The State of the Collective Liver of the Federal Trade Commissioners

Willis W. Hagen
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There is a statue of a horse and a man in front of the Federal Trade Commission building in Washington, D.C. It is an artist's conception of the relation of business and the Commission, the former being depicted as a wild horse and the latter as a man attempting to subdue it. Like all works of art, its meaning is subject to interpretation. It is said that the artist intended to portray the application of reins upon the wild practices of industry. It is equally symbolic, however, of business as a dumb animal being subjected to the arbitrary will of its master. *

The Federal Trade Commission was created in 1914 and given carte blanche to determine what constituted an "unfair method of competition in commerce" and to proceed against methods it deemed unfair. Later, in 1938, the Wheeler-Lea Act extended its jurisdiction to "unfair or deceptive acts or practices in commerce." The Commission, thus, administers law as it applies to business morals. No mention is made in either the original or amended acts as to what standards or principles shall guide the Commission in the determination of what constitutes unfairness.

Morality is more than the shallow concept, what's right is right, as a survey of the literature on the subject will readily reveal. Over the centuries learned men have contemplated the values and obligations of Man in depth and there have developed many schools of ethical thought. An action is right or moral, in the view of a given school of thought, if it is consistent with a principle verified to the satisfaction of its ad-

* B.A., University of Wisconsin; LL.B., Marquette University; CPA (Wisconsin); Associate Professor of Business Law and Ethics, University of Wisconsin-Milwaukee.

2 Wheeler-Lea Act, 52 Stat. 111 (1938), 15 U.S.C. §45 (1958), amending the Federal Trade Commission Act. Senator Wheeler, in the discussion of the amendment in the Senate said: "Section 5 of the present act is amended, first, by making unlawful unfair or deceptive acts or practices in commerce. The present act makes unlawful 'unfair methods of competition' and the Supreme Court has held that the Commission loses jurisdiction of a case where an actual or potential competitor is not involved. The amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor." 85 Cong. Rec. 3255 (1938).
3 Section 5(a)(1) of the Federal Trade Commission Act as amended by the Wheeler-Lea Act reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."
Immorality is action inconsistent with these principles. Obviously, the same action may be moral or immoral depending upon the school of moral thought to which one subscribes.

Business morality is the application of moral principles to business problems. Business practices, therefore, become moral and fair or immoral and unfair if they are consistent or inconsistent with a particular pattern of moral theory. Again, the same business practice may be fair or unfair, depending upon the pattern of moral theory to which one subscribes. The power of selection of moral theory to be applied to business by an administrative agency having the power to act against business practices amounts to the legislation of business morals.

The proper test of the fairness or unfairness of a business practice, within the scope of administrative authority, is whether it is consistent or inconsistent with the standards of fair dealing as reflected in generally accepted practices in the business community at the time the practice is employed. Since Congress did not legislate an ethical philosophy to serve as a guide for the Commission, the Commission's function can be only to harmonize the conflicting interests of the business and consuming public in terms of generally accepted practices. The Commission must survey, in each case that comes before it, the prevailing practices in commerce and then determine the fairness of a respondent's practices in the light of the standards of fair dealing thus ascertained. This is its duty, not because morality is necessarily relative, but because under the present state of the law, any approach other than this is administrative legislation.

In Schechter v. United States, both the opinion of Chief Justice Hughes and the concurring opinion of Justice Cardozo commented extensively upon the differences between the National Industrial Recovery Act and the Federal Trade Commission Act to indicate why the former

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4 To illustrate, one who subscribes to John Stuart Mill's Utilitarianism would accept as a verified principle that those acts are right and good which produce the greatest happiness for the greatest number of persons and his judgments of morality would turn on that principle, whereas one who subscribes to the Formalism of Immanuel Kant would view the "universal end of mankind as the highest moral perfection" so that "each of us must make such a contribution of his own that if all contributed similarly the result would be perfection." See MAGILL, PHILOSOPHY 654-659 (1961), for a discussion of Mill's Utilitarianism and KANT, LECTURES ON ETHICS 252 (no copyright indicated).

5 As stated in 1 AM. JUR. 2d Administrative Law §108, at 907 (1963):

"It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not be the let or leave of administrative agencies, and this principle ought not to be surrendered for convenience, or in effect nullified for the sake of expedience."

"Apart from certain exceptions, it is almost universally held that arbitrary powers may not be conferred on administrative agencies, even though the courts are authorized to review the exercise of such power."

6 See: Federal Trade Commission v. Standard Education Society, 82 F. 2d 692 (2d Cir. 1936). Highlights of Judge Learned Hand's opinion, as they apply to this discussion, are presented later in the body and notes of this article.

7 See note 5 supra.
was an unconstitutional delegation of legislative power and the latter was not. The latter act did not give the power of an arbitrary imposition of rules of business conduct, but required a consideration of competitive practices before a specific practice might be condemned. Said Justice Hughes:

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

In his concurring opinion Justice Cardozo clarified the distinction when he said:

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

Later, Justice Cardozo said: "When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers." The Court was commenting on the Federal Trade Commission Act prior to the Wheeler-Lea Amendment. That amendment made it unnecessary for the Commission to determine and show the deleterious effect the practices of a respondent would have on competition. It cannot be supposed, however, that the broadening of the powers of the Commission left it without obligation to "ascertain upon inquiry" prevailing practices so as to determine standards of practices against which "unfair . . . acts or practices" might be determined. Only by such inquiry and appropriate findings can it condemn a practice without exercising its powers in an unconstitutional manner.

In Federal Trade Commission v. Standard Education Society, the eminent jurist Learned Hand wrote: "It is its (the Commission's) duty to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." This article raises the question of whether the Federal Trade
Commission has been performing this duty or whether it has been imposing an arbitrary censorship upon the morals of businessmen; whether business is operating under a Government of Law or a Government of Man; whether the standards of morality are those prevalent in the business community; whether they are those of a particular moral philosophy; or whether they turn on the state of the collective liver of the Commissioners. The answer is not to be found in any pronouncement of principles by the Commission, for there has been none. It is not to be found in the evidence of prevailing practices adduced at its hearings for such evidence is inadmissible. If there is an answer, it can be found only in a detailed survey of its proceedings with a searching look for its possible moral guideposts. Before embarking upon an analysis of a line of cases in an effort to answer the questions here raised, however, a few observations on standards of morality as reflected by prevailing business practices will be made.

As our Gross National Product approaches $600,000,000,000, industry finds it increasingly necessary to find new and different ways to motivate consumer purchases. Motivation research has become an important factor in marketing programs. As a result of motivation studies, marketing campaigns are developed where emphasis is placed upon emotions, even human weaknesses and frailties, rather than the merits of the product. The day of competition on the basis of merit alone has long since passed, if it ever existed. As Vance Packard points out, merchandisers sell the feeling of security, ego-gratification, a sense of power and of immortality as well as their products. The emotional motives of emulation, individuality and conformity are played upon. Almost since its inception the automobile industry has traded upon psychological obsolescence created by annual model change with its consequent stimulation of consumers' inclinations toward ostentation and prodigality, characteristics which many moral philosophers would place on the lower end of the scale of morality. The point here made is that standards of fair dealing in present day business practice permit of

rect, and a community which sells for profit must not be ridden on so short a rein that it can only move at a walk."

\[\text{\textsuperscript{16}}\] Board of Governors of Federal Reserve System, \textit{Fed. Reserve Bull.} 1316 (1963), Table titled: "Gross National Product or Expenditure" sets forth the Gross National Product for the first two quarters of 1963, with quarterly data adjusted at annual rates, as $571,800,000,000 for the first quarter and $579,600,000,000 for the second quarter. These figures might be compared with $284,600,000,000 for 1950 and $502,600,000,000 for 1960.


\[\text{\textsuperscript{18}}\] See Packard, \textit{op. cit. supra} note 17, at 61-70.

\[\text{\textsuperscript{19}}\] Aristotle maintained, in his \textit{Ethica Nicomachea}, that virtue is the choosing of the mean between extremes of conduct. Among the vices of excess he included empty vanity and prodigality. Magill, \textit{op. cit. supra} note 4, at 157-162.
playing upon the emotions of the consuming public, even though such action may detract attention from the comparative merits of the goods involved; indeed, the vitality of the distribution of the product of our free enterprise system requires the widest latitude in the development and use of motivating techniques. The essence of free competition is the freedom of businessmen to use whatever motivating techniques their ingenuity may devise.

The morality or immorality of a business practice does not turn on its potential for vice if the standard is to be determined from prevailing practices. Moralists, almost universally, regard promise breaking as immoral and, if it be true that it is, as a general proposition, it is all the more capable of verification in commerce, since the entire foundation of our economy rests upon promise keeping.\textsuperscript{20} Personal bankruptcies, which involve the wholesale breaking of promises and are, in a large measure, a result of the easy credit policies of merchants, have skyrocketed by more than 450\% in the last ten years.\textsuperscript{21} Yet, one would not seriously contend that the granting of easy credit by some merchants is unfair to other merchants who sell the same lines of goods on a cash basis, nor that it is unfair to members of the consuming public in the light of prevailing practices. Regulation of practices by the Federal Trade Commission on any pretext of unfairness or immorality would be a usurpation of Congressional legislative power.

Nowhere in the United States Code is there a prohibition against the use of the element of chance in the merchandising of goods. Like other forms of emotional motivation, chance injected into a merchandising plan adds a feature other than merit and thereby tends to detract from the consumer's rational motivation. Likewise, as easy credit has a potential for vice, so the consumer who is exposed to a merchandising plan encompassing a chance element, one might reason, may be led into a life at the race tracks and the slot machines. It

\textsuperscript{20}Immanuel Kant viewed promise keeping as universal law and catagorically commanded of persons: "For supposing it to be a universal law that everyone when he thinks himself in a difficulty should be able to promise whatever he pleases, with the purpose of not keeping his promise, the promise itself would become impossible, as well as the end that one might have in view in it, since no one would consider that anything was promised to him, but would ridicule all such statements as vain pretense." KANT, CRITIQUE OF PRACTICAL REASON AND OTHER WORKS OF THE THEORY OF ETHICS 40 (Abbot transl. 1898). Even the egoistic ethics of Thomas Hobbes provided that the third law of nature was "that men perform their covenants made." GARNETT, ETHICS 126 (1960).

\textsuperscript{21}U.S. DEPARTMENT OF COMMERCE BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 508 (1963) : Table No. 682, "Bankruptcy Cases Filed, by Type of Bankruptcy and Occupation of Debtor: 1940 to 1962" shows the following figures for employees: 1940, 36,846; 1950, 22,933; 1955, 46,163; 1956, 48,784; 1957, 59,053; 1958, 73,379; 1959, 81,516; 1960, 89,639; 1961, 119,117; 1962, 120,742. Other occupations listed are Merchants, Manufacturers, Farmers, Members of Professions and Other. In business and not in business. The total number of bankruptcies filed in U.S. District Courts in 1962 was 147,780, the employee group accounting for over 80\% of the total.
should be noted, however, that there is far less agreement among ethical philosophers that gambling, even distinct from merchandising is bad, than there is that promise breaking is immoral.\footnote{22}

An illustration of the use of the element of chance in merchandising may be seen in a recent advertisement run by Sears, Roebuck and Company in a number of nationally distributed magazines. The advertisement reads:

If it turns out to be twins, Sears will give you the second layette free. The minute you buy a layette at a Sears store or through the Sears catalog, you become eligible to collect another layette exactly like the first—absolutely free. Provided you have twins.

There are more twins born than most people think—one set in every 100 births. Note: If you have triplets, Sears will give you \textit{two} layettes free. Three free for quads, and so on, and on.\footnote{23}

The desire of toiling mortals for a handful of fairy gold is also played upon by the use of "contests" offering lavish rewards to the winning consumer-participants. Inverted glass "fishbowls," containing a mixture of gumballs and tiny toys may be found in almost any drug store, where a child can insert his penny or nickel and take a chance on getting the toy he would like to have. The reader is surely familiar with Crackerjack and the consideration, chance and prize involved in its merchandising. The marketing of goods by the use of punch boards or push cards has also been engaged in extensively.\footnote{24} Any use of the element of chance

\footnote{22} The Vatican Weekly, \textit{L'Osservatore Della Domencia}, in an editorial stated: "Gambling is not immoral by itself, and the code of canon law prohibits it specifically only to priests. But gambling can easily become immoral when the bet, big or little, goes beyond the economic possibilities of the player, or when it is subtracted from priority purposes such as family needs." Chicago American, July 12, 1962.

The promised land was divinely ordained to be divided by chance. "And the Lord spake unto Moses, saying . . . the land shall be divided by lot . . . according to the lot shall the possession thereof be divided between the many and few." \footnote{23} Numbers 26:52, 55-56.

\footnote{24} New York, Pennsylvania and Illinois courts have held that punchboards are not gambling devices. See People v. Trace, 109 N.Y.S. 2d 893, 200 Misc. 286 (1951); Commonwealth v. Synder, 16 D.C. 552 (1907); Question Game Co. v. Pioneer, 273 Ill. App. 187 (1933); D'Orio v. Catalona, 260 Ill. App. 626 (1931).
in any form of merchandising, however, has received the unqualified and unwaivering condemnation of the Federal Trade Commission since the early 1930's and its views have been successfully urged upon the various circuit courts of appeal.\(^{25}\) An examination in depth will now be

\(\text{has been held to be not violative of the postal laws covering lotteries by the following interpretive authorities: 28 Stat. 964 (1895), 39 U.S.C. 4005 (1962), (formerly 259 and 732). The administrative statute covering lotteries in the mails. See Garden City Chamber of Commerce v. Wagner, 100 F. Supp. 769 (E.D.N.Y. 1951); 18 U.S.C. 1302, the statute providing for criminal punishment for the operation and conduct of a lottery through the United States mails. See United States v. Halseth, 324 U.S. 277 (1951).}

In September, 1961, Congress adopted and the President signed 18 U.S.C. §1952 (Supp. 1963), which provides in part as follows:

"(a) Whoever . . . uses any facility in interstate or foreign commerce, including the mails, with intent to—

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity and thereafter performs or attempts to perform any of the acts specified in subparagraph (1), (2), and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section, 'unlawful activity' means (1) any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are committed or of the United States . . ."

Also, in September, 1962, Congress passed and the President signed 18 U.S.C. §1084 (Supp. 1963), making unlawful the interstate transmission of wagering information. Adopted at the same time was 18 U.S.C. §1953 (Supp. 1963), which condemns as unlawful the interstate transportation of any record, paraphernalia, ticket, certificate, bills, slips, token, paper, writing, or other device used, or to be used, or adapted, devised or designed for use in bookmaking, or wagering pools with respect to a sporting event, or in a numbers, policy, bolita, or similar game. Exempted from its operation is parimutual betting equipment and other betting equipment shipped into a state in which such betting is legal under the statutes of that state.

In the statement of Robert F. Kennedy, Attorney General of the United States before the Senate Committee on the Judiciary in support of these three bills, then known as S. 1653, S. 1656, and S. 1657, Mr. Kennedy declared:

"We have submitted to you a series of bills through which we know the Federal Government can meet its responsibilities and be of great aid and assistance to local law enforcement, these bills carefully limit the activities of the Federal Government to the most important and the most dangerous problems now facing law enforcement. Our purpose primarily is to prevent transmission of gambling information and equipment in interstate commerce; prevent travel in support of 'business enterprises' involving gambling, liquor, narcotics, prostitution or travel involving extortion or bribery and to give the F.B.I. more tools to aid their fellow law enforcement officers."

\(^{25}\) In addition to those cases cited elsewhere in this article, the following have sustained the Commission's position regarding the use of chance in merchandising: Seymour Sales Co. v. F.T.C., 216 F. 2d 633 (D.C. Cir. 1954); U.S. Printing & Novelty Co. v. F.T.C., 204 F. 2d 737 (D.C. Cir. 1953); Gay Games Inc. v. F.T.C., 204 F 2d 197 (10th Cir. 1953); Feitel v. F.T.C., 201 F. 2d 790 (9th Cir. 1953); Consolidated Mfg. Co. v. F.T.C., 199 F. 2d 417 (4th Cir. 1952); Bock Mfg. Co. v. F.T.C., 194 F. 2d 611 (9th Cir. 1952); Hamilton Mfg. Co. v. F.T.C., 194 F. 2d 346 (D.C. Cir. 1952); Chas. A. Brewer & Sons v. F.T.C., 158 F. 2d 74 (6th Cir. 1946); Deer v. F.T.C., 152 F. 2d 65 (2d Cir. 1945); Lee Boyer's Candy v. F.T.C., 139 F. 2d 112 (7th Cir. 1943); Wolf v. F.T.C., 135 F. 2d 564 (7th Cir. 1943); Keller v. F.T.C., 132 F. 2d 59 (7th Cir. 1942); Koolish v. F.T.C., 129 F. 2d 64 (7th Cir. 1942); Jaffee v. F.T.C., 128 F. 2d 261 (9th Cir. 1942); Douglas Candy Co. v. F.T.C., 125 F. 2d 665 (8th Cir. 1942); Kritzik v. F.T.C., 125 F. 2d 351 (7th Cir. 1942); McAfee Candy Co. v. F.T.C., 124 F. 2d 104 (5th Cir. 1941); Jaffe v. F.T.C., 123 F. 2d
made of the Federal Trade Commission's position against this form of motivation in an effort to determine whether it is in fact legislating morality, rather than making explicit the standards which the community has developed. Since the examination will involve primarily appeals of respondents to the various circuit courts of appeal, it will necessarily consider the validity of the decisions of these courts. It must be kept in mind, however, that these decisions reflect the "philosophy" and exhortations of the Commission in which the duty to determine "unfairness" is reposed.

It all started with the United States Supreme Court case of Federal Trade Commission v. Keppel & Brothers, Inc., which has served, no doubt unintentionally, as a foundation of an inverted pyramid of "moral philosophy."26 In that landmark case in unfair practices, the respondent was engaged in the business of manufacturing, selling and distributing "break and take" package assortments of candies to retail dealers in the penny candy trade.

The break and take assortments are so arranged and offered for sale to consumers so as to avail of the element of chance as an inducement to the retail purchasers. One assortment, consisting of 120 pieces retailing at 1 cent each, includes four pieces, each having concealed within its wrapper a single cent, so that the purchasers of those particular pieces of candy receive back the amount of the purchase price and thus obtain the candy without cost. Another contains 60 pieces of candy, each having its retail price marked on a slip of paper concealed within its wrapper; 10 pieces retail at 1 cent each, 10 at 2 cents, and 40 at 3 cents. The price paid for each piece is that named on the price ticket, ascertained only after the purchaser has selected the candy and the wrapper has been removed. A third assortment consists of 200 pieces of candy, a few of which have concealed centers of different colors, the remainder having white centers. The purchasers of the candy found to have colored centers are given prizes, packed with the candy, consisting of other pieces of candy or a package containing lead pencils, pen-holder and ruler. Each assortment is accompanied by a display card, attractive to children, prepared by respondent for exhibition and use by the dealer in selling the candy, explaining the plan by which either the price or the amount of candy or other merchandise which the purchaser receives is affected by chance. The pieces of candy in the break and take packages are either smaller than those of the competing straight goods packages, which are sold at a comparable price without the aid of any chance feature, or they are of inferior

26 814 (7th Cir. 1941); Sweets Company of America, Inc. v. F.T.C., 109 F. 2d 296 (2d Cir. 1940); Ostler Candy Co. v. F.T.C., 106 F. 2d 962 (10th Cir. 1939); National Candy Co. v. F.T.C., 104 F. 2d 999 (7th Cir. 1939); Bunte Brothers, Inc. v. F.T.C., 104 F. 2d 996 (7th Cir. 1939); Minter Brothers v. F.T.C., 102 F. 2d 69 (3rd Cir. 1939); Helen Ardelle, Inc. v. F.T.C., 101 F. 2d 718 (9th Cir. 1939); Chicago Silk Co. v. F.T.C., 90 F. 2d 689 (7th Cir. 1937); F.T.C. v. F. A. Martoccio Co., 87 F. 2d 561 (8th Cir. 1932); F.T.C. v. A. McLean & Son, 84 F. 2d 910 (7th Cir. 1936).

291 U.S. 304 (1934).
quality. Much of the candy assembled in the break and take packages is sold by retailers, located in the vicinity of schools, to school children.  

After commenting that "the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of businessmen" (emphasis added.), the United States Supreme Court, in the only case it has ever considered involving the use of the element of chance in merchandising, said:

But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction to hold the method is not "unfair."

It is said that extreme cases make bad law. Perhaps, it may also be said that extreme cases may be used by administrative agencies to expand their powers. At any rate, Keppel was such an extreme case dealing, as it did, with a business selling inferior candy, integrated with a gambling plan, to school children so young that they were "unable to protect themselves." Children are said to be wards of the Court and have always been given a kind of special protection by the law. Even after their tender years, minors traditionally have been held to have the right to avoid their obligations. It is not difficult to see, therefore, irrespective of one's own particular ethical philosophy, how the Supreme Court came to condemn the practice in Keppel. What might be a little more difficult to see, however, is how the language of Keppel became authority for an eternal injunction against the element of chance in any form in business practice. The law, developed in the various circuit courts of appeal, purportedly following the Keppel case effectively accomplished this.

Walter H. Johnson Candy Co. v. Federal Trade Commission, decided the next year by the Seventh Circuit Court of Appeals, added to the law the feature that testimony by parents and educators that lottery

27 Id. at 307.
28 Id. at 313.
29 Ibid.
30 Ibid.
devices do not have a deleterious effect on children and by manufacturers that they have no moral or other objection to manufacturing and selling by means of the devices is irrelevant. The Court said: "That not all manufacturers believed the practice to be dishonest or that these manufacturers were mistaken in their beliefs was clearly immaterial and irrelevant." Thus, within 12 months did a circuit court not only relieve the Commission of any burden of establishing what is a fair practice for purposes of comparison, but also eliminated any opportunity for a respondent to do so, all on the strength of the language of Keppel, previously quoted.

Two years following Keppel, in 1936, the Seventh Circuit Court of Appeals, in Hofeller v. Federal Trade Commission, found in the language of the Supreme Court decision, authority to condemn the practice of selling candy in packages which retailed for 5 cents to 25 cents and contained various prizes ranging from 1 cent to 3 dollars, which practice was not aimed at child consumption. The Court said:

It cannot be denied that the persuasive argument in the Keppel case was based on the fact that the customers of the candy were, in the main, children. We are not satisfied, however, that the conclusion there reached is not here applicable. It will be noted that the Supreme Court emphasized the factor of lottery and chance in determining what constituted an unfair method of competition, and it spoke in general terms, at times without limitation to instances where consumers were children.

In the Keppel case there are many facts indicative of unfair trade methods which are present in the instant case. Among such similarities are: Inferior candy sold in the prize packages; a relatively negligible amount of candy was given in return for the price; substantial diversion of trade from actual or potential competitors; sale of the candy with the lottery feature in violation of local law; and competing manufacturers damaged by refraining from such practices.

While it was not necessary to the decision of the case, the circuit court, without any supporting discussion, set the stage for Federal Trade Commission censorship by saying: "It is quite impossible to escape the conclusion that where a competitive method employs a device whereby the amount of the return is made to depend upon chance, such method is condemned as being contrary to public policy." It should most carefully be noted that this statement is based by the court on the authority of Keppel, which said rather that "the practice is of the sort which the common law and criminal statutes have long deemed contrary to public

31 78 F.2d 717 (7th Cir. 1935).
32 Id. at 718.
33 82 F.2d 647 (7th Cir. 1936).
34 Id. at 649.
35 Ibid.
The significance of the change in language from that of an apparent summary of a survey of common and criminal law to that of flat condemnation is that the latter was the beginning of

36 Note 29 supra. Twenty-four states now have legalized gambling, as such, in some form. The following statutes are of interest:

(1) N.Y. UNCONSOL. LAWS §7952 (McKinney 19—) as declaring legal pari mutual betting on horse races, and §487 as legalizing Bingo.

(2) N.J. STAT. ANN. §§5:8-25, 5:8-51 (1959) as authorizing and legalizing Bingo and raffles.

(3) N.H. REV. STAT. ANN. §284:34 (1955) as declaring pari mutual betting on horse races legal, and chapter 287 as legalizing Bingo.

(4) FLA. STAT. ANN. §550.16 (1962) as legalizing pari mutual betting on horse races, dog races and Jai Alai.

(5) CAL. BUS. & PROF. CODE §19594 as legalizing pari mutual betting on horse races. The playing of draw poker in draw poker clubs has also been legalized in California.

(6) OHIO REV. CODE ANN. §3769.03 (1963) as legalizing pari mutual betting on horse races.

(7) KY. REV. STAT. ANN. §436480 (1963) as legalizing pari mutual betting on horse races.

(8) Md. ANN. CODE art. 788 (1957) as legalizing pari mutual betting on horse races.

(9) DEL. CODE ANN. tit. 28, §§361, 551 (1953) as legalizing pari mutual betting on horse races.

(10) ILL. ANN. STAT. ch. 8, §37 (1) (Smith-Hurd 1941) as legalizing pari mutual betting on horse races. The old gambling statute, chapter 38, §121 (b) and §344 which prohibited punchboards under certain conditions, and the new chapter 38, §28-1 which replaced them in 1961 and which does not prohibit or mention punchboards.

(11) NEV. REV. STAT. §464.050 (1960) as permitting various forms of gambling under license.

(12) PA. STAT. ANN. tit. 18, §4699.5 as legalizing betting on horse trotting races given by regularly incorporated trotting associations.

(13) R. I. GEN. LAWS ANN. §41-4-2 (1956) as permitting various organizations to operate Bingo games, and §41-4-2 as authorizing betting on horse races on the pari mutual system.

(14) S.D. CODE §§3.05 (Supp. 1960) as authorizing horse races and betting thereon under the certificate system.

(15) MONT. REV. CODE ANN. §§94-2401 (1947) as authorizing organizations, drug stores and other places of business to maintain card games for their members or customers and “trade stimulators” such as “pull boards” and other boards, where the board’s return does not exceed the retail price of the prize. Also §94-2425, as legalizing betting on horse races.

New Hampshire recently enacted into law a bill establishing a state lottery. While lotteries were common in the early history of the United States, having been used to found Columbia University and to help finance Harvard, Yale, Dartmouth and Williams, the New Hampshire lottery is the first in modern United States history since 1894. For a discussion of the attitude of the New Hampshire citizens toward the bill, see King, I’m Not Ashamed of Our Lottery! This Week, July 14, 1963. For a well-written monograph presenting the views against legalized gambling, see Peterson, Gambling, Should It Be Legalized (1951).

It is interesting to note that in 1950 the Congress of the United States enacted 18 U.S.C. 1305 (1950), which declares it to be legal to give prizes in fishing contests for specie, size, weight or quality of fish caught.

Four years later, in 1954, Congress imposed a stamp tax of $50.00 on persons who receive wagers. The curious language used in the statute creates the impression that the payment of $50.00 per year is a sort of license fee for the right to engage in the business of accepting wagers. Section 4901 provides: “Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering) . . . until he has paid the special tax therefor.”
the closing of the door upon any future consideration of the dynamics and progressive development of the morality of business practices.

In the early 1940's Modernistic Candies determined to market chewing gum by means of a "Ballgum" board, whereby the consumer would punch paper to determine the flavor he would get. This practice disgusted the Federal Trade Commission to the point where they issued a complaint which was ultimately considered by the Seventh Circuit Court in *Modernistic Candies v. Federal Trade Commission* in 1944.\(^3\)

While still ostensibly having the welfare of children in mind, the "what's right is right" approach to business ethics had begun to get such a firm hold in this area of business practice that the court felt constrained to by-pass any discussion of the broad moral principles and to ridicule counsel for Modernistic Candies with a projection of the Court's personality into its opinion:

> Counsel for the petitioner discussed at great length from a sociological point of view, the age-old problem of the gambling instinct in the human being. According to his analysis, gambling perverts our entire economic system; thus, insurance contracts are gambles, stock and grain exchange transactions are gambles, and the farmers' dependence on the weather is a gamble. Counsel's attempt to apply this analysis to the present case left us cold and unimpressed.

> He even reminded us that our great idol, Mr. Chief Justice Marshall in his day attended the horse races and wagered with his clergyman. In fact, they ran a book. As indicating how times have changed, and how even our coarse nature has yielded to the protecting care of governmental policy, we confess we do not even know a bookmaker, clerical or otherwise, and our passes to the beautiful race tracks around Chicago lie in our desk unused. (Author's note: But not destroyed!)

The device used in the case at bar is too apparently allied with the purpose of merchandising by gambling to appear to a court as being a fair trade practice, particularly designed as it is to appeal to children's trade and to appease their desire to get something for nothing.\(^3\)

The *Globe Cardboard Novelty Co. v. Federal Trade Commission* case, decided in 1951 by the Third Circuit Court of Appeals, did not involve merchandising by means of the element of chance but rather the sale of punch boards and push cards themselves.\(^3\)

The court, however, pointed out, with approval, how static the law had become some 18 years after *Keppel*, when it said:

> Since the decision of the Supreme Court in *Federal Trade Commission v. Keppel & Bros.*, 291 U.S. 304, (1934), it has been settled law that the sale of merchandise by lottery methods constitutes an unfair method of competition under Section 5 of the

\(^3\) 145 F. 2d 454 (7th Cir. 1944).

\(^3\) Id. at 454, 455.

\(^3\) 192 F. 2d 444 (3d Cir. 1951).
Federal Trade Commission Act. Thus, we accept as our starting point the proposition that it is contrary to the public policy of the United States for sellers to market their goods by taking advantage of the consumer's propensity to take a chance. (Emphasis added.)

In 1952, two cases which also involved the sale of punch boards and push cards in and of themselves were considered in the circuit courts. In *Lichtenstein v. Federal Trade Commission* the extent of the Ninth Circuit Court's consideration of the moral aspects of the practice was:

> We are of the opinion that the petitioner's use of interstate commerce to ship these devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the "unfair . . . practices in commerce" subject to the preventive control of the Commission.

The language of the Supreme Court in *Phalen v. Virginia*, 1850, 8 How. 163, 49 U.S. 163, 12 L. Ed. 1030, as to the "pestilence" of lotteries which "enters every dwelling . . . reaches every class . . . and preys upon" and "plunders the ignorant and simple" applies with force many times multiplied to the spread of lottery methods into line after line of merchandise.

It is interesting to note the application of the 1850 fact situation to the 1950 business practice. In *Zitserman v. Federal Trade Commission*, the Eighth Circuit Court of Appeals did not feel that even reference to the 1850 situation was required when it said:

> It is now well settled by controlling decisions that the sale of goods by a plan or method which involves the use of a game of chance, gift enterprise or lottery is a practice which is contrary to the established policy of the Government of the United States and violative of the Federal Trade Commission Act. (Emphasis added.)

But are business practices dynamic or well settled?

The most recent cases in this area have involved the mail order selling of merchandise through the mailing of push cards to members of the public from which sales of chances are made by a member of the public to others, who, depending on chance, receive merchandise or nothing, the seller receiving for his efforts a duplicate of the main item of merchandise offered on the card. In these cases there have been no complaints as to the quality of the merchandise offered or as to the total value of the merchandise given by the mail order seller in relation to the total sum of the chances provided for on the card. Neither has the involvement of children or the good faith of the seller been in issue.

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40 Id. at 446.
41 194 F. 2d 607 (9th Cir. 1952).
42 Id. at 609.
43 Id. at 611.
44 200 F. 2d 519 (8th Cir. 1952).
45 Id. at 522.
No questions of violation of federal or state criminal or civil law, other than the Federal Trade Commission Act, have been raised. The sole question has been whether the practice is unfair.

In *Surf Sales Co. v. Federal Trade Commission*,46 seventh circuit, the moral issue in the 1958 business climate was dismissed with a simple:

The law is now firmly established that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, including push cards such as we have here, is contrary to the established policy of the United States. . . .47


Mindful of the admonition that no conclusions are to be drawn from the denial of certiorari by the Supreme Court, it may be noted in passing that the opinion in Keppel is the last statement on this subject by that court since 1934.49

After acknowledging the arguments advanced by petitioners in *Wren Sales Company v. Federal Trade Commission*,50 seventh circuit, the latest pronouncement on the subject as of this writing, the court said: "... we have concluded that our decisions, cited above, were not in error and that it is now established that the practices outlined above are contrary to the public policy of the United States. . . ."51

In the almost 30 years since Keppel, its holding has been literally rubber stamped in no less than 34 decisions, 14 of which were decided in the seventh circuit.52 In none of these cases has evidence of the standards of fair dealing in the contemporary business community been admitted and it looks like it never will. The closed nature of the proposition in the view of the Commission was clearly indicated by Commissioner Anderson in his opinion in the case of *Max H. Goldberg*53 when he said: "In view of the numerous decisions on the point, it is difficult to believe that a respondent can contend seriously that such a practice does not constitute a violation of the Federal Trade Commission Act,"54 and the attitude of the Commission's attorneys was no doubt correctly stated by Mr. Pope in the oral argument *In the Matter of Dandy Products, Inc.*55 when he said: "Mr. Hagen has said right or wrong depends on the standards of the community, whether it is right or wrong. But,

46 259 F. 2d 744 (7th Cir. 1958).
47 Id. at 746.
48 283 F. 2d 299 (7th Cir. 1960).
49 Id. at 302.
50 296 F. 2d 456 (7th Cir. 1961).
51 Id. at 457.
52 Note 25 supra.
53 56 F.T.C. 582 (1959).
54 Id. at 586.
55 FTC Doc. No. 8467.
if something is right, it is right. If it is wrong, it is wrong. It is not a variable."

The fact that there has been a consistent rubber stamping of Keppel does not give its principle validity in modern day business practice. It must be kept in mind that all of the decisions have been by circuit courts of appeal whose attitude is that they have no business taking a new or different position until the Supreme Court chooses to modify or overrule Keppel. One must also keep in mind that an administrative agency, such as the Federal Trade Commission, which acts both as prosecutor and judge, though ostensibly acting impartially, cannot help but develop a prosecution-complex and is not likely to give up any power it has or add to its burdens in the conduct of litigation. Hence, the dilemma and the static nature of the law in this area.

Commissioner Lowell B. Mason, who served on the Commission 11 of the 30 years of Keppel, until November of 1956, in his excellent book, *The Language of Dissent,* sets forth what he calls "Mason's Law." It holds, he says, that:

... bureaucracy will arrogate to itself all power available under a statute in spite of the limitations against tyranny in the Constitution. This it will do, quietly and unobtrusively, through decisions at the lowest rung of the quasi-judicial ladder where the issue seldom meets the eye of the public.

He illustrates the erosion of the constitutionally guaranteed civil rights of businessmen, such as the prohibitions against ex post facto trials, with the dissenting opinions which he entered in the various cases which he heard. He speaks of bureaucracy as amoral, as the state personified: "But what if you said to the man next day, 'My friend, where is the boundary line between my property and yours?' and he were to reply, "'I refuse to tell you. But beware if you step over it—I shall shoot.'"

In its decisions of what is fair and what is unfair in business practices the Federal Trade Commission is making the moral judgments of the business community. Moral judgments presuppose and must be predicated upon moral principles. What, then, are these principles? What is the texture of the moral theory? Is it Aristotle's moderation?

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56 Id., Official Transcript of Proceedings, at 53.
58 Id. at 35.
59 Id. at 36. Mason avers that, in addition to the abridgment of prohibitions against *ex post facto* trials, administrative agencies have impinged upon other "fundamental concepts of Anglo-American jurisprudence," including the presumption of innocence, statutes of limitations upon actions, rules against hearsay evidence, the defendant's right to his day in court and the prohibition against prosecutors acting as judges in their own cases.
60 Id. at 278.
61 Note 19 supra.
or Hobbes’ egoism? Is it Bentham’s utilitarianism or Kant’s universal law? Is it Perry’s harmonization of conflicting interests or Herskovits’ relativism? Whatever it is, it has never been announced by the Commission and no thread of ethical thought is perceptible weaving through its decisions. If there is an ethical theory underlying its decisions the writer’s analysis of it is that the Commission and, hopefully, the businessman will intuitively know what the latter’s duty is, what he ought to do, what action is right, what is wrong and what ends are good or bad.

The Federal Trade Commission Act and its resulting regulation has

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62 Hobbes, Leviathan chs. 11, 13, 15, 17 & 18 (Molesworth ed., 1651), as reprinted in excerpts in Randall, Buchler, & Shirk’s, Reading in Philosophy 288-305 (1959), viewed Man, the individual, as particles in motion toward endless desires and held that objects of desire are therefore called “good.” He believed that all motivation is egoistic and that Man is in a constant state of war-like competition. As a consequence, reason and prudence demands of us three moral principles, which he referred to as laws of nature: first, seek peace; second, be content with as much liberty as you would allow other men against yourself and; third, keep covenants made. He believed that to keep peace, absolute, unquestioned authority of the State is essential, for otherwise there can be no moral right or peace. See also Magill, op. cit. supra note 4, at 394-395, and Garnett, op. cit. supra note 20, at 123-128.

63 Bentham, An Introduction to the Principles of Morals and Legislation (1789), as reprinted in Burtt, The English Philosophers from Bacon to Mill (1939), analyzed in Magill, op. cit. supra note 4, at 551-556, and criticized in Garnett, op. cit. supra note 20, at 166-172, propounded “the principle of utility” as fundamental in both morals and legislation, that is, the obligation of the individual to promote the greatest possible happiness for the greatest number. In his development of this principle, he believed that the moralist and lawmaker must consider the value of particular pleasures in connection with the morality of particular acts and the ends of legislation. He believed that all punishment was wrong and should only be administered for the exclusion of greater evil.

64 Kant, Fundamental Principles of the Metaphysic of Morals, as translated by A. W. Wood, Kant’s Critique of Practical Reason and Other Works 12 (6th ed. reprint 1948), speaks of the “Will” as “the supreme good and condition of every other, even of the desire of happiness.” At page 38, he maintains that “there is therefore but one categorical imperative, namely, this: Act only on that maxim whereby thou canst at the same time will that it should become a universal law.” Illustrating this concept, on pages 39-41, he shows how suicide, promise breaking, neglect of one’s natural capacities and a lack of concern with the wretchedness of one’s fellow man are inconsistent with “universal law” and, hence, immoral. Also see Magill, op. cit. supra note 4, at 545-551 and Garnett, op. cit. supra note 20, at 65. Ralph Barton Perry, who, incidentally is quoted in Commissioner Mason’s book, op. cit. supra note 57, at 274, as stating that “the efficacy of law depends on . . . lawabidingness,” developed his theories of ethics in Perry, General Theory of Value (1926) and Perry, Realms of Value (1954). In essence, the central ideas of his views upon morality are that an object has value only to the extent that we have an interest in it and that morality is the harmonization of conflicting interests. He believed that Man should work toward a harmony of cooperation. Morality, he contended, is the integration of interests, rendered harmonious without losing their identity. Also see Magill, op. cit. supra note 4, at 874-880.

66 Melville Herskovits treats ethical evaluations as “relative to the cultural background out of which they arise.” See Herskovits, Man and His Works 63. Under this view there are no cross-cultural norms, and an act is moral if it is consistent with the customs, institutions and moral standards of a given culture.
been a part of our American jurisprudence for almost 50 years. Its encroachments upon the freedom of business enterprises have been increasing continuously. The legal principle of *stare decisis* has caused those encroachments to become “well settled,” 67 “firmly established,” 68 and no longer “seriously” contestible. 69 The ultimate result of the present direction of the law is toward a static, hamstrung business community. But this tide can be turned and it is the *moral* obligation of American businessmen to turn it. Businessmen and the lawyers who represent them must realize that they are dealing in ethical philosophy and they must familiarize themselves with philosophical thought. They must approach the ethical issue from an ethical point of view. They must develop an ethical philosophy of business. They must pursue their causes beyond the circuit courts of appeal and their arguments must be framed upon ethical, philosophical lines. If the philosophy of American business is to be a matter of law, then it is high time that its principles be litigated and resolved.

67 Note 45 *supra.*
68 Note 47 *supra.*
69 Note 54 *supra.*