An Overview of Commercial Speech

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On the evening of May 4, 1984, University of Wisconsin President Robert M. O'Neil (and teaching member of the University Law Faculty at Madison), addressed the Law School's Benchers Society Dinner.

The topic we had given President O'Neil—"An Overview of Commercial Free Speech"—was a formidable one for such an occasion but there were several rather particular reasons for choosing the topic.

First, Bob O'Neil is a truly pre-eminent First Amendment scholar.

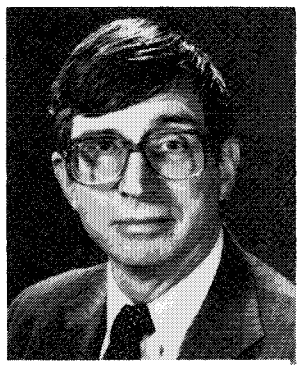
Second, we had scheduled on the Law School's Spring Program the following morning a seminar that would be devoted to lawyer advertising and an overview on First Amendment protection of commercial speech would contribute importantly to putting the seminar in perspective.

And, finally, what we knew of Bob O'Neil as a scholar and teacher gave us confidence that in the role of an after-dinner speaker he could serve our combined needs elegantly. His address, set forth following this introduction, neatly vindicates our expectations.

President O'Neil was introduced by Law Dean Cliff Thompson, that fact itself a nice touch since the two had been very close friends in their undergraduate and law school days at Harvard and their paths have, only within the past year, come together again at Wisconsin.

Excerpts from Dean Thompson's introduction of President O'Neil appear in the quotations which immediately follow:

*"President Robert O'Neil will speak to you on '**An Overview of Commercial Speech.**' I am honored to introduce him, though by limiting my remarks to a couple of minutes, I have not made the task an easy one: An outline resume of his achievements is five pages and takes 15 minutes to read at Dan Rather's speed, and 10 minutes at the speed of a sport's broadcaster describing a fast break.*



"I tried the tighter summary provided by the latest Who's Who in America but it is also too long as well as too dry. However, I can share a little known fact —his entry appears twice in Who's Who. Perhaps the editors were so impressed they could not resist the repetition, or perhaps there really are two Bob O'Neils.

"For ordinary high achievers, the existence of two Bob O'Neils is the only explanation of his superlative achievements.

"He is a distinguished administrator with enough experience to comprise at least two careers. He is an accomplished teacher with enough expertise to cover half the curriculum. He is a scholar of outstanding quality. The list of his articles seems to disappear into infinity. His books number more than ten.

"Permit me to notice, idiosyncratically, two items which reflect his merit and wisdom. First, he persuaded Karen Elson to marry him and they have four lovely children. Second, he is a popular teacher in our Law School.

"Overall, he is also a grand human being.

"Finally, I will provide some flavor of Bob's level of achievement by a comparison. Do you remember the spy-adventure films of 'Our Man Flint' with superstar James Coburn as Flint? In the world of education, Bob is Our Man Flint. In one film, the Director of Intelligence comes in to find Flint in the swimming pool talking to dolphins. 'Heavens!' says the Director, 'That's amazing. How do you do it?' Flint gets out of the water and gets a thick book off the shelf, entitled something like 'Communication Theory,' and hands it to the Director, who says, 'Good grief, how do you find time to read things like this?' Flint looks slightly puzzled, and says, 'Read it? I wrote it.'

"Likewise, Bob finds time to write books that most of us feel good about if we can find time to read them. He does the things that others dream might be accomplished. I am honored to introduce him to you: President O'Neil."

*The text of President Robert O'Neil's address, "**An Overview of Commercial Speech,**" follows immediately.*

There is no group with which I would rather meet than fellow lawyers and friends—nor any topic on which I'd rather speak than First Amendment law. This occasion also gives a chance to do several other things that are closely related. It is an opportunity to express special appreciation to some very special friends of legal education and particularly of the University of Wisconsin Law School. This I do much more as a person proud to be a member of the Law School Faculty than as a general university administrator. My own association with the Law School is one of the happiest parts of life in Wisconsin. It has been made even happier this year by the arrival as our Dean of one of my oldest and closest friends—one with whom just about 30 years ago I made my very first trip to Wisconsin for a college debate in Milwaukee. Little would Cliff and I have supposed at that time that we would some day end up back together again in Wisconsin. (Incidentally, since we lost the debate to Marquette in the Spring of 1954, I suppose we exemplify the maxim "If you can't beat 'em, join 'em!") A week from next Monday, Cliff and Judith, Karen and I are in fact going to Milwaukee for a reunion with George and Campion Kersten—our opponents of 30 years ago—and their wives and several other Marquette colleagues. That's a long way 'round to saying how truly delighted I am to be Cliff's colleague once again and to look to him as the Dean of the Faculty of which I am proud to be a member.

That's not, however, the topic on which Bill Foster many months ago asked me to speak this evening. What he requested was something on the subject of "commercial speech." Since I have long believed commercial speech to be a neglected facet of free expression, I was delighted to accept this specific assignment. Much has been happening in this area of late, and I know tomorrow morning's seminar focuses on one particular dimension of commercial speech. The timeliness of the topic is reinforced by having found in my Law School mailbox just yesterday the very first of my spring semester student papers—entitled, "The First Amendment and Professionals: A Study on Lawyer Advertising and Solicitation." That paper should reassure you that students, too, are concerned about these issues.

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Perhaps I could start by summarizing several recent cases. One of them just happened to arise in Wisconsin and was decided by the Federal Court of Appeals for the Seventh Circuit just a bit over a month ago. The source of this intriguing case is a boycott by many Arab countries against companies who trade with Israel. The Arabs have sent questionnaires to such U.S. companies asking about their business in the Middle East. Companies which refuse to return the questionnaires tend to be blacklisted by Arab nations. The federal Export Administration Act and Commerce Department regulations, however, preclude such replies. Faced with this dilemma, several Wisconsin firms (including Briggs and Stratton and the Trane Company) sued in federal court challenging the constitutionality of these federal prohibitions. Specifically, the companies claimed a First Amendment right to respond to the boycott questionnaire in order to maintain profitable trade relations in the Middle East.

The Justice Department argued, however, that the companies' free speech claim was limited by the "commercial" nature of the communication involved. The companies replied that not all speech which relates to commerce is for that reason less protected by the Constitution. They also argued that the speech in question was more political than commercial. Nonetheless, both Judge Gordon in the District Court and, later, the Seventh Circuit have concluded that the proposed answers to the boycott questionnaires "would serve only to allow [the companies] to continue to maintain commercial dealings with the Arab world" and for that reason are merely commercial speech.

The second case is a bit less complex. Christopher Lowe publishes newsletters containing investment advice. Six years ago, he was convicted of two felonies under New York law. The Securities and Exchange Commission then revoked his registration as an investment adviser—a step which makes unlawful the continued publication of such newsletters. Lowe went to federal court challenging the SEC ban as a denial of free speech. The court wrestled with what it conceded to be a novel question—whether investment adviser letters were (as the government argued) properly styled "commercial speech." In the end, a divided District of Columbia Circuit ruled against Mr. Lowe on the ground that the newsletters were merely commercial expression and thus entitled to a lesser measure of protection. While his prior convictions would not have sustained a government ban on non-commercial speech, the nature of the newsletters pushed this issue over to the other side of that elusive line.

The score at this point is government 2, private party 0. In the third very recent case, however, the outcome was rather different. At the risk of intruding upon tomorrow's seminar, I would like to mention one attorney advertising case. Pennsylvania's Code of Professional Responsi-

bility permits lawyers to identify in various forms of advertising their specialties and areas of expertise. Any such claims must, however, be accompanied by a disclaimer that the attorney is not "recognized or certified as a specialist in those fields." A group of Pennsylvania lawyers recently challenged this disclaimer requirement and prevailed in the Federal District Court. This requirement, the federal judge concluded, could create a negative or pejorative implication and thus "cause lawyers to decline to list any fields of concentration simply to avoid the requirement of including the damaging disclaimer." Such a possibly chilling effect made the disclaimer rule itself unconstitutional.

If we put these three very recent lower court cases together, a curious anomaly emerges. In the one case that did involve unquestionably commercial speech—the Pennsylvania attorney disclaimer case—the First Amendment claim prevailed. Yet in the other two cases, the government regulation prevailed despite the less clearly commercial nature of the expression in question. If at this point you feel a bit confused, I can only welcome you to what I believe to be a distinguished—if puzzled—group of constitutional scholars. Maybe this would be an appropriate point to retrace some of the tortuous steps that have brought us the current confusion over Arab boycott, investment adviser letters and attorney advertising.

It all began on the sidewalks of New York in 1940. One F. J. Chrestensen brought a small submarine to New York and moored it at a municipal pier in the East River. He began distributing a handbill which advertised the boat and offered tours for a stated admission fee. When he was told this activity violated the city sanitary code, which forbade distributing commercial material and business advertising on the street—but permitted handbills devoted to "information or a public protest"—he reprinted the handbill asserting on the other side his constitutional right to advertise his submarine. The reverse also contained a protest against the city dock department for its restrictive policies. The minions of Mayor La Guardia were unmoved and Mr. Chrestensen soon went to court in search of further redress. Within two years, he was before the United States Supreme Court as the very first person to raise a constitutional claim involving advertising or commercial speech.

The Justices disposed of Mr. Chrestensen quite as summarily as the New York City Police had done. "We are equally clear" a unanimous Court proclaimed, "that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." Nor was the Court moved in the least by the double-sided handbill; the protest had been appended "with the intent and for the purpose of evading the prohibition of the ordinance." And if Chrestensen succeeded, then any merchant could violate the handbill ordinance simply by appending whatever grievance he might have with City hall.

This decision is the more remarkable because it evoked not the slightest misgiving from Justices Black, Douglas, Murphy or Rutledge—not even by way of a brief concurrence to suggest possible reservations. The case exemplifies a maxim that has always had some appeal to me—if hard cases can make bad law, cases that look easy may at times be equally mischievous.

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There the issue rested for more than three decades The court did in the early '70s uphold government regulation of help wanted advertising —but without really considering the nature of the expression involved. It was not until 1975 that the Justices really returned to the issue Mr. Chrestensen had been so unsuccessful in presenting earlier. Jeffrey Bigelow publishes an underground weekly in Charlottesville, Virginia. His readers are mainly university students and staff. Early in 1971, he published an advertisement for a New York abortion clinic—containing specific information, telephone number, referral data and the like. Abortion clinics were at that time unlawful in Virginia but perfectly legal in New York. Mr. Bigelow was brought to court for violation of a statute which specifically forbade publication or advertisement which would "encourage or prompt the procuring of an abortion." Clearly he had violated the law. The only question was whether some constitutional interest had been abridged.

This time a nearly unanimous Court found in Mr. Bigelow's favor. *Chrestensen* could be distinguished as a rather different case—since the public interest in learning about availability of abortion substantially surpassed the value of visiting submarines. Moreover, Virginia had tried to give extraterritorial effect to its laws and thus prevent its citizens from learning about services lawfully available in other states. Yet the whole tone of the *Bigelow* decision departed dramatically from the Court's view three decades earlier. The Virginia courts had "erred in their assumption that advertising as such was entitled to no First Amendment protection." While it was unnecessary to determine the full extent of that protection in order to vindicate Mr. Bigelow, a new chapter had clearly opened.

Much more has been written in that chapter through later decisions. The following year, for example, in another Virginia case the Court struck down a state law against advertising of prescription drug prices. While the public interest might at first seem less substantial, an increasingly consumer sensitive Court pointed to the great value of well informed prescription drug buy-

ers. Even now, the Court did stop short of saying that advertising was entitled to full First Amendment protection; the Justices rejected all the grudging premises of *Chrestensen* but also acknowledged that "some forms of commercial speech regulation are surely permissible." Four possible exceptions emerged at the end of the opinion: regulation of time, place, and manner; advertisements which are false or misleading; advertisements which propose illegal transactions; and broadcast advertising. Thus, when the dust settled in 1976, the Court had come a very long way since the time it threw Mr. Chrestensen and his handbills off the sidewalks of New York.

The next chapter in this curious drama was the 1977 decision giving constitutional protection to lawyer advertising. Since that is the focus of tomorrow's seminar, I should only observe that the *Bates* decision was essentially an implementation of the Virginia abortion and prescription drug advertising cases. While new claims of professionalism and the like did trouble the Court and evoke substantially longer opinions, the basic test had not varied. (The one important exception was a decision the following year upholding Ohio suspension from practice of an attorney who violated face-to-face solicitation rules and thus exceeded the bounds of constitutional protection. The line between general advertising, on the one hand—yellow pages, mailings and the like—and face-to-face solicitation on the other has been helpful in marking the new line between that commercial speech which is protected and that which is not.)

Later the Court complicated matters a bit further by holding that Texas could require optometrists to use individual names for advertising since trade or institutional names might deceive or mislead consumers.

Yet we have evidence as recently as last summer that commercial speech is indeed protected at least to a degree; a unanimous Court last June held unconstitutional a federal law which prohibits the mailing of unsolicited advertisements for contraceptives. Most of the recent attorney advertising cases have gone in the lawyers' favor—although not without careful analysis of the asserted government interest and the particular effect on expression and communication. In every case, the Court now asks not only whether the expression is essentially protected but also whether the government asserts a substantial interest—and if so, whether that interest could be served in less restrictive or less intrusive ways. Finally, the Court does ask whether the speech for which protection is sought is either unlawful or deceptive and if so,may require a less exalted government interest to uphold regulation.

We return at length to the question that has so troubled the lower courts in recent cases. It is a question first raised by Justice Stevens in a utility advertisement mailing case several years ago and revisited in the contraceptive mailing case last summer. Justice Stevens has been concerned about overly rigid classifications—an artificial distinction between expression which is merely commercial and that which is "pure speech." He wisely suggests that many messages in the real world may partake both qualities: "Advertisement may" he warns, "be complex mixtures of commercial and non-commercial elements: the commercial message does not obviate the need for appropriate commercial regulation; conversely, the commercial element does not necessarily provide a valid basis for non-commercial censorship." For him, the contraceptive mailing case illustrates the dilemma. The pamphlets in question did indeed contain some purely commercial advertising. They also provided information of a kind which might be entitled to separate treatment had the Court held differently on the advertising ban. While Justice Stevens appeared still to be alone in his plea for more flexible and discriminating treatment of these issues, I rather suspect his voice is that of the future.

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Indeed, the flexible analysis that Justice Stevens would bring to this area might help considerably in cases like the Arab boycott questionnaire and the investment adviser newsletter. Just as courts have become more conscious of a continuum of expression in areas like obscenity and defamation, so I suspect a comparable recognition of the complexity of commercial speech will greatly aid the resolution of future cases.

To say more at this point would not only impose unduly upon a Friday evening social gathering but would risk preempting the topic of tomorrow's seminar. Let me, therefore, conclude at this point.