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Prescription drugs and open housing: More on commercial speech

Howard HUNTER
Singapore Management University, howardhunter@smu.edu.sg

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PRESCRIPTION DRUGS AND OPEN HOUSING: MORE ON COMMERCIAL SPEECH

by
Howard O. Hunter*

I. INTRODUCTION

It has long been an assumption of American democracy that the liberties guaranteed by the First Amendment to the Constitution are fundamental to the development and success of a democratic society. The freedom to speak one's mind, to publish one's thoughts, to petition the government for a redress of grievances, and to worship or to refrain from worshipping according to one's conscience are those freedoms which set a democratic society apart from other forms of political organization. They provide the individual with the opportunity for self-fulfillment and the society with the benefit of the thoughts, ideas, and aspirations of an enormous variety of human minds. If common sense prevails, the social and political organization will reflect the consensus of its members as to the best of those ideas.[1] The Constitution contains a number of provisions designed to protect individual liberties and to render the state subject to the will of the people. In a legal sense each provision of the Constitution stands equally with each other provision.[2] Conflicts can and do arise, however, between competing constitutional interests. To the extent that any judicial pattern can be discerned, there has been a developing tendency to treat First Amendment liberties

* Assistant Professor of Law, Emory University School of Law; A.B. 1968, J.D. 1971, Yale University.

[1] In the absence of such a consensus, the democratic polity may find itself in a much weaker position than rivals whose social organization is less democratic. Both the Vietnam and Korean Wars are good examples. In neither instance was there a general debate or a general public understanding of the causes of the war, the American interest in the area, the magnitude of the commitment, or the likely outcome, prior to the entry of the United States on a large scale. Whether or not the United States would have entered either war if there had been a prior public discussion is debatable, but the absence of an initial national consensus led inevitably to difficulties in waging the wars. Prohibition, by way of contrast, was a hotly debated topic for decades prior to the passage of America's silliest constitutional amendment. What that debate lacked was an application of common sense.

[2] U.S. CONST. art. VI, para. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

as first among equals. That is to say, when there is a conflict between a First Amendment freedom and another constitutionally protected right, there is a slight tilt toward the former.[3]

The government has, from time to time, attempted to squelch speakers or newspapers,[4] but the courts have generally refused to allow significant governmental intrusion into areas of free expression. As Justice Cardozo stated in a 1937 opinion:

> [F]reedom of thought, and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.[5]

Professor Louis Pollak has carried Cardozo's point a bit further:

> The political processes of a democratic community of course depend on free thought and free expression. But the freedoms cut deeper still. Science, religion, art, poetry—all the aspects of man's reaching out for wider horizons—depend upon free inquiry and free intellectual exchange.[6]

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[3] This proposition is illustrated by the recent case of Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976), in which the Supreme Court overruled a "gag order" imposed on reporters by a state court judge in a criminal trial. The "gag order" was ostensibly designed to protect and to preserve the Sixth Amendment rights of the accused, but according to the Court it was too pervasive in scope and infringed upon the First Amendment rights of the press. The Court refused to say that one amendment carries more weight than another. It reiterated a judicially created presumption against the validity of any prior restraint on speech or the press and suggested that alternatives to the suppression of speech were available for the protection of an accused from prejudicial publicity. In his concurrence, Justice Brennan, joined by Justices Stewart and Marshall, stated:

> Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained. This does not imply, however, any subordination of Sixth Amendment rights, for an accused's right to a fair trial may be adequately assured through methods that do not infringe First Amendment values.

Id. at 2816 (Brennan, J., concurring). Of course, press conduct and publicity concerning judicial proceedings may lead to reversals or modifications on appeal and new trials. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966).

[4] The restraints imposed upon the press by the federal government during the Civil War are among the most notorious. *See* Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526 (1921). There were also the short-lived Alien and Sedition Acts and miscellaneous other attempts at governmental sanctions such as those involved in the *Pentagon Papers* case, New York Times Co. v. United States, 403 U.S. 713 (1971).

[5] Palko v. Connecticut, 302 U.S. 319, 326-27 (1937).

[6] II L. POLLAK, THE CONSTITUTION AND THE SUPREME COURT, A DOCUMENTARY HISTORY 4 (1966).

As the comments of Justice Cardozo and Professor Pollak indicate, there is a tendency to discuss First Amendment freedoms in connection with their value to the political and legal processes, to artistic and religious expression, and to intellectual inquiry. An area in which free expression is no less valuable is the commercial marketplace, although speech in a commercial context has not been considered as sacrosanct. The American constitutional system is founded on the development of eighteenth century notions of private property no less than on the political notions of free expression and popular rule. John Locke, the philosophical source of much of what we call Jeffersonian, helped to provide the basis for the development of a political system which recognized an individual's right to own property in his own stead, separate and apart from the state and other individuals.[7] We tend to forget what a revolutionary concept that was in the seventeenth and eighteenth centuries.

The recognition and protection of private rights in property was certainly important to the Virginia landholders who were instrumental in the formation of the republic, but private property became even more important during the course of the industrial revolution.[8] Although some economists and businessmen may argue that the state now affords less protection to private property rights than

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[7] *See, e.g.*, J. LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. V (Barnes & Noble ed. 1966).

[8] At times in American history, it has seemed as if the protection of private property was the right which was first among equals in the Constitution. After all, Thomas Jefferson and his fellow Virginians were slaveholders and their northern comrades were tolerant of slavery in the new republic. *See also* Lochner v. New York, 198 U.S. 45 (1905), in which the Supreme Court gave its blessings to freedom of contract and individual enterprise and struck down a New York law which would have limited the number of hours of employment per week of bakers. The remarks of President Hadley of Yale University at the University of Berlin in 1908 are also of considerable interest in this regard:

> The fundamental division of powers in the Constitution of the United States is between voters on the one hand and property owners on the other. . . .
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> This theory of American politics has not often been stated. But it has been universally acted upon . . . . To mention but one thing among many, it has allowed the experiment of universal suffrage to be tried under conditions essentially different from those which led to its ruin in Athens or in Rome. The voter was omnipotent—within a limited area. He could make what laws he pleased, as long as those laws did not trench upon property right. He could elect what officers he pleased, as long as those officers did not try to do certain duties confided by the Constitution to the property holders. Democracy was complete as far as it went, but constitutionally it was bound to stop short of social democracy.

Hadley, *The Constitutional Position of Property in America*, 64 INDEPENDENT 837 (1908), *quoted in* F. KESSLER & G. GILMORE, CONTRACTS (2d ed. 1970).

it once did,[9] it cannot be denied that such rights continue to be the basic underpinning of the American free enterprise system. The purpose of this inquiry is not, however, to consider the merits of state intrusion into the free enterprise system; rather, the focus here is on state regulation of free expression in the marketplace. The courts are beginning to give credence to the proposition that speech does not lose its First Amendment protection simply because it is uttered in connection with a business proposal. Yet, the courts have continued to apply a different standard to the regulation of speech in the commercial area from that applied to speech in political, social, religious, or intellectual areas. This dichotomy raises significant First Amendment questions particularly with respect to the application of commercial speech standards to the advertising pages of newspapers.

Despite the absolute prohibition in the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ," the courts have never adopted an absolutist view of the amendment.[10] Some regulation of speech has been considered desirable and necessary. For instance, speech is not protected when it is "obscene,"[11] when it is "libelous,"[12] when it creates a "clear and present danger to the national security,"[13] or when it is part and parcel of the commission of an illegal act.[14] For no clear

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[9] Compare, for instance, the judicial reasoning in Hammer v. Dagenhart, 247 U.S. 251 (1918), where the Supreme Court invalidated a child labor law, with that in Wickard v. Filburn, 317 U.S. 111 (1942), where the Court sustained an application of a federal agricultural act which had the effect of limiting the production of wheat on a single farm. The latter approved a vastly greater degree of federal governmental intrusion into private business affairs than would ever have been countenanced by the Court of 1918.

[10] *See generally* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 47-62 (Vintage ed. 1967) [hereinafter cited as EMERSON].

[11] *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

[12] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[13] The first exposition of the "clear and present danger" test was in the opinion of Justice Holmes in Schenck v. United States, 249 U.S. 47, 51-52 (1919).

[14] The law of conspiracy offers the clearest example of an instance in which the act of speaking itself becomes a part of the prohibited activity. Some method of communication is necessary to effect a conspiracy, and that communication may subject the speaker to liability even though it is nothing more than speech. *See generally* Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 (1970).

An interesting discussion of the extent to which the First Amendment may offer protection from the antitrust laws where there is a joint effort among competitors to influence legislation or participate in the judicial, administrative, or legislative process may be found

reason the Supreme Court also created an ambiguous exception for "commercial speech" in the 1942 case of *Valentine v. Chrestensen.*[15] "Commercial speech" was there defined as speech which does nothing more than propose a commercial transaction. Neither *Chrestensen* nor any of the cases following it held that commercial speech was absolutely unworthy of any First Amendment protection. The Court simply applied a different standard and allowed regulation that would not have been considered appropriate in more traditionally protected areas.[16] Two recent Supreme Court decisions have significantly eroded the *Chrestensen* doctrine, and these will be considered as they affect not only the commercial/noncommercial dichotomy but also the regulation of newspaper advertising in certain specific instances.

II. THE *Chrestensen* DOCTRINE

Mr. Chrestensen was one of a long line of American entrepreneurs and hucksters. He owned a retired Navy submarine which he transported to various ports and opened to the public for a fee. One such port was New York, where, after some difficulty, Chrestensen obtained a moorage at an East River wharf. He then passed out handbills to attract visitors to his submarine, but in so doing, he ran afoul of an ordinance which prohibited the distribution of such handbills on the city streets. Chrestensen reprinted his handbills and the new ones contained a criticism of certain local officials on one side and information about his submarine on the other. When the city fathers still objected and threatened Chrestensen with legal action, he

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in the series of cases which develop the "Noerr-Pennington" doctrine. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See also* Sadd, Huth, Cortesio, & Hunter, *Report on Antitrust Implications of Joint Industry Activities Under Price Controls,* 44 ANTITRUST L.J. 423 (1975).

[15] 316 U.S. 52 (1942).

[16] Justice Roberts, writing for the Court, stated without citation, "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* at 54.

Two decisions prior to Valentine v. Chrestensen had approved the regulation of commercial advertising, Fifth Ave. Coach Co. v. City of New York, 221 U.S. 467 (1911), and Packer Corp. v. Utah, 285 U.S. 105 (1932). The *Fifth Avenue Coach* case was decided prior to the time that the application of the First Amendment was extended to the states by Stromberg v. California, 283 U.S. 359 (1931); in the *Packer* case, the First Amendment issue was not raised. *See generally* Cammarano v. United States, 358 U.S. 498, 513-15 (1959) (Douglas, J., concurring); Breard v. City of Alexandria, 341 U.S. 622 (1951); Martin v. City of Struthers, 319 U.S. 141 (1943).

sought and was granted an injunction against the enforcement of the ordinance. The city appealed, and the case finally reached the Supreme Court. By that time World War II was under way and submarines had other uses, which may explain the lack of sympathy for Chrestensen. He lost unanimously without even the courtesy of a citation to precedent. The Court considered the police power of New York to be sufficiently broad to sustain the handbill prohibition. Moreover, it was singularly unimpressed with Chrestensen's argument that the second handbill was protected as a legitimate commentary on a political and legal issue because it contained a criticism of certain public officials.[17]

Although *Chrestensen* was harshly criticized,[18] the notion that commercial speech was subject to state regulation was not novel. Congress and state legislatures had enacted deceptive practices acts and other statutes which had the effect of regulating advertising prior to the *Chrestensen* decision. *Chrestensen* could only have encouraged more such legislation.[19] As one court baldly put it,

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[17] 316 U.S. at 54.

[18] Justice Douglas, who was a member of the Court when *Chrestensen* was decided, said twenty-nine years later that the "holding was ill-conceived and has not weathered subsequent scrutiny." Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting). *See also* Gardner, *Free Speech in Public Places*, 36 B.U.L. REV. 239, 240 (1956):

> This bald assertion that Chrestensen's handbills did not "communicate information"; and that the Constitution sets a higher value on the liberty to save souls, air one's grievances, or rouse political passions than it does on the liberty to earn a living by ministering to the universal demand for instruction, relaxation, and entertainment challenges an inquiry into the nature of constitutional liberty and the nature of people's rights in their parks and streets. The present author entertains no illusion that he is able to exhaust either the theory or the history of these subjects; but perhaps a few minutes devoted to tracing a single thread through the web of the last half century of legal history may serve to give courage to those who still hold the doctrine that the ambition to serve one's contemporaries by rendering a service which they are willing to pay for is at least as laudable as the ambition to inspire, to save, or to rule the world.

[19] *See* Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018 (1956); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967) [hereinafter cited as *Deceptive Advertising*]; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965); *Developments in the Law—The Federal Food, Drug and Cosmetics Act*, 67 HARV. L. REV. 632 (1954); Note, *The Consumer and Federal Regulation of Advertising*, 53 HARV. L. REV. 828 (1940), for discussion of various aspects of trade and advertising regulation. *See also* SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963); Murray Space Shoe Corp. v. FTC, 304 F.2d 270 (2d Cir. 1962); E.F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); American Medicinal Prod., Inc. v. FTC, 136 F.2d 426 (9th Cir. 1943); Fur Information & Fashion Council, Inc. v. E.F. Timme & Son, 364 F. Supp. 16 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 1048 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974), as examples of government regulation in this area.

"[r]egulation of commercial advertising does not intrude upon First Amendment rights of free speech."[20]

The *Chrestensen* doctrine is founded on the idea that speech which merely proposes a commercial transaction is subject to regulation in a manner different from the regulation of speech in other areas. Much of the case law in the commercial speech area has centered on advertising, and it is easy to understand the initial reluctance of judges to apply the hallowed principles of Jefferson, Madison, and Holmes to the latest come-on for deodorants. Nevertheless, it cannot be denied that a proposal for a commercial transaction is a legitimate and necessary part of any economic system whether it is privately or publicly controlled. The speaker's motive to make a profit in no way lessens his need to communicate the availability of his wares in order to sell them and to remain a functioning part of the economy. Millions of spoken and printed words each day merely propose commercial transactions and thus constitute "commercial speech" as defined by *Chrestensen.* Communications between companies, sales calls by salesmen, radio, television, and newspaper ads, flyers, pamphlets, billboards, posters—all propose the sale and purchase of a product or service. The response of the recipient determines, in part, the economic success or failure of the speaker. Thus, it is a fundamental requisite of a free economy that there be a free flow of commercial messages in order to insure the educated and reasonable exercise of economic decision making.[21] To the extent that governmental intrusion restricts that flow, the rationality of private economic decisions may be adversely affected. Such limitations may raise significant First Amendment questions. While many ads may be designed to create a mood or to convey an impression rather than to impart specific information,[22] advertising

[20] Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969). This was a suit to enjoin enforcement of VA. CODE § 54-426.1 (1968) (repealed 1970), which was similar to the statute challenged in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), discussed in text accompanying notes 36-43 *infra.*

[21] Even in a centrally planned economy, the planners must have access to regular information from various sectors of the economy in order to make rational planning decisions. Indeed, the inability to obtain and to assimilate all the relevant bits of information in a centralized plan has become one of the more serious shortcomings of the planned economies of eastern European nations. *See generally* A. NOVE, THE SOVIET ECONOMY (rev. ed. 1965).

[22] For an interesting discussion of the commercial speech doctrine in the context of mood or image advertising, see Note, *The Regulation of Corporate Image Advertising,* 59 MINN. L. REV. 189 (1974).

is still the basic means by which the public is informed about what is available, where it is available, and how much it costs.

Attempts to justify or explain the commercial/noncommercial speech dichotomy have been taken to considerable lengths. For example, it has been suggested that commercial speech is not even speech—that it is an outgrowth of property rights and not a part of a system of free expression.[23] Such a suggestion is nonsensical. Speech does not lose its character as speech merely because its content is commercial. A printed advertisement is not physically different from a printed editorial. The aspirin peddler on television talks and communicates in the same manner as a politician on the campaign trail. The content of the speech does not alter the basic nature of the method of communication. The focus in all the commercial speech cases is on the spoken or printed word itself. Justice Brennan's dissent in *Lehman v. City of Shaker Heights,*[24] a case which upheld a local ordinance allowing commercial ads on city buses but disallowing political ads, is precisely on point:

> And while it is possible that commercial advertising may be accorded *less* First Amendment protection than speech concerning political and social issues of public importance, . . . it is "speech" nonetheless, often communicating information and ideas found by many persons to be controversial. There can be no question that commercial advertisements, when skillfully employed, are powerful vehicles for the exaltation of commercial values.[25]

An analysis of the commercial speech doctrine must focus on the degree to which such speech can be regulated consistently with the First Amendment. The reconsideration of the commercial speech doctrine in two recent Supreme Court cases provides the proper context for this analysis.[26]

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[23] *See, e.g., Deceptive Advertising, supra* note 19, at 1027. It has also been suggested that there is no clear understanding that those who drafted the First Amendment had in mind commercial advertising. *See* Note, *Freedom of Expression in a Commercial Context,* 78 HARV. L. REV. 1191 (1965). It may be true that the draftsmen were primarily concerned with political speech, but the failure specifically to approve commercial speech should not condemn it to a lesser status. The constitutional draftsmen certainly never thought that the commerce clause would be invoked to support the public accommodations provisions of the 1964 Civil Rights Act. *See, e.g.,* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[24] 418 U.S. 298 (1974).

[25] *Id.* at 314-15 (Brennan, J., dissenting) (citations omitted).

[26] Both of the cases arose in Virginia. Many of the strongest advocates of free speech and

III. Abortions and Prescription Drugs: Development of the Truth and Legitimacy Test

The first of the two recent Supreme Court cases, *Bigelow v. Virginia*,[27] involved a Virginia statute which prohibited the circulation of any publication to encourage or to promote the procurement of an abortion.[28] Bigelow, the managing editor of a weekly Virginia newspaper, published an advertisement which announced that abortions were legal in New York and offered the services of a referral agency to assist in arrangements with a New York clinic. At the time abortions were illegal in Virginia. The defendant was prosecuted and convicted of a misdemeanor. His appeal from the Supreme Court of Virginia reached the United States Supreme Court during the pendency of the major abortion cases,[29] and after the Court decided those cases, it remanded *Bigelow* to the Virginia Supreme Court for further consideration.[30] The state court reaffirmed the conviction in a terse per curiam opinion,[31] and the Supreme Court reversed.

The *Bigelow* majority did not, however, eliminate the commercial/noncommercial dichotomy. Instead, the Court resorted to a detailed content analysis of the advertisement to determine whether it was entitled to First Amendment protection notwithstanding its commercial nature. The advertisement was clearly commercial in that both the referral agency and the New York clinic expected to make money on the venture. The determination that

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press among the framers of the Constitution were Virginians, and that commonwealth is a fitting locus for any First Amendment colloquy.

[27] 421 U.S. 809 (1975).

[28] Va. Code § 18.1-63 (1950) (repealed 1975). For a good background discussion of the case, see Note, *Freedom of the Press, The Commercial Speech Doctrine Applied to Abortion Advertisement*, 24 Emory L.J. 1165 (1975).

[29] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

[30] 413 U.S. 909 (1973). The original appeal was taken from the Virginia Supreme Court's initial affirmance of the conviction, 213 Va. 191, 191 S.E.2d 173 (1972).

[31] The Virginia Supreme Court's brief and pointed opinion read in pertinent part as follows:

> Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of Roe v. Wade and Doe v. Bolton which in any way affects our earlier view. So we again affirm Bigelow's conviction.

214 Va. 341, 342, 200 S.E.2d 680 (1973).

the advertisement was protected was based upon the conclusion that it imparted specific information about a matter of public concern and that it constituted fair comment on a matter of significant public interest.[32] There is no question that the advertisement provided the reader with certain factual information just as a news column might have done; one reading the ad could have gone to New York to investigate clinics and the availability of abortions without the necessity of going through the referral agency. Nor is there any question that abortion was, and continues to be, an issue that has stirred a profound national debate.[33]

The difficulty with the *Bigelow* decision is that the reasoning necessarily involves the courts in a content analysis of commercial speech whenever it is subjected to governmental sanction.[34] If the speech in question is determined to be commercial within the meaning of *Chrestensen,* then, under *Bigelow,* the content must be analyzed to determine whether it conveys any significant information or contains any significant social comment in order to decide its entitlement to traditional First Amendment protection. This approach is analogous to the Court's attempts to deal with the obscenity question by trying to determine on a case-by-case basis whether the "speech" in question has any socially redeeming importance.[35]

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[32] The courts have consistently agreed that social, political, artistic, or intellectual comment will be protected even if it appears in an advertisement or some similar commercial context. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), where the statements complained of appeared in an advertisement.

[33] There is a significant problem, however, in this approach. Almost any statement can be construed to be a comment on a matter of public interest or concern if someone is willing to pay to have it printed and published. The courts could find themselves embroiled in a series of questions about what is or is not of "significant" public concern. Consider, for instance, the difficulties which the Supreme Court had with the determination of what is a matter of "general public concern" in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), a defamation case. The shift from an analysis of public interest in the subject matter of a publication to a consideration of the status of the libel plaintiff underscores this problem. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons,* 49 S. CAL. L. REV. 1131 (1976).

[34] Justices White and Rehnquist, in dissent, were sharply critical of the content analysis approach. They thought that the *Chrestensen* doctrine should be upheld and that the Court was trying to create a nonexistent distinction between the commercial proposition in *Bigelow* and other commercial propositions. 421 U.S. at 829-32.

[35] *Compare* Roth v. United States, 354 U.S. 476 (1957), *and* Memoirs v. Massachusetts, 383 U.S. 413 (1966), *with* Miller v. California, 413 U.S. 15 (1973), *and* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). As Justice Brennan said in his dissent to the *Paris Adult Theatre* opinion:

Despite the victory of the publisher in *Bigelow,* the decision is entirely consistent with the commercial/noncommercial dichotomy created by *Chrestensen.* The Court certainly did not undertake any detailed content analysis in *Chrestensen,* but the necessity of such an analysis is implicit in the holding. *Chrestensen* allows the regulation by the state of speech which does nothing more than propose a commercial transaction. If it does "something" more, such speech may be entitled to traditional First Amendment protection. *Bigelow* partially defined the "something" more that may suffice to protect the speech, but it did not affect the fundamental holding of *Chrestensen* that commercial speech, as there defined, is not entitled to the same degree of First Amendment protection as other forms of speech.

More recently, the Court faced the commercial speech doctrine directly in the *Prescription Drugs* case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[36] As part of its regulatory scheme for the pharmaceutical industry, Virginia prohibited pharmacists from advertising prescription drugs.[37] Virginia argued that the purpose of its ban was to protect the unwary from unscrupulous merchandising of potent drugs and to prevent a deterioration in pharmaceutical quality that might result from price wars and a concomitant decline in profits.[38] A group of Virginia consumers attacked the prohibition on the grounds that it denied them the right to know what prices were being charged by what drugstores for various prescription drugs, and evidence was introduced which showed a tremendous disparity in price for the same drugs.[39] The Court reasoned that the state was entirely capable of maintaining a system of quality control through its educational and licensing requirements for pharmacists. With only Justice Rehnquist dissenting,[40] the Court invalidated the Virginia statute.

> No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards.

413 U.S. at 73 (Brennan, J., dissenting).

[36] 425 U.S. 748 (1976).

[37] VA. CODE § 54-524.35 (1974). The statute provided that any pharmacist who advertised prices would be guilty of unprofessional conduct.

[38] 425 U.S. at 766-68.

[39] *Id.* at 753-54.

[40] *Id.* at 781. Rehnquist argued that Virginia had broad powers to regulate the flow of information in the commercial area. His approach to Virginia's authority in this area reflects a surprisingly paternalistic view of government. Perhaps his view can be more readily under-

Interestingly, the Court based its decision in large part on the right of the listener to receive the information rather than on the right of the speaker to disseminate it.[41] This approach avoided a thorny standing problem in that the statute was directed toward pharmacists and not toward the public generally.[42] In addition, this tack recognized the value of speech in a commercial context: it conveys information on which a rational economic decision may be made. With a ban on advertising in effect, Virginia consumers found it difficult to compare prices on drugs. If the licensing and regulatory system worked properly, the quality of the drugs being offered for sale by various pharmacists should have been equal. Where quality is equal and the product homogeneous, price is one of the most crucial factors affecting consumer purchases. The advertising ban led to a constant and undesirable series of irrational economic decisions. Those who unwittingly bought from the highest priced pharmacists not only did themselves a disservice; if they were eligible for private or public health insurance plans, the public as a whole was affected to the extent that higher drug prices increased the costs of those plans.

For the first time, the Court clearly stated that speech does not

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stood in terms of states' rights; that is, he is unwilling to read the Constitution to prohibit Virginia from doing that which is not expressly reserved to the national government. Then again, he may simply be hearkening back to the early Federalists. It was, after all, John Adams and his colleagues who blessed the young republic with the Alien and Sedition Acts.

Justice Rehnquist also had considerable difficulty with the problem of standing:

> The statute . . . only forbids *pharmacists* from publishing this price information.
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> There is no prohibition against a consumer group, such as appellees, collecting and publishing comparative price information as to various pharmacies in an area. Indeed they have done as much in their briefs in this case. Yet, though appellees could both receive and publish the information in question the Court finds that they have standing to protest that pharmacists are not allowed to advertise. Thus, contrary to the assertion of the Court, appellees are not asserting their "right to receive information" at all but rather the right of some third party to publish. . . . Here, the only group truly restricted by this statute, the pharmacists, have not even troubled to join in this litigation and may well feel that the expense and competition of advertising is not in their interest.

Id. at 1836.

[41] This approach was somewhat unusual, but it was not novel. *See generally* EMERSON, *supra* note 10, at 7-11; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965). *See also* the opinion of Justice Douglas in Griswold v. Connecticut, 381 U.S. 479, 482 (1965):

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . .

[42] *See* note 40 *supra*.

lose its First Amendment protection because it is uttered in a commercial context. Nevertheless, the Court was reluctant to disown *Chrestensen* entirely, and it retained a test for determining the validity of regulation of speech in the commercial area:

> Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of *truthful* and *legitimate* commercial information is unimpaired.[43]

Thus the courts need not resort to an inquiry into the social significance of the speech as was done in the *Bigelow* case, but the speech must still be subjected to the test of truthfulness and legitimacy. To determine whether the *Prescription Drugs* test applies, the courts must initially determine whether or not the speech is "commercial." *Chrestensen* may be weakened, but it still has some vitality.

The proposition that untruths are not privileged within the meaning of the First Amendment is not peculiar to commercial speech. The law of libel and slander bears witness to the disfavor in which untruthful speech is held. In the areas of political, social, artistic, religious, and intellectual comment, however, there has been a growing tendency to be fairly lax about imposing strict standards of truthfulness. It is recognized that the development of a democratic society requires a free-wheeling discussion, much of which may eventually be proven false.[44] A "calculated falsehood" is not

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[43] 425 U.S. at 771 n.24 (emphasis supplied). The Court also was careful to limit the impact of its decision by stating that "quite different factors" may apply to advertising by lawyers or doctors. 425 U.S. at 773 n.25 and 773-75 (Burger, C.J., concurring). Pharmacists and professionals other than lawyers and doctors might look askance at distinctions between the impact of the First Amendment on differing groups of professionals. The Court will, however, shortly have an opportunity to express its opinion on the question of whether the First Amendment prohibits advertising restrictions on lawyers. The Court has noted probable jurisdiction of an appeal from a disciplinary proceeding in which two Arizona lawyers were censured by the Arizona Supreme Court for advertising their services in a newspaper. Bates v. Arizona State Bar, 97 S. Ct. 53 (1976). It would be possible for the Court to avoid the First Amendment question entirely if it were to focus on the antitrust questions posed by the case and to extend the impact of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). For a general discussion of the Arizona case, see 62 A.B.A.J. 1422 (1976). A federal district court has relied on *Prescription Drugs* to invalidate another Virginia law which prohibited advertising by physicians. Health Sys. Agency v. Virginia State Bd. of Medicine, 45 U.S.L.W. 1078 (E.D. Va. Nov. 4, 1976). If pharmacists are free to advertise, why not physicians, and if physicians, why not lawyers?

[44] *See* note 47 *infra*. One need only recall the problems faced by Socrates, Columbus,

protected by the First Amendment,[45] and even a truthful publication of "private facts" may be unprotected if the subject matter is not newsworthy.[46] However, the courts have generally immunized publications of opinion and social commentary.[47]

Galileo, and Darwin to realize that societal acceptance of new ideas or theories is not always readily forthcoming. For an intriguing discussion of the Socratic dilemma, see D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates,* 49 S. CAL. L. REV. 1079 (1976).

[45] *See* Garrison v. Louisiana, 379 U.S. 64 (1964). Also, as the Court pointed out in *Prescription Drugs,* "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." 425 U.S. at 771.

[46] The publication without consent of truthful statements concerning "private facts" may be a tortious invasion of privacy if the subject matter is not "newsworthy." RESTATEMENT (SECOND) OF TORTS § 652D (Tent. Draft No. 21, 1975) provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for unreasonable invasion of his privacy, if the matter publicized is of a kind which (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

The foregoing section was extensively discussed in Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975). That case concerned an article on body surfing which appeared in *Sports Illustrated.* The complainant, a well-known body surfer in California, had voluntarily given a lengthy interview to a *Sports Illustrated* reporter with full knowledge that there might be an article published. Before the article appeared the complainant revoked his consent because there were certain personal matters that he did not want publicized. The article was printed despite his objection. In response to the defendant's truth defense, the court stated: "To hold that [the First Amendment] privilege extends to all true statements would seem to deny the existence of "private" facts. . . . The public's right to know is . . . subject to reasonable limitations so far as concerns the private facts of its individual members. . . . The press . . . cannot be said to have any right to give information greater than the extent to which the public is entitled to have that information. . . . [U]nless it be privileged as newsworthy . . . , the publicizing of private facts is not protected by the First Amendment." *Id.* at 1128 (footnotes omitted). On remand the district court determined that *Time* was entitled to summary judgment based on the newsworthiness standard established by the court of appeals. Virgil v. Time, Inc., 45 U.S.L.W. 2329 (S.D. Cal. Dec. 17, 1976). *See also* Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Kapellas v. Kofman, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

[47] The Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964), one of the landmark cases in this area, stated:

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . .
>
> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker . . . . The constitutional protection does not

Commercial speech, therefore, is in no different posture from any other form of speech when it is said that there may be some regulation based on the truth or falsity of the speech. The difference lies, however, in the method and manner of regulation. Prior restraints on speech are frowned upon and rarely, if ever, upheld in the areas of traditional First Amendment practice. As Justice Brennan said in the *Pentagon Papers* case,

> [T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.[48]

And as Chief Justice Hughes stated in *Near v. Minnesota,*[49] the "chief purpose" of the First Amendment is to prevent prior restraints on publication or speech. Libel and slander laws provide after-the-fact redress for injuries caused by unprotected speech.

On the other hand, most of the attempts to regulate truth in commercial speech amount to prior restraints and even outright censorship. A securities registration or the proxy statement of a public corporation must receive the prior approval of the SEC before it can be made public.[50] The Federal Trade Commission has the power to enjoin the publication of advertisements which it determines to be deceptive and to exercise a continuing power of censorship over the content of advertisements within the area of its jurisdiction.[51] If an untruthful advertisement is published and a person suffers injury as a result of reliance thereon, the advertiser may also be subject to an after-the-fact remedy.[52] Thus, the commercial

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turn upon "the truth, popularity, or social utility of the ideas or beliefs which are offered."

The modern cases which allow considerable leeway in the expression of matters of opinion generally derive from the classic dissent of Justice Holmes in Abrams v. United States, 250 U.S. 616, 630 (1919), where he affirmed his faith in free thought and expression:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct 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, and that truth is the only ground upon which their wishes safely can be carried out.

[48] New York Times Co. v. United States, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring).

[49] 283 U.S. 697, 713 (1931).

[50] 15 U.S.C. §§ 78*l*, 78*n* (1970).

[51] 15 U.S.C. §§ 45-53 (1970).

[52] In addition to whatever statutory remedies may be available for false advertising, an

speaker may be subjected to controls over the content of his speech both before and after publication. The existence of a post-injury remedy may act as a restraining factor, but there is a significant difference between the restraint occasioned by such a remedy and actual pre-publication regulation by the state of the content of the speech.

The prior restraints inherent in the regulation of advertising have generally been justified on three grounds:

(1) The damage to a person's physical or pecuniary well-being that is likely to result from reliance on a misleading advertisement may be substantial.

(2) The truth or falsity of an advertisement may often be objectively proven, which is rarely true of social or political comment.

(3) Free-wheeling discussion is not as important in commerce as it is in politics because such discussion is unlikely to have any beneficial effect on the product or the service which is the object of the advertisement.[53]

The first justification is logical enough, but there is no reason why the same logic could not apply in the case of libel. Defamation does not cause physical injury,[54] but the damage to reputation may cause pecuniary loss that might equal or exceed the pecuniary loss caused by reliance on a misleading advertisement.

The second justification is reasonable in a number of instances. There are scientific tests which can determine the gas mileage of an

injured party may also have a common law action for fraud. *See, e.g.*, Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), *appeal after remand*, Harris v. Hertz Corp., 472 F.2d 552 (5th Cir.), *cert. denied*, 414 U.S. 825 (1973).

[53] *See generally* Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018 (1956). One cannot argue with requirements that a poison be labelled as such or that careful instructions be given for the use of a powerful piece of machinery such as a chain saw. The development of contract and tort law has also made available remedies based upon representations concerning the quality of a product during the course of its sale. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Calabresi, *Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Kessler, *Products Liability*, 76 YALE L.J. 887 (1967); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[54] A defamatory statement in and of itself may not cause any physical injury, but if the defamation is so derogatory as to constitute "fighting words," there may indeed be resulting physical injury to one party or the other.

automobile or the vitamin content of an ounce of cereal. Nevertheless, in advertising as in every other field of human endeavor, there is a great deal of room for opinion and conjecture. No court has seriously considered the difficulty of determining the objective facts with respect to advertising. In some instances, the truth or falsity of an advertising claim may not only be difficult to prove but the results may vary depending upon the user. This is not to suggest that the state should not regulate the promotion and sale of those products which pose potential dangers not readily discoverable by the consumer (for example, drugs or household cleansers). The state has a clear interest in so doing. However, the ease of ascertaining the truth of an advertising claim is a weak justification for the regulation of the content of speech under the First Amendment and one which may involve the judicial process in time-consuming inquiries of minimal social or legal utility.[55] The first justification discussed above is the more compelling one for the regulation of the promotion of potentially dangerous products.

The third justification for prior restraints on advertising is a departure from the notion that the promotion of free and open debate unhampered by government interference will eventually lead to improvements in the organization and functioning of society. Professor Emerson states the traditional postulate well:

> Hence an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view. He must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false. Conversely, suppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas,

[55] Some of the FTC cases in the advertising area demonstrate the types of problems presented to the courts. In Mueller v. United States, 262 F.2d 443 (5th Cir. 1958), the issue under consideration was an advertising claim for a cure for baldness. The courts were called upon to weigh the validity of an FTC regulation of advertising for hemorrhoidal remedies in Grove Laboratories v. FTC, 418 F.2d 489 (5th Cir. 1969), and in FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 2623 (1976), the court determined that advertisements questioning the relationship of egg consumption to heart disease were representations concerning the quality of a product and promoting its use and, therefore, were within the scope of regulation by the FTC. In Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944), the court stated that the FTC was charged with the duty to protect the general public, including the ignorant, the unthinking, and the credulous, from advertising claims. That case involved an ad for skin creams.

> and tends to perpetuate error. This is the method of the Socratic dialogue employed on a universal scale.[56]

It has been argued that the clash of opinion in advertising, whether truthful or not, does not lead to any product or service improvement in the same sense that the clash of opinion in politics may lead to better government or to some other social good.[57] This argument lacks rational foundation. Advertising is a means of soliciting sales; competitive success directly depends upon an ability to do so. Profitability, or the lack thereof, bears a direct relationship to product development and improvement. Although new products may not always be better products, the same can be said for new political ideas. Free expression is desirable not because it will result in some improvement in every instance, but because in the long run it will lead to the fullest development of man's capabilities. The free flow of information about products and services, by making rational economic choices possible, should eventually lead to the development of improved products and services.

This third justification is a reflection of the unspoken assumption that commerce somehow dirties the purity of speech which, to be protected, must be related to lofty ideals.[58] The truth standard for regulation is not, in and of itself, objectionable in terms of the First Amendment. The manner of its implementation may be. What needs to be recognized is that the truth standard is applied to commercial speech in a distinctly different and more stringent manner than it is applied to political or social commentary. Prior restraints and censorship are allowed and content is closely analyzed. The *Prescription Drugs* case may make it clear that speech in a commer-

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[56] EMERSON, *supra* note 10, at 7.

[57] *See, e.g., Deceptive Advertising, supra* note 19, at 1029. One commentator has suggested a different approach to the consideration of First Amendment questions in a commercial context with the focus on the rights of the advertising creator himself. An advertisement, by this analysis, represents the artistic creation of one or more individuals and, as such, is deserving of recognition as protected speech. *See* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429 (1971).

[58] The following statement puts the matter in the proper perspective:

> Yet the proper functioning of the economy and the stimulation of consumption are issues of public concern and although it can be said that the right to deceive an individual seeking satisfaction of his personal wants and to profit by the deception is not necessary to liberty and self-government, such abuse of otherwise desirable activity has clear parallels in political hucksterism and religious charlatanism.

Deceptive Advertising, supra note 19, at 1029-30.

cial context is not bereft of First Amendment protection, but that case does not remove the commercial/noncommercial dichotomy that will continue to exist as long as prior regulation of the content of commercial speech receives judicial and legislative sanction.

The relationship of spoken or printed words to the commission of an unlawful act bears directly upon the second prong of the *Prescription Drugs* test, that of legitimacy. It has been stated that the government may regulate or prohibit the advertising of a product or service which it has determined to be unlawful.[59] It has even been suggested that the state may legitimately regulate or limit even truthful advertising of a lawful product or service if the state has the inherent authority to limit or to regulate the sale of the product or service.[60] Cigarettes are a good example: their manufacture and sale are lawful, but the federal government has completely banned their advertisement on electronic media subject to regulation by the Federal Communications Commission.[61] The question

[59] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973), where the Court said, "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." For a discussion of this case, see text accompanying notes 84-93 *infra*. *See also* Camp of the Pines, Inc. v. New York Times Co., 184 Misc. 389, 53 N.Y.S.2d 475 (1945); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1195 (1965).

[60] *See* Lydick, *State Control of Liquor Advertising Under the United States Constitution*, 12 BAYLOR L. REV. 43 (1960). As stated in Premier-Pabst Sales Co. v. State Bd. of Equalization, 13 F. Supp. 90, 95-96 (S.D. Cal. 1935):

> Advertising is one of the incidents in the sale of liquors. If the state, under its police power, can prohibit the whole business from being carried on, it can prohibit and control any of its incidents. The prohibition against certain forms of advertising is really a prohibition against soliciting of business. Advertising is soliciting in the last analysis.

That court's analysis was premised on the assumption that advertising is incidental to the act of selling liquor. If the state has banned the sale or importation of liquor, it may indeed have considerable power to regulate liquor advertising. But would a state have the authority to prohibit an ad which stated that liquor was legally available for sale in an adjoining state? Such a prohibition might violate the *Bigelow* standards if it were determined that there was significant public interest in the sale and purchase of liquor. To go further and suggest that the state may not only regulate but may also prohibit the advertising of lawful products and services is to run afoul of the *Prescription Drugs* case.

[61] Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970). The banning of cigarette ads on the electronic media spawned the lively case of Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972). The three-judge court upheld by a 2-1 vote the validity of that Act. The majority neatly skirted the broadcasters' argument that the loss of revenues would infringe their First Amendment rights:

> Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages.

here is not the regulation of speech which is itself part of an illegal act, such as communications between criminal co-conspirators, but the regulation of speech discussing or offering for sale a lawful product or a service which is or could be subject to government control.

If the *Prescription Drugs* case holds that commercial speech is entitled to First Amendment protection subject only to regulation for truthfulness and legitimacy, then there is a serious question whether the government may regulate or prohibit truthful commercial speech about a lawful product or service. The electronic media do not provide a good example because of pervasive federal regulation in that area,[62] but if the government sought to limit or to prohibit advertisement of cigarettes but not to limit or ban their sale, such a ban would be inconsistent with the rationale of the *Prescription Drugs* case. If the products or services are lawful and if the speech describing or discussing them is truthful and not obscene, then there is no rational basis consistent with a system of free expression for further regulating or limiting that speech.

Nonetheless, a major federal statute, the Fair Housing Act,[63] specifically prohibits the advertising of truthful information about lawful activity. In addition, that Act and at least one Supreme Court case[64] sanction the application of penalties and remedies against the publisher as well as against the originator. In other words, both a

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333 F. Supp. at 584.

Judge Skelly Wright's dissent raised some interesting questions. Significantly, the ban resulted in a substantial *increase* in the profitability of the cigarette business. The FCC had previously invoked its fairness doctrine to require the broadcasting of antismoking ads in response to commercial cigarette messages. The result, according to Judge Wright, was to increase the advertising costs of the cigarette industry and to reduce smoking. The industry itself supported the statutory ban on ads and thereby rid itself of the pesky antismoking advertisements. The effect of the ban was to cut off an open debate and to stifle the free flow of information, a result clearly counter to the purpose of the First Amendment. *Id.* at 587-91. Judge Wright further noted:

> The only interest which might conceivably justify such a total ban is the state's interest in preventing people from being convinced by what they hear—the very sort of paternalistic interest which the First Amendment precludes the state from asserting.

Id. at 594.

[62] The FCC's "fairness doctrine," for instance, requires television and radio stations to give equal time to proponents of opposing views on matters of social and political significance. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971).

[63] 42 U.S.C. §§ 3601 *et seq.* (1970), *as amended by* 42 U.S.C. § 3604 (Supp. V 1975).

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

newspaper and an advertiser can be liable for printing an advertisement containing language or information which the government seeks to regulate. This potential liability raises profound First Amendment questions and should be analyzed in the context of *Prescription Drugs.*

IV. Housing and Employment Discrimination: The Legitimacy Test As Applied to Newspaper Advertisements

Section 808(b)(1) of the Fair Housing Act[65] makes it illegal

> [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin. . . .

The prohibition is directed not only at sellers, landlords, and real estate agents, but also at newspapers, magazines, printers, radio announcers, TV stations, and other disseminators of information, all traditionally protected by the First Amendment. There are certain exceptions to the antidiscrimination provisions of the statute. An individual homeowner may lawfully discriminate in the sale or rental of his home. Likewise, an owner of a small boarding house may discriminate if he lives there. Additionally, certain religious and private organizations are excepted.[66] The advertising ban, however, is catholic in its coverage and prohibits the advertising of

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[65] 42 U.S.C. § 3604(c) (Supp. V 1975).

[66] 42 U.S.C. § 3603(b)(1) exempts single family homes which are offered for sale or rent by the owner with certain limitations. Section 3603(b)(2) contains what is popularly called the exception for "Mrs. Murphy's boarding house" and exempts:

> rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

Section 3607 contains an exception which allows religious organizations and private clubs to limit sales or rentals to members of that religion or to club members, again with certain limitations not pertinent here.

An act of discrimination by a seller or a lessor which is permissible under the Fair Housing Act may, however, violate 42 U.S.C. § 1982 (1970) which provides that

> [a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

See, e.g., Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974).

lawful as well as unlawful preferences.[67] A violation of the statute may subject a publisher to a private action for damages including punitive damages up to $1,000 plus attorney's fees[68] and to a government action for prospective injunctive relief.[69]

The problems that can thereby be created for a newspaper were dramatically illustrated in the case of *Holmgren v. Little Village Community Reporter,*[70] an action against three small neighborhood newspapers in Chicago. The complaint sought a permanent injunction against the publication of classified advertisements which indicated a preference for persons of a particular national origin.[71] The court dismissed a challenge to the Fair Housing Act and granted the injunction without respect to the legality of the underlying discrimination. Interestingly, the court said that if the desired restrictions were lawful under the Act, the parties could talk about their preferences to potential purchasers, but they could not buy space in a newspaper and publish a printed statement indicating the lawful preferences.[72] It is difficult to understand how such a distinction can be justified in the face of the First Amendment.

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[67] The language does not specifically mention the exceptions contained in 42 U.S.C. § 3607, but the exceptions of 42 U.S.C. § 3603(b) are specifically included within the advertising ban. *See* note 66 *supra.*

[68] 42 U.S.C. § 3612(c) provides a private remedy for "actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." An indigent complainant is entitled to a court appointed attorney to pursue his private action. 42 U.S.C. § 3612(b).

[69] 42 U.S.C. § 3613 gives the Attorney General authority to initiate an action for preventive relief when any group of persons has been denied any rights granted by the Act "and such denial raises an issue of general public importance . . . ."

42 U.S.C. § 3617 further provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

[70] 342 F. Supp. 512 (N.D. Ill. 1971).

[71] The advertisements were defended, in part, as a legitimate attempt to insure that tenants would be able to speak a certain language. The court thought that an indication of a language preference would itself constitute a preference for a certain national origin. Although there is some logic to the court's conclusion, it is not necessarily compelling. That one can speak French does not necessarily mean that one is of French origin. The case did, however, come out of working class ethnic neighborhoods where the ability to speak a tongue other than English was probably directly related to national origin.

[72] The pertinent portion of the decision follows:

> However, it should be noted that this decision only prohibits defendants from printing the type of advertisements which plaintiff has appended to his motion for

The *Holmgren* decision must have led to one or more of the following results:

(1) Landlords and sellers covered by the Act were prohibited from advertising unlawful preferences in the local newspapers.

(2) The newspaper defendants lost certain advertisements and the revenue from them.

(3) Landlords and owners who were within exceptions to the Act refrained from advertising or stopped indicating their lawful preferences and placed general advertisements.

The first result is the one clearly within the intended scope of the Fair Housing Act. Insofar as it is directed toward the originator, there is little constitutional difficulty.[73] But insofar as the prohibition is directed toward the newspapers, *Holmgren* and the statute compel newspapers to act as enforcement agents for the government. It is within the discretion of newspapers to accept, censor, or reject ads based upon their own business and editorial judgment,[74] but *Holmgren* and the statute subject that discretion to the scrutiny of the Justice Department. This necessarily makes the presence of the federal government felt in editorial offices and forces upon newspapers work which should be done by the Justice Department. This

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summary judgment. That is, defendants cannot publish ads which indicate a preference for buyers or tenants of particular national origins. *This decision does not, however, preclude the same sellers and landlords who are no longer permitted to express national origin preferences in newspaper ads from exercising such a preference in personal negotiations with prospective buyers and tenants, provided, of course, that the sellers and landlords come within the terms of 42 U.S.C. § 3603(b).*

342 F. Supp. at 513-14 (emphasis supplied).

[73] This statement must, of course, be subject to the caveat of Bigelow v. Virginia, 421 U.S. 809 (1975), discussed in text accompanying notes 27-35 *supra*. If the speech is not a solicitation to do an unlawful act in the jurisdiction where it is unlawful, but just provides information concerning a place where such an act is lawful, then it is questionable that such speech may be prohibited. It should also be noted that the Virginia statute at issue in *Bigelow* was aimed not only at the prevention of abortions but also at any attempts to *encourage* abortions. Thus, the speech need not have been connected with any illegal act of abortion if the purpose of the speech was to encourage Virginia women to have abortions, whether legal or not.

[74] *See* Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971); Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Carpets By the Carload, Inc. v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973). For a contrary view, see Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

is a significant intrusion of the government into an area of traditional First Amendment protection.

The second and third results would infringe upon another basic purpose of the First Amendment—the assurance of the free flow of information. Revenues lost by the prohibition of a certain category of advertisements may not be too great in any one instance, but the precedent and the cumulative effect might have adverse consequences. As two commentators have said:

> Any restriction which materially diminishes advertising revenues could have a chilling effect on the functional viability of the press and thus run afoul of the First Amendment.[75]

The third result would not necessarily affect a newspaper's revenues, but it would certainly restrict the free flow of information. Suppose that a German male owns a small boarding house which falls within one of the exceptions to the Act. He may lawfully restrict his rentals to German-speaking males of Prussian origin, but he cannot advertise that fact. If he runs a general advertisement, he will probably receive numerous inquiries from persons other than German-speaking males of Prussian origin. Everyone's time will be wasted, and the efficacy of the advertisement will be severely diminished. Such a limitation on the communication of information about a lawful activity serves no rational or legitimate purpose in a system of free expression.[76]

The problems raised by *Holmgren* are also present in *United States v. Hunter*,[77] a government action against the publisher of a community newspaper in the Maryland suburbs of Washington. The newspaper had printed a classified advertisement for a rental which indicated a preference for whites. The advertiser was within one of the exceptions to the Fair Housing Act and could lawfully discriminate in favor of whites. The government sought to enjoin further publication of such ads, and the publisher unsuccessfully challenged the constitutionality of the Act's prohibition on advertising.

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[75] DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745, 746 (1975) [hereinafter cited as DeVore & Nelson].

[76] For an extensive treatment of the role of the First Amendment in supporting and encouraging the free flow of information and the justification for First Amendment protection for commercial speech on informational grounds, see Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

[77] 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

In upholding the Act's validity, the court went through a four-step reasoning process. First, the advertisement was "commercial speech" within the meaning of *Chrestensen* and was, therefore, subject to government regulation.[78] This line of reasoning is too facile in light of the *Prescription Drugs* case, but *Hunter* did antedate that decision. Second, the prohibition applied to all publishers, not just to newspapers, and thus there was no unconstitutional discrimination.[79] The *Hunter* court was correct in that the language of the statute does not restrict its impact to newspapers, but the statute may be discriminatorily applied as in *Holmgren* where the court considered it permissible to talk about discrimination but not to advertise it.[80] Third, there would be no diminution of advertising revenues because the publication of discriminatory ads was illegal everywhere and advertisers would remain with the newspaper and publish lawful ads. This point is well taken with respect to advertisers who had sought to engage in unlawful discrimination, but it again fails to take into account the exceptions to the Act. The utility of a published advertisement can be drastically reduced for the person who wishes to make a lawful preference,[81] and if such a

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[78] One commentator has suggested that the advertisement in *Hunter* was a form of social commentary subject to traditional First Amendment protection.

> The court's failure to explain exactly why the commercial speech precedents were applicable is particularly disturbing here, where the advertisements themselves constituted, in a very real sense, social expression, relating more to the advertiser's preference in neighbors, than to preferences in a "business context."

Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60, 84 (1974).

[79] There have been instances in which statutes were invalidated because of their peculiar effect on newspapers, such as a tax on gross receipts from advertising. *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936).

[80] Neither *Holmgren* nor *Hunter* dealt with yard signs. The validity of a blanket prohibition on "for sale" and "sold" signs was the central issue in Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786 (3d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3340 (U.S. Nov. 9, 1976). The majority determined that the ordinance prohibiting the signs was a valid exercise of the police power of the township to prohibit "panic selling" of homes and that the information communicated by yard signs was commercial speech within the meaning of *Chrestensen*. The decision was rendered prior to *Prescription Drugs*, and it will be interesting to see what effect that decision will have on the *Linmark* case in the Supreme Court. *Linmark* does, however, involve questions of racial discrimination as well as free speech, and it is conceivable that the case could be decided on other than First Amendment grounds. Two other courts have dealt directly with ordinances regulating yard signs. The results were not consistent, but there were significant differences in the ordinances under scrutiny. *See* Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974); DeKalb Real Estate Bd., Inc. v. Chairman & Bd. of Comm'rs of Roads & Revenues, 372 F. Supp. 748 (N.D. Ga. 1973). Query whether a poster written by a homeowner and placed on his house or in his yard would be an "advertisement" or merely the sort of communication suggested as permissible in *Holmgren*.

[81] *See* text accompanying notes 75-76 *supra*.

person decides to seek alternative means of publicizing the availability of his property, newspapers will lose that potential revenue. Fourth, there would be no undue burden placed on a newspaper because the advertisements are easy to police and the violations are apparent on the face of the ads. This is the most troublesome justification advanced by the court. It assumes that a newspaper may properly be called upon to perform a governmental policing function, and it glosses over the practical difficulties in determining what may be a mixed question of law and fact—whether an ad is in compliance with or in violation of the Act.

The Fair Housing Act, *Holmgren,* and *Hunter* take a shotgun approach to the enforcement of the advertising ban by prohibiting all discriminatory advertisements whether the underlying discrimination is lawful or not. It might be argued that such a wholesale ban is necessary as a practical matter because of the difficulty in determining on a case-by-case basis who may discriminate with impunity and who may not. Such an argument turns the First Amendment on its head. If there is difficulty in making such a determination, the proper cure is to amend the statute to clarify the prohibited acts of discrimination and the exceptions.

Even if the prohibition were limited to advertisements stating illegal preferences, the practical effect might well be the same. Assuming that all the ads in question contained blatantly discriminatory language, which is not likely, a newspaper's editors would be required to undertake an investigation of each advertiser in order to determine whether or not he came within an exception to the Act.[82] To protect his newspaper, an editor might understandably decide to apply a blanket proscription against all colorably discriminatory advertisements.

An even more difficult situation can be created by the use of "code words." In a certain context an apparently innocent statement could convey a message that was prohibited. Suppose that a black-owned real estate firm which has traditionally specialized in the sale and rental of homes to and from black families places an

[82] Can editors be expected to examine every boarding house to determine whether it is within the "Mrs. Murphy" exception? The exemption in 42 U.S.C. § 3603(b)(2) is partially defined in terms of intent. *See* note 66 *supra.* What if Mrs. Murphy's boarding house is now occupied by more than four families, but Mrs. Murphy does not *intend* for it to remain so crowded and hopes to reduce the number to four? How is an editor to determine Mrs. Murphy's intent?

advertisement in a newspaper which states that the firm specializes in a certain part of a city which is predominantly black. Presumably, a white or an oriental family could answer the ad and buy a home through the firm. If not, the firm would probably be in violation of the Fair Housing Act. Nevertheless, to persons familiar with the city and its neighborhoods, the tag line indicating that the firm specialized in a certain area of town could be understood to indicate a "preference . . . based on race. . . ." Similarly, an advertisement by a white-owned firm that contained a statement that the firm specializes in homes in Whiteville, which is known to be an expensive, suburban, lily-white community, could be read to indicate a similar preference. Potential customers might be discouraged by the language of the advertisements even though neither company engaged in any acts of discrimination. While it may be desirable to rid society of artificial barriers based on race, sex, and other factors, the question is whether the government can or should call upon newspaper editors to act as government censors and to subject every advertisement to a careful analysis to determine whether it might possibly indicate a latent discriminatory bias on the part of the advertiser. In this instance, the remedy seems worse than the ill.

A similar problem might occur in other areas.[83] Code words could undoubtedly be used to communicate the availability of illegal drugs or other substances. If the Court, in applying the legitimacy test of *Prescription Drugs,* were to allow publishers to be held liable for ads which are subtle in their promotion of illegal activities, publishers might be forced to investigate the intent of the advertiser. Such a task would be formidable indeed.

The assumption in *Holmgren, Hunter,* and the Fair Housing Act that the government can call upon newspaper editors to act as policing agents and subject them to liability if they fail to do so was also an issue in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[84] Unfortunately, that issue was not squarely addressed by the Supreme Court, and the result was a very unsatisfactory opinion.

Pittsburgh had enacted an ordinance which was designed to prohibit sexual discrimination in employment, a legitimate function of

[83] *See* note 59 *supra* and accompanying text.
[84] 413 U.S. 376, 388 (1973).

government as our society currently views the regulation of economic activity. Prior to 1969, the *Pittsburgh Press* had segregated its "help wanted" advertisements into male and female columns. After the passage of the ordinance, the *Press* changed the format of its classified advertising pages so that the "help wanted" section had columns entitled "Jobs—Male Interest" and "Jobs—Female Interest." Advertisers were allowed to choose whichever column they preferred. The Pittsburgh Commission on Human Relations considered this method of classification to be a violation of the antidiscrimination ordinance and issued a cease and desist order to forbid the practice. The dispute was taken to the Pennsylvania state courts where the order was narrowed to apply to ads for jobs covered by the antidiscrimination provisions of the ordinance.[85] That order was affirmed by a five to four decision of the Supreme Court.[86]

The *Pittsburgh Press* case was decided prior to *Prescription Drugs,* and the majority relied on *Chrestensen* and the commercial speech doctrine. The Court briefly focused on the scope of the injunction and determined that it was sufficiently narrow to withstand the newspaper's argument that it was unconstitutionally broad and vague.[87] However, a crucial factor in the majority's opinion, and perhaps the most important factor for the decision, was the determination by the Court that the regulation of classified advertisements was incidental to and coextensive with the regulation of employment discrimination:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.[88]

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[85] *Id.* at 380-81.

[86] This case resulted in a fascinating philosophical split on the Court. Justice Powell wrote the Court's opinion in which Justices Rehnquist, Brennan, Marshall, and White joined. The dissenters were equally as mixed: Chief Justice Burger, and Justices Douglas, Stewart, and Blackmun each wrote separate opinions. One wonders how the case would have been decided with Chief Justice Warren and Justices Black, Harlan, and Fortas in place of Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell.

[87] 413 U.S. at 390.

[88] *Id.* at 389. One commentator has suggested that the case could have been decided solely on the basis of the illegality point if the Court had followed through on its analogy to advertisements for drugs and prostitutes. (*See* note 59 *supra.*) That is, the Court could have reasoned that the speech was part and parcel of the unlawful discrimination without relying

In contrast to the Fair Housing Act, the Pittsburgh authorities sought to prohibit only the classification of non-exempt jobs in the newspaper's columns. Jobs which could legitimately be restricted to one sex or another[89] could continue to be advertised in sex-designated columns. However, there was no requirement of a showing of actual discrimination by an advertiser or by the newspaper prior to the invocation of the advertising ban.

In their dissenting opinions, both the Chief Justice and Justice Stewart expressed particular concern for what they considered to be an unwarranted governmental intrusion into the editorial function of a newspaper.[90] There was no indication in the record of any actual discrimination. The ban was a prophylactic measure designed to stifle the flow of certain information which might suggest the possibility of discrimination. It was the connection between the speech and the act of discrimination, or the lack thereof, which most concerned Justice Douglas.[91] He was not convinced that the classifica-

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on the commercial speech doctrine. 23 DEPAUL L. REV. 1258, 1269 n.62 (1974). This position has been disputed by commentators who suggest that the illegality test is only a partial basis for the decision and that the retention of the commercial/noncommercial dichotomy was of considerable significance. A noncommercial ad which criticized the ordinance would probably have been subjected to more traditional First Amendment standards. DeVore & Nelson, *supra* note 75, at 763.

[89] The ordinance banning the discrimination did not apply, for example, to employers of fewer than five persons. 413 U.S. at 380.

[90] The Chief Justice thought the decision represented an unjustified expansion of the commercial speech doctrine and warned:

> It also launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions of newspapers are "sufficiently associated" with the "commercial" parts of the papers as to be constitutionally unprotected and therefore subject to governmental regulation.

Id. at 393 (Burger, C.J., dissenting).

Justice Stewart was especially concerned with prior restraint and the preservation of editorial freedom:

> 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?

Id. at 403 (Stewart, J., dissenting).

[91] *Id.* at 397. Justice Douglas also characterized the want ad as a form of expression that was more than the mere offer of a commercial transaction—the ad by its very terms conveyed a message and a preference. He thought such expression should be protected.

> I would let any expression in that broad spectrum flourish, unrestrained by Government, unless it was an integral part of action—the only point which in the Jeffer-

tion scheme adopted by *Pittsburgh Press* could legitimately be construed to be an integral part of any illegal discrimination.

The Douglas dissent emphasizes the perennial problem posed by any attempt to regulate speech. Is the speech nothing more than speech or is it a necessary and integral part of an unlawful act? Justice Douglas argued that there should be a prior showing of a causal nexus between the unlawful act and the speech which the government seeks to regulate before any regulation can be approved.[92] The logic of his argument is compelling. Although there was no such affirmative showing of a causal nexus in the *Pittsburgh Press* case, such a nexus might have been provable. The choice of classification was left to the advertiser and was not made by the newspaper, and the selection of a certain sex-designated column by a potential employer does indicate something about his preference. Had the classifications been made by the newspaper, its First Amendment arguments in favor of editorial discretion as opposed to government intrusion might have been more persuasive.[93]

The *Pittsburgh Press* decision is reconcilable with the *Prescription Drugs* case, but the ban on advertising imposed by the Fair Housing Act and approved by *Holmgren* and *Hunter* is not. The latter prohibit the communication of truthful information about lawful activity. If *Prescription Drugs* means what it says, then such a prohibition cannot stand consistent with the First Amendment and with the "truthful and legitimate" standard there established. By comparison, the regulation of speech at issue in *Pittsburgh Press* was limited to descriptions of jobs which were subject to the antidiscrimination provisions of the Pittsburgh ordinance. If the speech is in fact connected with actual discrimination in violation of the ordinance, then the speech can be made subject to regulation under the "legitimacy" prong of the *Prescription Drugs* case. The problem of proving a causal connection discussed by Justice Douglas is a fact question not necessarily involving First Amendment theory. The legitimacy test is one which has its roots in traditional First Amendment analysis and, like the truth stan-

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sonian philosophy marks the permissible point of governmental intrusion. *Id.* at 399 (Douglas, J., dissenting).

[92] *Id.* at 397-99.

[93] *See* note 74 *supra* and note 97 *infra* and accompanying text.

dard, does not suggest theoretical problems of any greater difficulty for commercial speech than for traditionally protected speech.[94]

The truth and legitimacy test does continue to create problems despite the recognition in *Prescription Drugs* that commercial speech is entitled to First Amendment protection. The most serious problem is the imposition on newspapers of the role of government enforcer. By holding the publisher liable for the publication of an advertisement which does not meet the legitimacy test, the government forces the publisher to act as a censor, a role clearly not envisaged by the framers of the First Amendment.[95] Although liability for the publication of an untruthful commercial advertisement has not yet been imposed upon the publisher as opposed to the advertiser, the precedent established with respect to the legitimacy of the advertisement could be applied with respect to the truthfulness of the advertisement. That could place an impossible burden on newspapers.[96]

By enlisting newspapers and other communicators of information into the ranks of government censors, the state is, in essence, making editorial judgments about what may and may not be printed. It

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[94] In the *Pittsburgh Press* case the Court made it clear that a newspaper could be forbidden to publish a want ad which proposed a sale of narcotics or which solicited business for prostitutes. 413 U.S. at 388. In such a case the speech itself is part of the illegal act and prohibiting such speech is not fundamentally different from imposing criminal sanctions for continuing an illegal conspiracy by means of speech. *See* note 14 *supra*. Of course, there may be substantial factual problems involved if the advertisement is not clearly for an illegal purpose but is couched in some form of code words. *See* text accompanying note 83 *supra*.

[95] The press was not intended to be the handmaiden of government but its skeptical critic. In the words of the late Justice Black:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

[96] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 395-96 (1973) (Burger, C.J., dissenting). In defamation cases, for example, publishers are only held to a standard of actual malice or reckless disregard for the truth when the subject of the comment is a public official. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Where the complaining party is not a "public figure," he must still prove fault on the part of the publisher. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Chief Justice's concern in *Pittsburgh Press* was the possible establishment of a precedent for something akin to a strict liability standard.

has been repeatedly held that a newspaper is free to reject or to censor advertisements as it sees fit, free from any sanction, public or private.[97] Moreover, the state has consistently been restrained from requiring a newspaper to publish that which it does not want to publish. As the Chief Justice stated in *Miami Herald Publishing Co. v. Tornillo*,[98] a case in which the Supreme Court invalidated a Florida right to reply statute:

> We see that beginning with *Associated Press*, . . . the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by the government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.[99]

If the state may not compel newspapers to publish that which they do not want to publish, then logically the state should not prohibit a newspaper from publishing whatever its editors want to publish. Logic, unfortunately, falls prey to situation. The state cannot compel a newspaper to print an obscenity, but it can prohibit the newspaper from printing an obscenity or at least provide post-publication sanctions sufficient to deter its publication. The converse must, therefore, be that the state may not prohibit a newspaper from publishing whatever the editors choose to publish so long as it falls within the protection of the First Amendment. That returns us to the standards of the *Prescription Drugs* case. The two-part proposition that may be derived from that case and *Miami Herald* is as follows:

(1) The state may not compel the publication of any matter whatsoever.[100]

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[97] *See* cases cited at note 74 *supra*. As stated by one court:

> We can find nothing in the United States Constitution, any federal statute, or any controlling precedent that allows us to compel a private newspaper to publish advertisements without editorial control of their content merely because such advertisements are not legally obscene or unlawful.

Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 136 (9th Cir. 1971).

[98] 418 U.S. 241 (1974).

[99] *Id.* at 256.

[100] This proposition obviously does not apply to the electronic media because the FCC

(2) The state may not prohibit the publication of any commercial matter so long as it is truthful and relates to lawful products, services, or activities, subject to the caveat that truth may not be an absolute defense to an action for invasion of privacy.[101]

The failure of *Hunter* and *Holmgren* is that they do not articulate any prohibition against a state requirement that newspapers act as censors for the advancement of some state-sanctioned interest, such as the elimination of racial, sexual, and ethnic discrimination in the sale or rental of housing. This writer would add a third part to the above proposition:

(3) The state may not require the press to be responsible for the censorship of advertisements or other publications concerning products or services which are subject to state regulation.

An additional shortcoming of those cases, considered in light of *Prescription Drugs,* is that they do not require an initial determination that there is a connection between an unlawful act and the speech sufficient to justify its prior limitation or regulation. This writer would add yet a fourth part to the stated proposition:

(4) The state must affirmatively prove a causal nexus between an unlawful act and speech prior to the limitation or regulation of that speech by means other than common law or statutory post-injury remedies for breach of warranty, false representations, and the like.

Taken together, the four parts of the proposition would give the state sufficient authority to protect the public from unlawful products, services, or activities and would also set clearer standards for First Amendment protection of commercial speech. There is no question that the state should establish positive guides for its citizens in such socially sensitive areas as race relations. The state also has a legitimate interest in seeking to limit sexual discrimination and to protect its citizens, by appropriate regulatory methods, from dangerous substances or fraudulent schemes. Nevertheless, the First Amendment is a constitutional prohibition against state interference with speech and press, and any regulatory scheme which attempts to limit or to censor expression in the marketplace should

has a pervasive regulatory power in that area. The "fairness doctrine" itself is contrary to the proposition. *See* note 62 *supra.*

[101] *See* note 46 and accompanying text *supra.*

be subjected to serious scrutiny and should carry with it a presumption of constitutional infirmity.

V. CONCLUSION

The *Prescription Drugs* case has, for the most part, eliminated the unfortunate notion that speech uttered in connection with a commercial transaction is undeserving of First Amendment protection. The dichotomy between commercial and noncommercial speech continues to exist, however, by reason of the different standards that are applied to determine the scope of permissible regulation of speech in traditionally protected areas on the one hand and speech in commercial contexts on the other. The pervasive system of economic regulation designed to benefit and protect the consumer from unscrupulous merchants and the system of censorship and prior restraints applicable to advertising will continue to distinguish commercial speech and set it apart from other categories of expression. The method of application of the "truthful and legitimate" standard of *Prescription Drugs* could also have a profound effect on the actual degree of protection afforded to commercial speech by the courts.

The regulation that intrudes most significantly into areas of First Amendment protection is that imposed by the Fair Housing Act, which requires newspapers and other publishers to censor advertisements and similar materials to insure that they refer and relate to lawful services and activities. The government has improperly foisted upon newspapers and similar publishers a governmental function and has made them liable for failure to perform it. This flies in the face of the purpose and intent of the First Amendment to protect freedom of expression "against interference by the government in its efforts to achieve other social objectives or to advance its own interests."[102] It also establishes an unfortunate precedent for further regulation in areas other than housing. If the rationale of *Prescription Drugs* is applied, however, to cases arising under the Fair Housing Act, the advertising prohibition should at least be limited to advertisements which reflect discrimination made unlawful by that Act.

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[102] EMERSON, *supra* note 10, at 29.