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## Honesty and Competition: False Advertising Law and Policy Under FTC Administration. by George J. Alexander.

Daniel Wilkes  
*University of Connecticut*

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examination of what judges say in their case decisions. The jury too is centuries old as a device for bringing public attitudes and understanding into the courtroom process; juries continue to decide so many cases and influence the settlements of so many more that juror opinions too are a central part of our legal system. But actual jury verdicts leave the jurors' reasons hidden, except where judges, lawyers or reporters interview them; these interviews are often hurried and inadequate, and many judges discourage or forbid them. A continuing program of experimental jury deliberations, sponsored by the courts and covering a wide range of legal topics, would permit us to examine what jurors say in arriving at their case decisions. This would make available to the law the wisdom or foolishness of the jury so that reasonable instructions and trial procedures could be developed, and it would make available to the judicial and political lawmakers the operating "sense of justice" of the public on major legal issues. The deliberations of experimental juries who have been exposed to concrete cases and argument on both sides can provide a much more valuable and thoughtful form of public opinion data on legal issues than the normal public opinion polls. The Simon study is a prototype for such ventures.

ALLEN H. BARTON

*Director*

*Bureau of Applied Social Research*

*Columbia University*

HONESTY AND COMPETITION: FALSE-ADVERTISING LAW AND POLICY UNDER FTC ADMINISTRATION. By George J. Alexander. Syracuse: Syracuse University Press, 1967. Pp. 315. \$10.

This excellent book packs into several hundred pages a summary of the precedents and problems to which the Federal Trade Commission has given birth since it first won clear authority to stop false or misleading advertising practices.<sup>1</sup> An additional reason why it will be well worth its space on the desk of any attorney who counsels those who market goods across state lines is that George J. Alexander, professor and associate dean at Syracuse University College of Law, has avoided three of the most damaging pitfalls facing the scholar who adds to the law books in print.

The first pitfall lies in the mounting tendency of the scholar to combine a string of theoretical generalizations without explaining them by examples or hypothetical instances. The result, quite frequently, is a failure of communication for which any judge or client would be justifiably upbraided. Dean

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1. See *FTC v. Gratz*, 253 U.S. 421, 428 (1920) where complaint of tie-in sales of jute bagging with baling wire for cotton was held not proven an unfair method of competition, *inter alia*, because no proof of deception or misrepresentation was produced by the Commission. See also G.J. Alexander, *Honesty and Competition 1-6* (1967) (thumbnail sketch of the sources of Commission jurisdiction).

Alexander's text is notable for its ability to extract the theoretical rules under which the FTC's policing of advertising operates while making both the meaning and the dimension of each rule intelligible through illustration.

An excellent example lies in his analysis of the role of "substitutive assertions" in depicting some present policies underlying FTC action in the product naming area. To show the line beyond which cease-and-desist orders will be requested, Alexander contrasts the permissiveness with which the FTC has allowed the use of statements like "27 percent smoother," with its crackdown on uses of "comparable" products in a label to identify what is actually marketed as a substitute for that product, as in "antelope suede" for skins or "alligator calf" for shoe leather.<sup>2</sup> Dean Alexander suggests the difference between the two cases is that the vague claim something is "27 percent smoother" may really be aimed at suggesting a company's product is somewhat different in kind from other products rather than that it is substitutable. Here the practical value of Dean Alexander's theoretical work is revealed, for if in a border-line case attorneys can stress to the FTC the primacy of this product-differentiation function, its policy of permissiveness may govern.

The second pitfall lies in the obverse tendency of thick compendia to present practicing attorneys with even the smallest bush in the forest without any overview of how they fit into the theoretical forest as a whole. In the case of the "Unfair Competition Woods" in which the false advertising trees lie, it is often far less useful to an attorney arguing for a change in FTC policy to know just what the FTC and the courts have done, than it is to understand the dilemmas of conflicting policies upon which the FTC must be so often impaled in this area. Here *Honesty and Competition* is at its best, for there is practically not a single page on which oft-ignored policy implications are not searchingly brought to bear, whether it be on calling a thinner-sliced loaf "light-diet bread" and similar problems of describing a product's assets in terms of the consumer's economic demands,<sup>3</sup> or on trying to describe a suitcase as lower priced than similar goods and similar problems of introducing assertions about competitive price advantage into the consumer's purchasing decision.<sup>4</sup>

The third pitfall lies in the persistent belief among writers of law books that decisional precedent is the only relevant source of guidance as to what the courts will do with a client's claim. The fault can be readily seen to lie, not in the parochialism of the local bar, but plainly in our own law teaching. Every time a class hour goes by when the only things discussed about a case are the legal arguments raised we are teaching that arguments based upon the knowledge of other disciplines is irrelevant. In particular, every time an unfair com-

2. See G.J. Alexander, *supra* note 1, at 50-51.

3. *Id.* at 112-15, discussing Matter of National Bakers Services, Inc., [1961-1963] CCH Trade Reg. Rep. ¶ 16,375 (FTC 1963).

4. *Id.* at 135-36, discussing Matter of Arnold Constable Corp., 58 F.T.C. 49 (1961).

petition course focuses in on the doctrines of "misrepresentation"—when a white lie about a product rises to the threshold of a fraud—and "diversion of customers"—when a similarity of names is enough for "unfair competition"—and leaves out the economic effect on consumer preferences and competition, we are teaching that the economic and public policy concepts learned in undergraduate study are irrelevant now that one has decided to practice law.

In this respect, the all encompassing view which Professor Alexander casts on so many aspects of the FTC's approaches to false advertising over the past fifty-two years acts as an indictment of "Ad Law" and "Gov Reg" professors alike. The thrust of Dean Alexander's analysis in *Honesty and Competition* is that the FTC, in exercising its statutory function of defining unfair advertising, repeatedly ignores the extent to which the FTC may deprive the public of the lower-priced substitutes it normally desires. An example given by Dean Alexander raises a problem familiar to every man who washes his own car. It is known that "chamois" leather will dry the most sensitive car with a maximum of absorption and a minimum of scratch. The high price for chamois, it turns out, is not so much an accident of short supply as it is a miracle of government intervention to "protect the consumer." Here, the FTC has gone along with one particular substitute for the original Alpine antelope "chamois," apparently to the exclusion of all others.<sup>5</sup> The result, Dean Alexander points out, is to keep the consumer from buying what he assumes "chamois" to be—"a cloth-like material for washing a car that has particular properties of absorption and softness," by granting what might be called a "label monopoly" to manufacturers who hope to be free of competition with their products as a result. An anomalous role for a consumer-protecting agency or just the result of failing to preserve the forest while cutting down individual trees?

DANIEL WILKES  
*Visiting Associate*  
*Professor of Law*  
*University of Connecticut*

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5. *Id.* at 76-79, discussing Matter of Atlantic Sponge & Chamois Corp., 52 F.T.C. 500 (1955).