FREE ADVERTISING: THE CASE FOR PUBLIC RELATIONS AS COMMERCIAL SPEECH

by
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The commercial speech doctrine, the doctrine establishing a subcategory of protected speech under the First Amendment, has been under increased fire, most prominently in 2003 with Nike v. Kasky*, but also in other cases around the country covering a variety of contexts. A key distinguishing attribute of the commercial speech doctrine is that it permits the government to regulate the speech that it covers for its truth. This is precisely what the government may not regulate in the area of political and expressive speech. Many critics would like to see the commercial speech doctrine done away with altogether. They argue commercial speech should be treated like political and expressive speech under the First Amendment. Professor Piety has argued elsewhere that subjecting commercial speech to the same strict scrutiny as political and expressive speech would have far reaching negative consequences. In this Article, Professor Piety addresses a narrower concern: the argument that (assuming efforts to eliminate it altogether fail) the commercial speech doctrine's application should be expressly limited to "traditional advertising," excluding corporate speech in the form of public relations. She proposes that this argument is misplaced because the purposes articulated by the Supreme Court in establishing the commercial speech doctrine would be better served by applying it to all marketing-related speech, including public relations.*

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> *Advertising is publicity that a firm pays for; public relations seek publicity that does not require payment to the media for time or space.*[1]
>
> *Advertising is the continuation of public relations by other means and should be started only after a PR program has run its course.*[2]

The commercial speech doctrine, the doctrine establishing a subcategory of protected speech under the First Amendment, has been under increased fire, most prominently in 2003 with *Nike v. Kasky*,[3] but also in other cases around the country covering a variety of contexts.[4] A key distinguishing attribute of the commercial speech doctrine is that it permits the government to regulate the speech that it covers for its truth. This is precisely what the government may *not* regulate in the area of political and expressive speech.[5] Many critics would like to see the commercial speech doctrine done away with altogether.[6] They argue commercial speech should be treated like political and expressive speech

[1] MICHAEL SCHUDSON, ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY 100 (1984).

[2] AL RIES & LAURA RIES, THE FALL OF ADVERTISING AND THE RISE OF PR xii (2002).

[3] 539 U.S. 654 (2003).

[4] United States v. Wenger, 427 F.3d 840 (10th Cir. 2005) (First Amendment offered as a defense to securities fraud); Whitaker v. Thompson, 353 F.3d 947 (D.C. Cir. 2004) (marketers of saw palmetto who claimed on label that it might be beneficial for prostate condition asserted First Amendment as a defense to FDA action).

[5] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 271−72 (1964) (First Amendment may require government to tolerate even false or erroneous speech in some contexts).

[6] *See, e.g.*, Motion for Leave to File Amicus Curiae Brief for the Advancement of Capitalism Supporting Petitioners at 3−11, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (arguing for reconsideration and abolishment of commercial speech doctrine). The Center for the Advancement of Capitalism actually argued for the reinstatement of the *Valentine v. Chrestensen*, 316 U.S. 52 (1942) standard which would arguably permit even more regulation of commercial speech than the current doctrine. *See infra* notes 31–76 and accompanying text.

under the First Amendment.[7] I have argued elsewhere that subjecting commercial speech to the same strict scrutiny as political and expressive speech would have far reaching negative consequences.[8] Here I address a narrower concern: the argument that (assuming efforts to eliminate it altogether fail) the commercial speech doctrine's application should be expressly limited to "traditional advertising," excluding corporate speech in the form of public relations.[9] I propose that this argument is misplaced because the purposes articulated by the Supreme Court in establishing the commercial speech doctrine would be better served by applying it to *all* marketing-related speech, including public relations.[10]

The claim that the commercial speech doctrine ought to be confined to traditional advertising was raised by Nike[11] and by many of its *amici*[12] in the *Nike v. Kasky* case.[13] The argument is that the *form* of communication should dictate its treatment under the doctrine.[14] Thus, because the disputed communications in the *Nike* case were delivered in the form of press releases, letters to the editor, advertorials, issue ads, and the like, Nike and its *amici* argued that the statements contained therein should be treated as political, and

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[7] *See, e.g.*, Samuel A. Terilli, Nike v. Kasky *and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383 (2005); Deborah J. La Fetra, *Kick It Up A Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004); Comment, *Free Speech Protections for Corporations: Competing in the Markets of Commerce and Ideas*, 117 HARV. L. REV. 2272 (2004).

[8] Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 188−99 (2005) [hereinafter Piety, *Grounding Nike*]. Nor do I attempt to address here the more complicated issue of corporate speech−that is, speech by a corporation in non-marketing contexts. That too I have addressed elsewhere. Tamara R. Piety, Against Freedom of Commercial Expression: Some Reflections on Existing and Potential Costs (2005) (unpublished manuscript, on file with author) [hereinafter Piety, Against Freedom of Commercial Expression]. *See also* R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DEN. U. L. REV. 137 (1994).

[9] *See, e.g.*, Bruce E.H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, Is The Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243 (2004).

[10] At present it is not clear what the doctrine covers. That the public relations and marketing industry experts still believe it could go either way—that is, full protection or fully commercial—is illustrated by the following article appearing recently in the Journal of Advertising. Kathy R. Fitzpatrick, *The Legal Challenge of Integrated Marketing Communication (IMC): Integrating Commercial and Political Speech*, 34 J. ADVERTISING, 93 (2005).

[11] *See* Brief for Petitioners at 22−24, *Nike, Inc.*, 539 U.S. 654 (No. 02-575) (arguing that California decision "expands" the definition of commercial speech).

[12] *See, e.g.*, Brief for the Bus. Roundtable as Amicus Curiae Supporting Petitioners at 13, *Nike, Inc.*, 539 U.S. 654 (No. 02-575) (state interest in regulating speech is "strong and legitimate" with respect to traditional advertising); Brief for Exxonmobil et al. as Amici Curiae Supporting Petitioners at 16, *Nike, Inc.*, 539 U.S. 654 (No. 02-575) ("Only when a corporation's statements are presented as a part of a corporation's selling message in a product advertisement or a product label can the government's interest in preventing 'commercial harms' arguably justify a degree of regulation not permitted for speech by other speakers.").

[13] 539 U.S. 654 (2003).

[14] *See also* Johnson & Fisher, *supra* note 9.

thus fully protected, speech. Central to this argument was a characterization of Nike as a "speaker" with speech "rights." This was a powerful rhetorical device; one that many observers found persuasive.[15] However, the power of this metaphor of the corporation as a "person" with "speech rights" tends to obscure the degree to which statements made to the press through the vehicle of public relations are an integral part of most corporations' marketing plans.[16] They aren't "opinions" or expression as we normally think of them–at least not for the corporation. They are marketing. Moreover, even the most cursory study of current marketing practices reveals that issues such as labor and environmental practices are considered integral parts of the corporate image and thus relevant to marketing the firm by those who market it. Speech on these topics is *always* of commercial interest to the firm making it. That is its primary, perhaps only, *legitimate* interest given the duty to shareholders.[17]

As noted, many have argued that the commercial speech doctrine, which permits more governmental regulation of speech deemed "commercial" than of speech deemed "political," ought only to apply to speech issued in a "traditional product advertising" format.[18] Apart from the difficulties of clearly defining "traditional product advertising" format, this argument isn't supported by a close review of the Supreme Court's cases. Although in some cases the Court implies that commercial speech *is* advertising, thus lending some support for the position (if only tangentially) in fact the Court has not clearly defined what constitutes "commercial speech," let alone what "traditional advertising format" might be. And in other cases, the Court has *rejected* the proposition that all advertising, traditional or otherwise, equals "commercial speech" or that the mere linkage of advertising to an issue of public concern will convert commercial speech to fully protected political speech.[19]

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[15] Moreover, it finds support in some of the Court's decisions which treat corporations as speakers with rights. *See, e.g.*, Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). *But see* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (retreating from the strong stance of corporate speaker as indistinguishable from individual speaker).

[16] On the power of metaphor see Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745, 753−57 (1992); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

[17] Indeed, some in the pro-Nike camp admitted as much. "[B]ecause corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, *no responsible corporate spokesman speaks on a company's behalf without being concerned about the effects the statements may have on corporate sales and profits.*" Brief for Arthur W. Page Soc'y et al. as Amici Curiae Supporting Petitioners at 18−19, *Nike, Inc*., 539 U.S. 654 (No. 02-575) (emphasis added). I argue, in Against Freedom of Commercial Expression, that is the only legitimate interest for commercial expression under current principles of corporate governance. *See supra* note 8. *See also* Daniel J.H. Greenwood, *Essential Speech*: *Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995 (1998).

[18] *See, e.g.*, Brief for Forty Leading Newspapers et al. as Amici Curiae Supporting Petitioners at 3, *Nike, Inc*., 539 U.S. 654 (No. 02-575).

[19] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66−69 (1983).

Given that much traditional advertising makes few, if any, explicit claims, limiting the commercial speech doctrine to traditional product advertising would potentially leave the government presiding over an increasingly empty set—that is, free to regulate "advertising," but only as to explicit claims in a context where few explicit claims are made and powerless to regulate *non*-product advertising marketing speech, a context where many explicit claims may be made. Many of the claims the government has an interest in regulating—false health, safety, and environmental claims by for-profit corporations—are made in the context of marketing efforts outside of traditional advertising, such as in press releases which attempt to position these marketing claims as "news." Moreover, "the market" that advertisers are concerned with is made up of not just "consumers," but also investors, reporters, banks, employees, stockholders, and many others.[20]

I argue here that the Court should clearly state that the term "commercial speech" broadly encompasses *all* speech that could be characterized as marketing or related to for-profit corporate self-promotion. In other words I propose the following formula: public relations = marketing = commercial speech, absent some factual circumstances that might suggest a different treatment. This proposal is premised on Professor Steven Shiffrin's argument[21] that there is no *single value or theory* animating the First Amendment and that the most promising approach to the issues that implicate it is a nuanced, multi-factor approach. I hope in this Article to offer some of the concrete examples of why, consistent with the theory for protection of *commercial* speech, "commercial speech" should be interpreted broadly to include many statements made in the context of public relations because such statements' primary, if not exclusive aim, is a marketing aim. Such statements are aimed at making a contribution to public discussion.

Part I reviews the *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[22] case, which established the commercial speech doctrine and reviews the justifications offered therein for its creation. These justifications suggest that the interests the Court meant to protect in the early articulation of the doctrine are *equally* implicated by marketing in the form of public relations.[23] The foundational and controlling case law demonstrates that

[20] Of course many of these groups include consumers since the categories are not hermetically sealed.

[21] Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). *See also* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990).

[22] 425 U.S. 748, 770 (1976).

[23] What is *not* discussed in this Article is whether the strong version of commercial speech, the version that equates corporate speech with commercial speech, and which employs the metaphor of corporation as "speaker" with speech "rights" can be squared with theories of what the First Amendment is meant to protect. I am not certain that it can. I address this question in a separate article and suggest that the commercial speech doctrine perhaps represents a wrong turn in the interpretation of the First Amendment. *See* Piety, *Grounding Nike*, *supra* note 8. This Article does not challenge the commercial speech doctrine *per se* and presumes the legitimacy of the interests expressed by the Court in

the Court constructed the commercial speech doctrine primarily for the protection of the consumer and to promote the efficient operation of the market by providing for protection of truthful commercial speech and limiting the government's ability to paternalistically suppress or regulate such truthful speech on the alleged grounds of consumer welfare. The Court reasoned that advertising contained information that, if truthful, the government should ordinarily not suppress, absent fairly compelling circumstances.[24] Consumers should be trusted with the truth and the market's efficient operation depends on information. But for precisely the same reasons, the Court *retained* the government's power to regulate such speech for its truth and to suppress, or (more accurately) to provide sanctions for *un*truthful or misleading speech. The subsequent sections illustrate that these interests are also implicated by speech that takes the form of public relations and thus that such speech ought to be considered at least presumptively "commercial" unless proven otherwise.

Part II of the Article addresses the question of advertising's alleged informational function. The Supreme Court has at times appeared to use the terms "advertising" and "commercial speech" as if they were synonymous and yet in other contexts clearly indicated that they are not synonymous. This section argues that the two terms are not synonyms. Advertising is a subset of marketing. And while advertising has some informational function, its principal function is to sell and it need not provide much information to do so. In this it overlaps with other kinds of marketing speech that also contain some information. Indeed, pursuant to industry practice, there is often more information *outside* of advertising than in it. The Court's assumption that advertising's function is primarily informational bears little resemblance to the observable practice. Nor does it track the understanding drawn from marketing professionals and academics as to how they understand advertising and how it fits generally into a marketing plan. In their view advertising is only one part of an overall marketing program in which important information may be conveyed through marketing devices *other than* the traditional product advertising or the use of traditional advertising format. A key part of this plan is the development of brand identity. And brand identity is maintained through several devices—advertising is only one of those devices..

establishing the doctrine so as to provide a starting point for analyzing whether those interests are *also* served by treating public relations speech as commercial speech. Again, I am not suggesting that there is a single value that the First Amendment can be said to protect. *See* Shriffin, *supra* note 21, and Balkin, *supra* note 20. *See also* Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965 (1993).

[24] *Va. State Bd. of Pharmacy*, 425 U.S. at 770−73. (observing that while the government may not protect the public from truthful information about legal activity, the government may retain the right to regulate the form, time, place and manner, ads about illegal activity, and provide special rules for the media). *See also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (articulating the still applicable 4-part test: speech must (1) concern a lawful activity, (2) not be misleading, (3) the regulation must directly advance the government's interest, and (4) do so no more than necessary to accomplish objectives).

Part III discusses the issue of brand identity as an amalgam of several factors which involve not only issues regarding the qualities of the products or services, but also about the processes that generate those products and services. Increasingly it is the case that consumers are interested in channeling their consumption[25] to certain types of companies or companies that engage in, or refrain from, certain practices. For example, in the 2005 Christmas season, some religious groups urged doing business only with companies that explicitly referred to "Christmas" rather than to "holiday" in their advertising and promotional displays.[26] Some consumers are interested in whether a manufacturer is "sweatshop free" or whether it conducts manufacturing in environmentally sound ways or produces a product that is not harmful to the environment.[27] For decades many consumers have been interested in "buying American" and seek assurances that a product is "Made in the U.S.A." Drawing on the work of Professor Douglas Kysar and using his terminology, I argue that these "preferences for process" are as legitimate an expression of consumer interest as color, quality, price, and other conventional loci of consumer interests.[28]

However, without accurate and reliable information on issues such as environmental, labor, animal testing, and other practices, consumers are unable to use their purchasing "vote" to reflect their interests and preferences in these areas. And in the absence of negative consequences for false statements, some sellers can free-ride on the efforts of others—that is, benefit from identifying their products as "cruelty-free" without actually incurring the costs of making the production changes that would warrant such a designation. It is significant to the issue of negative consequences that often much of the information about environmental, labor, animal testing, and other such practices is conveyed through public relations mechanisms such as press releases, advertorials, interviews, editorial comments, web page commentary and the like. Delivered in this form, the speech appears to some observers as protected speech. But to its practitioners it is (when it works) just free advertising.

Part IV explores the practice of public relations—the source of that "free advertising." Here I examine the foundations of the profession. The key point that emerges in this section is that public relations speech is a form of marketing which gains credibility and effectiveness because of its delivery through a third party—the media. Although it need not be so, it has often been the case that the various media outlets have been fairly uncritical of "news" coming from interested sources and shown a perhaps distressing willingness to "report" information obtained through a company's press officer without

[25] Actually it is not just consumption activities, but also investing. *See* Cynthia L. Cooper, *Religious Right Discovers Investment Activism*, CORPWATCH, Aug. 3, 2005, http://www.corpwatch.org/print_article.php?id=12527.

[26] Adam Cohen, Op-Ed., *This Season's War Cry: Commercialize Christmas, or Else*, N.Y. TIMES, Dec. 4, 2005, § 4, at 11.

[27] Samar Farah, *The Thin Green Line*, CMO MAG., Dec. 2005, *available at* http://www.cmomagazine.com/read/120105/green_line.html?action=print.

[28] *See also* Amicus Curiae Brief in Support of Respondent by Members of the United States Congress at 10−14, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

attribution or independent verification of the facts.[29] When a newspaper carries a company's "message" it is *better* than any advertising because it is both free and more credible to the public than it would be coming directly from the company. And, for the reasons explored in the previous sections, many of those "messages" involve the company's labor, environmental, and other process practices that relate to its image, reputation, and personality—all of which are directly relevant to sales. Such claims are more likely to be covered as "news" than simple product descriptions, but they nevertheless contribute to the bottom line. Moreover, many of the explicit claims that the government may have an interest in regulating as a matter of consumer and environmental protection are made in the context of public relations initiatives.

In Part IV, I offer two case studies indicating why the statements made in the public relations context are as relevant, if not more so, to the quality of information in the market and to consumer protection, the reasons commercial speech was protected in the first place, as any statements made in the traditional product advertising context. To illustrate this claim I take two specific examples: the role played by publicity in Enron and the role played by public relations with respect to information on the impact of cigarette smoking on public health as documented in the recent tobacco litigation brought by the United States. These examples are only a few of many that illustrate that public health and welfare may depend upon the government's ability to regulate the quality of information in the market and to provide appropriate sanctions for false and misleading information.[30]

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[29] JOHN C. STAUBER & SHELDON RAMPTON, TOXIC SLUDGE IS GOOD FOR YOU: LIES, DAMN LIES AND THE PUBLIC RELATIONS INDUSTRY 179−96 (1995) (chapter entitled *All The News That is Fit to Print*, describing interpenetration of news and public relations professions, heavy reliance of journalists on public relations news releases, manipulation of journalists, etc.). *See also* Diane Farsetta & Daniel Price, Center for Media and Democracy, *Fake TV News: Widespread and Undisclosed*, Apr. 6, 2006 *available at* http://www.prwatch.org/node/4550/ (report of 10 month nationwide study of the undisclosed use of video news releases (VNR)). This practice also undermines the argument made by the media *amici* in *Nike* that there is no need to provide liability for false statements made in this context because the public can rely on the media to ferret out the deception. *See* Brief for Forty Leading Newspapers et al. as Amici Curiae, *supra* note 18, at 22−26 (media coverage of Nike demonstrates that regulation is unnecessary). For a discussion of a distinct, but related, source of distortion in the press—the threat of withdrawal of advertising on the basis of content—see Byron Calame, Op-Ed., *Cracks in the Wall Between Advertising and News*, N.Y. TIMES, Nov. 6, 2005, § 4, at 12. This problem is also discussed in, among others, ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY 56−57 (1999) ("[I]n 1997 the *Wall St. Journal* reported that some major national advertisers demanded to know the contents of specific issues of magazines before they would agree to place ads in them."). C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 44−70 (1994) (chapter 11, *Advertising and the Content of a Democratic Press*, describing commercial pressure to shape content). This second source of concern is not the subject of this Article. But its existence further undermines the suggestion that concerns for "balance" and airing all views require offering First Amendment *protection* to commercial entities' marketing efforts that appear as editorial content.

[30] All sides in this debate may be guilty of not making explicit the perhaps significant difference between regulation in the form of suppression and regulation in the form of permissible sanctions for violations of the prohibition on false statements of fact. Although

Finally, in Part V, I propose a test for distinguishing between protected speech and commercial speech in the context of public relations statements. The test is meant to be a starting point for a more Realist approach to the assessment of commercial speech under the First Amendment and builds on the existing test articulated by the California Supreme Court in *Kasky v. Nike, Inc*. This is only meant as a starting point for analysis and undoubtedly does not mean there will be no difficult cases. But the alternative that the proponents of expanded commercial speech propose, full First Amendment protection for everything but traditional product advertising, would mean losing significant control over speech with important economic, public health, and welfare implications.

I. COMMERCIAL SPEECH

The commercial speech doctrine is a controversial subsection of that speech considered protected by the First Amendment.[31] The commercial speech doctrine protects truthful, not misleading, commercial speech, while making explicit the government's power to regulate commercial speech within the guidelines set out in the doctrine. The doctrine entails virtually unlimited ability to regulate *un*truthful or misleading speech, while providing limitations on the government's ability to regulate truthful commercial speech. Prior to the creation of the commercial speech doctrine, most observers and the Court appeared to believe that the government had unlimited ability to regulate any commercial speech. So the limitations on the ability to regulate commercial speech, of heightened scrutiny of fit and purpose, as set forth in the still controlling case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[32] represented an expansion of the scope of the First Amendment to areas not previously covered by it. The question is: What were the *grounds* for that expansion?

there is much academic disagreement about the validity of the distinction, see JOHN H. GARVEY & FREDRICK SCHAUER, THE FIRST AMENDMENT: A READER 309−10 (2d ed. 1996) (collecting articles), doctrinally the Court continues to assert that there are important distinctions between the two. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Tory v. Cochran, 125 S.Ct. 2108, 2111 (2005) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)). Also, with respect to the varieties of ways to police false advertising, there is some evidence that private enforcement actions authorized by law may be more effective than regulatory agencies. Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 71 (1985).

[31] It is axiomatic that much speech is not covered by the First Amendment at all, even though proponents of First Amendment "absolutism" tend to overlook this point. *See* Frederick Schauer, *Categories and The First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 273 (1981).

[32] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

A. The Listeners' Rights

The commercial speech doctrine was developed in the context of a claim by a consumer group that the government ought not to have the power to suppress truthful information about products.[33] The truthful information in question was price and the product was prescription drugs. The State of Virginia argued that the publication of drug prices would result in price wars that would ultimately lead to an undesirable decline in professionalism by pharmacists. The Virginia Citizens Council argued that the State's justification for suppression of price information was unduly paternalistic. In a free society, it argued, consumers ought to be able to make up their own minds about their purchases with full information about the product, including the price. The Supreme Court agreed. The Court wrote, "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."[34] "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[35] The State, it noted, may not advance its goals of protecting the citizenry "by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."[36]

The interest in accurate information, the Court observed, could have very concrete consequences for individuals. Indeed, this was particularly true in the context of prescription medications since the availability of a given drug at a particular price could make the difference between whether the consumer could purchase it and thus make a difference to human health and well being. The Court observed that, "*[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate*."[37] This analysis focused on the *listeners*' right to receive information, *rather than* on the *speaker's* interest in transmitting it, or on any notion of expressive rights in the speaker.

As the Court noted, the case did not involve any claim for the pharmacists who would be "directly subject to" the statutory prohibition (such a claim had been earlier struck down by a Virginia appellate court), but rather it involved consumers interested in receiving the price information.[38] The threshold question, according to the Court, was whether, even assuming that constitutional protection could be extended to the publication of drug prices,

[33] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (characterizing Virginia's argument in favor of the price ban as "highly paternalistic"). *See also* Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollection*, 54 CASE W. RES. L. REV. 1189 (2004) (article by one of the attorneys who argued the *Virginia Pharmacy* case describing the context in which the prevailing argument was developed).

[34] *Va. State Bd. of Pharmacy*, 425 U.S. at 769.

[35] *Id.* at 770.

[36] *Id.*

[37] *Id.* at 763 (emphasis added).

[38] *Id.* at 753.

the recipients of that information had standing to advance the claim. The Court concluded that its case law on the subject provided that "freedom of speech '*necessarily protects the right to receive*'" as well as to disseminate information.[39] "If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."[40] But this formulation required the Court to *first* find a right to advertise, something which it had, up to that point, declined to do.

For example, in 1942, in *Valentine v. Chrestensen*,[41] the Court rejected the proposition that the First Amendment protected "purely commercial advertising."[42] But by 1973, the Court, while not directly addressing the issue of protection for advertising *per se*, had upheld an ordinance that prohibited newspapers from printing want ads for employment segregated by gender on the grounds that because the segregation of want ads into gendered categories was illegal, the government was constitutionally free to prohibit such speech.[43]

Then, two years later, in *Bigelow v. Virginia*,[44] the Court concluded that the First Amendment protected the publication in Virginia of advertising of the availability of abortion services in New York, even though those services were illegal in Virginia and a Virginia statute "made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor."[45] In *Bigelow*, the Court announced that the holding in *Valentine v. Chrestensen* was "distinctly a limited one."[46] However, because the Court found the abortion ads did more than "simply propose a commercial transaction," it held the ads were protected. [47] As a result, the *Virginia Pharmacy* Court later concluded that the question of whether strictly commercial speech might be entitled to any First Amendment protection had not been raised in *Bigelow*.[48] Finding the question "squarely before us" for the first time since *Valentine*, the *Virginia Pharmacy* Court concluded that there was some limited First Amendment protection for speech that "does 'no more than propose a commercial transaction.'"[49] It observed that the fact that money was paid for its dissemination and that the "advertiser's interest [was] a purely economic one" "hardly disqualif[ied] him from protection under the First Amendment."[50]

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[39] *Id*. at 757 (citing Kleindienst v. Mandel, 408 U.S. 753, 762−63 (1972)) (emphasis added).

[40] *Id*. at 757.

[41] 316 U.S. 52 (1942).

[42] *Id.* at 54.

[43] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

[44] 421 U.S. 809 (1975).

[45] *Va. State Bd. of Pharmacy,* 425 U.S. at 759−60.

[46] *Bigelow*, 421 U.S. at 819.

[47] *Id.* at 822.

[48] *Va. State Bd. of Pharmacy*, 425 U.S. at 760−61.

[49] *Id*. at 761−62 quoting Pittsburgh Press Co. v. Human Relation Comm'n., 413 U.S. 376, 385 (1973).

[50] *Id.* at 762.

In fact, the Court noted, parties to a labor dispute had primarily economic interests with which they were concerned. Yet the protection of the First Amendment to labor disputants did not require them to address "unionism in general."[51] Rather, the Court found, their individual economic interests in the dispute at hand were of significance because "'the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing.'"[52] "*Since the fate of such a 'single factory' could as well turn on its ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.*"[53] The Court took this observation and segued into a discussion in which the principal justifications offered to protect some commercial speech had almost everything to do with the listeners, in particular the public at large, and little to do with the speakers.

B. The Need for Accurate Information in the Operation of a Free Market

Thus, to the "keen interest" of the specific consumers before the Court were added the interests of the public at large. "[S]ociety also may have a strong interest in the free flow of commercial information."[54]

> So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable*. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[55]

This observation focuses on the public interest in the efficient functioning of the economy, not on anyone's "rights" to speak. According to the Court, it is in the *public* interest for there to be a free flow of *accurate* information because such a free flow of accurate information is necessary in order for the economy to function properly. In the traditional rights analysis to which First Amendment rights are often subject, rights are not described as protected for solely instrumental reasons, that is, because they further some other goal, even though protection may in fact further those other goals. Rather, they are

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[51] *Id*.

[52] *Id.* at 763 (citing Thornhill v. Alabama, 310 U.S. 88, 103 (1940)) (emphasis added).

[53] *Id.* (emphasis added). Note that the Court did *not* say that the *only* basis for extending protection to speech in labor disputes was the significance of that dispute to the larger world; but it did imply that it was the justification with the most relevance to the current dispute before the Court.

[54] *Id*. at 764.

[55] *Id.* at 765 (emphasis added) (internal citations and footnotes omitted).

protected as intrinsically valuable components of human dignity or autonomy.[56] However, the *Virginia Pharmacy* justification for protection of commercial speech is almost exclusively instrumental. It protects the dissemination of information, not for its own sake, but because of the good that is said to flow from it.

The key premise on which this judgment rests is that that in order for the public to be assisted by the information, it must be accurate. Thus, the state remained free to regulate speech that was false or misleading. "The First Amendment, as we construe it today, *does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely*."[57] It is rather hard to imagine that the Court would find the proposition that the dissemination of *false* information was "indispensable" to the functioning of the economy, even if there are some empirical reasons to suppose this might be true.[58] So then the articulation of the commercial speech doctrine begins with the proposition that its protections extend only to truthful speech. "*Untruthful speech, commercial or otherwise, has never been protected for its own sake.*"[59] Moreover, the Court found that it was consistent with this principle to regulate even speech that wasn't, strictly speaking, "untruthful" if it merely had the potential to be "deceptive or misleading."[60]

This statement of purpose was reiterated in *Central Hudson*,[61] the case that remains the controlling test for regulation challenged under the commercial speech doctrine.[62] In *Central Hudson* the Court reiterated that, "[t]he First Amendment's concern for commercial speech is based on *the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the*

[56] *See, e.g.*, Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 880 (1963) ("The theory asserts that freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society."); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413−14 (1986) (describing classic liberalism's identification of autonomy in what he calls the Free Speech Tradition, with freedom from interference by the government). The question of *whose* autonomy is protected by dominant interpretations of the First Amendment is forcefully raised by Professor Catharine MacKinnon. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 206−13 (1987).

[57] *Va. State Bd. of Pharmacy*, 425 U.S. at 771−72 (emphasis added).

[58] False statements may in fact generate sales. They may even generate *more* sales than truthful statements as long as people want desperately enough to believe the claims to be true. To the extent the economy is fairly dependent upon a high level of consumption and any decline in consumption is met with alarm, it may be the case that if a fair amount of that consumption is generated by *false* claims, then even false claims could be said to be "indispensable." There may be evidence for that proposition. But exploring it is beyond the scope of this Article.

[59] *Va. State Bd. of Pharmacy*, 425 U.S. at 771 (emphasis added).

[60] *Id.*

[61] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[62] Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (observing that *Central Hudson* was the controlling test in the commercial speech area).

public about lawful activity."[63] Thus, the test as set forth in the *Central Hudson* case begins with the requirement that the speech in question "concern lawful activity and not be misleading."[64]

But if much of the information on which consumers (and other persons who may affect the economy such as analysts, investors, business persons, and the like) depend is disseminated as public relations speech, then presumably there is an *equally* strong justification for regulating *this* speech on the very same grounds—the proper functioning of the market—that justified the protection for price advertising in *Virginia Pharmacy*. Indeed, this intuition is supported by the key role that information plays in securities regulation and corporate governance generally. From decisions about whether a board of directors' actions can receive the protection of the business judgment rule,[65] to the adequacy of proxy solicitations in shareholder votes,[66] to the ratification of potential conflicts of interest[67]—in virtually every area of corporate law, adequate disclosure is key to protection from liability.[68] Presumably this is because disclosure is seen as essential to proper market function. It is not "disclosure" if it isn't true.

It remains then to be explored the source of this alleged distinction between "traditional advertising" and public relations when dealing with commercial speech. It is a key premise of this Article that the distinction cannot be maintained because *all* of the speech of a for-profit corporation is, ultimately, marketing speech. I suggest it was a wrong turn taken in cases such as *First National Bank of Boston v. Bellotti*[69] and *Consolidated Edison Co. of New York v. Public Service Commission of New York*,[70] cases in which the

[63] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563 (emphasis added).

[64] *Id.* at 566. The remaining prongs of the 4-part test are that: (2) the government's asserted interest in regulating the speech be "substantial;" (3) that the regulation in question "directly advances" said interest; and that (4) it does so without being "more extensive than is necessary to serve that interest."

[65] MODEL BUS. CORP. ACT § 8.31(a)(2)(B) (focusing on a director's obligation to be well or adequately informed in order to have the benefit of the business judgment rule).

[66] *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) ("The purpose of § 14(a) [of the Securities Exchange Act] is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.").

[67] *See, e.g.*, DEL. CODE ANN. tit. 8 § 144(a)(1)–(2) (1974).

[68] The focus on the truthfulness in this context raises specters for some of governmental "arbitrators of truthfulness." Brief for the ACLU & the ACLU of Northern California as Amici Curiae Supporting Petitioners, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575). However, this concern obscures the fact that much of the judicial enterprise is directed at determining the "truth"–factual and legal–in innumerable situations, an enterprise fraught with difficulties given the fallibility of human reasoning processes and the limitations of the ability to know the truth of a past event. *See, e.g.*, TERENCE ANDERSON & WILLIAM TWINING, ANALYSIS OF EVIDENCE 96−104 (1998) (describing the Rationalist Tradition under which the judicial system proceeds as if such truths are ascertainable). Unless one is prepared to abandon the judicial system wholesale, it must be admitted that the law acts as an arbiter of truth in many areas, certainly with respect to concrete factual claims..

[69] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[70] Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530 (1980).

Court found a right for corporations to speak about matters of public concern, that raised the prospect, attractive to for-profit corporations, that *all* speech by the corporation could or should arguably be deemed protected because the right as analyzed in these cases appeared to reside in the corporation, *not* in the public.

Because corporations have no "opinion" about matters of public concern, apart from their impact on the economic affairs of the corporation—it was inevitable that these two categories would collide. As previously noted, the broader argument that for-profit corporations ought to have no "rights" at all to speech is dealt with in another paper.[71] Here I will assume that a distinction can be made between a general statement on a matter of public concern, such as the statement about the state income tax referendum in *Bellotti*, where there is no obvious connection between the statement and the corporation's welfare, and statements, like those in the *Nike* case that have a clear connection to the corporation's economic interest or operations, such as a factual statement concerning whether it pays minimum wage, even though in *both* cases the only real justification for the expenditure pursuant to principles of corporate governance can be that it advanced the company's economic interests in some manner. It is the latter type of communication, speech that directly implicates the company specifically—its products, its practices, its policies—that arguably constitutes "commercial speech"—even if it is issued in a public relations format.

C. Definitional Difficulties

The term "commercial speech" has never been very satisfactorily defined so that it can be established that the *Central Hudson* test, as opposed to some other test, or no test at all, is applicable to a particular instance of speech. One of the problems, and the principal source of controversy, is the difficulty of defining "commercial speech." What *is* commercial speech? Throughout its relatively short lifetime "commercial speech" has been dogged by much the same definitional ambiguity as has marked the question of pornography. The Court, both in its early rejection of First Amendment protection for commercial speech[72] and in its later announcement of limited protection in the *Virginia Pharmacy*[73] case, seemed untroubled by any definitional ambiguity. And although the doctrine has survived many assaults on it, both in case law and in academic and other writing, it has been controversial and the controversy has escalated over time.

As Professor David Vladeck has observed, "[f]ew of the early commercial speech cases were unanimous."[74] The attempts to formulate a standard that

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[71] *See* Piety, Against Freedom of Commercial Expression, *supra* note 8.

[72] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

[73] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[74] David C. Vladeck, *Lessons from a Story Untold*: Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1052−53 (2004).

would reflect broad consensus have been unsuccessful even though, as yet, the *Central Hudson* case still stands. But the analysis has moved from a standard that was rather deferential to governmental claims for a power to regulate, to one that is closer to strict scrutiny.[75] "The *Central Hudson* test the Court now employs is a demanding one—a standard so rigorous that it results in virtually automatic invalidation of laws restraining truthful commercial speech."[76] Still, many commercial interests are not satisfied by this more rigorous doctrine and would like to sweep it away altogether or, failing that, to restrict the doctrine even more narrowly to "traditional advertising." An analysis of modern marketing vividly illustrates what interests are at stake in this request. But it also illustrates what might be a basis for claiming a legitimate governmental interest in regulating public relations speech as well as traditional advertising, that is, a return to the foundational concern—the role of accurate information in the proper functioning of the economy. I begin with an analysis of "traditional advertising."

II. WHAT IS "ADVERTISING"?

> ***Ad·ver·tis·ing*** *(ăd'vər-tī'zĭng) n. 1. The act of calling public attention to a product or business.*[77]

According to a leading educational text, advertising is: "A form of either mass communication or direct-to-consumer communication that is non-personal and is paid for by various business firms, nonprofit organizations, and individuals who are in some way identified in the advertising message and who hope to inform or persuade members of a particular audience."[78] In a chapter entitled "Traditional Advertising Media," the book identifies the vehicles for traditional advertising as out-of-home (billboards, etc.) advertising, newspaper, magazine, radio, and television advertising.[79]

But promotion or marketing of a firm's products or services is not confined to these traditional vehicles. Hence the term, "integrated marketing communications" or IMC.[80] Marketing communications take place in the form of in-store displays, direct mail campaigns, product placement in movies and television, promotional tie-ins with movies and television, event sponsorship, issue sponsorship, email, give-aways, contests, word-of-mouth campaigns—in short, the only limitation for form appears to be the imagination of the

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[75] *Id.* at 1055−59.

[76] *Id.* at 1059.

[77] WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 81 (1984) (all fonts and typeface, excepting italics, in original).

[78] TERENCE A. SHIMP, ADVERTISING, PROMOTION, & SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS 621 (6th ed. 2003).

[79] *Id.* at 354−81. Presumably, although the vehicle is non-traditional, Internet advertising would also be "traditional" in the sense of its content.

[80] *Id. See also* Kathy R. Fitzpatrick, *The Legal Challenge of Integrated Marketing Communications (IMC): Integrating Commercial and Political Speech*, 34 J. ADVERTISING 93 (2005).

marketer. In the quoted textbook, the author notes, "we use *marketing communications* to refer to the collection of advertising, sales promotions, public relations, event marketing, and other communication devices . . .."[81] Some of these forms may explicitly "propose a commercial transaction,"[82] others may only imply it or be intended to create positive associations with the brand.[83] It is unclear how the proponents of a limitation to traditional product advertising would deal with this proliferation. The Court has also not been clear.

The United States Supreme Court has never really precisely defined "advertising." But it has often used the term as if it were coextensive with "commercial speech," that is, as if all "advertising" = "commercial speech."[84] Obviously this is not the case since some advertisements—such as the one involved in *New York Times Co. v. Sullivan*[85]—are treated as political speech. The speech in *Sullivan* was an "ad" in that it was space purchased from the newspaper by an outside party. But it did not involve the promotion of, or information about, any product. Rather it was a plea for donations for the assistance of Martin Luther King and other civil rights demonstrators in the South.[86] This "ad" was thus appropriately treated not as product advertising but as political speech.[87]

It is also not the case, much as some observers would like to argue that it should be, that as a doctrinal matter, all "commercial speech" = "advertising," at least as that term is traditionally understood. As the Court has previously noted, even materials which do include some discussion of matters of public concern, and thus are not limited to traditional product advertising, can be deemed "commercial speech."[88] "*We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to constitutional protection afforded noncommercial speech*."[89] However, the Court has fairly consistently assumed that advertising equaled information and that information had some impact on consumer behavior. Both of these assumptions are actually fairly problematic and will be explored in more detail

[81] SHIMP, *supra* note 78, at 3 (emphasis in original).

[82] This definition was proposed in the *Virginia Pharmacy* case. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

[83] Of course sometimes a name can become associated in the public mind with something negative and call up negative associations. *See* Note, *Badwill*, 116 HARV. L. REV. 1845 (2003) (discussing issue of, when a trademark or trade name becomes associated with negative information, whether it ought to be able to change its name). Phillip Morris and its affiliates changed their name to Altria, apparently in the hopes of disassociating the company from the negative connotations related to Phillip Morris and tobacco. http://www.altria.com/about_altria/1_0_AboutAltriaOver.asp (last visited on Feb. 5, 2006).

[84] *Virginia Pharmacy* is itself an example of this since its discussion uses the terms "commercial speech" and "advertising" as if they referred to the same thing.

[85] 376 U.S. 254.

[86] *Id*. at 256−60 (describing contents of the ad).

[87] *Id*. at 266 ("The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*.").

[88] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67−68 (1983).

[89] *Id.* at 68 (emphasis added) (citations omitted).

below. However, the protection the Court offered to commercial speech was based on these notions that the speech carried some "information" and that this information was of relevance to the proper functioning of the market.

A. Advertising as "Information"

In *Virginia Pharmacy*, the Court essayed the following definition of advertising's function: "Advertising, however tasteless and excessive it sometimes may seem, *is* nonetheless *dissemination of information as to who is producing and selling what product, for what reason, and at what price.*"[90] In the same opinion the Court suggested that commercial speech was speech that does "no more than propose a commercial transaction."[91] This latter definition may be a more general version of the first definition, but it still involves characterizing the speech as informational. Similarly, the Court in *Central Hudson* referred to the "informational function of advertising."[92] The proponents of expanded protection for commercial speech also take the position that advertising is information.[93]

This characterization of advertising as performing an informational function crucial to the operation of the economy, progress, and perhaps even democracy itself was the position taken by many of the persons, such as J. Walter Thompson, George French, and Oscar Herzberg, who were some of the founders of the advertising profession.[94] Herzberg, the managing editor of *Printer's Ink*, the trade publication for the emergent advertising industry, wrote in 1899 that advertising was one of the "great developments of the century,"[95] "benefiting both seller and buyer by developing markets for the 'hundreds of improvements and articles by which life can be made more pleasant.'"[96] In the early part of the twentieth century, advertising's promoters and practitioners seemed to believe there was virtually no limit to the positive social goods that could be attributed to advertising. By introducing products with which the public had not previously been familiar, advertising could introduce better

[90] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (emphasis added).

[91] *Id.* at 771 n.24 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (striking down the segregation of want ads into "male" and "female" categories)).

[92] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

[93] *See, e.g.*, Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?,* 76 VA. L. REV. 627 (1990); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437 (1980); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

[94] *See* PAMELA WALKER LAIRD, ADVERTISING PROGRESS: AMERICAN BUSINESS AND THE RISE OF CONSUMER MARKETING (1998).

[95] *Id.* at 338.

[96] *Id.*

habits to the public and thus it could perform an "educational" function.[97] Moreover, by stimulating desires, it stimulated the economy.[98] Advertising, it was argued, also improved competition and thus made business more efficient.[99]

"[W]hen twentieth-century advertising practitioners and their advocates set about attributing 'civilizing and uplifting' to advertising, they were quite in earnest about it."[100] But even then criticisms about the effectiveness of advertising, the potential for influencing the public in negative directions, concerns about advertising's effectiveness if it were seen to be untruthful, and the advertisers' willingness to exploit the "foibles" and "childishness"[101] of the public, suggested that the "information" provided by advertising was not always necessarily beneficial to the public welfare. Nevertheless, the industry continued on a largely optimistic self-evaluation. During the 1920s and 1930s "ad creators . . . proudly proclaimed themselves missionaries of modernity."[102]

Although the 1930s saw the rise of consumer advocacy that manifested itself, among other ways, as truth-in-advertising and labeling regulation,[103] the faith that advertising's function was largely beneficent and contributed to a healthy economy continued to prevail. However, as the twentieth century progressed, advertisers increasingly moved away from reliance on persuading consumers through reasoning with them and presenting them with all the "information" or "reason-why" advertising, and toward methods of persuasion that stimulated emotional and unconscious reactions.[104] Advertising that was identifiable as a "pitch" came to be seen as less persuasive, part of the hard sell.[105] Instead, advertisers became interested in entertaining, in telling a story so that the selling message could be received as a sort of by-product, albeit a crucial one, of the ad. "[N]o one buys facts. They buy a story."[106]

This picture, gleaned from advertising and marketing professionals, is much different than that proposed by the description of the "informational function" of advertising the Supreme Court identified in *Virginia Pharmacy*—speech that offers "information as to who is producing and selling what

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[97] *Id.* at 354−58.

[98] *Id.*

[99] *Id.* at 347−48, 354.

[100] *Id*. at 355.

[101] *Id.* at 370.

[102] ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY 1920−1940 xxi (1985).

[103] LIZABETH COHEN, A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 18−61 (2003).

[104] RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 72–73 (2d ed. 2005).

[105] "Advertising is taken for it is—a biased message paid for by a company with a selfish interest in what the consumer consumes." RIES & RIES, *supra* note 2, at 5.

[106] Seth Godin, *The Storytellers*, CMO MAG., June 1, 2005, *available at* http://www.cmomagazine.com/read/060105/storytellers.html (last visited Feb. 5, 2006) (excerpt from SETH GODIN, ALL MARKETERS ARE LIARS (2005)).

product, for what reason, and at what price"[107] or speech that does "no more than propose a commercial transaction."[108] The actual advertising environment encompasses a much broader definition of information, much of it not, strictly speaking, informational if one requires truth to be a foundational requirement of what constitutes "information."

But that does not make it *un*true either. In many cases it makes no sense to ask if an ad is "truthful" because it makes no claims. Much advertising is directed at creating images. Advertising is as much about creating perceptions as it is about conveying information. Indeed, with respect to the creation and maintenance of a brand, it is almost *entirely* about creating perceptions, perceptions that might not correspond to any "real" difference beyond the brand identity itself.[109] "There's a cardinal rule about choices in the marketplace that marketers often find difficult to accept: The physical properties of the goods are important only to the degree that they affect consumers' perceptions!"[110]

B. Advertising as Product Differentiation Through Emotional and Visual Appeals

It is a fact of modern marketing that the marketing of a product consists of far more than simply a communication of the nature of the goods and their price, but includes the creation of all manner of associations, not all of them overt sales pitches, such as product placements in movies. Nevertheless, all of these activities are initiated with the intent of adding to the bottom line.[111] That is what makes them marketing. And much advertising doesn't explicitly say very much. Take, for example, Nike's ad that appeared in the September 2004 issue of *Vanity Fair*. It is a six-page full color spread of track and field athlete Marion Jones.[112] The first page shows her face and no text. The remaining pages contain the following text: "Crowd noise. Not wanting to see the back of anyone's [page break] head. A second skin more aerodynamic than your first. A call from Jackie Joyner-Kersee. Relative humidity. Your name yelled from the cheap seats. Not giving your [page break] rival the satisfaction of a 'hello.' You're faster than you think." [113]

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[107] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (emphasis added).

[108] *Id.* at 771 n.24.

[109] *See* Fed. Trade Comm'n v. Borden Co., 383 U.S. 637, 643−46 & n.5 (1966) (holding that the marketing effects that created a consumer perception of difference between Borden milk marketed under its own label and that sold to be marketed under other private labels did not create a cognizable difference pursuant to the jurisdictional requirements of 'like grade and quality' for purposes of Robinson-Patman Act).

[110] ROBERT B. SETTLE & PAMELA L. ALRECK, WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT 70 (1986) (emphasis in original omitted).

[111] *See* La Fetra, *supra* note 7, at 1231−36 (describing various marketing techniques that cannot be described as traditional advertising). Advertisers and marketers may not be able to draw a straight line of cause and effect between a particular ad and sales, but all such efforts are ultimately intended to generate positive economic results.

[112] Ad on file with the author.

[113] *Id.*

It is not entirely clear what is to be conveyed by chopping up the sentences across the pages (except maybe to keep one reading), but none of the text could really be described as "informational." Rather, the text seems to be intended to inspire readers to *identify* with Ms. Jones, to imagine themselves as competitors and to put themselves in her place. Of course the easiest and quickest way for a reader to put herself in the place of the woman in the ad is to buy what she is wearing. But a message that can be loosely translated as "Buy our athletic shoes and clothing and you will be like (run as fast as?) Marion Jones"—if that is indeed the message[114]—is one that is immune from regulation for its misleading qualities because it would undoubtedly be categorized as mere "puffery" that no sensible person would believe.[115] And of course no one *would* believe this message (or admit that they do). But as one advertising professional puts it, "[t]he purpose of advertising is to create desire beyond what the product can actually deliver."[116] Nike runs these ads because its executives believe that such ads will motivate people to buy their product. *How* they do so, or even whether they do so in fact, may be beside the point.

A glance at any newspaper or magazine or a few minutes spent watching commercial television reveals that very little of what constitutes "traditional product advertising," that is, media products that are recognizable as ads, is devoted to making explicit claims of any kind.[117] This is one of the difficulties with enforcing the existing regulation of commercial advertising; its "message" is sufficiently ambiguous, vague, and impressionistic that it is fairly difficult to

[114] As Professor Richard Craswell has noted, "different consumers draw different inferences from the same commercial" and a single consumer may draw more than one bit of information from the same phrase. Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 672 (1985).

[115] *See, e.g.*, *In re* Gen. Motors Corp. Anti-Lock Brakes Prods. Liab. Litig., 966 F. Supp. 1525 (E.D. Mo. 1997), *aff'd*, 172 F.3d 623 (8th Cir. 1999) (consumers cannot reasonably believe a test supports a claim that anti-lock brakes are 99% more effective). "Simply stated, puffing is sales talk that the buyer should discount when making a transaction because no reasonable person under the circumstances would rely on the statement when contemplating a purchase." Tylka v. Gerber Prods. Co., No. 96-C1647, 1999 U.S. Dist. LEXIS 10718, at *18−19 (N.D. Ill. July 1, 1999), *vacated by* Tylka v. Gerber Prods. Co., 211 F.3d 445 (7th Cir. 2000). For more on the puffing doctrine, see David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. ___ (forthcoming 2006) *available at* http://ssrn.com/abstract=887720).

[116] Diann Daniel, *Real Beauty = Real Sales?*, CMO MAG., *available at* http://www.cmomagazine.com/read/current/real_beauty.html (last visited Feb. 28, 2006).

[117] The informational content may actually vary quite a bit depending on the type of advertising. For example, classified advertising is entirely informational. Some ads, for example diet products, may combine emotional appeals (photographs) with claims (Lose 10 lbs in 2 weeks!). And some ads, like the Nike ad discussed, may make no explicit claims at all. Most information in traditional advertising, while subject to regulation, is also offered with various hedges in the form of disclaimers ("results may vary"). In addition, the puffing doctrine, low levels of funding and enforcement for the regulatory agencies involved, volume of complaints, etc., are such that even where there is an explicit claim that is alleged to be false, it is very likely that the advertiser will suffer no negative consequences as a result. For a discussion of some of the techniques to avoid liability in the context of testimonials, see *The Problem with 'True Stories,'* CONSUMER REPS., Jan. 2006, at 32−33.

simply establish what it "says," let alone to establish whether that claim, assuming it isn't found to be "puffing," is truthful.[118]

If it is not making a claim what is it doing? Clearly there is an attempt to generate sales. But the sale is at the end of a chain of associations and actions generated by those thoughts which perhaps did not actually begin with the ad, but are triggered by it. One element in this chain is the image or association that the viewer is left with, the feeling about the product or manufacturer, as well as how readily the name and look will be recalled at the time the buying decision is made. This is what advertisers are seeking to affect. One of the principal devices onto which these hopes are pinned is the brand.

It is hard to imagine a concept that is emptier of real content in some sense and yet more significant to the manufacturer than the brand. Yet much advertising appears to be directed at creating this brand "identity" rather than at making any specific claims about product features, such as price, performance, or quality, the claims the Court in *Virginia Pharmacy* seemed to imagine were the *usual* content of advertising. Instead, much traditional advertising relates to brand identity.

III. WHAT IS A BRAND?

A brand is a perception in the prospect's mind.[119]

All sorts of things make up the image of a corporation that is then reflected in the brand identity. According to authors from the Kellogg School of Management at Northwestern, a brand is "'a set of associations linked to a name, mark, or symbol associated with a product or service—a brand is much like a reputation.'"[120] A company can itself be a brand, like Southwest Airlines, Starbucks, or Nike. In other cases, a company is the repository of a number of brand names, such as General Mills, which encompasses Old El Paso, Wheaties, Cheerios, and Betty Crocker, among other brands.[121]. And sometimes companies which house a number of related brands are themselves owned by a larger parent company. Brands are protected by a variety of devices, including trademarks and antitrust laws intended to prevent free riding on a brand by the development of similar marks that capitalize on the investments of competitors by using a similar mark or logo and hoping thereby to benefit by customer confusion.[122]

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[118] Craswell, *supra* note 111, at 668−81.

[119] RIES & RIES, *supra* note 2, at 85.

[120] *The Last Word*, THE ECONOMIST, Nov. 26, 2005, at 99 (quoting from KELLOGG ON BRANDING (Alice M. Tybout & Tim Calkins, eds., 2005)) (alteration of quoted material in original).

[121] *See* http://www.generalmills.com/corporate/brands/index.aspx (last visited May 6, 2006). Notice that some of these brands are for one product (Wheaties) while others make a number of products under a particular label (Betty Crocker).

[122] *See, e.g.*, Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 832 (2004) ("orthodox justification for protecting trademarks" involves promoting market efficiency through reduced search costs for consumers, return on

But what these logos and images evoke in customers is not precisely informational. Rather it is often a feeling. "Consumers in the marketplace operate on the basis of the *psychological* and *social* images of the goods they buy."[123] "By pairing the brand name of the product with stimuli that naturally elicit positive emotional responses from people, over many repetitions, consumers learn to associate the brand with positive emotions. When they think of the brand they'll have good feelings about it."[124] According to a vice president of marketing for Starbucks, "'consumers don't truly believe there's a huge difference between products,' which is why brands must 'establish emotional ties' with their customers through the 'Starbucks Experience.'"[125]

"More and more of the currency of commerce is not goods, but information and even brand-loyalty itself."[126] And the "information" referred to is as much about the company and its practices as a whole as it is about the product itself. Prada or Coach can charge the prices that they do in part because what the consumer is buying is not just the materials and workmanship that went into the product[127] but the *idea* of the product, its social meaning.

As one marketing specialist puts it:

> Today's most successful brands don't just provide marks of distinction (identity) for product. Cult brands are beliefs. They have morals—embody values. Cult brands stand up for things. They work hard; fight for what is right. Cult brands supply our modern metaphysics, imbuing the world with significance. We wear their meaning when we buy Benetton. We eat their meaning when we spoon Ben & Jerry's into our mouths. . . . Brands function as complete meaning systems. They are venues for the consumer (and employee) to publicly enact a distinctive set of beliefs and values.[128]

investment in advertising and preventing free-riding by competitors). *See also* Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321 (1990), regarding the controversy over the question of the alleged anti-competitive aspects of advertising and the move to regarding advertising and branding as promoting economic efficiency.

[123] SETTLE & ALRECK, *supra* note 110, at 128 (emphasis in original).

[124] *Id.* at 107. The authors describe this as "classical conditioning," a revealing allusion to the genesis of these techniques in the experiments of Skinner and Pavlov. *See id.* at 107−08 (chart of "learning modes": association, classical conditioning, operant conditioning, modeling, and reasoning). That advertising is at least *sometimes* effective is hard to deny. *See* Tylka v. Gerber Prods. Co., No. 96-C1647, 1999 U.S. Dist. LEXIS 10718, at *37–42 (N.D. Ill. July 1, 1999) (plaintiffs suing Gerber over what they alleged were false advertising claims about the nutritional value of Gerber baby food couldn't remember much about Gerber's product claims from the ads except the name and that they trusted it, with one plaintiff testifying that when he thought of the name he got a "warm, fuzzy feeling").

[125] NAOMI KLEIN, NO LOGO 20 (1999).

[126] Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999).

[127] In fact it is not by any means the case that there is a reliable correlation between price and quality of workmanship.

[128] DOUGLAS ATKIN, THE CULTING OF BRANDS: WHEN CUSTOMERS BECOME TRUE BELIEVERS 97 (2004). Although it might not be apparent from the title, the author is not writing a cautionary tale about the pernicious effects of brands. He is a marketing specialist

And a good deal of this social meaning is created by the advertising. However, not all of the image or social meaning is created by the advertising for the product. Much of it is created by what I call "free advertising," that is, public relations and other marketing efforts. "Advertising any given product is *only one part* of branding's grand plan, as are sponsorship and logo licensing. *Think of the brand as the core meaning of the modern corporation*, and of the advertisement as one vehicle used to convey that meaning to the world."[129] That "core meaning of the modern corporation" is often conveyed through speech that relates to issues involving labor, the environment, animal testing, and any number of other issues that may affect the market's perception of the company. And it is the *whole* market that is relevant—not just customers, but investors, employees, government regulators—everyone.[130] And of course people aren't neatly divided into one category or another. Categories overlap. For example, many employees are also investors and customers.

Through what is known as "image advertising," corporations attempt to create impressions about the corporation itself, to give the corporation a "personality" and create a "favorable attitude" toward the company.[131] How people *feel* about a corporation or a brand may be far more significant than what they know. But what they feel is often created by what they think rather than what they know. Some part of the image promotion takes place as public relations and issue advertising, that is, advertising which takes a position on a

whose premise is that marketers can learn from the techniques that cults use to engender loyalty to the cult to engender similar brand loyalty. As he puts it, "The position of this book is that *cults are a good thing*, that *cults are normal*, and that people join them for *very good reasons*." *Id.* at xiv (emphasis in original). As with the Ries & Ries book, many of his case studies are clients, leading to the suspicion that the book's principal function is to market his services. *See* RIES & RIES, *supra* note 2. Of course this observation may merely serve to illustrate what some would describe as the edge of a slippery slope suggested by the argument here. If the book is promotional, what stops the government from regulating the content of books if promotional materials are commercial speech? The response is, I think, that if by "regulation" we mean the provision of damages for detrimental reliance on falsehoods, then such regulation already exists where the representations are sufficiently concrete as to provide a basis for damages. There is no inevitability to prior restraints on book publishers from the conclusion that false statements ought to be actionable in a marketing context. This would distinguish the situation presented, for instance, by the debacle surrounding the discovery that much of James Frey's book, *A Million Little Pieces*, touted by Oprah Winfrey and almost instantly achieving best seller status, was false. *See, e.g.*, Michael Granberry, *'Pieces' Fallout Continues*, DETROIT FREE PRESS, Feb. 12, 2006. While some readers may have felt hurt and misled, and Frey admits that he made up parts to make the story more interesting (and thus presumably to sell more copies), he wasn't, for example, promoting any addiction treatment services. So if someone had entered treatment upon reliance on his representations that turned out not to be true, he probably would not be liable since he wasn't benefiting from the provision of those treatment services or paid to promote them.

[129] KLEIN, *supra* note 125, at 5 (emphasis added).

[130] Note that Atkin's quote above supports this observation in that he references "employees" as well as "consumers." *See* ATKIN, *supra* note 128.

[131] SHIMP, *supra* note 78, at 285 (quoting S. Prakash Sethi, *Institutional/Image Advertising and Idea/Issue Advertising as Marketing Tools: Some Public Policy Issues*, 43 J. MARKETING 68, 70 (1979)).

current issue of public interest. "When using issue advertising, a company takes a position on a controversial social issue of public importance with the intention of swaying public opinion."[132] And everything for-profit corporations say in the public sphere is presumptively related to the bottom line and related to profitability concerns.[133] That includes, for example, comments about labor and environmental practices.

A. Corporate Image as a Part of Marketing

"Today, corporate advertising can be defined in terms of its purpose: to establish, alter or maintain the corporation's identity."[134] Image advertising is intended to give a "personality" to a company. Thus, not only products, but "entire corporations could themselves embody a meaning of their own."[135] In this context then it seems to make sense to say a company is "radical," "hip," "traditional," or "responsible." Bennetton, Abercrombie & Fitch, Brooks Brothers, and Body Shop may each respectively be described as having a personality that is "radical," "hip," "traditional," or "responsible." These are the images these brands or companies[136] have attempted to craft for themselves. And image advertising directed at creating feelings about the company actually works in both directions. That is, advertising meant to make the consumer "feel good" about the parent corporation could make him or her simultaneously feel good about its products or services.

Although there is no clear consensus on what constitutes corporate image advertising it seems to have several facets, one part of which is sometimes separated out as "issue" advertising.[137] Issue advertising involves representations about issues of public concern—the environment, labor practices, animal testing practices, and the like. But this information is not offered merely as a public service. As indicated above, it is offered because companies disseminating it believe (or more accurately, their representatives

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[132] *Id.* at 286. A similar effort is described as "cause related marketing" where companies form alliances "with nonprofit organizations to promote their mutual interests. *Companies wish to enhance their brands' images and sales*, whereas nonprofit partners obtain additional funding by aligning their causes with corporate sponsors." *Id.* at 581 (emphasis added).

[133] *See* Greenwood, *supra* note 17. *See also* Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B.U. PUB. INT. L.J. 389, 458 (2003) (arguing that commercial advertising's contribution to the so-called "marketplace of ideas" is distinctive because it is all aimed in the same direction, toward consumption).

[134] David Schumann, et al., *Corporate Advertising In America: A Review of Published Studies on Use, Measurement, and Effectiveness*, 20 J. ADVERTISING 35, 37 (1991).

[135] KLEIN, *supra* note 125, at 7.

[136] For purposes of the consuming audience it often doesn't matter if a brand is really a free-standing company or part of a conglomerate. It is often part of the branding strategy to keep the brand visible but not to brand the parent company, or to have separate brand identities for subsidiary and parent.

[137] *See, e.g.*, C.C. Laura Lin, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459, 462−67 (1988) (describing the multiple purposes of corporate image advertising, all of which, despite the author's observation regarding their mixed impact, have a single aim—increasing corporate welfare, that is the company's economic success).

believe) that it will affect the bottom line. "Corporate image advertising is directed at more than merely trying to make consumers feel good about a company. Companies are increasingly using the image of their firms to enhance sales and financial performance. *Corporate advertising that does not contribute to increased sales and profits is difficult to justify*."[138] These practices are an integral part of what the consumer sees as "the product" and contribute to what they view as the corporation's image. "Information about the *relations of production* is as important as information about the performance features of the objects of production."[139]

B. Nike *as a Case Study*

For many years Nike has been criticized for its labor practices.[140] Many critics have accused Nike of subcontracting its manufacturing processes to "sweatshops" in Southeast Asia. As a consequence an anti-Nike "no sweatshops" grassroots campaign began on college campuses to question the lucrative contracts that Nike has with college athletic teams to be "Nike teams."[141] These contracts mean hundreds of thousands of dollars to the colleges that sign them and provide Nike with what it apparently views as important visibility and indeed even endorsements.[142] Nike also has (or has had) lucrative endorsement deals with prominent sports figures such as Michael Jordan and Tiger Woods to wear its clothing and to do ads endorsing it.[143]

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[138] SHIMP, *supra* note 78, at 285−86 (emphasis added).

[139] SUT JHALLY, THE CODES OF ADVERTISING: FETISHISM AND THE POLITICAL ECONOMY OF MEANING IN THE CONSUMER SOCIETY 24 (1990).

[140] For examples of some of the critiques of Nike, *see* Ronald K.L. Collins & David M. Skover, *Foreword: The Landmark Free-Speech Case That Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV. 965, 968−71 (2004). Interestingly enough, by 2005 Nike's reputation was almost completely resuscitated as it was listed 31st in *Business Ethics*' 100 Best Companies for 2005. Business Ethics Magazine, *What's New*, http://www.business-ethics.com/whats_new/100best_2005.html (last visited Feb. 28, 2006).

[141] *See, e.g.*, Global Exchange, About Global Exchange, http://www.globalexchange.org/about/index.html (last visited Feb. 28, 2006) (describing mission as including fighting sweatshop labor conditions and specifically naming Nike); *Just Do It!: The Nike Boycott Spreads Across Alberta*, http://www.geocities.com/Athens/Acropolis/5232/ (last visited Feb. 28, 2006); Sweatshop Watch Newsletter, Summer 2001, *Resources*, http://www.sweatshopwatch.org/media/pdf/newsletters/7_2.pdf (last visited Feb. 28, 2006) (reporting on Global Exchange's Just Do It! proposed boycott of Nike). *See also* First Amended Complaint at 21−22, Kasky v. Nike, Inc., No. 994446 (Cal. Super. Ct. Jul. 2, 1998) (describing a demonstration on February 22, 1997 in San Francisco protesting the opening of a Niketown store).

[142] First Amended Complaint, *supra* note 137, at 5−6. Of course, as it is increasingly the case that both sides of the field are "Nike teams," it may be less significant to endorse a winner.

[143] "Air Jordan", named after basketball star Michael Jordan, is a sub-brand of Nike footwear. *See, e.g.*, Nikebiz, *Air Jordan's New Runway,* http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=1999&month=03&letter=b (last visited Feb. 6, 2006). Nike named a building after Tiger Woods. Nikebiz, *Tiger Woods Christens State-of-the-Art Conference Center on Nike World Campus* (May 25, 2001), http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2001&month=05&letter=l (last visited Feb. 6, 2006).

When criticism of its labor practices began to emerge, some of Nike's athletic stars were quoted as promising to "look into" the allegations about Nike and sweatshops.[144] So these grassroots campaigns combined with lots of negative press meant Nike had to roll into action.

And roll it did. It launched an aggressive public relations campaign. It hired Andrew Young to conduct a supposed fact-finding tour of its factories and then commissioned a report from that tour, the positive points of which found their way into press releases.[145] Its employees wrote letters to the editor confirming Nike's commitment to fair labor practices.[146] It drafted a "Code of Conduct" and then issued press releases with a copy of the Code of Conduct indicating that it made its subcontractors sign the Code and agree to be bound by it. It issued press releases purporting to respond to the allegations.[147] It wrote letters making similar statements and commitments to college and university presidents and athletic directors.[148] And its chief executive, Phil Knight, spoke publicly about Nike's commitment to fair labor practices, an adequate wage, and safe working conditions. He claimed that "you'll find air quality better [in our plants] than it is in Los Angeles."[149]

There was just one problem. Allegedly many of these statements were either misleading or simply not true. Marc Kasky, a citizen and activist in California, filed a law suit claiming that Nike's statements violated California's unfair trade practices and false advertising laws. He was not seeking damages for himself. Rather he was suing under the then "private attorney general" provision of the California false advertising and unfair competition statutes that permitted any citizen to launch such claims on behalf of the public.[150] Kasky claimed that the above statements were made to boost the reputation of Nike, to preserve its lucrative contractual arrangements, and ultimately, thereby, to boost flagging sales. To the extent then that these statements were not true, Kasky claimed they represented a fraud on the public. Nike categorized them as free speech on issues of public concern, namely "globalization," and filed a demurrer to his complaint. Nike's position was that if its customers were concerned about such matters, they were concerned as a "moral" matter and such moral matters were not subject to governmental purview. Nike claimed it

[144] Kasky's lawsuit alleged that Reggie White had called for Nike to relocate its manufacturing in the U.S. and that Michael Jordan had indicated that he would "see it for [him]self" about the conditions in Nike's factories and if the working conditions were as alleged by the critics Nike should "revise its situation." First Amended Complaint, *supra* note 137, at 7−8.

[145] *Id.* at 21−24.

[146] *Id.* at 10 (letter to the editor of Lee Weinstein, Nike's Director of Communications); Phillip H. Knight, Letter to the Editor, *Nike Pays Good Wages to Foreign Workers*, N.Y. TIMES, Jun. 21, 1996, at A26.

[147] First Amended Complaint, *supra* note 137, at 19.

[148] *Id*. at 9−10. *See also* Nike, Inc. v. Kasky, 539 U.S. 654, 685–86 (Breyer, J., dissenting) (appendix presenting one such letter).

[149] First Amended Complaint, *supra* note 137, at 16.

[150] It is surely no coincidence that California, after heavy corporate lobbying, passed Proposition 64 which eliminated the private attorney general provision from the statute. *See* Piety, *Grounding Nike*, *supra* note 8, at 195 n.256 (discussing Proposition 64).

should have an absolute and unfettered right to say whatever it wished in this context.[151]

But of course, as explored above, all of these matters, whether or not they were "moral" concerns for consumers, were *commercial* concerns for Nike. It is for these reasons that Nike's claims about its labor practices, practices that go into the manufacture of Nike clothing and shoes, are no less a "real" component of the product than the brand name itself, which Nike spent close to a billion dollars promoting in the year prior to the filing of the complaint in the Kasky lawsuit.[152] So it cannot be that when Nike issued press releases about its labor practices it was not speaking to its "commercial" interests. Obviously it was. That attitude is reflected in a letter to the editor by Nike's Director of Communication Lee Weinstein that was published in the *San Francisco Examiner*:

> Consumers are savvy and want to know that they support companies with good products and practices. . . . During the shopping season, we encourage shoppers to remember that NIKE is the industry's leader in improving factory conditions. Consider that Nike established the sporting goods industry's first code of conduct to ensure our workers know and can exercise their rights.[153]

Of course it may not be saying much to claim to be the "industry leader" if the industry's practices are generally abysmal. And establishing a code of conduct doesn't mean enforcing it or distributing it to workers. These were the sorts of objections, and more, that the Kasky lawsuit raised.

Kasky claimed that documents such as Weinstein's letter to the editor were performing a marketing function. The aim in publishing this letter, or a "Code of Conduct," was to improve the public *perception* of Nike's practices, and thereby consumer behavior, without actually having to *do* anything about changing these practices. Because Nike knew consumers cared about these issues, it wanted to assure them that it did too without actually having to incur the costs that would be associated with making the changes that consumers were seeking. The plaintiff, Kasky, claimed this constituted a fraud on consumers. And if his allegations were true, it is difficult to understand why it would *not* be a fraud on consumers.[154] If the speaker knows and assumes that such statements will influence consumer behavior and intends to influence behavior through reliance on the statements' truth, then it seems fraudulent to

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[151] I have characterized this elsewhere as asking for a right to lie. For a detailed exploration of that claim and of the Nike case generally, see Piety, *Grounding Nike*, *supra* note 8.

[152] First Amended Complaint, *supra* note 137, at 5.

[153] *Id.* at 10.

[154] It cannot be over-emphasized that whether this is an accurate reflection of what the letter said, whether the statements were true or false, etc., were all matters of fact which were to be subject to proof and resolution at the trial and that Nike's position, in filing a demurrer, was that the truth didn't matter. Nike claimed it was entitled to legal protection for these statements even if it had made them with the intent to influence shoppers and with full knowledge.

make these statements where that information is untrue or misleading. As Professor Douglas Kysar puts it:

> Rather than being scientifically unfounded, nakedly protectionist, or ethically inconsistent, consumer process preferences instead offer an important vehicle through which individuals influence the world, express their views on public issues, and fashion their moral identity in an era of extraordinary interconnectedness, complexity, and dynamism in the market. [155]

This consumer concern for issues that Professor Kysar labels "process" should, theoretically, be no less a part of product "quality" or "characteristics" than whether a product is a "real" Prada bag or a knock off. Although Nike argued that "no one contends that [its] statements misled consumers about the *characteristics* of Nike products,"[156] this is *precisely* what Kasky alleged insofar as he argued that the "characteristic" at stake was whether Nike's products were the product of unfair labor practices and that Nike misled, or intended to mislead, consumers on this point. Why should the company's labor practices be any less a "characteristic" of the product than its association with Marion Jones?

Certainly labor practices are a characteristic that is of interest to many consumers. And as Professor Kysar points out, it is one that appears to allow consumers the feeling of meaningful participation in issues that contribute to more than simply their own satisfaction.[157] "[R]ather than waiting for post-market wealth transfers and ameliorative environmental, health, and safety regulations, consumers . . . instead express preferences for sustainable, equitable outcomes through their market purchases *ab initio*."[158] However, their ability to actually make such choices effectively depends on their ability to receive *accurate* information on which to make such decisions. If the information received is not reliable on the topics about which the public is interested in basing their economic decisions, then those decisions are unlikely to affect such practices. Indeed, even if such decisions are collectively effective, if the companies successfully persuade consumers that they are not, that the problem is "too big" to be addressed by their individual purchasing decisions, it may discourage further attempts to effect real change through consumption.

As noted above, the information regarding such issues as labor practices is directly related to the corporation's welfare. It is unclear why that welfare should trump the desire by consumers for accurate information on these topics.

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[155] Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 624 (2004).

[156] Petition for Writ of Certiorari at 13, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (emphasis added).

[157] Professor Kysar notes that this other-directed component of consumption is one that appears to contradict a "neoliberal view of the world" that focuses almost exclusively on individual welfare maximization. *See* Kysar, *supra* note 155, at 635. *See also* COHEN, *supra* note 100, at 388−97.

[158] Kysar, *supra* note 155, at 636.

> [B]ecause corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, no responsible corporate spokesman speaks on the company's behalf without being concerned about the effects the statements may have on corporate sales and profits. . . . [*A*]*ll corporate speech is, and should be, uttered in the interests of benefitting the corporation in the eyes of potential consumers*. . . .[159]

This was the argument offered by the various public relations professionals in support of Nike. And it is consistent with the dominant legal theory of the legitimacy of corporate action as described by professors Henry Hansmann and Reinier Kraakman. "There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[160] It is hard to improve on the public relations professional's own statements about the nature of speech by corporations. However, the authors of this quote in support of Nike seemed to think that aspect of corporate speech *strengthened* the argument for protecting it rather than weakening it.

However, saying that there isn't any corporate speech that isn't calculated to improve or protect long-term shareholder value is *not* the same thing as saying that whatever the corporation says in aid of protecting shareholder value is necessarily in the public interest. And it most certainly is not necessarily information. If it is possible to assert that a corporation follows a particular practice that the public finds laudable or attractive, but without assuming the additional costs associated with following that practice, it would seem axiomatic that a corporation not only would have an incentive to do so, it would have a *duty* to do so. The only mechanism standing in the way of that practice that would not only arguably preclude a corporation from engaging in this sort of speech/practice, but provide it with a legitimate basis for declining to do so, would seem to be a legal regime in which it could ultimately cost the corporation *more* to *fail* to honor its public pledges than one in which it was the better practice to *avoid* fulfilling them.

To be sure, the existence of a legal proscription for a particular practice is no guarantee that the proscription will be observed where there is a strong financial incentive to violate the law. The trade in illegal drugs flourishes, as does corporate misconduct with regard to a variety of antitrust, securities, or other regulatory matters.[161] Still, unless we are prepared to concede that the

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[159] Brief for Arthur W. Page Soc'y et al. as Amici Curiae Supporting Petitioners, *supra* note 17, at 18−19.

[160] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001). For a thoughtful and thorough critique of what the authors call the "meta-script" from which statements such as this emanate, see Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law,* 103 MICH. L. REV. 1 (2004).

[161] *See, e.g.*, Complaint, United States v. Parke-Davis, Division of Warner-Lambert, No. 96-11651-PBS (D. Mass. 2001) (alleging various violations of the criminal law related to Warner-Lambert's marketing of the drug Neurontin for off-label uses). Pursuant to a plea agreement the company pled guilty to several of the charges "expressly and unequivocally admit[ting] that it committed the crimes charged in the Information." *See* Letter from Michael J. Sullivan, U.S. Dept. of Justice, to Robert B. Fiske & James P. Rouhandeh (May 13, 2004), *available at* http://news.findlaw/nytimes/docs/pfizer/usw51304plea.pdf. *See*

criminal and civil regulatory regime is of no force in the corporate decision-making process, it would seem that the existence of a legal regime prohibiting false statements for the purposes of boosting corporate image or sales or responding to criticisms would represent some sort of reinforcement for the behavior the government would like to encourage.

And there is some support for this observation in the post-litigation conduct of Nike itself. Although Nike and many of its supporters ominously opined that "news" sources would dry up in the face of potential liability[162] because corporations would no longer be willing to issue press releases, in fact, as predicted long ago by the Supreme Court in *Virginia Pharmacy*, it appears that the robustness of the incentives to speak *far* outweigh the specter of liability for misstatements[163] because Nike has continued to make statements about its labor practices and indeed has expanded its commentary despite the fact that the objectionable California Supreme Court ruling is still, at this printing, good law[164] And Nike is not alone. It is now commonplace for companies to issue social responsibility statements, to publicize their efforts to engage in environmentally sound practices, to publicize benefits to employees, and other process-related concerns that roughly fall into the category of corporate social responsibility.

This practice is not without its critics. Many argue that there is little consensus about what constitutes social responsibility and little in the way of standardized measurements for assessing social responsibility, leaving corporations somewhat adrift as to how to meaningfully contribute. Recently *The Economist* saw fit to weigh in against the practice of corporate

United States v. Microsoft: Settlement Information, http://www.usdoj.gov/atr/cases/ms-settle.htm (last visited Feb. 23, 2006).

[162] *See* Brief for Petitioners, *supra* note 11, at 39 (indicating that Nike had declined to participate in the Dow Jones Sustainability Index and has turned down "dozens of invitations . . . to speak on corporate responsibility issues" out of the fear of liability in California should any of its statements be deemed false and misleading). *See also* Chris Atkins, *Where's A Cop When You Need One?* (2003), http://64.233.179.104/search?q=cache:U3wyYw8w16MJ:www.ketchum.com/DisplayWebPage/0,1003,1973,00.html+wheres+a+cop+when+you+need+one&hl=en&gl=us&ct=clnk&cd=1. Ketchum, a public relations firm, suggests that the California Supreme Court's decision in *Kasky* had implications that "could be quite broad for anyone who makes a living in PR."

[163] "Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

[164] *See* Jason A. Cade, *If the Shoe Fits:* Kasky v. Nike *and Whether Corporate Statements About Business Operations Should Be Deemed Commercial Speech*, 70 BROOK. L. REV. 247, 270 (2004) ("In spite of repeated threats to discontinue providing any information about its factory conditions should it lose its litigation with California activist Mark Kasky, Nike now provides more extensive information related to the working conditions in its factories on its website that it did before the suit settled."). Nike issued its first Corporate Social responsibility statement in 2001. *See* Nikebiz, *Nike Releases First Corporate Responsibility Report* (Oct. 9, 2001), http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2001&month=10&letter=e.

responsibility as a legitimate corporate function on these very grounds.[165] In addition, the objection was made that managers aren't really trained to engage in social engineering. It is best to leave them to do what they do best—running their businesses—and leave governmental functions to legislators.[166] Presumably that criticism extends to advertising and publicity about corporate social responsibility.

C. Advertising: From Economic Waste to Value Added

For a good part of the twentieth century, the consensus opinion among economists, law makers, and legal scholars seemed to be that advertising dollars that were directed primarily at product differentiation, that is, branding such as identified above, particularly in the context of identical products, for example, household bleach, represented an economic waste because it did not relate any real information to consumers and was actually of negative value to consumers since the expense generated by such product differentiation attempts was passed on to consumers in the form of higher prices.[167]

> Since there is no reason (save cheapness and availability) for a consumer to prefer one brand of liquid bleach over another, there is no real need for the various manufacturers to incur as heavy advertising expenses as they do—except to protect their market shares . . . *we have a situation in which heavy advertising benefits the consumer, who pays for such advertising in the form of a higher price for the product, not at all*.[168]

The Supreme Court came to a similar conclusion with respect to whether the Robinson-Patman Act prohibited price differentials between milk Borden sold to be marketed as a house or "private" brand, and sales of the same milk under the Borden label, where the only discernable differences in the product were those associations created by the advertising.[169] The majority was of the

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[165] Editorial, *The Good Company: A Skeptical Look at Corporate Responsibility*, THE ECONOMIST, Jan. 22, 2005, at 11 (criticizing much in the way of corporate social responsibility as "pernicious benevolence").

[166] There is some good evidence that legislators are themselves contracting out their responsibilities with regard to drafting legislation by accepting wholesale legislative proposals from lobbying groups. *See* Wendy Higgins, Ghostwriting Legislation: The New "Non-Profits" that Write Many State Laws (unpublished student manuscript, on file with author) (describing the practice of lobbyists writing legislation that then is adopted verbatim by legislators).

[167] Mensch & Freeman, *supra* note 118, at 326−29 (quoting Commissioner Elman's opinion with respect to Clorox's merger with Proctor & Gamble to the effect that since all bleach was chemically identical and thus there were no rational reasons for advertising, from the consumer information standpoint, except to protect market share on the basis of this unreal difference, such advertising was wasteful, anticompetitive, and ultimately harmful to consumers since it increased the price to consumers). *See also* Ralph S. Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L. J. 1165, 1173 (1948) (describing advertising directed at product differentiation for similar products as often profitable for the companies involved but increasing costs and thus not involving competition in the "economically useful sense of the word").

[168] *In re* Proctor & Gamble Co., 63 F.T.C. 1465, 1581−82 (1963) (emphasis added).

[169] Fed. Trade Comm'n v. Borden Co., 383 U.S. 637, 645−46 (1966).

opinion that the "like grade or quality" test in the Act should not encompass the expenditures made regarding brand differentiation or different consumer attitudes created thereby.[170] Justice White writing for the majority noted, "The dissent would exempt the effective advertiser from the Act. We think Congress intended to remit him to his defenses under the Act, including that of cost justification."[171] And the enormous expenditures of the largest companies can still be seen, practically if not legally, as economic barriers to entry for competitors.[172]

However, in the seventies the consensus shifted, at least in some areas, to the position that:

> There is no way to distinguish qualities of a product attributable to image alone (hence misleading and wasteful) from qualities attributable to "real" difference—for example, lower price, better quality, or easier availability. Given the impossibility of making that distinction – one which necessarily entailed a normative judgment about the social value of advertising—consumer "preference" as registered on the existing market must prevail.[173]

That capitulation to the view that advertising "created" something has always been somewhat controversial in that there was some suspicion that empirical support was lacking for the association between the expenditure by a corporation on advertising dollars and the receipt of something of value, particularly increased sales attributable to those expenditures.[174] "[C]hances are that neither the client nor the [ad] agency will ever know very much about what role the ad has played in sales or profits of the client, either short term or long-term."[175] Or as a running joke in the industry has it, "I know half of my advertising money is being wasted. I just don't know which half."[176] But one of the reasons advanced for this problem of attribution of effectiveness is that advertising lacks credibility. "Advertising has no credibility. Advertising is not believable because consumers perceive it to be biased. Advertising is the voice of the seller."[177] The solution? Put the advertising message in the hands of a third party the public perceives as neutral—the media. "The essence of public

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[170] *Id.*

[171] *Id.* at 645 n.6.

[172] "[I]t is marketing investments like this one [Gatorade's investments in its NFL connection] that make it virtually impossible for Powerade or All-Sport to ever overtake the sports-drink king of the NFL hill." *Id*. at 227.

[173] *Id.* at 337.

[174] "The simple fact is that traditional advertising isn't working very well." RIES & RIES, *supra* note 2, at 85. The authors devote an entire chapter in this book to reviewing case studies of celebrated advertising campaigns that nevertheless did not generate sales. *Id.* at 49−59 ("Advertising and Sales"). *See also* SHIMP, *supra* note 78, at 228−29 (discussing arguments for "disinvesting in advertising" relating to established brands). *But see* Schumann, et al., *supra* note 134 (surveying published studies and concluding, with some caveats, that corporate image and issue advertising had been "successful in encouraging financially-related goals").

[175] SCHUDSON, *supra* note 1, at 85.

[176] *Id.* (paraphrasing quote with various attributions).

[177] RIES & RIES, *supra* note 2, at 75.

relations is to verbalize the brand in a way that encourages the media to run stories about the product or service."[178] "In light of how difficult it is now to raise advertising awareness above the noise of so many competitive messages, marketers are turning increasingly to product publicity as an important adjunct to advertising."[179]

IV. WHAT IS PUBLIC RELATIONS?

If one were to ask the man often dubbed "the father of public relations,"[180] Edward L. Bernays, "What is public relations?" he would have said it is the profession intended to facilitate communication. In his influential book, *Propaganda*, Bernays noted:

> If we accept public relations as a profession, we must also expect it to have ideals and ethics. The ideal of the profession is a pragmatic one. It is to make the producer, whether that producer be a legislature making laws or a manufacturer making a commercial product, understand what the public wants and to make the public understand the objectives of the producer.[181]

In Bernays' view, one of the chief features of democracy, modernity, and industrialization in a country the size of the United States was that it was necessary for society to be guided by what he called "the invisible government."[182] "Propaganda," he wrote, "is the executive arm of the invisible government."[183] This invisible government was necessary according to Bernays because, in order for the theory of competitive markets to work in the face of the reality of a surfeit of information and a tendency for people therefore to follow tastemakers, those "minorities" who actually acted as the governors needed a device to "mold the mind of the masses [so] that they will throw their newly gained strength in the desired direction."[184]

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[178] *Id.* at 246.

[179] FRASER P. SEITEL, THE PRACTICE OF PUBLIC RELATIONS 228 (8th ed. 2001).

[180] *See, e.g.*, LARRY TYE, THE FATHER OF SPIN: EDWARD L. BERNAYS AND THE BIRTH OF PUBLIC RELATIONS viii (1998) ("Edward Bernays almost single-handedly fashioned the craft that has come to be called public relations.").

[181] EDWARD BERNAYS, PROPAGANDA 69 (Ig Publ'g 2005) (1928).

[182] *Id.* at 47−48.

[183] *Id.* at 48. Of course it may be the executive arm of the *visible* government as well. Certainly the government has made liberal use of public relations techniques to get across its "message." *See, e.g.*, Felicity Barringer, *Public Relations Campaign for Research Office at E.P.A. May Include Ghostwritten Articles*, N.Y. TIMES, Jul. 18, 2005, at A16.

[184] *See* BERNAYS, *supra* note 177, at 47. Even if he would not necessarily agree with some of the ethical decisions of current practitioners, one cannot help but think Bernays might have smiled in spite of himself had he read the following critique of the public relations business. "The power of the PR industry is demonstrated not only by its hegemonic manoeuvrings within and for every area of government and business, but also by its remarkable ability to function as a virtually invisible 'grey eminence' behind the scenes, gliding in and out of troubled situations with the ease of a Cardinal Richelieu and the conscience of a mercenary." JOYCE NELSON, SULTANS OF SLEAZE: PUBLIC RELATIONS AND THE MEDIA 19 (1989).

Although there was no PR industry as such at the time, the history of public relations perhaps begins with Andrew Jackson's notorious aide, Amos Kendall, credited with being the first to engage in the news "leak" as well as conducting many of the activities which today would be the job of the president's press secretary, and showman P.T. Barnum.[185] Bernays and a former Wall Street reporter, Ivy Ledbetter Lee,[186] began the job of professionalizing and formalizing the training and practice for the business that came to be known as public relations.

Lee began his career assisting businesses to communicate following a period of public criticisms of business from journalists who became known as "muckrakers." "For Lee, the key to business acceptance and understanding was that The Public Be Informed."[187] According to his Declaration of Principles, sent out to newspaper editors, his practice would be to communicate with the press "frankly and openly" on behalf of his clients.[188] However, his technique did not rely entirely on sending out "frank and open" press releases and responding honestly to press inquiries. It also involved touches of the showman P.T. Barnum. Lee would arrange for press coverage of events intended to "humanize" clients like the Rockefellers by offering the press human interest and family angles to cover, showing "them in real-life situations such as playing golf, attending church, and celebrating birthdays."[189]

Today, public relations practice covers a range of activities that is so broad that it is difficult to summarize. "[W]ell-worn tactics include calling a press conference, pitching stories directly to journalists, arranging eye-catching events, setting up interviews and handing out free samples."[190] Certainly a feature of the practice is the crafting of press releases and the attempt to catch the attention of the media to carry the "news" thus released as a story with the byline of the reporter, thereby lending automatic credibility to a message that might otherwise be dismissed as obviously biased. But public relations is far more than press releases. It also involves scheduling activities that keep the client in the posture of making news and spreading the message. So it includes scheduling executives to appear on panels at conferences,[191] before legislative bodies, and on television and radio. Increasingly, it means preparing and maintaining a website that is in effect an extended advertisement for the company by providing information (although obviously principally that information that will put the company in a positive light) as well as creating opportunities, such as through contests and interactive features, to engage visitors with its products or services in some way.

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[185] SEITEL, *supra* note 175, at 27−29.

[186] *Id.* at 30. Seitel calls Ivy Lee "the real father of modern public relations."

[187] *Id.*

[188] *Id.*

[189] *Id.* at 31.

[190] *Do We Have a Story for You!*, THE ECONOMIST, Jan. 21, 2006, at 57.

[191] The author was recently on a panel at the University of Miami School of Communications on March 31, 2006, for "Communications Week" about the Nike case along with Vada Manager, a Nike employee.

Public relations practice is also not limited to the for-profit sector. It is a key part of governmental policy, albeit much criticized when it appears that a story is all "spin" and no substance.[192] But even in the for-profit sector, public relations firms are deeply involved in lobbying and the apparently indispensable job of conducting public opinion surveys. It is obvious why companies perceive lobbying to be a good investment. Legislatures pass laws that may directly influence the bottom line.[193] It is often also the public relations firm that may advise management of the advisability of expansion into new markets or new lines on the basis of such surveys. They may coordinate what have been dubbed "Astroturf campaigns" intended to influence legislation which involve recruiting persons (sometimes with deceptive practices) to participate in letter writing campaigns or other demonstrations which suggest public support.[194] Public relations practitioners may also craft "advertorials" for traditional ad placement. They often have a role in creating non-profit research or opinion organizations through which opinions favorable to the industry client can be funneled without a direct connection to the client.

For many marketing professionals, public relations is a clear subset of marketing efforts and ought to be driven by the marketing objectives of a company—hence the term "integrated marketing communications," or IMC.[195] "In a 2004 review of the state of IMC, the authors concluded that, 'IMC has swept the world and become the accepted norm of businesses and apparently the agencies that service their needs. . . .'"[196] Not only is PR a key part of marketing for the for-profit enterprise, according to influential PR writers Al

[192] *See, e.g.*, Stuart Elliot, *A Undisclosed Paid Endorsement Ignites a Debate in the Public Relations Industry*, N.Y. TIMES, Jan. 12, 2005, at C2 (reporting on disclosure that the Department of Education paid conservative commentator Armstrong Williams $240,000 to write columns supporting the Administration's program No Child Left Behind); Frank Rich, *Enron: Patron Saint of Bush's Fake News*, N.Y. TIMES, Mar. 20, 2005, § 2, at 1 (critiquing the Bush administration's screening of the audience in the Social Security program tour "conversations" and discussing the administration's payment of journalists through lobbyists); Frank Rich, Op-Ed, *One Step Closer to the Big Enchilada*, N.Y. TIMES, Oct. 30, 2005, Week in Review, at 12 (claiming the Bush administration engages in a practice of creating an "alternate reality built on spin and outright lies"). *See also* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005) (critiquing governmental use of the public relations practice of attempting to influence policy through planting news stories, influencing television drama scripts, influencing counseling received from doctors, and other similar techniques as undermining the legitimacy of the communications, and advocating greater transparency).

[193] It is even better if you can write the law and get your version adopted by the legislature. *See* Wendy Higgins, *"Ghostwriting the Law": Who's Writing the Law Anyway?* (essay on file with author).

[194] STAUBER & RAMPTON, *supra* note 29, at 79.

[195] However, not all public relations professionals agree. Some argue that "PR includes public affairs, issues management, crisis communication, community relations and employee relations—all of which, I believe, are only marginally related to marketing." *Integrated Marketing: Is it PR Nemesis or Salvation?,* O'DWYER'S PR SERVICES REPORT (Jan. 1995). This remark was made in 1995. Judging from current marketing literature, that battle has largely been lost. *See infra* note 196.

[196] Fitzpatrick, *supra* note 10, at 93.

and Laura Ries, "PR is in the driver's seat and should lead and direct a marketing program."[197] Moreover, as noted in the title of this piece, "in comparison with many other types of marketing, PR is cheap."[198] *If you can get the media to carry your message it is free.* Furthermore, as Ries and Ries argue, "[p]ublicity provides the credentials that create credibility in the advertising."[199] "PR has credibility, advertising does not. People believe what they read in newspapers or magazines or what they hear on the radio or see on television."[200] They may believe it, but perhaps they should not.

The principal thrust of PR is to change the perception. As Ries and Ries say, "perception is everything." At the end of the day, the consequences to the bottom line may be *as* beneficial (if not more beneficial) to the company that manages to change the perceptions without changing the practices, as it would be to change the practices as well as the perceptions. An example of the overt use of this technique is the Nestlé corporation's attempt to address its public relations problems stemming from its sales of infant formula in the Third World by initiating a campaign to set up a fund called "Carnation Care" to benefit HIV-infected children.[201] Its PR firm, Olgivy & Mather, proposed a number of potential "feel good" campaigns to "inoculate" the company from the negative ramifications that its practices regarding infant formula sales in the Third World were generating before the "Carnation Care" campaign was chosen.[202] Unfortunately for Nestlé, the details of that campaign were leaked to the press before it began, thus undermining the program's potential effectiveness.[203] Of course whether it contributed to aid for HIV-infected infants is not, in some sense, germane to whether its practices in selling infant formula were acceptable. But it was clear the company hoped to be able to change its image with*out* changing its practices.[204]

But the discussion between the firm's representatives and Nestlé's representatives illustrate some of the problem. It is not entirely clear that for the practitioners of PR, acid rain, for example, is anything *other than* a PR problem. The problem is the discipline may encourage a mindset that equates improving the public perception of a problem with actually addressing the problem. And of course, as explored above, this is partly because, from the perspective of the client, the problem *is* the perception. So if it is possible to cure the perception without incurring the additional expenditures that may be associated with actually addressing the problem, there is a strong incentive to

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[197] RIES & RIES, *supra* note 2, at xii.

[198] *Do We Have a Story for You!*, *supra* note 190, at 57.

[199] REIS & RIES, *supra* note 2, at xix.

[200] *Id.* at 85.

[201] NELSON, *supra* note 184, at 13−15.

[202] *Id.* at 14. The parade of proposals, including "Carnation Combats Cocaine," would be comical were it not for the seriousness of the issues and the distastefulness of using them in this way.

[203] *Id.*

[204] After temporarily ceasing sales of infant formula in response to criticism, Nestlé resumed the practice. *Id.* at 13.

do so. That may encourage a mindset in which truth becomes irrelevant. That is a problem—particularly when there is a crisis.

The public relations department is where clients turn when things go wrong. The paradigmatic case is the response of Johnson & Johnson to the poisoning deaths of consumers in Chicago in 1982 when it appeared that persons unknown had tampered with some Tylenol by lacing it with cyanide. The Johnson & Johnson case is often lauded as a textbook case of the appropriate responsible corporate response to a crisis.[205] However, according to some, this version of the Johnson & Johnson response is itself an example of PR at work because the Johnson & Johnson response was anything but exemplary. Jack O'Dwyer, a public relations authority and publisher of a newsletter for the profession, asserts that in fact Johnson & Johnson took eight days to respond with a recall, less time than it took for the stores to remove the product from their shelves.[206] According to O'Dwyer, "J&J was just another case of normal corporate foot-dragging during a crisis"[207] and that PR professors "have to 'unteach' the Tylenol episode because so many of their students are ill-informed about it."[208] Perhaps it is the journalism students who most need to be "untaught."

In any event, crises continue to emerge, as of course they will—from the Exxon Valdez spill[209] to the General Motors and Goodyear tire issue, the Vioxx recall[210] to Wal-Mart labor practices[211]—the public relations people are often the first responders. When that information is not accurate, the possibility for harm seems obvious. But the harm is not limited to the response to isolated crises. As discussed above, consumers care about and sometimes respond to process issues. If they are misinformed on these process issues, then the market is misled. The market relies on accurate information for its operation. The consequences for misleading information skewing market responses can be

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[205] *See* SEITEL, *supra* note 179, at 42−47 (offering it as a case study of a responsible corporate approach).

[206] Jack O'Dwyer, *PR Industry's Amicus Brief* [in Nike v. Kasky] *Has a Flaw* (Nov. 19, 2002), http://www.odwyerpr.com (accessible only to members), *available at* http://reclaimdemocracy.org/nike/pr_brief_retort_kasky_nike.html.

[207] *Id.* O'Dwyer's very laudable purpose in publicizing this issue is to emphasize to the profession and its clients that responses to a crisis need to be swift and substantive. Given that we have ample evidence in the Tylenol case of the possibility of *successfully* selling the public on the notion that a *slow* response actually was a *swift* one, O'Dwyer may be fighting a losing battle. It would be beyond the scope of this Article to catalog the numerous similar episodes in the political sphere in the last few years.

[208] *Id.*

[209] SEITEL, *supra* note 179, at 168−71 (*Exxon Valdez* as a case study).

[210] Theresa Agovino, *Merck Steps Up Public Relations Campaign After Recall*, CORPWATCH, Nov. 22, 2004, http://corpwatch.org/article.php?id=11. (public relations campaign could be viewed as part of cover-up if claims that Vioxx was pulled from the market as soon as the company knew of the problems with it that caused the deaths relating to the lawsuits).

[211] Michael Barbaro, *A New Weapon for Wal-Mart: A War Room*, N.Y. TIMES, Nov. 1, 2005, at A1 (describing Wal-Mart's press office set up to respond to stories and allegations about Wal-Mart's labor, environmental and other practices with "press releases, phone calls to reporters and instant Web postings").

illustrated with two cases. These two cases are two of many more that might illustrate the problem.

A. The Enron Story

By now the story of the spectacular rise and fall of the Houston energy company, Enron, has been re-told many times.[212] There were a number of social, personal, and political factors that contributed to the debacle that was Enron. However, the role played by publicity and the gullibility of the media may not have been sufficiently appreciated. And while it may not be the case that retaining the power to regulate corporate press releases for their truth, or at least imposing liability when those releases contain information that is not true, would necessarily have made any difference to the outcome in Enron, it surely cannot be said that extending to these breathless issuances the mantle of First Amendment protection would similarly be meaningless. Rather, it would seem to be yet another obstacle for the government to overcome in either prosecuting or restraining such conduct.

Many observers now say that the red flags were there to be seen in Enron's financial statements. "Enron's principals abused the system in plain view, taking advantage of the considerable slack it extends to successful actors. Although they did not disclose everything, they disclosed more than enough to put the system's layers of monitors on notice that their earnings numbers were soft and their liabilities understated."[213] Yet, for some reason, analysts, bankers and the media were slow to read the signs of problems. "To the casual reader of business weeklies, Enron was riding high at the turn of the 21st century." [214] "Fortune Magazine hailed it as America's most innovative firm for five years running."[215] Worse, glowing media coverage and ready acceptance of Enron's officers' self-assessment of the company turned out to be self-perpetuating. "In retrospect, one wonders why Wall Street and the press were so willing—so eager even to swallow the idea that Enron was reinventing corporate culture."[216] But good press begets more good press. "The fundamental PR strategy is to use a story in one publication and then move it up the ladder to another publication. Or from one medium (print) to another medium (radio or TV)."[217]

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[212] *See, e.g.*, BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003); Jeffrey D. Van Niel & Nancy B. Rapoport, *Dr. Jekyll & Mr. Skilling: How Enron's Public Image Morphed from the Most Innovative Company in the* Fortune 500 *to the Most Notorious Company Ever*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004); KURT EICHENWALD, CONSPIRACY OF FOOLS: A TRUE STORY (2005).

[213] William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1283 (2002).

[214] Van Niel & Rapoport, *supra* note 212.

[215] Bratton, *supra* note 213, at 1276.

[216] MCLEAN & ELKIND, *supra* note 212, at 121.

[217] RIES & RIES, *supra* note 2, at 251.

Enron even succeeded, through a campaign initiated by Andy Fastow and adopted and pushed by Enron and CEO Ken Lay, to have *CFO Magazine* name Fastow "CFO of the Year." [218] The company prepared a "three-paragraph letter"[219] with "[a]n attachment that ran five pages"[220] to support the case that Andy Fastow should be *CFO Magazine's* "CFO of the Year." The project was "under way for six months."[221] It worked. In 1999, CFO Magazine named Fastow "CFO of the Year."[222] Surely such accolades were not irrelevant to the general acceptance of Enron?

But, as indicated in the above discussion of public relations, the business of promotion is not limited to getting good press coverage. It also includes lobbying activities. "In 2000, Enron also paid $2.1 million to a dozen or so Washington lobbying firms."[223] And the business of promotion includes staging events, events that themselves will generate good press coverage or positive reactions in the target audience. One of Enron's primary target audiences was the corps of market analysts whose reports are relied upon by investors, investment banks, regulators, and the press. And here Enron pressed the boundaries of promotion straight into fiction when it took analysts on a tour of Enron Energy Service's (EES) supposed "war room."

> There, they beheld the very picture of a sophisticated, booming business: a big open room, bustling with people, all busily working the telephones and hunched over computer terminals, seemingly cutting deals and trading energy. Giant plasma screen displayed electronic maps, which could show the sites of EES's many contracts and prospects. Commodity prices danced across an electronic ticker. 'It was impressive,' recalls analyst John Olson, who, at the time, covered the company for Merrill Lynch.[224] 'It was a veritable beehive of activity.'
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> It was also a veritable sham. The war room had been rapidly fitted out explicitly to impress the analysts. Though EES was then just gearing up, Skilling and Pai had staged it all to convince their visitors that things were already happening . . .. The analysts had no clue they'd been hoodwinked.[225]

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[218] EICHENWALD, *supra* note 212, at 211 (Fastow proposes the idea to Mark Palmer, Enron's PR head).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] Russ Banham, *The Finest in Finance: Andrew S. Fastow, Capital Structure Management*, CFO MAG., Oct. 1, 1999, at 62.

[223] Bratton, *supra* note 213, at 1279.

[224] Olson was later fired by Merrill Lynch for his failure to join the chorus of bullish reports on Enron and his persistence in asking questions that Enron's executives did not want to answer. MCLEAN & ELKIND, *supra* note 212, at 180. Of course, now Olson appears prescient. But as noted above, many observers, including Olson, say the problems were all in plain sight.

[225] *Id*. at 179−80. *See also* Jason Leopold, *Questioning the Books: Enron Executives Helped to Create Fake Trading Room*, WALL ST. J., Feb. 20, 2002, at A4.

Given this sort of coverage, lobbying, and promotional activities, it is not surprising that the naysayers amongst those covering Enron, those responsible for approving transactions, and assessing the firm's viability, etc., found it difficult to convince others. Indeed, there is the sense on the part of some observers that key Enron players believed their own press and, worse, really did believe that the key to performance was *entirely in perception* rather than substance.[226] Enron had successfully promoted itself.

It is possible to say that Enron's crash proves that the market and the marketplace for information works. But at what cost? Is there any question that had the company *not* been permitted to engage in such showmanship, if it had been clear that public relations statements could be tested for accuracy and might expose the company to liability, that the lack of substance might have been revealed sooner? Plenty of companies may engage in "cooking the books." Not all companies manage to simultaneously convince the public that they are not only sound, but spectacular. At the very least, should it not be crystal clear that even while some of these statements and acts may be providing the basis for criminal liability under the current law, that if Nike and other proponents of the proposition that public relations is political speech,[227] that is, speech fully protected by the First Amendment, have their way, this would not have a positive impact on the reliability of the information in the market?

Enron's collapse caused undeniable harm. But the connection of the harm to the speech and promotional activities in question may be complex enough that any cause and effect argument seems tenuous—despite what might be widespread agreement that stunts like the Potemkin village of EES operations are unethical. Tobacco presents a case in which the connection between the harm and the speech appears more robust.

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[226] According to author Kurt Eichenwald, Mark Palmer, communications director for Enron, had to battle CEO Ken Lay's argument "that Enron's troubles were just caused by bad publicity, not by a flawed business model, not by a mismanaged balance sheet." EICHENWALD, *supra* note 212, at 852. Further evidence of this (or perhaps just evidence that he is out of touch) was offered by Ken Lay's speech to the Houston Forum on December 13, 2005, just months before his criminal trial was to begin in which he told the audience, "'We must create our own 'wave of truth.'" Simon Romero, *Enron's Chief Offers His Case*, N.Y. TIMES, Dec. 14, 2005, at C1. Ordinarily, criminal defendants are cautioned not to make speeches. Of course someone who is innocent might be more inclined to make such a speech. This may also be true for those who want to opt for a "brazen-it-out" approach. Lay clearly felt the evidence strongly supported him. But it is also likely to be ambiguous enough that most lawyers would undoubtedly advise him not to take the risk. The trial began as this Article was going to press, so Lay may yet be vindicated. But at the least his speech suggests that he is out of touch with the potential consequences of that proceeding. So far as we know, he has not yet taken a page out of Richard Scrushy's book and used a PR firm to actually pay a journalist for favorable coverage during his trial. Jay Reeves, *Writer Says Scrushy Paid for Favorable Copy*, TULSA WORLD, Jan. 20, 2006, at E3.

[227] Another way to get protection for this sort of speech and to insulate it from liability would be to characterize it as "puffing." *See supra* note 115. It might be a neater descriptive fit as "puffery," but the deleterious consequences of insulating the speech from liability would be equally obvious.

B. The Case Concerning Tobacco

Given the well documented negative health consequences of cigarette smoking, consequences only marginally offset by any positive emotional or other boosts, it is, from one perspective, a little remarkable that the product is still legal to sell, let alone to promote.[228] Still, one might reasonably think that a governmental strategy to reduce consumption by reducing the demand (whatever that might be) created by attractive promotional materials might be a legitimate and sensible policy. Nevertheless, such attempts to regulate tobacco advertising beyond the current limitations have, so far, met with little success.[229] However, the attorneys general of forty-four states successfully sued tobacco manufacturers,[230] and that suit resulted in a master settlement agreement that contained numerous limitations on speech by these companies. The tobacco companies were not to engage in sponsorship of events (with limited exceptions).[231] The companies could not pay for product placement,[232] could not produce market branded merchandise,[233] agreed to limits on lobbying,[234] and agreed to subsidize, on remaining billboard leases, anti-smoking outdoor advertising "intended to discourage the use of Tobacco Products by Youth and their exposure to second-hand smoke."[235]

These are just a few of the provisions of the Master Settlement, and the agreement itself could serve as a primer on the variety of activities undertaken to promote products. But one of the most interesting aspects, and relevant for purposes of this discussion, was the agreement for the dissolution of the Tobacco Institute, Inc., the Council for Tobacco Research-U.S.A., Inc., and the Center for Indoor Air Research, Inc., along with representations that no new non-profits would be formed that would attempt to dispute the health consequences of smoking and that any trade organizations formed would operate under strict transparency rules. [236] What makes this interesting is that

[228] Perhaps it is less curious considering that millions still smoke and that many substances taken in excess can act as a poison. So perhaps it would be, all things considered, undesirable to have the government declare tobacco illegal. Besides, repression as a strategy has not worked very well. It did not work with alcohol during Prohibition. And, despite the continuing resistance to legalization with respect to drugs, the war on drugs hasn't been very successful either.

[229] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (Massachusetts statutes attempting to regulate the outdoor advertising and point of sale advertising for non-cigarette tobacco products struck down under *Central Hudson* test as overbroad and violative of First Amendment; attempt to regulate cigarette advertising preempted by federal law).

[230] *See* Tobacco Litigation Documents, *available at* http://www.library.ucsf.edu/tobacco/litigation/ (last visited Feb. 28, 2006).

[231] Nat'l Ass'n of Attorneys Gen., Multistate Settlement with Tobacco Industry at 13−14, *available at* http://www.library.ucsf.edu/tobacco/litigation/msa.pdf (last visited Feb. 28, 2006).

[232] *Id.* at 15.

[233] *Id.*

[234] *Id.* at 17.

[235] *Id.* at 14.

[236] *Id.* at 19−21. The agreement purports not to "limit the exercise of any First Amendment right," *Id.* at 21. Some of these restrictions, particularly those relating to the

ostensibly these organizations were not-for profit organizations whose whole purpose was speech and the dissemination of research findings. Actually though, they were PR "front" operations funded by the tobacco industry. Their "speech" was simply attacking the promotional difficulties cigarette manufacturers were experiencing as a result of the eventual publication of studies demonstrating negative health consequences connected with tobacco use by issuing counter studies and counter data to create the appearance of an "issue."

The role of these groups in delaying the general acceptance of the negative data did not escape the United States government. And in 1999 it sued not only the tobacco companies, but the Council for Tobacco Research-USA, Inc. and the Tobacco Institute, as well, alleging a conspiracy by the defendant companies and these two non-profit organizations to conceal or diminish publication of evidence with regard to the risks of cigarette smoking.[237] A key component of the complaint alleged that the tobacco companies entered into a "gentleman's agreement" to obscure and obstruct the delivery of information to the public about the true dangers of smoking by using the non-profit organizations to disseminate information intended to obscure the true nature of the addictive properties of nicotine and to diminish or downplay the role of smoking in the development of cancer.[238]

The Complaint specifically identifies statements made by the Council and the Tobacco Institute in which both organizations pledge that they have a "responsibility to the public" to help explore the health consequences of smoking, and that they were independent research organizations which were undertaking to do so.[239] The government alleged that these statements "were false and misleading when made."[240] "From its inception, TIRC (later CTR) was *essentially a public relations organization designed to counter adverse publicity concerning smoking and health*, and not as an independent research organization dedicated to getting to the bottom of the smoking and health controversy."[241] If the format of this and similar press releases and advertorials by the defendants were dispositive for purposes of determining the level of First Amendment protection to be accorded to these statements, the government would not have been able to pursue this prosecution because the defendants would have had a First Amendment defense. Indeed they raised it. "Defendants assert affirmative defenses that their innumerable public statements cannot serve as a basis for liability or constitute violations of the mail and wire fraud

non-profits, would undoubtedly be unconstitutional had Nike's definition of protected speech been accepted by the Supreme Court in 2003, because the non-profits could point to their non-profit status and the issue of the health consequences of smoking as "issues of public concern."

[237] *See* First Amended Complaint at 2−3, United States v. Phillip Morris, Inc., No. 99-C V-02496(GK) (D.C. Dist. 2006), *available at* http://www.usdoj.gov/civil/cases/tobacco2/.

[238] *Id.* at 21−42.

[239] *Id.* at 25−26.

[240] *Id.* at 26.

[241] *Id.*

statutes because they were 'good-faith' *expressions of opinion* or belief and are protected by the First Amendment."[242] It just wasn't successful this time.

There is no question that the health consequences of smoking constitute "issues of public concern." But it seems equally clear that in such circumstances a for-profit entity ought not to be able to immunize false statements by claiming they are political speech on issues of public concern. "[T]he labels that Defendants now attach to these statements–*attempting to cast the public communications as political speech, commercial speech, or expressions of scientific opinion*–are wholly irrelevant. False, misleading, or deceptive speech in furtherance of a scheme to defraud receives no First Amendment protection."[243] But this is exactly what proponents of broad protection for commercial speech issued in the form of public relations would authorize. For if it is completely protected, as Nike argued in the *Kasky* case,[244] albeit in the civil context, then this would represent a serious obstacle to such prosecutions. This Article proposes that such speech may fit comfortably into the existing commercial speech framework and should be so interpreted, in order to retain important governmental and social control over the negative social consequences that may arise from a contrary finding.

V. A PROPOSED TEST

No test proposed can address all of the potential cases. However, a working framework is offered by the California Supreme Court's decision in *Kasky v. Nike* and which I offer here with some additional suggestions for distinguishing between commercial and protected speech in the category of public relations speech. "[W]hen a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message."[245]

A. The Speaker

In analyzing the speaker, the first most relevant question is whether it is a commercial speaker. As the California Supreme Court noted, in commercial speech cases the "*speaker* is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of good or services—or someone acting on behalf of a person so engaged."[246] Of course this runs the risk of simply re-framing the question without actually answering it. But generally "commercial speech" is going to be issued from a for-profit business

[242] *See* U.S. Dept. of Justice, Litigation Against Tobacco Companies, United States v. Philip Morris, Inc., Civil Action No. 99-CV-02496(GK) (Jul. 1, 2004), http://www.usdoj.gov/civil/cases/tobacco2/ (emphasis added).

[243] *Id.* at 42−43 (emphasis added).

[244] *See* Piety, *Grounding Nike*, *supra* note 8, at 192.

[245] Kasky v. Nike, Inc., 45 P.3d 243, 311 (Cal. 2002).

[246] *Id.* (emphasis in original).

enterprise. As the Supreme Court has noted on numerous occasions, the existence of an economic motive is not dispositive. Authors don't generally write books for their own satisfaction. They hope to sell them. But typically authors do not write books in order to sell something else.[247] The product authors are selling is the speech itself.

This distinguishes the case of the manufacturers of products which are themselves speech products. A cogent case has been made out by Professor C. Edwin Baker for carving out a similar exception for newspapers and other news media.[248] But by the same token this does not mean that non-profit status is dispositive. In *Austin v. Michigan Chamber of Commerce*, the Supreme Court had no trouble finding that a law aimed at for-profit corporations' political speech and the endorsement of candidates could be applied to a non-profit organization where "more than three-quarters of the Chamber's members are business corporations."[249] Were the Court to adopt a rigid profit/not-for-profit distinction, the Court noted, "[b]usiness corporations . . . could circumvent the Act's restrictions by funneling money through the Chamber's general treasury."[250] This is precisely what the government alleged the tobacco companies did in the case of dissemination of "information" about smoking. For purposes of applying the commercial speech doctrine, there is ample precedent from which to draw that suggests that it is appropriate to distinguish between commercial and non-commercial speakers,[251] and that the designation "commercial" be considered a factual question.

B. The Intended Audience

Although the obvious audience for commercial speech is consumers, it was in part concern for the proper operation of the market, of which consumers were a part, that prompted the *Virginia Pharmacy* Court's concern about protecting truthful information. Cases like Enron make clear that consumers are

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[247] Author Fay Weldon's contract with Bulgari may represent an exception. *See* Calvin Reid, *Weldon's Bulgari Product Placement Raises Eyebrows* , PUBLISHERS WKLY., Sept. 10, 2001, *available at* http://www.publishersweekly.com/article/CA155440.html?pubdate=9%2F10%2F2001&display=archive. But I would also note that some of the marketing, business, self-help, and similar texts do seem to be authored with an eye to promoting the authors' services in another sector. The Ries & Ries book, *supra* note 2, and the Atkin book, *supra* note 128, seem to be drawn largely from case studies of their own clients and seem to promote their services and their approach to existing and future clients.

[248] *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 225−49 (1989) (arguing for separate treatment of the press through the First Amendment on the basis of the press clause, independent of the speech clause); BAKER, *supra* note 29, at 5 (arguing there is a basis for protecting the press as a constitutive part of a democracy rather than as merely an extension of the individual's right of self-expression.).

[249] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 664 (1990).

[250] *Id.*

[251] *Id.* at 662−64 (citing Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986), for the proposition that non-profits formed for "the express purpose of promoting political ideas" and having a policy not to accept corporate contributions are distinguishable from business corporations).

not the only parties who influence the proper functioning of the market. The California Supreme Court observed in *Kasky* that the "*intended audience* is likely to be actual or potential buyers or customers of the speaker's good or services."[252] But it also noted that the intended audience could *include* "persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers."[253] Such a test then encompasses analysts, as in the Enron case, or college presidents and athletic directors in the Nike case, and would not immunize statements simply because they were not directed at end users.

C. Message Content

Finally, key to regulating in this area is that the court must be dealing with material about which it is meaningful to regulate for whether it is truthful or is instead false, deceptive, or misleading. Broad statements such as "We are a Company That Cares" may not be actionable to the extent that the statement is so vague, so capable of multiple interpretations, that the resolution is open to dispute that cannot be resolved by examination of the facts.[254] Of course it is not the case that the facts will always speak for themselves in terms of resolving a dispute. But clear-cut factual assertions, such as, "we pay our employees minimum wage," may be susceptible to proof and should not be immunized as puff or opinion. Combined with the economic motivation of stimulating sales or business, a limitation to factual assertions both imposes no onerous burden and does not set up the government as arbiter of truth. The California Supreme Court noted that such "representations of fact" would not be limited to the company's products or services, but could include "the business operations" as well.[255] Consumers care about all aspects of a company's conduct of its business operations and the rest of the relevant market players do as well.

VI. CONCLUSION

Those entities seeking to profit from information injected into the stream of commerce need to be accountable for the quality of that information. The incentives for the information to be misleading and inaccurate are too great and the consequences to the public too high for it to be in the public interest to issue these companies a First Amendment blank check. Public relations statements are issued in support of marketing and commercial objectives. For-profit corporations have no other legitimate reason to issue such speech. There is no reason why the public should subsidize them by not only ensuring that they can

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[252] Kasky v. Nike, Inc., 45 P.3d 243, 311 (Cal. 2002) (emphasis in original).

[253] *Id.*

[254] But it may still be possible that in context such a statement would be actionable if sufficient factual support was offered for the proposition that the speaker intended a particular interpretation that was not supported by the facts.

[255] *Kasky*, 45 P.3d at 312.

get "free advertising" in the context of public relations, but that there will be no legal consequences for false speech. Given the relative paucity of explicit claims in "traditional advertising," claims which under current doctrine can be tested for their truth, and the clear marketing and commercial relevance of explicit claims made in the public relations context, far from being cut back, the Supreme Court ought to make clear that the commercial speech doctrine *includes* statements made in the public relations context.[256] The Court should reaffirm the commitment it made earlier in the doctrine's genesis, that merely inserting a matter of public interest will not immunize commercial statements from regulatory scrutiny when the public is likely to be misled.[257] It is still in the interest of the proper functioning of the market that "the stream of commercial information flow cleanly as well as freely."[258]

[256] It seems clear that those concerned with advising corporations about these practices do not rule out the possibility of liability stemming from public relations. *See* Andrea J. Nordaune, *Sales and Advertising: Keeping the Promises We Make*, 27 WM. MITCHELL L. REV. 361, 369 (2000) ("Require that all communications that go outside the company go through the formal review process [for accuracy] (television and radio commercials, print advertising, sales and promotional brochures, catalogs, press releases, trade show exhibits and distribution pieces, etc.")); Fitzpatrick, *supra* note 10, at 99 (observing that the "most important finding" of the California *Kasky* court was "that public relations expression is not *fully* protected under the First Amendment as both conventional wisdom and some scholarly studies have suggested.") (emphasis in original).

[257] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983).

[258] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976).