

1-1-1988

Brothels in the marketplace of ideas: Toward a heuristic definition of commercial speech

Marc S. Charisse
University of Nevada, Las Vegas

Follow this and additional works at: <https://digitalscholarship.unlv.edu/rtds>

Repository Citation

Charisse, Marc S., "Brothels in the marketplace of ideas: Toward a heuristic definition of commercial speech" (1988). *UNLV Retrospective Theses & Dissertations*. 24.
<http://dx.doi.org/10.25669/3b4c-uwnu>

This Thesis is protected by copyright and/or related rights. It has been brought to you by Digital Scholarship@UNLV with permission from the rights-holder(s). You are free to use this Thesis in any way that is permitted by the copyright and related rights legislation that applies to your use. For other uses you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself.

This Thesis has been accepted for inclusion in UNLV Retrospective Theses & Dissertations by an authorized administrator of Digital Scholarship@UNLV. For more information, please contact digitalscholarship@unlv.edu.

INFORMATION TO USERS

The most advanced technology has been used to photograph and reproduce this manuscript from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book. These are also available as one exposure on a standard 35mm slide or as a 17" x 23" black and white photographic print for an additional charge.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

U·M·I

University Microfilms International
A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA
313/761-4700 800/521-0600

Order Number 1337604

**Brothels in the marketplace of ideas: Toward a heuristic
definition of commercial speech**

Charisse, Marc S., M.A.

University of Nevada, Las Vegas, 1989

U·M·I
300 N. Zeeb Rd.
Ann Arbor, MI 48106

BROTHERS IN THE MARKETPLACE OF
IDEAS: TOWARD A HEURISTIC
DEFINITION OF COMMERCIAL
SPEECH

By Marc S. Charisse

A thesis submitted in partial fulfillment
of the requirements for a

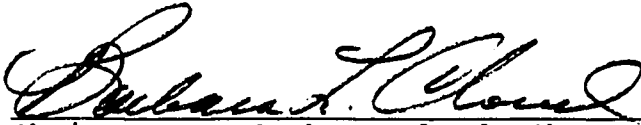
Master of Arts

in

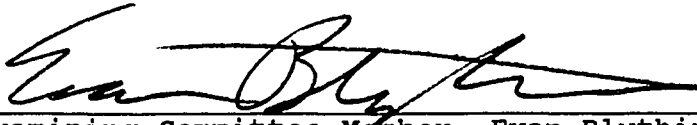
Communication Studies

Department of Communication Studies
University of Nevada, Las Vegas
April, 1989

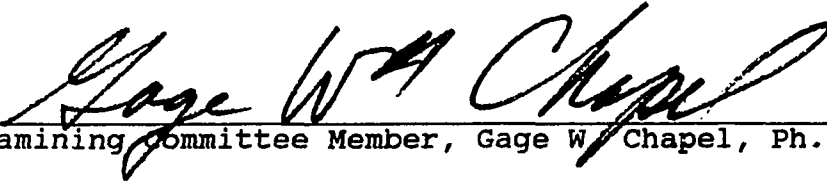
The thesis of Marc S. Charisse for the degree of master of arts in Communication Studies is approved.



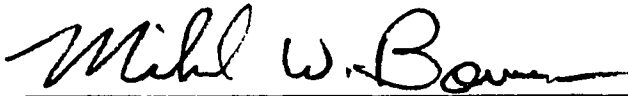
Chairperson, Barbara Cloud, Ph.D.



Examining Committee Member, Evan Blythin, Ph.D.



Examining Committee Member, Gage W. Chapel, Ph.D.



Graduate Faculty Representative, Michael W. Bowers, Ph.D.



Graduate Dean, Ronald W. Smith, Ph.D.

University of Nevada, Las Vegas
April, 1989

ABSTRACT

Nevada's legal brothels offer a unique opportunity to study the problem of defining commercial speech. Although state law forbids advertisements of houses of prostitution in counties where brothels themselves are against law, brothel messages are abundant in Clark County, where any form of prostitution is illegal. The publishers of these messages claim they are constitutionally protected editorial speech rather than advertisements which enjoy little or no First Amendment protection, thus confounding the efforts of prosecutors who say they would otherwise move to remove such messages from public display.

The thesis examines the development of the U.S. Supreme Court's commercial speech doctrine and those definitions of commercial speech which have been suggested by jurists and scholars. The limitations of these definitions are illustrated by applying them to the Nevada brothel messages.

Finally, a heuristic definition of commercial speech, based on the Masses standard currently used in adjudicating sedition cases is suggested. The position is taken

that the line between commercial and non-commercial speech is the line between abstract economic discussion and incitement to a specific economic transaction. The strengths and weaknesses of the proposed definition are also illustrated by applying it to the brothel messages.

TABLE OF CONTENTS

Chapter One: Introduction 1

Chapter Two: The Commercial Speech Doctrine 9

 The Commercial Speech Exception . . . 12

 The Exception's Gradual Demise . . . 15

 Retrenchment 26

Chapter Three: Various Philosophical Assumptions. . . .39

 The Meiklejohn Paradigm 40

 The Self Expression Paradigm 48

 Rationalizing the Regulation of
 Commercial Speech 52

Chapter Four: Brothel Messages in Nevada 56

 Comment or Advertising? 61

Chapter Five: Defining Commercial Speech 78

 Message-Based Definitions 79

 Speaker Intent. 81

 Communication Context 86

 Combining the Components 87

 The Question of Harm 90

 The Speech/Action Nexus 93

Chapter Six: A Heuristic Definition 97

 Applying the Definition 102

 Conclusion 104

Appendices 111

Cases Cited 114

Works Cited 117

ACKNOWLEDGEMENTS

I would like to thank the following individuals:

The Graduate Student Association, for funding which provided reproductions of brothel messages as well as offset the financial burden of legal research; Drs. Evan Blythin and Gage Chapel, whose challenging criticisms produced more than one epiphany during the course of the project; Dr. Michael Bowers, whose constitutional expertise and legal insights improved the finished product; attorneys Joshua Landish and Mahlon Edwards, whose generous donation of time and files made the timely completion of the thesis possible; Dr. Barbara Cloud, whose comments, support, analysis, careful editing, and friendship kept the project going; and most important my wife, Pat, whose saintly patience and lonely weekends I hope someday to be able to repay.

CHAPTER ONE

INTRODUCTION

"[I]n a sense, advertising is the pornography of capitalism, intended to arouse desire for objects rather than for persons." (Farber 383-384)

Erotica has long been used by advertisers as a sales tool without raising constitutional concerns. But when it is sex itself that is for sale, in the case of legalized Nevada prostitution, the issue of whether or not brothel messages can be disseminated raises interesting First Amendment concerns in the area of commercial speech. Brothel prostitution is allowed by Nevada law in all but two of the state's 17 counties (NRS 244.345; see Appendix A). Advertising these houses of "ill fame or repute," as they are referred to in the law, is similarly prohibited in the two counties, Clark and Washoe, which contain the state's two largest cities, Las Vegas and Reno. Nevada Revised Statute 201.430 makes brothel advertising a misdemeanor punishable by a \$500 fine in those counties where houses of prostitution are prohibited; the law defines such advertising to include, "any display, handbill, pub-

lication of address, location or telephone number of a house of prostitution or of directions telling how to obtain such information" (See Appendix B).

Despite the law, there appears to be an abundance of brothel advertising in Las Vegas. Booklets and magazines distributed free in newsracks in high tourist traffic areas contain what appears, prima facie, to be advertising. These flyers, found under a variety of names, commonly contain maps giving directions to Nevada brothels, telephone numbers of those businesses, references to limousine service and other information in seeming violation of state statute. Most of the flyers also describe various brothels or offer comment on the role of prostitution in American society. As AIDS has increasingly become an issue of public concern, some of the messages claim brothels offer safe sex.

While the content of the messages varies somewhat, they all have one thing in common: all claim not to be advertisements, but constitutionally-protected editorial content, thus frustrating the efforts of county officials who say they would otherwise act to stop publication. Mahlon Edwards, the deputy district attorney in Clark County whose duties include prosecution under statutes regulating adult businesses, said the difficulty in drawing a legal distinction between commercial and non-commercial speech is at least one of the factors which keeps his office from acting against the publishers of brothel messages

(Edwards).

Edwards was not alone in his uncertainty. The line between speech more fully protected by the First Amendment and that which jurists and scholars have come to label "commercial speech" has never been distinct. The U.S. Supreme Court has evolved a complicated commercial speech doctrine. Nevertheless, as Rome and Roberts have pointed out, "To date, the Supreme Court has failed to formulate a precise definition of commercial speech" (108). While a few scholars have attempted definitions, no one definition seems adequate. The purpose of this thesis is to investigate the difficulties of precisely defining commercial speech by applying extant definitions to examples of contemporary Nevada brothel messages. Then, a heuristic definition of commercial speech based on the standards the Court has come to apply to sedition cases is suggested. Although this definition, too, has its shortcomings, it is the position taken by this thesis that the definition is a valuable starting point from which to begin further research into the problem of defining commercial speech. A more workable definition of commercial speech is important because, without one, the status of more fully protected speech is threatened. As Simon has noted:

The lack of a workable definition presents serious questions about First Amendment theory and its application . . . Many in the legal community are concerned that diminished protection may spread from

commercial speech to "core" speech like an infectious disease. There is evidence in a number of cases that this fear is reasonable (216-218).

Despite the importance of clear definitions, the problem of distinguishing commercial from non-commercial speech has received scant attention. As Simon pointed out, "Both the Supreme Court and its critics have been relatively unconcerned with the problem of defining commercial speech. Rather, discussion has mainly concerned the analysis of the actual and proposed tests used in deciding disputes" (219).

That does not mean that the definitional issue has been ignored. But neither scholars nor jurists have yet isolated a definition which is without significant problems. Justice William Brennan put the problem succinctly in his concurring opinion in Metromedia Inc. v. City of San Diego:

I would be unhappy to see city officials dealing with the following series of billboards and deciding which ones to permit: the first billboard contains the message, "Visit Joe's Ice Cream Shoppe"; the second, "Joe's Ice Cream Shoppe uses only the highest quality dairy products"; the third, "because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe"; and the fourth, "Joe says to support dairy price supports: they mean lower prices for you at his Shoppe." (538)

This thesis will suggest means, grounded in well-accepted constitutional principles, by which to begin to make such determinations. But rather than deal in hypothetical examples, it will utilize Nevada brothel messages as real instances on which to test theoretical definitions of commercial speech. By focusing these definitions on Nevada brothel messages, the workability of each definition should become apparent.

Nevada brothel messages are a particularly well-suited locus from which to examine the definitional problems surrounding the commercial speech doctrine. In addition to ensuring definitions that are applicable to actual situations, the brothel messages themselves contain what appears to be a mixture of commercial and non-commercial elements. Such mixed messages have seemed especially difficult to deal with in definitional terms, as will be seen in subsequent chapters.

Also significant is that legal prostitution is an ongoing political issue in Nevada, both because of its economic importance to some of the smaller counties and because of the public health issues it raises in an AIDS-conscious era. A focus on brothel advertising also serves as a reminder that messages which raise genuine political concerns are not always those which one would intuitively categorize as fundamental to the First Amendment. Legitimate political controversy can just as easily center on images which, as Justice John Paul Stevens wrote, "few of

us would march our sons and daughters off to war to preserve the citizen's right to see" (Young v. American Mini Theaters, Inc. 70).

By applying abstract definitions to actual examples, one also avoids the danger of overemphasizing hypothetical concerns at the expense of sound theory. Simon has written that, "[l]aw reviews have featured abundant materials on commercial speech. Few, however, have sought a definition precise enough to be useful in deciding cases As a result, theoretical speculation has prevailed over application" (229-230). Pritchard has criticized much media law research for its institutional emphasis and its focus on precedent and the "correctness" of court decisions. This institutional paradigm is fine, Pritchard said, for "the study of philosophy or moral principles," (56), but it is also limiting. To cite Friedman and Macaulay: "To make formal rules and formal institutions the center of attention, and to ignore the way events, values and people affect them would distort the picture badly" (32). Focus on extant brothel messages will offer insight into the actual ways in which communicators confront the commercial contours of First Amendment theory.

Before addressing in detail the definitional issues at the heart of this thesis, some theoretical background is needed. In Chapter Two, the evolution of current commercial speech doctrine, as articulated in the relevant decisions of the U.S. Supreme Court, is traced. Then, the

philosophical assumptions which inform the various positions the Court has taken with regards to First Amendment protection for commercial speech are discussed in Chapter Three. Contemporary Nevada brothel messages and their relationship with changes in state law are examined in Chapter Four. Those definitions that have been suggested by jurists and scholars are applied in Chapter Five to the brothel messages. The various definitional approaches are evaluated, with the advantages of and problems with each discussed. Finally, in Chapter Six, the problem of distinguishing commercial from non-commercial speech is analogized to the Masses standard suggested by Judge Learned Hand: That the court recognize a difference between abstract speech and advocacy of specific acts. It is argued that if this standard works in the political sphere, it ought to be equally useful in the economic marketplace. Hard cases will no doubt remain. But this should not dissuade us from moving in the direction of greater definitional precision, if only to understand the limitations of any such attempt. Laurence Tribe has observed:

That there are and will remain hard cases -- is the coal company's ad proclaiming its concern for the environment and warning of the hazards of nuclear fuel commercial speech or political expression? -- is an insufficient reason either to return to the unprincipled extreme of excluding all commercial

speech from First Amendment protection or to embrace the equally indefensible position that government cannot stop someone from selling 7-Up claiming it to be insulin. (895)

Tribe's observation points out two widely disparate views of the proper position of commercial speech in the scheme of the First Amendment. It is this author's hope that the definition to be proposed in this thesis is one that will be useful to students of the First Amendment, however their views diverge. In the final analysis, fostering agreement between scholars with significantly divergent political and legal philosophies by approaching definitional issues from a principled perspective all can agree with is the highest aspiration of this inquiry.

CHAPTER TWO
THE COMMERCIAL SPEECH DOCTRINE

It will be helpful to examine the commercial speech doctrine in general before focusing on definitional issues. This chapter traces the development of commercial speech case law from its roots in the so-called "Jehovah's Witnesses" cases of the 1930s, through the 1970s when commercial expression enjoyed expanded protection, to the late 1980s in which the protection enjoyed by such speech is again being curtailed.

Commercial speech -- which we might informally define as advertising or other commercial solicitation, until we can formulate a more precise definition later on -- occupies a place unique in the scheme of ordered First Amendment liberties. Although the U.S. Supreme Court has held that certain types of speech are beyond the protection of the Constitution, commercial speech is neither protected at the same level as political speech, nor fully outside the ambit of the First Amendment.

It is a well-established principle that the First Amendment's proscription of laws "abridging" freedom of speech is not absolute. As the U.S. Supreme Court held in Chaplinsky v. New Hampshire (1942):

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (571-572).

In addition to the above-cited categories of speech, the advocacy of imminent illegal activity has also been held undeserving of constitutional protection (Brandenburg v. Ohio, 1969). Purely commercial advertising, too, was at first held to be outside the protection of the First Amendment when the Court considered the issue of advertising and free speech in Valentine v. Chrestensen, decided the same year as Chaplinsky.

Valentine, like Chaplinsky, is one of the so-called "Jehovah's Witnesses cases" the Court heard in the 1930s and 1940s. Although Valentine is generally considered the first commercial speech case, Rome and Roberts have correctly pointed out that "[t]he Court's holding in Valentine v. Chrestensen was not the inexplicable appearance of

a new rule and is properly viewed in its context with a number of prior decisions" (11).

These prior decisions include two cases significant to our inquiry: Lovell v. Griffin, Georgia (1938) and Schneider v. State of New Jersey, Town of Irvington, (1939). Both cases involved the dissemination of literature and alleged commercial solicitation by Jehovah's Witnesses.

In Lovell, the Court unanimously struck down a Georgia municipal ordinance which prohibited the distribution of "handbooks, advertising, or literature of any kind" without a permit (447). The Court invalidated the ordinance on free speech grounds, holding that pamphlets were entitled to the same level of constitutional protection as were more traditional forms of the press, without addressing either the potential freedom of religion issue, or the commercial aspects of soliciting funds in return for religious tracts.

The following year, the Court decided Schneider and three companion cases, this time, in dicta, addressing the commercial aspects of the speech involved. In Schneider, the Court reversed the conviction of Clara Schneider, a Jehovah's Witness who was distributing religious literature door-to-door as well as seeking contributions to the sect. In Young v. California, City of Los Angeles, handbills advertised a meeting of the "Friends of the Lincoln Brigade," a gathering at which speakers would discuss

the Spanish Civil War. Admission was to be charged. Nichols v. Massachusetts, City of Worcester and Snyder v. Milwaukee involved leaflets advertising a meeting protesting unemployment insurance administration and labor picketing, respectively.

Of the four cases, Schneider and Young directly involved the economic interests of the speaker, Schneider through direct solicitation, Young because of the admission charge for attending the meeting. The economic interest of petitioners was also a factor in the other two cases, albeit indirectly, since it cannot be denied that the financial well-being of picketers and those protesting unemployment insurance policies might be affected by the actions the speakers sought to protest.

The significance of economic motivation in distinguishing commercial from non-commercial speech will be discussed later. For now, it is sufficient to note that in all these pre-Valentine cases, the Court recognized a distinction between purely commercial activity and solicitation or advertising which was related to an activity which itself was constitutionally protected. In cases involving protected activity, the Court held that speech related to such endeavors, although otherwise possibly commercial, would be similarly protected.

The Commercial Speech Exception

Valentine was the case in which the commercial speech

doctrine went beyond dicta. Although the Supreme Court treated the case as one involving "purely commercial advertising" (54), Valentine involved what might be termed "mixed speech," communication containing both commercial and political elements. The brothel messages examined in Chapter Four are much the same sort of "mixed speech." Valentine, then, deserves to be examined in detail, not so much because it is traditionally regarded as the seminal commercial speech case, but because of the similarity of the underlying communication to the brothel messages at the locus of our inquiry.

In 1940, F.J. Chrestensen, the owner of a former U.S. Navy submarine which he advertised in handbills as a "\$2,000,000 fighting monster," applied for but was refused permission to dock and exhibit his vessel at New York City-owned docks at Battery Park. Chrestensen subsequently secured permission to conduct his submarine tour off a state-owned pier on the East River. He sought to advertise the exhibit through the use of handbills which depicted a cutaway diagram of the vessel and included the statement that guides would take sightseers on a tour of the submarine's various compartments. "See how men live in a Hell Diver," the handbill stated. The handbill quoted admission prices of \$.25 for adults and \$.15 for children (Chrestensen 522).

Chrestensen was informed that his advertisement would be illegal under a New York statute which prohibited

purely commercial handbills, but expressly allowed leaflets advertising public protests. (New York City Sanitary Code, Health Department Regulations, Art. III, sec. 318.) Chrestensen revised his handbill in an attempt to conform to the law, removing all reference to the sale of tickets, or the price thereof, but retaining a map showing how to reach the submarine exhibit.

According to the federal appellate court which ruled in Chrestensen's favor:

In place of the schedule of prices appeared the statement, "The only submarine used for exhibition in the world"; instead of the insistent commands to "see" the described points of interests were only the drab statements that "Submarine S-49 contains" the torpedo compartment, the sleeping quarters, the kitchen, etc.; and the invitation to see life in a hell diver vanished completely. (512)

The other side of the brochure displayed four paragraphs of closely-spaced type under the headline, "Submarine Refused Permission To Dock At Any City Owned Pier By Commissioner Of Docks McKenzie." The paragraphs protested against the "almost unbelievable" action of the "dictatorial" subordinates of "a mayor who is one of the outstanding liberals of the United States" by refusing Chrestensen permission to dock at the city-owned piers. The protest concluded that "while not as convenient for the visitors of Battery Park, by following the diagram on the other

side of this paper, it may be reached in about two (2) minutes" (Chrestensen v. Valentine 512).

Chrestensen was subsequently informed his revised handbill would also be illegal because of the information of a commercial nature on its face, but that he could distribute a flyer with only the information contained on the back of the handbill without interference.

Judge William Clark, writing for a majority of the appellate court, upheld a federal district court ruling that the New York City ordinance was unconstitutional as applied. Clark wrote that "Absolute prohibition of expression 'in the marketplace' is illegal, not to be saved by any commercial taint attached to the expression. . . . And borderline cases are to be resolved, not in favor of the regulation, but in favor of the cherished right" (515).

Nonetheless, Clark's decision was overturned by a unanimous Supreme Court in the terse Valentine decision. Rather than follow Clark's admonition that borderline cases be resolved "in favor of the cherished right," the Court simply dismissed Chrestensen's protest as subterfuge, saying it had been written "with the intent and purpose, of evading the prohibition of the ordinance" (Valentine 55).

The Exception's Gradual Demise

If Valentine v. Chrestensen were still good law, this inquiry into the definitional problems surrounding the

commercial speech doctrine might seem unnecessary, or at best purely academic. But the Court's ipse dixit approach to mixed speech has fared no better than the Valentine decision itself.

For a short time, it appeared the Court would broaden the new commercial speech doctrine and reach decisions incompatible with those announced in the pre-Valentine Jehovah's Witnesses cases discussed above. As "local authorities attempting to suppress the activities of the Witnesses tried to capitalize on the commercial speech exception . . . announced in Valentine," another group of cases soon reached the Court (Rome and Roberts 21). Since proselytization by Witnesses involved solicitation for funds to offset the cost of literature, prosecutors argued that the profit motive involved meant the resulting communication was commercial speech, unprotected by the First Amendment.

At first, the Court seemed to agree. In Jones v. Opelika, Kansas (1942) and several companion cases, the convictions of sect members were upheld. Justice Stanley Reed, writing for the 5-4 Court majority, argued that restrictions on solicitation were simply non-discriminatory "time, place and manner regulations" (594) which dealt only with commercial transactions "incidental to the exercise of religion or the freedom of speech or the press" (596). Citing Valentine, the Court noted, "[C]ommercial advertising cannot escape control by the

simple expedient of printing matter in the public interest on the same sheet or handbill" (597).

In its initial Jones decision, the Court held that it made no difference that solicitation for funds played only a minor role in sect activities. Reed concluded that "to subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles" (596).

The following year, the Court decided Jamison v. Texas (1943). Jamison, a Jehovah's Witness, was convicted of violating an anti-handbill ordinance. The leaflets Jamison distributed announced a religious revival meeting on one side and on the other advertised that two books were available for \$.25 to cover postage. The Court distinguished the case from Valentine, deciding that the motive in the Jamison case was to raise funds for religious purposes rather than the acquisition of personal profit (417). Again, the Court looked to the activity underlying what might otherwise be considered commercial speech. Following Jamison, the Court reheard and vacated Jones and its companions, on the like reasoning that the solicitation was religious in nature rather than purely commercial. (319 US 105). The same year, the Court decided Murdock v. Pennsylvania, a similar Jehovah's Witness case, in which it went beyond the protection of religion, noting,

in dicta, that "[t]he right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills" (111).

The distinction between protected religious or political canvassing and unprotected commercial solicitation was further sharpened in Breard v. City of Alexandria (1951). In Breard, the Court upheld the conviction of a door-to-door seller of secular magazines. The case seemed on its face similar to those immediately preceding it, in that its outcome hinged on the motive of the speaker. As Rome and Roberts note, the case, "appears to hold that the profit motive in selling the magazines is sufficient to deprive the door-to-door solicitation of magazine subscriptions of the protection of the First Amendment" (33).

However, a closer look at Breard reveals that the Court had moved away significantly from Valentine's absolute denial of constitutional protection for commercial speech. Instead, in Breard, the Court balanced competing interests, acknowledging a conflict between "the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results," and "some householders' desire for privacy" (Breard 644).

By 1959, Justice Douglas had observed that the Valentine ruling "has not survived reflection" (Cammarano v. United States 514). But the exception of commercial speech from constitutional protection continued, if in name only,

until 1976, with the decision in Virginia Board of Pharmacy v. Virginia Citizens Consumer Council. The intervening years saw the gradual demise of the commercial speech exception, as individual cases were distinguished from Valentine.

Following Breard, the Court next addressed the commercial speech exception, albeit cursorily, in New York Times v. Sullivan (1964). Sullivan, more rightly viewed as a landmark case in the area of libel and defamation law, need not be discussed at length here. It will suffice to note that the Court rejected the plaintiff's argument that because allegedly libelous statements were part of a paid advertisement, they were not entitled to constitutional protection. Justice William Brennan noted that the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" (376 U.S. at 266). To deny constitutional protection to such editorial advertisements, Brennan's opinion held, would "shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources'" (266).

This distinction between purely commercial advertising, on the one hand, and advertising involving issues of public concern on the other, was further refined in Pittsburgh Press Co. v. Pittsburgh Commission on Human Rela-

tions, (1973). The case involved the categorizing of classified advertisements in a daily newspaper under the headings "Male Help Wanted" and "Female Help Wanted." Appellants argued that such categories facilitated illegal sex discrimination in employment.

The Court viewed its task in Pittsburgh Press as deciding whether the advertisements more resembled the public interest editorial advertisement in Sullivan or the purely commercial speech of Valentine (413 U.S. 385). The Court had no difficulty deciding that "[i]n the crucial respects, the advertisements in the present record resemble the Chrestensen rather than the Sullivan advertisement" (385).

The Court also dealt with Pittsburgh Press's argument that such restrictions interfered with the editorial discretion of a newspaper and that "if this package of advertisement and placement is commercial speech, then commercial speech should be accorded a higher level of protection than Chrestensen and its progeny would suggest." (388). Justice Lewis F. Powell's majority opinion replied that:

Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the

nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement. (388)

In an attempt to distinguish the legal difference (if not the substantive distinction) between permissible and non-permissible commercial speech, the Court went on to note that:

We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment. Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial (391).

The Court thus recognized a legal difference not only between commercial and non-commercial speech, but a difference in the level of protection to be afforded advertisements, depending on their level of "public interest." This underlines the need to distinguish between these types of communication. As previously noted, attempts to

define commercial speech will be the focus of Chapter Four and need not be discussed in detail here. But it should be pointed out that the 5-4 Pittsburgh Press decision concerned the dissenters because of the definitional issues it seemed to raise but not answer. Chief Justice Warren Burger thought the decision represented "a disturbing enlargement of the 'commercial speech' doctrine" which would launch the courts on "a treacherous path of defining what layout and organizational decisions of newspapers are 'sufficiently associated' with the 'commercial' parts of the papers as to be constitutionally unprotected and therefore subject to governmental regulation" (293). Justice Potter Stewart was concerned that Pittsburgh Press was "the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages" (402).

Justice Douglas agreed, again explicitly repudiating his vote in the unanimous Valentine decision. He wrote that:

I believe that commercial materials also have First Amendment protection. If Empire Industries Ltd. . . . wanted to run full-page advertisements denouncing or criticizing this Pennsylvania law, I see no way in which Pittsburgh Press could be censored or punished for running the ad, any more than a person could be punished for uttering the contents of the ad in a

public address at Independence Hall. (398)

Pittsburgh Press is not the only time the Court was able to avoid difficult commercial speech issues by relying on the legal status of the conduct underlying the speech. The changing legal status of abortion in 1973 also allowed the Court to decide a difficult case by looking at the conduct which the commercial speech was about. In Bigelow v. Virginia, (1973), however, the Court decided in favor of the commercial speech in question. Bigelow was the managing editor of an "underground" newspaper at the University of Virginia that accepted an advertisement announcing the availability of legal abortions in New York. He was charged with violating a Virginia criminal statute making it unlawful to "encourage or promote the procuring of abortion or miscarriage," in any publication, lecture or advertisement. (421 US at 813.) The Virginia Supreme Court, relying on Valentine, rejected Bigelow's appeal in 1972.

During the pendency of Bigelow's appeal to the U.S. Supreme Court, the Court decided Roe v. Wade, (1973), outlawing state control of abortion in the first trimester, and remanded Bigelow to the state court. The Virginia court again decided against the plaintiff.

The case returned to the U.S. Supreme Court in 1975, and the conviction was overturned at least in part because the commercial speech involved dealt with the constitutional considerations in Roe and Doe v. Bolton, (1973).

But the Court went further. Justice Harry Blackmun, for the Court, stated that "Virginia is really asserting an interest in regulating what Virginians may hear or read about the New York services." (827-828) In addition,

Blackmun argued, the Bigelow advertisement:

conveyed information of potential interest and value to a diverse audience -- not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or general interest in, the subject matter . . . and to readers seeking reform in Virginia. (811)

The Court distinguished Bigelow from Valentine, calling the latter's holding "distinctly a limited one" (819), somewhat unconvincingly perhaps, in light of the earlier case's sweeping language.

A year later, the Court stopped distinguishing individual cases, and explicitly overturned Valentine in Virginia State Board of Pharmacy. In Board of Pharmacy, the Court dealt with the purely commercial advertising of drug prices. A consumer group challenged Virginia law prohibiting the advertisement of drug prices, giving the Court the opportunity to deal squarely with the commercial speech exception.

As Justice Blackmun's opinion in the Board of Pharmacy case pointed out:

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He

does not wish to report any particularly newsworthy fact or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." (761)

In striking down the Virginia law, the Court looked not at the constitutional interests of advertisers, but to the First Amendment rights of the receivers of information. Citing Lamont v. Postmaster General, (1965) and Procurier v. Martinez, (1974), the Court held that "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients" (756). Thus, the Court considered the individual consumer's interest in the free flow of commercial information. "[T]hat interest may be as keen, if not keener, by far, than his interest in the day's most urgent political debate," Justice Blackmun observed (763).

Moreover, in a free market economy, commercial information was vital to informed decision-making, the Court noted. The state's position that allowing advertising might harm the professionalism of pharmacists was rejected as "highly paternalistic" (770). Blackmun argued that the idea behind the First Amendment was to provide people with more, not less communication, and that closing channels of communication was not the best way to serve the public interest.

The Court also acknowledged the potential definitional

difficulties inherent in a continued commercial speech exception. Blackmun commented that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn," (765) and went on to observe:

Our pharmacist could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not. (765)

Retrenchment

Perhaps because of the sweeping language of Virginia Board of Pharmacy, as well as the fact that the next few commercial speech decisions relied on its holding and dicta, there has been a tendency on the part of some commentators to view the commercial speech exception as, with few exceptions, moribund. Overbeck and Pullen view the Virginia Board of Pharmacy case as the most important modern commercial speech decision, with subsequent cases expanding First Amendment protection for commercial and corporate speech. (283-288) Cohen and Kaplan take a similar position, casting the Virginia decision as the central case, and the subsequent holdings as either expanding protection or narrowly defining exceptions to this new, anti-paternal doctrine. (194-205)

To be sure, in 1977, the Court relied on Virginia

Board of Pharmacy to declare unconstitutional an ordinance outlawing truthful "for sale" and "sold" signs in residential areas in Linmark Associates v. Willingboro. And the following year, in First National Bank of Boston v. Bellotti, the Court ruled that in commercial speech cases the state must meet the same exacting standards -- a compelling interest and closely drawn means -- which apply to "core" First Amendment speech.

In addition, a series of attorney advertising cases extended, within limitations, First Amendment protection to at least some forms of lawyer advertising. In Bates v. State Bar of Arizona (1977), the Court cited the potential interest to listeners in upholding a legal clinic's right to advertise "legal service at reasonable prices." Although in-person solicitation is distinguished from protected commercial speech in Ohralik v. Ohio State Bar (1978), protection was extended to a lawyer's newspaper advertisement aimed at potential product liability plaintiffs in Zauderer v. Office of Disciplinary Counsel (1985).

It must be emphasized, however, that although Virginia State Board of Pharmacy overturned Valentine, it did not elevate commercial speech to the status of other communication protected by the First Amendment. The limited question in Virginia Board of Pharmacy, as phrased by Blackmun, was whether the state could completely suppress truthful information about lawful activity. In Bates, the

Court put it even more succinctly, noting in dicta that "advertising that is false, deceptive or misleading . . . is subject to restraint," (384) and that "advertising concerning transactions that are themselves illegal obviously may be suppressed" (384).

The notion that communication must be truthful is foreign to the rest of the First Amendment. As Justice Powell wrote for the majority in Gertz v. Robert Welch, Inc., (1974), "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction, not on the conscience of judges and juries, but on the competition of other ideas" (339). As shall be seen in Chapter Three, the justification for this lower level of protection -- that commercial speech is somehow hardier and more verifiable than other types of speech -- is open to debate. In fact, the Court itself has admitted on one occasion that commercial information is not always subject to verification. (National Commission on Egg Nutrition v. FTC) In addition, the advocacy of illegal activity is not always unprotected. While incitement to specific illegal acts has been held to be outside the protection of the First Amendment, the Court has held that the advocacy of such activity in the abstract cannot be proscribed (Brandenburg).

The post-Virginia Board of Pharmacy cases also distinguish protection afforded commercial speech from that to which core speech is entitled in another important

respect. In Bates, the Court observed that "since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad legislation" (380). And in Ohralik, the Court went even further, warning that the commonsense distinctions between commercial and non-commercial speech might "invite dilution, simply by a levelling process" of the latter (455). Therefore, the Court would grant "[c]ommercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression" (455). Thus, the stage was set for the Court to retrench and reformulate the commercial speech doctrine.

Central Hudson Gas & Electric Corp. v. Public Service Commission has been called a case that "expanded the First Amendment protection of corporate speech" (Overbeck and Pullen 287), perhaps because the Court decided in favor of the communication involved. But in the course of deciding Central Hudson, the Court undertook an entire restatement of the commercial speech doctrine, a restatement which explicitly reaffirmed and institutionalized the limits on commercial speech freedom begun in the three above-mentioned attorney advertising cases. Because of its tremendous importance in articulating current doctrine, Central Hudson will be closely examined.

In Central Hudson, the Court declared unconstitutional a New York Public Service Commission order banning advertising by electric utilities promoting the use of energy as a violation of the First and Fourteenth Amendments. Although the Court recognized the state's legitimate interest in promoting the conservation of energy, the Public Service Commission's order was struck down on the narrow ground that the regulation was more extensive than necessary, since it might apply equally to energy-efficient electric devices as well as those in more common use (580-581).

In his majority opinion, Justice Powell articulated a four-part test to be used to determine when state regulation of commercial speech was allowable:

[W]e, must determine (1) whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it must (1A) concern lawful activity and (1B) not be misleading. Next, we ask (2) whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than necessary to serve that interest. (566)

The fourth prong of the Central Hudson test, the one used to strike down the Public Service Commission order, appears, prima facie, to be a restatement of the over-

breadth doctrine. But Powell was quick to note that while statutes regulating commercial speech must be narrowly drawn, "[t]his analysis is not an application of the overbreadth doctrine" (565 at n. 8).

To understand this apparent contradiction, it is necessary to briefly review the overbreadth doctrine itself, and attempt to distinguish between that doctrine and Central Hudson's fourth prong. This analysis will also be helpful before attempting narrowly-tailored definitions of commercial speech itself.

It is an accepted principle of First Amendment law that statutes must be neither overbroad nor underinclusive. In other words, statutes, and the definitions on which they rely, must be drawn narrowly enough to avoid the risk they might be applied to otherwise protected speech, on the theory that such imprecise definitions might "chill" broad categories of speech. At the same time, they must not be drawn so narrowly that they fail to include speech that should be controlled if they are to directly advance the state interests which inform them.

In Erznoznik v. City of Jacksonville, (1975), for example, the Court overturned a city ordinance prohibiting the showing of nudity in drive-ins and on other movie screens visible from public streets. The Court held that the law was overbroad in that it would "bar a film containing a picture of a baby's buttocks, the nude body of a war victim or scenes from a culture where nudity is

indigenous" (213). Here, the Court was relying on the philosophy expressed in Chaplinsky, where the majority held that control of speech is permissible only in "narrowly limited classes of speech" (571). The Jacksonville ordinance was unconstitutional also because it was underinclusive. Part of the rationale behind the law was that nudity on drive-in screens was a hazard in that it might distract drivers. But the Court majority replied that nudity was being singled out and that other movies, such as those depicting violence, might be equally distracting, yet were permissible under the ordinance (215).

When applying the doctrine of overbreadth, courts are generally not obliged to reach the question of whether the speech in a given case is itself protected. As a note in the Harvard Law Review has explained it: "Rather than excise particular applications one by one as they arise, the Court has employed the First Amendment overbreadth doctrine to short circuit the process by invalidating the statute and putting it up to the legislature for redrafting. (The First Amendment Overbreadth Doctrine 845).

The overbreadth doctrine gives litigants the power, as the Court noted in Broadrick v. Oklahoma, (1973), to "challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression" (612).

If the Court were ever to declare the overbreadth doctrine totally applicable in the commercial speech area, it might permit an advertiser to challenge a state or federal statute, "even where the advertiser's communication in question was false or misleading, or related to unlawful activity, or was for some other reason unprotected" (Rome and Roberts 151).

The distinction between the overbreadth doctrine and the fourth prong of the Central Hudson test, then, is that courts must reach the question in commercial speech cases of whether or not the specific communication involved is constitutionally protected. The Court's refusal to apply the overbreadth doctrine in its entirety to the commercial speech area, other than to require statutes to be "narrowly drawn," stems from its belief implied in Bates, that commercial speech is somehow "hardier" speech than other communication deserving constitutional protection.

The Court, in the first prong of the Central Hudson test, also reinforced the notion that protected commercial speech not be false or misleading, supplying the following rationale: "[C]ommercial speakers have extensive knowledge both of the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity" (564 at n.6).

Far from being an expansion of the rights afforded commercial speakers, then, Central Hudson clearly represents movement away from the expansive tone of Virginia

Board of Pharmacy. To be sure, the Court in Central Hudson recognized Board of Pharmacy's rejection of paternalism; it went even further, stating that "even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all" 562). But taken as a whole, Central Hudson cannot be viewed as a victory for commercial speakers, particularly when its progeny are examined.

Following Central Hudson, the Court had occasion to again deal with what has been termed "mixed speech" in Bolger v. Youngs Drug Products (1983). Here, for the first time, the Court articulated criteria for dealing with such speech.

The case involved the mailing of unsolicited flyers promoting prophylactics and "discussing the desirability of prophylactics in general and Youngs' products in particular" (Bolger 62). Because the Court ruled against the Postal Service, holding that the information involved was "relevant to important social issues such as family planning and the prevention of venereal disease" (69), Bolger might appear to be a victory for commercial speech interests.

Justice Thurgood Marshall, for the Court, stated that taken by themselves, reference to a specific product, or proposals to engage in a commercial transaction, or economic motivation, would not compel the conclusion that the

pamphlets involved are commercial speech (Bolger 66-67). However, the existence of all three characteristics taken together meant the communication in question was commercial.

Nonetheless, Marshall went on to say that:

[A]dvertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. (68)

Thus, it would seem that otherwise protected speech loses its protected status if it appears in a context the Court decides is commercial.

Justice John Paul Stevens, in concurrence, worried that Bolger might lead to just this sort of dilution:

[A]dvertisements may be a complex mixture of commercial and noncommercial elements: the noncommercial message does not obviate the need for appropriate commercial regulation conversely, the commercial element does not necessarily provide a valid basis for noncommercial censorship. . . .

[S]ignificant speech so often comprises both commercial and noncommercial elements. . . ." (81-81)

If one adopts the view that recent commercial speech

decisions have moved away from Board of Pharmacy, the Court's most recent major encounter with advertising --Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico -- seems more a continuation of this reformulation than it does a dramatic turn-around, as it has been viewed by some commentators (e.g. Hoveland and Wilcox).

In Posadas, a 5-4 Court upheld a Puerto Rico regulation that banned advertising of casino gambling on the island. The regulation was aimed at discouraging casino gambling by citizens of the Commonwealth while allowing advertising aimed at tourists. Justice Rehnquist, writing shortly before his elevation to chief justice, applied the Central Hudson test, and found the statute permissible.

Rehnquist's underlying rationale makes Posadas important to any examination of commercial speech involving Nevada brothel advertising.

Rehnquist reasoned that gambling was an activity that could be completely proscribed by the state: "The greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" (283), Rehnquist wrote. He continued:

It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange con-

stitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product through advertising on behalf of those who would profit from such increased demand. (92 LEd. 2nd 284)

In his sharply-worded dissent, Justice Brennan replied that the "strange constitutional doctrine" Rehnquist referred to was known as the First Amendment (289 at n. 4). Rehnquist's position will be addressed more fully in Chapter Three when we turn our attention to the divergent First Amendment philosophies which underlie the differing formulations of the commercial speech doctrine. For now, it will suffice to note that Rehnquist's opinion, while clearly indicating advertising of prostitution in Nevada could be proscribed by the state, held that editorial comment on the same subject would remain fully protected by the First Amendment:

[A]dvertising restrictions cannot be used to inhibit either the freedom of the press in Puerto Rico to report on any aspect of casino gambling, or the freedom of anyone, including casino owners, to comment publicly on such matters as legislation relating to casino gambling. (92 LEd. 2d 280 at n. 7)

Posadas, then, reiterates a thread common throughout the evolution of commercial speech doctrine -- that while commercial expression may be regulated, editorial comment

on commercial issues remains largely protected. Although the level of protection enjoyed by commercial speech has fluctuated over time, the notion that this level is different that afforded editorial expression in general or advertising in the "public interest" has remained constant.

A definitional problem, then, remains at the core of the commercial speech doctrine. Commercial speech must not only be truthful and non-misleading, it is also subject to government suppression if the expression relates to activity not itself constitutionally protected. On the other hand, a publication's editorial content receives substantially more protection. This editorial content includes more than "opinion" articles reflecting a publication's position on issues of public interest; by common journalistic usage "editorial" refers to all non-commercial content in a publication.

Attempts to define commercial speech will be the focus of Chapter Five. But before examining these attempts, it will be helpful to review the philosophical positions that have resulted in differing standards of protection for different types of speech. It is these philosophical assumptions, which underlie First Amendment theory in general, to which this thesis now turns.

CHAPTER THREE

VARIOUS PHILOSOPHICAL ASSUMPTIONS

The cases discussed in Chapter Two reflect divergent visions of the First Amendment -- from the narrow view of protected speech articulated in Valentine to the expansive philosophy of Virginia Board of Pharmacy to the retrenchment of Posadas. These differing positions reflect different underlying philosophies as to what values the First Amendment is intended to serve. Understanding those differing interpretations of First Amendment values will be helpful in evaluating the various definitions that have been proposed for commercial speech, since any definition of commercial speech necessarily reflects certain underlying assumptions. This chapter discusses these philosophical positions, from the view that the First Amendment was designed to protect only political speech to the broader notion that the amendment serves the larger value of self-expression. How these differing views have been applied to commercial speech, and how they have resulted in a differing level of the protection for such expression, will also be examined.

The Meiklejohn Paradigm

As noted, Valentine v. Chrestensen reflects a narrow view of what speech ought to be constitutionally protected. Among modern constitutional scholars, the view that the First Amendment was primarily intended to protect political speech was first articulated by Alexander Meiklejohn. This view of the First Amendment is important because, as Professor Martin Redish has observed, "Dr. Meiklejohn's articulate exposition of the purposes that lie behind the [F]irst [A]mendment has received considerable attention, and some adherence, from both commentators and the Supreme Court" (434).

In Free Speech and Its Relation to Self-Government, Meiklejohn argued that self-government is the essence of the American political system. Meiklejohn concluded from this premise that, "The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal -- only therefore, to the consideration of matters of public interest" (94).

It follows from this that the First Amendment is designed not to protect the rights of speakers, but to ensure the free flow of information which facilitates the effective functioning of the political system of self-government. In this sense, Meiklejohn foreshadows the audience-centered perspective the Supreme Court would

later use, ironically enough, to expand dramatically the First Amendment protection afforded commercial speech: that the rights of the listener to receive information were entitled to at least as much consideration as the rights of speakers.

Meiklejohn drew a clear distinction between "public" and "private" speech, arguing that only "public" discourse, which he defined as expression relating to the performance of self-governance, was protected by the First Amendment. "Private" speech, that expression which took place outside the political arena, would receive whatever consideration to which it was legitimately entitled only from the due process clause of the Fifth Amendment.

This distinction between public and private speech is not as clear as it might at first seem. How directly, for instance, must speech affect public discourse before it is granted the protection of the First Amendment? It was reported that when the Court decided Sullivan, Meiklejohn declared it was "an occasion for dancing in the streets" (Kalven 221). Thus, at least in some cases, Meiklejohn allowed that some advertising, normally considered private speech, might further political ends and ought to be considered public.

If advertisements were to be considered public, then what of literature, science, and scholarship? At first, Meiklejohn suggested these might be relegated to what Zechariah Chafee called the "obscure shelter" of the Fifth

Amendment (Chafee 891). However, responding to the criticisms of Harry Kalven and Chafee, Meiklejohn subsequently expanded his theory to allow "that the people do need novels and dramas and paintings and poems 'because they will be called upon to vote,'" (The First Amendment 263).

Despite the difficulty in drawing any distinct line between protected and unprotected speech, a politically-based interpretation of the First Amendment remains attractive to at least some scholars. At the extreme end of this tradition was Judge Robert Bork, whose position is that First Amendment "protection should be accorded only to speech that is explicitly political" (Bork 20). Richard Barnes pointed out that this would exclude not only commercial speech, but science, literature and scholarship as well (459).

Specifically addressing the issue of commercial speech from the Meiklejohn perspective were Thomas H. Jackson and John Calvin Jeffries, Jr. These scholars took a somewhat broader view than Bork, holding that political speech "need not be limited to debate of government policy," but may also "encompass a wider exchange of ideas and information antecedent to the formation of political opinion" (10). Jackson and Jeffries would also protect certain economic speech, at least as it related to government policy:

For example, information concerning the degree of concentration in a particular industry and the costs and benefits of reducing (or increasing) that concen-

tration may be considered relevant for informed decision-making on antitrust policy, even if that information is not acquired in the course of a debate over governmental action. (10)

Presumably, too, debate on the legalization of prostitution and the public health concerns raised by the legal status of brothels might be included in Jackson and Jeffries' scheme of constitutional protection.

Like Meiklejohn, however, Jackson and Jeffries argued that whatever protection is to be afforded private speech, if any, must come from the due process clause of the Fifth Amendment. Thus, commercial speech, at least that which does no more than propose an economic transaction, should receive no constitutional protection. The authors argued that the Virginia Board of Pharmacy case was wrongly decided, since it resurrects the discredited constitutional notion of economic due process under the guise of the First Amendment. They pointed out that in Carolene Products, the Court struck down the holding in Lochner v. New York that economic liberty was a constitutionally protected right. Since Carolene Products, economic regulation has been considered a legislative, not a judicial matter. Redefining the constitutional question as one of free speech is inappropriate and does not mandate judicial interference with legislative authority, according to Jackson and Jeffries.

Jackson and Jeffries advanced the argument -- later

relied upon by Rehnquist in his majority Posadas opinion -- that the greater power to regulate economic activity includes the lesser power to regulate commercial advertising. They argued that the Court's holding in Virginia Board of Pharmacy makes sense only if one assumes a First Amendment value to advertising independent of its role in facilitating the sale of a given commodity. "That no such independent purpose in fact can be identified confirms the hypothesis that the significance of ordinary business advertising lies in its relation to the contemplated economic transaction" (Jackson and Jeffries 36).

Finally, Jackson and Jeffries criticized the notion, expressed by the Court in Virginia Board of Pharmacy, that the failure to expand the protection of commercial speech will result in definitional difficulties. Indeed, the authors claimed, a reliable way to distinguish between commercial and non-commercial speech is not necessary for two reasons.

First, the Court's concern that advertisers would attempt to evade legislative restraint by clothing their advertisements in political commentary is, they argued, "belied by experience" (22). They noted that the record in the Virginia Board of Pharmacy case contains no evidence of such subterfuge; nor did the only such instance dealt with by the Court, Valentine v. Chrestensen, seem to present any definitional difficulty for the justices. Second, since the primary purpose of advertising is to make

money, the fact that "politicized" advertisements would likely be less effective would serve as an economic constraint against such attempts at subterfuge. As the authors stated: "Economic self-interest would often counsel against any elaborate ruse to convey a forbidden commercial message" (24).

However, Jackson and Jeffries' arguments remain unconvincing. The existence of Nevada brothel messages belies the authors' argument that the Court is engaging in pure speculation rather than with realistic concerns. So does Valentine v. Chrestensen, despite both the Court's and the authors' cavalier dismissal of the case's explicit definitional problem. That the Court created a definition for commercial speech in Valentine -- "purely commercial advertising" -- and then seemed to disregard this definition in its holding, underlines the unresolved nature of the problem.

Neither can much weight be given Jackson and Jeffries' argument that economic self-interest would preclude attempts at subterfuge. Here, the authors viewed advertising only in the most simplistic terms. Modern advertising is not limited to, or indeed even largely composed of simple announcements of price and availability. The very existence of issue and institutional corporate advertising, press releases and other forms of business communication argue against the notion that "subterfuge" is economically unfeasible. Nor does the authors' argument consider

that such subterfuge may be the only way for an advertiser to get his message into the marketplace. Such is certainly the case with Nevada brothel messages, since any form of such advertising is banned in Clark and Washoe counties, the chief sources of customers for the rural houses of prostitution. Should other business interests, tobacco or alcohol producers for example, find themselves similarly prohibited from advertising, it is not unreasonable to suppose they might resort to such measures on a national level.

In addition, there may be motivations other than "subterfuge" involved. Who is to say that Youngs Drug Company is not genuinely interested in birth control or public health and honestly wishes to educate the public on such matters? Who knows for certain that brothel owners are not genuinely concerned about AIDS as a public health issue? Finally, the lack of a plethora of actual cases reaching the Supreme Court which require a distinction be made between commercial and non-commercial speech does not obviate the need for such a definition. Jackson and Jeffries cited Bork, who noted that "The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate" (Bork 28). Nor should refusal to draw needed lines deny the judiciary the power to adjudicate. The authors also pointed to Rehnquist's dissent in Virginia Board of Pharmacy, where the justice argued that it is

one thing to speculate about some future case that may require subtle distinctions and quite another to use this rationale to displace legislative authority (Jackson and Jeffries 19). Justice Rehnquist also noted in that dissent that:

There are undoubted difficulties with an effort to draw a bright line between "commercial speech" on the one hand and "protected speech" on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. (787)

It can certainly be argued that a search for definitions of categories of speech better faces up to definitional difficulties than does hiding them under the label of judicial restraint. While it is certainly an accepted principle of appropriate judicial restraint that courts avoid sweeping constitutional pronouncements where possible, it is also the judiciary's mandate to answer such questions when necessary.

Jackson and Jeffries noted that Virginia Board of Pharmacy would have been decided correctly "[h]ad the case involved political commentary or the publication of newsworthy information" (16). But if this is true -- and indeed it seems an accepted principle of commercial speech case law that it is -- then one cannot avoid facing the definitional issues of just what constitutes political commentary or newsworthy information as opposed to some yet ill-defined category of "commercial speech," Jackson

and Jeffries' claims to the contrary notwithstanding.

The Self Expression Paradigm

Although he reached much the same conclusion as Jackson and Jeffries -- that commercial speech should be outside the protection of the First Amendment -- Professor C. Edwin Baker viewed the issue from a very different perspective. To Baker, self expression, rather than political expediency was the central value served by the First Amendment. He summarized his theory of the amendment succinctly: "As long as speech represents the freely chosen expression of the listener while depending for its power on the free acceptance of the speaker, freedom of speech represents a charter of liberty for non-coercive action" (7). For Baker, the First Amendment was designed to allow free individuals to develop their own visions of a good life.

Commercial speech, for Baker, could never be equated with self expression, since it is motivated by a desire for profit, rather than expressing the values of the speaker. Baker argued that a whiskey company, for instance, would promote whiskey regardless of the personal feelings of its managers, employees or stockholders (18). Although Baker admitted the press is motivated by profit, he distinguishes the media from other businesses on the ground that media are protected by the press clause of the First Amendment. Baker seemed satisfied with a traditional

notion of the press, and would not expand the definition of press to include corporate-sponsored image advertising, even when explicitly political.

Baker's anti-capitalist perspective had also to distinguish economically-motivated speech on the part of labor unions, which he favored, from that of corporations, which he opposed. He did so by arguing, perhaps unconvincingly, that the market did not determine the speech of labor unions (37).

The key to understanding Baker is that one must realize that his First Amendment theory is what one commentator has termed "an alternative to marketplace theory" (Shiffrin 1243). Baker rejected the "marketplace of ideas" metaphor articulated by John Stuart Mill and implicit in the audience-centered perspective of Bork and Jackson and Jeffries, arguing that the marketplace disproportionately represents the status quo on important issues. Instead, Baker advanced a uniquely source-focused theory of the First Amendment, based upon self fulfillment through self expression without coercion. This, for Baker, became a constitutional principle not to be balanced away in favor of other societal interests. Indeed, Baker was generally critical of balancing and in favor of judicial "principles," arguing that the weighing of competing interests led to inconsistent results and offered little protection to fundamental liberties.

In addition to the problems with motivation already

discussed in regards to Jackson and Jeffries, Baker's theory is open to other criticisms. As Professor Steven Shiffrin has noted:

If [Baker] is correct that people's perspectives "are greatly influenced, if not determined" by their location in a specific socio-economic structure, then it becomes difficult to understand why individual speech reflects free choice any more than does corporate speech. (1246)

One can also observe, as did Shiffrin, that Baker's scholarship "is a piece of advocacy designed to promote change" (1248). As such, although he provided at least one way of looking at commercial speech, Baker must be approached circumspectly.

Of more value, perhaps, is the theory of Professor Martin Redish. Redish, too, focused on the value of self expression, but arrived at the opposite conclusion from Baker in regards to commercial speech. For Baker, the First Amendment protected the union picketer, but not the businessman. Redish, on the other hand, posed the following analogy: "[I]f the constitutional guarantee of free speech permits a picket to stand in front of a business establishment to urge patrons not to enter, then by the same reasoning a merchant could stand in the doorway of his establishment and solicit customers" (430).

For Redish, the matter also went beyond simple social equity. Focusing on the receiver of advertising messages

rather than the source, Redish was able to discern important First Amendment values which were served by commercial speech:

It has long been recognized that one function of government is to promote the general welfare -- to assist the citizenry in achieving a materially satisfactory life. It is also generally recognized that advertising, at least in theory, may serve a vital role in aiding an individual's attainment of that goal. (432)

Redish admitted that much actual advertising did not fulfill this informational function, but argued that this did not lessen the level of constitutional protection to which all advertising should be entitled.

In an argument similar to that later put forth by the Court majority in Virginia Board of Pharmacy, Redish argued that commercial decisions were often more important to the individual than political ones. Commercial speech was seen as similar to political speech, but on a smaller scale. Redish argued that if society held political self-government to be important, then by the same reasoning, "private self-government" in the economic marketplace should similarly be nurtured by protecting commercial speech (442). Perhaps the most important First Amendment function of commercial speech for Redish was its role in allowing the individual to achieve "the maturation of his rational capabilities" (441). Commercial speech, particu-

larly price advertising, facilitates rational decision-making in the marketplace, encouraging consumers to weigh price and other product information before making personal economic decisions. Such behavior allows the consumer to "exercise his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment" (444). Although it is true that advertisements might not provide mental exercise to the extent of that provided by literature and at least some forms of political debate, Redish reminded his reader that the Supreme Court has seen fit to grant substantial First Amendment protection to other forms of communication, including much political speech, far below this rarified standard (444).

Redish called the task of distinguishing commercial from non-commercial speech an "onerous" one, avoidance of which could threaten otherwise protected expression (431). But in the final analysis, Redish's theory would eliminate the need for defining commercial speech, since such speech would be elevated to the level of protected political communication. Certainly, the very act of defining commercial speech implies that it is entitled to a different, if not lesser, level of protection than that afforded other categories of speech.

Rationalizing the Regulation of Commercial Speech

By defining commercial speech, we distinguish commer-

cial speech from other communication in terms of what makes it unique. The Court has already implicitly done so. However, the traditional rationales for regulating commercial speech -- that such speech is inherently harder and more easily verifiable than other forms of communication -- are easily dismissed.

As already noted, in denying certiorari in National Commission on Egg Nutrition v. FTC, the Supreme Court itself observed that in some areas, commercial information is actually less subject to verification than other categories of speech. Certainly the nutritional aspects of some foods would be one such area. Others might include the health benefits of certain substances, or even the economic ramifications of governmental action or of individual purchasing behavior. For instance, is the statement "Buy American -- help reduce the trade deficit" empirically verifiable or not? In any event, commercial speech as a class seems no more verifiable than political speech -- indeed, in many cases it would seem less so. As Farber has observed: "A political candidate knows the truth about his own past and his present intentions, yet misrepresentations on these subjects are immune from state regulation" (386).

Nor does commercial speech, as a class, seem any harder than other types of speech. First, it is dangerous to allow the motivation of economic self-interest to serve as a basis for the level of protection afforded a given cate-

gory of communication. Extending such a rationale could threaten economically motivated communication on the part of newspapers, office seekers, and others whose speech rightfully enjoys strong constitutional safeguards. The argument that commercial speech is somehow hardier also seems to assume that advertising is usually done by large corporations with considerable resources available with which to disseminate their economic messages. But even a cursory examination of Supreme Court commercial speech case law belies this supposition. On the contrary, religious groups, civil rights advocates, and abortion counseling centers have all relied on advertising to communicate to mass publics. Such speech seems no more hardy, nor less important, than much that is fully protected under the First Amendment.

Still, reasons for allowing some form of regulation of commercial speech remain. First, even if commercial speech is not more intrinsically verifiable than other forms of speech, there are often aspects of such speech that are similar to contracts. Farber has noted that "the constitutional status of an advertisement describing a product may be unclear, but a seller is obviously liable for damages for failure to deliver a product corresponding to the contract description" (387). Although the existence of an implied contract does not seem by itself to warrant prior restraint of commercial speech, it does lend weight to governmental claims regarding the need to regulate

patently false or deceptive speech.

Such claims appear even more legitimate when one considers that while it is today an accepted constitutional principle that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters" (Gertz 341), such protection is limited to public, rather than private matters, in defamation law. The Court in Gertz decided that falsehood might sometimes need to be protected in cases of clear public interest, but many commercial speech cases deal only with private economic choices.

Finally, while a standard of absolute protection for commercial speech might seem theoretically appealing, since it would allow for easy resolution of many difficult issues, such a standard would be unrealistic. A majority of the Court has never endorsed an absolutist interpretation of the First Amendment generally; it is highly unlikely it would do so in commercial speech cases. At the same time, commercial speech intuitively seems different from other forms of speech, and as such might deserve a different standard of protection. Attempting to articulate those differences, and fashioning from them a workable definition of commercial speech that satisfies adherents of both the Meiklejohn and self-expression paradigms is a subject to which we will return in the final chapter of this thesis.

CHAPTER FOUR

BROTHEL MESSAGES IN NEVADA

Distinguishing commercial from noncommercial speech became an issue in Nevada soon after the constitutionality of banning brothel advertisements in Clark and Washoe counties (NRS 201.430) was upheld by the Nevada Supreme Court in 1982, three years following the law's enactment. The court's decision in Princess Sea Industries v. Nevada, has been criticized as "an opinion filled with righteousness" (Simon 234). This chapter discusses the shortcomings of the Princess Sea decision before moving on to the changes that case engendered in the dissemination of brothel messages.

The case went to the Nevada Supreme Court when attorneys for brothel owner Walter Plankinton and two adult-oriented publications, Las Vegas Panorama and Las Vegas Mirror, argued the law violated their client's First Amendment rights to free expression. Citing U.S. Supreme Court case law on commercial speech, the appellants argued that since brothel prostitution was a lawful activity, advertising of that activity could not be curtailed.

Deputy Attorney General Joshua Landish, who, with

Edwards, argued the case before the court, admitted that:

It is beyond dispute that after the Supreme Court's rulings in Bigelow . . . Virginia Pharmacy Board . . . and Bates, that paid commercial advertisements are not stripped of First Amendment protection merely because they appear in that form. (Landish 29)

But Landish went on to argue that:

[I]n concluding that commercial speech may be afforded a degree of First Amendment protection, the Court stressed its holding did not mean that commercial advertising could never be regulated in any way. On the contrary, the Court specifically recognized that some forms of commercial speech regulations were surely permissible (96 S. Ct. at 1817). The Court noted: ". . . there is no claim that the transaction proposed in the forbidden advertisements are themselves (sic) illegal in any way." (34)

Anticipating Rehnquist in Posadas, Landish reasoned that since brothel prostitution was illegal in Clark County and the state was entitled to regulate prostitution in all its jurisdictions, it could certainly regulate the advertising of brothel prostitution (Record on Appeal 39).

Nonetheless, the Nevada Supreme Court avoided the First Amendment issues involved and relied simply on a "presumption of constitutionality" in Justice John Mowbray's majority opinion, arguing that "the legislative

enactment in question does not clearly contravene constitutional principles as thus far articulated by the United States Supreme Court" (Princess Sea 283).

Mowbray's analysis is unsatisfactory. United States v. Carolene Products clearly limits the application of the presumption of constitutionality to laws of economic regulation, and not to potential abridgements of the First Amendment rights of either speakers or listeners. Indeed, cases involving questions of fundamental liberties require courts to apply strict scrutiny, and laws which appear to abridge such rights are to be presumed unconstitutional.

More satisfactory, from a constitutional doctrine point of view, is Justice Noel Manoukian's concurring opinion in Princess Sea. "I believe that those in the majority fail to sufficiently address the important First Amendment issue of this appeal," Manoukian wrote. "In light of the many recent United States Supreme Court holdings bearing on this vital question, it is incumbent on this Court to re-examine and fully discuss the First Amendment when it is dispositive of the case at hand."
(283)

Manoukian relied on an argument Landish used in his "Points and Authorities," filed with the Nevada Supreme Court June 28, 1979. Although commercial speech is entitled to some measure of constitutional protection, Landish argued the level of such protection is less than that afforded purely political speech. Manoukian agreed,

noting:

To require parity of constitutional protection for commercial speech and noncommercial speech could invite dilution, simply by a levelling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values" (Princess Sea 285).

Manoukian, citing Ohralik, correctly pointed out that the Court explicitly endorsed a lower level of judicial scrutiny in commercial speech cases (Princess Sea 285). He concluded that "the advertisement of prostitution does not pertain to fundamental constitutional interests as does the advertisement of abortion" (285). Rather, the justice concluded, "The speech at hand is due little, if any protection. It involves entertainment, not information or ideas" (Princess Sea 287).

Still, attorneys for Plankinton and the publications argued that brothel advertising dealt with an issue in the public interest. Their arguments underline the difficulty of defining what sorts of otherwise commercial speech might be protected because they deal with issues of either import or notoriety:

[T]he advertisements lay bare and open avenues of

discussion and debate on the legalized, medically controlled practice of one of the "oldest of professions", obviously polarizing the American public as diametrically as the hitherto well-litigated areas of capital punishment, abortion, dissemination of birth control products and information and the personal viewing of obscene motion pictures in the home.

Whether prostitution should be legalized in licensed medically controlled brothels has long been a subject of debate in many areas. That Nevada permits such an activity in certain of its counties has greatly advanced such debate and provided a viable forum and actual basis to foster such discussions and debates. Petitioners (sic) advertisement advances such meaningful discussion and debate, for clearly anyone responding to such an advertisement and becoming a patron thus becomes an informed voice in the Freedom of Speech on this almost ageless subject. (Hanson and Smith 20)

Still, the U.S. Supreme Court refused to hear the case and denied petitioners certiorari in 1981. Although both courts rejected advertisements as an avenue for debate and discussion on prostitution, it soon became apparent advertisements weren't the only "viable forum" available to those interested in disseminating brothel information.

Comment or Advertisement?

As commercial speech, of course, brothel messages would clearly be proscribable under Posadas. But, as noted in Chapter One, even Rehnquist approvingly cites Pittsburgh Press in support of the idea that editorial expression is always due full First Amendment protection. The line between the two remains far from distinct.

The July 6, 1979 issue of the Las Vegas Mirror, was published the same week NRS 201.430 took effect. The Mirror, a tourist-oriented publication, contained entertainment and gaming articles and was supported by advertisements for resort hotels, car rental agencies and other businesses with a large visitor trade. Prior to July 1979, the Mirror also ran advertisements for a variety of adult-oriented businesses, including brothels. But the July 6 issue carried no brothel advertisements; instead, the Mirror carried an article entitled "Gone But Not Forgotten."

The article was a sentimental history of the role of brothels in the old West, as well as a discussion of the current legal difficulties facing brothel advertisers. Frontier prostitutes were described as "Sisters of Mercy" who tended to the needs of lonely pioneers.

The article then discussed NRS 201.430. Clark County District Attorney Bob Miller and Edward Bernstein, an attorney for Princess Sea Industries, were quoted discussing each side of the Princess Sea case.

Accompanying the article was a brothel advertisement

labeled "example." (See Figure One.) Clearly visible on the advertisement were a map detailing how to reach Las Vegas's "closest and finest brothel, the World Famous Chicken Ranch," telephone numbers to the brothel and a limousine service, and descriptions of services offered at the brothel. These services were said to include the "largest selection of girls," "outcall services" and "dominant females for passive males." Also appearing on the advertisement was a caricature of two policemen holding a sign reading, "censored" between them. A comparison of this "example" with a similar advertisement in the Mirror run before the passage of NRS 201.430 indicates the "censored" sign covers only the words "and still growing strong" and "courtesy gas available to our customers."

Such brothel messages have been continuously distributed in Las Vegas, without reference to NRS 201.430, since 1979, according to Deputy District Attorney Edwards. Edwards said the constitutional status of the messages is too unclear to warrant prosecution. Despite complaints from some Las Vegas citizens concerning the sexual nature of the materials, efforts to remove the vending racks containing the magazine were discontinued, he said, when it was decided by his office that such measures would have to apply equally to all publications distributed in such a manner -- whether they contained brothel messages or not.

For the purposes of this study, flyers containing brothel messages were obtained from newsracks on Las Vegas

Bob List signed the bill. The State banned here in a bill, employees at Supreme Court. In February radio talk the Chicken Ranch that fails they have show, he referred to Brother in Pahump grounds to file suit. A billboards that are report they have in Federal District in sight for children been receiving calls Court, because it to see. However, from clients in involves a con brothels do not use California, asking the stitutional issue. The billboards in Clark they were still District Attorney County open. There seems Bob Miller has said Bernstein says to be a rumor that he feels brothels the Supreme Court Nye County add are offensive does not agree with brothels are closed, and should be Miller. The high Attorneys for, somehow legally court ruled in

Chicken Ranch owner Walter Plankinton the Mirror and Panorama have been denied a temporary restraining order to enjoin the state from enforcing the new law by District Judge Paul Goldmann and Michael Wendell. A July hearing will be held July 19, 1982 to determine if the statute is valid under the Constitution. The state has the power to regulate advertising. Mirror attorney Ed Bernstein claims this violates the First and Fifth Amendments of the U.S. Constitution: Freedom of Speech and Press, and taking away a property right of local Brothels. Bernstein contends that the state merely has the right to regulate a brothel from using obscene or misleading ads. Their rights to advertise cannot be cut off without due process. They will attempt to get a stay of enforcement pending an appeal, if the law is held valid at the July 19th hearing. He says if the case is lost in district court, they will take it directly

Carey Vs. Interstate Commerce. When New York legalized abortions, the rights of interstate commerce, as well as the First Amendment, were not violated. The test for AB is the first case to involve interstate commerce, but the U.S. Supreme Court held that Virginia attorneys will use the ad because it would hamper interstate commerce. The govern-

LAS VEGAS CLOSEST & FINEST BROTHEL

THE WORLD FAMOUS CHICKEN RANCH




CENSORED

Service - to and from Las Vegas - call 735-8107

Call rates call 735-8187

- Largest selection of girls
- All girls have physical inspections
- Our girls are the most beautiful
- Open - 24 hours. Visa, Master Charge accepted.
- Dominant females for passive males

For a complete L.V. experience it's a must to visit the world's most Famous Brothel. The Chicken Ranch.

We accept Visa and Master Charge




FOR SPECIAL CAR RENTAL RATES CALL 735-8187

JOIN US IN OUR NEWLY OPENED HEALTH FACILITY (JACUZZI, STEAM BATH, ETC.)

24 Hours

call: 1-702-727-5721

limousine service call 735-8187

Applications being taken from girls 18 & over.



Fig. 1. Example, "Gone But Not Forgotten."

Boulevard and on Fremont Street between Fall 1987 and Summer 1988. One 16-page flyer, entitled Fantasy To Remember is typical of these materials. Fantasy to Remember is made up almost entirely of pages labeled "paid advertisement," which tell of "nude show-dancers" who offer to perform in a customer's hotel room.

Only one page of the publication contains more than a few words of copy, the publication being dominated by suggestive pictures of scantily-clad women. Labelled "editorial," the page is headlined "Positively the Closest Brothel to Las Vegas." (See Figure Two.) It displays telephone numbers for the Chicken Ranch and for free air or limousine transportation service, a map showing how to reach the brothel, and a description of the facilities. In addition to a bar, a jukebox, and "eight-person jacuzzis offering private and group relaxation and enjoyment," the Chicken Ranch offers facilities to accommodate the physically handicapped, including widened doors and wheelchair ramps.

The "Ladies of the Chicken Ranch" are also described. (This part of the editorial could not be reproduced due to production limitations.) Their ages (18-37) and outside interests (nursing, teaching, real estate, farming, finance and physical fitness) are discussed. "One of the ladies speaks five languages and is still learning," the editorial notes. The writer of the editorial also stated that the prostitutes are involved in charitable activities

PLEASE NOTE:

Copyrighted materials in this document have not been filmed at the request of the author. They are available for consultation, however, in the author's university library.

These consist of pages:

65 (Figure 2: Fantasy to Remember)

UMI

in their spare time: "[T]heir support of the local Pahrump senior citizens' fund-raisers indicates their caring support of their home away from home."

Judging from the use of the word "editorial," it would seem the publishers of the flyers are using it in the sense touched upon in Chapter Three -- to refer to any non-advertising content. Such content could, of course, go beyond discussion of political issues or other matters in the public interest. In this sense, the term "editorial" might be properly applied to any expression protected by the First Amendment, including entertainment, literature and, artwork.

A second 16-page flyer, titled Singles Expose, also contains a single "editorial" page, headlined, "Legal Whorehouses...Only 45 minutes from Vegas but, oh, what a difference it makes!" (See Figure Three). This editorial emphasizes the safety of Nevada brothels from a public health perspective. It states that the girls are inspected weekly by a physician and that "health problems are virtually non-existent." It also warns that prostitution is illegal in Clark County and that "you have no protection against encountering an unhappy experience if you pick up a street walker."

The "editorial" goes on to describe the facilities at the Cherry Patch and at Mabel's and includes a map. "For information purposes, we are printing a map of the area, displaying the location of Mabel's and other significant

Legal Whorehouses...Only 45 minutes from Vegas but, oh, what a difference it makes!

FREE LIMO SERVICE

CHERRY PATCH RANCH
Featuring Japanese Type Bath!!

Cherry Patch PHONE NUMBERS
(In Nevada Dial (702)
Out of Nevada Dial (702)
1-372-5251
1-372-5574
1-372-5678

TO RENO
STRAIGHT OUT US 95 North to Highway 160 & turn left. You'll soon see a flashing red light.

ASH MEADOWS
CHERRY PATCH RANCH • BROTHEL
MABEL'S WHOREHOUSE

Only 18 Miles
Nevada 160
CRYSTAL NEVADA
Mansory to 100 - Turn
Indian Springs
95

Also SEXY Las Vegas

There are several legal brothels in Nye County. All of these brothels provide the safest avenue of enjoying paid sex. All girls are inspected weekly by a physician and health problems are virtually non-existent. It must be remembered that prostitution is illegal in Clark County (in which Las Vegas and the famous Strip are located). It exists of course, but you have no protection against encountering an unhappy experience if you pick up a street walker. Recently re-nubbed, the Cherry Patch now sports a rustic Western facade. Its interior is dominated by the western motif, with red velvet furnishings adding to the ranch atmosphere. The Cherry Patch a mere 25 miles from the Clark County line, is the closest and perhaps the most scenic of all Nevada's legal brothels to find. It's about an hour's drive from the center of Las Vegas.

FLASHING LIGHT
Go straight out US 95 North to Highway 160 and turn left. You'll soon see a flashing red light 10 to 15 miles in the distance. When you reach this light, you've arrived at the Cherry Patch.
For those who don't drive, or who arrive in Las Vegas by plane, bus or train, a phone to the ranch will provide round-trip limousine service to the ranch free of charge. This limousine service is available 24 hours. If you fly your own light plane, an airstrip is available during daylight hours.
When you arrive at the Cherry Patch you find, much to your delight, that there are always 15 to 20 beautiful girls waiting to please you.

SPECIALITIES

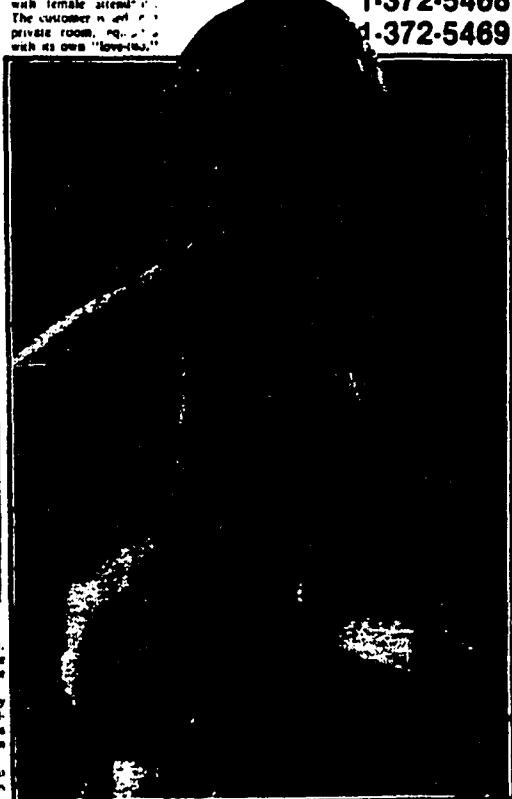
The new brothel, called Mabel's, is open and ready for business as you read this. For information purposes, we are printing a map of the area, displaying the location of Mabel's and of other significant tourist attractions. Mabel's is housed in a structure taken from the site of the old El Rancho resort, one of the first hotels custom built for adding a swimming pool and lighted tennis courts. In addition the visitor to Mabel's is in for another treat: Japanese style baths with female attendants. The customer is left in a private room, equipped with its own "love-tub."

Immersed therein, the customer feels tingling fingers over the body, soothing tired muscles with warm, scented oils, and is eased into a state of total relaxation. So enjoy the attractions of our area, from its mix and casino games on the Strip and downtown, to the "love-tub" out at Mabel's!

ARE Japanese type baths, Bubble Baths, Trade sessions. Largest selection of girls, 18 years and older. Girls of all nationalities, out calls, Ranch services, free limo service. Your own personal limo free.

brothel information and, of course, the Cherry Patch's famous limousine...only if you dare. Master Charge, Visa and Travelers Checks are accepted. A physician gives the girls weekly health checkups, while the girls check out their customers thoroughly.

MABEL'S PHONE NUMBERS
(In Nevada Dial (702)
Out of State Dial (702)
1-372-5468
1-372-5469



Editorial

Fig. 3. Singles Expose.

tourist attractions," the article states. These other attractions include the towns of Mercury, Pahrump, Ash Meadows, and the Cherry Patch brothel.

The "Wild West" theme seen in the Mirror "editorial" discussed above is further evolved in an article appearing in the Sept. 11 1987 issue of Las Vegas After Dark. (See Figure Four.) Unlike the flyers described above, Las Vegas After Dark is a more traditional editorial forum with entertainment features, show reviews, and an opinion piece entitled "Abort Bork," in which readers are urged to oppose the nomination to the U.S. Supreme Court of the former appellate court judge. The brothel story, headlined, "The Brothels of Nevada; In the Spirit of the Old West...Only 45 minutes from Vegas, but oh, what a difference it makes! (16)" focuses on the social role brothels have historically played:

Much has been told over the years about the Winning of the West. About those courageous pioneers who blazed new trails into the wilderness, taming that virgin land and making it their own.

These brave men needed uncomplicated outlets for their pent-up passions. Equally courageous and adventurous women soon followed, and the first brothels in the west opened, flourished and grew.

The feature points out that prostitutes are inspected by a health officer monthly -- "That is why the US Dept of Health recommends the legal brothels of Nevada in these

AD16

THE BROTHELS OF NEVADA

IN THE SPIRIT OF THE OLD WEST

BROTHELS OF NEVADA

Only 45 Minutes From Vegas ... Oh, What A Difference It Makes!

Fig. 4. Las Vegas After Dark, Sept. 11, 1987.

Las Vegas After Dark, September 11-17, 1987

Much has been told over the years about the winning of the US 95 which eventually leads to Reno; you can find three of these legal brothels within a reasonable drive from the Las Vegas Strip from the Nevada State Capitol building to the Las Vegas Strip.

These brave men needed an complicated outlets for their own up payments. Equally courageous and adventurous women soon followed, and the first brothels in the West opened, flourished and grew.

Today, that tradition is kept alive in Nevada, a state with an inside most akin to that of the early pioneers. We are also the only state in the Union that permits legal brothels. Some of the finest and oldest are within the vicinity of Las Vegas.

If leaving the city limits of Las Vegas and traveling north along US 95 which eventually leads to Reno, you can find three of these legal brothels within a reasonable drive from the Las Vegas Strip from the Nevada State Capitol building to the Las Vegas Strip.

The first opportunity for you to visit one of Nevada's brothels will come about 85 miles outside of Las Vegas, just beyond a town called Indian Springs. Take a left at the junction of US 95 and Highway 106 and continue for

AD17

three miles on 106 to Crystal, Nevada. Turn right at the sign and you'll quickly be pulling up to the famous Cherry Patch Ranch.

If you continue on the road to Crystal, you'll reach Madam's, several miles farther. If you do not turn off at Highway 106 and you continue on US 95, you will drive on the same roads, where the Valley of the Baths brothel is located. Its next brothel after that are on the outskirts of Reno, some 400 miles north.

If and when you do pull up at the Cherry Patch, you might want to go first to the adjacent Visitor's Center, where you'll find a restaurant and bar, serving some of the best hamburgers in the state of Nevada (that's in New York City, in case you didn't know) and with one of the finest and most comfortable bathrooms you'll ever see. Next is an exhibit of artifacts and literature pertaining to the colonial history of Nevada. Brothels, Inc. is the only museum of its kind in the world.

After you've eaten and maybe unblinded a little liquid refreshment, ask to see Madame Anne Ample. If she is not on tour with her famous surprise act, Anne will personally introduce you to some of the loveliest - and healthiest - girls in the West.

You see, in order to work at a legal brothel in Nevada, you must have a clean criminal record, as determined by the US Dept. of Health recommends the legal brothels of Nevada for safety in these uncertain times.

Honesty tells us that the healthiest persons are those which enable people to satisfy their basic human needs with the least amount of alcohol and risk and be free of the time to work toward the betterment of humanity. The American West was won by pioneering men and women who were hard working and quality breed of men. The area of metropolitan Las Vegas is one where these ideals are still cherished and are in daily evidence.

So enjoy yourself in Las Vegas and, if you want to play away from the tables, drive a few miles north and do it the safer way.

FREE LIMO SERVICE

Cherry Patch PHONE NUMBERS

1-372-5251
1-372-5574
1-372-9984

CHERRY PATCH (Ranch) - BROTHELS - WHOREHOUSE

VALLEY OF THE DOGS

CRITICAL CHERRY PATCH TURN

125 10886



MADAME ANNE AMPLE

uncertain times" -- and concludes:

History tells us that the healthiest societies are those which enable people to satisfy their basic needs with the least amount of difficulty and risk and be free the rest of the time to work toward the betterment of humanity. The American West was won by pioneering individuals who believed in hard work and equally hard play. So enjoy yourself in Las Vegas and, if you want to play away from the tables, drive a few miles north and do it the safer way.

A second issue of Las Vegas After Dark, dated Nov. 27 - Dec. 3, 1987, elaborates on the public safety and health issue. The front cover of the magazine announces: "Brothels Safest Says AIDS Chief Page 16." (See Figure Five.) In the page 16 editorial, Clark County health official Rick Reich is quoted as saying legal Nevada brothels are "especially safe," in light of the fact that no case of AIDS has ever surfaced in a licensed house of prostitution. The editorial contrasts "safe" legal houses of prostitution, where customers must wear condoms, to prostitution on the streets, "where there is no way to know whether or not such a prostitute is infected." (See Figure Six.) On page 17, facing the editorial, is an advertisement for "Free Tourist Information," including information about brothels close to Las Vegas. (See Figure Seven.) On the two pages before the editorial is an article similar in appearance to the one appearing in the Sept. 11 issue of Las Vegas

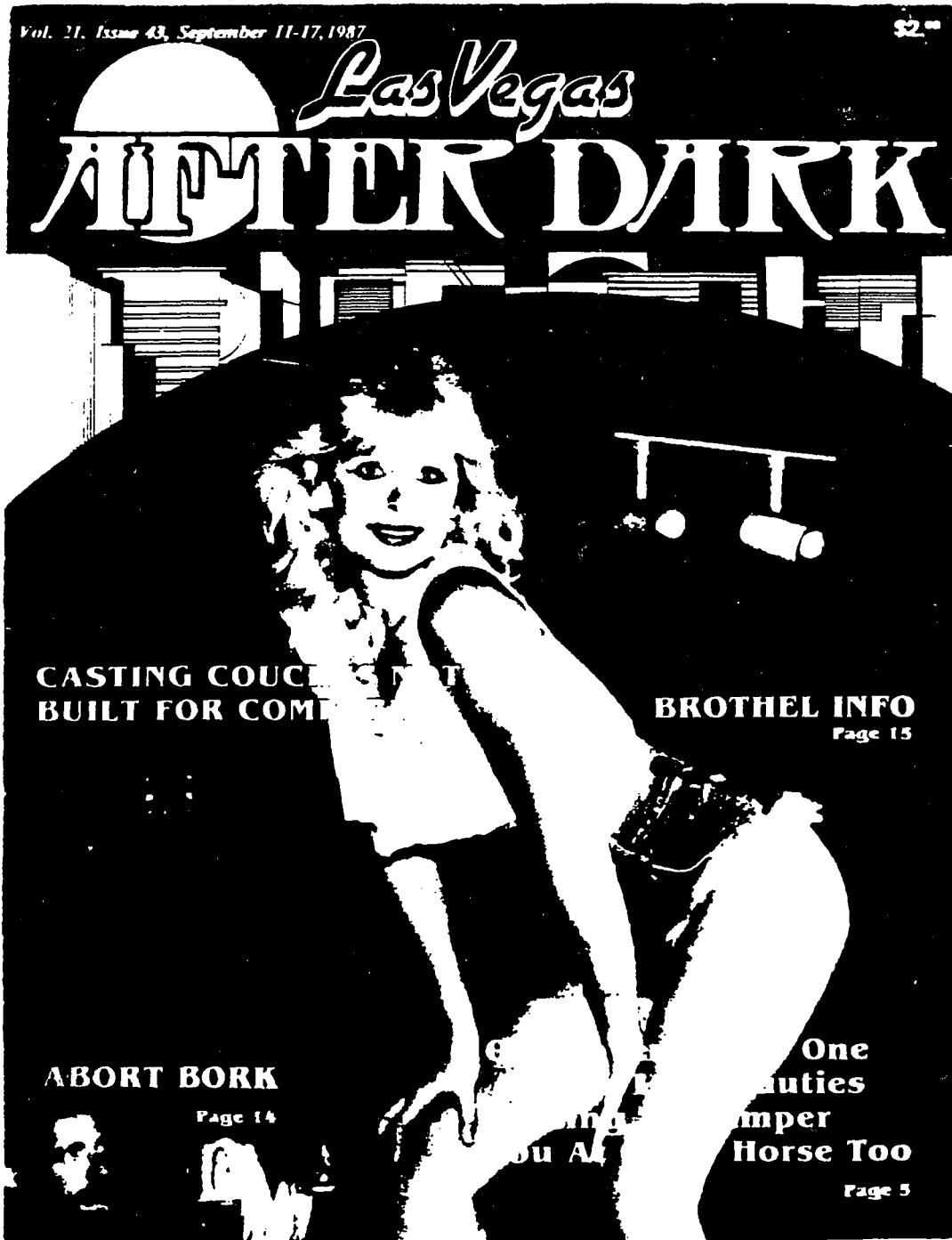


Fig. 5. Las Vegas After Dark, Nov. 27, 1987.

AD18

Las Vegas AFTER DARK, Nov. 27-Dec. 3, 1987

• COMMENTARY —

Brothels Offer Safer Sex

Legal brothels are the safest places these days for a man to have a sexual experience, outside of the bonds of marriage. That's the word from state and county health officials.

In fact, according to Clark County Health District AIDS Services Coordinator Rick Reich, not a single woman working in a legal brothel, either in Nevada or in Calgary, Canada (the other location in North America where brothels are allowed), has ever tested positive for the AIDS virus.

For the past year and a half, the State of Nevada has required that every applicant for a position with a legal brothel be tested for the virus prior to being licensed to work. During that time, six women taking the test turned up positive, meaning they had been exposed at some time to the virus. That doesn't necessarily mean these women had AIDS or were carrying it, but they were still excluded from working at a Nevada brothel.

Reich adds that because all brothel employees are required to be tested every two weeks during their employment, he now has statistics confirming that brothels are no place to find this dread disease. Not one brothel worker has "zero-converted," meaning that no one who tested negative prior to going to work at a brothel has subsequently tested positive.

"The fact that legal brothels now require all clients to use condoms makes them especially safe from the threat of AIDS and all other sexually transmitted diseases," says Reich.

By contrast, streetwalker prostitutes are not monitored in any way and there is no way for a potential customer to know whether or not such a prostitute may be infected.

In a time of anxiety, that's good news to everyone in this area, resident or visitor.

By the way, Reich also states that there are no reported cases of AIDS or even positive blood testing for AIDS even from prostitutes working legally in Western Europe. As anyone who has ever visited Amsterdam, Hamburg or a number of other European cities knows, there are districts within each of these municipalities where prostitution is legal.

Working women are inspected regularly by health officials and pay normal taxes on their wages. They also receive health insurance and retirement benefits.

It's good that parts of Nevada and of Calgary permit the operation of legal brothels. Wouldn't it be better, from both a medical and societal standpoint, if small sections of New York, Chicago, Los Angeles and other American cities were zoned for this activity?

Citizens not wishing to participate or to witness such goings-on would know where not to go, and the rest of their cities — as in Europe — would be kept free from any form of prostitution.

If someone wants to gamble legally in the United States, he or she knows where to go; the state of Nevada or Atlantic City, New Jersey. Gambling is a basic human urge, as, of course, is sex.

Neither is likely to disappear as long as humanity survives. How much better to provide appropriate, regulated places for them than to force individuals to break the law and risk personal dangers in order to satisfy their basic needs.

Until other parts of our great country become more enlightened in these areas, we can at least be thankful for the legal casinos — and the brothels — we do have.

'Tasty Tidbits'

•From page 3

recalls about her private bank account in those days and, when that was gone, she would tell his secretary and another deposit would be made.

She would customarily do her shopping at London's posh Harrod's department store and the same secretary would be sent the bill. Now, she has to pay her own bills and doesn't like it one bit.

So you think bigtime TV execs have it made! CBS Entertainment last week axed three VPs from its payroll, along with 32 other workers.

Included in the firings were VPs Nancy Bien, Bob Silberling and Peter Frankovich. Lesser fires all came from the dept. of telepix (TV movies) and miniseries.

This is the latest bloodletting in CBS' effort to get rid of its red ink. Earlier this year, the famed CBS News Dept. was severely pruned, prompting anchorman Dan Rather to say the word "Courage" at the end of one of his newscasts, in an attempt to comfort his colleagues.

Vegas movie producer Ray Steckler, whose past epics include "Blood Shack" and "The Vegas Slasher," hosted a party a couple of weekends ago in the Sands Hotel room of some of his prospective new investors.

Among those present for the festivities were Palomino Club strip tease artist Christi Cambell (see photo), actress Adrienne Garcia (who was featured here some weeks ago after she revealed how she has been propositioned on the "Las Vegas Casting Couch"), Channel 13 reporter Sandy Beal and his astrologer-friend, Celia.

The investors, from Canada, were being wooed by Steckler in hopes they would back another of his features, which are now shot directly for video. But, the investors, still suffering from the Oct. crash of world stock markets, have not yet come through with the required dough.

Las Vegas Publishers, Inc.

dba

CASINO NEWS

Now in its 15th Year Serving The
Hotel Industry's Personnel &
Entertainers

RALPH PETILLO

General Manager

Mailing address: P.O. Box 15330,
LV, NV 89114 ... Located at 2450-
52 Industrial Rd. LV, NV 89102
Phone: (702) 364-9900

Fig. 6. Las Vegas After Dark, Nov. 27, 1987, "Editorial."

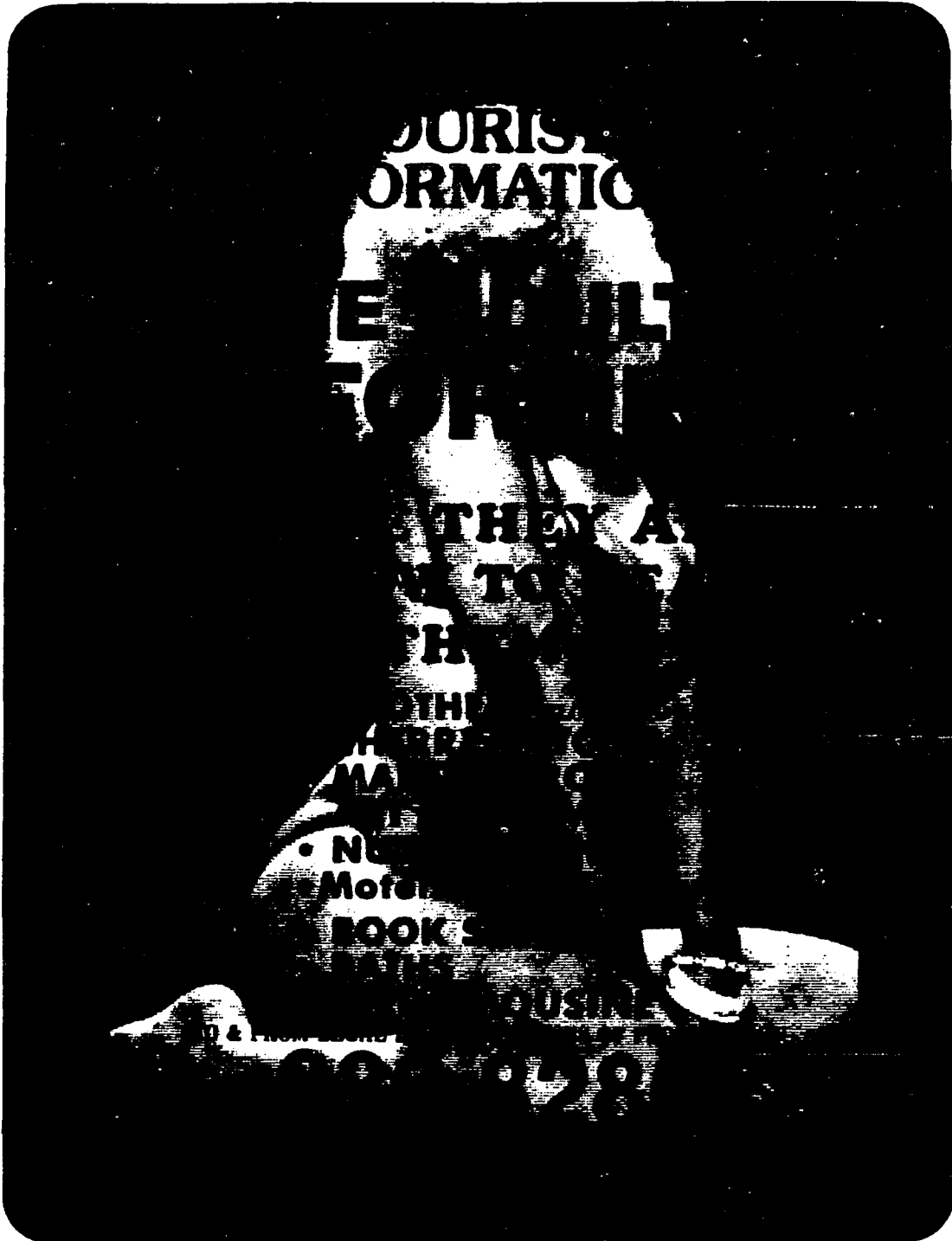


Fig. 7. Las Vegas After Dark, "Tourist Information."

After Dark. (See Figure Eight.)

In 1988, with AIDS an ongoing concern, brothel messages continue to focus on public health. An 8-page flyer titled "Showgirls and Showdancers," containing many of the same advertisements seen in Singles Expose and Fantasy to Remember, features an "editorial" entitled "Safe Sex What Everyone Should Know." (See Figure Nine.) The editorial claims that with the advent of public concern over AIDS, Nevada brothels have been declared "100 percent safe" by state health officials. A picture of a hot tub, a limousine and a seductively-smiling woman adorn the "editorial," which prints a single phone number to call for further information or free transportation to Sheri's Ranch.

When addressing public health issues, these "editorials" contain much information which is either false or misleading. It seems highly unlikely that public officials would have ever "recommended" brothels or called them "100 percent safe," nor are these claims ever documented. If false, such statements might run afoul of the Federal Trade Commission, and would certainly put them outside the protection of the First Amendment when considered as commercial speech. But if one considers the statements editorial opinion -- ideas rather than facts -- they might well be within the law. As previously noted, the First Amendment does not recognize the existence of a false idea (Gertz 339).

Therefore, in addition to Simon's concern that lack of

THE BROTHELS OF NEVADA

IN THE SPIRIT OF THE OLD WEST



BROTHELS OF NEVADA

Only 45 Minutes From Vegas ... Oh, What A Difference It Makes

Legal Whorehouses ... Only 45 minutes from Vegas but, oh, what a difference it makes!

SPECIALTIES

The new brothel, called Mabel's, is open and ready for business as you read this. For information purposes, we are printing a map of the area, displaying the location of Mabel's and of other significant tourist attractions.

Mabel's is housed in a structure taken from the site of the old El Rancho resort, one of the first hotels built in Las Vegas for making a relaxing pool and lighted tennis courts.

In addition, the venue to Mabel's is in hot tubs, Japanese style baths with female attendants. The customer is led to a private room, equipped with its own "hot-tub" immersed therein, the customer feels tingling fingers over the body, soothing tired muscles with warm, scented oils, and so on.

By then the attractions of our area from shows and casino games on the Strip and downtown, to the "love tub" out at Mabel's!

Our Japanese-style baths, bubble baths, made especially, layered selections of girls, 18 years and older, girls of all nationalities, east coast, west coast, free time service, your own personal items, free bottled information mail, of course, the Cherry Patch's business telephone - only if you dare.

A special feature of the girls' beauty treatments are massages, which the girls check out their customers thoroughly.

FREE LIMO SERVICE

CHERRY PATCH RANCH
Japanese Type Bath

CHERRY PATCH PHONE NUMBERS
Out of Nevada (951) 1-372-5251
In Nevada (702) 1-372-5574
1-372-9984

MEADOWS OF THE CHERRY PATCH RANCH • BROTHEL

WHOREHOUSE

LEFT TURN
One 1/2 mile on 158 Turn

CITIZEN CENTER
NEVADA

Las Vegas

There are several legal brothels in Nye County. All of these brothels provide the safest avenue of enjoying paid sex. All girls are inspected weekly by a physician and health problems are virtually nonexistent.

It must be remembered that prostitution is illegal in Clark County (in which Las Vegas and the famous Strip are located). It exists, of course, but you have no protection against encountering an unhygienic experience if you pick up a street walker.

Recently redeveloped, the Cherry Patch now sports a rustic, Western facade. Its interior is decorated in the western mode, with red velvet furniture and a warm, inviting atmosphere.

The Cherry Patch is located 21 miles from the Clark County Line in the closest and perhaps the easiest of all Nevada's legal brothels to find. It's about an hour's drive from the center of Las Vegas.

FLASHING LIGHT
Go straight out US 95 South to Highway 150 and turn left. You'll soon see a flashing red light 10 to 15 miles in the distance. When you reach this light, you've arrived at the Cherry Patch.

For those who don't drive, or who arrive in Las Vegas by plane, bus or train, a phone to the ranch will provide round trip limousine service to the ranch free of charge. This limousine service is available 24 hours a day. If you fly your own light plane, an airport is available during daylight hours.

When you arrive at the Cherry Patch you find, much to your delight, that there are always 15 to 20 beautiful girls wanting to please you.



ALL BROTHELS PHONE NUMBERS
In Nevada (702) 1-372-5251
Out of State (951) 1-372-5469
1-372-9984

Fig. 8. Las Vegas After Dark, Sept. 11, "Editorial."

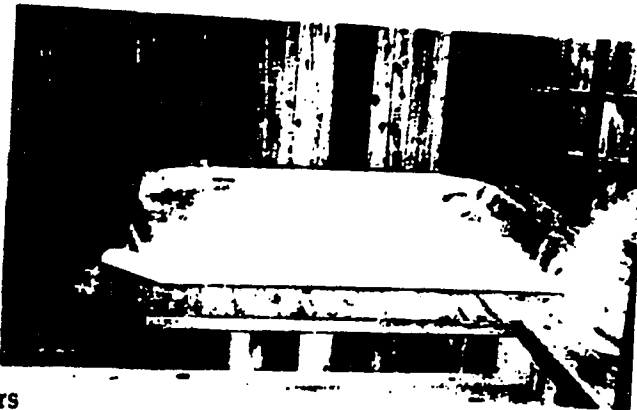
SAFE SEX



What Everyone Should Know

If you are a local or visitor to Las Vegas and are looking for a safe sexual encounter, Nevada's legalized brothels are the answer.

With the advent of the AIDS scare, Nevada brothels have been declared 100% safe by the Nevada Health Dept. Sheri's Ranch in Pahrump Nevada has been known for its dedication to providing the clean luxurious and courteous service, which earned it and it alone a six star rating in the book "Brothels of Nevada."

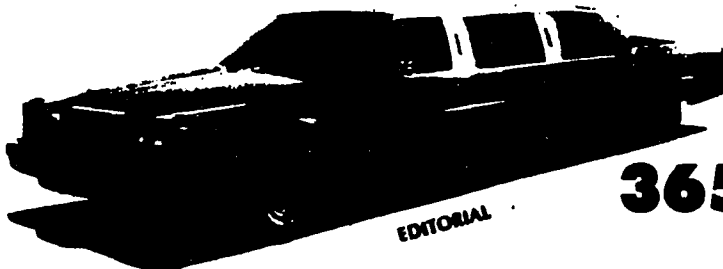


Sheri's Ranch being the oldest name in So. Nevada brothels has carried on with its tradition of over 25 years providing clean safe sex to its customers.

All girls in the ranches have regular weekly health inspections by a Certified Doctor. Sheri's Ranch being absolutely the closest brothel to Las Vegas provides free limousine service to and from Sheri's Ranch.

So for the time of your life at a down-to-earth price & freedom from disease visit Sheri's Ranch.

For more information or
free limousine
service call



365-1118

EDITORIAL

Fig. 9. "Safe Sex -- What Everyone Should Know."

commercial speech definitions might dilute the protection offered core speech, there is also the danger that imprecision could lead to the protection of speech which might be legitimately controlled. The question, then, is not only one of choosing between control or freedom, as proponents of commercial speech rights sometimes suggest. The question is one of separating that speech which it is in society's legitimate interest to control from that deserving the full protection of the First Amendment.

CHAPTER FIVE

DEFINING COMMERCIAL SPEECH

The messages with which the Nevada judiciary dealt in Princess Sea Industries were treated by both sides as advertisements, and definitional issues were not raised at any level of that case. Justice Mowbray cited U.S. Supreme Court case law recognizing a "'commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'" (Ohralik 455-456).

The U.S. Supreme Court has tended to evaluate commercial speech cases in terms of two "commonsense" definitional components: message and content. A third component, the context in which a message appears, has also received some attention. In this chapter, the definitions arising from message content, speaker intent and communication context will be applied to the brothel messages examined in Chapter Four. It will be seen that while most of the definitions offer certain insights into the nature of commercial speech, none can distinguish commercial from non-commercial messages with any reliability.

Message-Based Definitions

Perhaps the most common distinction proposed is to equate commercial speech with advertising, a form of communication which generally consists of messages that publications have been paid to project. But such a definition founders on at least two grounds. First, an examination of the brothel messages reveals an implicit claim that the brothel messages in question have not been paid for. As already noted, while nearly every page in the booklets from which the messages in Figures Two, Three, Four, and Nine are taken are labeled "Paid Advertisement," those pages on which the brothel messages appear are labeled "Editorial." The implication is that these messages represent the editorial voice of the publishers of the booklets. Defining commercial speech as paid advertising, therefore, is underinclusive. By the same logic, a newspaper's commercial messages regarding circulation, advertising or employment opportunities could never be categorized as commercial speech as long as they appeared in the sponsoring publication, since they were not paid for in the traditional advertising sense. In addition, there is the potential problem, again suggested by the brothel messages under discussion, of proving a given communication had been paid for by someone other than the publisher of the medium in which it appeared.

A second problem with such a definition is that the U.S. Supreme Court itself has rejected the notion that

messages lose their constitutional protection if money has been paid to project them (New York Times v. Sullivan). A lesser standard regarding paid advertising might well threaten the protected constitutional status of political campaign commercials and other messages which are explicitly political, but nonetheless commercial in the sense that they have been paid for. Therefore, defining commercial speech as advertising is not only underinclusive; such a definition seems overbroad as well, since the Court has chosen to exclude advertising in the public interest from the type of commercial speech regulation normally permitted.

Still, the first definition used by the Court, in Valentine v. Chrestensen, was based entirely upon message content. There, the Court defined commercial speech as "purely commercial advertising," a definition which seems very narrow if applied to Nevada brothel messages. Only the message in Figure Seven seems "purely commercial;" the rest have considerable non-commercial elements. That the Court itself did not apply its own definition to Valentine's handbill in no way saves this definition. If such a definition's connotative meaning were actually to be applied, it would seem that advertisers need only add information or entertainment value to their messages to have them fall outside the category of "purely commercial advertising."

The inadequacy of such a definition should be even

more apparent when one considers a later version of the same message-based formula, the one used in Pittsburgh Press. In that case, the Court declared that commercial speech was that which did "no more than propose a commercial transaction" (385). Under this definition, only the brothel message in Figure One, with its statement, "We accept Visa and Master Charge," makes a reference to a specific economic transaction, and should be considered commercial. Not one of the messages mentions payment for or price of a specific sexual activity, factors which would seem to be necessary before one could meaningfully discuss a commercial transaction with a prostitute.

In general then, one can conclude that message-based definitions of commercial speech suffer from underinclusiveness. They fail to reach all but the simplest form of price advertising and are easily eluded by advertisers seeking to insulate their messages from government regulation. This is unfortunate, because, as Richard Barnes claimed, such definitions are at least "objective" in that "all that need be determined is the speech's content" (488).

Speaker Intent

Still, the Court has on occasion relied on definitions which turn on motive. Perhaps this represents an effort to remedy the underinclusiveness encountered when evaluating content only. Unfortunately, motive-based definitions are

even more troublesome than message-based distinctions, since they require subjective evaluations which go beyond the speech itself.

Obviously, a search for motives can be a difficult, if not impossible task. As Judge Clark asked in Chrestensen:

[H]ow can we say that plaintiff's motives are only or primarily financial? Is he just engaged in an advertising plot, or does he really believe in his wrongs? We know how opposition to oppression, real or fancied, grows upon a person, and we can suspect that by now, plaintiff regards himself as a crusader against injustice. . . . Indeed, we think it is a misconception of the great freedom here involved to hold it more applicable to a group protest for abstract religious or political principle than to individual protests for concrete business injuries. Not such was the attitude of the founding fathers; was it not against a tax on tea that one of our most cherished blows for freedom was struck? (516)

Judge Clark's observations raise another problem with a motive-based definition -- that it is as overbroad as a content-based definition is underinclusive. Many forms of absolutely protected speech are presumably economically motivated, from newspaper editorials to labor demonstrations. Certainly, one could argue that all the messages examined in Chapter Four are motivated by a desire to increase business at Nevada's legal brothels. Such a defi-

dition, then, does not offer a way to distinguish between those messages that appear overtly commercial and the commentary contained in Figure Six, which recites factual information and argues for the legalization of brothels in other jurisdictions.

The editorial in Figure Six is also a good example of how motivation is difficult to determine. One might argue that the editorialist seeks to enhance the reputation of legal brothels by pointing out their public health safety record. On the other hand, it can also plausibly be argued that the call for legalization of brothels in other jurisdictions, if heeded, could have a negative economic impact on geographically remote Nevada houses of prostitution. Thus, the claim could be made that the content of the editorial in Figure Six indicates its motive is to hurt Nevada brothel business by seeking the legalization of prostitution in more accessible locales.

Finally, a motive-based definition could lead to some disturbing anomalies. The messages in Figures Five, Six and Nine all mention public health and the safety record of brothels. In the Figure Six editorial, these statements are attributed to a Clark County Health Department official. A motive-based definition would allow some publications to quote this official, but forbid the same quotes if they were published by those with an economic interest in brothels. By construing an underlying economic motive, those who would regulate speech could forbid one speaker

the right to disseminate information to which others enjoyed unfettered access. Motive, then, would determine the overall level of First Amendment protection afforded speakers, precisely the situation warned against by Justice Douglas in his celebrated Dennis dissent:

The crime then depends not on what is taught, but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen. (583)

The Court's consideration of economic motive has not been limited to the economic interests of the speaker. In Central Hudson, in which the Court fully restated the commercial speech doctrine, commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience" (561). Such consideration of readers' economic interests might call into question the legal status of such messages as a November 1980 Cosmopolitan magazine article, "Sex For Sale in Las Vegas." Presumably, Cosmopolitan had no economic interest in Nevada brothels. Without reaching the more problematic issue of whether the magazine's economic interests were served by publishing sexually titillating articles, thereby affecting classification of the piece, one can assume its generally favorable description of a Pahrump brothel may well have impacted the reader's economic interests. Indeed,

because the article explicitly listed the sexual services offered, under this definition it was, in the sense of describing a specific economic transaction, more commercial than the brothel messages.

Such a definition, if the word "solely" were to be given any consideration, might also be as underinclusive as those which equate commercial speech with no more than a proposal for an economic transaction. The use of the word "solely" further underscores the notion that any entertainment or political function served by the speech removes it from the realm of the commercial.

One variation of motive-based distinctions which purports to eliminate at least some of the troublesome subjectivity involved with discovering intent is commonly called the "primary purpose test." Here, the message itself is evaluated to determine the motivation behind its dissemination. But the problem with using a primary purpose test to distinguish commercial from non-commercial speech was pointed out as early as Chrestensen by Judge Clark:

[A]t once we are faced by the question, "How much is primarily"? "Primarily" commercial presumably signifies a test quantitative in amount; a limited dross of commercialism does not vitiate, though a more substantial amount may, and presumably will . . . Plaintiff's handbill furnishes a good example of the uncertainty, not to speak of unreality, of the sug-

gested distinctions. (515-516).

A variation of the primary purpose test was suggested by Nadir N. Tawil. Tawil claimed his definition lay between the subjectivity of motive and the underinclusive-ness of content. But the definition --"commercial Speech is an expression designed primarily to promote a commercial product, service, or a business interest" (1027) --seems only a restatement of the primary purpose test and is fraught with the same difficulties. Such attempts to separate primary from secondary motives are bound to fail, Tribe observed, since communicators are likely to want to both make money and convince others of the value of their ideas. Protection cannot be limited to those with altruistic motives, Tribe wrote, because "it is unthinkable that [F]irst [A]mendment protection should extend only to saints." (892, n. 11)

Communication Context

Another commonsense distinction between commercial and non-commercial speech is the context in which the message appears. Although the Supreme Court has considered context as a minor factor, if at all, it deserves examination, if only to emphasize its shortcomings as a definitional component.

If considering context, one might be tempted to afford greater protection to the messages appearing in Figures One, Six and Eight because they appear in publications

which conform to traditional notions of reputable media. Panorama and Las Vegas After Dark are traditional magazines in the sense that they feature considerable editorial content dealing with a variety of subjects of presumed interest to Nevada tourists. In contrast, the other publications deal editorially only with brothels, while the rest of the pages, those labelled "Paid Advertisement," also concern themselves with sexually-oriented entertainment.

One must be careful, however, not give too much weight to such considerations, for they simply add another definitional problem to our inquiry: what constitutes "the press?" Donald Lively has examined these difficulties in a commercial context and has concluded, "The notion that a publication must be evaluated to determine whether it is part of the bona fide press is demonstrably dangerous" (862). For the most part, the Court has wisely avoided this issue. There is also the historical view, held by the Court, that pamphlets and handbills, far from being non-traditional media, "have been historic weapons in the defense of liberty" (Lovell v. Griffin 452).

Combining the Components

The Court has also, on more than one occasion, combined the above-mentioned components into a single definition. In Bigelow, the Court noted that "[t]he diverse motives, means and messages of advertising may make speech

'commercial' in widely varying degrees" (826). This is not particularly helpful, since the Court does not address the issue of where the line should be drawn between protection and permissible regulation. Even a cursory examination of Nevada brothel messages reveals they contain commercial elements in widely varying degrees, but this observation does not help separate commercial from non-commercial speech.

In Bolger, the Court looked for three factors, which, when taken together, were determinative of commercial speech: economic motivation, proposal to engage in an economic transaction, and reference to a specific product. But combining these factors did not alleviate their individual shortcomings. Product reference and proposal to engage in economic transaction do not remedy the intractable problem of determining motivation.

Nor does this combination of factors help separate commercial from non-commercial brothel messages. As already noted, most of the brothel messages lack any specific proposal to engage in economic transaction. Such a definition then, is seriously underinclusive, since the lack of any of its three parts means the speech in question is non-commercial.

Another combination of factors was advocated by Thomas Merrill, who suggested the following three-part definition of commercial speech:

(1) speech that refers to a specific brand name prod-

uct or service, (2) made by the speaker with a financial interest in the sale of the advertised product or service, or in the distribution of the speech, (3) that does not advertise an activity itself protected by the [F]irst [A]mendment. (236)

Neither of the subsidiary second and third prongs of Merrill's definition need be discussed in detail at this point. Prong two is a motive-based test, the shortcomings of which have been discussed above. Prong three, which will be incorporated into the definition proposed in this thesis, will be discussed more fully in Chapter Six.

At first glance, Merrill's first prong, using specific product reference as a definitional component of commercial speech, seems attractive. Like other message-based factors, it offers an objective criterion for distinguishing commercial speech. (Although that objectivity is sacrificed in prong two, which perhaps Merrill feels compelled to add in order to save his definition from overbreadth.) But while the initial objection to this is its potential overbreadth (specific product reference would categorize the above-mentioned Cosmopolitan article as commercial speech and could also apply to consumer publications) it also appears to be underinclusive. Only the commentary in Figure Six makes no specific product reference, but it would be easy enough to delete any reference to a specific brothel in Figure Seven, the only message whose status as an advertisement is not in dispute, with-

out substantively changing the message itself. Neither does the third prong save Merrill's definition, since speech which concerned an activity not itself protected, like prostitution, would remain commercial, regardless of the circumstances surrounding publication.

The Question of Harm

What is notably absent from any of the above definitions is an underlying justification for affording a lesser standard of protection to commercial speech. And while the Court has attempted to justify a lower position in the hierarchy of First Amendment values, the Court has never said commercial speech is per se harmful.

Simon claimed that this was a problem with prior definitional attempts, arguing that, "The notion that speech may be regulated or prohibited without a showing of harm is foreign to the spirit of [F]irst [A]mendment jurisprudence" (232). Implicit, then, in Simon's argument is the notion that for a separate category of "commercial" speech to exist at all, such speech must somehow be harmful. Simon suggested that rather than continue applying the Central Hudson test, a test which allowed for the regulation of non-harmful speech, the harm of commercial speech must be explicit in its definition (232). Such a definition, according to Simon, would require the government to show a causal link between advertising and the purported harm. Thus, Simon's definition of commercial speech was:

calculated expression in the form of advertising or promotional material which is designed by the speaker to affect consumer purchases on the basis of information or impressions contained therein resulting in action which is harmful to individual consumers or society as a whole. (244)

Simon's definition stands apart from the others because its use of the term "commercial speech" is unique. Most advertisements would not be categorized as commercial under the definition, unless specific harm could be shown.

A second troublesome aspect of Simon's definition is that there is also the source of the harm to be considered. Would the state of Nevada, in attempting to control brothel advertising, have to show merely that brothel messages increased business at houses of ill repute? Or would the state have to show that prostitution itself was harmful? Is speech itself ever harmful, or is it only the action which the speech might engender which society ought to prevent? These questions are implicitly raised by Simon's definition, but never answered.

Simon's definition is inadequate because the answers to these questions remain open to debate. Also open to debate is his claim that "the effects of advertising can be reasonably predicted" (240). Persuasion is at best a murky science, and specific cause-effect relationships between message and audience behavior are rarely, if ever, quantifiable. Professor Don Pember noted that "there is

little specific evidence, for example, that an advertising campaign can foist unwanted products upon an unwilling public. Evidence is also lacking that most advertising has significant impact upon most consumer purchasing decisions (Pember 56).

It is, of course, reasonable to argue that advertising must work, otherwise advertisers would sooner or later realize that their efforts were unsuccessful and discontinue them. But Simon's definition could well require that courts decide questions of cause-and-effect better left to scientists.

In addition, Simon's definition provides no reliable way to distinguish between what he calls "advertising or promotional material" and what those wishing to disseminate brothel messages would undoubtedly call protected editorial copy. One is still left to decide by some other standard what exactly distinguishes commercial from non-commercial speech. What Simon has done then, is not to define commercial speech, but suggest a new standard by which commercial speech cases should be decided.

Finally, commercial speech is not the only form of communication of which the Court has declared regulation permissible without a specific showing of harm. Despite continued controversy over the societal effects of obscenity, the Court continues to permit regulation, if not suppression.

The Speech/Action Nexus

Each of these definitions has its shortcomings. Message-based tests usually are underinclusive, and sometimes overbroad; motive-based formulations are also generally or so subjective as to be of little value. The primary-purpose test suffers similarly from the problems inherent in determining intent. Neither does combining the factors seem to take care of the difficulties encountered. If anything, such combinations seem only to exacerbate the definitional problems, since rather than compensate for each other, each definitional component retains its weaknesses.

On the other hand, some of the commonsense distinctions discussed in this chapter seem to offer help in defining commercial speech, in that they attempt to isolate some factor -- or combination of factors -- that make commercial speech different from other forms of communication. Discussions of motivation, as well as Merrill's emphasis on product reference, remind one that commercial speech is characterized by an intended economic transaction. Message-based tests attempt to isolate some objective indicator of this connection between commercial speech and subsequent economic activity.

Several commentators have discerned this close relationship. Rome and Roberts have commented that "commercial speech is 'speech plus conduct'" (33). Although Simon seemed to ignore the importance of persuasion in other categories of speech when he observed that commercial

speech "is the most intentional of all speech," it is certainly true that commercial speech is always linked to an intended economic transaction. It was Farber who offered the best-developed analysis of the link between commercial speech and economic action, when he discussed the contractual elements of commercial speech. Farber noted that "Similar to the language of a written contract, the language in advertising can be seen as constituting part of the seller's commitment to the buyer" (387). After dismissing economic motivation and subject matter as distinguishing factors, Farber turns to the distinction that "the commercial speaker not only talks about a product, but also sells it" (386).

Such a reconception of commercial speech as speech brigaded with economic action should appeal to those on both sides of the advertising regulation issue. Those opposed to regulation would likely agree that contracts, either explicit or implied, ought not be protected by the First Amendment. Those favoring regulation ought equally to agree with Farber's observation that a "statute which prohibits the showing the contract to consumers in advance might raise [F]irst [A]mendment problems not unlike those raised by a ban on advertising" (387 at n. 70). Although this distinction does not seem to justify suppression of commercial speech, it certainly serves to explain such communication's lesser level of constitutional protection. The contractual aspects of commercial speech should cer-

tainly be truthful and non-misleading.

However, Farber's reliance on implied contract is limiting. Surely, a contract between seller and buyer, either implied or explicit, is only one form of the relationship between commercial speech and economic action. An application of this contractual perspective to the brothel messages will illustrate this point. The descriptions of facilities in Figures One, Two, Three, Four, Seven, Eight and Nine discuss a type of service available. A potential customer can reasonably expect a given brothel to have a large selection of girls, Japanese-style baths, a dungeon, handicapped facilities and/or other services described in the messages. Similarly, the health claims in Figures Three, Six, Eight and Nine imply a contract: a customer can expect that prostitutes working at a brothel have recently been examined by a doctor.

But are these the only explicitly commercial elements contained in the messages? The telephone numbers and maps prominently featured in several messages seem one of their most overtly commercial aspects. Indeed, as noted in Chapter One, NRS 201.430 specifically mentions the "location or telephone number of a house of prostitution" as constituting brothel advertising. It is not a contract that is being implied, but a close connection of the type discussed above that such maps and telephone numbers constitute.

Another way of defining this link would be as those

elements of the message that enable the receiver of the communication to follow through with the intended economic transaction. William McGuire pointed out that an integral part of the persuasive process is providing one's audience with the skills necessary to put one's proposal into effect. In the economic marketplace, this translates into price or credit information and location and availability of goods and/or services. These, then, are the connections between economic speech and commercial activity. They are the specific tools consumers need before consummating transactions in the economic marketplace.

The recognition of this nexus as a distinguishing characteristic of commercial speech implies not only a new definition of commercial speech, but a reformulation of the commercial speech doctrine. The final chapter of this thesis will propose an heuristic definition of commercial speech which, it is hoped, will bring such communication into better alignment with other speech protected by the First Amendment.

CHAPTER SIX

A HEURISTIC DEFINITION

To view commercial speech as that speech which is closely linked with an intended economic activity implies a difference between economic speech in the abstract and specific commercial exhortations. Constitutional scholars will notice this distinction is similar to that difference between advocacy of illegal activity as a general political doctrine and incitement to specific illegal acts, a difference already recognized by the U.S. Supreme Court. Indeed, it is the central thrust of this thesis that if such a standard is workable in the political marketplace, it ought to be equally applicable to the economic marketplace. The line between commercial and non-commercial speech ought to be the line between abstract economic ideas and specific economic incitements.

This chapter briefly reviews the development of the above-mentioned standard in sedition cases and then proposes a heuristic definition of commercial speech suggested by the concepts articulated in these cases. It must be emphasized that this definition is intended as an educational tool; while it is hoped that the definition pro-

vides insight into the nature of commercial speech, it does not operationalize the concept of such expression. Both the shortcomings and the advantages of the proposed definition will become clearer when it is applied to the brothel messages that have already been examined.

The distinction between abstract advocacy and specific incitement was first proposed by Judge Learned Hand in Masses Publishing v. Patton in 1917. After Justice Oliver Wendell Holmes advanced the "clear and present danger" test in Schenck v. United States in 1919, Hand complained in a letter to civil liberties lawyer Walter Nells that he doubted his standard would ever be recognized as law (Gunther 750). But Masses has indeed become an accepted standard in such cases. By 1969, when the Court decided Brandenburg v. Ohio, Hand's Masses standard had become what Gerald Gunther called "a central theme" in sedition cases and an accepted part of constitutional law (722). The per curiam opinion in Brandenburg stressed that the law "must observe the established distinction between mere advocacy and incitement to imminent lawless action" (449).

At the time when Hand wrote his Masses opinion, it was customary to view seditious speech cases in terms of the potential effects of such communication:

[P]unishability of speech turned on its probable effect or tendency, on assessments of causation and consequences; talk of the 'natural and reasonable effect of the publication' was a characteristic way

of framing the question. (Gunther 724)

Such a standard disturbed Hand, who sought a more "absolute and objective test" (Gunther 725). In Masses, Hand had the chance to attempt to articulate such a standard.

In his opinion in the district court case, Hand granted an injunction against the New York postmaster to the publishers of The Masses, a journal which opposed United States involvement in World War One. The postmaster had declared The Masses non-mailable as a seditious publication because it aroused opposition to the draft law. Hand ruled that it was not enough that the indirect effect of the publication might be draft resistance: "If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me that it should not be held to have attempted to cause its violation" (540). Although Hand recognized it was possible to persuade through indirect means, he argued that any lesser standard would "involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies" (539-540).

The Masses standard began to be incorporated into the Supreme Court's mainstream thinking in two opinions authored by Justice John Marshall Harlan. Yates v. United States and Scales v. United States involved the prosecution under the Smith Act of officers of the Communist

Party. In Yates, decided in 1957, Harlan accepted a defense argument that the jury should have been instructed that the government had an obligation to prove the defendants advocated unlawful action, not just abstract doctrine. And in Scales, decided in 1961, the Court again overturned the conviction of a communist leader on the grounds that no party member could be convicted as long as the organization advocated only abstract doctrine.

Finally, in Brandenburg, the Court combined the notion of harm implicit in Holmes' clear and present danger test with the Masses distinction between incitement and abstract doctrine. Since, as has already been discussed, harm is not an issue in commercial speech cases, the clear and present danger test is of little value to such cases. But the Masses standard, with its focus on message rather than effect, seems a well-suited tool for helping to distinguish between commercial and non-commercial expression.

With these distinctions in mind, then, the following heuristic definition is proposed: Commercial speech is that communication which incites its audience to engage in a specific economic transaction which itself may be constitutionally regulated. Indicators of such incitement include specific product reference, price advertising, implicit or explicit contracts, or other information which facilitates the intended transaction.

Seeking such indicators of economic incitement seems a better approach than a subjective search for motive. It

certainly seems in line with Hand's call for a test focusing on the speaker's words (Gunther 721). The incitement standard is also superior to the primary purpose test in that it does not require that distinctions be made between primary and secondary motives; "objective" evidence of incitement in the speech itself is enough to classify the communication as commercial, regardless of the speaker's motivation.

In addition, commercial messages which deal with activities which are themselves constitutionally protected -- abortion, religion and labor activism, to name but a few -- would also enjoy constitutional protection. Of course, the contractual aspects of such expression, such things as price advertising and specific product claims, would have to remain truthful and non-misleading. This would replace the subjective "public interest" qualification currently used by the Court to grant protection to some commercial speech with an objective standard that could be applied to all expression. This standard also seems to fit well with the most current formulation of commercial speech doctrine represented by Posadas.

This definition would also help avoid the problem of overbreadth when dealing with consumer publications and other correctly protected forms of expression, since such publications lack that close relationship between message and economic activity. Although they contain specific price and product reference, they lack the incitement to

engage in a specific economic activity that characterizes commercial speech.

Applying the Definition

The advantages, as well as the shortcomings of this new definition of commercial speech can be illustrated by applying it to Nevada brothel messages with consistent results. The message in Figure One, taken as a whole, is commercial since it contains several direct links between message and action. The mention of a specific brothel, though not a distinguishing feature if considered by itself, is coupled with the notation "We accept Visa and Master Charge," providing consumers with the notion of where they can get the product and how they can pay for it. The map to the Chicken Ranch further provides access to economic activity, as does the phone number and notation that limousine service is available.

That the message is displayed as an "example" used to illustrate an article on the Princess Sea Industries case does not save it from being commercial. The Figure One "example" is actually a mixture of commercial and non-commercial elements, and under the definition any economic incitement renders the entire message commercial speech. As Barnes pointed out, "So long as the Court retains a separate commercial speech category, mixed messages must inevitably be classified as commercial speech" (485). But if mixed messages are invariably classified as commercial,

this in no way threatens protected speech, since speakers always have the option of removing those commercial elements which the state may regulate.

Although mixed messages would be considered commercial in their entirety, it will illustrate the workings of the proposed definition if we examine individual elements of the brothel messages under discussion. The message in Figure Two, for instance, would be classified commercial, since it is a mixture of commercial and non-commercial elements. But if the maps and phone numbers which incite economic activity were removed, what remained -- the physical description of the Chicken Ranch and its "ladies" -- would not be considered commercial speech. Similarly, most of the message in Figure Three would be protected under the proposed definition, with the exception of maps and phone numbers.

A further example of the kind of line-drawing the definition would facilitate is provided by a comparison of two similar paragraphs contained in Figures Three and Four. Protected under the definition would be the paragraph in Figure Three which reads "The Cherry Patch, a mere 21 miles from the Clark County line, is perhaps the closest and perhaps the easiest of all Nevada's legal brothels to find. It's about an hour's drive from the center of Las Vegas." This description of the location lacks the link necessary to render the speech commercial in that it is insufficient information with which to actually find

the brothel. In contrast, in addition to the maps and phone numbers in Figure Four, three paragraphs (beginning with "From the Strip, take Interstate 15") contain information specific enough to constitute a close relationship between message and the consummation of economic activity.

The message in Figure Six would be fully protected, since it contains no close relationship between speech and economic activity. Figure Seven, on the other hand, could be suppressed, under NRS 201.430, without endangering protected speech. Like Figure Five, Figure Nine contains information specific enough to be considered purely commercial; otherwise it would be protected. Finally, Figure Nine would be protected speech, with the exception of the phone number provided for further information. Although it advocates a visit to Sheri's Ranch, it lacks specific incitement and provision of directions to get there.

Conclusion

Some readers may be troubled by the fact that the proposed definition allows for the regulation of truthful information concerning the location of legal Nevada brothels. But such power seems inescapable under the Court's current formulation of the commercial speech doctrine, as articulated in Posadas. Since the state can outlaw prostitution entirely, it may regulate commercial speech concerning prostitution as well. Chicken Ranch owner Russell Reade wrote that "a large number of male tourists who

visit Las Vegas . . . are interested in utilizing the services of a prostitute. Nevada wisely, discreetly and quietly offers a legal alternative" (Review Journal 11B). NRS 201.430 allows the state a constitutional means to ensure its brothel industry remains quiet and discreet. It is not the purpose of this thesis to suggest the level of protection that ought to be afforded commercial speech. That is for other commentators to argue and finally for the Court to decide.

It is also important to remember that this definition is offered only as a first step toward resolving the difficult problem of distinguishing commercial from non-commercial speech. Problems remain. In Chapter Five, it was stated that commerciality went beyond implied or specific contracts. Yet it is entirely possible to craft a hypothetical message which contains the remaining specific indicators of economic incitement listed -- specific product reference, price advertising, and other information that facilitates an economic transaction -- which intuitively seems to be non-commercial speech. The announcement of a protest to take place at a Nevada brothel, for instance, might include maps, phone numbers and even the observation that the business in question accepts credit cards, without being an incitement to engage the services of a prostitute.

However, such a hypothetical example does not necessarily indict the conceptual value of the definition. The

notion that there is a substantive difference between abstract economic thought and specific economic incitement -- and that this difference is at the heart of the commercial speech problem -- is still valid. What the example does suggest is it is necessary to better identify the indicators of incitement before a truly operational definition of commercial speech is possible.

Another limitation of this study is that to replace "intent" with "incitement" does not obviate the need to draw an arbitrary, quite possibly subjective line between what is deemed abstract economic discussion and specific economic incitement. But at least the definition replaces the subjective search for motive with a somewhat more objective examination of potentially commercial messages themselves. And it is not a presumed intent on which the matter of constitutional protection turns, but rather the advertisement itself, giving communicators fair notice as to what is likely to constitute commercial speech. Still, it will require further study before the distinctions between intent and incitement are fully clarified.

In keeping with this emphasis on objective, rather than subjective indicators, the function of communication context in distinguishing commercial from non-commercial speech must also be more fully addressed. In Chapter Five it was pointed out that communication context added definitional difficulties to this inquiry, since it required, at the very least, that one distinguish the press from

other forms of media. However, a consideration of communication context seems inevitable to prevent the definition from reaching communication which intuitively seems non-commercial. This thesis, for instance, contains those indicators of commercial speech identified in the brothel messages. What keeps the thesis from being categorized as commercial itself is the larger context of scholarship in which it is presented. The same is true of consumer publications. It has already been stated that such publications lack incitement, but the reason they lack incitement has more to do with the context in which they present information rather than with the presence or absence of any specific indicators. Under the definition, mixed speech --those messages which contain economic messages in a context which does not suggest they are anything but commercial -- would, as previously noted, always be categorized as commercial. But the inclusion of commercial indicators within a larger context does not necessarily mean even those portions of the speech containing those indicators should be labelled commercial. Operationalizing this notion of context will be necessary before the definition can be applied beyond brothel messages with any consistency.

Application of the definition beyond the examples discussed in this thesis would be the next step in arriving at a more reliable way to distinguish between commercial and non-commercial speech. At this point, however, fur-

ther problems would present themselves. Many modern advertising messages appear to fall outside the definition as proposed; they seem to lack the specific product identification or incitement to imminent economic activity to justify their regulation. It can be argued that economic self-interest mitigates against the widespread use of such advertising as a way to circumvent regulation, but "image" advertising remains a popular tool in the economic marketplace.

The more abstract nature of image advertising may mean such messages would never be considered commercial under the definition. But in a sense, these messages are unlike more traditional forms of advertising and perhaps should be entitled to a different level of constitutional protection.

It is the philosophical position of the author of this thesis that until such time as these problems can be resolved, it is better that some speech which might otherwise be undeserving of protection escape regulation than to risk the possibility of controlling speech which ought to be protected. The major limitation of the proposed definition seems to be that it is too narrow rather than too broad. But in the sensitive area of First Amendment issues, perhaps this should be seen as an advantage rather than a liability.

Finally, what makes the proposed definition valuable conceptually despite its many limitations is its potential

for bringing together theorists of divergent perspectives and for bringing commercial speech itself within the "mainstream" of the First Amendment.

Those who favor limiting commercial speech protection need not worry that economic due process is being revived; the power of the government to regulate economic activity and speech closely linked with such activity is not threatened. Nor should those who worry about undue suppression of protected speech have cause for concern. The proposed definition would protect precisely that kind of economic speech jurists and commentators have been worried about chilling. That concern has not been over the constitutional status of price advertising so much as it has been over the possible suppression of other, more general economic speech which might be categorized as commercial. When Justice Blackmun wrote that he saw no need to force the hypothetical druggist in Virginia Board of Pharmacy to cast himself as a commentator on drug prices, he missed the point. It is commentary on drug prices, not the cost of the compounds themselves, which is beyond the legislative power of the state. Forcing the hypothetical druggist to discuss drug prices in the abstract puts the kind of speech in the marketplace that the Court has been eager to protect. Tribe has observed that "The entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear about goods and services and the right of government to regulate the sale of such goods

and services" (903). The proposed definition allows for just that sort of accommodation.

The definition moves the commercial speech doctrine from what Tribe has called the "makeshift . . . and unsteady" (904) foundation of the case law we have examined in Chapter Two, to the stable and well-evolved doctrine which produced Brandenburg. Perhaps because of the Meiklejohnian bias shown toward political speech on the part of so many scholars and jurists, the problem of reconciling free speech and advocacy of illegal activity in the political realm has received considerable attention. The result is a well-articulated body of case law which serves as a reliable analytical tool with which to deal with future cases. That same analytical framework could be employed in commercial speech cases by adopting the proposed definition. After all, if the safety of the republic can be entrusted to the principles embodied in Brandenburg, then certainly these same precepts should ensure the integrity of the economic marketplace.

APPENDIX A

**244.345. Dancing halls, escort services and gambling games or devices:
Licensing and regulation; licensing houses of prostitution
prohibited in certain counties.**

1. Every natural person, firm, association of persons or corporation wishing to engage in the business of conducting a dancing hall, escort service, or gambling game or device permitted by law, outside of an incorporated city, must:

(a) Make application to the license board of the county in which the business is to be engaged in, for a county license of the kind desired. The application must be in a form prescribed by the regulations of the license board.

(b) File the application with the required license fee with the county license collector, as provided in chapter 364 of NRS, who shall present the application to the license board at its next regular meeting.

The board, in counties having a population of less than 250,000, may refer the petition to the sheriff, who shall report upon it at the following regular meeting of the board. In counties having a population of 250,000 or more, the board shall refer the petition to the metropolitan police department. The department shall conduct an investigation relating to the petition and report its findings to the board at the board's next regular meeting. The board shall at that meeting grant or refuse the license prayed for or enter any other order consistent with its regulations. Except in the case of an application for a license to conduct a gambling game or device, the county license collector may grant a temporary permit to an applicant, valid only until the next regular meeting of the board. In unincorporated towns and cities governed under the provisions of chapter 269 of NRS, the license board has the exclusive power to license and regulate the businesses mentioned in this subsection.

2. The board of county commissioners, and in counties having a population of less than 250,000, the sheriff of that county constitute the license board, and the county clerk or other person designated by the license board is the clerk thereof, in the respective counties of this state.

3. The license board may, without further compensation to the board or its clerk:

(a) Fix, impose and collect license fees upon the businesses mentioned in this section.

(b) Grant or deny applications for licenses and impose conditions, limitations and restrictions upon the licensee.

(c) Adopt, amend and repeal regulations relating to licenses and licensees.

(d) Restrict, revoke or suspend licenses for cause after hearing. In an emergency the board may issue an order for immediate suspension or limitation of a license, but the order must state the reason for suspension or limitation and afford the licensee a hearing.

4. The license board shall hold a hearing before adopting proposed regulations, before adopting amendments to regulations, and before repealing regulations relating to the control or the licensing of the businesses mentioned in this section. Notice of the hearing must be published in a

newspaper published and having general circulation in the county at least once a week for a period of 2 weeks before the hearing.

5. Upon adoption of new regulations the board shall designate their effective date, which may not be earlier than 15 days after their adoption. Immediately after adoption a copy of any new regulations must be available for public inspection during regular business hours at the office of the county clerk.

6. A majority vote of the members of the license board present governs in the transaction of all business. A majority of the members constitutes a quorum for the transaction of business.

7. Any natural person, firm, association of persons or corporation who engages in any of the businesses mentioned in this section without first having obtained the license and paid the license fee as provided in this section is guilty of a misdemeanor.

8. In a county having a population of 250,000 or more, the license board shall not grant any license to a petitioner for the purpose of operating a house of ill fame or repute or any other business employing any person for the purpose of prostitution. (1923, pp. 62, 63; CL 1929, §§ 2037 — 2040; 1959, p. 838; 1961, p. 364; 1971, p. 11; 1973, p. 923; 1975, p. 562; 1979, pp. 20, 511, 728, 730, 732, 733.)

Cross references. — As to location of houses of ill fame, see NRS 201.380.

CASE NOTES

Houses of prostitution no longer constitute a nuisance per se. — Subsection 8 of this section, when read in conjunction with subsection 1, manifests a statutory licensing scheme for houses of prostitution outside of incorporated cities and towns, and this licensing scheme is repugnant to and, by plain and necessary implication, repeals the common-law rule that a house of prostitution constitutes a nuisance per se. *Nye County v. Plankinton*, 94 Nev. 739, 587 P.2d 421 (1978).

Counties may ban prostitution. — The electorate of the county, through the exercise of their prerogative to initiate county ordinances by initiative and referendum, have the power to ban all brothels; with but the one exception provided in subsection 8 of this section, the Legislature appears to have reserved the total ban question to the counties but demands licensing in counties where brothels are allowed. *Kuban v. McGimsey*, 96 Nev. 105, 605 P.2d 623 (1980).

Prostitution on an Indian reservation. — The Secretary of Interior's decision to rescind a tribal ordinance which would have permitted houses of prostitution on an Indian reservation, on the grounds that prostitution is frowned upon by federal policy and the licensing of prostitution on a reservation would bring about a political reaction adverse to the Indian tribes, was not arbitrary and capricious even though prostitution is legal in parts of the state and is a profitable economic enterprise. *Moapa Band of Paiute Indians v. United States Dep't of Interior*, 747 F.2d 563 (9th Cir. 1984).

Cited in: *Princess Sea Indus., Inc. v. State*, 97 Nev. 534, 635 P.2d 281 (1981); *Republic Entertainment, Inc. v. Clark County Liquor & Gaming Licensing Bd.*, 99 Nev. 811, 672 P.2d 634 (1983); *IDK, Inc. v. County of Clark*, 599 F. Supp. 1402 (D. Nev. 1984).

APPENDIX B

201.430. Unlawful advertising of houses of prostitution.

1. It is unlawful for any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise any house of prostitution:

(a) In any public theater, on the public streets of any city or town, or on any public highway; or

(b) Any where in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

2. Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

3. Any person, company, association or corporation violating the provisions of this section shall be punished:

(a) For the first offense, by a fine of not more than \$500.

(b) For any subsequent offense, for a misdemeanor. (1913, p. 135; RL 1912 (1919 Supp.), § 1, p. 3379; CL 1929, § 10535; 1967, p. 481; 1979, pp. 305, 604.)

CASE NOTES

Constitutionality. — This section and NRS 201.440 do not clearly contravene constitutional principles as thus far articulated by the United States Supreme Court. *Princess Sea Indus., Inc. v. State*, 97 Nev. 534, 635 P.2d 281 (1981).

Prostitution is an activity which this state may choose either to regulate or to prohibit entirely. *Princess Sea Indus., Inc. v. State*, 97 Nev. 534, 635 P.2d 281 (1981).

201.440. Unlawful to permit illegal advertising of houses of prostitution.

Any person, company, association or corporation who knowingly allows any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise a house of prostitution in his place of business shall be punished:

1. For the first offense, by a fine of not more than \$500.

2. For any subsequent offense, for a misdemeanor. (1913, p. 136; RL 1912 (1919 Supp.), § 2, p. 3379; CL 1929, § 10536; 1967, p. 481; 1979, pp. 305, 605.)

Cases Cited

- Bates v. State Bar of Arizona. 433 U.S. 350, 1977.
- Bigelow v. Virginia. 421 U.S. 809, 1975.
- Bolger v. Youngs Drug Products. 463 U.S. 60, 1983.
- Brandenburg v. Ohio. 395 U.S. 444, 1969.
- Breard v. City of Alexandria. 341 U.S. 622, 1951.
- Cammarano v. United States. 358 U.S. 498, 1959.
- Carey v. Population Services Int'l. 431 U.S. 678, 1977.
- Carolene Products Co., United States v. 304 U.S. 144,
1938.
- Central Hudson Gas and Electric Corp. v. Public Service
Comm'n. 447 U.S. 557, 1980.
- Chaplinsky v. New Hampshire. 315 U.S. 568, 1942.
- Chrestensen v. Valentine. 122 F.2d. 511, 1941.
- Doe v. Bolton. 410 U.S. 179, 1973.
- Dennis v. United States. 341 U.S. 494
- Erznoznik v. City of Jacksonville. 422 U.S. 205, 1975.
- Federal Communications Commission v. Pacifica Foundation.
438 U.S. 726, 1976.
- First National Bank of Boston v. Bellotti. 435 U.S. 765,
1978.
- Gertz v. Robert Welch, Inc. 418 U.S. 323, 1974.
- Jamison v. Texas. 318 U.S. 413, 1943.

Jones v. Opelika, Kansas. 316 U.S. 584, 1942.

Lamont v. Postmaster General. 381 U.S. 301, 1965.

Linmark Associates v. Willingboro. 431 U.S. 85 1977.

Lochner v. New York. 198 U.S. 45, 1905.

Lovell v. City of Griffffin, Georgia. 303 U.S. 444

Masses Publishing Co. v. Patton. 244 Fed. 535, 1917.

Metromedia Inc. v. City of San Diego. 543 U.S. 490, 1981.

Murdock v. Pennsylvania. 319 U.S. 105, 1943.

National Committee on Egg Nutrition v. FTC. 439 U.S. 821,
1987.

New York Times v. Sullivan. 376 U.S. 254, 1964.

Nichols v. Massachusetts, City of Worcester. 308 U.S. 147,
1938.

Ohralik v. Ohio State Bar. 436 U.S. 447, 1978.

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rela-
tions. 413 U.S. 376, 1973.

Posadas de Puerto Rico Associates v. Tourism Company of
Puerto Rico. 478 U.S. --, 92 L. Ed. 266, 1986.

Princess Sea Industries v. State of Nevada. 635 P.2d. 281,
1981.

Procunier v. Martinez. 416 U.S. 396, 1974.

Roe v. Wade. 410 U.S. 113, 1973.

Scales v. United States. 367 U.S. 203, 1961.

Schenck v. United States. 249 U.S. 47, 1919.

Schneider v. State of New Jersey, Town of Irvington. 308
U.S. 147, 1939.

Snyder v. Milwaukee. 308 U.S. 147, 1939.

United States v. Carolene Products. See Carolene Products,
United States, v.

Valentine v. Chrestensen. 316 U.S. 52, 1942.

Virginia Board of Pharmacy v. Virginia Citizens Consumer
Council, Inc. 425 U.S. 748, 1976.

Yates v. United States. 354 U.S. 298, 1957.

Young v. American Mini Theaters, Inc. 427 U.S. 50, 1976.

Young v. California, City of Los Angeles. 308 U.S. 147,
1931.

Zauderer v. Office of Disciplinary Counsel. Slip Opinion
83-2166, 1985.

Works Cited

- Baker, C. Edwin. "Commercial Speech: A Problem in the Theory of Freedom." Iowa Law Review 62 (1976):1-45.
- Barnes, Richard L. "Commercial Speech Concerning Unlawful Conduct: A Clear and Present Danger." Brigham Young University Law Review 4 (1984): 457-509.
- Bork, Robert. "Neutral Principles in First Amendment Theory." Indiana Law Journal 47 (1971): 1-48.
- Chafee, Zechariah. "Book Review," Harvard Law Review 62 (1949): 891-896.
- Farber, Daniel A. "Commercial Speech and First Amendment Theory." Northwestern University Law Review 74 (1979): 372-408.
- Friedman, Lawrence M. and Stewart Macaulay. Law and Behavioral Sciences. Second edition, 1977.
- Hanson, Roger S. and Leonard P. Smith. Petition for Writ of Certiorari to the Supreme Court of Nevada, Supreme Court of the United States, October Term, 1981. Number 81-1388.
- Hovland, Roxanne and Gary B. Wilcox. "The Future of Alcoholic Beverage Advertising." Communications and the Law 9 (1987): 5-14.
- Jackson, Thomas H. and John Calvin Jeffries, Jr. "Commer-

- cial Speech: Economic Due Process and the First Amendment." Virginia Law Review 65 (1979):1-41.
- Kalven, Harry. "The New York Times Case: A Note on the Central Meaning of the first Amendment" Supreme Court Law Review 64 (1964): 191-217.
- Landish, Joshua. "Points and Authorities." Record on Appeal, Princess Sea Industries Inc. v. State of Nevada A189674. Filed July 17, 1979.
- Las Vegas After Dark. 21:43 (Sept. 11-17, 1987.)
- Las Vegas After Dark. 22:3 (Nov. 27-Dec. 3, 1987.)
- Las Vegas Mirror. July 6, 1981. No further publication data available.
- Lively, Donald E. "Securities Regulation and Freedom of the Press." Washington Law Review 60 (1985): 843-871.
- McGuire, William J. "Attitudes and Attitude Change." The Handbook of Social Psychology. Ed. Gardner Lindzey and Elliot Aaronson. New York: Random House, 1985.
- Meiklejohn, Alexander. Free Speech and its Relation to Self-Government. New York: Harper and Row, 1948.
- . "The First Amendment as an Absolute," Supreme Court Review, 1961: 245.
- Merrill, Thomas W. "First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine." University of Chicago Law Review 44 (1976): 205-244.
- Mill, John Stuart. On Liberty. Oxford: Oxford University Press, 1974.

- Pritchard, David. "A New Paradigm for Legal Research in Mass Communication." Communications and the Law 8 (1986): 51-68.
- Redish, Martin H. "The First Amendment in the Marketplace." George Washington Law Review 39 (1971): 429-473.
- Reede, Russell. "Legal Brothels Offer Safe, Quality Environment." Review Journal Aug. 21, 1988: 11B.
- Ricker, Audrey Leech. "Sex For Sale in Las Vegas." Cosmopolitan November, 1980: 280-283, 315.
- Rome, Edwin P. and William H. Roberts. Corporate and Commercial Free Speech. Westport: Quorum, 1985.
- Shiffrin, Steven. "The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment." Northwestern University Law Review 78 (1984): 1212-1283.
- Simon, Todd F. "Defining Commercial Speech: A Focus on Process Rather Than Content." New England Law Review 20 (1985): 215-245.
- Tawil, Nadir N. "Commercial Speech: A Proposed Definition." Howard Law Journal 27 (1984): 1015-1030.
- "The First Amendment Overbreadth Doctrine." Harvard Law Review. 83 (1979): 844-893.
- Tribe, Laurence. American Constitutional Law. Mineola: Foundation Press, 1988.