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Economic Problems of Fraud Law

*Robert A. Leflar**

FRAUD AND MISREPRESENTATION are as old as human communication. Many of today's devices for deceit are that old too. The outright lie, the misleading half-truth, the tricky act that speaks without words were inventions of primitive man, reinvented as each new generation of the acquisitive and the gullible came into competitive existence. Negligence in the use of words likewise began when use of words began. Some of today's fraudulent transactions are similarly ancient in character, distinguishable only by environment from events at the dawn of history. Perhaps that is true of all twentieth century fraud; it is ancient guile in modern dress.

Whether fraud has changed or not, the economic society in which it occurs has changed, and ethical standards which prevailed a millennium or even a generation ago will not maintain the vaunted efficiency of today's complex commercial and industrial organization. A credit economy such as America's cannot operate on a Yankee horsetrader's ethics. Reliability rather than guile must be the business standard. Confident reliance depends upon accuracy. Today, even careless inaccuracy defeats the economy's requirements.

Traditionally, law lags behind socio-economic mores. That is clearly true of the common law, and almost equally true of legislation in a common law country. Specifically, it has been true of the law's sanctions against commercial falsehood. Most of these sanctions were formulated as common law in the latter half of the nineteenth century, on a foundation built still earlier, and reflected standards of a low-level marketplace which even then were being superseded in the better marketplaces. Since those days the gap has widened. In nearly all areas of commercial intercourse the need for reliability, largely regardless of fault, will increase as the century progresses. It is generally agreed that legislation rather than the common law's slow processes must fill the gap. And the legislation should be drafted by experts whose studies look well beyond our economic past.

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Is maximum efficiency in the economy the ultimate and whole ideal for this legislative up-dating of the law? Surely not! Society's mores furnish the standard, and economic efficiency is only one item, albeit an increasingly important one, in the bundle of values which society takes into account when it draws its line of minimum approval for free speech in the marketplace.

We tolerate more freedom of speech for sellers of geriatric medications and used cars than for sellers of listed securities. Why is that so? There are controversial economic areas, within the confines of private enterprise, in which honest differences of opinion and opposing analyses of fact render the constitutional guaranty of free speech as vital as in areas of political or cultural controversy. The social values that inhere in uninhibited expression of opinion and publication of controverted fact can be as genuine when motivated by free economic enterprise as when motivated by any other kind of enterprise. The anti-social aspects of economic deception when balanced against these social values will not always outweigh them.

The lawmaker's task of balancing between free expression on the one hand and a modern economy's demand for accurate reporting on the other is no easy one, no easier than when society's well-being calls for any other interference with freedom of speech.¹

¹ Cf. Leflar, *The Free-ness of Free Speech*, 15 *Vand. L. Rev.* 1073 (1962).