy demanded some national restraint as well. The passage of the Federal Trade Commission Act in 1914 provided the means for necessary restraint at the national level.

For 46 years now the Federal Trade Commission has waged war against false and misleading advertising. Today a major part of the Commission's effort to enforce the antitrust and trade regulation laws committed to its care is devoted to securing truth in advertising.

However, the Commission's contribution to truth in advertising does not end with its enforcement effort. One of the principal obstacles facing those who seek to advance the cause of truth is the difficulty of defining what constitutes falsity and deception. In a dynamic field such as advertising, technological revolution, changing market

conditions and shifting competitive situations can produce infinite varieties of advertising methods and claims, each of which must be judged for deceptive qualities. Congress, fully realizing the difficulty of defining economic offenses but determined to persevere and extend a fair and free economy, wisely chose not to erect a universal statutory standard which might be adequate at the moment but which might become hopelessly outmoded as conditions changed. Instead, Congress created an administrative agency, the Federal Trade Commission, and charged it with the task of defining unfair or deceptive acts and practices as they occurred within the context of given competitive situations. The Commission has diligently pursued this never-ending requirement for definition. In literally thousands of cases, formal and informal, the Commission has established guides for the honest as well as proscriptions for the dishonest. The definitions of deception achieved in this process are infinitely varied but they are all of them premised on a few core principles. In each and every situation the Commission insists that an advertisement must be true; it must be true in all its aspects. The advertisement must be truthful in its negations as well as in its declarations. It must avoid misleading implications just as it must avoid explicit falsehoods. Its truth must be as capable of perception by the credulous as it is by the sophisticated. The deceptive half-truth is condemned as

severely as the outright falsehood. An advertisement may be deceptive even though every statement within it is literally true because it fails to disclose material facts which are necessary for proper evaluation of the advertised product. Every advertisement will be judged according to its total impression--a subtle qualification lost amid a welter of blatant puffing does not clothe an advertisement in the robes of legality.

The Commission's contribution does not end with the definition of deception and the proscription of deceptive acts and practices. The Commission has another positive duty to perform. To be truly effective and to faithfully discharge its duty to remedy deleterious business practices rather than punish the use of those practices, the Commission must educate honest businessmen as well as deter dishonest businessmen. The Commission has long sponsored some limited educational programs but only in very recent times has it vigorously exploited a wide range of educational techniques. Now the guides program, informal industry-wide negotiations, area conferences for businessmen, wide-ranging public contacts and consumer education activities have been added to the Commission's program. It is my personal conviction that the Commission in the future must continue to implement an imaginative educational program and a vigorous enforcement effort simultaneously.

II.

In the wake of the sharp and sudden drop of public confidence in advertising late in 1959, enforcement activities by the Federal Trade Commission rose to a record level. In calendar 1960 the Commission instituted 359 new actions against deceptive practices, the vast majority involving advertising in some form. This unprecedented number reflects the Commission's quick and decisive effort against payola, an increasing concern with misleading "demonstrations" in television commercials, an awareness of the possibility of deception in the use of claims based on scientific tests, concentration upon industries in which deceptive advertising violations were particularly rife (such as contact lenses and television tubes), and a determination to mount a new attack on specific deceptive advertising practices (such as fictitious pricing and representations of profit and earning opportunities), that continued to flourish despite persistent attack. The Commission also made marked progress by instituting informal industry-wide negotiations to achieve voluntary termination of questionable practices. The demise of the tar and nicotine derby among cigarette manufacturers is the outstanding example of the successful implementation of this technique.

Realizing that unfairness results when advertisers in interstate commerce are effectively restrained while

advertisers in intrastate commerce are free to deceive, the Commission in the past year has actively encouraged the improvement of state statutes and local ordinances against deceptive advertising and the vigorous enforcement of sanctions at the state and local levels.

I have spoken of the need for some restraints against advertising harmful to the public interest and I have touched upon the contribution of two of the sources of those needed restraints. However, the federal government and the state and local governments do not comprise the whole spectrum of possible sources of beneficial restraints. The other sources are voluntary group effort to maintain adherence to the laws and standards of ethics, and individual recognition and discharge of responsibility.

Fortunately the recent vivid examples of the abuse of the power of advertising have not been lost upon the voluntary associations within the advertising industry and the advertising media. A number of these organizations moved to improve existing programs of voluntary self-regulation or to devise new programs. The efforts of your own association, of the Advertising Federation of America and the Better Business Bureaus and of numerous local advertising groups in cities throughout the country have been especially noteworthy.

Individual integrity is at once potentially the most potent source of needed restraint and at the same time the restraining force most difficult to measure or evaluate. But one thing is certain--no system of laws, no ethical system, no civilized activity is possible without it. During the past 18 months I have suggested to numerous audiences of advertising men and women that the best way for advertising to avoid a permanent loss of public confidence is for each of them to develop a sense of professionalism, a sense of professional responsibility. A profession is distinguished by the recognition that ethical standards must govern every aspect of the individual's work and adherence to those standards even when adherence means temporary economic loss. A professional must be willing to instruct his client in ethical precepts, recommend ethical conduct to his client and be prepared to resign from the service of any client who persists in shady or dishonest conduct. In any activity where such a spirit prevails the danger of harmful conduct is markedly lessened.

III.

These four sources of restraint are not mutually antithetical. Indeed, advertising, or any other form of economic activity, must draw upon all four if it is to survive and grow in healthy ways. It is obvious that self-regulation by individuals and by voluntary groups cannot

furnish all the necessary protection, for there will always be a few willfully dishonest men and enterprises who recognize no restraint except the compulsory process of government. There must be government action to provide sanctions against those few lest the majority of honest advertisers suffer competitively and become tempted to compete on the terms of the unscrupulous. Massive governmental control alone cannot insure that advertising does not transgress the public interest if we wish to continue to call ourselves a free nation with a free economy. For nothing short of police state methods will insure minimum compliance if there is no will for voluntary self-regulation. Therefore, all four sources are indispensable.

Even if we agree that all four sources are essential there is still much room for debate as to the desirable relative contribution of each particular source. As the examination of the current state of advertising continues, some may feel that the current governmental restraints are too few; others, that they are too many. I feel that the recent alarms and questionings throughout the state of advertising have demonstrated that our existing restraints against deceptive advertising are not all that they should be. But I also feel that the additional restraint necessary can most effectively be contributed by individual and voluntary group self-regulation programs and by continued

vigorous action by the Federal Trade Commission under existing laws.

One thing is certain. The awareness and sophistication of the American public has grown at a startling rate in recent years. This public will not long tolerate blatant assaults upon its credulity. If the advertising industry does not restrain itself, the public will demand increased governmental restraints. If the advertising industry wishes to demonstrate that increased governmental control over its activities is unnecessary, then it must provide an immediate demonstration of effective self-regulation. If necessary additional restraint can be provided from private sources, the time to prove it is now.

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