ETHICS, MARKETING AND THE FEDERAL TRADE COMMISSION

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Many of our federal administrative agencies deal in the social responsibilities of management. These responsibilities are spoken of in some areas of administrative law in terms of what is fair or unfair in management's relations to the various contributors to the economic product. In other areas these responsibilities are spelled out, without more, by the imposition of specific statutory duties and standards upon management.

The Securities Exchange Commission is concerned with management's responsibilities to contributors of capital to the economic product. The National Labor Relations Board deals in management's fairness to labor and labor's fairness to management. The Federal Trade Commission is involved in management's fairness to competitors, to consumers and to the public at large. Thus, what constitutes fairness in the various business relationships is one of the continuously important ethical, marketing and legal questions of our day.

The National Labor Relations Board has been provided by Congress with standards of unfairness. 29 U.S.C.A. 152 (8) states that "the

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term 'unfair labor practice' means any unfair labor practice listed in section 158 of this title." Section 158 sets forth what shall be "an unfair labor practice for an employer" and what shall be "an unfair labor practice for a labor organization or its agents." While applications of the law to fact situations allow some administrative latitude, the general area of activity is circumscribed and the basic ethical guidelines for this aspect of management's social responsibilities are provided by legislation.

The Federal Trade Commission is in a rather different position. Section 5 of the Federal Trade Commission Act of 1914, which set up the Commission, made unlawful "unfair methods of competition in commerce." The statute did not, however, specify what practices were to be treated as unfair methods of competition. The Commission envisioned its role not only as protector of competitors against each other, but of the consuming public as well. Businessmen viewed the Commission's function as little more than that of providing a well-oiled free market mechanism. In 1931 the United States Supreme Court in *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, cleared by air by holding that the Commission had the burden of showing injury to a competitor to establish a respondent's business practice as unfair. Thus, practices could not be treated as unfair if they were consistent with those of competitors generally. Additional legislation would be necessary to extend the Commission's jurisdiction beyond that of maintaining a fair competitive environment for businessmen.

The Wheeler-Lea Act of 1938 provided the necessary additional legislation. It amended Section 5 of the Federal Trade Commission Act to extend the Commission's jurisdiction to "unfair or deceptive acts or practices in commerce." As Senator Wheeler said: "The amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."[1]

Again, no specifics are set forth in the amended Federal Trade Commission Act to circumscribe the area of activity of the Commission or to provide it with basic ethical guidelines. The only qualifying factors for its intervention in the free market are "unfairness," the fact that interstate commerce is involved and that "it shall appear that a proceeding would be in the public interest."[2]

The Judicial Process of Inclusion and Exclusion

While the Commission initiates proceedings, makes decisions and orders, it is the Courts which, at least theoretically, weave ethics into the

[1] 85 Congressional Record 3255 (1938).

[2] Section 5 (b) of the Federal Trade Commission Act.

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fabric of the law of commerce. As the United States Supreme Court said: "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include." *Federal Trade Commission v. Gratz,* (1920), 253 U. S. 421, 427. "***It (the phrase 'unfair methods of competition') belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" *Federal Trade Commission v. Raladam Co.,* (1931), 283 U. S. 643, 648. Of course, only a small portion of those matters receiving Commission attention attain the dignity of judicial review. Nevertheless, the Federal Trade Commission can be viewed in the proper perspective when conceived only as a part of what has been called the administrato-judicial process.

Orders of the Commission may be set aside where they are "arbitrary, capricious, (or) an abuse of discretion," by virtue of the Administrative Procedure Act. In *Mary Carter Paint Co. v. Federal Trade Commission* 333 F. 2d. 654, 659 C.C.A. 5th 1964, the United States Court of Appeals made some interesting observations concerning administrative agencies and the historical background of the Act when it said:

> *referring to the establishment of administrative bodies, declared: ". . . in thirty-four months we have built up new instruments of public power. In the hands of a people's Government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people."*
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> *Some ten years later, the President transmitted to Congress, with his full endorsement and the statement that it was a great document of permanent importance, the report of his Committee on Administrative Management, which, because of the growth and intensification of administrative legislation of private enterprise and other phases of American life, he had created, appointing to it wise and earnest men. In transmitting the report he took occasion to say that the practice of creating administrative agencies, which perform administrative work in addition to judicial work, threatens to develop a fourth branch of the government for which there is no sanction in the Constitution.*
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> *To this the Committee added:*
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> *"There is a conflict of principle involved in their make-up and functions. . . . They are vested with duties of administration . . . and at th same time they are given important judicial work . . . The evils resulting from this confusion of principles are*

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insidious and far reaching. . . . Pressures and influences . . . directed towards officers responsible for formulating and administrating policies constitute an unwholesome atmosphere in which to adjudicate private rights."

In June, 1946, the Congress enacted, and on June 11, the President approved the Administrative Procedure Act, and thus there had at last come about an Administro-Judicial Process established by legislative sanction and judicial approval.

Obviously, the Federal Trade Commission operates in a three dimensional environment which comprises ethical philosophy, marketing theory and law. The interdisciplinary character and, at the same time, kaleidoscopic nature of its work presents a real challenge to one who would attempt to distill from its decisions and those of the reviewing courts an evolving ethical philosophy and marketing theory of business. Yet, the challenge must be met so that businessmen, and the lawyers who advise them, may have some notion of the legal framework which circumscribes management's ethical and marketing decisions.

The Ethical Dimension

Fairness and unfairness have an ethical connotation. Fairness may be equated with ethical; unfairness, with unethical. One dimension of the Commission's work, then, is, or ought to be, the application of moral principles to business activity. Ideally, such application of moral principles would treat business practices as moral, fair and lawful or immoral, unfair and unlawful depending upon whether they are consistent or inconsistent with a verified pattern of moral theory. Can we find in the decisions of the Commission and the appellate courts bits of ethical theory out of which we might perceive the whole? Such a discovery might be of even greater value to the American public that an astronaut's determination of the composition of the moon.

In 1920 the United States Supreme Court said: "They (the words 'unfair method of competition') are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Federal Trade Commission v. Gratz* (1920), 253 U. S. 421, 427. Later, in 1935, it said: "What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." *Schechter Poultry Corp. v. United States,* (1935), 295 U. S. 495, 532. A year later, Judge Learned Hand observed that "its (the Commission's) duty in part at any rate is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively

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develop." *Federal Trade Commission v. Standard Education Society,* (1936), 86 F. 2d. 692, 696 (C.C.A. 2d. 1936). All of these expressions of the appellate courts point out the limited role of the Commission prior to the Wheeler-Lea Amendment of 1938.

During the years 1914 to 1938, the Commission's concern was that of preventing practices which were beneath the level of those prevailing in industry. The philosophy of Ethical Relativism was the only appropriate ethical theory in this setting. Under it, "evaluations are relative to the cultural background out of which they arise."[3] The school of Ethical Relativism takes the position that there are no cross-cultural ethical norms and that ethical norms hold only for specific cultures. American business may, of course, be viewed as a culture and, if American businessmen treat a given practice as being right, as evidenced by so practicing, such a practice becomes right or ethical for American business. This essentially was the holding of the United States Supreme Court in the *Raladam* case. The philosophy had the advantage of providing a norm and avoiding the criticism that the Federal Trade Commission was acting as a legislative body.

Since the Wheeler-Lea Amendment the Commission's ethics may be described as Intuitionism, modified by a specialized teleological, or goal oriented, ethics, where practices against competitors, and in some instances, prospective customers, are involved, in which the goal value is an effective free market mechanism in a society of relatively free competition. As in all teleological ethical philosophy, practices contributing to the goal are moral, ethical and fair, while those which do not so contribute are immoral, unethical and unfair. The latter ethical concept is the basis for condemning deceptive practices and several of the forms of business activity proscribed by the Commission as unfair practices.

Unfortunately for American business, unmodified Intuitionism is in too many instances the ethical basis of the Commission's decisions. It is the concept that since the Commission is composed of experts in business matters, it is peculiarly well qualified to determine what is right for American business, consumers and the public in general, based upon intuition alone. It is not required in cases involving alleged unfair practices to adduce evidence to support its intuitive findings. Its "expertise" is treated in the law as sufficient support for its conclusions. Two obvious weaknesses of this kind of ethics are, first, that in this important segment of the law ethical reasoning becomes little more than "what's right is right," and, second, the businessman whose intuition is not "on all fours" with the Commission is headed for at least some significant financial loss. Finally, it may be observed that the political appointees of the Commission, in some instances, have had far more

[3] See Melville Herskovits, *Man and His Works,* (1948) at page 63.

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experience in politics than they have had in business. Serious questions, therefore, arise as to the validity of Intuitionism as the ethical philosophy for the administration of the law of American business.

THE MARKETING DIMENSION

Among academic disciplines, Marketing is a relatively new branch of learning. Unlike the Law, few of its principles may be said to be "well settled." Its experts find difficulty even in agreeing upon what the subject area comprises. Such basic concepts as whether the market is a mass market or a segmented market and whether much of the marketing functions is merely a cost of, rather than a value added to, the product are the subjects of disagreement among leaders in the field. Yet, at the heart of a just and useful administration of the law relating to marketing there ought to be a valid and consistent theory of the subject matter involved.

Marketing experts recognize that an understanding of consumer behavior is vital to the development of any marketing theory. It is necessary that industry be aware of what motivates consumer purchases and that it follow the best and most direct course of action to cause a maximization of consumer purchases in order that our economy operate at its present high level. Yet, on this very fundamental marketing question, experts in the field are divided. One school of thought takes the position that wants are created by advertisers.[4] An equally impressive group of experts perceive wants as eminating from the consuming public.[5] These divergent starting points make for very significant differences in the structure of marketing theory and philosophy and, indeed, in conclusions as to what is right in terms of marketing practices and regulation.

The notion that wants are created by advertisers puts the Commission in between the advertiser and the consuming public as a sort of moral guardian of the market place. It is the construct which the Commission has over the years accepted as true. It is the over-simplified, negative view of an anti-social business community leading the consuming public shepherd-like, down the paths of waste and immorality. The modern concept of "Big Brother" aptly fits the role of the Commission in this setting.

This aspect of the "robber baron" characterization of business describes advertisers as waging campaigns emphasizing emotions, even

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[4] Views expressed by Tousley, Clark & Clark, *Principles of Marketing*, (1962), Ch. 6: "Consumer Behavior and Motivation"; Anderson & Cateora, *Marketing Insights*, (1963), Ch. 14: "Why You Buy"; Newman, article from Challenge: The Magazine of Economic Affairs, Jan. 1959, pp. 13-17; and V. O. Packard, *The Hidden Persuaders* (1957).

[5] See F. H. Knight, "Ethics and the Economic Interpretation," *The Ethics of Competition* (1935) and Walter Taplin, *Advertising, A New Approach*, (1960, 1963).

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human weaknesses and frailties, rather than merits of products, as selling feelings of security, ego-gratification, sense of power and immorality, of playing upon motives of emulation, individuality and conformity, indeed, of selling everything but goods. The automobile industry is pointed at as trafficking in waste, stimulating consumers' inclinations toward ostentation and prodigality by means of the psychological obsolescence of automobiles in terms of annual model changes. Under this theory the want or desire of the consumer is created by the advertiser and may be a "good" want or a "bad" want. At any rate, since the want arises external to the consumer it may well be proper for the Commission in administering law concerning "fairness" to be concerned about its "goodness."

The hypothesis that wants eminate from the consumer results in an entirely different theory of marketing and suggests an equally different role for regulation in the best interests of a prospering economy. This is the view that wants and desires are innate and preexisting in the consumer and that they are not created by the efficient merchandiser, but rather discovered by him. It views the consumer's problem as that of consumption optimization and the merchandizer's problem as that of finding the means which is most efficient and effective of satisfying wants. Theory predicated upon this hypothesis places wants at the keystone of all marketing thought. Wants, in this context, are not only physical, but more importantly psychic in nature. The consumer is forever plagued with the question of how he can optimize the satisfaction of his psychic needs within the framework of his limited means. Wants, in this context, are not singular and isolated, but extremely involved and interlaced.

No doubt both concepts of the starting point of consumer motivation have some merit. Surely, in some instances, advertising may stimulate dormant wants. By and large, however, it would seem reasonable to consider desire as a natural human trait and the right to optimize consumption as a basic consumer's right. In this view, the great contribution regulation can make is that of providing a setting in which the consumer has the widest latitude of choice in finding satisfactions most economically within the bounds of his means. To the degree that government constricts the free market mechanism, the problem of consumption optimization becomes more complex. Business practices are most properly a subject of consumer referendum. The role of government is most properly limited to preventing practices which are unfair only in that they prevent the free market from operating effectively or practices which have the same effect because they are deceptive.

The right of consumers to a freedom of choice in optimizing consumption was enunciated by the United States Supreme Court in *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 78, cited with favor in *Federal Trade Commission v. Colgate-Palmolive Co.*, (1965),

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380 U. S. 374, 387, when it said: "[T]he public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." Regarding the corresponding right of competitors to provide consumers broad opportunities of choice without undue governmental restriction, the court said in *Federal Trade Commission v. Sinclair Refining Co.*, (1923), 261 U. S. 463, 476:

> *The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called "competition." The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.*

Mr. Justice Goldberg, in his dissenting opinion in *Atlantic Refining Co. v. Federal Trade Commission*, 381 U. S. 389, 391, remarked: ". . . it seems obvious to me that the Commission must formulate a clear rational rule which is based on an *adequate economic explication* and takes into consideration the situation of all industry members affected by the rule." (Emphasis supplied)

The Legal Dimension

Section 5 (a) (1) of the amended Federal Trade Commission Act, 15 U.S.C. Sec. 45 (a), provides: "Unfair methods of competition in commerce, and *unfair* or *deceptive acts or practices in commerce,* are declared unlawful." (Emphasis supplied) Section 5, (b) provides that the Commission shall act if it shall appear that a proceeding would be "in the interest of the public." There is no other language in the Act to indicate criteria or policy.

Article I, Section 1, of the United States Constitution provides in part as follows:

> *All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.*

It seems remarkable, in view of the fact that the business practices of millions upon millions of American businessmen are controlled by the decisions of the Federal Trade Commission, that the constitutionality of the delegation of legislative powers brought about by the amendment to the Act (Wheeler-Lea Amendment) has never been reviewed by the United States Supreme Court. It is true that the constitutionality of the Amendment has been urged upon the Court and certiorari denied, but one would think that the importance of the question would justify an opinion by the Court. (Denial of certiorari does not necessarily involve

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a consideration by the Court of the questions raised.) In *1 Am. Jur. 2d,* "Administrative Law," § 108, at 907, (1962), the observation is made that "[a]part from certain exceptions, it is almost universally held that arbitrary powers may not be conferred on administrative agencies, even though the courts are authorized to review the exercise of such power." If the Federal Trade Commission Act as amended constitutes such an exception, the Courts have never indicated that it does.

Prior to the 1938 Amendment to the Act, when the power of the Commission was limited to practices involving "unfair methods of competition in commerce" the United States Supreme Court, by way of dicta considered the constiutional question of delegation of powers in the original Federal Trade Commission Act. In *Schechter Poultry Corp. v. United States,* (1935), 295 U. S. 495, both the opinion of Chief Justice Hughes and the concurring opinion of Justice Cardozo commented extensively upon the differences between the National Industrial Recovery Act and the Federal Trade Commission Act to indicate why the former was an unconstitutional delegation of legislative power and the latter was not. The latter Act did not give the power of an arbitrary imposition of rules of business conduct, but required a consideration of practices in the business community before a businessman might be put out of business. Said Justice Hughes: (p. 523)

> *What are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest.*

In his concurring opinion Justice Cardozo clarified the distinction when he said: (p. 552)

> *If codes of fair competition are codes eliminating "unfair" methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions.*

Later, Justice Cardozo said: (p. 552)

> *When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers.*

But the *Schechter* case was decided before the enactment of the Wheeler-Lea Amendment. At the time of *Schechter* the Commission *was* acting under criteria laid down by Congress, namely, the standard of current competitive business practices, for the Commission could only proceed if the practice was an "unfair method of competition." This

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criteria was removed after *Schechter* by the Wheeler-Lea Amendment which extended the Federal Trade Commission's powers to any "unfair act or practice in commerce." Not evidence, but the Commission's unbuttressed expertise is a sufficient criterion for its findings of unfairness under the present Act.

Aside from the disturbing question of whether we have as a substitute for unbridled competition, unbridled and perhaps unconstitutional administrative legislation, is the further disconcerting prospect of the ultimate end of the right of private contract between businessmen and the consuming public. While it is true that the right of private contract may yield to competiting public policy, it should yield only if there is substantial reason therefor. The right of private contract is an important right of citizens. As the United States Supreme Court said in *Baltimore & O. S. W. R. Co. v. Voigt,* 176 U. S. 498, 505: (1900) ". . . it must not be forgotten that the right of private contract is no small part of the liberty of the citizen," pointing out that obligations should not be treated as against public policy "unless it clearly appear that they contravene public right or the public welfare." Indeed, freedom of contracting is itself an important part of our public policy, for as the Delaware Supreme Court said in *State v. Tabasso Homes,* 28 A. 2d. 248, 252: (1942) quoting Sir George Jessel in *Printing Co. v. Simpson, L.R.* 19 Eq. 465, " 'If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting,' and that this freedom of contract shall not lightly be interfered with."

Obviously, whenever the Commission condemns a practice as unfair and particularly where the alleged unfairness is to consumers, it is invading the right of private contract and it is, in effect, saying that there is a public interest or policy with respect to that practice which is superior to the right of private contract. Surely, to justify such administratively determined judgment, there should, as a predicate, be a sufficient criteria or policy and it should appear in the legislation which gave the Commission its powers. The Federal Trade Commission Act as Amended provides no such policy or criteria, while at the same time making "the interest of the public" a condition for a Commission proceeding.

The right of private contract is as important a right to the consumer as it is to the businessman. While the focus of the Federal Trade Commission Act as Amended is upon the unfairness of business practices, as such unfairness is arbitrarily determined by the Commission, the constraints placed upon business equally constrain the consumer in his problem of consumption optimization. A case in point is the ban on merchandizing by means of lottery. While sweepstakes of incomprehensible proportions are given free reign, the lottery method of selling

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is prohibited. Thus, the consumer is denied the right to elect this relative inexpensive way of satisfying his want of taking a chance by reason of the Commission's arbitrary view that such merchandising is, in our modern business environment, against public policy and this, despite the fact that the consumer's desire to take a chance is catered to in an almost infinite variety of ways throughout the entire country.

Since the Federal Trade Commission Act as Amended neither defines the nature of the unfairness contemplated by Congress nor the classes of persons sought to be protected, an analysis of the cases becomes necessary if one is to derive any sort of policy or philosophy as to its nature in the business environment as perceived by the Commission. While new and different "principles" of business ethics and marketing theory will no doubt evolve with the passage of time, the thinking of the Commission as to what is improper practice in business seems to lend itself to a codification something along the following lines:

Business policies which tend to cause disloyalty of employees of either prospective customers or competitors to the benefit of the businessman causing their disloyalty are unfair. In accordance with this precept, commercial bribery, secret rebates and the giving of lavish entertainment and gifts with a view to creating bias in employees of prospective customers toward the briber or "donor" are condemned practices. It should be noted, however, that in *New Jersey Asbestos Co. v. Federal Trade Commission,* 264 F. 509, 511 (C.C.A. 2, 1920) in which, on appeal, the Court held that the giving of liquor, cigars, meals, theater tickets and entertainment to employees to induce them to influence employers to purchase was not unfair, it said: "However, it stretches theory to the breaking point to suppose that the entertainment expenses found unfair in this case constitute fraud practiced by the respondent and by employes of the purchasers of the respondent's goods." The practices of enticing and inciting competitor's employees as well as prevailing upon them to reveal a competitor's trade secret is similarly banned by this maxim.

Business policies which cause prospective customers to involuntarily assent to contractual relationships, even though short of fraud or duress, are unfair. In this category are such practices as scaring prospective customers into making purchases by misrepresenting dangers in the use of products they already have or in the products of competitors; forcing prospective customers into a position in which they must buy by causing damage to property they already have; forcing prospective customers to buy additional goods by withholding their property; shipping goods which have not been ordered; and, as a specialized practice, demanding payment for unauthorized publication of advertisements. As in other areas of Federal Trade Commission activity, the fact that the consumer may have a legal remedy is not treated as a defense against the allegation

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of unfairness where the practice is regularly engaged in and may be said to be a policy of the firm.

A business policy of consistently breaching contracts with customers is unfair. The Commission expects businessmen to perform their contracts with customers in a way that is reasonably expeditious and consistent with its terms. The failure of a businessman to deliver goods at the times promised has frequently been the subject of a Commission proceeding. Along the same vein is the view that substituting goods for those ordered, particularly of a lesser value, and "short changing" in terms of quantity are treated as unfair practices.

Business policies based upon deception, even though the deception is not pertinent to the merits of the product, are unfair. Bait advertising, that is, the practice of advertising an item which the advertiser has no intention of selling, but rather intends to use as a device to bring persons to his place of business to be told of its poor quality and uselessness and to be "steered" into buying a more expensive product is a form of deception which has continuously received the condemnation of the Commission. Along with this practice is the equally offensive deception of threatened legal action when none is contemplated and, in fact, could not possibly maintained because based on cancelled orders or unordered goods. Moreover, the use of form letters purporting to be from a retained attorney who has, in fact, not been retained, but merely has provided the businessman with a supply of his stationery, is looked upon as unfair.

Business policy which has the tendency to cause others to misrepresent the merits of the firm's products is unfair. The well-publicized "payola" cases fall under this heading. Pay-offs to disc jockeys to push records tends to cause a situation in which the public is misled to believe that a particular record has merit, in the view of the Commission. The general practice of giving push money to salesmen of customers to push goods of the seller is likewise treated as unfair on this and other grounds.

Business policy employing devious means to interfere with the competitive potential of competitors is unfair. Sending competitors fictitious requests for estimates and prices on a large scale and engaging in other acts designed solely to annoy competitors as well as using physical means to interfere with their goods and properties is treated by the Commission as an improper method of competing. Inducing customers of competitors to breach their contracts is viewed by the Commission as an unfair practice aside from its tortious aspects. Schemes which enable a firm to appropriate to its own use materials designed and developed by competitors are held improper practices though they might not violate copyright, trade-mark, patent or other law.

Lottery methods of merchandising are unfair. This precept is unique among all business practices treated as unfair by the Commission in that

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the unfairness of this practice is predicated upon social moral grounds. The lottery method of merchandising ordinarily consists of a sales plan in which the customer's right to merchandise is determined by chance. Since gambling has been treated as against public policy over the years, sales plans which are essentially gambling and at the same time involve the sales of merchandise are viewed by the Commission as within their jurisdiction and, at the same time, unfair.

The use of the element of chance in merchandising is big business these days. Perhaps the best known illustration of the practice is a recent million dollar shopping spree which attracted over 61 million entries and was apparently so successful that the sponsor followed it with a two million dollar shopping spree. As strong an argument may be made for the "unfairness" of this game and others like it as is made for the "unfairness" of the lottery method of merchandising in that it imports the same basic lottery method into company merchandising policy. The traditional three elements of a lottery (prize, chance and consideration) may be found in these nationally conducted promotional plans, despite some weak attempts at disguise by the promoters. In the shopping spree sweepstakes (which is typical), the prize was the right to shop in a supermarket for a limited period of time without cost, the element of chance was a drawing and the consideration was the purchase of cartons of the product in which entry blanks were stuffed, the filling in of forms and the mailing of them to the sponsor or, more simply, the benefit to the sponsor, for, as is stated in 54 *C. J. S.* 848, "lotteries" consideration may be present even when buying the product is not required.

The sweepstakes is a significant marketing phenomenon of today's business environment. A remarkably large number of the merchandising giants have seen fit to trade upon the consumer's desire to take a chance by the employment of a gigantic national lottery-like promotional plan. While it would seem that the impact of these enterprises upon the morals of the American public is far greater that the relatively insignificant sales of goods by lottery methods, the Commission has never seen fit to attack the merchandising giants on grounds of unfair practices.

It is virtually impossible to shop in any of the large chain grocery stores of today without being solicited to participate in a bingo type of game for prizes or other drawing. In addition, merchandise on shelves in the chain grocery stores provide further opportunities for satisfying the urge to gamble. A recent shopping trip revealed an entire line of breakfast cereals, the boxes of which were imprinted with entry blanks for a different sweepstakes for each brand of cereal, offering an opportunity for the purchaser to participate in random drawings for phonographs, walkie-talkies and other items. Again, the Commission is either unaware of these wide-spread gambling oriented practices or believes that for some reason they do not constitute as serious a peril to the

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morals of the American public as punch cards and similar devices and, therefore, are not in the spirit of unfair practice so far as social morals are concerned.

Justice Harlan's remarks in his dissenting opinion in *Federal Trade Commission v. Mary Carter Paint Co.,* (1965), 86 S. Ct. 219, 223, are as appropriate to unfair practice matters as they are to deception cases:

> *At the very least the Commission should be required to demonstrate real deception and public injury in a decision that allows the courts to evaluate its reasoning and businessmen to comply with its latest views. . . . The temptation to gloss over the analytical failings of the rational now asserted for the FTC by relying on agency expertise must be short-lived in this case.* ****Surely there can be no resort to uninvoked expertise to buttress an unarticulated theory.*

Conclusion and Challenge

It is one thing to idly philosophize about business ethics and to academically argue marketing theory. It is quite another thing to have these matters take the shape and force of law. It seems a pity that matters of such magnitude should evolve by the haphazard "process of inclusion and exclusion" and all the more so when one notes that much of the philosophical and marketing theory output of the bureaucracy of administration never reaches the appeal stage and that, when it does, the "inclusion and exclusion process" is frequently a matter of rubber stamping the expertise of the bureaucracy.

The evolution of a philosophy of business ethics and of a marketing theory is more appropriately within the jurisdiction of the democracy of business than that of an oligarcy of political appointees. Those who practice business and those who would teach and research it are faced with the very real challenge of correlating the disciplines of ethics, marketing and the law and of working toward the development of a sound, synthesized, consistent, workable and persuasive philosophy of business which may serve both as a guide to businessmen and as a foundation for judicial determinations relating to business practice. For businessmen the challenge is for professionalization and, particularly, for the development of a sense of ethics and social responsibility which will put business in proper perspective in relation to the society it serves.

Legal constructs ought not to be predicated upon intuition or, to use Judge Harlan's phrase, upon "uninvoked expertise." A framework of business philosophy is essential to the orderly development of a legal theory of business regulation and is critical to the sensible and just administration of the law of business to new and different practices in the ever-changing environment of business. Only when such a framework exists in the law will business be governed by Law rather than by Men.

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