7-31-1974

Correspondence Between Dane J. Durham, Roger J. Traynor, and Roscoe L. Barrow, 1974 July 31-1974 August 20

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*The Hastings Law Journal*

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August 20, 1974

Professor Roger J. Traynor
2643 Piedmont Avenue
Berkeley, California 94704

Dear Professor Traynor:

Enclosed is a copy of a supplementary statement prepared by Professor Barrow.

Sincerely,

Dane J. Durham
Articles Editor

DJD/ceb

Enclosure
August 20, 1974

Mr. Dane J. Durham
Articles Editor
The Hastings Law Journal

Dear Mr. Durham:

Your letter of August 2, reminding that an outline of my article should be provided so that Judge Traynor can prepare the introduction to the communications symposium issue, came during my absence on vacation.

Upon receiving your first letter, that of May 7, I sent directly to Judge Traynor a statement of the theme of my article. However, as you are sending additional material to him, I will amplify my statement below:

THE FAIRNESS DOCTRINE: A DOUBLE STANDARD FOR ELECTRONIC AND PRINT MEDIA

A brief introduction uses Miami Herald and Red Lion to evidence the double standard adopted by the Supreme Court in regard to fairness in reporting on issues involving personal attack. The purpose of the article is to assess the merit and validity of this double standard.

The first section of the article, entitled "The Need of the People to Know", reminds that our government is a representative democracy in which social readjustment is achieved through participation by the people in the decisionmaking process. It points out that, while the mass media are capable of supplying the information necessary for the people to participate in self government, these media tend to represent the point of view of the owners and managers unless contrasting viewpoints on controversial issues of public importance are required. It then traces the preferred position given to freedom of speech and press under our Constitutional Law, borrowing from Hand, Holmes and others to show that this position exists because of the paramount importance of the free exchange of ideas to self-government.

The second section, entitled "The Fairness Doctrine in Broadcasting", draws from legislative history to show that Congress was concerned that through network broadcasting a few interests might be able to dominate opinion on issues. The key cases are then discussed, it being appointed out that, while scarcity of the radio spectrum is the principal basis for holding that the requirement that broadcasters present opposing viewpoints on public issues and devote a reasonable amount of time to broadcast of such issues, the courts have recognized that there is a freedom of speech of listeners and viewers as well as a freedom of speech and press of broadcasters involved in the first amendment issue in broadcasting, and that the interest of the listeners and viewers is paramount. This section treats some of the recent limitations on the doctrine as evidenced by the Supreme Court in Democratic National Committee and Business Executives' Move for Vietnam Peace. On July 18, 1974, the FCC announced its report on its new two year study on the Fairness Doctrine. This had delayed writing the article, as the report has only recently come to hand. However, the Fairness Doctrine is reviewed in the light of this new report. Also, attention is given to the views of various groups that the Fairness Doctrine should be abandoned in broadcasting. The article...
concludes that the Fairness Doctrine should be retained in broadcasting.

The third section, entitled "The Fairness Doctrine in Cable Television", follows a structure similar to that in the second section focusing upon the Cable Television Rules, which apply the Fairness Doctrine to Cable Television, and analyzing the pros and cons of applying the Fairness Doctrine to Cable Television.

The fourth section focuses on right-to-reply statutes and the Miami Herald case. Notwithstanding the unanimous opinion of the Supreme Court holding in Miami Herald that Florida's right-to-reply was an unconstitutional infringement of freedom of the press, it is believed that in the context of a personal attack by a newspaper on a political candidate during a political campaign, the Supreme Court could have validly held that such a statute in this context is consistent with the first amendment. Nevertheless, there is a persuasive basis for distinguishing the electronic and print media. Three television networks blanket the broadcasting stations of the United States during prime time - the important viewing time. Hence, the impact of sight, sound and motion on substantially the entire population simultaneously is much greater than the influence of chains of newspapers and individually owned newspapers. This section of the article has not been written, and perhaps Judge Traynor would wish to say as little as possible about this area in writing his introduction.

Also, in the article attention has been given to the practicality of securing responsibility and fairness in reporting of the news through the overview of citizens' committees such as Judge Traynor has been the founding Chairman.

Sincerely,

Professor Roscoe L. Barrow
August 19, 1974

Professor Roger J. Traynor
2643 Piedmont Avenue
Berkeley, California 94704

Dear Professor Traynor:

Enclosed is Messrs. Cameron DeVore and Marshall Nelson's outline of their article, Commercial Speech and Paid Access to the Press.

Insofar as I have not received a reply to my letter to you of August 8, allow me to reiterate the Journal's concern at the possible loss of your contribution. We sincerely hope that you will be able to complete your introduction during your stay in Cambridge.

Sincerely yours,

Dane J. Durham
Articles Editor

Enclosure
COMMERCIAL SPEECH
AND
PAID ACCESS TO THE PRESS

By P. Cameron DeVore
Marshall J. Nelson

I. INTRODUCTION

With the exception of political advertising and so-called "advertorials," advertising, like obscenity, has been pretty much drummed out of the First Amendment. But where obscenity has at least some ceremony of due process, commercial speech is summarily dismissed on the basis of its label.

The assumption, largely unanalyzed, is that commercial advertising is undignified and of less social value than other forms of speech. On another level, there is a second assumption on the part of many lawyers and judges that commercial speech has been held by the courts to be totally without First Amendment protection.

This article will explore both assumptions, primarily in the context of the printed media. This is not meant to minimize the significance of recent cases in the area of the broadcast media, but the present regulatory framework based on the scarcity of broadcast frequencies, and the consequent treatment of broadcasters as public trustees, raises additional considerations beyond the scope of this article. Many of these are, presumably, covered in another article in the symposium. Antitrust considerations are similarly given cursory treatment as they, too, are covered elsewhere in the symposium. In general terms, the focus of the article is on the place of advertising or "commercial speech" in, to borrow Professor Emerson's phrase, "the system of freedom of expression."

The question is not as simple as whether commercial speech is or should be protected under the First Amendment. Commercial advertising can be cast in at least four separate roles, each of which raises First Amendment questions:

1. Advertising is the economic base of the communications media. A prohibition against all advertising would virtually eliminate the daily newspaper and broadcasting as we know them.
2. At the same time, advertising is part of the content of the media, for which publishers and broadcasters can be held liable and which is subject to their editorial judgment.

3. Advertising is also the individual's means to the forum of the mass media. [Quote New York Times v. Sullivan.] This role may create direct conflicts with the concept of advertising as content, set out in #2.

4. Advertising is undeniably speech in its own right.

As we shall see, much of the confusion surrounding the treatment of commercial speech arises from a failure to recognize these several facets.

II. THE COMMERCIAL SPEECH DOCTRINE.


C. The Doctrine in the Supreme Court.


The court in Pittsburgh Press carefully limited its holding to the facts at hand. In doing so, it suggested three areas of limitation on operation of the commercial speech doctrine.

1. The "financial threat" limitation.

This is not a case in which the challenged law arguably disables the press by undermining its institutional viability ... Nor does Pittsburgh Press argue that the ordinance threatens its financial viability.

2. The "impairment of editorial judgment" limitation.

Under some circumstances, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of the advertisement and, in those cases, the scope of the newspaper's First Amendment protection may be affected by the content of the advertisement.
This and several other quotations, taken together, recognize the editorial judgment involved in determining the advertising content of the newspaper and impliedly reserve the possibility that this judgment is entitled to First Amendment protection. The subsequent opinion in *Miami Herald Publ. Co. v. Tornillo* reinforces this view.

3. The "illegal subject matter" limitation.

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

[Transition.] These limitations or reserved questions provide another framework for discussion of the various roles of advertising suggested in the introduction:

--The financial threat limitation recognizes the role of advertising as the economic base of a free press;

--The illegal subject matter limitation leaves open the possibility that a lawful advertisement may be speech entitled to some protection in its own right;

--The discussion of the role of editorial judgment recognizes that the advertising content of the media is, to some extent, a matter of editorial judgment which, although it is not specifically discussed, raises the conflict between the exercise of this judgment and the claimed right of individuals to access to the forum of the mass media.

III. THE EDITORIAL JUDGMENT TO REFUSE ADVERTISING VS. THE RIGHT OF ACCESS.

A. Non-Political Advertising.

1. *associates and Aldrich Company v. Times Mirror Company*, 440 F.2d 133 (9th Cir. 1971) (Commercial ad for motion picture).

3. Others, including implications of Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).


C. "State Action" Concept--Comparison With Broadcasting Cases.


[Transition.] Query: If the newspaper has a First Amendment right to accept or refuse advertising altogether and the concomitant right to control its content (see Associates and Aldrich case), how does it follow that the content they do accept is commercial speech without First Amendment protection?

IV. REGULATION OF ADVERTISING.

This section does not attempt to be a complete survey of advertising law. Various areas of regulation are discussed as illustrative of the application of the commercial speech doctrine and in the context of the First Amendment questions raised.

A. False and Misleading Advertising.

B. Prohibitions Against Types of Advertising.

C. Civil Rights Acts.

D. Securities Acts.

E. Judicial "Regulation"--Libel and Privacy.

F. Unfair Competition, Trademark and Copyright.

V. BEYOND PITTSBURGH PRESS AND TORNILLO.

A. Reject any per se distinction between commercial and non-commercial speech. Regulation against false and misleading advertising and other abuses may very well be constitutional under normal First Amendment analysis. In addition, there may, in fact,
be a valid distinction between the "marketplace of ideas" and the commercial market, but the distinction itself must be framed in First Amendment terms.

B. It is important to distinguish between protection for commercial speech, itself, and the First Amendment protection of the press as an institution. "Aiding and abetting" provisions in social legislation, which render the newspaper liable for carrying offending ads may be unconstitutional.

C. At very least, there must be some recognition of First Amendment due process in denying protection to commercial speech. See Fur Information & Fashion Council, Inc. v. E. F. Timme & Son, Inc., 364 F. Supp. 16 (S.D.N.Y. 1973):

While Congress may limit [advertisers' First Amendment] rights to prevent fraud, copyright infringement or palm­ing off, such limitations must be drawn narrowly, so as to meet the perceived evil, without unnecessary infringement on the right of free speech.
August 8, 1974

Professor Roger J. Traynor
2643 Piedmont Avenue
Berkeley, California 94704

Dear Professor Traynor:

I must begin by admitting that I have proceeded under the misconception that your introduction would be based upon the summaries which have been requested. If I had realized that the finished manuscripts were needed within the time set out in your letter, I would have informed the authors of this fact earlier in the summer. However, all is not lost, for the contributors to this symposium were all given August 1 deadlines for the submission of their manuscripts. Extensions have been requested by three authors: Professor Barrow (August 31); Mr. Devore (September 1); Mr. Kehe (October 1). At present, only Mr. Friendly's speech is in our possession, but I shall impress upon the remaining authors the urgency of early submission of their articles.

Publication of this symposium could proceed without your introduction, but in doing so, the Journal would suffer an immeasurable loss. Therefore, the entire staff will do all it can to facilitate the preparation of your introduction. The first thing we can promise is to forward to you copies of each manuscript as we receive them. Naturally we anticipate that no editing of your contribution will be necessary. However, if you require student assistance, this would be provided without delay. Correspondence between Cambridge and San Francisco would involve some delay, but given the fact that the publication of most past issues has been tardy, the immediate problem does not appear to be significant.

I sincerely hope that this proposal will meet with your approval.

Sincerely,

Dane J. Durham
Articles Editor

Enclosures
July 31, 1974

Mr. Robert J. Russell
Articles Editor
The Hastings Law Journal
198 McAllister Street
San Francisco, California 94102

Dear Mr. Russell:

I am sorry to have to take advantage of the offer of your associate Mr. Bergin, and ask for an extension of the deadline on my contribution to your Free Speech and the News Media symposium.

I have a second draft done, but will not be able to mail the final one to you until August 9, the day I go on vacation. At this moment, I have about 6,000 words of text and 99 footnotes, but, of course, these figures -- especially the latter -- are likely to change.

I must also apologize to Judge Traynor for not having sent an outline.

My article is tentatively called "Branzburg v. Hayes and the Developing Law of Qualified Newsman's Privilege". I will deal extensively with Justice Powell's opinion in Branzburg and then cover the 25 cases which have been decided since then.

I believe Powell adopted a qualified newsman's privilege in his opinion, and that a number of the later cases have done likewise. Thus, Branzburg may have provided more protection in practice than was feared at the time it was handed down.

I sincerely regret the delay, but promise I will make every effort to see that the article was worth waiting for.

Sincerely,

James C. Goodale

JCG:rm
August 2, 1974

Professor Roger J. Traynor
2643 Piedmont Avenue
Berkeley, California 94704

Dear Professor Traynor:

Enclosed are four summaries of articles which are being prepared for the symposium on Free Speech and the News Media. As you are aware, the Journal has a copy of Mr. Fred W. Friendly's speech, entitled "The Nervous Breakdown Of The First Amendment." If you would like a copy of Mr. Friendly's speech to work from, please let us know.

We are still awaiting outlines from the following authors: P. Cameron Devore ("Commercial Speech and the First Amendment"), James Goodale ("Reporter's Privilege and Shield Laws") and Roscoe Barrow ("The Fairness Doctrine"). These writers are being contacted this week, and copies of their outlines will be forwarded to you as soon as we receive them.

If you require any further assistance, please do not hesitate to write or call the Journal office.

Sincerely,

Dane J. Durham
Articles Editor

DJD/ceb

Enclosures
3 August 1974

Mr. Dane J. Durham
Articles Editor
The Hastings Law Journal
Hastings College of the Law
198 McAllister Street
San Francisco, CA 94102

Dear Mr. Durham:

Your letter of 2 August enclosed "four summaries of articles which are being prepared for the symposium on Free Speech and the News Media," by James J. Boosnahan on Times v. Sullivan and its Progeny:

David O. Kehe on Do We Really Need First Amendment Antitrust Protection For the Media;

C. Delos Putz, Jr. --no proposed title as yet.
(Article will deal with Fairness Doctrine)

Marshall W. Krause on The More Public Trial: Justice Needs Television

You write that you "are still awaiting outlines" from the following authors:

P. Cameron Devore (Commercial Speech and the First Amendment);
James Goodale (Reporter's Privilege and Shield Laws) and
Roscoe Barrow (The Fairness Doctrine)

I will be glad to read over Mr. Fred W. Friendly's speech on The Nervous Breakdown of the First Amendment if you want to send it along.

Do you know when all of the articles set forth above will reach your office in final form? There would have to be adequate time for me to read them over before putting together a foreword that would relate to them. I will assume, unless I hear otherwise from you, that you will be sending on all the completed articles within the next two weeks. Otherwise there would hardly be time for the task you have asked me to undertake, given the approaching time of my departure for Cambridge.

Yours sincerely,

Roger J. Traynor