Advertising and the Commodification of Law(yers)

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In my work I use semiotic interpretation theory to investigate the relationship between law and market economy.[1] I think that this is important because interpretation theory gives us a new way of exploring and of understanding the relationship between law and markets. It is also important because market choice involves a process of interpretation, and the ability to shape and frame this process influences substantive outcomes in the allocation of social resources.[2]

In this context, advertising involves one prototypical example of semiotics.[3] It is a sign system that produces meanings and values through exchange.[4] Furthermore, the relationship between lawyers, advertising, and the law is interconnected and multi-directional. In this essay, I explore this relationship and argue that the "acceptance" of legal advertising is related to the emergence of the law and economics movement. I do not claim that it is dependent upon the law and economics movement or that the rise of law and economics was the central factor behind advertising for lawyers. I do argue that there is an interesting connection and convergence in the time horizon for both activities and that both activities have worked to further commodify lawyers and the law.[5] Additionally, I suggest that exploring this connection helps us to better understand the meanings and values of advertising and of law.

To start with, the primary professional skill of lawyers and public policy makers relates to language and interpretation. We read cases, legislation, contracts, court proceedings, and a variety of other texts. We write memoranda, pleadings, briefs, position papers, contracts, wills, and legislation. We make oral arguments, take depositions, conduct interviews, address the jury, appear before boards, negotiate with one another, and make a variety of persuasive appeals in formal and informal settings. In order to do our work we must be able to interpret the meanings of the texts and arguments we encounter, and we must make sure that our own writings and arguments embody the intended meanings that we hope to express.

To be persuasive we must understand our audience and how they will read and hear our words, our mannerisms, our entire delivery. All of this activity involves interpretation theory and an indirect, if not direct, knowledge of linguistics, semiotics, rhetoric, and logic.

When we think about law in a market context we, therefore, focus our attention on the relationship between our skills of interpreting and creating meaning, and the way in which these meanings can influence or facilitate particular allocations and distributions of resources.[6] These distribution issues are very important and yet they are seldom given adequate attention. In law we do not simply write or tell stories, our words have consequences that go beyond mere story telling. Legal words and legal texts exist in a market context and they shape the distribution of resources within society. The structure of these "texts" can also facilitate the process of economic growth and wealth formation.[7]

The rise in legal advertising presents one such "text" that we should explore if we hope to gain a better understanding of the image of law and of lawyers in society. In this regard, I argue that law and lawyers have become more commodified and product oriented as a result of the commercial images of law and of lawyers presented in some advertising. I suggest that the rise of legal advertising and its changing image of the lawyer and of law correspond in time to the rise and influence of the law and economics movement. In short, I believe that there is a meaningful correspondence between a development in modern legal theory and the practice of advertising by some lawyers.

An increase in the acceptability of lawyer advertising seems to roughly coincide with the rise of the economic analysis of law. Gary Becker's work[8] and then that of Judge Richard Posner[9] during the 1960's and 1970's, both at the University of Chicago, are common points of reference for examples of two people involved in the early stages of the law and economics movement.[10] In this work economic analysis presented the legal world with the proposition that law was about economics, as a descriptive matter, and that as a normative matter this was good.[11] This line of argument also provided a justification for lawyer advertising and for thinking of law in commercial terms. More importantly, the economic rationale for law also served to advance the commodification of law and of lawyers. Lawyers were not simply to be regarded as professional mediators of disputes but rather as instruments and merchants of trade. Like plumbers, car sales-

men, and other merchants, lawyers were available for hire. They were not simply professionals providing noble services but modern day collection agents or bounty hunters hired to bring home the cash rewards for clients willing to pay the "finders fee."

> "Hire me and I will get you every dollar you have coming!"
> "My firm will fight for you and make them pay!"
> "I will hammer them for every last penny!"

These are some of the pitch phrases used by local lawyers advertising in Upstate New York. Similar phrases are used around the country. Some firms use less aggressive strategies but all promise quality and affordability as they deliver the client his or her "fair share" of the legal-economic pie.

This is not just about advertising as providing information, its about selling the law. It's about understanding the relationship between law and economics, not as a jurisprudential theory but as a crass expression of a truism that the *law can make you rich*. Rich people always have lawyers, and advertising promises that same opportunity to every consumer. We used to think law was in some respects sacred or special and therefore only for special people. . . . law and economics showed us that law was just another product, and like Henry Ford's insight into mass production, advertising makes it possible to produce law and legal rights for the general public. . . . advertising makes law affordable even if it only "comes in limited colors."

Law is just part of the market landscape and just like the stock market you need a good financial advisor in order to navigate effectively. So how does one know who the right legal advisors are? The same way that one knows the best beer, the best car, and the best fast food burger. . . . advertising shapes the image of the lawyer and of the law to appeal to a particular market segment.[12] The lawyer is pitched and positioned for a particular consumer audience in the same way as many other products.[13] In fact, many of the firms that advertise employ national business and media consulting companies.[14] For instance, one Syracuse law firm that I am familiar with uses a New Orleans marketing and consulting firm to manage its advertising. In this way individual lawyers can receive training and buy pre-packaged marketing strategies. As a consequence, these are not individual attorneys battling the legal establishment, they are part of a

nation wide business and organizational network selling services off the rack. . . . at discount prices to consumers that would probably not "shop" at uptown law offices.[15]

For many of the lawyers that live off of an advertising practice, their work isn't David vs Goliath, or the tale of the solo practitioner that takes on the corporate giant to do justice for the underdog. Their work is a business, it is "law-mart," it involves the pursuit of big profits based on high volume and the occasional "jackpot" liability suit. These lawyers don't see themselves as crusaders or as the hero's of *A Civil Action,*[16] this is entrepreneurism in a world of K-Mart and Wall Mart consumerism.

This work is not about the lawyer helping the little guy so much as it is about the lawyer *using* the little guy to turn over a large number of routine business transactions in an effort to crank out a handsome profit.

Some of these advertising law firms, or "T.V." law practices, focus on plaintiff's work involving actions against insurance companies. Consequently, most of the insurance companies respond by hiring consultants and train their claims people to respond to specific prepackaged strategies used by the "T.V." lawyers.[17] I am told by one such lawyer that the ultimate compliment and confirmation of local market dominance is when the local insurance people name their defensive training program after you . . . such as "M & P" or "Malloy and Papke training" in a situation where Malloy and Papke are one of several firms competing for this end of the business.

None of this should be surprising. The law and economics movement told us all, and in particular it told the legal profession, that law was simply another part of the economic world of production and consumption. Despite lofty legal rhetoric to the contrary, we were told that there was an optimal level of justice, and that one would not want to produce too much. There is also an optimal level of crime, rape, and racial discrimination, and one would not want too little of these.[18] We were also told that law was not about the pursuit of justice, fairness or equality. Law is about the pursuit of profit and the maximization of wealth.[19]

The law and economics movement transformed our view of law. As a quick and simple example consider the transformation of the promise in contract law. In early common law a contract included a moral obligation to live up to one's word.[20] By the 20th century Justice Holmes repositioned this and taught us that the law of contracts was not about morality but

about a simple choice, perform or pay damages.[21] More recently, Judge Posner informed us that, in fact, there may be an obligation to encourage people to break their contract promises.[22] This is the case when a breach would be more efficient or more valuable than performance; if the winners would win more than the losers lose we should encourage a breach.[23] Thus, the idea of a promise has been transformed and it is now offered as nothing more than part of a cold economic calculus.

In a broader sense, law, in law and economics, becomes transformed. Law is not about doing the right thing, it is about doing the most efficient and the most profitable thing. Sometimes, however, doing the wrong thing is more profitable than the alternative.

In many respects, the law and economics movement has taught us that making law is like producing widgets. Law is just one more commodity in a complex and cluttered marketplace. In this situation advertising helps position a product and its producer in an attempt to survive the clutter.

More recently Public Choice Theory emerged as an influential subset of the law and economics movement and it took these arguments further.[24] It showed us that legislation has no public purpose. Legislation, it revealed, is all about special interests using the legal system to obtain favors, rewards, powers and riches not otherwise available in the open marketplace.[25] Law is for sale, as are the law-makers. In this approach legal interpretation involves the search for the legal deal and the protection of reasonable investment-backed expectations.

Likewise, the proliferation of simple cost and benefit analysis came into greater play, remaking legal analysis into production functions about maximizing the return on investment in legal rules and outcomes.[26] As a result of these and other theoretical concepts, the legal system began to see itself and portray itself as value-less, other than in economic terms.[27] Traditional legal economists rejected a role for non-economic values, for ethics, esthetics, and morality; the lawyer was not to be understood as a human actor but as a market actor, and law was not about justice it was about maximizing a return on investment. Law was a game, and game theory became the key to its strategic analysis.[28]

The lawyer became a cynical, one-dimensional tool of the market . . . an ironic position to be in since most lawyers know little or nothing about how markets and business actually work.

My point in all of this is simple. Legal theory developed a commodified approach to law and lawyering that was compatible with the desire by some elements of the Bar to permit advertising in the legal profession. Law was busy redefining itself as a commodity for sale and it was only logical that some people would embrace these new interpretive signs and become the instruments of exchange. The lawyer became an input item in the production function of law. Not too much law, and not too little law. Law and society were in search of an economically justifiable equilibrium.

Lawyers became defined, in part, as the intermediaries of exchange and of wealth transfer. The big players, the corporations, the rich people, they all had their lawyers to get them the best that the world had to offer, and advertising became one vehicle for selling law and lawyers to the mass market. It also became a way for upstart lawyers to develop a market, and even if it wasn't respectable — it was profitable, and in America wealth eventually brings respectability.

The trend toward advertising coincided with the development and embracing of the idea of law *as* economics. Understanding this convergent relationship provides a new frame of reference for interpreting both developments.

In the end, perhaps, a senior partner in the firm I used to be associated with summed up the interconnectedness of law and economics quite succinctly when he explained to me that, "the firm was a partnership held together by the common element of greed, we don't have to like or respect each other we just need to make money." To him lawyering was just one of many cleaver ways to make a buck, and a law firm was just a useful way for a partner to leverage his earning potential.

The law and economics movement redefined law and lawyering in commercial terms. In commodifying the legal profession, law and lawyers became common, they became reachable, and they therefore abandoned or lost a substantial portion of the sacred space that once existed between the profession and the other ordinary products of modern market life. Restoring a sense of professionalism to law will, therefore, require an increased awareness of the need for an ethic of social responsibility in *market life,* as well as in the life of the law.

1 *See, e.g.,* Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge: Cambridge University Press, 2000); Robin Paul Malloy, *Planning for Serfdom: Legal Economic Discourse and Downtown Development* (Philadelphia: University of Pennsylvania Press, 1991); Robin Paul Malloy, *Law and Economics: A Comparative Approach to Theory and Practice* (St. Paul: West Publishing Co., 1990); Robin Paul Malloy and Chris Braun, eds., *Law and Economics: New and Critical Perspectives* (New York: Peter Lang, 1995); Robin Paul Malloy and Jerry Evensky, eds., *Adam Smith and the Philosophy of Law and Economics* (Dordrecht: Kluwer, 1994,1995); Robin Paul Malloy, "Toward a New Discourse of Law and Economics," 42 *Syracuse Law Review* 27 (1991); "Posner and Malloy Debate: Is Law and Economics Moral?," 24 *Valparaiso University Law Review* 147 (1990); Sharon Hom and Robin Paul Malloy, "China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence," 45 *Syracuse Law Review* 815 (1994); Robin Paul Malloy, "Letter from the Longhouse: Law, Economics and Native American Values," 1992 *Wisconsin Law Review* 1569.

2 *See* Malloy, *Law and Market Economy, supra* note 1.

3 My reference to semiotics and signs is related to the work of Charles S. Peirce and Roberta Kevelson.

See, e.g., Nathan Houser and Christian Kloesel, eds., *The Essential Peirce Vol. 1* (Bloomington: Indiana University Press, 1992); Peirce Edition Project, eds., *The Essential Peirce Vol. 2* (Bloomington: Indiana University Press, 1998); Floyd Merrell, *Peirce, Signs, And Meaning* (Totonto: University of Toronto Press, 1997); Christopher Hookway, *Peirce,* (New York: Routeledge 1985,1992); James Jakob Liszka, *A General Introduction to the Semeiotic of Charles Sanders Peirce* (Bloomington: Indiana University Press, 1996); Kenneth Lane Ketner, ed., *Reasoning and the Logic of Things: Charles Sanders Peirce* (Cambridge: Harvard University Press, 1992); Roberta Kevelson, *The Law as a System of Signs* (Cambridge: Perseus, 1988); Roberta Kevelson, *Charles S. Peirce's Method of Methods* (John Benjamins Publishing Company, 1987); Roberta Kevelson, *Peirce's Pragmatism: The Medium as Method* (New York: Peter Lang, 1998); Roberta Kevelson, *Peirce, Science, Signs* (New York: Peter Lang, 1996); Roberta Kevelson, *Peirce's Esthetics of Freedom* (New York: Peter Lang, 1993).

4 Malloy, *Law and Market Economy, supra* note 1.

5 For legal articles developing the concept of the commodification of lawyers and the law see generally Clive M. Doran, "Television Advertising by Attorneys: A Deception Exception?," 29 *New England Law Review* 425 (1995); Edward J. Eberle, Article, "Practical Reason: The Commercial Speech Paradigm," 42 *Case Western Reserve Law Review* 411 (1992); Elizabeth D. Whitaker and David S. Coule, Article, "Professional Image and Lawyer Advertising," 28 *Texas Tech Law Review* 801 (1997).

For key decisions in legal advertising see Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

6 Malloy, *Law and Market Economy, supra* note 1.

7 *Id.*

8 *See* Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (Chicago: University of Chicago Press, 1983); Gary S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1971).

9 *See* Richard A. Posner, *Economic Analysis of Law,* 5th ed. (New York: Aspen, 1998); Richard A. Posner, *Antitrust Cases, Economic Notes and Other Materials* (Chicago: University of Chicago Press, 1976).

10 Becker, *supra* note 8; Posner, *supra* note 9; *see also* Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 *Harvard Law Review* 1089 (1972); Ronald H. Coase, "The Problem of Social Cost," 3 *Journal of Law and Economics* 1 (1960).

11 Becker, *supra* note 8; Posner, *supra* note 9; Calabresi and Melamed, *supra* note 10.

12 For several advertising sources see generally Shapiro & Shapiro, Attorneys at Law — We want to get you the biggest, fastest cash award possible, I Want Your Million Dollar Case, http://www.shapiroshapiro.com/site/home.htm; Autoacccident.com, Law Offices of Edward A. Smith, http://www.autoaccident.com; Finkelstein, Levine, Gittelsohn & Partners Welcomes You, Finkelstein, Levine, Gittelsohn & Partners: Your Personal Injury Law Firm http://www.lawampm.com; Bailey and Galyen Attorneys at Law — Personal Injury Law, Solving Your Legal Puzzle http://www.pinjury.com; Texas Injury Attorney in Dallas, Texas, The Law Offices of Jeffrey H. Rasansky http://www.texasinjuryattorney.com.

13 *See supra* note 12.

14 For several national media consulting companies specializing in attorney marketing see generally GALA Homepage — Global Advertising Lawyers Alliance http://www.gala-marketlaw.com; Network Affiliates, professional marketing http://www.netaff.com; PowerAdvocates, attorney web sites and marketing http://www.poweradvocates.com; RW Lynch: Group Television Advertising for Personal Injury Lawyers http://www.injury-helpline.com.

15 *See generally* Paul Abercrombie, "In Depth: Business of Law — Lawyers state their case through advertising," *The Business Journal,* March 27, 1998.

16 *See* Jonathan Harr, A Civil Action (New York: Random House, 1995).

17 *See generally* John D. Shugrue, *Manual for Complex Insurance Coverage Litigation* (Saddle River: Prentice Hall, 1993); Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insured,* 3rd ed. (New York: Shepard's/McGraw Hill 1995); Thomas H. Veitch, *What You Need to Know to Settle With Insurance Companies* (Costa Mesa: James Publishing Inc., 1991);Tort and Insurance Practice Section, American Bar Association, *Litigating the Coverage Claim: denial of coverage and duty to defend* (1992); Tort and Insurance Practice Section, American Bar Association, *Litigating the Coverage Claim II: pretrial procedures and strategies for insurers, insureds, and their counsel* (1993).

18 Posner, *supra* note 9; *see generally* William L. Barnes, Note, "Revenge on Utilitiarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment," 74 *Indiana Law Journal* 627 (1999); Kenneth G. Dau-Schmidt, Article, "An Economic Analysis of the Criminal Law as a Preference Shaping Policy," *1990 Duke Law Journal* 1.

19 Posner, *supra* note 9; *see generally* Annalise E. Acorn, Article, "Valuing Virtue: Morality and Productivity in Posner's Theory of Wealth Maximization," 28 *Valparaiso University Law Review* 167 (1993); Leonard R. Jaffee, Symposium, "The Future of Law and Economics: The Troubles with Law and Economics," 20 *Hofstra Law Review* 777 (1992); Peter F. Lake, Article, "Posner's Pragmatist Jurisprudence," 73 *Nebraska Law Review* 545 (1994); Michael I. Swygert and Katherine Earle Yanes, Article, "A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs," 11 *DePaul Business Law Journal* 1 (1998); Michael I. Swygert and Katherine Earle Yanes, Article, "A Unified Theory of Justice: The Integration of Fairness into Efficiency," 73 *Washington Law Review* 249 (1998).

20 *See generally* Kevin M. Teeven, Article, "Origins and Scope of the American Moral Obligation Principle," 46 *Cleveland State Law Review* (1998); Vincent A. Wellman, Article, "Conceptions of the Common Law: Reflections on a Theory of Contract," 41 *University of Miami Law Review* 925 (1987).

21 *See generally* David J. Seipp, 125th Anniversary Essay, "Holmes's Path," 77 *Boston University Law* Review 515 (1997); Thomas S. Ulen, Article, "The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies," 83 *Michigan Law Review* 341 (1984).

22 Posner, *supra* note 9; *see generally* Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Belknap Press 1999).

23 *See supra* note 22.

24 *See generally* Kenneth J. Arrow and Herve Raynaud, *Social Choice and Multicriterion Decision-Making* (Cambridge: MIT Press 1986); Robin Paul Malloy, *Law and Economics: A Comparative Approach to Theory and Practice, supra* note 1 at 42–45.

25 Arrow and Raynaud, *supra* note 24; Malloy, *Law and Economics, supra* note 1.

26 Becker, *supra* note 8; Posner, *supra* note 9; Calabresi and Melamed, *supra* note 10.

27 *See supra* note 26.

28 *See generally* Robert Cooter, *The Strategic Constitution* (Princeton: Princeton University Press, 2000); Herbert Gintis, *Game Theory Evolving: A problem-centered introduction to modeling strategic behavior* (Princeton: Princeton University Press, 2000); Michael Mesterson-Gibbons, *An Introduction to Game Theoretic Modeling,* 2d ed. (American Mathematical Society 2001); Eric A. Posner, *Law and Social Norms* (Cambridge: Harvard University Press, 2000).