

# William & Mary Law Review

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Volume 15 (1973-1974)  
Issue 1

Article 2

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October 1973

## The Politics of Advertising

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<https://scholarship.law.wm.edu/wmlr/vol15/iss1/2>

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# William and Mary Law Review

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VOLUME 15

FALL 1973

NUMBER 1

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## ARTICLES

### THE POLITICS OF ADVERTISING

LEE LOEVINGER\*

Once upon a time it was respectable to be engaged in business in the United States. Today public opinion experts tell us that business is held in low esteem by the majority of people.<sup>1</sup> Self-styled public interest groups claim a copyright on respectability and speak of business as though it were a social disease and advertising as though it were slightly worse than skyjacking. While castigation ranges across the field of business activity broadly enough to avoid any claim of discrimination, some of the most vigorous attacks are mounted against advertising. The criticism is epitomized by the charge of an advertising man that our culture is rotten and that advertising has helped make it so and is continuing to make it worse.<sup>2</sup> Woven through the criticisms are demands for a variety of reforms and regulations, ranging from proposals to pro-

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This Article is a slightly edited version of a paper presented to the International Radio and Television Society at the Waldorf-Astoria Hotel, New York, N.Y., on January 4, 1973. The editing has been confined to changes of wording and construction and the addition of footnotes; the substance is unchanged. Although the paper was originally drafted in the latter part of 1972, events since that time have strongly reinforced the conclusions reached and the views expressed. The opinions in the case of *Columbia Broadcasting System v. Democratic Nat'l Committee*, 93 S. Ct. 2080 (1973), appear very nearly to establish the thesis urged here: Government action to require the broadcasting of particular views in the commercial area is inconsistent with or contrary to the mandate of the first amendment.

1. See, e.g., *BUSINESS WEEK*, Sept. 16, 1972, at 70. Numerous public opinion polls report declining public confidence in and respect for "big business."

2. *BUSINESS WEEK*, June 10, 1972, at 46.

hibit various kinds of advertising and to limit the amount of advertising generally, through proposals to require "corrective," or self-incriminating, advertising as well as scientific substantiation for all advertising claims, to a proposal that every broadcast advertisement be followed or matched by a counter-advertisement presumably contradicting whatever claims are made in the advertisement. Strangely enough, it appears that the attacks are increasing at the very time that performance is improving.

The counter-advertising proposal is potentially the most far-reaching of the various attacks. Its genealogy is fairly clear, originating with the decision of the Federal Communications Commission in 1949 that broadcasters could express editorial opinions on licensed facilities but that they must also provide a fair opportunity for the expression of opposing or contrasting views on controversial issues of public importance.<sup>3</sup> This principle, which came to be known as the "Fairness Doctrine," until 1967 was applied only to the discussion of major political and social issues. In that year, the FCC declared that the Fairness Doctrine applied to cigarette advertising to the extent of requiring public service announcements warning of the dangers of cigarette smoking.<sup>4</sup> The Commission opinion quite explicitly and emphatically declared that the situation with respect to cigarettes was "unique." In 1964 there had been a report by a Surgeon General's Advisory Committee warning that cigarette smoking was hazardous to health, and in 1965 Congress had enacted a statute requiring a warning of such hazard to be carried on all cigarette packages. The FCC brushed aside the argument that application of the Fairness Doctrine to commercial advertising was an unwarranted and dangerous extension by saying that it did not know of any other advertised product to which the ruling would be applicable, that the ruling was limited to cigarettes, and that the ruling did not imply that "any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance."<sup>5</sup>

Although the cigarette ruling of the FCC was sustained by the Court of Appeals for the District of Columbia Circuit on the basis urged by the FCC that the situation was unique,<sup>6</sup> the same court, within three

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3. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

4. Television Station WCBS-TV, 8 F.C.C.2d 381 (1967); Cigarette Advertising, 9 F.C.C.2d 921 (1967).

5. Cigarette Advertising, 9 F.C.C.2d 921, 943 (1967).

6. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

years, held that the Commission could not avoid applying the Fairness Doctrine to other commercial advertisements. Thus, it was held that reply time under the Fairness Doctrine was required for commercials of a department store which was the object of a union boycott<sup>7</sup> and for commercials advertising high powered cars and leaded high octane gasoline.<sup>8</sup>

As complaints against advertising under the Fairness Doctrine increased dramatically, the Commission began to be concerned about the growing extension of that principle and instituted a general inquiry into the entire subject.<sup>9</sup> In January 1972, the Federal Trade Commission filed a statement in the FCC Fairness Doctrine inquiry advocating that the FCC require all broadcasters to provide substantial amounts of time, both free and paid, for regularly scheduled "counter-advertising" on a broad scale. This proposal is still being debated and considered.<sup>10</sup>

The FTC counter-advertising proposal echoes similar schemes urged by other business critics and has engendered support from most of the militant anti-establishment camps. Of all the attacks on advertising, this proposal is the most basic, the most bold, and the most patently political. Its potential benefits and dangers are not so obvious, however, and appraisal requires detailed analysis.

On first impression there is plausibility to the argument that since the public is exposed to a vast amount of advertising urging the purchase of products or services, there should be comparable opportunity provided for those who wish to urge contrary views. Nevertheless, when the proposal is reduced to specifics and examined closely, its plausibility disappears, virtually all valid considerations are seen to militate against it, and implications are disclosed reaching far beyond broadcasting and advertising and deep into our political life.

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7. *Retail Store Employees Union v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

8. *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971), *on remand*, 33 F.C.C.2d 648 (1972).

9. *Alan F. Neckritz*, 29 F.C.C.2d 807 (1971).

10. It appears that for several reasons the counter-advertising proposal is less favorably regarded than it was several months ago. A new member of the FTC, Mayo J. Thompson, has expressed reservations about the proposal, stating that "the practice might well create more problems than it solves." *BNA ANTITRUST & TRADE REG. REP.* No. 618, at D-1 (June 19, 1973). The term of Nicholas Johnson, the FCC commissioner most notoriously hostile to broadcasting and favorable to counter-advertising, has ended, and the White House has made it clear that he will not be reappointed. Furthermore, the decision of the Supreme Court in *Columbia Broadcasting System v. Democratic Nat'l Committee*, 93 S. Ct. 2080 (1973), sustaining the FCC in its rejection of claims to a right of commercial access, has diverted attention from the proposal.

1. *The Reasons Urged for Counter-Advertising Are Logically Fallacious*

The institution of general counter-advertising is urged by the FTC on the grounds that there are faults in advertising with which the FTC cannot cope effectively because of its limited tools and resources. Faults specified by the FTC are advertising claims which are false or deceptive, which are truthful but incomplete, or which involve controversial opinion or evidence. Although the FTC states that not all commercials raise the kind of issues or involve the type of problems that make counter-advertising appropriate, it also asserts that the measures it proposes are necessitated by advertising which is silent about any negative aspects of a product, a characteristic the FTC urges is inherent in all commercial advertising. Thus, the FTC is itself inconsistent and contradictory in asserting that its proposal is responsive to problems created only by certain types of advertising but that such problems are inherent in all advertising.

In any event, neither of these inconsistent premises logically supports the proposal. The FTC does not allege that the advertising faults it identifies are confined to broadcast commercials. However, since counter-advertising is proposed only for broadcasting, it is not necessarily responsive to the problems which allegedly require its institution. Indeed, the advertising vices noted by the FTC seem to provide more an excuse for berating advertisers than a basis for proposing some particular remedy, since there is nothing in the proposal which would make counter-advertising responsive, or even relevant, to any particular defect in advertising or claims.

For this reason, counter-advertising is not really relevant to the Fairness Doctrine, which is its ostensible logical support. The Fairness Doctrine applies only to specific issues and requires that opposing viewpoints be identified with respect to each issue and be given a fair opportunity for broadcast expression. The FTC, however, proposes measures which would permit the expression of special views without any provision for insuring that issues be identified, that the opportunity for expression of viewpoints be balanced, or that any of the counter-advertising be responsive or even relevant to any particular advertising

Examination of the FTC statement to the FCC, as well as other recent FTC statements, discloses not only that the FTC is not really interested in a Fairness Doctrine kind of balancing but also that its counter-advertising proposal is not really directed at meeting particular flaws of advertising. Rather, the FTC is now attempting to move away from the

unglamorous job of policing advertising, which is its statutory function, and is undertaking to promote a general educational program to provide consumers with all the information necessary to enable them to make informed choices among products.<sup>11</sup> This may, or may not, be a socially desirable objective; however, it is not within the scope of the Fairness Doctrine or within the statutory jurisdiction of either the FCC or the FTC. Thus, the argument offered by the FTC in support of its proposal is merely a camouflage and does not logically support the proposal at all.

Indeed, the kind of controversy to which counter-advertising relates is not the kind of controversy covered by the Fairness Doctrine. Advertising is advocacy which seeks to persuade a consumer to buy a particular brand of product (or service) or attempts to establish identification of a particular brand with some favorable association in the consumer mind. In the sense that counter-advertising attempts to present counter-arguments or establish unfavorable association, it is like competitive advertising. Thus, to some degree, all competitive advertising is counter-advertising, since the issues or arguments involved all are aimed at the consumer decision to buy or not to buy particular products or services. However, the Fairness Doctrine applies only to controversial issues of public importance. It is difficult to discern how the consumer decision to buy or not to buy particular product brands can rise to the level of an issue of public importance, and neither the FTC nor any other counter-advertising advocate has yet suggested a means of bridging this logical chasm.

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11. The FTC's desire to remedy situations in which consumers "have no means of evaluating the products and services that are offered to them [while] the businessman with whom they deal has all of the relevant information" is disclosed by the author's notes of remarks by Commissioner Mary Gardiner Jones on Oct. 14, 1970, and of her address to the Austin Advertising Clinic of the University of Texas School of Communication and the Austin Advertising Club, Austin, Tex., Feb. 21, 1972. Notes of the author also reveal that Gerald Thain, Assistant Director, Bureau of Consumer Protection, on May 12, 1971, while discussing the White House Conference on Food, Nutrition and Health, remarked that "if food companies and advertisers do not assume their responsibility for presenting factual nutritional information to consumers, and particularly to children, regulatory agencies may require them to do so. See also Pfizer, Inc., F.T.C. Docket No. 8819 (July 11, 1972), BNA ANTITRUST & TRADE REG. REP. No. 572, at D-1 (July 18, 1972). In the Statement of the Federal Trade Commission before the FCC, in F.C.C. Docket No. 19260, the FTC stated, *inter alia*: "In addition to being truthful, it would be desirable for advertising to be 'complete' in the sense that it makes available all essential pieces of information concerning the advertised product, i.e. all of the information which consumers need in order to make rational choices among competing brands of desired products."

Furthermore, the FTC suggestion that there is something bad about the fact that advertised products may have any "undisclosed negative aspects" and that it could force "all advertisers to disclose all such aspects" is not only illogical but silly. While the FTC is giving out with mod terms and rapping with jive talk calculated to send contemporary cats, there is no indication that it has even a speaking acquaintance with the vast body of knowledge, thought, and wisdom accumulated in the fields of philosophy, science, and law. Apparently that's just for squares. Disregarding for the moment the limitations of time in broadcasting and space in publishing, the notion that an advertiser could state all negative aspects of a product or all information needed to make a rational choice between products is naive at best. The data that are, or may be, negative or relevant to a product choice are literally infinite.

Moreover, some facts are obviously more important to a buyer than others; relative importance, like relevance, is a subjective matter, dependent upon the buyer's desires, purposes, alternatives, tastes, temperament, and a host of other factors. What is negative or relevant in the choice among products is not a fixed, objective, or determinable thing. One buyer may prefer a wide variety of relatively cheap clothes; another may want a single garment of the highest quality and price and exclusive design. Some may think a moderate variety of medium-priced clothes is best. In varying circumstances, different factors may be relevant for any individual. The combination and determination of elements of choice is as widely variable as the number of individuals. It is presumptuous to the point of being false and deceptive for the FTC, or any other agency, to suggest that it can determine or specify all of the negative or relevant elements in a buying choice.

The whole truth with respect to any physical product may involve every aspect of human knowledge. Even that, as truly wise men know, is but a tiny fraction of what might be called the "whole truth." Sir Isaac Newton, who contributed as much to human knowledge as any man who has ever lived, said of his own efforts: "I do not know what I may appear to the world; but to myself I seem to have been only like a boy playing on the seashore, and diverting myself in now and then finding a smoother pebble or a prettier shell than ordinary, whilst the great ocean of truth lay all undiscovered before me."<sup>12</sup> The FTC should give greater heed to the warning of William Penn: "Truth often

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12. D. BREWSTER, *MEMOIRS OF NEWTON*, vol. II, ch. 27 (1855).

suffers more by the heat of its defenders, than from the arguments of its opposers." <sup>13</sup>

The fact that not all negative aspects of a product can be ascertained, specified, and disclosed does not mean that some should not be. It does mean, however, that those characteristics which are important enough to require disclosure in advertising must be ascertained and specified, product by product. This is what the FTC is supposed to do and what it has ample authority to do. Although the assertion that advertising in its present form does not disclose all negative aspects of advertised products is necessarily true and will always be true, it has no significance. Since it is impossible to ascertain or specify all negative aspects of a product, it is a logical certainty that they cannot all be disclosed. It necessarily follows that counter-advertising would not disclose all negative aspects of any product. Moreover, there is no assurance that counter-advertising would address itself to important aspects of particular products. If the FTC believes that there are negative aspects of products which require disclosure, it should not attempt to evade its statutory responsibility of performing the difficult and arduous task of determining such aspects and specifying them product by product.

The argument that the FTC does not have adequate resources to perform its responsibilities is essentially irrelevant to its proposal to require counter-advertising. The FTC, like all other government agencies, is allocated that share of our limited national resources which the public, acting through its representatives in Congress, determines to be appropriate and reasonable. All other segments of society, including advertisers, broadcasters, and the public, also have limited resources. The FTC is not authorized or warranted to appropriate the resources of others not subject to its jurisdiction, such as broadcasters or advertisers against whom no charge has been made, for purposes which it approves or deems especially worthy. If FTC resources really are inadequate to perform a proper task, it should seek additional resources from the body which created and controls it. Limitations of FTC resources do not justify the appropriation for its purposes of the resources of others. In private life there is a nasty name for such a process. The fact that the FTC seriously offers such a reason in support of its counter-advertising proposal further suggests the absence of any logical foundation for the proposal.

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13. W. PENN, *SOME FRUITS OF SOLITUDE* (1693).



## 2. *Counter-Advertising Would Destroy the Economic Foundation of Broadcasting*

Argument in favor of the counter-advertising proposal seems to originate in a kind of intellectual vacuum where no account is taken of the fact that four minus two equals two, and does not remain four. To give rational consideration to this proposal, it is necessary to recognize some obvious and simple facts, most importantly that broadcasting time is limited so that nothing can be added without subtracting something else.

Commercial broadcasting is completely dependent upon advertising revenue. It has no other significant source of income. The only alternative method of financing developed in this country is government support or subsidy, the problems of which are the subject of continuing public debate and do not need retelling here. It is significant to note, however, that since the counter-advertising proposal does not discuss the multitude of problems and cost to the taxpayers which would require analysis if broadcasting were to be changed from a commercial system to one supported by the government, it ostensibly seeks no change in the system of commercial broadcasting.

Counter-advertising would affect commercial broadcasting in two ways. First, it would impose a cost by its encroachment on commercial and broadcasting time. Second, it would result in a loss to the extent it would drive advertisers out of broadcasting.

The direct cost imposed by counter-advertising on broadcasting would depend upon the amount of response time required. The proportion most generally discussed and advocated is twenty percent of all commercial time. Counter-advertising advocates would surely not be satisfied with less. The time for such counter-advertising would have to be diverted from time now devoted either to commercials or programming. If taken from commercial time, it would decrease proportionately the revenue from commercials. If taken from programming time, counter-advertising would increase clutter, program interruptions, and audience annoyance and would decrease advertising effectiveness.<sup>14</sup> Since both the FCC and industry code authorities are seeking to limit program interruptions and clutter, it seems most likely that time for counter-advertising would come from that currently devoted to commercials.

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14. By far the most common complaint about broadcast commercials is that there are just too many of them, with about 70 percent of all classes of viewers 'expressing this opinion. ROBERT T. BOWER, *TELEVISION AND THE PUBLIC* 84 (1973). See also ROPER ORGANIZATION, *WHAT PEOPLE THINK OF TELEVISION AND OTHER MASS MEDIA, 1959-1972*, at 24 (1973).

Taking total profit as a percentage of gross revenue, the overall profit margin of the television industry is under twenty percent. However, the profit margin of television networks is only about five percent and that of radio less than ten percent, as calculated on the basis of published FCC data.<sup>15</sup> If twenty percent of commercial time were diverted to counter-advertising, industry profit would be eliminated, even if no other commercial revenue were lost. Although a myriad of detailed calculations can be made as to the cost of counter-advertising under various limitations, the result under relatively severe limitations would still be devastating. Thus, even if counter-advertising were limited to some products which have been the subject of the most vigorous attacks, such as automobiles, gasoline, cereals, drugs, and detergents, and even if it were placed entirely in time diverted from commercials for these products on a one-to-five basis and restricted to television network commercials, it would cost the television networks about \$68 million annually, which is more than their combined pre-tax profits of \$50 million. Thus, on the basis of direct costs alone, counter-advertising in an amount sufficient to satisfy the minimum demands of its advocates would eliminate broadcasting profit.

The total effect of counter-advertising on broadcasting would probably be even more severe. Since it is proposed to apply only to broadcasting, it would certainly drive many, and possibly all, advertisers into other media. To reach this conclusion, it need be assumed only that advertisers are rational in protecting their own self-interests. However, speculation on this point is unnecessary, since spokesmen for major national advertisers have already announced that if counter-advertising measures were limited to products which are advertised on broadcast media, they would avoid the verbal stoning in the market place of counter-advertising simply by using other media. Moreover, if a product could be attacked through counter-advertising whether it is advertised on broadcasting or only through nonbroadcast media, then an advertiser would do best to stop paying for broadcast advertising and demand free reply time under the Fairness Doctrine when his product is attacked.

No matter what mechanics or rationalizations are employed, counter-advertising would result unavoidably in the decreased attractiveness of broadcasting as an advertising medium, with an inevitable decrease in the amount of broadcast advertising. The magnitude of such loss is not crucial to the inquiry since the direct costs of supplying time for

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15. These figures were obtained from the 37th Annual Report of the F.C.C. for the Fiscal Year 1971, at 151 (television) & 169 (radio).

counter-advertising alone would wipe out current profit margins; the loss of revenue resulting from advertisers departing the media would simply make broadcasting even more unprofitable.

Experience with cigarette counter-advertising buttresses the conclusions reached above. First, counter-advertising cannot be limited by the FCC to any particular product or application, since the courts have insisted that it be applied to the full extent of whatever logical rationale upon which it is adopted. Second, demands for counter-advertising escalate with its use, and even the cessation of advertising at which it is directed does not terminate demands for counter-advertising. Third, counter-advertising does diminish the demand for a product at which it is directed. Finally, counter-advertising does drive advertisers out of broadcasting. After the cigarette manufacturers began to feel the effects of broadcast counter-advertising, they told Congress they would welcome a statute forbidding broadcast advertising of cigarettes, and such a statute was enacted. Although distributors of other products may achieve similar results by some other method, there can be no reasonable doubt that counter-advertising would drive most, if not all, advertisers away from broadcasting to more hospitable media.

### 3. *Counter-Advertising Would Cause a Deterioration of Broadcast Programming and Journalism*

There is literally no way in which counter-advertising could be introduced into broadcasting on any substantial scale without deteriorating the quality of broadcast programming and news reporting. Complex, detailed, and lengthy calculations are necessary to demonstrate the full extent to which this would occur, and the precise figures will change from year to year. However, certain general relationships which are fairly constant demonstrate the impact that would result. FCC data disclose that in television network operation, expenses exhaust about 95 percent of total revenue, and programming costs constitute about 90 percent of all expenses.<sup>16</sup> Taking television networks and stations together, expenses are over 80 percent of all revenues, and program costs account for about 70 percent of all expenses. The radio networks have been operating at a loss for a number of years, with expenses exceeding revenues and program expenses amounting to over 60 percent of all expenses. For radio networks and stations combined, total expenses amount

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<sup>16</sup>. These data were computed from the F.C.C. Report for the Fiscal Year 1971, *supra* note 15.

to about 90 percent of revenue, and program expenses account for about 33 percent of all expenses.

Assuming that commercial broadcasting could survive the substantial additional cost as well as the loss of revenue imposed by counter-advertising, it is obvious that a substantial reduction of some expenses would be necessitated. The only item which offers this possibility is programming, particularly in the area of news and public affairs, where costs are especially disproportionate to the time involved. A reduction of expenditures for programming and news would reduce the quality; the relationship is as simple and inexorable as anything in this complex field. It follows that the introduction of counter-advertising into broadcasting would inevitably result in a permanent deterioration of programming and news reporting and hasten the demise of commercial broadcasting.

#### 4. *Counter-Advertising Is Unreasonably Discriminatory Against Broadcasting*

It is noteworthy that proponents of counter-advertising have not suggested that it be applied to any of the print media, billboards, mail, or other forms of advertising. The proposal limiting counter-advertising to the broadcast media is wholly adventitious and is made because broadcasting is subject to government licensing and therefore can be subjected to forms of political influence and control that cannot be exerted against other media. As a matter of simple logic, if certain types of advertising, or advertising for particular products, present social problems requiring legal remedies beyond the power of the FTC, then surely action is required with respect to all advertising media. However, there has not been the slightest hint of a belief by the FTC that it, or any other government agency, has the power to require nonbroadcast media to carry counter-advertising; nor is there any indication that the FTC intends to ask Congress for such authority, despite the fact that substantial enlargement of its authority is currently in the legislative mill.<sup>17</sup>

Moreover, there has been no suggestion that the counter-advertising proposal should be applied to the one advertising medium over which the government clearly has a right of control. Much of the most objectionable advertising is delivered by the Postal Service. Indeed, Congress has found it necessary to enact legislation permitting persons to "turn off" delivery of particular types of mail advertising (although the process is more complicated than changing television channels) If free counter-

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17. See N.Y. Times, July 11, 1973, at 70, col. 2.

advertising is a sound proposal for broadcasting, the same logic would support a requirement of free delivery of counter-advertising through the mails. It is clear, however, that such a measure would be as economically infeasible as is the proposal for counter-advertising in the broadcast media.

The United States Supreme Court in 1936 held that a tax on advertising in newspapers is prohibited by the first amendment because it is discriminatory and might result in destroying both newspaper advertising and newspapers.<sup>18</sup> The counter-advertising proposal of the FTC is no less oppressive, no less threatening, and no less discriminatory than the tax held unconstitutional in that case. If counter-advertising is indeed a socially desirable principle, it should be embodied in a legislative proposal applicable to *all* advertising media, including the mails. In its present form, the proposal is irrationally and indefensibly discriminatory against broadcasting.

5 *Counter-Advertising Would Not Be Informative and Would Result in Diatribe Rather than Dialogue*

One of the difficulties with many reform proposals is their presentation in terms of a contrast between the vices of an actual situation and the flawless dream of an hypothetical situation, between the imperfections of reality and the perfection of an ideal. Advocates have intimated that counter-advertising will merely provide time for impartial and public spirited scientists to give objective and factual little talks on the undisclosed ecological and health dangers of advertised products. However, experience to date with demands for reply time to advertising under the Fairness Doctrine demonstrates that while impartial scientists are occupied in their laboratories, those who most frequently demand free broadcasting time to answer advertisements are, at best, biased zealots and, at worst, publicity seekers or crackpots.

A recent complaint to the FCC involving dog food commercials charged that such advertising misleads the public into thinking that the dog is man's best friend without warning of the danger of animal-borne diseases. Another complaint demanded time to reply to a United Fund appeal in order to urge people not to contribute on the ground that an inadequate share of the proceeds went to blacks. Other complainants are vegetarians and astrology advocates who claim unfairness toward their views.

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18. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

.. It is evident that the individuals most likely to demand counter-advertising time would not be the well informed, but the extremists, the fanatics, and the purveyors of odd brands of social snake oil cures. Counter-advertising instituted as a regular part of broadcasting would require an immense amount of labor on the part of those wishing to make known their views. Who is likely to dedicate himself to such an effort? Is it the scientist working on some project of his own? Is it the busy doctor or the informed professional dietitian or engineer? Or is it the college student who is bored by his studies and resentful of the establishment, the self-appointed prophet who marches the streets bearing a sign warning of some impending doom, or the aspiring politician looking for publicity? Professors may advocate the principle of counter-advertising, but fanatics will exercise the right.

Both common sense and experience indicate that if counter-advertising time were provided, it would soon be filled more with diatribe and denunciation than with factual disclosures or rational discussion. It is altogether illusory to believe that counter-advertising would really be informative.

6. *The Counter-Advertising Proposal Is Based on the False Premise that the Consumer Does Not Have Diverse Information Sources*

Today's consumers have a plethora of sources from which they may obtain information concerning advertising claims. Statements highly critical of advertised products are widely carried in all media, including broadcasting. Conferences devoted to denunciation of broadcasting, the media, or advertising are widely reported, even in the media being denounced. The most bitter criticisms of broadcasting and advertising are the most frequently broadcast, apparently on the theory that they are newsworthy. The defects of advertised products are reported in news stories and commentaries in broadcasting and the press. Entire publications are devoted to giving consumers objective advice on the merits of advertised products. "Action line" newspaper columns and radio programs not only help individual consumers but advise others of complaints.

It is true that advertising messages outnumber counter-advertising messages, but there is no evidence that they are as influential. Although there are no reliable data on the comparative potency of advertising, counter-advertising, and news, there have been demonstrations that news reports are far more influential than advertising. A "scare story" about a product may be enough to drive it off the market despite advertising.

On the other hand, an increase in counter-advertising in all its forms would not necessarily increase its effectiveness. Counter-advertising may even defeat its own purpose by proliferating warnings against advertised products to the point that the credibility of legitimate warnings is reduced. It is reported that this has happened in the case of hexachlorophene,<sup>19</sup> and apparently it has occurred with cigarettes.<sup>20</sup> Certainly no one can claim that the public is not informed and warned about the dangers of cigarettes, since every package and advertisement carries its own counter-advertisement.

Similarly, news about many other products and problems is common in the media. The public is continually reminded of the problem of air pollution and of the contribution made to air pollution by automobiles. The virtues and vices of various foods and dietary supplements are matters of daily media comment.

Furthermore, advertising itself now performs many of the functions attributed to counter-advertising. Generally, advertising is highly competitive; it is the essence of competitive advertising to urge the superiority of one product over another. This is not infrequently done by presenting comparative data with respect to size, performance, or other qualities, and frequently comparisons between competitive brand products are made. Moreover, the law requires some categories of products, such as drugs, to carry labels containing specified information, and many labels are beginning to read like miniature treatises.

These considerations evoke suspicion that advocates of counter-advertising hope it will perform the role of unselling, rather than informing. In any event, the available sources of information concerning advertised products are so numerous and diverse that the difficulty confronting the average consumer is in coping with the mass of available data, not in securing more.

### 7 *Counter-Advertising Would Diminish the Amount of Useful Information Available to the Consumer*

There are three limiting factors which determine the amount of information anyone can use: the sources, the channels, and the attention span of the mind. There are more diverse sources of information about consumer products than any consumer can now study attentively. To the degree that broadcasting serves as a channel of such information, the

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19. Wall Street Journal, Dec. 26, 1972, at 1, col. 4.

20. *Id.*, Nov. 29, 1972, at 44, col. 1.

time and resources available to present objective news and impartial commentary will inevitably be curtailed if broadcasting is required to carry any substantial amount of counter-advertising. Perhaps more important, the tolerance of any individual for attending to discursive expatiation on the merits or demerits of consumer products is quite limited. Advertisers know that doubling the amount of advertising does not double its impact. Substituting a substantial amount of counter-advertising for either programming or advertising is far more likely to irritate than to inform the audience.<sup>21</sup> The result is likely to be that the average consumer is less, rather than more, informed.

The effect will be even greater on advertising itself. Although all advertising will be within the target area for counter-advertising, the target's bulls-eye will be factual advertising, a point the FTC has already made clear in its attacks. So long as advertising is confined to identifying a product and brand name, or even to suggesting that the consumer will like Brand X, there is little to counter. However, as soon as advertising makes *any* assertion of fact, it opens the door to dispute and attack. To be subject to counter-advertising, factual claims need not be false or misleading; if they are, they lie within the present scope of FTC power. It is advertisements not subject to action on the ground of being false or misleading which are the targets of counter-advertising. In short, a main purpose of the counter-advertising proposal is to provide a method of disputing factual claims which cannot be disproved.

To observe the effect of this approach, consider the types of advertising which might be used to market a soft drink:

Drink Burpo!  
Burpo tastes good.  
Burpo makes you feel good.  
Burpo has vitamin C.  
Burpo has lots of vitamin C.  
Burpo with vitamin C is good for you.

It is clear that those advertisements containing the most factual information are most vulnerable to attack by counter-advertising. Because this conclusion is already known to advertisers,<sup>22</sup> the net effect of counter-

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21. The most common complaint concerning television commercials is that they are too frequent and too long. ROBERT T. BOWER, *TELEVISION AND THE PUBLIC* 84 (1973). See also *ADVERTISING AGE*, June 25, 1973, at 10; ROPER ORGANIZATION, *WHAT PEOPLE THINK OF TELEVISION AND OTHER MASS MEDIA, 1959-1972* (1973).

22. The Washington Star-News, Feb. 28, 1973, at A-24. This report quotes the Rev. Robert McEwen, professor of economics at Boston College and president of the



advertising, assuming that broadcasting and broadcast advertising survive its implementation, would surely be to diminish, rather than to increase, the amount of information now available to the average consumer.

#### 8. *Counter-Advertising Is Unfair to Honest Advertisers*

Whatever case may be made for permitting counter-advertising in specific cases with reference to particular claims and products, it is difficult to construct any rational argument for requiring counter-advertising periods devoted to attack on any or all advertising. Virtually all product commercials are directed to promoting product brands rather than to discussing general issues, and advertisers are inhibited by knowledge that they cannot misrepresent or mislead. Counter-advertising advocates, on the other hand, are uninhibited by any constricting principles, and their statements already on file with the FCC demonstrate that they are prepared to attack all product advertising on such extreme grounds as the claim that consumers should spend less money for commercial products because the industrial establishment of the country is already too large and thus industrial production should be reduced. In the face of such attacks, advertisers would be confronted with the equally undesirable alternatives of either continuing to concentrate on the promotion of their brands, leaving the attacks unanswered, or of attempting, at substantially increased cost, both to promote their brands and defend their social position.

Although the desirability of decreasing the GNP may be a legitimate subject of public debate, there is no reason why the cost should be borne by, and the attack directed at, those advertisers who are unfortunate enough to use broadcast commercials. Counter-advertising would be a kind of public pillorying of all broadcast advertisers, without any charges, inquiry, hearing, evidence, or finding of fault or guilt. Such a system is contrary to the most elementary requirements of due process and fair procedure and is symptomatic of an impatience with due process of law and an insistence on instant remedies without regard to legal principles.

For those with a knowledge of history, counter-advertising is simply a sophisticated modern method of licensing buccaneers. Once the licensing is established, the financial demands, the payoffs, and the blackmail will begin. This pattern has already resulted with respect to threatened challenges to broadcast license renewals. To extend this system to

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Massachusetts Association of Consumers, as saying that "nothing ads" are a direct result of FTC efforts to impose more rigorous standards on advertising.

all broadcast advertisers is to invite a massive new corruption of American commercial life and to fasten a pernicious plague upon honest advertisers.

9 *Counter-Advertising Would Create Bars to Innovation, Improvement, and Entry of New Products into the Market*

It is particularly ironic that counter-advertising should be proposed by the FTC. One of the functions of that agency, in addition to policing advertising, is to enforce the antitrust laws. An important aspect of such enforcement is preventing the erection of economic bars to market entry. Probably the most effective method of introducing a new or improved product into the consumer market is by advertising. There may, indeed, be no other effective way. However, it is the claim of novelty, innovation, or improvement which is most likely to draw the fire of the anti-advertising brigade.

This phenomenon has been demonstrated in the field of ecology. Although some products have been improved so that they pollute less or aid in diminishing pollution, advertising claims of such developments seem to be particularly inciting to the self-appointed guardians of the environment.<sup>23</sup> Moreover, the FTC has indicated that such claims are inherently controversial and subject to rebuttal attack regardless of their truth or validity.<sup>24</sup>

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23. See, e.g., Alan F. Neckritz, 29 F.C.C.2d 807 (1971), 37 F.C.C.2d 528 (1972). This case involved the claim of Standard Oil Co. of California that its patented gasoline additive Chevron F-310 reduces unburned hydrocarbons and carbon monoxide in automobile exhaust emissions by significant and determinable amounts. On appeal to the Court of Appeals for the District of Columbia Circuit, complainants, together with a host of amici curiae, contended that regardless of the truth of the advertising claims such advertisements should be subjected to counter-advertising under the Fairness Doctrine. This author appeared as counsel for the advertiser, Standard Oil Co. of California. Complainants' demands were rejected by the FCC. As of the date this Article was prepared for publication, the case was still pending before the Court of Appeals.

24. The Statement of the Federal Trade Commission before the FCC in F.C.C. Docket No. 19260, part III, noted in pertinent part:

Many advertisers have responded to the public's growing concern with environmental decay by claiming that their products contribute to the solution of ecological problems, or that their companies are making special efforts to improve the environment generally. Similar efforts appear with respect to the public's concern with nutrition, automobile safety, and a host of other controversial issues of current public importance. While other approaches could, of course, be devised, the most effective means of assuring full public awareness of opposing points of view with regard to such issues, and to assure that opposing views have a significant chance to persuade the public, is counter-advertising.

There cannot be any serious doubt that it is desirable for products to be made and sold which ameliorate or contribute to the solution of environmental pollution problems. This can and will be done only if there is some practical way to gain entry into the market for such products. New or improved products that meet a public need are traditionally introduced into mass markets by advertising. There is no equally effective alternative. Advertising that is subject to government licensed and sponsored attacks is certainly less effective and less attractive than advertising which is simply required to be truthful and accurate. Consequently, it is certain that whatever other effect it may have, counter-advertising would act as another bar to the entry of new products into the market. Such a result not only would operate to increase market concentration and decrease competition but also would tend to discourage the development of new and improved products, particularly those which are ecologically beneficial.

10. *The Purpose and Effect of the Counter-Advertising Proposal Is To Increase Government Power*

A favorite topic of government officials is the evil of increasing concentration of economic power. There is no real dispute that the concentration of economic power is undesirable; the debate concerns whether the evidence demonstrates an increased concentration of power in the private sector. Usually neglected in such discussions is that concentration of power in public institutions has about the same social consequences as undue concentration in the private sector, and that economic and social power has undoubtedly become increasingly concentrated in government in recent years.

The tendency to seek power is natural. Government officials are not disembodied spirits inhabiting an ethereal realm where they seek only some holy grail called "the public interest." Government officials are flesh and blood people who are motivated by impulses common to all human beings. Probably the majority of individuals employed in and out of government are motivated primarily by the desire for monetary rewards. However, for most policymaking officials, in and out of government, the remunerative factor is less important than considerations of personal prestige and satisfaction.

Top executives in private enterprise seek money, or profit, at least in significant part as a measure and symbol of success. Achievement of this objective usually involves expanding sales or operations so that more business is transacted and more profit earned. In government the situa-

tion is similar, except that the money secured by expanding operations is called "appropriations" instead of "profits", greater prestige and satisfaction, as well as the success of increased appropriations, is secured by increasing the scope of agency operations through the expansion of jurisdiction or power. As a general rule, businessmen seek increased profits and government officials seek increased power. Businessmen do not always seek to increase their profit at whatever cost, and government officials do not always seek increased power. Nevertheless, more often than not, the profit motive will be explanatory of business action and the power motive of government action.<sup>25</sup> The power motive is to government what the profit motive is to business.

The consistent operation of the power motive can be verified by anyone reading the newspapers. An example, if any, of a government agency asking for diminished jurisdiction or less appropriations would be extremely rare and relatively insignificant. On the other hand, any week's news dispatches from Washington will carry numerous accounts of government agencies importuning Congress for more power and more money to exercise the increased power. The chairman of the FTC recently testified that the needs of that Commission cannot be appreciated properly by the Office of Management and Budget and that the FTC therefore should have the right to submit its budget request directly to Congress, obviously so that it will be able to ask and get bigger appropriations.<sup>26</sup>

At first glance the FTC proposal that the FCC require counter-advertising would seem to be inconsistent with operation of the power motive. It appears to be a suggestion from one agency that another agency's jurisdiction should be expanded. However, the appearance is illusory. If the FCC adopts the FTC proposal, the FTC will thereby demonstrate its own influence. Furthermore, it is clear that counter-advertising would attract every publicity seeker, eccentric, and a substantial portion of the lunatic fringe, and would invite statements and claims more false and deceptive than anything appearing in commercial advertising. In recognition of these possibilities, the FTC has stated that some

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25. See Loevinger, *The Sociology of Bureaucracy*, 24 BUS. LAWYER 7 (1968). Cf. ROBERT N. KHARASCH, *THE INSTITUTIONAL IMPERATIVE* (1973), where it is contended that government agencies and other bureaucratic institutions are motivated mainly by the purpose of maintaining their own existence. While there are some differences in implication between the power hypothesis and the institutional survival hypothesis as explanatory of government action, they have substantially the same significance for the analysis presented in this Article.

26. BNA ANTITRUST & TRADE REG. REP. No. 551, at A-17 (Feb. 22, 1971)

form of regulation or restraint of counter-advertising may be necessary, implicitly suggesting its availability

Authority to supervise counter-advertising claims would expand FTC power just at a time when that agency is losing some of its jurisdiction in other areas. The new product safety commission, for example, is taking over a significant segment of the consumer protection field formerly held exclusively by the FTC, and the proposed consumer agency threatens to displace the FTC as the principal consumer spokesman in the federal government. Thus, like an industrialist with a product that has become obsolete, the FTC must diversify into new fields in order to maintain its position.

The counter-advertising proposal is only part of the FTC effort to expand and diversify. That agency is also seeking to develop its own "fairness doctrine." In *Pfizer, Inc.*<sup>27</sup> the FTC declared that it would henceforth judge advertising not merely by whether it was false or deceptive but also by whether it was "fair" to the consumer. Fairness, in this sense, means that an advertiser must give the consumer whatever information the FTC regards as relevant and important. Thus, the FTC is moving from the function of preventing false, misleading, or deceptive advertising to the role of establishing standards based upon its concept of what is best for the consumer.

In its search for increased power, the FTC has both responded to and encouraged the general hostility to and distrust of business which has developed in the public in recent years. Like many government agencies, the FTC has accepted uncritically the idea that there must be a political remedy for every problem. Such a premise leads to the assumption that there should be a legal remedy for every complaint. The difficulty, of course, is that complaints are easy to voice, vary widely, and are often inconsistent, while legal remedies are difficult to formulate, relatively slow in operation, and usually less effective than expected, or even quite unforeseeable in effect. Furthermore, complaints are not satisfied, even by effective remedies, but tend to proliferate and escalate endlessly, while the power of law is limited. As a result, since it is literally impossible to devise legal remedies for all complaints, complainants continually demand more than legal authorities can possibly produce.

Nevertheless, by stimulating, encouraging, and responding to complaints, a government agency can create an active constituency supporting and encouraging its claims to power. This is what the FTC has done

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27. F.T.C. Docket No. 8819 (July 11, 1972), BNA ANTITRUST & TRADE REG. REP. No. 572, at D-1 (July 18, 1972).

in the past and appears to be the principal motivating force behind the counter-advertising proposal. In any event, the FTC has pleased its constituents.

If the proposal were adopted, the FCC would soon find itself in an area completely alien to it and one for which it lacks staff, experience, and appropriations. If the FCC were rash enough to reach for the FTC counter-advertising chestnuts, it would thus have to turn to the FTC for help in avoiding the fire. The inevitable result would be a vast expansion of the jurisdiction of the FTC without any action by Congress or the courts and without a scintilla of statutory authority. In effect, the FTC would have borrowed authority from the FCC to increase its own power. In the annals of government power-seeking, this would rank as a great coup d'état.

#### 11. *Counter-Advertising Would Increase the Power of Small Militant Groups*

Behind every powerful government agency there stand interested social or economic groups. For years it has been charged that specialized regulatory agencies were unduly responsive to the industry group they regulated. Agencies like the FTC, however, have until recently lacked the support of cohesive pressure groups. With the rise of militant and activist consumer movements, the FTC suddenly has found itself a pressure group. It has attempted to cement its developing alliance by being highly responsive to its constituency's demands for new remedies.

The counter-advertising proposal is one such response. Although the FCC had held a wide-open inquiry on the application of its Fairness Doctrine to commercials, and although the most activist and articulate consumer advocates had commented in that hearing, no one had yet suggested as radical and far-reaching a proposal as the FTC counter-advertising scheme. The reaction from the anti-advertising gang was similar to what would be expected from the oil industry if the Internal Revenue Service proposed increasing the oil depletion allowance to 50 percent.

If the FTC proposal were adopted, there would be immediate need for the production and presentation of a vast number of counter-commercials. These would certainly not come from advertisers or their agencies. The only plausible source would be the activist groups now supporting the FTC proposal. Such groups would thus be in the same position that a business enterprise would occupy if it were given a gift of 10 or 20 percent of all broadcast commercial time. The ideas of this

little group would suddenly assume immense importance, and its influence would be greater than that of any business or advertiser. The group would assume semi-official status, since the FTC and FCC would, of necessity, have to deal with its self-proclaimed leaders. This scenario is not mentioned in the FTC statement; however, this is the way reality works.

Although these small, activist, militant groups would obtain a large measure of political and economic power, there would be no assurance that their objectives at all coincided with the interests of the mass of consumers. No mechanism has been suggested or devised to test, much less insure, such representation. In fact, the agencies have expressed little concern about this question, as verbal volume seems to be more important than supporting numbers. Nevertheless, it is quite clear that the opposition to such groups is substantial. The head of a federal agency was applauded by hundreds of women leaders when she told them that television's "inordinate amount of time given to dissenters, protesters, and ne'er-do-well radicals is incomprehensible—and dangerous."<sup>28</sup> This and other indications suggest that it is imprudent and unwarranted to take a step that can result only in giving much additional power and media exposure to a small, vocal, but unrepresentative group.<sup>29</sup>

## 12. *Counter-Advertising Would Meet No Real Need and Solve No Important Problem*

It is banal to say that we are confronted with many important and serious problems today. The FCC requires broadcasters to survey the needs and interests of their communities, and, in effect, to ascertain and respond to community problems. As Senator Hartke has noted, the files of the FCC provide a rich mine of social information.<sup>30</sup> Perusal of these and other sources reveals many problems about which people are concerned, but advertising is practically never mentioned. War, crime, housing, racism, inflation, the economy and unemployment, drugs, taxes,

28. Washington Star-News, Dec. 7, 1972, at B-2; Washington Post, Dec. 7, 1972, at L-1, col. 1-6.

29. As Justice Douglas has said in an analogous case: "In 1973—as in other years—there is clamoring to make the TV and radio emit the messages that console certain groups." *Columbia Broadcasting System v. Democratic Nat'l Committee*, 93 S. Ct. 2080, 2112 (1973) (concurring opinion). The opinion of the Court in that case states that the Court cannot accept the "view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of his or her views. All journalistic tradition and experience is to the contrary" *Id.* at 2097.

30. 139 CONG. REC. 14,362 (daily ed. Sept. 8, 1972).

malfeasance in government, and similar matters are the problems which concern people. Advertising is at most a peripheral and at least a synthetic problem.

No doubt there are advertising abuses. There always have been, and probably always will be, abuses of every freedom. There continue to be false, misleading, and deceptive advertisements, although these are clearly fewer in proportion to the total amount of advertising than has been the case in the past. The FTC has ample power to deal with such abuses; moreover, broadcast industry agencies are assuming an increasingly significant role in detecting and preventing abuses.

Indeed, the FTC has stated that wherever product safety is involved, "scrupulous accuracy in advertising claims"<sup>31</sup> is required, and that "it is unlawful not to affirmatively reveal any limitations which may in fact exist"<sup>32</sup> or to fail to disclose the limits of safety claims. The FTC also insists that "advertisers are held to a high standard of care in making representations involving the safety of their products in order to assure to the greatest extent possible that their claims will not be misunderstood by the public."<sup>33</sup> In light of these standards, it cannot be contended that counter-advertising is necessary with respect to the safety of advertised products. Even beyond matters of safety, the FTC has stretched the limits of reasonableness in reading implied claims into advertising and requiring disclosures or disclaimers wherever there is any possibility that advertising claims may mislead. Thus, it cannot be asserted that counter-advertising is required to remedy any abuses involving falsity, misrepresentation, or deception of any kind.

The ironic fact seems to be that advertising today is not at all menacing but is simply annoying. The current complaints about advertising are that so much of it is irritating and boring. These qualities have been exacerbated by the highly visible and intrusive nature of television advertising, and counter-advertising would simply make matters worse. Counter-commercials would surely be less professional and more polemic and pedestrian than commercials. They would certainly be as boring as commercials, and, by adding to the volume of gabble and clutter, they would make broadcast advertising even more irritating to the public.

Although there is a certain amount of advertising which almost all of us find distasteful, this is not a social problem. The price we pay for free speech is toleration of distasteful and abusive expression. If we

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31. Firestone Tire and Rubber Co., F.T.C. Docket No. 8818 (Sept. 22, 1972).

32. *Id.*

33. *Id.*



permit only that speech which we find tasteful and agreeable, there is no free speech. Freedom exists only when we permit that which we dislike and disapprove. Similarly, the price we pay for a free economy is toleration of distasteful expression and excesses. An economy is not free when standards of taste and acceptability are prescribed by the state and deviations are subject to sanctions. There must, of course, be ultimate limits of social tolerance set by law. Advertising which is false, misleading, or deceptive is, and should be, prohibited and punished. Within these limits, however, a free economy cannot afford the imposition of official standards of propriety or acceptability.

Counter-advertising is an attempt to do just that. It is an effort to meet the loud vocal demands of a small group which has become the FTC constituency, even at the cost of introducing new economic impediments to entry and innovation and other rigidities and distortions into the marketing process. It is not a response to any crying abuse, need, or problem, and it is not discernibly related to any important social need or problem.

13. *Counter-Advertising Would Create a Host of New Problems, Including Possible Governmental Interference with the First Amendment Right to Free Speech*

Although counter-advertising would not solve any problems, it would certainly create some real ones.<sup>34</sup> Most significantly, any attempt by the government to determine which spokesmen and which viewpoints should be heard during time devoted to counter-advertising would result in the government's setting the agenda for the issues to be heard by the public, a situation hardly consistent with the freedom of speech contemplated by the first amendment. Furthermore, although the FTC suggests the possibility of limitations and prohibitions on the content of counter-advertising, there does not appear to be any legal basis for the exercise of such a power. The FTC has no jurisdiction to control any expression of views concerning products by persons not engaged in trade in such products.<sup>35</sup>

As indicated by cases which have already come before the FCC, it appears certain that the counter-commercial spokesmen will make state-

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34. The Supreme Court has noted that the attempt to provide free broadcasting time to those unable to afford commercial time would raise "incredible administrative problems." *Columbia Broadcasting System v. Democratic Nat'l Committee*, 93 S. Ct. 2080, 2097 n.17 (1973).

35. *Globe Cardboard Novelty Co. v. FTC*, 192 F.2d 444 (3d Cir. 1951); *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir. 1941).

ments which advertisers will regard as false, deceptive, and unfair. Will the advertisers then be entitled to reply time under the Fairness Doctrine, or will advertisers be required to purchase additional commercial time to reply to attacks on counter-commercial time? In either event, advertisers will be put to the burden and expense of defending themselves against charges which are, in effect, sponsored by the government, even though no government agency will have investigated them or determined that they should be brought. An even more troublesome possibility is that not only will advertisers not be given free reply time, they may be unable to purchase commercial time because the broadcaster may have reached his commercial limit with the added burden of counter-commercials or may be unwilling to incur the added risk of further rejoinders if he permits an advertising response to counter-advertising attacks. Under such circumstances, advertisers would be at the mercy of the most irresponsible and extremist factions or individuals.

There is also the probability, verging on certainty, that counter-advertising voices would raise innumerable controversial political and social issues, as they have already done. These issues include such modest proposals as limiting private expenditures, increasing taxation and government expenditures on public projects generally, prohibiting private automobiles and internal combustion engines, increasing our reliance on atomic power, prohibiting further construction of atomic power plants, prohibiting such products as personal deodorants, and prohibiting the sale of any drugs over the counter or the broadcast advertising of any drugs, including aspirin. How a broadcaster could maintain any balance in the face of such contentions, whether he would have to double the counter-advertising time and provide counter-counter-advertising, and whether broadcasting would become nothing but a medium for debate between the most dissident groups in society and their opponents are all problems squarely presented by the FTC proposal. However, no answers are so much as hinted.

.. The more closely the proposal is examined, the more complex the questions become, and there is no indication that any effort has or will be devoted to arriving at solutions before it is too late. What are the rights of a producer who believes that the advertised claims of superiority for a product competitive to his are exaggerated or false? Does a seller have the right to use counter-advertising time to correct what he regards as the misleading claims of a competitor? Or suppose it is discovered that some ardent counter-advertising advocate is, in fact,

subsidized, advised, or connected with the competitor of an advertiser who is attacked? What mechanism can prevent such incidents, and how can they be fairly handled when they occur if counter-advertising is institutionalized?

These are only a few of the manifold problems that will surely arise if the FTC counter-advertising proposal is implemented. The result is a scheme which neither solves nor responds to any important problem but which would certainly create at least several major problems. A charitable conclusion is that the proposal was not well considered.

#### 14. *Counter-Advertising Is the Antithesis of Free Speech*

Counter-advertising is urged in the name of free speech; indeed, on first impression it may seem that offering time to speak against the volume of broadcast commercials is an expansion of the right of free speech. More careful examination of the proposal, however, demonstrates that the free speech claim is quite specious and that counter-advertising is, by its very nature, government-mandated and controlled speech, not free speech.

Suppose that the FCC adopted a requirement for counter-advertising and that some public-spirited engineer demanded time to assure consumers that Chrysler cars really are engineered better than others. Can one conceive that he would be heard? Or suppose that a labor leader requested time to urge that consumers should buy domestic rather than imported products—automobiles, textiles, cameras, shoes, whatever—and to advise people what brands were manufactured by union labor in this country. Does anyone imagine that such a plea would be given counter-advertising time? It is the opposite viewpoints—that automobiles are not well engineered or that domestic products are produced in sweatshop conditions—which would surely be welcomed by counter-advertising “sponsors.” Although counter-advertising advocates might wish to quarrel with this formulation of acceptable and unacceptable views, the significant point is that inherent in the very concept of counter-advertising is the idea that certain viewpoints are entitled to a government mandate compelling their broadcast.

Thus, the demand for counter-advertising time is not a demand for free speech at all; rather, it is a demand that the government sanction and mandate a particular kind of speech and the expression of some special viewpoint. The proposal is wrong in principle and dangerous as precedent. If the government can mandate the expression of a specific

viewpoint in the economic realm, it can do so with equal logic and propriety in the political realm.<sup>36</sup> At this point, all pretense of free speech, an open society, and political democracy vanish, and the whole scheme becomes apparent for what it is—an effort to use the power of government to promote the expression of a particular viewpoint held by a favored articulate group. Such an effort is not redeemed by the fact that this group marches today under the banner of “consumerism.” Tomorrow the same group, or some other group with the same demand for government support of its viewpoint, may march under the banner of national socialism or communism, or some other ideology. The proposal that the government mandate the broadcast expression of any special viewpoint, no matter how defined, is basically subversive, inconsistent with, and dangerous to the American principle of government neutrality and protection of free speech.<sup>37</sup>

It is no secret that every administration believes that news reporting and commentary on its activities is unfair. Since the function of the

36. In *Columbia Broadcasting System v. Democratic Nat'l Committee*, 93 S. Ct. 2080 (1973), it was argued that the FCC was required to mandate the broadcasting of particular political views. The FCC had rejected this argument in *Democratic Nat'l Committee*, 25 F.C.C.2d 216 (1970), and *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970). However, a majority of the Court of Appeals for the District of Columbia Circuit ruled that broadcasters could not refuse editorial advertisements expressing political views, as a matter of policy, and that the FCC had the power and the duty to determine which editorial advertisements (and therefore which political views) broadcasters were required to present. 450 F.2d 642 (D.C. Cir. 1971). This decision was reversed by the Supreme Court.

37. See *Columbia Broadcasting System v. Democratic Nat'l Committee*, 93 S. Ct. 2080, 2098-99 (1973), where the Supreme Court observed that a government-mandated “right of access” to broadcasting involves “the risk of an enlargement of government control over the content of broadcast discussion of public issues.” The Court continued:

Under a constitutionally commanded and government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the [Federal Communications] Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy, for the ailments respondents complain of.

The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for a speculative gain is not warranted.

media is to criticize, rather than to tout, the operation of government, there may indeed be some basis for such views. The logic of counter-advertising would warrant the government in requiring the establishment of a regular pro-administration broadcasting period when only spokesmen favorable to the current administration would be allowed to speak. Logically this would lead to a demand that a specific period be set aside for the opposition viewpoint; very shortly the determination of what viewpoints should be expressed and what spokesmen heard would be entirely a function of some government agency. It cannot be seriously maintained that this would be free speech or a practice permissible under the first amendment.

It is unnecessary to decide whether the principle of counter-advertising would be extended beyond the proposal now before the FCC. That proposal itself only masquerades as free speech. Its true essence is the absolute antithesis of free speech. Counter-advertising, by its very nature, is government-mandated and controlled speech, and represents the epitome of government control which the first amendment was designed to outlaw forever in this country in order to preserve truly free speech. It must always be remembered that it is a free press, not a "fair" press, that is required by the Constitution.<sup>38</sup> Freedom in a large and diverse country will ultimately produce fairness, but a government-balanced "fairness" cannot produce freedom.

Broadcasting today carries much counter-advertising material. It is the principle of government mandate and control that is objectionable in the present proposal. The exercise of government power to establish periods for the broadcast expression of any government-specified or controlled viewpoint is inherently contrary to the whole concept of free speech and free press.<sup>39</sup> In that sense, counter-advertising is a dangerously subversive proposal.

#### 15. *The Counter-Advertising Proposal Can Be Explained Only as a Political Power Play*

When examined analytically, the counter-advertising proposal simply makes no sense from the logical, economic, or sociological viewpoint. It can be understood only when analyzed in political terms.

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38. As Justice Stewart observed in his concurring opinion in *Columbia Broadcasting*: "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice." 93 S. Ct. at 2108.

The first and most obvious effect of counter-advertising would be to impose substantial additional cost on broadcasting and drive at least some advertising away, thus reducing revenue. By almost any calculation, this would wipe out the overall profit margin of both radio and television. Ultimately, because of ever-increasing needs for subsidy or support, broadcasting would become subject to government control. Presumably this process would be gradual, during which time broadcasters would be increasingly subject to the influence and control of the most militant and persistent counter-advertising advocates.<sup>40</sup> These groups certainly have reason to believe that government agencies which adopt their counter-advertising proposal despite the strong objections to it will continue to be responsive after substantial control of broadcasting has moved from present management to government.

Whether counter-advertising would result in an expansion of what now is referred to as "public broadcasting" or whether it would produce some new form of government subsidy and control of present commercial broadcasting facilities is an unimportant detail. The impact will surely be to transfer effective control from the numerous diverse licensees now operating the more than eight thousand licensed stations<sup>41</sup> to some government agency controlled by the political administration of

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39. Although *Columbia Broadcasting* resulted in six separate opinions, it is notable that five Justices (Burger, White, Blackmun, Powell and Rehnquist) thought that the proposal for government-mandated access to broadcasting was contrary to the public interest and involved a dangerous extension of government control over speech, while two other Justices (Douglas and Stewart) thought the danger of extending government control over speech was so great as to contravene the first amendment. Only two Justices (Brennan and Marshall) favored officially mandated access to broadcasting facilities. In view of the recent disclosures of official activity in the "Watergate" investigations, one wonders how any believer in democracy can favor any proposal to increase government power or influence over the mass media in any respect.

40. In *Columbia Broadcasting*, the Court noted that broadcasters are likely to be more responsible and accountable than those who importunately seek access to broadcast facilities: "No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be 'robust, and wide-open' does not mean that we should exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators." 93 S. Ct. at 2097-98.

41. As of May 31, 1973, there were 7,756 commercial radio and television stations and 914 educational FM and television stations authorized to broadcast, for a total of 8,670 authorized broadcasting stations. Of this number, 7,538 commercial radio and television stations and 823 educational FM and television stations were actually on the air, for a total of 8,361. BROADCASTING, July 9, 1973, at 48.

the country and responsive to the most militant advocates of a favored viewpoint.

Basically, the counter-advertising proposal is simply an echo of the demand that the power of business be curbed and that the power of government agencies and their politically militant supporters be increased. Business and journalism, both print and broadcast, are the two groups in contemporary society strong enough to offer some significant opposition to and criticism of government. In recent years, although government control of business has been extended in many ways, the fundamental freedoms of speech and of the press have been maintained. Further extension of government controls may endanger these freedoms, particularly when such controls are directed at the economic foundation of the journalism business.<sup>42</sup>

The FTC is now busily engaged in extending its power over advertising. If counter-advertising is instituted, government agencies will have the power to encourage and direct attacks on business without any responsibility for such attacks, and will also have the power to control a large part of the public discourse in a manner never before attempted in this country. The combination of these powers, together with increased economic power over the broadcasting medium, would create a degree of government control over American social and political life that is unprecedented in our history. No complaints about advertising have ever charged abuses grave enough to justify such a threat to our fundamental rights.

The massive power held by the government should not be mobilized for any causes but those having genuine social significance. The abuses which the FTC now claims to be attacking are at worst peripheral annoyances. The damage which the FTC proposal may cause to our social, economic, and political structure is vastly greater than any injury which is likely to result from the annoyance of advertising abuses.

The big story today is not what advertising is doing to politics, but what politics is doing to advertising. Politics is attempting to turn advertising on its head by establishing counter-advertising, an effort which, if successful, would change advertising from an instrument of competition in a free economy to a servant of government and an instrument of propaganda or government-sanctioned viewpoints. Freedom of the press would be endangered, and the political process itself would run the risk of subversion. Defeat of the counter-advertising proposal will not merely

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42. Compare the statement of the Supreme Court in note 37 *supra* with *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

save the institution of advertising and help preserve a competitive economy, it will also help to preserve the democratic values of American politics.