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HANDCUFFING SPEECH: FEDERAL FRAUD STATUTES AND THE CRIMINALIZATION OF ADVERTISING

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For my late mother, Joyce Strawn Maye.

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ABSTRACT

The potential criminalization of deceptive advertising implicates the adequacy of regulatory oversight by the Federal Trade Commission (FTC) and the proper balance between the free flow of information and the Government's role in consumer protection. Is there a need for, and room for, both FTC and Department of Justice (DOJ) oversight on the deceptive advertising front? These issues have ramifications for the courts, who bear the burden of adjudicating challenged applications of that policy, and also for the orderly functioning of government, which must accommodate the convergence of competing interests and divisions of authority.

Many fraudulent schemes are perpetuated without the use of advertising, but fraudsters frequently incorporate advertising, most often as a lure. To date, advertising has directly intersected with federal fraud statutes most often not because the advertising was regarded as the fraud, but because of its utility as a lure and a jurisdictional hook to bring conduct within prosecutorial reach. Exceptions exist, however, in which advertising appears to have been regarded as the fraud, rather than an instrumentality of a fraud.

Multiple parties—prosecutors, the courts, defense attorneys, advertisers, advertising agencies, media, consumers and policy influencers—have potential roles to play in assuring an acceptable balance between speech rights and consumer-protection efforts. Prosecutorial discretion, however, is essentially all that stands between a deceptive advertiser and a federal, criminal prosecution.

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CHAPTER 1

INTRODUCTION

Consider this statement to voters during a televised debate from a politician running for reelection: "Under my proposed plan, if you like your insurance, you can keep your insurance. Period." Consider this statement to consumers in a television commercial from a car dealer trying to outpace the competition: "I'm ready to make a deal. If you like this new car, it can be in your driveway for only $79 a month. Just sign and drive."

Fifty years after the Supreme Court declared that "erroneous statement is inevitable in free debate,"[1] it appears well-settled[2] that "noncommercial speech," such as that conveyed by the first statement,[3] is fully protected by the First Amendment.[4] Even if

[1] New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (citing N.A.A.C.P. v. Button, 371 U.S. 415 (1963)).

[2] This statement is based on an aggregate reading of the Supreme Court's First Amendment opinions in general and its holding in *Alvarez v. United States*, 132 S.Ct. 2537 (2012), in particular. Recently, the Court considered a specific challenge to an Ohio election law that criminalizes falsehoods expressed in a political campaign. *See* Susan B. Anthony List v. Driehous, 134 S.Ct. 2334 (2014). Although the questions before the Court concerned the law's procedural aspects, as opposed to substantive constitutionality, members of the Court appeared skeptical regarding the law's constitutionality. In oral arguments April 22, 2014, individual justices expressed reservations about the law itself. See Sabrina Eaton, *U.S. Supreme Court Justices bash Ohio election law*, CLEVELAND.COM (April 22, 2014, 4:10 PM), http://www.cleveland.com/open/index.ssf/2014/04/us_supreme_court_justices_bash.html

[3] Noncommercial speech, sometimes called ideological speech, is broadly defined as speech about matters of public concern. Commercial speech clearly includes speech that

the speaker knew his or her promise to be false—or at least, unlikely to be realized—at the time it was made, the deceived voter's sole recourse is to harness similarly situated voters to try and effect change through the routine political process.[5]

Equally well established is that "commercial speech," such as that conveyed in the second statement, is First Amendment-protected to a lesser extent, and if false, not constitutionally protected at all.[6] If the commercial speaker's promise was false or unlikely to be realized—even if the speaker did not know that to be the case at the time, and even if no actual deception occurred—the speaker could face legal repercussions for the speech,[7] including civil fines and—because the speech appeared on television—possibly federal, criminal charges.

Statement of Problem

Because potential criminal jeopardy is likely "off the radar" of many advertisers and their agents, this project examines the connection between advertising and federal,

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proposes a commercial transaction. Debate exists about whether the definition also should include speech that is economically motivated.

[4] "The Congress shall make no law respecting an establishment of religion, or the free exercise thereof; or abridging the freedom of speech, or of the press, or of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

[5] Howard notes that state and local laws regulating deceptive speech in political campaigns mostly address only false speech about candidates and all are subjected to "at least strict scrutiny under the first amendment, applying standards and analyses totally different than with commercial speech." Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. Rev., 1093, 1163 (1991).

[6] Preston says that advertising regulation and the First Amendment are not incompatible, and that the prohibition of deception, in particular, is in keeping with the First Amendment. See Ivan L. Preston, *The Compatibility of Advertising Regulation and the First Amendment*, 9 J. OF ADVERTISING 12 (1980). *See also* Howard, *supra* note 5, for a discussion of the constitutionality of deceptive political speech regulation.

[7] These range from private, civil lawsuits to public, civil actions initiated by State Attorneys General (SAGs) acting on behalf of the consuming public.

criminal fraud charges. With the First Amendment as a backdrop, it categorizes and contextualizes instances in which advertising has intersected with federal wire-fraud and related statutes.

Background

The constitutional hierarchy evidenced by the above examples is manifest in the Supreme Court's "commercial speech doctrine." The doctrine provides that the content of commercial speech may be regulated more readily than the content of noncommercial speech, and that false or deceptive commercial speech is devoid of constitutional protection. Like other categories of speech found by the Court to be unconstitutional—obscene speech, extortive speech and fighting words, for example—false or misleading ("deceptive") commercial speech may be readily restricted.[8]

Traditionally in the United States, legal repercussions for deceptive commercial speech have consisted of civil penalties meted out primarily by the Federal Trade Commission (FTC). The FTC is a civil law enforcement agency and the only federal agency with general jurisdiction over consumer fraud.[9] The FTC has jurisdiction over such speech "in or affecting interstate commerce," meaning all but the most geographically limited intrastate speech is subject to FTC authority.

In practice, the FTC's consumer-fraud focus is directed largely toward either fraudulent schemes or deceptive advertising that crosses state lines or otherwise affects a significant number of consumers. A review of FTC and Department of Justice (DOJ) cases suggests that a fraudulent scheme may be defined as a pattern of conduct devised

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[8] *Id.*

[9] Constitutional authority for FTC oversight of advertising springs from the commerce clause in Article I, Section 8, applicable to interstate commerce: "The Congress shall have Power To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I § 8.

by illegitimate merchants bent on duping consumers in the marketplace. Such schemes are viewed as conduct detrimental to society, not unlike the conduct of robbing a bank. Attempts to both prevent such conduct with civil penalties—as the FTC might—and punish it with criminal sanctions—as might the DOJ—are hardly controversial.

Unlike fraudulent schemes, however, which are enterprises the whole of which are regarded as socially undesirable conduct, deceptive advertising claims may emanate from legitimate merchants conducting otherwise legitimate business enterprises. In such cases, any alleged deceit generally has to do with some aspect of the seller's speech about his or her products or services. Even given the Supreme Court's unwillingness to extend constitutional protection to false or misleading commercial speech (discussed more fully in Chapter Two), the Court has made clear that, for First Amendment reasons, curbs on such speech should employ the least restrictive means possible. Unfortunately, separating deceptive advertising from fraudulent schemes for this purpose may be difficult, at best. The difficulty means seller-to-consumer communications may themselves be regarded as the fraudulent scheme, effectively subjecting commercial speech to one of the most restrictive means—criminal prosecution—possible.

The FTC's civil authority over deceptive commercial expression in the legitimate commercial marketplace is largely unquestioned; the DOJ's authority to prosecute criminal conduct is equally accepted. In fact, the FTC and DOJ routinely bring parallel civil and criminal proceedings based on the same pattern of fraudulent conduct, with the civil complaint forming the basis of the criminal charge.[10] (Parallel FTC and DOJ

[10] *See, e.g.*, *United States v. Tankersley*, 96 Fed. Appx. 419 (7th Cir. 2004) (affirming the Circuit Court's denial of a motion to dismiss); Fed. Trade Comm'n v. Think

proceedings are discussed more fully in Chapter Four.) Less considered, however, is the DOJ's potential role in addressing deceptive advertising. DOJ authority to punish less-than-truthful advertisers, as it does fraudulent actors, may not be as easily acknowledged or reconciled in light of the First Amendment, irrespective of the commercial speech doctrine. Yet, as two unrelated events, described below, suggest, seemingly deceptive advertising claims by a seller engaging in an ostensibly legitimate business enterprise[11] may attract DOJ attention; the FTC is not the only sentinel at the advertiser's gate.

The Case of the Car Dealers

On January 9, 2014, the FTC announced it had settled deceptive advertising claims with multiple automobile dealers across the United States. The FTC operation, called Operation Steer Clear, was a nationwide sweep focusing on the sale, financing and leasing of motor vehicles."[12] After months of FTC investigation, nine automobile dealers across the country agreed to settle deceptive advertising charges alleging that a variety of print, online and broadcast advertising misrepresentations "violated the FTC Act, falsely leading consumers to believe they could purchase vehicles for low prices, finance vehicles with low monthly payments, and/or make no upfront payment to lease

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Achievement Corp., 312 F.3d 259 (7th Cir. 2002) (holding that defendant's representations were actionably fraudulent).

[11] The indicted car dealer and employees faced two additional counts. Count Two was for Conspiracy to Commit Wire Fraud as to Fraudulent Financing; Count Three was for Conspiracy to Commit Wire Fraud as to False Reports to American Suzuki Corporation. While this suggests possible impropriety in the conduct of the business, there was no indication that the business itself was not legitimate or that customers were being sold horses when they thought they were buying cars; the dealership was, in fact, engaged in the selling, buying and financing of automobiles.

[12] *FTC Announces Sweep Against 10 Auto Dealers*, FTC.GOV (Jan. 9, 2014), http://www.ftc.gov/news-events/press-releases/2014/01/ftc-announces-sweep-against-10-auto-dealers (last visited Feb. 2, 2014).

vehicles."[13] Each of the nine dealerships accepted proposed consent agreements "designed to prevent the dealerships from engaging in similar deceptive advertising practices in the future."[14] The orders bar the dealerships from deceptive advertising practices for 20 years and carry hefty monetary penalties for any violations.[15]

As the FTC was announcing Operation Steer Clear, an automobile dealership owner and his sales manager in South Carolina[16] were contemplating another kind of settlement with an arm of the Federal Government: a criminal plea bargain.[17] Sixteen months earlier, the dealership owner and sales manager had been criminally indicted for three felony counts of conspiracy to commit wire fraud, and their February trial date was fast approaching.[18] According to the criminal indictment, allegedly deceptive broadcast advertising in the form of radio and television commercials qualified the dealership owner, the sales manager and eight members of the sales staff for federal prosecution.[19] This was notable because the first charged count, which carried a potential prison term of 20 years, described advertising practices almost identical to those targeted by the FTC in Operation Steer Clear. With the indictment, the South Carolina car dealer and sales crew were confronted with another, less-considered potential penalty associated with allegedly deceptive advertising: criminal charges that contemplate significant prison time.

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[13] *Id.*
[14] *Id.*
[15] *See, e.g.,* New World Auto Imports, Inc., Doing Business as Southwest Kia, et al.; Analysis of Proposed Consent Order to Aid Public Comment," 79 Federal Register 3,370-02, 3,370–72 (Jan. 21, 2014).
[16] The South Carolina auto dealership was not among those targeted in Operation Steer Clear.
[17] The dealer and sales manager entered plea agreements for prison terms of one year and one day and six months followed by six months' house arrest, respectively.
[18] The indictment was handed down Sept. 12, 2012.
[19] Charges later were dropped against all but the dealership owner and sales manager.

Viewed separately, the above-described events may appear remarkable only to the parties involved. Juxtaposed, however, they illustrate that DOJ attorneys have the authority, and sometimes the inclination, to leverage federal fraud statutes against advertisers in a way that shifts the focus from one of FTC-oriented prevention to DOJ-oriented punishment.

In some cases, the FTC encourages DOJ involvement in consumer-protection matters. Since 2003, DOJ fraud-enforcement efforts have been formally aided by the FTC, which that year launched a Criminal Liaison Unit (CLU).[20] Housed in the FTC's Division of Enforcement, the CLU seeks to "increase the criminal prosecution of consumer fraud" by referring certain cases to federal prosecutors for potential indictment. Noting its own lack of criminal authority, the FTC's position is that "some offenders will be stopped only by criminal prosecution."[21]

Courts also have aided DOJ efforts by declining to foreclose or restrict DOJ prosecution on the heels of FTC intervention. In 2004, for example, a Federal Court of Appeals held that the civil penalties imposed by the FTC did not constitute double jeopardy[22] because they were not "so punitive in purpose of effect as to be in actuality a

[20] In its first decade of operation, the CLU helped secure more than 550 indictments for FTC defendants and their associates. In 2013 alone, prosecutors working with the CLU initiated 76 indictments or complaints and obtained 65 convictions or guilty pleas with an average prison sentence of more than 40 months. Since 2007, particularly effective prosecutors have been singled out for recognition with the CLU Prosecuting Attorney's Award; each year, the award honors "prosecutors who have made a significant contribution to the protection of American consumers."

[21] Video: *Criminal Liaison Unit*, FTC.GOV, http://www.ftc.gov/enforcement/criminal-liaison-unit (last visited July 13, 2014) [hereinafter *CLU Video*].

[22] The Double Jeopardy Clause is found in the Fifth Amendment: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

criminal penalty."[23] Such FTC action "does not approach the more serious sanction of imprisonment"[24] and thus does not implicate the protection against the imposition of multiple criminal punishments for the same offense.

Clearly, not all advertisers, even those whose commercial claims are dubious, are at risk for potential criminal prosecution, and not all CLU-referred cases necessarily will include an advertising element. The FTC has described "repeat offenders, egregious behavior, or other evidence that criminal conduct is involved"[25] as primary concerns. Informational materials prepared by the FTC for distribution to federal prosecutors emphasize large-scale, widespread operations that defraud a large number—often hundreds of thousands—of victims and produce significant—often tens of millions of dollars—financial loss that cannot be recovered or repaid.[26]

These parameters, if maintained, suggest that a majority of advertisers are unlikely to be referred by the CLU for potential criminal prosecution. The unit's existence, however, underscores the potential for seller conduct, including deceptive commercial speech, to trigger parallel civil and criminal law-enforcement proceedings. Aside from the CLU's focus on "big-fish" fraudsters, the South Carolina car dealer case illustrates the corresponding potential for even "routine" advertising on a relatively small scale to trigger a criminal prosecution, irrespective of CLU involvement. A public admonishment from the FTC along with an extracted civil fine and a promise from an

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[23] Tankersley, 96 Fed. Appx. at 421.
[24] *Id.* at 422.
[25] *FTC Presents Criminal Liaison Award to Assistant United States Attorney Ellyn Lindsay*, FTC.GOV, http://www.ftc.gov/news-events/press-releases/2010/06/ftc-presents-criminal-liaison-award-assistant-united-states (June 18, 2010).
[26] *See CLU Video*, *supra* note 21.In one CLU-referred case involving a "$34 million cramming scam," prosecutors secured a 21-year sentence; in another, involving a "$106 million advance-fee loan scam," prosecutors obtained a 29-year sentence.

advertiser to "do better" in the future is one matter; a grand-jury indictment, a costly criminal trial, potential federal prison time and a criminal record is another. Advertisers should be aware, if not beware. As one author, commenting on the criminalization of certain accounting practices in the early 2000s, expressed it, "Nothing concentrates the mind like the prospect of a hanging."[27]

Advertising and Deception

The rise of advertising—and advertising deception—in America is often attributed to the Industrialization Era of the 1800s. Accompanied by the rise of the mass media, the Industrial Revolution[28] created new markets and new means for sellers to reach prospective buyers within those markets. Smith, for example, observed, "the introduction of the assembly line and techniques for mass marketing have made available to consumers a continually expanding assortment of goods,"[29] and "radically changed" the relative bargaining power of parties to a sales transaction.[30] During this shift in markets and media, commercial transactions were conducted within an atmosphere of *caveat emptor* (buyer beware) that "assumed that the necessary facts were available to all participants."[31] As transactions became less personal, however, deceptive advertising began to populate the mass media and reliance on *caveat emptor* began to wane. Among

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[27] Ann Marie Tracey and Paul Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging*, 25 N. Ill. U. L. REV. 125, 125 n.1 (Fall 2004) (paraphrasing a quote attributable to Samuel Johnson) (citing *Respectfully Quoted: A Dictionary of Quotations*, http://www.bartleby.com/73/369.html (last visited Oct. 24, 2004)).

[28] The Industrial Revolution refers to a period of significant change in manufacturing that occurred between the mid 1700s and mid 1800s.

[29] Christopher Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W. L. REV. 391, 392 (1977).

[30] *Id*.

[31] Dee Pridgen & Ivan L. Preston, *Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission*, 14 GA. L. REV. 635, 636 (1980).

the most common, and egregious, examples of deceptive ads were those for "patent medicines," which "promised a cure for everything from rheumatism to arthritis to cancer."[32] Regulation was nonexistent, and unscrupulous advertisers—nicknamed "snake-oil salesmen" and "confidence men"—"could outright lie, deceive and otherwise cheat with little or no threat of being punished by the government."[33] By the late 1800s—sometimes called the "P.T. Barnum Era" of advertising[34] because of the circus promoter's claim that "there's a sucker born every minute"—concerns about deception in advertising began to set the stage for government intervention.

The first significant advertising reform came about just prior to the start of World War II, when Congress broadened the scope of FTC authority to encompass unfair trade practices affecting consumers.[35] Prior to this time, the FTC's chief purpose had been the leveling of the playing field between and among competitors in the marketplace. The 1938 Wheeler-Lea Amendments to the Federal Trade Commission Act (FTCA) provided authority for the agency to enact consumer-protection measures against unfair trade practices, including deceptive advertising.[36]

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[32] THOMAS C. O'GUINN ET AL., ADVERTISING AND INTEGRATED BRAND PROMOTION 84 (6th ed. 2012).
[33] *Id.*
[34] *Id.*
[35] The Federal Trade Commission Act, passed in 1914, was originally concerned with unfair business practices affecting competitors. The 1938 Wheeler-Lea Amendments expanded the agency's focus to include unfair or deceptive trade practices, including advertising. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–51 (2012).
[36] Constitutional authority for FTC oversight of advertising springs from the commerce clause in Article I, Section 8, applicable to interstate commerce: "The Congress shall have Power To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I § 8.

Alongside federal FTC regulation, individual states took steps to make statutory remedies available to counter unscrupulous advertising practices.[37] Before states codified their intent to address unfair or deceptive advertising, aggrieved individuals who felt they were victims of deceptive product claims had to rely on burdensome common-law actions for fraud or misrepresentation. In South Carolina, for example, a plaintiff suing a merchant for fraud must allege and prove nine elements, and the failure to prove any one of them is fatal to recovery.[38] State statutes governing deceptive advertising, however, generally refer to and incorporate the FTCA[39]—they often are called "Little FTC Acts" or "Mini-FTC Acts"—and are more favorable to consumer-plaintiffs.[40] Little FTC Acts give state attorneys general (SAGs) the authority to seek injunctions,[41] conduct investigations[42] and sue for and civil penalties[43] against advertisers, and often provide a

[37] The South Carolina Unfair Trade Practices Act, for example, declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" to be unlawful. S.C. CODE ANN. § 39-5-20. (1976).
[38] The nine elements are (1) a misrepresentation; (2), its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person, (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) his right to rely thereon; and 9) his consequent and proximate injury. *See* Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959).
[39] As an example, the South Carolina Unfair Trade Practices Act says: "It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." S.C. CODE ANN. § 39-5-20 (1976).
[40] *See* Jon Mize, Comment, *Fencing Off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653 (2005).
[41] In South Carolina, for example, the statute reads: "Whenever the Attorney General has reasonable cause to believe that any person is using, has used or is about to use any method, act or practice declared by Section 39-5-20 to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary restraining order, temporary injunction or permanent injunction the use of such method, act or practice." S.C. CODE ANN. § 39-5-50(a) (1976).
[42] The grant of investigative authority in South Carolina, for example, is as follows:

private right of action.[44] Willful or knowing violations of the law can result in a recovery beyond those damages actually sustained, along with attorney's fees and costs.

The Literature

Despite a clear legal shift from *caveat emptor* to *caveat venditor* (seller beware) provided by FTC regulation and state consumer-protection statutes, concern lingers about whether these measures provide the appropriate balance of protection for consumers and

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> When it appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article, or when he believes it to be in the public interests that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article, he may execute in writing and cause to be served upon that person or any other person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination and copying, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

S.C. CODE ANN. § SECTION 39-5-70 (a) (1976).

[43] The availability of a private right of action means that individuals who suffer some type of loss as a result of deceptive advertising may invoke the statute to bring a civil lawsuit seeking monetary compensation. For example, the South Carolina Unfair Trade Practices Act states: "If a court finds that any person is willfully using or has willfully used a method, act or practice declared unlawful by Section 39-5-20, the Attorney General, upon petition to the court, may recover on behalf of the State a civil penalty of not exceeding five thousand dollars per violation." S.C. CODE ANN. § 39-5-110(a) (1976).

[44] The South Carolina Unfair Trade Practices Act provides that "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful … may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. CODE ANN. § 39-5-140 (1976).

,markets in a technologically innovative and complex economy.[45] The literature reflects two perspectives. Observers generally have agreed that a goal of deceptive-advertising laws should be the protection of both consumers and markets. The "role of government should be to insure a balance between buyer and seller in the marketplace,"[46] preserve "the integrity of our capital markets"[47] and protect "the consumer and the business man who provide the resources for these markets."[48] The consensus in the literature is that "deceptive advertising is bad."[49] Truthful (or at least, non-misleading) advertising performs an important economic function, but deceptive advertising undermines the system:

> [I]nformation qua information is not sufficient to sustain an economic democracy … For example, when goods are praised to the point of untruth, or a competitor's goods are falsely disparaged and the competitor then replies in kind, the result is not informed, intelligent choice, but rather its perversion; there is no "choice" when selection is a function of competing untruths, deceits, and misleading comparisons. Production is no longer regulated by consumer choice, and business success is no longer measured by consumer satisfaction.[50]

As Chapter Two will explore, this perspective echoes that of the Supreme Court in interpreting the First Amendment's protective contours. Implicit in the Court's

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[45] *See, e.g.*, William B. Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968).
[46] *Id.* at 897.
[47] Louis J. Lefkowitz, *Consumer Protection: Meeting the Challenge*, 4 NEW ENG. L. REV. 67, 67 (1968-1969).
[48] *Id.*
[49] Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 658 (1985). *See also* Earl W. Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1270 (1966); Lefkowitz, *supra* note 48.
[50] Kintner, *supra* note 50 at 1270.

commercial speech doctrine and its protection for truthful—but not untruthful—commercial speech is a concern for "preservation of a fair bargaining process."[51]

A minority viewpoint evident in the literature acknowledges the potentially negative impact of deceptive advertising but suggests aggressive government intervention is not necessarily the best solution. Government intervention should be weighed against the resulting economic costs in a cost-benefit analysis. This viewpoint reflects work by Posner and others that applies "economic principles to the analysis of legal process."[52] Under this theory, "market, not government, regulation in the realm of commerce as well as ideas may be a better idea."[53] Posner, for example, regards non-legal preventatives against deception as most effective and says "[E]ven in the absence of legal remedies of any kind, it is unlikely that deceptive selling would be rampant"[54]:

> There is first of all the incentive of the consumer to exercise reasonable care and common sense in purchasing and to learn from any unhappy experiences. Second, there is competition. A seller has a strong incentive not to antagonize customers lest he lose their patronage to his competitors.[55]

Craswell, a proponent of a cost-benefit approach to deceptive advertising, says "[t]he regulation of deceptive advertising is best viewed as a pragmatic exercise whose purpose is to make advertising as useful as possible for consumers."[56] He advocates comparing the actual effects of a deceptive ad on consumers with the ease with which the

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[51] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 485 (1996).
[52] Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 61 (1969). *See* Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 527 (1979).
[53] Jordan & Rubin, *supra* note 52, at 553.
[54] Posner, *supra* note 52, at 61.
[55] *Id.* at 61–62.
[56] Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 550, 551 (1991).

advertiser could "have constructed an ad that was less deceptive."[57] Using this approach, "an ad would be deemed deceptive if and only if the advertiser failed to take some precaution that would have reduced the net injury caused by the ad."[58] Applying a cost-benefit analysis, Jordan and Rubin concluded, for example, that the remedies provided by the common law are "consistent with efficiency"[59] craved by economic principles.

The predominant viewpoint, however, is that common law and civil litigation options available to aggrieved individuals are inadequate or offer "no realistic remedy at all."[60] Bernstine, for example, observes that individuals who would stand to gain only a small recovery as a result of private litigation may simply allow the matter to drop:

> The time and expense of litigation for what may be a comparatively negligible recovery, notwithstanding court costs and attorney's fees, may well have a chilling effect on the pursuit of individual recoveries. Merchants may calculate their practices to bilk small amounts from customers encouraged by the certain knowledge that any one customer will probably not sue for a small loss."[61]

Similarly, observers have questioned the adequacy of FTC oversight as a consumer-protection mechanism in the area of deceptive advertising. Much concern expressed in the literature was inspired by an apparent policy shift by the FTC in 1983 (discussed more fully in Chapter Four) that modified the Commission's working

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[57] *Id.* A year earlier, an experimental study by Preston and Richards suggested that ads may easily be rewritten to convey the truth in place of the falsity and also to avoid elimination of other useful information. *See* Ivan L. Preston & Jef. I Richards, *The Costs of Prohibiting Deceptive Advertising—Are They as Substantial as Economic Analysis Impies?*, 16 ADVANCES CONSUMER RES. 209, 209–14 (1989).
Craswell, *supra* note 50 at 657. Craswell says this would produce a "rough equivalent" of the negligence standard articulated by Judge Learned Hand in the area of tort liability. *Id*.
[59] Jordan & Rubin, *supra* note 52 at 528.
[60] Gordon F. Bowley, *Law Enforcement's Role in Consumer Protection*, 14 SANTA CLARA L. REV. 555, 556 (1974). *See* Nancy T. Bernstine, *Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices*, 20 HOW. L.J. 247, 249 (1977).
[61] Bernstine, *supra* note 60, at 249.

definition of deception.[62] Although the FTC chairman characterized the policy statement as a "clarification" and not a new definitional approach, critics interpreted the statement as giving more leeway to advertisers and effectuating a return toward *caveat emptor*.[63] State attorneys general, whose enforcement of Little FTC Acts depends on cues from the FTC, viewed the policy statement as limiting consumer-protection efforts and responded negatively.[64] The policy statement was labeled "a significant step backward"[65] that failed to take "into account the complexities of the modern day marketplace."

Although at least one subsequent researcher concluded the FTC's consumer-protection efforts were not, in fact, undermined by the 1983 policy statement,[66] whether concerns about the FTC's policy shift have been realized or not remains, to some extent,

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[62] The 1983 Policy Statement on Deception identified deception as any "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." Letter from James C. Miller III, Chairman Fed. Trade Comm'n, to John D. Dingle, Chairman House Comm. on Energy & Commerce (Oct. 14, 1983) (on file with author) [hereinafter *Policy Statement*]. Before issuing the policy statement, the FTC used a somewhat vague "acquired or working definition of deception" that defined deception as "an act or practice … that has the tendency or capacity to mislead a substantial number of consumers in a material way." Thomas C. Kinnear & Ann R. Root, *The FTC and Deceptive Advertising in the 1980s: Are Consumers Being Adequately Protected?*, J. PUB. POLICY & MARKETING, vol. 7, 1988, at 40, 41.

[63] *See* Lee D. Dahringer & Denise R. Johnson, *The Federal Trade Commission Redefinition of Deception and Public Policy Implications: Let the Buyer Beware*, 19 J. CONSUMER AFFAIRS 326 (1984).

[64] Kinnear & Root, *supra* note 62, at 42.

[65] Dahringer, *supra* note 63, at 327.

[66] Petty concluded that the FTC's advertising enforcement program not only survived the Reagan revolution, but that during this period the Commission "made two important improvements that appear lasting and beneficial to consumers," namely "the pursuit of fraud cases in federal district court" and efforts to do away with advertising restraints professional societies tended to impose on their members. Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution?*, 30 AM. BUS. L.J. 1, 31–32 (1992). The former initiative enabled misleading advertising to be stopped quickly and assets to be preserved for potential consumer redress; the latter allowed more information about professional services to make its way to consumers. *Id*.

unsettled. Also unsettled is the issue of whether private remedies are adequate to fill gaps left by FTC or SAG enforcement. If private remedies are inadequate, are public remedies, such as criminal sanctions, the solution? Posner, the proponent of largely non-legal approaches to the problem of deceptive advertising, sees room for the alternative of criminal proceedings—instead of FTC action—in "hard-core" fraud cases where legal malice or willfulness is present.[67] "It would be surprising," says Posner, "if the Commission, with its highly limited remedial powers, had much impact on fraudulent activity of this sort."[68] Criminal laws "are a useful back-up that gives force to civil administrative actions"[69] and are "not necessarily bad"[70] when "the danger to the public is so overwhelming that no one would hesitate to treat the prohibited conduct as a crime."[71] On the other hand, the application of criminal sanctions to deceptive advertising could "result in unnecessary punishment if civil sanctions would achieve compliance with laws and regulations."[72] It also could serve to unduly restrict commercial messages and chill otherwise protected commercial speech, raising First Amendment concerns. Have federal prosecutors sought to perform a consumer-protection-oriented, gap-filling function in pursuing criminal charges springing from deceptive advertising? Or have federal prosecutions for advertising-related activity veered into a lane more appropriately occupied solely by the FTC?

Implications

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[67] Posner, *supra* note 52, at 76.
[68] *Id.* at 76-77.
[69] Geraldine Szott Moohr, *Playing With the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685, 688 (2011).
[70] *Id.* at 700.
[71] *Id.* at 688.
[72] *Id.* at 690.

The potential criminalization of deceptive advertising implicates the adequacy of regulatory (FTC) oversight and the proper balance between the free flow of information and the government's role in consumer protection. As a matter of public policy, should the aim be protection of the consumer? Or should the aim be punishment of the speaker? Is there a need for, and room for, both FTC and DOJ oversight on the deceptive advertising front? These issues have ramifications not only for the courts, who bear the burden of adjudicating challenged applications of that policy, but also for the orderly functioning of government, which must accommodate the convergence of competing interests and divisions of authority.

Overcriminalization

A related issue is growing public awareness and concern regarding overcriminalization. Overcriminalization refers to the potential for unsuspecting citizens to run afoul of multiplying, often obscure federal criminal codes or regulations.[73] It has been described as "[t]oo many crimes, too much punishment."[74] Like the double-jeopardy argument, the overcriminalization argument has failed to gain significant traction with courts considering whether to limit the application of federal fraud statutes on conduct perhaps more suited to noncriminal sanctions. In 1980, a federal appellate court stated:

> In the instant case, we are asked to construe two seemingly limitless provisions, the mail and wire fraud statutes, in the context of the employer-employee relationship. The government urges us to hold that these statutes are violated whenever an employee, acting to further a scheme for pecuniary gain, intentionally breaches a fiduciary duty of

[73] *See* Press Release, United States House Judiciary Comm., House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014) http://judiciary.house.gov/index.cfm/press-releases?id=2D73C6FD-DAEB-4DA0-B4B4-7A2F32BA784F (last visited Feb. 6, 2014) [hereinafter Press Release, House Judiciary Comm., Feb. 5, 2014].

[74] Moohr, *supra* note 69, at 686.

> honesty or loyalty he owes his employer. The defendant decries this "overcriminalization" of the employment relationship, and asks us to declare his alleged conduct exempt from criminal sanction. While we reject the sweeping theory advanced by the Government, we find that the mail and wire fraud statutes do reach the conduct with which the defendant is charged.[75]

Today, however, concern over overcriminalization extends beyond an individual defendant's attempt to fend off a felony conviction. On February 5, 2014—as the South Carolina car dealership owner and sales manager were awaiting a federal district court judge's approval of their plea deal—a bi-partisan, federal Congressional task force received authorization from the House Judiciary Committee to continue its assessment of overcriminalization in the federal system, which it had begun the year before.[76] According to the House Judiciary Committee:

> The Unites States Code currently contains some 4,500 federal crimes. Recent studies estimate that approximately 60 new federal crimes are enacted each year, and over the past three decades, Congress has averaged 500 new crimes per decade. In addition to the statutory criminal offenses, there are thousands of federal regulations that, if violated, can also result in criminal liability. Some of these new statutes have been accompanied by hundreds of thousands of implementing regulations—studies put the number at more than 300,000—many of which, if violated, can also result in criminal liability.[77]

Overcriminalization also encompasses the related ability for federal prosecutors to focus on individuals and then mine those codes and regulations for crimes with which to charge them. As Professor Reynolds describes it, rather than waiting to launch an

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[75] United States v. Von Barta, 635 F.2d 999, 1001 (2d Cir. 1980) (footnotes omitted) *abrogated by* Ingber v. Enzor, 841 F.2d 450, 455 (2d Cir. 1988).
[76] The committee, originally convened in May 2013, will examine the current federal criminal code and make recommendations for improvements. *See* Press Release, House Judiciary Comm., Feb. 5, 2014, *supra* note 73.
[77] *Id*.

investigation after finding Professor Plum dead in the conservatory, "authorities can instead start an investigation of Colonel Mustard as soon as someone has suggested he is a shady character."[78] The "broad, vague language" of the criminal code "invites the executive branch to argue, ex post, that an actor's conduct violated the provision."[79] In some cases, this process results from "mission creep,"[80] in which well-intended prosecutors, seeking to punish clear cases of bad or harmful conduct, make use of broadly written criminal statutes in ways not necessarily intended by Congress. The Supreme Court acknowledged this tendency in 2010 when it held a criminal statute to be in conflict with the First Amendment:

> Not to worry, the Government says: The executive branch construes § 48 to reach only "extreme cruelty," . . . and it "neither has brought nor will bring a prosecution for anything less." . . . But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. . . . This prosecution is itself evidence of the danger in putting faith in Government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret § 48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex. … No one suggests that the videos in this case fit that description."[81]

In addition, overcriminalization may occur when prosecutors' competitive instincts, coupled with almost blanket discretion and prosecutorial immunity, combine to

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[78] Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013), *available at* http://www.columbialawreview.org/ham-sandwich-nation_Reynolds.

[79] Moohr, *supra* note 69 at 689.

[80] Mission creep refers to "the gradual broadening of the original objectives of a mission or organization." *Mission Creep Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/mission%20creep (last visited July 13, 2014).

[81] United States v. Stephens, 559 U.S. 460, 480 (2010) (citations omitted), *superseded by statute*, 18 U.S.C. 48 (2010), *as recognized in* United States v. Richards, 13-20265, 2014 WL 2694225 (5th Cir. 2014).

shift the criminal statutes from their legislative moorings.[82] In 2002, a Federal District Court Judge criticized what he perceived as a tendency among federal prosecutors to seek a conviction at all costs, telling an audience of United States Attorneys, "[y]our office is perceived as acting like arrogant bullies who over-indict, always believe snitches, threaten defendants who seek release on bond, always seek to get the max and go for the jugular."[83] The same jurist also began refusing to accept most plea agreements because they forced criminal suspects to relinquish their rights to appeal and were, in his view, "unconscionable."[84]

Irrespective of a given prosecutor's motivation, a system that accommodates overcriminalization may be, as Larkin suggests, inefficient at best:

> If new statutes are merely copies of existing laws with different labels, they are, at best, prescriptions for inefficiency (maybe even useless), or, at worst, fraudulent. If they outlaw the same conduct but multiply the penalties, the punishments become grossly disproportionate to the harm they seek to avoid and empower prosecutors to stack charges against a defendant to coerce a guilty plea.[85]

Organization of Dissertation & Methodology

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[82] Competitiveness among federal prosecutors, who enjoy prosecutorial immunity, is a natural byproduct of a system that produces wins and losses and in which risk to prosecutors is low. Quoting Wu, Professor Reynolds describes "a popular game in the U.S. Attorney's Office for the Southern District of New York," in which senior prosecutors would challenge more junior prosecutors "to figure out a plausible crime for which to indict" famous people such as Mother Teresa or John Lennon. Reynolds, *supra* note 80 at 103. He notes, "since, as the game Wu describes illustrates, everyone is a criminal if prosecutors look hard enough, they are guaranteed to find something eventually." Reynolds, *supra* note 78*,* at 104.

[83] Gary L. Wright, *Federal Judge Raps Rules on Sentencing*, CHARLOTTE OBSERVER, May 29, 2006, at 1A.

[84] *Id.*

[85] Paul J. Larkin, Jr., Article, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 720 (2013).

This study commences with an examination of the Supreme Court's view of commercial falsehood (Chapter Two). Chapter Three looks at how other categorically exempt types of speech, including libel, incitement to violence and obscenity, have intersected with the First Amendment for lessons applicable to deceptive speech. Chapters Two and Three provide necessary context for appreciating FTC and DOJ enforcement mechanisms and authority, both of which are discussed in Chapter Four. Chapter Five presents specific findings with respect to the application of federal fraud statutes to advertising. A summary and recommendations follow in Chapter Six.

Throughout, unless the context suggests otherwise, the term advertising means a "paid, mass-mediated attempt to persuade"—a common industry definition—and is used as a synonym for "commercial speech." Similarly, the term "deceptive advertising" as used here means "deceptive commercial speech." It should be noted that from both an industry and legal perspective, however, advertising may convey either commercial or noncommercial messages. Similarly, speech conveyed by means other than advertising may be either commercial or noncommercial in nature. A politician's campaign advertising may be considered noncommercial, while a car manufacturer's claims about its manufacturing practices made in the editorial pages of a newspaper could be considered commercial. In this study, however, the term "deceptive advertising" is used as a synonym for "deceptive commercial speech."

The methodology employed here is standard legal analysis of case law and legal and social-scientific scholarship from juried law reviews and academic journals. Case law examined consists of opinions from the Supreme Court and Federal Courts of Appeals. Cases used were located and retrieved using the LexisNexis Academic and Lexis

Advance databases; articles were located and retrieved using LexisNexis Academic, Lexis Advance and Google Scholar. The citation style follows The Bluebook: A Uniform System of Citation, and features footnotes.

CHAPTER 2

FALSEHOOD AND THE FIRST AMENDMENT

The Supreme Court's commercial-speech jurisprudence is hierarchical. Atop that hierarchy is noncommercial speech, which, according to the Court, deserves maximum constitutional protection. Subordinate to that is commercial speech, which is deserving of lesser constitutional protection than noncommercial speech. A second divide also exists, where noncommercial falsehoods are viewed as largely protected while commercial falsehoods are viewed as largely unprotected. The ability of the Federal Trade Commission and Department of Justice to act against deceptive advertising and its purveyors owes in large measure to these relative relationships.[86] This chapter examines Supreme Court cases and doctrine to assess how these judicial divides came into being. Its relevance to this dissertation is in assessing the appropriate role, if any, of the First Amendment in the criminalization of deceptive advertising.

Part one presents a discussion of the Court's interpretation of First Amendment protection for deceptive noncommercial statements, a necessary predicate for appreciating its very different treatment of deceptive commercial claims. This part of the

[86] Notwithstanding Supreme Court indications that First Amendment protection extends somewhat to advertising claims that merely have "the potential to mislead," the FTC and federal appellate courts reviewing FTC action almost summarily have rejected arguments that the First Amendment in any way limits FTC regulatory power over either deception (inherently false claims) or deceptiveness (potentially misleading claims). Among the issues explored in Chapter Five is whether First Amendment arguments have been similarly dismissed in federal, criminal proceedings for fraud brought under the fraud statutes.

discussion begins with *New York Times v. Sullivan*[87], in which the Court considered falsehood by a speaker about another person. It concludes with *United States v. Alvarez*[88], in which the Court considered falsehood by a speaker about himself. Part two presents the Court's commercial speech opinions and their handling of falsity.[89]

A key criticism of the Court's commercial speech doctrine, and a challenge inherent in any discussion of this sort, is the difficulty in distinguishing between what is "commercial" and what is "noncommercial." The Court has described the line between ideological (e.g. noncommercial) and nonideological (e.g. commercial) speech as "impossible to draw with accuracy."[90] Even if bright lines of demarcation were discernible, technological innovations increasingly interfere with their ability to be perceived. For example, product placement and branded entertainment—both of which seamlessly incorporate commercial "advertising" messages into entertainment content—have been joined on the Internet by "native advertising" and "sponsored content," whose visual style and placement amid editorial content may create—and are designed to create—the impression it is something other than advertising.[91] Similarly, television programming and video-game action routinely incorporate commercial interests in ways that make them virtually indistinguishable from noncommercial content.

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[87] 376 U.S. 254.
[88] 132 S.Ct. 2537 (2012).
[89] Supreme Court cases addressing trademark infringement, which mislead by causing confusion among potential customers about the source of a good, are outside the scope of this discussion.
[90] Lehman v. City of Shaker Heights, 418 U.S. 298, 319 (1974) (Brennan, J., dissenting).
[91] In December 2013, the Federal Trade Commission held a one-day workshop on native advertising and sponsored content. *See Blurred Lines: Advertising or Content?—An FTC Workshop on Native Advertising*, FTC.GOV (Dec. 4, 2013), http://www.ftc.gov/news-events/events-calendar/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native.

Although the move toward blended content is a natural consequence of the legal "safe haven of noncommercial speech"[92]—Justice Brennan predicted "those who seek to convey commercial messages" likely "will engage in the most imaginative of exercises to place themselves within" the noncommercial safe haven—[93] other considerations have effectuated this shift, as well. Aside from the legal motivation to style their messages as noncommercial, contemporary advertisers are responding to changing media usage patterns in which consumers rely less and less on traditional media and increasingly on online sources for information. Changing media—namely, the use of the Internet and portable devices such as tablets and smart phones—have transformed the way consumers interact with advertisements. For example, *Advertising Age*, the industry trade magazine, has reported on studies suggesting that Internet users simply do not notice content displayed in website banners, irrespective of whether the content is commercial or noncommercial. The desire to try and overcome "banner blindness" on the part of Internet users has inspired native advertising and similar efforts by sellers to blend commercial messages with noncommercial ones.[94] *Techdirt*, an online technology blog with a policy orientation, has stated that the Internet is bringing about the end of the "captive audience" that formerly viewed "intrusive and annoying ads" whether they wanted to view them or not. Instead, the modern, online consumer "has billions of choices on what they can be viewing:"[95]

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[92] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 540 (1981).
[93] *Id.*
[94] Matthew Creamer, *Think Different: Maybe the Web's Not a Place to Stick Your Ads* ADVERTISING AGE, (March 17, 2008), http://adage.com/article/digital/web-s-a-place-stick-ads/125741/.
[95] Mike Masnick, *Advertising is Content; Content is Advertising*, TECHDIRT (Wed., Mar. 19th 2008, 12:10 PM),

> Advertising is content. … Content is advertising. … You can't think of ads as separate things any more. Without a captive audience, there's no such thing as "advertising" any more. It's just content. … Any content is advertising. It's advertising something. … Every bit of content advertises something, whether on purpose or not."[96]

Irrespective of the influences at work in the crafting of advertising messages that do not appear to be advertising messages, the commercial speech doctrine's existence puts governmental entities in the unfortunate, at best, position of making decisions about the content of speech.[97] In Justice Brennen's view, for example, even though the Court has "consistently distinguished between the constitutional protection afforded commercial, as opposed to noncommercial, speech," it would be incorrect to assume "that a governmental unit may be put in the position in the first instance of deciding whether the proposed speech is commercial or noncommercial. In individual cases, this distinction is anything but clear."[98]

Despite grappling with the definitional issue since early in its commercial-speech deliberations, the Court has yet to fully draw the contours of commercial speech. The certainties—such as they are—are limited to these: 1) Speech "in the form of paid commercial advertisement[s]" is not necessarily commercial speech, even though it "ha[s] commercial aspects or reflect[s] the advertiser's commercial interests."[99] 2) Speech that "does 'no more than propose a commercial transaction'" is commercial

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https://www.techdirt.com/articles/20080318/004136567/advertising-is-content-content-is-advertising.shtml.

[96] *Id*.

[97] Metromedia, Inc., 453 U.S. at 536 (Brennen, J., dissenting).

[98] *Id.*

[99] Bigelow v. Virgina, 421 U.S. 809, 809 (1975). *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); New York Times Co. v. Sullivan, 376 U.S. 254.

speech;[100] 3) Advertisements may contain both commercial and noncommercial elements; even advertisements with commercial elements may convey "information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity in, the subject matter…."[101] 4) Advertising "which 'links a product to a current public debate'" does not necessarily qualify for noncommercial status, particularly when that advertising contains misleading product information,[102] and 6) "[a] company has the full panoply of protections available [to individuals] to its direct comments on public issues."[103]

The definitional uncertainties include 1) Whether a speaker/seller of goods or services engages in commercial speech when it enters the public debate in defense of its own practices and processes,[104] and 2) Whether factual inaccuracies in such defensive speech may subject the speaker to liability "on the theory that its statements … might affect consumers' opinions about the business … and thereby affect their purchasing decisions."[105]

Matters are further complicated by the fact that "falsity" and "deception" also are not necessarily easily identified. Nor are their meanings necessarily synonymous. As will

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[100] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co., 413 U.S. at 385) [hereinafter Virginia Pharmacy].
[101] Bigelow, 421 U.S. at 822.
[102] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 68 (1983) (quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563 n. 5 (1980) [hereinafter Central Hudson].
[103] *Id*.
[104] *See* Nike, Inc. v. Kasky, 539 U.S. 654, 657 (2003).
[105] *Id.* The State of California has answered "yes" to both questions. To the disappointment of commercial speakers and legal scholars, the Supreme Court declined to opine about these definitions, leaving inconsistencies and uncertainty across the United States as to whether this type of speech is commercial or noncommercial for First Amendment purposes.

be discussed in Chapter Four, the FTC treats advertising claims that have the potential to deceive similarly to advertising claims that are factually false or that actually deceive. The Supreme Court, however, seems to have drawn a distinction between advertising claims that are "inherently misleading" or proven to have mislead, and those that are merely "potentially misleading." According to the Court, inherently false or proven false claims may be prohibited, but potentially misleading advertisements should be addressed via less restrictive means, such as "a requirement of disclaimers or explanation."[106] "Although the potential for deception and confusion is particularly strong … restrictions upon such advertising may be no broader than reasonable necessary to prevent the deception."[107] The Supreme Court has described the process of distinguishing deceptive from nondeceptive claims in advertising as something other than "simple and straightforward."[108] "[D]istinguishing deceptive from nondeceptive advertising in virtually any field of commerce," observed the Court, "may require resolution of exceedingly complex and technical factual issues and the consideration of … questions of semantics."[109]

If deceptive commercial speech may be readily subjected to criminal prosecution, the ability to distinguish commercial messages from noncommercial messages, and deceptive commercial messages from truthful messages, assumes even greater significance at a time when doing so is increasingly difficult. This combination of social and technological factors suggests it may be time for a reconsideration of the appropriate

[106] *In re* R.M.J., 455 U.S. 191, 203 (1982) (citing Bates v. State Bar of Arizona, 433 U.S. 350, 373 (1977)).
[107] *Id.*
[108] Zauderer v. Office of Disciplinary Council of the Sup. Ct. of Ohio, 471 U.S. 626, 645 (1985).
[109] *Id.*

scope of governmental action respecting deceptive commercial speech. While this Chapter does not seek to ultimately define "commercial" or "deceptive," it does seek to contribute to an enhanced understanding of the existing noncommercial-versus-commercial divide and its origins; such an understanding may aid in the development of prospective legal approaches—particularly those involving criminal sanctions—to deceptive advertising.

Noncommercial Falsehood

As noted previously, in the arena of noncommercial speech, the Court has rejected the notion that First Amendment protection extends only to truthful statements. In several early opinions, the Court hinted at some tolerance for government sanctions provoked by false, noncommercial statements. On one occasion, for example, it affirmed a speaker's conviction over a public speech that "misrepresented" the Government's motivations for "entering upon a war."[110] And Justice Holmes famously wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[111] On balance, however, the Court has been consistent in finding constitutional protection for noncommercial falsehoods. It has held that prior restraints upon speech are inappropriate for "the false as to the true"[112] and has written that the public should expect pleaders "in the realm of religious faith, and in that of political belief"[113] to resort "to exaggeration … and even to false statement."[114]

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[110] Gilbert v. State of Minnesota, 254 U.S. 325 (1920).
[111] Schenck v. United States, 249 U.S. 47, 52 (1919) (citing Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911)).
[112] Patterson v. Colorado *ex rel.* Att'y Gen. of Colo., 205 U.S. 454, 462 (1907).
[113] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).
[114] *Id.*

New York Times v. Sullivan

The foundation for the Court's approach to falsity is most clearly revealed in its 1964 *Sullivan* opinion,[115] whose reach has since extended beyond defamation into criminal libel statutes and the torts of false light invasion of privacy and intentional infliction of emotional distress.[116] In prescribing a fault standard of "actual malice" applicable to lawsuits brought by public officials over defamatory falsehoods relating to their official conduct,[117] the Court effectuated expansive protection for deceptive speech

[115] New York Times Co. v. Sullivan, 376 U.S. 254.

[116] *New York Times Co. v. Sullivan* arose over a full-page advertisement in *The New York Times* that described clashes between Alabama law enforcement officers and student civil-rights protestors at Alabama State College. The advertisement encouraged readers to lend financial support to civil-rights causes and carried the apparent endorsement of numerous citizens, many of them celebrities and notable civil-rights activists. It also contained what the Court described as statements that were "not accurate descriptions of events which occurred in Montgomery." *Id*. at 258. For example, "although the police were deployed near the campus … they did not at any time 'ring the campus,' and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied." *Id*. at 259. Moreover, the apparent endorsers had not given their permission for their names to be used. *See id*. at 260. In response to the advertisement, L.B. Sullivan, a Montgomery city commissioner responsible for supervising the police department, brought a defamation lawsuit against the newspaper and four clergymen whose names had appeared in the advertisement. *See id*. at 261. Defamation lawsuits allow individuals whose reputations have been harmed by a false publication or utterance to seek redress for the injurious falsehood. Sullivan prevailed on his libel claim in the Alabama state courts—his $500,000 damages award at trial was upheld by the Alabama Supreme Court—but the Supreme Court of the United States reversed after considering Sullivan's public-official status and the nature of the speech contained in the advertisement. *See id*. at 264–65.

[117] The actual malice standard allows a public plaintiff to win a lawsuit only if he or she can prove that a defamatory falsehood was published "with knowledge that it was false or with reckless disregard of whether it was false or not." *See* New York Times Co. v. Sullivan, 376 U.S. at 280. Because the actual malice standard places a significant proof burden on public-official and public-figure plaintiffs, its effect has been expansive protection for deceptive speech about people operating in the public sphere.

about those operating in the public sphere.[118] It also offered repeated justification for a First Amendment that protects noncommercial deception:

> [The First Amendment] does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered."[119]
>
> Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error.[120]
>
> Authoritative interpretation [] of the First Amendment['s] guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries of administrative officials—and especially one that puts the burden of proving truth on the speaker.[121]
>
> [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need to . . . survive."[122]
>
> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on the pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship."[123]

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[118] Two additional aspects of *New York Times Co. v. Sullivan* are relevant here. First, the Court rejected the argument that the speech contained in the ad was necessarily "commercial" because of its inclusion in a paid advertisement. *Id*. at 266. "The publication here was not a 'commercial' advertisement… It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id*. In holding that constitutionally protected statements "do not forfeit that protection because they were published in the form of a paid advertisement," the Court tied First Amendment protection to the function, rather than the form, of speech. *Id*.

[119] *Id*. at 271(quoting N.A.A.C.P. v. Button, 371 U.S. 415, 445 (1963)).

[120] *Id.* at 279 n.19 (quoting JOHN S. MILL, ON LIBERTY & CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 15 (Oxford: Blackwell 1947)).

[121] *Id.* at 271 (citing as comparison Speiser v. Randall, 357 U.S. 513, 525—526 (1958)).

[122] *Id.* at 272 (quoting NAACP v. Button 371 U.S. at 433).

[123] New York Times Co. v. Sullivan, 376 U.S. at 279.

These statements reveal a "public-purpose" interpretation of the First Amendment that almost certainly became part of the rationale for the commercial speech doctrine. Grounded in John Locke's seventeenth-century contract theory and advanced largely by Professor Meiklejohn, the public-purpose view of free expression regards it primarily as a tool of democracy.[124] The view that politically oriented speech is most valued fosters "the elaboration of a hierarchy of values"[125] doctrinally consistent with a First Amendment that accords lesser protection[126] to commercial speech:

> In the public-purpose view, commercial speech doctrine makes doctrinal sense. Indeed, the public-purpose view explains why strict scrutiny [to restrictions on commercial speech] is not appropriate. The easy extension of full First Amendment protection to corporate advertising disquiets. It seems to ennoble hucksters, cheapen political discourse, or both.[127]

These statements also reveal a reliance on the classic marketplace analogy that accompanies the public-purpose perspective. The marketplace analogy, rooted in in the words of Milton's Areopagitica[128] of the seventeenth century and Mill's On Liberty[129] two centuries later, conceives of ideas as competitors in a marketplace, battling for acceptance. Notwithstanding a recent suggestion that the marketplace model is actually

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[124] Meiklejohn noted that extra-legal theorizing has been present in many of the Court's contemporary First Amendment rulings, many of them "based on highly questionable and sharply conflicting views of underlying theory." Alexander Meiklejohn, *What Does the First Amendment Mean*, 20 U. CHI. L. REV. 461, 462 (1953).

[125] Darrel C. Menthe, The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United, 38 HASTINGS CONST. L.Q 131, 137 (2010).

[126] Lesser protection occurs in the degree of judicial scrutiny applied to regulations affecting commercial speech. Commercial speech restrictions are reviewed with intermediate scrutiny, while noncommercial speech restrictions must survive strict scrutiny in order to comport with the constitution.

[127] Menthe, *supra* note 125, at 137.

[128] *See* JOHN MILTON, *Areopagitica*, in COMPLETE PROSE WORKS OF JOHN MILTON, vol. 2, 561 (Ernest Sireluck ed., Yale University Press 1959).

[129] *See* JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947).

incompatible with the public-purpose perspective,[130] the traditional view has regarded the two models as interdependent, with the former enabling the latter. Ingber, for example, observes:

> The marketplace doctrine, once rooted in American jurisprudence, grew a new shoot that benefitted its new environment. In addition to its usefulness in the search for truth and knowledge, the marketplace came to be perceived by courts and scholars as essential to effective popular participation in government.[131]

Meiklejohn, the noted legal scholar of the twentieth century, was particularly devoted to the view that the Constitutional framers meant for the First Amendment to function as a tool of democracy. According to Meiklejohn, the First Amendment was intended not as an absolute bar to government restrictions on speech, but as a means to a democratic end.[132] His premise was that "the fundamental objective of democracy is the 'voting of wise decisions'"[133] that required access to information with which to make those decisions. Meiklejohn saw the First Amendment as an instrument by which the people exercised powers of "governing importance." He "argued that the people … granted only some powers to the federal and state instruments they established"[134] and reserved "very significant powers of government to themselves."[135] As a result, "[f]reedom of expression in areas of public affairs is an absolute."[136] Speech "that did not

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[130] *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1 DUKE L.J. 1 (1984).
[131] *Id.* at 3.
[132] Martin H. Redish and Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 Nw. U. L. REV. 1303 (2009).
[133] *Id.* at 1307.
[134] William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965).
[135] *Id.*
[136] *Id.* at 12.

relate to this self-government value"[137] should be excluded from First Amendment protection.[138]

Implicit in the Meiklejohn perspective is a belief that "truth (or the best perspectives or solutions)"[139] with respect to democratic issues is discoverable, and that in a competition with falsity, truth will emerge the victor—a belief articulated by both Milton and Mill. Milton wrote that attempts to aid the search for truth by curtailing or eliminating certain views were counterproductive and unnecessary:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?[140]

Similarly, Mill proposed that truth can emerge only if debate is robust and free from governmental interference:

> Defending this [classic marketplace of ideas] theory in On Liberty, John Stuart Mill argued that three situations are possible: 1) if heretical opinion contains the truth, and if we silence it, we lose the chance of exchanging truth for error; 2) if received and contesting opinions each hold part of the truth, their clash in open discussion provides the best means to discover the truth in each; 3) even if the heretical view is wholly false and the orthodoxy contains the whole truth, the received truth, unless debated and challenged, will be held in the manner of prejudice or dead dogma, its meaning may be forgotten or enfeebled, and it will in inefficacious for good. Moreover, without free speech, totally false heretical opinions which could not survive open discussion

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[137] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 592 (1982).
[138] *Id.* at 592. Professor Redish suggests that "Meiklejohn in later years appeared to soften the rigidity of his lines of demarcation by effectively extending his doctrine—in a somewhat less than persuasive manner—to many forms of apparently nonpolitical speech," namely artistic works, but that "other commentators have adopted his initial premise and kept within its logical limits."
[139] C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1978).
[140] MILTON, *supra* note 128.

> will not disappear; instead, driven underground, these opinions will smolder, their fallacies protected from exposure and opposition.[141]

This perspective clearly has influenced the Supreme Court's view of the relationship between truth, falsity and democratic values. In 1919—well before *New York Times v. Sullivan*—Justice Holmes wrote in dissent "the best test of truth is the power of thought to get itself accepted in the competition of the market."[142] In Holmes' view, "a properly functioning marketplace of ideas … ultimately assures the proper evolution of society, wherever that evolution may lead."[143] Although Holmes was in the minority in that 1919 opinion, Court observers see the marketplace analogy underpinning much First Amendment jurisprudence. Baker, a critic of the marketplace analogy, says the Court "steadfastly relies upon a marketplace of ideas theory in determining what speech is protected"[144] and its "constitutional analysis of defamation invokes Mill's marketplace of ideas theory to justify its conclusion."[145] These theoretical strains, clearly highlighted in *Sullivan*, appear to have shaped subsequent opinions[146] in which the Court has balanced

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[141] Baker, *supra* note 139, at 964–65.
[142] Abrams v. United States, 250 U.S. 616 (1919).
[143] Ingber, *supra* note 130.
[144] Baker, *supra* note 139, at 968.
[145] *Id.* at 972.
[146] *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 513 (1991); Hustler Magazine Inc. v. Falwell, 485 U.S. 46 (1988) (holding that in order to recover for the tort of intentional infliction of emotional distress, public officials or public figures such as the minister would have to show that the publication contains a false statement of fact was made with "actual malice," Minister who was the subject of a parody ad could not show actual malice because of jury determination that no reasonable person would believe the ad to be presenting true statements of fact.); Gertz v. Welch, 418 U.S. 323 (1974) (holding that the actual malice standard is appropriate for public-official and public-figures plaintiffs, but not private plaintiffs; public-figure plaintiffs, have greater access to communication channels and hence have a more realistic opportunity to counteract false statements); Time, Inc. v. Hill, 385 U.S. 374, 68 (1967) (holding that a plaintiff seeking to recover for false-light invasion of privacy must show the defendant had knowledge of the falsity or reckless disregard for the truth when the false report pertains to a matter of

speech and press interests with states' interests in protecting individuals and society from injurious falsehood.

United States v. Alvarez

Sullivan and its progeny concerned primarily falsehoods disseminated by a speaker about someone other than the speaker. More recently, the Court considered noncommercial falsity from the opposite perspective: the extent to which society may protect itself from alleged harm caused by individual speakers who disseminate falsehoods about themselves. Because of the source and nature of the falsehood—a self-promoting speaker communicating about his own putative military service—*United States v. Alvarez*[147] is perhaps more relevant to an analysis of deceptive commercial speech than the other noncommercial speech cases that preceded it. This is especially so in light of the fact that the Supreme Court has treated commercial speech differently in part because it is "more verifiable" than noncommercial speech. Presumably, speech by an individual about his own experiences and qualifications is equally, if not more, verifiable than speech by an organization about its own practices.

In *Alvarez*, the Court considered a challenge to the Stolen Valor Act[148] and whether the First Amendment protects speech in which someone falsely claims to have been awarded a military decoration or medal. It held that it does. The Court noted that it had never "confronted a measure, like the Stolen Valor Act, that targets falsity and

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public interest); Garrison v. Louisiana, 379 U.S. 64 (1964) (holding that the Sullivan rule also limits state power to impose criminal libel sanctions for criticism of the official conduct of public officials absent a showing of actual malice).

[147] United States v. Alvarez, 132 S.Ct. 2537 (2012).

[148] The Act made it a crime for anyone to "falsely represent … verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." Alvarez, a public official who falsely claimed to have been awarded the Congressional Medal of Honor, appealed his conviction on First Amendment grounds.

nothing more." Although the Court had "frequently said or implied that false factual statements enjoy little First Amendment protection,"[149] it characterized its precedents as having resisted singling out falsity for falsity's sake.[150] Instead, its previous decisions in which falsity was excluded from constitutional protection were intertwined with "some other legally cognizable harm associated with a false statement" such as defamation, fraud, invasion of privacy or "the costs of vexatious litigation."[151] The Court explained, "Falsity alone may not suffice to bring the speech outside the First Amendment." The Stolen Valor Act, it said, sought to invert *Sullivan's* speech-promoting principle and use it "for a new purpose. It seeks to convert a rule that limits liability … into a rule that expands liability in a different, far greater realm of discourse and expression:"[152]

> The requirements of a knowing falsehood or reckless disregard for the truth as the condition of recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not to blossom to become a rationale for a rule restricting it.[153]

The *Alvarez* Court, using a marketplace approach, highlighted the general function of counterspeech in a free society and its particular deployment as to *Alvarez*.[154] "The remedy for speech that is false is speech that is true," said the Court. "The Government has not shown, and cannot show, why counterspeech would not suffice to

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[149] Alvarez, 132 S.Ct. at 2553. (Breyer, J., joined by Kagan, J., dissenting.)
[150] In dissent, Justice Alito, joined by Justices Scalia and Thomas, asserted that "by holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." *Id.* at 2557.
[151] *Id.* at 2545.
[152] *Id.*
[153] *Id.*
[154] Alvarez, who had been exposed in the community as one who habitually lied, had been "ridiculed online," and had been asked to resign from his public office.

achieve its interest"[155] in seeking to protect the integrity of the Medal of Honor. "Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication."[156]

As these opinions illustrate, the Court has acknowledged a place in the marketplace of ideas for noncommercial falsehood. Speakers are given "breathing space" with respect to false statements about public officials, public figures and matters of public interest or concern, which are broadly defined. Constitutional breathing space also protects self-promoters who misrepresent themselves in their personal dealings; the appropriate remedy for such falsehood is speech that exposes or corrects the lie.

Commercial Falsehood

This contrasts sharply with the Court's view of commercial falsehood. Unlike politically oriented noncommercial speech—which has from the outset enjoyed the presumption of constitutional protection—commercial speech has been assigned a "subordinate position on the scale of First Amendment values"[157] and is "subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"[158] Although truthful commercial speech enjoys a measure of constitutional protection, commercial falsehood that transcends mere "sales talk" or "puffing"[159] has been viewed as altogether outside the scope of First-Amendment protection.

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[155] Alvarez, 132 S.Ct. at 2549.
[156] *Id.* at 2550–51.
[157] Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)).
[158] *Id.*
[159] The Supreme Court has defined "puffing" as a "magnification of opinion"—a "mere exaggeration of the qualities which the article has. The limits of puffing are transcended when the article sold "is not of the character or kind represented and hence does not serve

Valentine v. Chrestensen

Understanding this disparity first requires an examination of the Court's regard for commercial speech generally. The Court drew a bright-line distinction between commercial and noncommercial speech in 1942's *Valentine v. Chrestensen*,[160] in which it held constitutional protections for speech were meant to allow the communication of information and dissemination of opinion, but not the communication and dissemination of commercial messages. Although the Court eventually altered course and concluded "commercial speech, like other varieties, is protected,"[161] it has yet to completely abandon *Valentine's* lesser regard for commercial speech:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, although the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public throughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[162]

Valentine, which involved an entrepreneur's desire to distribute commercial handbills to generate tourism for a moored submarine in New York, is regarded as the origin of the commercial speech doctrine and it clearly set the stage for the doctrine's contemporary incarnation, which the Court began to define in 1975.[163]

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the purpose" for which it was purchased. United States v. New S. Farm & Home Co., 241 U.S. 64, 71 (1916). Puffery becomes fraud when it consists of "material representations. . . made with intent to deceive." Reilly v. Pinkus, 338 U.S. 269, 274–75 (1949).

[160] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[161] Virginia Pharmacy, 425 U.S. at 755.

[162] Valentine, 316 U.S. 52 at 54. Valentine was the first time the Court considered the constitutional implications of restrictions on commercial speech.

[163] *See* Bigelow, 421 U.S. 809.

Unlike its precursor, which viewed commercial speech as outside the scope of First Amendment protection, the modern commercial speech doctrine provides that truthful, non-misleading commercial speech is protected by the First Amendment and may be regulated only if the government can show a) it has a substantial interest in the regulation, b) the regulation at issue directly advances that substantial interest, and c) the regulation is narrowly tailored to further that substantial interest. .[164] Commercial falsehood is categorically unprotected.[165]

Critics and supporters of the commercial speech doctrine's lesser regard for commercial speech have questioned its legal and theoretical precedents and practical impact. It has been called "a doctrine in search of a theoretical justification,"[166] and "very much out of step with the rest of First Amendment law."[167] Baker, a supporter of the doctrine, has described it as "a major anomaly in first amendment theory"[168] and an "exception that has continually eluded theoretical justification."[169] Farber, a detractor, has said "commercial speech stubbornly declines to fit comfortably within our general rules of free speech,"[170] and the disparity in the Supreme Court's treatment of commercial speech creates "nagging questions:"[171] "If a political candidate can lie without fear of legal intervention, why can't a used car dealer?" In Farber's view, "judicial acceptance of

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[164] *See* Central Hudson, 447 U.S. at 566 (1980).
[165] *See Id.* Speech promoting unlawful activity also is categorically unprotected under the Central Hudson framework.
[166] Note, *Dissent, Corporate Cartels and the Commercial Speech Doctrine*, 120 HARV. L. REV. 1892, 1894 (2007).
[167] Menthe, *supra* note 128, at 133.
[168] C. Edwin Baker, *A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 2 (1976).
[169] *Id.*
[170] Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 373 (1979).
[171] *Id.*

such" is "fundamentally inconsistent with the scheme of values inherent in modern first amendment doctrine."[172] Kozinski and Banner, among the doctrine's most outspoken critics, have chided the *Valentine* Court for having seemingly "plucked the commercial speech doctrine out of thin air:"[173]

> Without citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating Chrestensen's contentions, the Court found it clear as day that commercial speech was not protected by the first amendment.[174]

Some of the harshest criticism has come from within the current Supreme Court. Justice Clarence Thomas, for example, regards the commercial speech doctrine as "paternalistic."[175] He believes strict judicial scrutiny[176] should apply to commercial-speech regulation, as it does with respect to protected noncommercial speech, and that "Americans' rights of free speech should be defended consistently, whether they are acting as citizens or consumers."[177]

Aside from the public-purpose perspective that encouraged a hierarchy of constitutional values, an additional contributing factor in the doctrine's development likely was the Court's view of advertising messages as something other than speech.

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[172] *Id.* at 379.
[173] Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 627 (1990).
[174] *Id.* at 628.
[175] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484.
[176] Strict judicial scrutiny requires the government to advance a "compelling interest" in the proposed restrictions on speech, as opposed a "substantial interest" required in commercial speech cases.
[177] Bruce Johnson, Online Symposium on Supreme Court Justice Clarence Thomas's First Amendment Jurisprudence: Justice Thomas and Commercial Speech (Oct. 8, 2007), *available at* http://www.firstamendmentcenter.org/justice-thomas-and-commercial-speech. Interestingly, Justice Thomas was in the dissent in *Alvarez*; he would have upheld the Stolen Valor Act as constitutional.

Even though the First Amendment was available in *Valentine* as a shield against state encroachment with respect to speech rights, the Court did not seem to regard advertising as speech at all. The Court's reasoning in *Valentine* "suggests quite strongly … that the Court conceptualized advertising as a business, not a means of expression."[178]

> In *Valentine*, therefore, the Court wasn't facing a case about commercial speech; it was facing a case about advertising. And it was one of the easiest cases the Court ever decided. … Thirteen days … was just about as fast as any case was ever decided. *Valentine* wasn't a case any of the Justices found necessary to dwell upon. … All this suggests that in 1942, the Justices considered the question whether the First Amendment has any application to advertising to be one that was easily resolved and not very important. Although the issue has never come up before, the Court disposed of it in a single paragraph containing no citations.[179]

Indeed, other advertising-related Court opinions of the period were reviewed not from a free-speech perspective, but from that of whether or not the government had exceeded its police powers. In 1932, for example, the Court dismissed an appeal by a dentist whose permit for a sign had been denied on the basis that the dental practice's corporate status, signaled by the abbreviation "Inc.," displayed in "diminutive type" underneath the dentist's name, amounted to a deceit.[180] The state appellate court had upheld the denial of the permit, agreeing with the local judgment that the "dimly discernible" corporate insignia was a type of fraud, the protection against which was "among the important functions of government."[181] According to the Supreme Court's

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[178] Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993).
[179] *Id.* at 757–58.
[180] Dr. Bloom, Dentist, Inc. v. Cruise, 259 N.Y. 358, 182 N.E. 16; 1932 N.Y. Lexis 951 (1932).
[181] *Id.*

order of dismissal, the dentist's appeal lacked "a substantial federal question"[182]—in other words, the sign didn't implicate "speech" rights. Two years later, in another case involving advertising by a dentist, the Court cited the role of local police powers in "the vital interest of public health."[183] It held states could prohibit advertising by licensed professionals "even though in particular instances there might be no actual deception or misstatement."[184]

The 1970s brought a retreat from *Valentine's* bright-line distinction between constitutional protection for noncommercial versus commercial speech. A deep constitutional divide remained, however, particularly where falsehood was concerned. In 1973, the Court indicated that non-discriminatory advertisements for job openings were constitutionally protected.[185] In 1974, it held that an advertisement for abortion services was constitutionally protected because it "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"[186]

Virginia Board of Pharmacy v. Virginia Citizens Consumer Council

By 1975, the Court's position on commercial speech appeared to have "been tempered"[187] sufficiently that a Federal District Court the next year struck down as unconstitutional a ban on the advertising of prescription drug prices. On appeal in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,[188] the Supreme Court confirmed its shift toward constitutional protection for commercial speech. It

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[182] *Id.*
[183] Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 612 (1935).
[184] *Id.*
[185] *See* Pittsburgh Press, 413 U.S. 376.
[186] Bigelow , 421 U.S. 809. This appeal was decided on the heels of Rowe v. Wade, the abortion-rights case.
[187] Virginia Pharmacy, 425 U.S. at 755. The lower court relied on the Court's holding in *Bigelow*, 421 U.S. 809. *See* Virginia Pharmacy, 425 U.S. at 755.
[188] 425 U.S. 748.

adopted the lower court's view "that First Amendment interests in the free flow of price information could be found to outweigh the countervailing interests of the State."[189] According to the Court, commercial information—prescription drug prices, in this instance—played a positive role in the functioning of society:

> 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. So long as we preserve a predominantly free enterprise society, 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.[190]

In arriving at that conclusion, the Court first ruled that First Amendment protection extended to the recipients of commercial information "and not solely, if at all, to the advertisers themselves who seek to disseminate that information."[191] It acknowledged a string of previous decisions that signaled a "'commercial speech' exception" to the First Amendment but pointed to its holding in *Bigelow v. Virginia*:[192] "Last Term, in *Bigelow v. Virginia*, the notion of unprotected 'commercial speech' all but passed from the scene."[193]

Notwithstanding the Court's shift toward a degree of constitutional protection for commercial speech, the notion of unprotected, *deceptive* commercial speech remained

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[189] *Id.* at 755.
[190] *Id.* at 765.
[191] Virginia Pharmacy, 425 U.S. 748.
[192] 421 U.S. 809. *Bigelow* concerned a newspaper editor's conviction for publishing an advertisement in Virginia for abortion services in New York. A Virginia statute prohibited such advertisements, but the Court found the ad's content included "factual material of 'clear public interest' that did more than "simply propose a commercial transaction."
[193] Virginia Pharmacy, 425 U.S. at 759.

very much on the scene. In both *Bigelow* and *Virginia Pharmacy*, the Court counseled that deceptive or fraudulent commercial messages would be treated differently. This was based in part on the Court's perception of two "common-sense differences" between commercial speech and noncommercial speech. One difference is that because commercial speakers are economically incentivized to speak, commercial speech is more durable than noncommercial speech;[194] commercial speakers are less likely to be deterred from speaking, even in the face of regulation aimed at assuring truthfulness. Another difference is that commercial speech is presumed to be more verifiable[195] than noncommercial speech; as a result, commercial speakers may be held to a higher standard of truthfulness.[196] It reiterated that "untruthful speech, commercial or otherwise, has never been protected for its own sake"[197] and "not all commercial messages contain the same or even a very great public interest element."[198] In searching for a public interest element, the Court seemed to turn to the underlying First Amendment theory employed in its analysis of noncommercial-speech cases. According to the Court, the First Amendment allows states to insure that the stream of commercial information flows "cleanly as well as freely,"[199] and states have "no obstacle"[200] to "dealing effectively with this problem" of false or deceptive commercial speech.[201] The Court restated this

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[194] *See Id.* at 748.
[195] *See Id.*
[196] Commentators have disputed the notion that commercial speech is either more durable or more verifiable. *See* Kozinski & Banner, *supra* note 176 *and* Schmidt & Burns, *infra* note 215.
[197] Virginia Pharmacy, 425 U.S. at 771 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Konigsberg v. State Bar, 366 U.S. 36, 49 (1961)).
[198] Virginia Pharmacy at 764.
[199] *Id.* at 772.
[200] *Id.* at 771.
[201] *Id.*

perspective—that false or deceptive commercial speech is unprotected—twice more[202] following *Virginia Pharmacy* before embedding it in a judicial test for determining the constitutionality of commercial-speech regulation.

Central Hudson Gas and Electric Corp. v. Public Service Commission of New York

Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,[203] decided in 1980, concerned a New York regulation banning regulated utilities from advertising in a way that would promote the use of electricity. The Court held that the advertising ban violated the First and Fourteenth Amendments because it "was more extensive than is necessary to serve the state interest in energy conservation."[204] It reasoned the total ban prevented the power company from "promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources."[205] *Central Hudson* remains an important Supreme Court opinion. It re-articulated the modern commercial speech doctrine[206] and prescribed a four-part test to be used by courts considering constitutional challenges to government restrictions on commercial speech. The four-part *Central Hudson* test addresses deceptive commercial speech at the outset:

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[202] *See* Bates, 433 U.S. 350; Ohralik, 436 U.S. 447.
[203] Central Hudson, 447 U.S. 557.
[204] *Id.* at 572.
[205] *Id.* at 570.
[206] The original commercial speech doctrine, established in *Valentine v. Chrestensen*, 316 U.S. 52, was that commercial speech was wholly outside the protection of the First Amendment. Central Hudson updated the doctrine by keeping misleading commercial speech on the sideline while clarifying the recognition of commercial speech as protected (per Virginia Pharmacy Board) if the government asserted a substantial interest likely to be advanced by a narrowly tailored regulation. In Central Hudson, the Court focused on its previous recognition of "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Id.* at 572, citing Ohralik, 436 U.S. 447.

> For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[207]

In separating "misleading" commercial speech from First Amendment protection, the Court referenced earlier opinions in which it recognized the "informational function of advertising"[208] and the importance of accuracy: "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."[209] The Court reasoned that advertising's potential role in allowing people to be adequately informed "to perceive their own best interests"[210] depends upon the veracity of the information presented. Consequently, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[211]

Virginia Board of Pharmacy and *Central Hudson* both emphasize the informational function of advertising as a means through which people can make well-informed decisions. This harkens the marketplace of ideas theory employed in the service

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[207] Central Hudson, 447 U.S. at 566. This multiple-step inquiry is known as the Central Hudson test and is used by courts to assess the constitutionality of restrictions on commercial speech. Originally, the third part of the inquiry was whether the regulation was "no more extensive than necessary to serve that interest." This was a "least-restrictive means test" that the court modified in 1989 in favor of a "narrowly drawn," "reasonable fit" approach. According to the Court, the commercial-speech doctrine's treatment of commercial speech as subordinate and subject to "ample" regulatory authority "would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State." Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 477, (1989) [herein after SUNY v. Fox].
[208] *Id.* at 563.
[209] *Id.* at 562 (citing Bates, 433 U.S. 350).
[210] Central Hudson, 447 U.S. at 562.
[211] *Id.* at 563.

of noncommercial speech. But as those opinions also show, the Court has stopped short of finding a legitimate place or role for falsity or deception in the commercial marketplace; it has continued to categorize deceptive commercial speech as constitutionally unprotected.

Despite the Court's "broadly stated" pronouncements about "the exemption of false and misleading commercial speech from the protections of the first amendment,"[212] few of the Court's commercial-speech cases have involved actual claims of or concerns about deception; only once has the Court repeated this statement in the context of speech which the Court found to be false or misleading and therefore unprotected.[213] Consequently, Court guidance regarding what constitutes false or deceptive commercial claims is scant. Four cases concerning lawyer advertising provided the Court an opportunity to consider deception in the commercial context and provide at least partial insight into its view of what is and is not deceptive.

Bates v. State Bar of Arizona

On the heels of *Bigelow* and *Virginia Pharmacy*, cases in which the Court signaled that deceptive or fraudulent commercial messages would be outside the First Amendment's protection, the Court considered a state's argument that lawyer advertising was inherently deceptive. *Bates v. State Bar of Arizona*[214] arose in 1977 after Bates and another attorney were temporarily suspended from practicing law because they had placed newspaper advertisements offering legal services at "reasonable fees" and which

[212] Richard M. Schmidt, Jr. & Robert Clifton Burns, *Proof or Consequences: False Advertising and The Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1282 (1988).
[213] *See Id.*
[214] Bates, 433 U.S. 350.

listed fees for certain services. [215] The State Bar cited concerns that price-related advertising by lawyers is necessarily misleading; legal services differ from client to client, meaning that prospective clients who subsequently learned that their cases were more complex and, therefore, more expensive, would have been misled by the lack of complete information contained in the ad.[216]

The Court determined that, despite shortcomings and imperfections, the advertising at issue—fixed-price advertising featuring the low end of the price scale for routine legal services—was not necessarily deceptive and lawyer advertising generally "may not be subjected to blanket suppression."[217] Initially, the *Bates* Court's reasoning regarding lack of deception in that case hinted at increasing protections for even false commercial speech. The opinion cast speakers and listeners as beneficiaries of an open marketplace of information that served substantial interests in the free flow of commercial speech. Consumers' potential naiveté, said the Court, was no reason to suppress commercial information that did not paint a complete picture as to every prospective consumer:

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the

[215] *See Id.* The advertisement violated a rule prohibiting such lawyer advertising, and the lawyers challenged the rule and their suspension on First Amendment grounds.
[216] *See Id.* It was argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.
[217] *Id.*

> information that flows to consumers. Moreover, this argument assumes that the public is not sophisticated enough to realize the limitation of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.[218]

In a footnote to the opinion, the Court also noted that certain types of potential transactions—such as the hiring of a lawyer—provided an opportunity for clarification of any potentially misleading advertising through face-to-face communication:

> We recognize that an occasional client might fail to appreciate the complexity of his legal problem and will visit an attorney in the mistaken belief that his difficulty can be handled at the advertised price. This misunderstanding, however, usually will be exposed at the initial consultation, and an ethical attorney would impose, at the most, a minimal consultation charge or no charge at all for the discussion. If the client decides to have work performed, a fee could be negotiated in the normal manner. The client is thus in largely the same position as he would be if there were no advertising. In light of the benefits of advertising to those whose problem can be resolved at the advertised price, suppression is not warranted on account of the occasional client who misperceives his legal difficulties.[219]

In this instance, the Court seemed poised to rule—as it had in *Sullivan* regarding false noncommercial speech—that the remedy for potentially false or misleading commercial speech was not regulation, but more speech. But it declined to uniformly

[218] *Id.* at 374-375.
[219] Bates, 433 U.S. at 373.

accord additional "breathing room" to false commercial speech, again referring to perceived differences between commercial and noncommercial speech—durability and verifiability—it had first delineated in *Virginia Pharmacy*. Moreover, the "public and private benefits" of commercial speech "derive from confidence in its accuracy and reliability."[220] Therefore, "advertising that is false, deceptive or misleading of course is subject to restraint"[221] and "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena."[222]

Bates provided the Court's first opportunity to evaluate a case involving commercial speech following *Virginia Pharmacy's* holding that commercial speech was protected. The informational function of advertising recognized in *Virginia Pharmacy* was present in *Bates*, the Court said. Also, *Bates* gave the shape to the Court's earlier pronouncements, made somewhat casually in *Bigelow* and *Virginia Pharmacy*, regarding false or deceptive commercial speech.

In Re R.M.J.

Five years after *Bates*, the Court considered *In Re R.M.J.*, another case in which a lawyer's advertisements ran afoul of the state board charged with regulating lawyer conduct, this time in Missouri. In ruling for the lawyer, the Court noted the *Bates* holding that lawyer advertising was a form of First Amendment-protected commercial speech that "'may not be subjected to blanket suppression,'"[223] but that false, deceptive or misleading advertising by lawyers "remains subject to restraint."[224] It re-stated its position regarding

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[220] *Id.* at 383.
[221] *Id.*
[222] *Id.*
[223] *In re* R.M.J., 455 U.S. at 199 (quoting Bates, 433 U.S. at 383).
[224] *Id*. at 200.

advertising for professional services, in which the consuming public is likely to have "comparative lack of knowledge:"[225]

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, … if the information also may be presented in a way that is not deceptive. Thus, … the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.[226]

In other words, said the Court, advertising that is potentially misleading, as opposed to actually misleading, should be addressed with calls for greater clarity in the form of disclaimers or more effective explanation. Only inherently false or demonstrably false advertising may be banned, and such was not present in that case.

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio

A decade after *Bates*, the Court heard *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*[227] and again provided feedback regarding deception.[228] The state regarded two lawyer advertisements as deceptive in several respects. First, the ads

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[225] *Id*. at 202.
[226] *Id*. at 203.
[227] 471 U.S. 626.
[228] *See Id. Zauderer* concerned an Ohio lawyer's newspaper advertisements for legal services. One advertisement focused on drunk driving; another on litigation related to the use of a contraceptive device. The drunk driving advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis, which was not allowed. The contraceptive-device advertisement gave information about health problems associated with the device and stated the availability of legal action against the manufacturer. It offered a similar fee arrangement to that in the first advertisement, and included an illustration of the device itself.

contained information about fee arrangements that failed to indicate clients would be responsible for litigation costs. Second, one of the ads contained illustrations, whose very nature created "unacceptable risks that the public will be misled, manipulated, or confused."[229] The Court agreed that the contingent-fee information was potentially misleading, because a layman may not be aware of the distinction between "legal fees" and "costs."[230] The appropriate remedy, said the Court, was the reasonable addition of clarifying disclosure language:

> [W]e have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "[warnings] or [disclaimers] might be appropriately required … in order to dissipate the possibility of consumer confusion or deception." … We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.[231]

As for the potential of advertising visuals to mislead, the Court was "not convinced"[232] that a prophylactic ban on the use of pictures or illustrations was the appropriate course:

> [A]cceptance of the State's argument could be tantamount to adoption of a principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements, may, under some circumstances, be deceptive or manipulative. … We are not persuaded that the identifying deceptive or

[229] *Id.* at 648.
[230] *Id.* at 652.
[231] *Id.* at 651.
[232] Zauderer, 471 U.S. at 648.

> manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forego that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations.[233]

Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy

Finally, in *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*,[234] the Court considered a Florida lawyer's challenge to a disciplinary action filed by the state board responsible for the regulation of accountancy and accountants. Even though the lawyer was not practicing as an accountant, her law-services advertising mentioned (truthfully) that she was both a Certified Public Accountant (CPA) and a Certified Financial Planner (CFP). According to the accounting board, the advertising was misleading because it implied that in providing the advertised services, she was subject to the regulations governing the practice of accounting. The Court ruled in the lawyer's favor, reiterating that proof of actual harm is required to justify interfering with the valuable free flow of commercial information: "The State's burden is not slight … 'Mere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[235]

The commercial speech doctrine and its lesser protections for commercial speech have attracted considerable study and commentary, both positive and negative. Among those examinations, only a few have addressed the issue of constitutional protection for deceptive commercial speech. In 1979, Reich plotted a social and economic framework to

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[233] *Id.* at 649.
[234] 512 U.S. 136 (1994).
[235] *Id.* (citing Zauderer, 471 U.S. 626; Edenfield v. Fane, 507 U.S. 761 (1993)).

serve "as a starting point from which to develop standards for judicial review of governmental efforts to prevent deception."[236] He conceived of an approach in which courts—or, perhaps more appropriately, legislative bodies—weigh the social usefulness of commercial information against the costs of deception. In 1988, Schmidt and Burns proposed an approach to false commercial speech that mirrored, to some extent, the Court's approach to noncommercial falsehood in *Sullivan*:

> [t]he first amendment should be read to limit regulation of false advertising to (1) explicit misrepresentations or (2) implicit misrepresentations (a) where the advertiser knew that the advertising had misleading implications; (b) where the advertiser should have known that it had such implications by virtue of a trade rule clearly proscribing the terminology or practice giving rise to such misleading implications; or (c) where the agency submits valid consumer survey evidence indicating that consumers were in fact misled. [237]

According to Schmidt and Burns, false commercial speech should be treated similarly to false noncommercial speech in some instances. They write, "uncertainties in the federal regulation of advertising chill legitimate commercial speech and … even some false and misleading speech should be protected to provide breathing room for legitimate commercial speech."[238] Howard and Menthe each have recommended doing away with the commercial speech doctrine. The former proposes instead a "relational framework" that examines a regulation's impact on protected speech, the nature of the speech affected, and the justification for protecting a listener's reliance on the regulated speech.[239] The latter favors a regulatory regime "tied more closely to fraud protection,"

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[236] Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 805 (1979).
[237] Schmidt & Burns, *supra* note 212, at 1274.
[238] *Id.*
[239] *See* Howard, *supra* note 5, at 1093.

with proper plaintiffs being "those who can demonstrate some reliance on" falsehoods by corporations or individuals "about their business practices."[240] Aside from these few attempts to focus on noncommercial falsehood, the disparity between the Court's treatment of noncommercial and commercial falsehood is entrenched and largely unquestioned.

Summary

Noncommercial falsehood is largely First-Amendment protected, while commercial falsehood is categorically excluded from protection. Unlike other unprotected categories of speech—libelous speech, inciting speech and obscene speech, which will be discussed in Chapter Three—there is no established judicial test or framework for identifying commercial fraud. Nor is there clarity or consensus regarding applicable terminology. In *Alvarez*, decided in 2010, the Supreme repeated the proposition that "fraud" is categorically excluded from First Amendment protection, but a return to several other cases summarized in this chapter reveals ambiguity as to what is meant by commercial "fraud." In *Alvarez*, the Court cited *Virginia Pharmacy Board*, decided in 1976, as precedent for "fraud" as an excluded category of speech. In *Virginia Pharmacy*, however, decided in 1976, the Court used the terms "false or misleading" and "untruthful" to describe the type of commercial speech with which a state is free to deal "effectively."[241] Elsewhere the terms "deceptive" and "inaccurate" are used seemingly synonymously with "false," "misleading," and "untruthful."[242]

In between *Virginia Pharmacy Board* and *Alvarez*, the Court introduced a distinction between "actually misleading" advertising and that which is only "potentially

[240] Menthe, *supra* note 125, at 166.
[241] Virginia Pharmacy, 425 U.S. at 772.
[242] *Id.*

misleading,"[243] holding that only inherently or demonstrably ("actually") false advertising may be banned.[244] Fraud, then, has been categorized as unprotected, but ambiguity exists as to what fraud means. Is it deceptiveness, as the FTC has said, or deception? Does fraud mean advertising claims that are potentially deceptive—as in, an ad claim could be deceptive, depending on how it is perceived? Or does fraud mean advertising claims that are actually deceptive—as in, the ad claim is actually misleading because it is factually incorrect and consumers have, in fact, been deceived?

Given the Court's caution against outright bans when disclaimers or the addition of clarifying language would serve the state's interests, a logical reading would be that the categorical exemption for fraud is meant to include only actually deceptive claims. If that is the case, constitutional protection may extend to commercial claims that are potentially deceptive but not actually so.

As noted at the outset, the potential criminalization of commercial speech deemed deceptive raises the constitutional stakes. The continuing blurring of the lines between what is commercial and what is not, and the difficulty inherent in determining what is deceptive and what is not, may necessitate a reconsideration of the constitutional chasm between noncommercial and commercial falsehood. At the very least, this reality merits a broad-view look at the current state of civil and criminal schemes of redress that pauses to consider both the general purpose and meaning of the First Amendment and specific Supreme Court precedent regarding falsity. The following chapters offer a first attempt at such.

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[243] In Re R.M.J., 455 U.S. 191.

[244] It also reiterated that "flat prohibitions" designed to "dissipate the possibility of consumer confusion or deception" are more likely to chill protected commercial speech than are reasonable disclaimer or disclosure requirements.

CHAPTER 3

THE FIRST AMENDMENT & UNPROTECTED CATEGORIES OF SPEECH

Rejecting an absolutist view[245] of the First Amendment, the Supreme Court has adopted an expansive definition of "speech." Rather than insisting that only spoken or written ideological speech about matters integral to democracy be considered speech, court opinions have expanded the definition of speech to include "expressive conduct"—flag burning, for example—and of course, as seen in Chapter Two, nonideological, commercial speech. In keeping with this non-absolutist view, the Court also has said that liberty of speech and of the press is not an absolute right. When the right is or may be improperly exercised, governmental actors may attempt to prevent or punish its abuse.[246] Therefore, despite the First Amendment's "shall not abridge" command, some abridgments on speech are compatible with the Constitution.

Abridgements on speech take the form or either prior restraints or punishment after the fact. (See Figure 3.1) Prior restraints are imposed before the expression makes its way into the public discourse and are designed to keep it from doing so. Prior restraints (sometimes called previous restraint) are "administrative and judicial orders forbidding certain communications when issued in advance of the time that such

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[245] The absolutist view is that the First Amendment means what it says. It often is associated with Justice Black, who believed the "no abridging" language meant exactly that. "Neither as offered nor as adopted is the language of this Amendment anything less than absolute." Hugo L. Black, *The Bill of Rights*, 35 NYU L. Rev. 865, 874 (1961).
[246] *See* Near v. Minnesota, 283 U.S. 697 (1957).

communications are to occur."[247] They are "the essence of censorship."[248] Classic examples of prior restraints, according to the Court, are "temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities."[249] Licensing requirements imposed by the government also may act as prior restraints,[250] as may attempts to attack future speech in retribution for a speaker's past transgressions.[251] Past transgressions, however, may invite their own, subsequent punishment.

According to the Court, the First Amendment's "chief purpose" is to "prevent previous restraints upon publication."[252] Two opinions, *Near v. Minnesota*[253] and *New York Times Co. v. United States*,[254] are most often cited for the proposition. In *Near*, decided in 1931, the Court invalidated a lower court order permanently enjoining a newspaper publisher whose publication contained articles found to have violated a state nuisance statute. The statute allowed "malicious, scandalous or defamatory" publications to be permanently barred, which the Court found contrary to the First Amendment:

> The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent

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[247] Alexander v. United States, 509 U.S. 544, 544 (1993). Particularly frowned upon are prior restraints on the press, especially when the press is critiquing the performance of public officials. In such situations, prior restraints clearly conflict with the First Amendment's guaranty.
[247] Alexander, 509 U.S. at 550 (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, p. 4–14 (1984)).
[248] Near v. Minnesota, 283 U.S. at 713.
[249] Alexander, 509 U.S. at 550
[250] *See Id*. at 569 (Kennedy, J., dissenting)
[251] *See Id*. at 570 (Kennedy, J., dissenting) (citing Near v. Minnesota, 283 U.S. at 705).
[252] Near v. Minnesota, 238 U.S. at 713.
[253] 283 U.S. 697.
[254] 403 U.S. 713 (1971). This case, which concerned publication of the "History of U.S. Decision-Making Process on Viet Nam Policy," is commonly referred to as The Pentagon Papers case.

> punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.[255]

In *New York Times v. United States*, the Court rebuffed efforts by the Federal Government to enjoin publication of excerpts of the Pentagon Papers, a classified study on the conduct of the Vietnam War. The Court noted, "any system of prior restraints of expression comes to the Unites States Supreme Court bearing a heavy presumption against its constitutional validity."[256]

Post-Publication Punishment

Punishment after publication allows the speech into the public discourse but holds the speaker accountable for any harm caused by its dissemination. The Supreme Court has referred to "the time-honored distinction between barring speech in the future and penalizing past speech." Its own decisions, the Court has noted, "have steadfastly preserved the distinction between prior restraints and subsequent punishments,"[257] clearly preferring the latter to the former. As Justices White and Stewart stated in concurrence in the Pentagon Papers case,

> The Criminal Code contains numerous provisions potentially relevant to these cases. … If any material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.[258]

It has been argued—unsuccessfully—that because of their potential to deter if not eclipse future speech, post-speech penalties operate in fact as unconstitutional prior

[255] Near v. Minnesota, 283 U.S. at 721.
[256] New York Times v. United States, 403 U.S. 713, 714 (1971).
[257] Alexander, 509 U.S. at 553-54.
[258] New York Times v. United States, 403 U.S. at 735–36. (White, J., concurring).

restraints rather than a permissible post-publication punishment.[259] For example, the seizing of assets, such as equipment and supplies, that makes it difficult, if not impossible, to speak in the future is not a prior restraint if the seized assets were derived from some past criminal conduct.[260]

Unprotected Speech May be Banned or Punished

Both prior restraints and post-publication punishment are constitutionally tolerable when it comes to false commercial speech and several other categories of speech designated by the Court as being outside the scope of First Amendment protection. The rationale underlying this "categorical approach" to interpreting the First Amendment is that some types of speech lack redeeming social importance,[261] are removed from any exposition of ideas,[262] or present some grave and imminent threat that the government has the power to prevent.[263]

Three excluded categories of speech, namely libelous speech, advocacy speech intended to incite imminent lawlessness, and obscene speech are particularly relevant to this research because of their interaction with criminal penalties. Also, for each of these categories, the Court has produced a test or framework of evaluation that may be useful in considering criminal sanctions for deceptive advertising. Each of these three categories of speech is discussed below.

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[259] *See* Alexander, 509 U.S. at 550.
[260] Alexander, 509 U.S. at 553.
[261] *See* Miller v. California, 413 U.S. 15, 20 (1973).
[262] *See Id*.
[263] *See* Near v. Minnesota, 283 U.S. at 716.

Libel

Libelous speech[264] is speech that conveys false statements of fact harmful to reputation. Provided states observe the constitutional limitations of *New York Times v. Sullivan*, they are free to treat libel as a civil harm, a criminal act, or both. All states permit private, civil lawsuits as a means of redress for libel. Many states, however, have eliminated criminal libel statutes or leave them on the books, unenforced.

Criminal libel statutes traditionally were based not on concern for protecting individuals' reputations as much as protecting the public from potential violence or retaliation that may result. In essence, criminal libel traditionally was about disturbances to the peace, not unlike punishment for "fighting words."[265] In states where criminal libel statutes remain active, however, the breach-of-peace rationale has tended to be replaced with a focus on punishing speech that calls into question someone's character.[266] In most states, therefore, criminal libel statutes are motivated by and address the same individual, reputational concerns as civil lawsuits but allow for potential criminal charges brought on behalf of the state.

Although it has not declared criminal libel laws to be unconstitutional, the Supreme Court has expressed reservations about criminal libel based on concerns for

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[264] Libelous speech—defamation in written or broadcast form—is false statements of fact that harm another's reputation. As discussed in Chapter Two, the ease or difficulty with which a plaintiff may win a libel lawsuit depends on the status of the plaintiff. Public officials must show the defendant published the libel with "actual malice."

[265] Fighting words are words likely to provoke. They lack constitutional protection not because of their content per se, but because the person(s) to whom they are directed are likely to be provoked into a violent response. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[266] *See* Fitts v. Kolb, 779 F.Supp 1502, 1509 (D.S.C. 1991).

breaches of the peace. According to the Court, to avoid criminal liability for libel, speakers are required to divine how another party may react to the speech. Making an offense of conduct because of its potential to disturb the peace "involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se."[267] Not only is such an appraisal nearly impossible to make, "this kind of criminal libel 'makes a man a criminal simply because his neighbors have no self control and cannot refrain from violence.'"[268] In other words, said the Court, "audiences," not speakers, "are legally responsible for their reactions to speech."[269]

In addition, shortly after having established the actual malice standard for civil libel in *New York Times v. Sullivan*, the Court extended the standard to criminal libel, ruling that proof of actual malice was required when the alleged libelous remarks concern a public official's performance of public duties.[270] Applying that standard in 1991, a Federal District Court in South Carolina declared that state's criminal libel statute to be overly broad, vague and ultimately unconstitutional because it did not require a finding of "actual malice." By relying on the lower threshold of common-law malice, the statute impermissibly restricted protected speech.[271]

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[267] Ashton v. Kentucky, 384 U.S. 195, 200 (1966).
[268] *Id*. (quoting CHAFEE, FREE SPEECH IN THE UNITED STATES 151 (1954)).
[269] Gregory C. Lisby, *Criminal Libel*, FIRSTAMENDMENTCENTER.ORG (Tuesday, April 18, 2006), http://www.firstamendmentcenter.org/criminal-libel.
[270] *See* Garrison v. Louisiana, 379 U.S. 64 (1996).
[271] *See* Fitts v. Kolb, 779 F.Supp at 1513–14 (holding that S.C. CODE ANN § 16-7-15 is unconstitutionally overbroad). The statute remains, unaltered, as part of the criminal code in South Carolina, but has not been evoked since.

Despite clear constitutional infirmities, a number of states maintain enforceable criminal libel statutes.[272] An argument in favor of criminal libel is that it enables the states to assume some of the burden of holding speakers accountable, particularly where anonymous, online speech is concerned. The time and resources required to unmask the identity of those responsible for posting the libel may be prohibitive, and many private citizens who have suffered genuine harm may not have the wherewithal to pursue civil lawsuits.

Critics of criminal libel point to contemporary applications of the law designed "to intimidate the young and politically inexperienced,"[273] such as a prosecution in Utah over a high-school student's website "laced with obscenities and vulgar accusations" about the principal, teachers and other school personnel and students. The student was arrested and, without having been convicted of a crime, spent seven days in juvenile detention:[274]

> The problem with the crime of libel is, first, that it is too often used as a device for punishing criticism of those who direct the conduct of government—the so-called "best man"—and, second, that it does not promote or protect speech bearing even a tangential relationship to the requirements of self-government. It instead creates a "chilling effect" that makes speakers less likely to speak or criticize government in the future.[275]

The appropriateness of criminal libel statutes is a function of the effectiveness of alternative civil remedies and the detrimental effects of criminal libel enforcement on free

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[272] For a state-by-state compilation of criminal-libel statutes, see Bill Kenworthy and Beth Chesterman, *Criminal-libel statutes, state by state*, FIRSTAMENDMENTCENTER.ORG http://www.firstamendmentcenter.org/criminal-libel-statutes-state-by-state.
[273] Lisby, *supra* note 273.
[274] *See Id.*
[275] *Id.*

speech. In some jurisdictions, both criminal and civil penalties are among options for dealing with false speech harmful to reputation.

Speech Inciting Imminent Lawlessness

Given the First Amendment's clear protections for ideological speech, it follows that advocacy speech, even that which advocates violence or criminal conduct, is similarly protected. Truly threatening speech, however, is categorically excluded from constitutional protection. A challenge for regulators and courts is determining when mere advocacy ends and true threats to public safety begin. In 1969, the Supreme Court devised a test to help lower courts distinguish between mere advocacy and incitement to violence. In *Brandenburg v. Ohio*, the Court reviewed an Ohio statute that "by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."[276] The Court stated that, in light of First Amendment principles, mere advocacy may not be curtailed. "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation" except where such advocacy is 1) directed to inciting or producing imminent lawless action and 2) is likely to incite or produce that action.[277]

The temporal element present in the *Brandenburg* incitement test is significant; the passage of time between the speech and any ensuing "bad acts" by the listener means the undesirable conduct will not be imputed to the speaker. Only "immediate evil" coupled with "intent to bring it about,"[278] warrants government intervention.

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[276] Brandenburg v. Ohio, 395 U.S. 444, 435 (1969).
[277] *Id.* at 448.
[278] *Id.* at 452.

Obscene Speech

Obscenity as an unprotected category of speech frequently has met with both prior restraints and post-publication punishment in the form of state and federal criminal sanctions. In this context, obscenity refers not to foul language, but to hard-core sexual content—something more extreme than pornography, which is constitutionally protected.[279] A more appropriate term may be "hardcore pornography," but the Court has adopted the term "obscenity" to mean hardcore pornography and distinguish it from "regular"[280] pornography. Despite obvious differences, deceptive advertising and obscenity, as legal concerns, share certain similarities. Obscenity is difficult to define with precision. The line between sexual content that is merely pornographic—and therefore constitutionally protected[281]—and sexual content that is hardcore and extreme—and therefore unprotected—is "not straight and unwavering."[282] Justice Potter Stewart famously wrote of obscenity, "I know it when I see it."[283] And Justice Harlan wrote of "the intractable obscenity problem."[284] In addition, obscenity, like deception, may be in the eye of the beholder. As Chief Justice Warren stated, "Present laws depend largely upon the effect that the materials may have upon those who receive them. It is

[279] Profane speech is constitutionally protected, as is non-hardcore pornography and indecency. Indecent speech, however, may face heightened regulation when disseminated on radio or television using the broadcast spectrum.
[280] Whatever that is.
[281] Constitutional protection for pornography concerns only pornographic material of and concerning adults; child pornography, like obscenity, is categorically unprotected speech.
[282] Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring)
[283] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[284] Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part & dissenting in part).

manifest that the same object may have a different impact, varying according to the community it reached."[285]

The existence of a legal distinction between protected and unprotected sexual content requires the disseminator to be responsible for not only the speech itself, but for consumers' reception and processing of it. In that respect, obscenity laws also are like criminal libel statutes based on breach of the peace—they make the speaker responsible for consumers' reactions to the speech.

The Supreme Court has struggled with how to properly define obscenity, but never with the notion that obscenity—however defined—is unprotected speech. It formally said so in 1957's *Roth v. United States*, in which two businessmen questioned the constitutionality of a federal criminal obscenity statute under which they had been convicted:

> The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented in this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.[286]

Roth, then clearly established that obscenity is without First Amendment protection. Moreover, its unconstitutional status properly subjects it to federal criminal statutes.

In *Roth*, the Court also began to give shape to a working, legal definition of obscenity. As a starting point, the *Roth* Court noted the distinction between sex and

[285] Roth, 354 U.S. at 496 (Warren, C.J., concurring).
[286] Roth, 354 U.S. at 481.

obscenity. Sex, often portrayed in art, literature and scientific works, "is a great and mysterious motive force in human life … it is one of the vital problems of human interest and public concern."[287] Obscenity, in contrast, is material "which deals with sex in a manner appealing to prurient interest."[288]

Within the decade, the Court again considered obscenity. Unlike *Roth*, where the Court was asked to determine the constitutionality of obscene material, the appellant in *Memoirs v. Attorney General of Massachusetts*[289] challenged a state-level determination that the book at issue was obscene. Applying factors including an "utterly without redeeming social value" standard, the Court said it was not obscene. Because, in the Court's estimation, the book had artistic and literary value, it could not be adjudged to be without social importance and undeserving of constitutional protection.

In 1973, the Court devised a more nuanced test for identifying obscenity that remains in effect today. In *Miller v. California*, the Court considered an appeal from a conviction under a California obscenity law. Noting its inability "to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation,"[290] the Court articulated a three-part test to "confine the permissible scope of such regulation to works which depict or describe sexual conduct."[291] The test essentially designates "hardcore" pornography as obscene:

1. Whether the average person, applying contemporary community standards, would find that the material,

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[287] *Id.* at. 487.
[288] *Id*.
[289] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Att'y Gen. of Mass., 383 U.S. 413 (1966). The work was commonly known as "Fanny Hill."
[290] Miller v. California, 413 U.S. at 22.
[291] *Id.* at 24.

taken as a whole, appeals to the prurient interest in sex;

2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;

3. Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[292]

Acknowledging the flexibility in the *Miller* test and the resulting lack of a clear, national standard,[293] the Court expressed satisfaction that the test's provisions would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution:"[294]

Summary

With the exception of deceptive advertising, the unprotected categories reviewed here each have been aided by the development of a framework that operates to limit restrictions on speech that may conflict with First Amendment safeguards. With libel, the actual malice standard helps protect noncommercial speech about public officials and figures. With potentially inciting speech, a lack of imminence allows advocacy speech to cycle freely. With obscenity, a three-part evaluation relying on community standards applied to works in their entirety protects a significant amount of sexually explicit material. Though very different from deceptive commercial speech in terms of content, these unprotected categories may offer insight into the constitution's optimal operation

[292] *Id*.
[293] According to the Court, "fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our nation is too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states to a single formulation, even assuming the prerequisite consensus exists." *Id*. at 30.
[294] *Id*. at 27.

with respect to deceptive commercial speech. The regulation of deceptive advertising lacks a similar constitutional foil, which as Chapter Four will discuss, allows the FTC and DOJ to operate freely to address it.

CHAPTER 4

FEDERAL CIVIL AND CRIMINAL REMEDIES AND PENALTIES

The Federal Trade Commission (FTC) and Department of Justice (DOJ) employ a number of civil and criminal sanctions in the name of protecting consumers from commercial deception. This chapter examines them. It begins with an outline of FTC practices and procedures and the Commission's view of legally actionable advertising deception; it concludes with an examination of DOJ authority and procedure and an outline of relevant criminal statutes. Such an examination provides necessary background and context for Chapter Five, which looks more specifically at the criminal law's interaction with advertising.

Civil: The FTC and Consumer Protection

The FTC, described as "the heart of federal protection of consumers against abusive advertising practices,"[295] is a civil law-enforcement agency and the sole federal agency with general jurisdiction over consumer fraud.[296] Headquartered in Washington, D.C., the Commission employs more than 1,100 employees across the United States.[297] Five Commissioners, chosen by the President and confirmed by the Senate, each serve

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[295] BENDER 2 THE LAW OF ADVERTISING §15.03.

[296] Other federal agencies, including the Food and Drug Administration and the Federal Communications Commission, also regulate advertising, but the FTC is the primary federal regulator with authority over advertising.

[297] *The Federal Tade Commission's (FTC) Mission*, FTC.GOV, http://www.ftc.gov/system/files/documents/reports/2013-one-page-ftc-performance-snapshot/2013snapshotpar.pdf.

seven-year terms.[298] The FTC's Bureau of Consumer Protection, one of nine bureaus, is mandated "to protect consumers against unfair, deceptive, or fraudulent practices."[299] In contrast to criminal proceedings, which name individuals as defendants, FTC civil actions target entities. For example, Acme Corporation may be the subject of an FTC proceeding, but any criminal charges arising from Acme's operation would be brought against corporate officers or other employees in a position of authority or control.

The Bureau maintains seven divisions, several of which focus on commercial deception. In particular, the Division of Advertising Practices acts to protect consumers "from unfair or deceptive advertising and marketing practices that raise health and safety concerns, as well as those that cause economic injury."[300] The Division of Marketing Practices acts to "stop scams; prevent fraudsters from perpetuating scams in the future, freeze their assets; and get compensation for scam victims."[301] The Division of Enforcement litigates civil contempt and penalty actions "to enforce federal court injunction and administrative orders in FTC consumer protection cases."[302] The

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[298] The FTC Chairperson is selected by the President. Only three commissioners may be from the same political party.

[299] *Bureaus and Offices*, FTC.GOV, http://www.ftc.gov/about-ftc/bureaus-offices (last visited July 15, 2014).

[300] *Division of Advertising Practices*, FTC.GOV, http://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices (last visited July 15, 2014).

[301] *Division of Marketing Practices*, FTC.GOV, http://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-marketing-practices (last visited July 15, 2014).

[302] *Division of Enforcement*, FTC.GOV, http://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-enforcement (last visited July 15, 2014).

Enforcement Division also maintains the Criminal Liaison Unit "to encourage criminal prosecution of consumer fraud."[303]

With a few exceptions, FTC authority extends to people, partnerships and corporations "engaged in or whose business affects commerce."[304] As such, the FTC has federal rule-making authority to issue industry-wide regulations; investigative authority over law violations by individuals and businesses; and law-enforcement authority to enforce federal consumer-protection laws. The FTC is empowered to:

(a) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress.[305]Constitutional authority for the FTC derives from the interstate commerce clause,[306] which gives Congress power to regulate commerce "among the several states."[307] The Commission's original charge,

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[303] *Id*.
[304] 15 U.S.C. § 46(a) (2012). Banks, savings and loan institutions, federal credit unions and common carriers are among those institutions not policed by the FTC. *See* 15 U.S.C. § 46(j)(6) (2012).
[305] *Federal Trade Commission Act*, FTC.GOV, http://www.ftc.gov/enforcement/statutes/federal-trade-commission-act (last visited July 15, 2014).
[306] *See* U.S. CONST. art. I § 8, cl. 3.
[307] "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I § 8, cl. 3.

expressed in Section 5 of the Federal Trade Commission Act (FTCA),[308] was to work against "unfair methods of competition in commerce."[309] The Section provides:

> Unfair methods in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. … If any person, partnership or corporation violates any rule … respecting deceptive acts or practices … then the Commission may commence a civil action against such person, partnership or corporation for relief…. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return or property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice … except that nothing … is intended to authorize the imposition of any exemplary or punitive damages.[310]

As "originally constituted," Section 5 "was to be an instrument against restraint of trade" and "not directed at the problem of deceptive advertising."[311] Moreover, the term "commerce" in this context initially was defined[312] as "interstate" commerce, meaning purely state and local business practices were outside the FTC's authority. Subsequent amendments to Section 5, however, gave the FTC authority first over "unfair or deceptive acts or practices" in addition to unfair methods of competition, and later also over such acts or practices in "or affecting" commerce. Consequently, a much broader range of

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[308] *See* 15 U.S.C. § 45 (2012).

[309] The term "unfair methods of competition in commerce" in the granting legislation did not contemplate advertising practices at all, and in fact concerned competition only upon some showing of injury to a competitor or an inhibition of competition. *See* Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643 (1931).

[310] The Federal Trade Commission Act 15 U.S.C. §§ 41–77 (2012).

[311] BENDER, *supra* note 295, at §17.02 [1]

[312] The FTC Act defined "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation. *See* Act Sept. 26, 1914, ch. 311, 38 Stat. 717, *amended by* Act March 21, 1938 (current version at 15 U.S.C. § 45 (2012)) (Act March 21, 1938, is commonly known as the Wheeler-Lea Act).

activity, even that which is purely intrastate or local, may come under the FTC's auspices.[313] The FTC Act, therefore, has been amended frequently to proscribe a multitude of activities, including unfair methods of competition, unfair acts or practices, deceptive acts or practices and false advertising.[314] In addition, courts have held that the FTC Act authorizes only the Commission to act to protect consumers. Although it has been argued that the FTCA created a private right of action, courts have declined to allow aggrieved consumers to seek relief themselves directly under the statute, leaving the FTC to act on behalf of the consuming public.

Notwithstanding its initial legislative restraints limiting it to interstate, competitive practices, the FTC from the beginning exhibited a desire to intervene on behalf of consumers by addressing advertising practices in or affecting commerce. It interpreted the original "unfair methods of competition" language broadly, rationalizing that harm to consumers from deceptive advertising resulted in harm to trade.[315] In a notable 1931 example, the FTC entered a cease-and-desist order against a manufacturer and seller of a demonstrably bogus obesity cure whose advertisements it believed to be "calculated to mislead."[316] On appeal of the cease-and-desist order, the Supreme Court supported the FTC's findings that the "preparation" was potentially physically harmful

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[313] This expansive "in or affecting commerce" language was in the original 1938 bill sponsored by Senator Wheeler. The language was dropped over concerns it "would give the Commission to the right to go into a state and investigate intrastate commerce exclusively where it clearly and obviously was intrastate instead of interstate commerce." *See* CHARLES WESLEY DUNN, WHEELER-LEA ACT: A STATEMENT OF ITS LEGISLATIVE RECORD 31 (1938).

[314] BENDER, *supra* note 295, at §17.02 [1].

[315] *See* Ivan L. Preston & Jef I. Richards, *A Role for Consumer Belief in FTC and Lanham Act Cases*, 31 AM. BUS. L.J. 1, 10 (1993) [hereinafter Preston & Richards, *Consumer Belief*].

[316] Raladam Co., 283 U.S. at 645. This outcome is frequently referenced in the legislative history of the Wheeler-Lea Act.

and its advertisements "dangerously misleading."[317] It upheld, however, a lower-court order reversing the FTC and negating the order. According to the Court, advertising that adversely affected consumers was outside the FTC's reach unless it could be demonstrated to have resulted in harm to the advertiser's competition:

> Findings, supported by evidence, warrant the conclusion that the preparation is one which cannot be used generally with safety to physical health except under medical direction and advice. If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed. But this is not all.[318]

The 1938 Wheeler-Lea Amendment to the FTC Act "came to the rescue"[319] of the FTC, giving it jurisdiction over false advertising. The Amendment was a clear Congressional response to unfavorable court opinions regarding FTC authority and the perceived problem of deception in advertising. Legislative history preceding passage of the Wheeler-Lea Act reveals a Congress that had grown increasingly concerned about the FTC's lack of authority to deter competitive acts or practices that were potentially harmful to consumers but that resulted in no actionable economic harm to competitors.[320] As the primary regulator of advertising in the United States,[321] the contemporary FTC enforces a variety of consumer-protection statutes[322] that designate certain conduct as

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[317] *Id*. at 646.
[318] *Id*. at 646–47.
[319] BENDER, *supra* note 295 at § 17.02 [1].
[320] *See generally* DUNN, *supra* note 313.
[321] Other federal agencies, including the Food and Drug Administration (FDA) and the Federal Communications Commission (FCC) also have jurisdiction over some aspects of advertising. The FTC, however, is the primary regulator.
[322] Among the statutes enforced by the FTC are: The Equal Credit Opportunity Act, the Truth-In-Lending Act, the Fair Credit Reporting Act, the Cigarette Labeling Act, the Do-Not-Call Implementation Act of 2003, the Children's Online Privacy Protection Act, the

"unfair or deceptive" under Section 5 of the FTC Act. Toward this protective end, the FTC possesses investigative, enforcement and litigation authority over deceptive and misleading advertising.

Investigative Authority

Section 3 of the FTC Act sets forth the FTC's general authority to investigate deceptive advertising, among other acts and practices.[323] Originally, this authority included specific powers to issue subpoenas, administer witness oaths, examine witnesses and receive evidence. In 1980, as part of the FTC Improvement Act[324], the Commission's subpoena power in the area of consumer protection was augmented with the more flexible power to issue Civil Investigative Demands (CIDs) to investigate unfair or deceptive acts or practices.[325] Like a subpoena, the issuance of a CID allows the FTC to obtain existing documents and elicit oral testimony; unlike a subpoena, a CID allows the FTC to require those under investigation to file written reports or answers to specific questions.[326] As with a subpoena, a recipient of a CID may file a petition to quash or limit the scope of the demand. In the event of noncompliance, the FTC may petition a federal district court seeking enforcement.[327]

Fair & Accurate Credit Transactions Act of 2003, and the Controlling the Assault of Non-solicited Porn and Marketing Act of 2003.

[323] *See* 15 U.S.C. § 46 (2012).

[324] FTC Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

[325] The FTC continues to use subpoena power to investigate possible antitrust violations.

[326] CIDs also allow the production of tangible things and the service of entities not within U.S. jurisdiction.

[327] A corollary tool is the issuance of a Section 6(b) Order. Orders issued pursuant to Section 6(b) of the FTC Act provide another investigative tool. Under Section 6(b), the FTC may request the filing of special reports or answers even when the requested information does not have a specific law-enforcement purpose. Such orders typically are used for wide-ranging economic studies or other reports deemed to be in the public interest.

Enforcement Authority

The FTC exercises its enforcement authority in consumer-protection matters either administratively or judicially. Administrative enforcement actions are initiated on the Commission's own authority; judicial enforcement actions commence and proceed with the aid of the courts.[328]

Administrative Enforcement

If an investigation provides the FTC with a "reason to believe" a violation of the law has occurred, the Commission's administrative options are to pursue either a rule-making[329] or adjudicative response.[330] When unfair or deceptive acts or practices are thought to be industry-wide and prevalent, the agency may initiate a rulemaking proceeding. Rulemaking proceedings include an opportunity for informal hearings that allow interested parties to cross-examine participants on a limited basis. Violations of promulgated industry-wide regulations may trigger civil penalties of up to $11,000 per offense.[331] Penalties are collected via lawsuits filed in federal district court;[332] in some cases, the FTC may file a lawsuit to seek consumer redress for injuries resulting from the violations.[333] For advertiser-specific—as opposed to prevalent, industry-wide—practices,

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[328] The FTC website labels judicial actions as "federal" actions in reference to their dependency on the federal courts.
[329] Under Section 18 of the FTC Act, 15 U.S.C. Sec. 57a, the Commission is authorized to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act. To commence a rulemaking proceeding, the FTC must believe the practices to be addressed are "prevalent."
[330] *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC.GOV (July 2008), http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority#N_1_ [hereinafter *Brief Overview*].
[331] *See Id*.
[332] *See Id*.
[333] *See Id*.

the FTC may turn to a series of adjudicative measures when it has reason to believe violations have occurred. Such proceedings begin with the issuance of a complaint, addressed to the advertiser, setting forth the charges.

Consent Agreements

Advertisers who are served with an administrative FTC complaint may choose to settle with the FTC at the outset, or to dispute the allegations in a more protracted process. Respondents who elect to settle the charges generally sign a consent agreement without admitting wrongdoing. A consent agreement spells out the advertiser's consent to the entry of a final order and waiver of all right to judicial review. A final consent order is binding and generally bars the advertiser from making deceptive claims for a specified time—often decades—into the future. It also may set forth other requirements of the advertiser, such as financial recompense to consumers. With high-profile advertising campaigns deemed to be deceptive, the FTC also may require the advertiser to produce and finance corrective advertising to counter consumer misperceptions.[334]

Administrative Trials

A respondent who elects to contest the charges outlined in the complaint may seek adjudication before an administrative law judge (ALJ). Using the FTC's rules of decision,[335] the ALJ holds a trial-type proceeding and issues an "initial decision." The initial decision includes findings of fact, conclusions of law, and the ALJ's recommendation of either a dismissal of the complaint or a cease-and-desist order instructing the advertiser to discontinue making claims the commission has deemed

[334] Corrective advertising is a significant but little-used alternative.
[335] *See Brief Overview*, *supra* note 330.

deceptive.[336] Initial decisions issued by an ALJ may be appealed to the full Commission. Subsequent appeals may be made to any federal court of appeals with jurisdiction[337] and ultimately to the Supreme Court. A Commission order becomes final and binding upon the respondent 60 days after it is served; violations of final orders may invite civil penalties of up to $16,000 for each violation.[338] In addition, following an adjudicative proceeding, the FTC may seek civil penalties from similar, non-respondent-violators—meaning those who were not a party to the proceeding—if those violators had been advised that such acts or practices had been deemed to violate FTC standards.[339]

Judicial Enforcement

The administrative enforcement options described above require the FTC to first make an agency determination that an advertiser's claims are deceptive and then seek the aid of a court to obtain civil penalties or consumer redress.[340] The Commission, however, may instead opt to challenge an advertiser's claims directly in court. Doing so allows the agency to seek intervention without first determining that the challenged conduct is unlawful. Unlike an administrative adjudication, in which a reviewing court must substantially defer to the Commission's own interpretation of the FTC Act, a court

[336] Appeals from the ALC proceeding are to the full FTC and then to the federal court of appeals, followed by review at the Supreme Court.
[337] The respondent may file a petition for review with any court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was employed. FTC Act, Section 5(c), 15 U.S.C. Sec 45(c).
[338] To assess a civil penalty or pursue mandatory injunctions or other equitable relief, the FTC must file suit in a federal district court seeking to have its order enforced.
[339] *See Brief Overview*, *supra* note 330.
[340] *See Id*.

handling a direct court challenge by the FTC is to accord the Commission no greater deference than it would any government plaintiff.[341]

Preliminary and Permanent Injunctions

Section 13(b) of the FTC Act allows the FTC to seek injunctions against deceptive advertising claims. Preliminary, temporary injunctions may be sought whenever the FTC has "reason to believe" that any party "is violating, or is about to violate" the Commission's prohibitions against deceptive advertising.[342] In such cases, the FTC may ask a district court to enjoin the allegedly unlawful conduct pending completing of an FTC administrative proceeding. Since around the time of its 1983 Policy Statement on Deception, the FTC has routinely sought permanent injunctions to challenge cases of basic consumer fraud and deception.[343] In the FTC's view, "a suit under Section 13(b) is preferable to the adjudicatory process because, in such a suit, the court may award both prohibitory and monetary equitable relief in one stop."[344] In addition, a judicial injunction becomes effective immediately, whereas a Commission cease-and-desist order is effective 60 days after it is received by the advertiser.

Litigating Authority

The FTC's investigative and law-enforcement authority is enhanced by the ability of the Commission to independently represent itself in court, rather than relying on the

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[341] The FTC notes it "has tended to prefer administrative adjudication" where "a case involved novel legal issues or fact patterns." *Id*.

[342] *Id*.

[343] According to the FTC, with the blessing of the courts, the Commission "began to make widespread use of the permanent injunction proviso of Section 13(b) in its consumer protection program," arguing that the availability of permanent injunction via the statute entitled it to "obtain an order not only permanently barring deceptive practices, but also imposing various kinds of monetary equitable relief … to remedy past violations," including the freezing of assets.

[344] *A Brief Overview of the FTC's Authority*, *supra* note 330.

Attorney General.[345] The FTC Act provides litigation authority in five categories of cases. Section 16 of the FTC Act allows such self-representation in suits for injunctive relief, suits for consumer redress, petitions for judicial review of FTC rules or orders, suits to enforce compulsory process and suits to prohibit recipients of compulsory process from disclosing the existence of the process in certain situations. In addition, the Commission may represent itself in a variety of cases involving civil penalties, if the Attorney General fails to do so after 45 days' notice. When the Commission has represented itself in the lower courts, it also may do so before the Supreme Court.

Approach to Deception

The FTC is both a rulemaking and quasi-judicial body, meaning it has the ability to define what is "false" or "deceptive" commercial speech [346]as well as investigate and prosecute offenders. Because reviewing courts generally defer to the FTC's broad determinations regarding deceptive advertising, the Commission has significant latitude in identifying and prosecuting deceptive advertising.[347]

The FTC Act defines the term "false advertisement" but provides only "skeletal"[348] guidance as to what constitutes such, leaving the FTC and the courts to "add flesh to this skeletal prohibition."[349] Section 15 (a)(1) reads as follows:

> The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is

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[345] *Id*.
[346] For purposes of this work, the term advertising is used synonymously with the term "commercial speech."
[347] *See* Belinda Welti, Note, *The Need for a Statutory Definition of "Deceptive" Advertising,* 19 NEW ENG. L. REV. 127, 127 (1984).
[348] JEF I. RICHARDS, DECEPTIVE ADVERTISING: A BEHAVIORAL STUDY OF A LEGAL CONCEPT 12 (1990).
[349] *Id*.

> misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.[350]

Section 12 of the FTC Act addresses false advertisements for food, drugs, devices or cosmetics and specifically defines such as ads that are "misleading in a material respect." Although limited to those particular types of advertisements, Section 12 is important because it provides for criminal misdemeanor charges related to advertising for those types of products, whose use can result in bodily harm. In addition, the section's built-in definition of false advertising—misleading in a material respect—has influenced the Commission's view of deception with respect to advertisements for those categories of product advertising covered by Section 5.

In applying Section 5, the FTC continues to operate under its 1983 "Policy Statement on Deception" (Policy Statement), issued in response to a Congressional request for clarification of its enforcement policy against deceptive acts or practices.[351] That document defined deception as "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's

[350] 15 U.S.C. § 55 (2012). The section continues: "No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug." *Id*.
[351] *See Policy Statement*, *supra* note 63.

detriment."[352] The Policy Statement "still forms the basis of all deception decisions."[353] Conveyed claims evaluated for deceptiveness must be factual—meaning capable of verification—and material.[354]

Material Versus Irrelevant Claims

Misrepresentations or omissions in advertisements will be considered material if they are "likely to affect a consumer's choice of or conduct regarding a product."[355] Express claims regarding a product's central characteristics, its cost or its performance, are presumed material, as are health- and safety-related claims. Implied claims are presumed material when evidence suggests the marketer "intended to make a claim conveying a specific message."[356] Otherwise, a finding of materiality will be based on the record before the FTC.[357]

Deception vs. Deceptiveness

Prior to issuing the Policy Statement, the FTC had adjudicated deception without having specifically defined it, essentially doing so on a "case by case analysis"[358] that

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[352] *Id*. The policy statement describes each of these elements. According to the policy statement, "a representation, omission or practice must be a material one for deception to occur," meaning it must be "likely to affect a consumer's choice of or conduct regarding a product."

[353] BENDER, *supra* note 295, at §18.01[3].

[354] Preston & Richards, *Consumer Belief*, *supra* note 315, at 3.

[355] FTC Policy Statement on Deception, referencing the Restatement of Torts, Second Edition, defines a material misrepresentation or omission as "one which the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or own peculiarities, is likely to consider important." On the subject of materiality of deceptive advertising claims, *see* Jef I. Richards & Ivan L. Preston, *Proving and Disproving Materiality of Deceptive Advertising Claims*, 11 J. PUB. POL'Y & MARKETING, no. 2, 1992, 45–56.

[356] BENDER, *supra* note 295, at §19.02.

[357] *See Id*.

[358] Welti, *supra* note 352, at 129.

created "unpredictable results."[359] The Policy Statement was the Commission's attempt to "synthesize the most important principles of general applicability" and "provide a concrete indication of the manner in which the Commission will enforce its deception mandate."[360]

In cases prosecuted prior to 1983, the Commission had adopted a legal concept of "deception" that clearly also encompassed "deceptiveness." Actual deception was unnecessary and the term "deceptiveness" appeared to be "a surrogate indicator" of actual deception.[361] The FTC then, traditionally has been concerned not only with an advertisement's resulting actual deception, but also with its potential deceptiveness—that is, whether consumers could have been deceived by it.[362] Advertisements with a "capacity or tendency to deceive or mislead"[363] run afoul of the FTC's deception mandate. Consequently, "some advertising claims may be prohibited as deceptive even though consumers may not believe them and so cannot be harmed by them."[364]

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[359] *Id*.

[360] The extent to which the Policy Statement was a synthesis or "in reality a complete shift in philosophy" has been widely debated. It has been noted that "although the manner of implementing these … inquiries may shift along with the prevailing political philosophy, they still form the basis of all deception decisions." BENDER, *supra* note 299, at §18.01

[361] Richards, *supra* note 348, at 13, citing Ivan L. Preston, *The Difference Between Deceptiveness and Deception, and Why It Should Mater to Lawyers, Researchers, and Advertisers*, 1982 PROC. OF THE AMER. ACAD. OF ADV. 81.

[362] An additional distinction exists between the terms "false" and "deceptive." The FTC's "legal criterion is deceptiveness, not falsity, in spite of the colloquial reference to 'false advertising.'" Richards, *supra* note 361, at 28. A true-false framework "represents the explicit message," and a deceptive-nondeceptive framework "is the conveyed message."[362]

[363] Ivan L. Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 U. CINN. L. REV. 1243, 1244 (1988).

[364] Preston & Richards, *Consumer Belief*, *supra* note 320, at 1

In specifying that advertising be "likely to mislead" in order to provoke a finding of deception, the 1983 Policy Statement seemed to signal a return to a focus on actual deception, as opposed to the mere possibility of deception. But the Commission declined to require proof of actual deception, instead requiring the establishment of "a probability of deception."[365] Despite the 1983 language, the FTC has continued to police "deceptiveness" as well as "deception;" concern about a heightened standard does not appear to have been borne out[366] and proof of actual deception is not required.[367]

Intentional vs. Unintentional Deception

Other concerns presented by the FTC's policy on deception have included the role of intent and whether deceptive statements must be expressly included. In defining deception broadly, the FTC has adopted the position that an advertiser's lack of intent to deceive is irrelevant to a determination of deception. Intention to deceive is not necessary for a finding of deception, but its existence may be an aggravating factor in FTC determinations.[368] In addition, the FTC has expanded its regulatory potential by focusing on implied claims in ads, in addition to explicit ones. "Advertising and other sales claims stated not explicitly but by implication can be ruled deceptive without question"[369] and "implied content is no less subject to regulation than is explicit content."[370]

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[365] Petty, *supra* note 67, at 11 (citing RICHARDS, *supra* note 53, at 12).
[366] *See* Preston 1990 (Although the FTC now applies the Miller definition in consumer cases, no litigated case has shown that the new standard makes a difference in the outcome.")
[367] Petty, *supra* note 67, at 13 (citing Cliffdale Associates, 103 F.T.C. at 165).
[368] RICHARDS, *supra* note 348, at 12 (summarizing Thompson Medical Co. v. FTC, 791 F.2d 189 (D.C. Cir. 1986)).
[369] Preston, *supra* note 363, at 1244.
[370] *Id.* at 1245.

Reasonable vs. Gullible Consumers

The FTC's deception policy calls for advertising claims to be evaluated from the perspective of the reasonable consumer, as opposed to the gullible or ignorant consumer:[371]

> The test is whether the consumer's interpretation or reaction is reasonable. When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.[372]

Early in its operation, the FTC employed an ignorant man standard by which it seemed determined "to protect everyone from everything which may deceive them."[373] Presumably, this approach was meant to distinguish the FTC's newly established consumer-protection function from that of common-law torts such as fraudulent misrepresentation, and to further a shift toward the enhanced consumer-protection orientation of *caveat venditor*.[374] The FTC's "consumer acting reasonably under the circumstances" language, therefore, appeared to hint at a return in the direction of *caveat emptor*, under which the FTC could allow an increasing number of deceptive advertising claims to enter the marketplace. In practice, however, the FTC had moved away from a strict ignorant man standard[375] prior to 1983, and it remains largely unfettered in its

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[371] *See* Ivan L. Preston, *Reasonable Consumer or Ignorant Consumer? How the FTC Decides*, 8 J. CONSUMER AFFAIRS 131, 131–43 (1974); RICHARDS, *supra* note 348.
[372] *Policy Statement*, *supra* note 62.
[373] Preston, *supra* note 371, at 142.
[374] *See Id*. A successful lawsuit for fraudulent misrepresentation relies upon a "reasonable man" standard.
[375] *See Id.*

ability to take action against any deceptive advertising claim when doing so would, in its view, serve a substantial public interest.

Deception vs. Puffery

Puffing, or puffery, is "exaggerated sales talk or opinion" that has long been present in advertising. In the FTC's view, the truth or falsity of statements regarding the degree of quality of a product cannot be verified. Because of this, the FTC generally overlooks such exaggerated, opinion-like statements on the basis that "no reasonable consumer would seriously rely on them—therefore they will deceive no one."[376] Therefore, statements deemed puffery (e.g., "the World's most comfortable mattress"), are not considered deceptive if they speak to the quality of a given product. In contrast, statements representing objective actuality (e.g., "the World's strongest padlock") are verifiable as being either true or false and will likely not be regarded as puffery in the eyes of the FTC.[377]

Extrinsic Evidence vs. Commission Intuition and Expertise

The FTC's leeway regarding deception includes the ability to infer the meaning of advertising claims on their face.[378] In the alternative, the Commission may, in its discretion, consider evidence, such as consumer surveys or expert testimony, apart from the advertisement itself.[379] Although the FTC has increasingly used extrinsic evidence to

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[376] Ivan L. Preston and Ralph H. Johnson, *Puffery: A Problem the FTC Didn't Want (and May Try to Eliminate)*, 49 JOUR. & MASS COMM. Q'TERLY 558 (1992).
[377] As Bender notes, courts have been more likely than the FTC to tolerate puffing. *See* BENDER**,** *supra* note 295, at § 10.06.
[378] *See* Deborah K. Owen & Joyce E. Plyler, *The Role of Empirical Evidence in the Federal Regulation of Advertising*, J. PUB. POL'Y & MARKETING, vol. 10, 1991, at 1.
[379] Ivan L. Preston, *Data-Free at the FTC? How the Federal Trade Commission Decides Whether Extrinsic Evidence of Deception is Required*, 24 AM. BUSI. LAW J. l 359, 360 (1988); Owen & Plyler, *supra* note 378, at 1.

aid in determining meaning or the extent to which consumers may or may not have been deceived,[380] there are no automatic triggers for doing so[381] and no clear indicators of when intrinsic evidence will be inadequate.[382] This practice owes in part to the theory that the FTC was created to "develop a special competence" and "accumulated expertise"[383] upon which it may rely and to which reviewing appellate courts are inclined to defer.

Summary

Although thoughtful people have differed as to the FTC's application of the above-described elements of deception, its jurisdiction over deceptive advertising is clear and well established.[384] The FTCA and the 1938 Amendment left the Commission "a great deal of flexibility to interpret and apply the Act as it saw fit."[385] As a result of this flexibility, it has been "noted that an advertisement is deceptive if the FTC says so."[386] Nonetheless, the FTC's purpose is "prophylactic, not punitive"[387] and its broad authority and discretion is intended to serve the "preventative purpose"[388] to "protect the consumers and competitors, not to punish advertisers for a bad intent."[389]

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[380] *See* Owen & Plyler, *supra* note 378, at 1.
[381] Consequently, the FTC's position with respect to extrinsic evidence has been described as having created "a state of confusion." Preston, supra note 384, at 359.
[382] A former FTC Commissioner and attorney posited that the FTC's need for more extrinsic evidence would increase as advertisers decrease their use of objective product claims in favor of implied claims. See Owen and Plyler, *supra* note 378.
[383] Owen & Plyler, *supra* note 383, at 1.
[384] *See* FTC Improvement Act of 1980, Pub. L. No. 96–252, 94 Stat. 374; U.S. Safe Web Act of 2006, Pub L. 109–455, 120 Stat. 3372.
[385] RICHARDS, *supra* note 348, at 12.
[386] *Id*.
[387] *Id*.
[388] *Id*.
[389] RICHARDS, *supra* note 348, at 12.

Criminal: The DOJ and Consumer Protection

Advertisers facing civil Federal Trade Commission action also may be subject to parallel criminal proceedings brought by the Department of Justice; in fact, the DOJ may target advertisers in the absence of FTC action. As noted above, in contrast to civil proceedings, which name business entities as defendants, DOJ criminal actions generally target individuals. For example, Acme Corporation's corporate officers or other employees in positions of authority and control may be the subject of a DOJ prosecution, but civil FTC proceedings arising from Acme's operation would name Acme itself.

This section explains DOJ authority to address commercial deception and how that authority has touched and concerned advertising. It should be noted that advertisers facing potential parallel FTC/DOJ proceedings must react to two sets of interests—the FTC's interest in protecting the public and the DOJ's interest in enforcing the criminal laws. These interests do not necessarily coincide and in fact may place a defendant's rights at odds with each other. After a brief introduction to the DOJ itself, the legal implications of such parallel proceedings are discussed first. This is followed by an overview of relevant federal, criminal statutes and their operation.

Background

The DOJ was established in 1870 to handle the legal business of the United States. As the central agency for the enforcement of federal laws, the DOJ, under the direction of the Attorney General of the United States, controls all criminal prosecutions and civil suits in which the United States has an interest.[390] Enforcement of all federal

[390] The contemporary DOJ features 53 divisions and offices.

laws not specifically assigned to other divisions[391] within the DOJ are supervised and enforced by the Criminal Division, which also has jurisdiction over civil matters. In contrast to the FTC's preventative purpose, the DOJ mission includes seeking "just punishment for those guilty of unlawful behavior."[392] The agency's priorities include "protecting taxpayer dollars and consumers against financial fraud while ensuring competitive markets."[393]

Only the DOJ has the authority to prosecute federal, criminal matters. Working at the supervision and direction of the Attorney General, 93 United States Attorneys (USAs) have "plenary authority with regard to federal criminal matters" in their districts.[394] A USA may pursue a potentially criminal act of commercial deception on his or her own, or do so in response to a referral from the FTC. Prosecution is initiated by the filing of a complaint, the request of an indictment from a grand jury, and in some cases, the filing of an information,[395] each of which may be initiated without prior authorization from the DOJ's Criminal Division. Similarly, a USA generally has authority to dismiss a criminal

[391] Other Divisions with direct responsibility for enforcing criminal statutes are the Antitrust, Civil Rights, Environment and Natural Resources, and Tax Divisions.
[392] *About DOJ*, JUSTICE.GOV (Jan. 2014), http://www.justice.gov/about/about.html.
[393] *Department of Justice Accomplishments*, JUSTICE.GOV (Feb. 2014), http://www.justice.gov/accomplishments/.
[394] U. S. DEP'T OF JUSTICE, USAM 9-2.001, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.001.
[395] When permitted by law, the US Attorney may file an information in any case that, in his or her judgment, warrants such action. *See* U. S. DEP'T OF JUSTICE, USAM 9-2.030, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.030.

complaint, indictment or information without seeking or obtaining prior authorization from the Criminal Division.[396]

Parallel Proceedings

Federal prosecutors are advised to commence or recommend federal prosecution if they believe "conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."[397] Prosecutions should be declined when "no substantial interest would be served by the prosecution,"[398] when the subject "is subject to effective prosecution in another jurisdiction,"[399] or if "there exists an adequate non-criminal alternative to prosecution."[400] When non-criminal alternatives—such as civil actions prosecuted by the FTC— are available, federal prosecutors are advised to "consider all relevant factors,"[401] including: "1) The sanctions available under the alternative means of disposition; 2) The likelihood that an effective sanction will be imposed; and 3) The effect of non-criminal disposition on Federal law enforcement interests."[402]

> When a person has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal

[396] Prior authorization to dismiss a criminal complaint is required in certain enumerated instances. *See* U. S. DEP'T OF JUSTICE, USAM 9-2.145, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.145.
[397] U. S. DEP'T OF JUSTICE, USAM 9-27.220, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220
[398] U. S. DEP'T OF JUSTICE, USAM 9-27.220, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220.
[399] *Id*.
[400] *Id*.
[401] *Id*.
[402] *Id*.

> prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only response to serious forms of antisocial activity, Congress and state legislators have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. … Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution."[403]

These guidelines notwithstanding, the Federal Government appears to have increasingly opted for criminal prosecution for those who run afoul of administrative agencies such as the FTC.[404] Aside from the potential unpleasantness and expense of responding to two significant federal actions simultaneously, such parallel proceedings create practical and legal dilemmas for respondents/defendants. As a threshold matter, the criminal prosecution for conduct—such as deceptive advertising—generally understood to be under the civil purview of an administrative agency—such as the FTC—may implicate due process. For example, an advertiser reasonably may be expected to understand that the FTC regulates advertising and be familiar with FTC guidelines and procedures; it may be unreasonable, however, to expect the same advertiser to realize the potential for advertising conduct to trigger criminal prosecution.[405]

Even more established are concerns about how a criminal proceeding may affect a civil proceeding, and vice versa. If a civil proceeding at the FTC unfolds first, any testimony offered by the advertiser could be used against him or her in the criminal

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[403] U. S. DEP'T OF JUSTICE, USAM 9-27.250, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.250.
[404] *See* BENDER, 1 BUSINESS CRIME ¶ 2.01.
[405] *See* Reynolds, *supra* note 78.

prosecution. [406] Because an individual claiming the Fifth Amendment[407] right against self-incrimination must either assert the privilege in the civil proceeding[408] or waive it altogether, this presents a Hobson's choice[409] for those concerned about potential criminal charges.[410] A related risk is the potential for the Government to "take advantage of liberal civil discovery rules" to obtain evidence that "would not have been otherwise available but for the civil proceeding."[411] The FTC's authority to issue Civil Investigative Demands, for example, is unique to it; the DOJ has no such investigative tool, but it may make use of information gathered by the FTC via a CID. Information and manpower may be exchanged, and prosecution may be withheld until after the civil action concludes; if criminal action remains in play, the civil-case defense "will be greatly affected," with some defenses entirely withdrawn in order to avoid disclosure of evidence harmful to the possible or actual criminal prosecution."[412]

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[406] A party involved in parallel proceedings may seek a protective or stay order with respect to the civil proceedings. Such an order would issue from an administrative law judge or federal district court judge, depending on the origin and path of the agency action.

[407] *See* U.S. CONST. amend V. The Fifth Amendment privilege against self-incrimination does not apply to corporations. *See* BENDER, *supra* note 404, at ¶ 2.02 [1][a][i]-[ii].

[408] In civil cases, a defendant who asserts the privilege against self-incrimination faces the potential of severe sanctions. *See* BENDER, *supra* note 404, at ¶ 2.02 [1][a][iii][b].

[409] A Hobson's choice is one in which there is no real choice.

[410] As Bender summarizes, "there are strategic considerations in choosing to remain silent. By testifying, the defendant risks disclosure of defenses to the criminal action, as well as self-incrimination, perjury, or inconsistent statements useful to the prosecution for impeachment in the criminal proceedings. However, there are also important practical considerations. Exercising the right to remain silent can result in the imposition of sanctions … generally directed toward some proprietary interest held by the party charged …. Invocation of the Fifth Amendment … may result in automatic loss," typically the defendant's means of livelihood." *Id*. ¶ 2.02 [1][a][i].

[411] *Id*. at 2.01.

[412] BENDER, *supra* note 404, at 2.01.

The DOJ's ability to pursue criminal sanctions, whether in the wake of administrative action or not, is limited only by its own discretion. In fact, the FTC Act itself leaves room for DOJ criminal prosecution for conduct under the FTC's general authority: "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."[413]

When the DOJ moves to prosecute those responsible for advertising, it primarily relies on criminal statutes found in Title 18 of the United States Code, which addresses "Crimes and Criminal Procedure." Chapter 63 is devoted to "Mail Fraud and Other Fraud Offenses." Section 1341, labeled "Frauds and Swindles," is the mail fraud statute. Section 1343, the wire fraud statute, addresses "Fraud by Wire, Radio or Television." Section 1349, the "Attempt and Conspiracy" section allows for attempt and/or conspiracy to be charged, either by itself, or in addition to one or more of the other delineated forms of fraud. Following an overview of basic federal criminal procedure, each of these statutes is discussed below, beginning with wire fraud and mail fraud.

Federal Criminal Procedure

Federal criminal charges may be initiated in one of several ways. If someone is suspected of a federal crime, an arrest must be preceded by the issuance of a written Warrant for Arrest supported by probable cause that the accused committed the crime. Arrest warrants issue upon either a written Complaint by an Assistant United States Attorney (AUSA), or upon a written Indictment returned by a federal Grand Jury.[414]

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[413] 15 U.S.C. 57(b)(6) (2012).

[414] A federal Grand Jury consists of a group of randomly selected citizens from across the judicial district that hears evidence and witnesses presented by the government. Defense attorneys are not allowed to appear before a grand jury. Federal grand juries meet several days each month for a term of approximately one year. The Indictment is called a True Bill. If no probable cause is found, the grand jury returns a No Bill.

When an arrest warrant is based on a Complaint, the final decision to prosecute rests with the Grand Jury. In cases in which an accused waives Indictment and agrees to plead guilty, the Grand Jury is bypassed and an Information is filed with the U.S. District Court outlining probable cause.

After being arrested on the basis of a Complaint, the accused has a right to a preliminary "probable cause" hearing before a United States Magistrate Judge within 10 days. Arrests made following an Indictment or Information do not require a preliminary hearing; at this stage, however, the defendant (formerly the accused) must participate in an Arraignment before a federal Magistrate Judge and enter a plea of guilty or not guilty. Arraignment is followed either by a Plea Agreement or a Trial. A unanimous finding of guilt beyond a reasonable doubt triggers the preparation of a Pre-Sentence Investigation Report, followed by Sentencing approximately eight weeks later. A sentence may include incarceration in a federal prison; a term of supervised release; the imposition of a monetary fine; and/or an Order of Restitution directing the defendant to pay the crime victims money lost or expenses incurred due to the offense. Convicted defendants may appeal[415] a finding of guilt, the sentence, or both.

Mail Fraud and Wire Fraud

The mail and wire fraud provisions of the federal criminal code make it a crime "to devise a scheme to defraud another of property, when either mail or wire

[415] Defendants sometimes waive their right to appeal in the plea agreement. Absent such waiver, a Notice of Appeal must be filed within 10 days of either the verdict or sentencing.

communications are used in furtherance of the scheme."[416] Each use of the mail or wire constitutes a separate offense. Both statutes

> condemn fraudulent conduct that may also come within the reach of other federal criminal statutes. Both may serve as racketeering and money laundering predicate offenses. Both are punishable by imprisonment for not more than 20 years; for not more than 30 years, if the victim is a financial institution or if the victim is a financial institution or the offense is committed in the context of major disaster or emergency.[417]

The mail and wire fraud statutes are regarded as "powerful tools for prosecutors,"[418] a prosecutor's "secret weapon," the "most prevalent and lethal weapon in the federal prosecutor's arsenal,"[419] "the vehicle of choice for the prosecution of 'a large number and variety of federal white collar' crimes"[420] and "far-reaching in the modern era of federal courts."[421] DOJ policy regarding prosecutions of mail fraud and wire fraud suggests such should be reserved for "any scheme which in its nature is directed to defrauding a class of persons, or the general public, with a substantial pattern of conduct"[422] and not invoked for isolated, individual transactions "resulting in minor loss to the victim;" the Department, however, acknowledges use of the statutes, with their

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[416] CHARLES DOYLE, CONG. RESEARCH SERV., R41930, MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW (2011).
[417] *Id*. at 1.
[418] Lee Greenwood, Article, *Mail and Wire Fraud*, 45 AM. CRIM. L. REV. 717 (2008); Christopher J. Stuart, Article, *Mail and Wire Fraud*, 46 AM. CRIM. L. REV. 813 (2009); Elizabeth Qagner Pittman, Article, *Mail and Wire Fraud*, 47 AM. CRIM. L. REV. 797 (2010).
[419] Jack E. Robinson, *The Federal Mail and Wire Fraud Statutes: Correct Standards for Determining Jurisdiction and Venue*, 44 WILLAMETTE L. REV. 479, 479 (2008).
[420] Lauren D. Lunsford, Note, *Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age*, 99 KY. L. J. 379, 379 (2010-2011).
[421] *Id*.
[422] U. S. DEP'T OF JUSTICE, USAM 9-43.000, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/43mcrm.htm.

"more severe sanctions," is expanding, and—from its perspective—not necessarily inappropriately so.[423]

The mail-fraud statute preceded the wire-fraud statute by 80 years. Congress passed the original mail-fraud statute[424] in 1872 to address schemes to defraud involving the use of the mails.[425] Today it specifically provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises… for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both ….[426]

At the time of the statute's enactment, "use of the mails" meant "by means of the post-office establishment of the United States."[427] In response to alternative, private means of distribution over the next few decades, Congress in 1994 expanded "the mails" to include private or commercial carriers, such as Federal Express and United Parcel

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[423] *Id.*
[424] *See* 18 U.S.C. § 1341 (2012).
[425] As Doyle has noted, "The mail fraud statute was first enacted … to prevent city slickers from using the mail to cheat guileless country folks," a "prohibition thought necessary 'to prevent the frauds which are mostly got up in the larger cities … by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." DOYLE, *supra* note 416, at 1 (citing McNally v. United States, 483 U.S. 350, 356 (1987) (quoting, 43 CONG. GLOBE 35 (1870)(remarks of Representative Farnsworth)).
[426] 18 USCS §1341. Frauds and swindles.
[427] DOYLE, *supra* note 416, at 1.

Service, in addition to the United States Postal Service.[428] Any use of the mails, even for intrastate deliveries made by interstate carriers, is subject to the mail fraud statute.

The more contemporary wire-fraud statute[429] was enacted in 1952.[430] Initially, the statute addressed "Fraud by Radio,"[431] but now also includes interstate transmissions by wire (telephone, microwave and the like) and television. The requirement that transmissions be "in interstate commerce" is not an element of wire fraud, but a jurisdictional requirement established by Congress to evoke its authority under the Constitution's interstate commerce clause.[432] Courts have interpreted this requirement to exclude from federal jurisdiction transmissions that are made intrastate—or example, a telephone call between parties in New York and Chicago would be interstate, but one between two parties in Chicago would be an intrastate wire transmission not subject to federal jurisdiction.[433] The current wire-fraud statute specifically provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not

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[428] *See* Senior Citizens Against Marketing Scams Act of 1994, Pub. L. No. 103-322, Title XXV, § 25006, and Title XXXIII, § 330016(1)(H), 108 Stat. 2087, 2147 (enacted as part of the Violent Crime Control and Law Enforcement Act of 1994); *see also* Cong. Rec. S2654-61 (March 10, 1993) (statement of Sen. Hatch) and S10017-19 (July 30, 1993) (statement of Sen. Hatch).

[429] 18 U.S.C. 1343. Fraud by wire, radio or television.

[430] The wire fraud statute was enacted as part of the 1952 amendments to the Communications Act.

[431] BENDER 6 BUSINESS CRIME ¶ 32.04 [1].

[432] *See* United States v. Jinian (2013 CA9 Cal) 712 F.3d 1255. Transmissions in foreign commerce are also contemplated by the wire fraud statute, but are not explored here.

[433] See Boruff v. United States, 310 F.2d 918 (5th Cir. 1962); United States v. Garrido (2013 CA9 Cal) 713 F.3d 985.

> more than $1,000,000 or imprisoned not more than 30 years, or both.[434]

Except for the medium—mail, as opposed to wire—associated with the offense, and except for the covered *intrastate* use of the mails, the mail- and wire-fraud statutes are substantively identical and construed *in pari materia*, meaning "the interpretation of one is ordinarily considered to apply to the other."[435]

Elements of Mail Fraud and Wire Fraud

To come within the statutes, a mailing or wire communication must be in furtherance of a scheme to defraud. It must involve a material deception, and the communication must have been made with the intent to deprive another of either money or property.[436] Each of these elements is outlined below.

Scheme to Defraud

A "remarkable array of schemes"[437] fall within the fraud statutes, including unsuccessful schemes and schemes in which use of the mail or wire was merely incidental or in reality failed to actually further the scheme. The breadth of the statute owes to the sweeping nature of the statutory language and also from courts' liberal construction applied to this language.[438]

Generally, a scheme to defraud involves the defendant's misrepresentations or omissions "'reasonably calculated to deceive persons of ordinary prudence and

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[434] 18 USCS §1343 (2012).
[435] DOYLE, *supra* note 416, at 2.
[436] In addition to protecting against the deprivation of money and property (including certain intangible property rights), the statutes also protect against schemes to deprive others of "honest services." The honest services provision, however, is limited to cases involving bribery or kickbacks. *See* Skilling v. United States, 130 S.Ct. 2896, 2907 (2010).
[437] BENDER, *supra* note 431, at¶ 32.01 [1].
[438] *Id.*

comprehension.'"[439] "No particular type of victim" (e.g. "gullible") is required; it "makes no difference whether the persons the scheme is intended to defraud are gullible or skeptical, dull or bright…."[440] For purposes of conviction, a prosecutor does not have to show the intended victim actually relied on the fraud or suffered loss of money or property.[441] Also, the defendant "need not devise the scheme him- or herself, but must simply willfully participate."[442] Similarly, the hiring of an agent will not insulate an advertiser if the advertiser "causes" the mailing or transmission, meaning that such is "the reasonable foreseeable consequence of his intended scheme."[443]

Materiality

Neither statute specifically mentions a requirement that a scheme's fraudulent aspects be "material," but courts have regarded materiality as an inherent requirement based on the common, ordinary meaning of the word "defraud." "At the time of the statutes' enactment, the word 'defraud' was understood to require … a misrepresentation or concealment of [a] material fact."[444] For mail- or wire-fraud purposes, "'a statement is material . . . only if it has the natural tendency to influence or be capable of influencing the person to whom it is was addressed.'"[445]

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[439] DOYLE, *supra* note 416, at 4 (quoting United States v. Williams, 527 F.3d 1235, 1245 (11th Cir. 2008)).
[440] United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990).
[441] *See* United States v. Pollack, 534 F.2d 964 (D.C. Cir. 1990).
[442] BENDER, *supra* note 431, at ¶ 32.04.
[443] DOYLE, *supra* note 416, at 2.
[444] Doyle, *supra* note 416, at 4 (citing Neder v. United States, 527 U.S. 1, 22-3-25 (1999)).
[445] *Id*. at 4–5 (quoting United States v. Jenkins, 633 F.3d 788, 802 n.3 (9th Cir. 2011) (parenthetical indications omitted); United States v. Wetherald, 636 F.3d 1315, 1324 (11th Cir. 2011); United States v. Radley, 632 F.3d 177, 185 (5th Cir. 2011); United States v. Weldon, 606 F.3d 912, 918 (6th Cir. 2010)).

Intent

Proof of fraudulent intent—not actual fraud—is a critical requirement in a mail- or wire-fraud prosecution.[446] However, it must be shown that "some actual harm or injury was contemplated by the schemer."[447] Representations made with reckless indifference to their truth or falsity can indicate fraudulent intent,[448] as can inferences drawn from statements and conduct.[449] Intent to defraud under both the mail and wire fraud statutes "'requires a willful act by the defendant with the intent to deceive or cheat, usually … for the purposes of getting financial gain for one's self of causing financial loss to another.'"[450] Intent will not be found if the defendant either did not know his scheme involved false representations,[451] or knew that he could not deceive the recipient of his statements.[452]

Mail Fraud or Wire Fraud as Criminal RICO Predicate Offenses

Mail fraud and wire fraud are considered predicate offenses for an invocation of the Racketeer Influenced and Corrupt Organizations (RICO) statute and are frequently

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[446] U. S. DEP'T OF JUSTICE, USAM 948, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00948.htm.
[447] U. S. DEP'T OF JUSTICE, USAM 949, AUTHORITY OF UNITED STATES ATTORNEYS IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00949.htm.
[448] *See* United States v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982); USAM 949, *supra* note 447.
[449] *See* Cusino, 694 F.2d 185, 187 (9th Cir. 1982); USAM 949, *supra* note 447.
[450] Doyle, *supra* note 416, at 5 (quoting United States v. Howard, 619 F.3d 727, 727 (7th Cir. 2010)) (citing United States v. Wetherald, 636 F.3d 1315, 1324 (11th Cir. 2011); United States v. Radley, 632 F.3d 177, 185 (5th Cir. 2011); United States v. Weldon, 606 F.3d 912, 918 (6th Cir. 2010)).
[451] *Id*.
[452] *Id*.

alleged in RICO indictments.[453] The RICO Act[454] was enacted in 1970, primarily as a means of curtailing organized crime. The Act "provides powerful criminal penalties[455] for persons who engage in 'a pattern of racketeering activity' … 'and who have a specified relationship to an 'enterprise' that affects interstate or foreign commerce."[456] Despite the original legislative motivation, RICO "is not limited to organized crime prosecutions, but rather broadly applies to all criminal conduct within its ambit regardless of whether it involves organized crime."[457] RICO prosecutions differ from non-RICO actions in that the filing or dismissal of a RICO criminal indictment or information requires prior approval by the Organized Crime and Racketeering Section[458] of the DOJ's Criminal Division. Mail fraud and wire fraud are among more than 100 "serious federal offenses" that are considered "racketeering activity."[459] Where both mail fraud and wire fraud (and/or one of the other designated predicate offenses) exist within a prescribed time period, they may be regarded as a "pattern" of racketeering activity sufficient to sustain a RICO charge. An "enterprise" for RICO purposes includes "any individual, partnership, corporation, association, or other legal entity, and any group of individuals associated in

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[453] *See* FRANK J. MARINE, CRIMINAL RICO: A MANUAL FOR FEDERAL PROSECUTORS 28, (Frank J. Marine et al. eds., 5th ed. 2009).
[454] 18 U.S.C. §§1961–1968 (2012)
[455] RICO also provides for civil remedies.
[456] CRIMINAL RICO, *supra* note 453, at 1 (quoting Pub. L. No. 91-452, 84 Stat 941 (1970)).
[457] CRIMINAL RICO, *supra* note 453, at 5.
[458] The Organized Crime and Racketeering Section has "supervisory authority over all Government uses of the RICO statute." Its aim it to "provide assistance to Government attorneys, and to promote consistent, uniform interpretations of the RICO statute." *Id*. at 18.
[459] *Id*. at 1 ("No crime can be a part of a RICO 'pattern of racketeering activity' unless it is included in this subsection.").

fact although not a legal entity."[460] Potential criminal penalties under RICO depend on the underlying racketeering activity. Penalties may range "from a maximum life sentence, or any term of years up to life imprisonment and/or a fine under Title 18."[461]

The RICO Statute also prescribes civil penalties, including a private right of action, for patterns of racketeering activity.[462] Civil actions seeking equitable relief may be brought by the Attorney General.[463] Private litigants seeking recompense may sue for treble damages for injury to their business or property.[464] To be successful in a civil RICO action, the United States must prove by a preponderance of the evidence that "a defendant committed or intended to commit a RICO violation by establishing the same elements as in a criminal RICO case, except that criminal intent is not required."[465] The Government also must prove that "there is a reasonable likelihood that the defendant will commit a violation in the future."[466]

Attempt and Conspiracy

Section 1349, the "Attempt and Conspiracy" section of Chapter 63, is one of dozens of criminal conspiracy statutes in the United States Code. Enacted in 2002, the section contemplates a specific attempt or conspiracy charge with respect to fraud and allows for the charging of attempt or conspiracy, either standing alone, or potentially in addition to one or more of the other delineated forms of fraud. The section provides:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same

[460] *Id*. at 2.
[461] *Id*. at 3.
[462] FRANK J. MARINE & PATRICE M. MULKERN, CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS 2, (2007).
[463] *See* 18 U.S.C. 1964(a) (2012).
[464] *See* 18 U.S.C. 1964(c) (2012).
[465] CIVIL RICO, *supra* note 462, at 2.
[466] *Id*.

> penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.[467]

An accused may be convicted of both conspiracy and the underlying offense (e.g. "wire fraud"), but not attempt and the underlying offense. As a result, a suspected fraudster could be charged with, and convicted of, multiple counts and combinations of wire fraud, conspiracy and attempt.

The ability to charge conspiracy has long been among the AUSA's options when charging mail or wire fraud. Prior to 2002, however, conspiracy charges ordinarily were brought under the general criminal conspiracy statute[468] elsewhere in the criminal code. That statute outlaws conspiracy to commit any other federal crime but contains no general provision for criminal attempt. In enacting Section 1349, Congress specifically contemplated both attempt and conspiracy in concert with mail fraud and wire fraud and gave federal prosecutors an additional charging option (attempt) when it comes to fraud.

Elements of Attempt and Conspiracy

The law condemns attempt and conspiracy as "forms of introductory misconduct" that should be addressed "lest they result in some completed form of misconduct."[469] The two charges are similar in that neither attempt nor conspiracy requires the commission of the underlying offense. When there is intent to commit the substantive offense, the

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[467] 18 USC §1349 (2012).

[468] 18 U.S.C. 371 (2012) provides "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

[469] CHARLES DOYLE, CONG. RESEARCH SERV., R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 14 (2010).

impossibility of doing so will not be a defense to either attempt or conspiracy. Conspiracy differs from attempt in several ways. First, "conspiracy becomes a crime far sooner" than does attempt. Conspiracy under Section 1349 is a completed crime upon agreement, meaning, "Mere acts of preparation will satisfy the most demanding conspiracy statute." The essence of conspiracy is an agreement to commit some act condemned by law.[470] An agreement for criminal conspiracy purposes "may be evidenced by word or action; that is, the government may prove the existence of the agreement either by direct evidence or by circumstantial evidence from which the agreement may be inferred."[471] That is not the case with attempt, which "becomes a crime when it closely approaches a substantive offense." Second, "there are no one-man conspiracies."[472] Conspiracy requires two people acting in concert; a conspiracy may be inferred and charged, however, even when no co-conspirator has been identified.[473] A single individual, conversely, may commit attempt. [474]

Summary

The Department of Justice has tremendous discretion in whether and how it enforces federal criminal statutes, including the discretion to bring criminal charges that address activity already within the civil authority of administrative agencies. The mail fraud, wire fraud, attempt and conspiracy statutes have potentially broad application over a variety of criminal conduct, including, in some cases, commercial deception. Chapter Five considers the manner and circumstances of that application in practice.

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[470] *Id*. at 5.
[471] *Id*.
[472] *Id*. at 4.
[473] *Id*. at 5. As Doyle observes, "even the acquittal of a co-conspirator is no defense" to a conspiracy charge. *Id*.
[474] *Id*. at 14.

CHAPTER 5

ADVERTISING AND THE FRAUD STATUTES

Commercial speech and deception have frequently intersected with the federal fraud statutes. An examination of federal appellate opinions, described below, revealed the circumstances under which such interaction has occurred. Examined cases were culled from written opinions issued by United States Courts of Appeals. Although suitable for this study for the reasons set forth below, reliance on appellate opinions comes with a few caveats. The most apparent is that appellate opinions are issued only after an appeal has been filed following an exhaustive adversarial proceeding in a court of original jurisdiction. As a result, appellate opinions are not revealing of United States District Court indictments and trial outcomes that do not generate an appeal. Nor do they reflect those prosecutions that result in plea bargains prior to the commencement or conclusion of a trial.

An additional limitation is that appellate opinions address not the facts of a lower-court proceeding, but instead focus on some purported error of law. In the cases examined here, for example, issues raised on appeal concerned the appropriateness of admitted evidence, prosecutorial bias or misconduct, defense counsel competence or conflicts of interest, statute-of-limitations issues, juror bias or instruction, double jeopardy, sentence calculation or some other procedural defect. The focus in appellate opinions on appealable issues—errors of law, as opposed to errors of fact—necessarily

means that appellate opinions may not offer a complete recounting of the underlying facts on which a criminal indictment was based. Most appellate opinions, however, do delineate charged crimes. They also generally provide some background of the factual basis for the charged crime or crimes, and many provide a detailed accounting of the relevant facts.

For these reasons, coupled with the ready availability of appellate opinions as a resource and the corresponding cumbersome process of gaining access to and screening significant numbers of criminal indictments, appellate opinions were selected as the units of analysis for this study. Because this study is intended to illuminate and not fully explicate the interplay between commercial speech and certain federal fraud statutes, reliance on appellate opinions for this purpose is appropriate.

In this chapter, "advertising" is defined, as it was in the Introduction, as a "paid, mass-mediated attempt to persuade."[475] The term "paid" means the space or time in which the message appeared was purchased by the sponsor of the advertising. To sponsor an advertisement means to pay for its placement. "Mass-mediated" means the message was carried by a "communication medium designed to reach more than one person, typically a large number —or mass—of people."[476] Based on these definitions, advertising was identified in the examined opinions as paid-for messages printed or appearing in newspapers, magazines or online publications, or broadcast on television or radio stations. Internet advertising also was included. Although the language of the federal wire-fraud statute clearly contemplates telephone and fax transmissions ("writings, signs, signals, pictures, or sounds" "transmitted by means of wire, radio or

[475] O'Guinn *supra* note 32, at 11.
[476] *Id*.

television communication in interstate or foreign commerce"), from an advertising industry perspective, telephone and fax-based solicitations and those delivered by electronic mail have not traditionally been regarded as "advertising." Therefore, sales messages transmitted by telephone, fax or electronic mail were excluded from the working definition of advertising provided above.[477] Notwithstanding their exclusion from this definition, however, communications by telephone, fax and electronic mail feature prominently in wire fraud prosecutions, were frequently present in the search results, and are necessarily referenced in the findings and the discussion that follows in Chapter Six.

Opinions for review were identified and selected using the LexisNexis Academic online database and search component available through the University of South Carolina's Thomas Cooper Library. Initial screening and selection of cases commenced on the LexisNexis Academic home page with the search term "wire fraud," which produced more than 2,500 results. (An ostensibly similar[478] initial search using the search term "wire fraud" in the LexisAdvance database of "Cases, U.S. Federal," produced more than 18,037 results. This is mentioned as support for the proposition, stated earlier, that the wire fraud statute is an oft-traveled federal prosecutorial avenue.) The search focused on "wire fraud" —as opposed to "mail fraud" or "wire fraud" and "mail fraud" because of anecdotal evidence that mail-fraud charges often accompany wire-fraud charges, and

[477] Also, the FTC's concern with deceptive advertising tends to be directed at messages conveyed by print and broadcast media. This study, therefore, focused on traditional print and broadcast messages.

[478] The LexisAdvance database is more extensive than LexisNexis Academic, but the search engines themselves revealed no apparent reasons for differences in the two results. The more limited result was viewed as sufficiently reliable for these purposes after additional screening applied to the larger initial results produced a number of duplicates found with the more limited results from LexisNexis Academic.

because of courts' similar treatment of the two statutes.[479] It is likely that the inclusion of "wire fraud" would have produced additional, earlier, examples of cases for particular study.

A second screening added the search phrase "advert! or marketing" to the original "wire fraud" results. The term "advert!" was chosen for its potential to select cases that included the term advertising or advertisement; "marketing" was added for its potential to select cases in which marketing was used as a synonym for advertising. This narrowed the search results to 429 cases.[480] Additional screening, using the search phrase "and not RICO" narrowed the results to 305 cases. This screening term was included in an attempt to omit cases brought under the Racketeer Influenced and Corrupt Organizations (RICO) statute. RICO cases were excluded because, as noted in Chapter Three, violations of the wire fraud and mail fraud statutes are predicate offenses for a civil or criminal RICO charge. Consequently, an understanding of the mail and wire statutes' operation is adequate to advance an understanding of conduct that could give rise to a RICO charge or charges involving mail or wire fraud.

Of the 305 cases identified by this search process, LexisNexis flagged four as originating in state courts. An examination of those four cases revealed the presence of the search terms but confirmed their irrelevance to this study. Their exclusion produced 301 cases with apparent relevance based on the computerized search terminology, including several that appeared twice because of multiple appeals.

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[479] As noted in Chapter Four, the mail- and wire-fraud statutes are substantively identical and construed in *pari materia*, meaning "the interpretation of one is ordinarily considered to apply to the other."

[480] It should be noted that the fluid nature of the database—cases are added frequently—could produce differing search results using identical terminology and steps.

A review of these 301 remaining cases was conducted with two goals: 1) identify the types of advertising-involved schemes that have invited federal, criminal prosecution and 2) ascertain the extent to which the First Amendment has been raised as a defense to criminal fraud. The second goal was aided by the introduction of the screening term "first amendment;" this identified 13 cases (out of 301) that mentioned the First Amendment in some respect. Accomplishing the first goal required reviewing the cases to determine if the search terms therein were central to the case, or if their appearance was incidental. A search term present in a case was deemed central if it seemingly had some bearing on the activities that ostensibly produced the wire fraud charge. For example, if a fraudulent scheme included the use of newspaper advertising to attract potential victims, the opinion was included. If the described advertising itself seemed to have inspired the prosecution (that is, the prosecution appeared to be advertising-inspired), the case was included.

A term was deemed to be incidental if its appearance seemingly had no bearing on the facts or issue(s) presented in the case. Cases in which the search terms were present, but incidental, were excluded. For example, if a case mentioned "marketing" only to describe a job description or as part of an organization's name, that case was excluded if its fact pattern failed to indicate that advertising activities played any role in the scheme or its prosecution. This screening and review process identified 60 opinions issued between 1966 and 2014 for more careful review.

Findings

Analysis of cases was instructive. The search results included cases from all 11 of primary federal circuits.[481] The fewest results from any circuit, three, was from the First

[481] Only the Federal and District of Columbia Circuits were unrepresented. The Federal Circuit serves as the appellate body for specialty courts and administrative agencies. For

Circuit, which includes the Districts of Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island; the most—nine—were from the Seventh Circuit, which includes three districts in Illinois, two in Indiana and two in Wisconsin. Eight of the nine cases out of the Seventh Circuit were from 2003 or later. The Ninth Circuit—the largest in terms of geography[482]—produced seven of the examined cases. The remaining Circuits produced between four and six cases each.

Common Schemes

Although many fraudulent schemes are perpetuated without the use of advertising, the cases examined here indicate that fraudsters frequently incorporate advertising into their schemes, most often as a lure. The impersonal, mass-mediated aspect of advertising makes it possible for fraudsters to cast a wide, relatively cost-effective net. A typology of common schemes incorporating advertising is presented in Appendix A.

One of the most common fraud schemes involves the use of print advertising to entice prospective purchasers or investors to call a toll-free telephone number for more information. This type of scheme is outlined in Appendix A and identified as Scheme P-1. During the response telephone call, telemarketers provide additional detail and solicit payment, which is provided over the telephone (usually with a credit card), wired using a funds-transfer service, or subsequently mailed using the United States Post Office or a private delivery service. Examples of this type of scheme abound. In *United States v.*

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examples, appeals from the Trademark Trial and Appeal Board are heard in the Federal Circuit.

[482] The Ninth Circuit includes the districts of Alaska, Arizona, California, Guam, Hawaii. Idaho, Montana Nevada, the Northern Mariana Islands, Oregon and Washington.

Ranney,[483] the defendants ran newspaper advertisements in major daily newspapers in large cities across the country—except in Boston, where their operation was located. The advertisements solicited investment contracts for home heating oil and made representations which "did not accord with underlying reality."[484] *United States v. Lutz*[485] in 1980 and *United States v. Aggarwal*[486] fourteen years later featured newspaper advertisements in the *Wall Street Journal* promising pre-approval of 100 percent loans or financial backing for high-risk borrowers. Potential borrowers paid advance loan application fees, but, none received the promised funding. Similarly, in *United States v. Anglin*,[487] the defendant's advertisements in the *Wall Street Journal* and other well-known publications promised a "guaranteed return" on investments, then instructed responding investors to wire money to a fake escrow account. Same for *United States v. Williams*,[488] in which advertisements in financial publications promised access to quick capital or large investment returns.

Charged schemes were not limited to loans and financing. *United States v. Serian*[489] involved the promised sale of contact lenses via advertisements in national magazines. Orders were accepted by phone and payment was made by mail or credit card, but most customers never saw any lenses. In *United States v. Kellett*,[490] advertisements in national trade magazines offered bulk buying and selling of storage tanks. Customers responded with purchase orders and made payment by mail or wire, but

[483] United States v. Ranney, 719 F.2d 1183 (1st. Cir. 1983).
[484] United States v. Ranney, 719 F.2d 1183, 1185 (1st. Cir. 1983).
[485] *See* United States v. Lutz, 621 F.2d 940 (9th Cir. 1980).
[486] *See* United States v. Aggarwal, 17 F.3d 737 (5th Cir. 1994).
[487] *See* United States v. Anglin, 2012 U.S. App. LEXIS 5984.
[488] *See* United States v. Williams, 1992 U.S. App. LEXIS 29350
[489] *See* United States v. Serian, 895 F.2d 431 (1990)
[490] *See* United States v. Kellett, 1993 U.S. App. LEXIS 11017.

the storage tanks were never traded. And in *U.S. v. Waters*,[491] prospective vacationers who responded to newspaper advertisements offering an oceanfront vacation rental were sorely disappointed to learn their follow-up phone call and deposit had secured not a vacation rental house, but a vacant lot.

A variation on this scheme involves an in-person meeting following the advertisement and telephone call. This pattern is outlined in Appendix A and identified as Scheme P-2. In-person meetings tend to be used when the prospective financial outlay is large and opportunities for participation are limited. For example, in *United States v. Lacefield*,[492] the defendant used newspaper advertisements and in-person presentations to misrepresent that certain contracts provided an opportunity to participate in a business opportunity with substantial income potential. (One scheme used print advertising and personal contact in a different way—not to lure participants, but seemingly to establish the appearance of legitimacy. In *United States v. Keller*, the defendant operated a bogus cancer clinic that recruited patients mostly by word-of-month. Those who came to the clinic and sought additional information were shown what appeared to be a magazine containing an article and advertisement about the clinic.[493]) Schemes that include broadcast advertising tend to be similar, inviting telephone calls that result in additional contact by the putative buyer with the putative seller, usually by telephone or electronic mail (Scheme B-1 in Appendix A), or sometimes in person (Scheme B-2). For example, in *United States v. White*,[494] the defendant sponsored local, gospel radio advertisements

[491] *See* United States v. Waters, 1995 U.S. App. LEXIS 23862.
[492] United States v. Lacefield, 2007 U.S. App. LEXIS 23977.
[493] United States v. Keller, 784 F.2d 1296 (5th Cir. 1986). See also United States v. Keller, 14 F.3d 1051 (5th Cir. 1994).
[494] United States v. White, 737 F.3e 1121 (2013).

offering "mortgage bailouts" for insolvent homeowners who subsequently contacted him for additional information. And in *Mann* (discussed) below, radio commercials were purported to be part of a fraud promising tax relief to those who sought additional information.

The most far-reaching schemes (Scheme M-1 in Appendix A) tend to make use of multiple print and broadcast media. *United States v. Andreadis*[495] (selling weight loss without dieting) and *United States v. Philip Morris USA, Inc.*[496] (selling health-neutral cigarettes), both discussed below, involved multiple media, including newspapers, magazines and television commercials on a national scale.

As noted, the potential criminal charges associated with such schemes of conduct depend on the choice of media and the manner in which those media reach the consuming public. Print media, for example, include newspapers and magazines. The traditional delivery mechanism for newspapers is home delivery for subscribers, plus in-store and newsstand sales for those who purchase an occasional edition but who do not subscribe. In addition, some out-of-town subscribers take delivery by mail. Print magazines traditionally have been delivered by mail to subscribers and sold individually in stores and on newsstands. For fraud-statute purposes, mail delivery of a newspaper or magazine containing a deceptive advertisement would invoke the mail-fraud statute, while the same advertisement in a publication delivered solely by home or newsstand delivery would not. An identical message in a radio or television commercial would subject the sponsor to the federal wire-fraud statute, but that message delivered in a speech to a throng of convention attendees would not.

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[495] United States v. Andreadis, 366 F.2d 423 (2d. Cir. 1966).
[496] United States v. Philip Morris USA, Inc. 566 F.3d 1095, 1107 (D.C. Cir. 2009).

Wire Fraud Plus Mail Fraud

Most of the charged schemes were alleged to have made some use of both the mails and wire.[497] A mail-fraud charge or charges accompanied the wire-fraud charge or charges in 38 (63 percent) of the 60 cases reviewed. Wire- or mail-fraud charges were accompanied by a conspiracy charge or charges in 17 cases (29 percent). Wire fraud was charged as a stand-alone crime in 10 (16 percent) of the examined cases, the earliest in 1979. By 1997—probably owing to increased reliance on electronic mail over traditional "snail" mail—wire fraud appeared less likely to be accompanied by a mail-fraud charge. Also, around this time, the "wire" used appeared more likely to be the Internet instead of the telephone.

Another finding was that wire- and mail-fraud prosecutions often include an additional charge or charges based on the specific underlying conduct. This occurred in 22 (36 percent) of the 60 examined cases. For example, where the fraud involves the income tax code, a tax-evasion charge may be included; where the fraud involves an investment scheme, a bank fraud charge may be included.

Using the number of indicted counts as a relative measure, it appears that the charged schemes differed greatly in scope, number of victims and the amount of money or property involved. Not every examined opinion provided specifics as to these details, but the available information revealed that the fraud statutes have been applied to a range of activity and dollar amounts or property values. Defendants in one case, for example,[498] faced 85 counts in a scheme that involved national advertising across many media and

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[497] *See*, *e.g.*, ; United States v. Frazin 780 F.2d 1461 (9th 1986); United States v. Ranney 719 F.2d 1183 (1st Cir. 1983); United States v. Condolon, 600 F.2d 7 (4th Cir. 1979); United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966); United States v. Lutz 1994 WL 542938 (E.D. Ky. 1994).

[498] *See* United States v. Caine, 441 F.2d. 454 (2d Cir. 1971).

that ensnared thousands of victims who each paid $3.00 to $5.00 per unit. Other defendants, including one who placed local newspaper advertisements and whose scheme consisted of convincing aspiring young models to part not with money or property but sexual favors, were indicted on only a single count.[499] Disparities in the range of victims and the amount of money or property contemplated by the charged schemes reflects the statutory language that fails to establish a threshold for triggering the wire-fraud statute. The number and type of charged defendants also was instructive. Although appellate opinions do not provide a definitive accounting of the number of charged defendants in a given prosecution—many opt not to pursue an appeal—of the 60 opinions examined, 45 featured a single defendant/appellant. Eight featured two defendant/appellants, and the remainder featured between three and six. With the exception of one of the three appeals, which referenced 15 original indicted defendants, the small number of defendants charged suggests that 1) most schemes cloaked in secrecy and are perpetuated by individuals working alone or with only a few others, and/or 2) most prosecutions ultimately target a scheme's mastermind or those participants who have been deeply involved with the scheme. With few exceptions, the examined opinions referred to the "owner," "founder," "operator," "president," "head of," "mastermind" or used another term that suggested the defendant(s) had originated and/or controlled the scheme. Where employees or participants, rather than mastermind(s), were charged, it was seemingly because the underlings had clear knowledge they were participating in a fraudulent scheme, even if they did not initiate or control it.

[499] *See* Condolon, 600 F.2d 7.

The examination also revealed that advertising agencies are not likely to be targets of wire fraud prosecutions, but are not necessarily exempt from such, either. The majority of the cases examined here involved operations devised purely for the purpose of perpetuating a fraud. In such cases, the mastermind(s) typically handles the ad creation and placement and does not involve an outside agent. But in situations where the business enterprise smacks of legitimacy and/or whose operation and advertising are widespread, an advertising agency is more likely to play a role. For example, in *United States v. Andreadis*, discussed below, the advertising agency that developed and placed the deceptive advertising copy in national media was indicted and convicted along with the mastermind.[500] Generally, advertising agencies are exempt from liability for their clients' advertising claims unless they knew or had reason to know of the defects. Agencies are not required to verify all information provided by their clients, but the FTC, for example, has said agencies have a duty to make sure the client can substantiate any claims the agency makes on its behalf. Although the DOJ has no similar policy or limitation, agencies that have no knowledge of defects or no reason to believe they should investigate further will likely be shielded from liability, if not prosecution, for lack of intent. Similarly, media outlets that merely carry advertising associated with a fraud generally are not legally responsible for advertising content and will not be considered part of the scheme.[501]

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[500] The agency declined to appeal the conviction. In the South Carolina car dealer case, only the car dealer and sales staff members were indicted. The dealer used a regional advertising agency that specialized in automotive advertising, but the agency was not indicted.

[501] Section 54(b) of the FTC Act exempts advertising media and agencies from liability for false advertising for foods, drugs, cosmetics and devices, unless the agency or

Sentencing

Advertising also may play a role in sentencing following a fraud conviction or plea agreement. The case analysis revealed a significant potential role for advertising in the sentencing of those convicted of wire or mail fraud. The federal, criminal code contains Sentencing Guidelines for United States Courts promulgated by the United States Sentencing Commission.[502] The guidelines assign a certain number of "points" to certain types of "offense behavior" or "offense characteristics" associated with a crime or one convicted of a crime. For example, a bank robbery is assigned a certain number of points, but a bank robbery committed with a gun merits additional points. More points are added if the robber has prior criminal convictions, for example. Those points are tallied and the range into which they fall determines generally the length of the sentence, including incarceration. Included in those guidelines is a "mass-marketing enhancement"[503] that allows a court to impose a two-level sentencing increase "if the offense was committed through mass-marketing."[504] For purposes of the enhancement, "mass-marketing" means

> a plan, program, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods

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medium refuses to provide information to the FTC about the identity of the person or entity who caused the advertising to be disseminated. 18 U.S.C. 54(b) (2012).

[502] 18 USCS Appx § 1B1.3 (LexisNexis 2014). According to its Guidelines Manual, the United States Sentencing Commission is an independent agency in the judicial branch whose principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

[503] 18 USCS Appx. §2B1.1(b)(2)(A)(ii) (LexisNexis 2014).

[504] *Id.*

> or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit.[505]

This language has been interpreted to include, among other activity,[506] local newspaper advertising seeking a single purchaser,[507] advertisements in a national newspaper,[508] advertisements on specialty websites,[509] advertisements on auction websites,[510] an advertisement on a single website,[511] printed advertisements in brochures distributed by mail,[512] radio commercials and television infomercials[513] and advertisements in previously established (as opposed to newly created) specialty newspapers.[514]

In one federal circuit, the mass-marketing enhancement has been limited in application, to situations in which the targets of the mass-marketing were also in some way victims of the fraudulent scheme. In that case, the court ruled that the mass-marketing targeted the general public, but the fraud itself was perpetrated on financial institutions.[515] These interpretations suggest that in a scheme to defraud consumers, virtually any advertising distributed by a printed newspaper, magazine, or online publication of any size, or distributed through the mail, may trigger the mass-marketing enhancement. It should be noted that, unlike the fraud statutes, which designate interstate

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[505] 18 USCS Appx. §2B1.1(b)(2) (LexisNexis 2014).*Id*.
[506] At least one court has held that and any commercial speech that reaches a large number of persons, including face-to-face communications, may be subject to the mass-marketing enhancement. *See* United States v. Jackson, 220 Fed. Appx. 317 (5th Cir. 2007).
[507] *See* United States v. Morrison, 713 F.3d 271 (5th Cir. 2013).
[508] *See* United States v. Parker, 302 Fed. Appx. 889 (11th Cir. 2008).
[509] *See* United States v. Christiansen, 594 F.3d 571 (7th Cir. 2010).
[510] *See* United States v. Blanchett, 41 Fed. Appx. 181 (10th Cir. 2002).
[511] *See* United States v. Tibor, 397 Fed. Appx. 242 (7th Cir. 2010).
[512] *See* United States v. Deming, 269 F.3d 107, 109 (2d Cir. 2001).
[513] *See* United States v. Munoz, 430 F.3d 1357 (11th Cir. 2005).
[514] *See* United States v. Sloan, 492 F.3d 884 (7th Cir. 2006).
[515] *See* United States v. Lacey, 699 F.3d 710 (2d Cir. 2012).

mail, wire, radio or television communications as a jurisdictional qualifier, application of the mass-marketing enhancement following a fraud conviction does not require that the marketing plan, program or campaign be in interstate commerce. This means that in a fraud conviction, even if advertising does not provide the jurisdictional hook, its existence could compound the punishment.

First Amendment Considerations

As expected, the First Amendment has had little appreciable role or impact as a defense in fraud prosecutions. Because the first search excluded RICO cases, a second search, using the search terms "wire fraud" and "first amendment," without the RICO exclusion, was performed to identify additional instances in which the First Amendment may have been raised as an issue in wire-fraud actions. (As indicated in Chapter Three, mail fraud and wire fraud are predicate offenses that may give rise to a Racketeer Influenced and Corrupt Organizations charge.) This search identified 20 cases, five of which also were present in the original 301 cases identified using the advertising-focused search terms. Excluding the overlap, 15 cases were identified in which a First Amendment issue had been raised in some capacity. Additional review indicated that, in almost half (seven) of those remaining 15 cases, the First Amendment had been introduced not as a defense, but by the reviewing court to explain the manner in which it was required to consider the defendant's vagueness challenge.[516] An additional seven cases concerned the petition clause of the First Amendment or otherwise failed to implicate the speech clause. This winnowing process identified a single case—*United*

[516] Laws that infringe First-Amendment-protected freedoms are put to a more rigorous review than are laws that do not. In three cases, the First Amendment issue related to the petition clause and did not implicate the Amendment's speech clause in any way.

States v. Philip Morris USA, Inc.—in which a First Amendment argument had been raised as part of a substantive defense to a wire-fraud charge.

United States v. Philip Morris USA, Inc.

United States v. Philip Morris was a high-profile civil RICO prosecution brought by the DOJ in 2009 against nine cigarette manufacturers and two trade organizations that represented tobacco interests. In *Philip Morris*, the scheme to defraud consisted of mail and wire fraud tied largely to the defendants' advertising and other communications with the consuming public:

> The government …presented evidence tending to show that Defendants marketed and promoted their low tar brand to smokers … as less harmful than full flavor cigarettes despite either lacking evidence to substantiate their claims or knowing them to be false. …Defendants became aware that secondhand smoke poses a health risk to nonsmokers but made misleading public statements an advertisements about secondhand smoke in an attempt to cause the public to doubt the evidence of harmfulness.[517]

The Court's handling of the defendants' First Amendment claims is illustrative of the lack of traction such claims establish. In particular, the Court rejected defendants' argument that at least some of their statements were First Amendment protected. Said the court: "Of course, it is well settled that the First Amendment does not protect fraud. … Recognizing this fact, Defendants argue that their statements were not fraudulent, but those arguments are discussed and rejected elsewhere in this opinion."[518] The court also upheld the lower court's requirement that the defendants disseminate "'corrective statements' concerning the topics about which they had previously misled

[517] United States v. Philip Morris USA, Inc. 566 F.3d 1095, 1107 (D.C. Cir. 2009).
[518] *Id.* at 1123.

consumers,'"[519] including "one-time full-page advertisements in thirty-five major newspapers, and as [sic] at least ten advertisements on a major television network over the course of one year."[520] Citing the commercial speech doctrine and the government's power to regulate commercial transactions, the court found the corrective-advertising requirement to be appropriate:

> In limited circumstances, … courts have upheld the government's ability to dictate the content of mandatory speech. This largely occurs in the commercial context. … Because commercial speech receives a lower level of protection under the First Amendment, burdens imposed on it receive a lower level of scrutiny from the courts.[521]

It also rejected the defendants' argument that the corrective statements were "freestanding" and not connected to existing advertising and should not be regarded as commercial speech. "Defendants' various claims …constitute commercial speech. Defendants disseminate their fraudulent representations about the safety of their products … in attempts to persuade the public to purchase cigarettes."[522]As *Philip Morris* illustrates, First Amendment claims have been essentially futile in the context of wire- and mail-fraud prosecutions.

Additional Findings

This research suggests that to date, advertising has directly intersected with federal fraud statutes most often not because the advertising was regarded as the fraud, but because of its utility as a jurisdictional hook to bring conduct within prosecutorial reach. Advertising, however, has rarely been the sole basis for establishing federal jurisdiction; most wire-fraud prosecutions involve some interstate use of "the wire" other

[519] *Id.* at 1138.
[520] Id. at 1142.
[521] *Id*. at 1142-43.
[522] Philip Morris, 566 F.3d at 1144.

than, or in addition to, the dissemination of an advertisement via the radio or television broadcast spectrum. In other words, among the examined cases, the majority of wire-fraud prosecutions could not be categorized as clearly "advertising-induced"—that is, enabled solely by the choice of advertising media—because the targeted conduct included some additional or alternative use of the wire. This appeared to be the case even in prosecutions where advertising was a component of the allegedly criminal conduct. In nearly all of the examined cases, some "other" (non-advertising) use of the wire clearly was present, irrespective of whether the defendant had, for example, sponsored radio or television advertising. In those cases, broadcast advertising may have been used to attract prospective buyers, but follow-up interaction may have included telephone conversations, money transferred by mail or some other interstate use of the wire apart from any advertising. In such cases, the presence of advertising—deceptive or not—is superfluous with respect to serving as the jurisdictional mechanism for bringing the conduct within federal control.

Exceptions exist, however. The indictment of the South Carolina car dealer, for one, was predicated upon the use of broadcast advertising. The television and radio advertising served as the jurisdictional hook, but also appeared to have inspired the prosecution itself. Six of the 60 examined opinions—10 percent—suggested that the indictments had been "advertising-inspired"—that is, the underlying conduct that gave rise to the fraud and related charges was the advertising itself.[523] These cases, four of which are discussed below, illustrate advertising's potential to become a substantive area

[523] *See*: United States v. Tankersley 96 Fed. Appx. 419 (7th Cir. 2004); United States v. McHenry, 952 F.2d 328 (9th Cir. 1992); United States v. Mann, 884 F.2d 532 (10th Cir. 1989); Frazin, 780 F.2d 1461; Caine, 441 F.2d. 454; Andreadis, 366 F.2d 423.

of focus for the wire-fraud statute. In *United States v. Andreadis*, the advertising schemes used to sell a "miracle weight-reducing drug" were depicted as the fraud. The defendants used mail-order advertising, print ads in national newspapers and magazines and television commercials to claim that Regimen Tablets "made possible 'no-diet' reducing, or reducing 'without dieting' and that the pills had been 'clinically tested' or 'proven clinically effective.'" According to the Government, the defendants had intended to defraud because these representations and statements were scientifically and factually false. Moreover, the appellants knew the claims were false, and despite the falsity and knowledge thereof, the defendants had "continued to include these representations and statements in their advertising." Andreadis' conviction was upheld.

In *United States v. Caine*, the Government claimed that multiple mail- and wire-fraud charges arose after a corporation "embarked on a massive advertising campaign, replete with exorbitant and unjustified claims for its product," a device purported to increase gasoline mileage in automobiles."[524] The advertisement contained "errors of omission and well as those of commission. There was no mention that the Unitron device was actually a can of engine detergent which needed to be replaced with every tankful of gas …. Nor did the advertisement indicate that the solid instrument shopped along with the fluid was simply a standard gasoline filter."[525] The Court also found evidence in "appellant's administration of the enterprise," such as failure to dispatch the product after payment was received or to process refunds, although the fraud charges themselves were seemingly directed at the advertising campaign. Caine's conviction was upheld.

[524] Caine, 441 F.2d at 455.
[525] *Id*.

In *United States v. Frazin*[526], the defendants were said to have "engaged in a fraudulent advertising campaign" by placing advertisements in out-of-state newspapers promising large investment returns. The jurisdictional requirement of the presence of interstate commerce evidently was established by the out-of-state advertising coupled with wire transfers from investors to the defendant. Frazin's conviction was upheld.

In *United States v. Mann*, a mail-fraud charge was tied to mail deliveries of a magazine that contained an advertisement placed by the defendant. A radio spot gave rise to the wire fraud count of the indictment. In *Mann*, advertising clearly triggered both the mail-fraud and wire-fraud charges, although it is unclear if the fraud was purported to be embedded in the content of the advertising—it claimed Mann's package of research materials about the federal tax code could show people how to avoid filing income tax returns—or if the fraud was in Mann's failure to provide promised materials after payment was received. Mann's mail-fraud conviction was upheld. His wire-fraud conviction, however, was overturned because in the judgment of the appellate body, the radio advertising's message was not sufficiently related to the actual fraud. Unlike the print ad, which offered a packet of legal information for sale, the radio spot did not advertise the legal packet, did not solicit any funds and did not refer to the magazine advertisement.

Impact of Choice of Media

The finding that relatively few (10 percent) of the federal fraud prosecutions examined appear to have been advertising-inspired was not unexpected. After all, the language of the wire-fraud statute itself contemplates the use of "wire, radio or television

[526] 780 F.2d 1461.

communication" for the purpose of executing "any scheme or artifice to defraud," and this approach comports with that wording.

More unexpected was the impact of a fraudster/advertiser's choice of media in inviting or inoculating against a federal prosecution. Again, the statutory language implies this, but an aggregate consideration of the sampled opinions reiterates that "fraud by radio" may invite a federal prosecution—such would almost certainly be interstate communication—but an identical "fraud by billboard"[527]—a clearly intrastate communication—may not, because the jurisdictional requirement would not be met. So even though both messages might have been aimed at and received by consumers in their cars, only the radio message could implicate the federal fraud statute. Similarly, an ad in a local newspaper distributed via home delivery could not trigger a federal prosecution, but if the same newspaper was mailed to a few out-of-town subscribers, federal jurisdiction—owing to use of the mails—could be established. A 30-second television commercial—irrespective of the number of viewers—could subject the sponsor to the federal wire-fraud statute, but an identical message delivered in a speech to a throng of 20,000 convention attendees could not. And a commercial handbill attached to the

[527] Billboards may be local in terms of geography, or they may appear alongside interstate highways. It is unclear if a billboard's appearance alongside an interstate highway would meet the wire-fraud statute's interstate commerce requirement for triggering federal jurisdiction. Court opinions from other arenas (hotels, for example), suggest such could conceivably invoke the interstate commerce clause. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Wire-fraud-specific opinions, however, suggest that a billboard, wherever located, would not by itself implicate interstate commerce for purposes of 18 U.S.C. 1343. Electronic billboards controlled remotely by computer, however, could arguably be brought within the wire-fraud statute.

doorknobs of homes in a neighborhood[528] would be safe from federal reach, but the same message delivered by mail or electronic mail could become a federal offense.

[528] The author, who finds these types of handbills to be highly annoying, proposes making this a federal crime.

CHAPTER 6

DISCUSSION AND RECOMMENDATIONS

In an animated television commercial of recent vintage, a herd of sheep is in "the slammer" with a tough-guy convict who snarls, "What are you in for?" The sheep, trade characters for a national mattress manufacturer (no counting sheep required), are reluctant[529] to admit their transgression: ripping off one of those mattress tags that reads, "Do Not Remove Under Penalty of Law."[530] Thinking quickly, Sheep # 1 barks an answer: "We got caught tearing … a man to pieces!"

One can imagine a similar jailhouse scenario featuring a car salesman in the slammer for approving television commercials promising too-good-to-be-true prices on new cars. Without making too light of a potentially serious situation, the two scenarios are useful reminders that prosecutorial discretion is essentially all that stands between a deceptive advertiser and a federal, criminal prosecution.

Re-Orientation

The introductory chapter told of a car dealer and sales manager whose criminal indictment described advertising practices almost identical to those targeted by the FTC in Operation Steer Clear. The ultimate question presented is the appropriateness of criminal penalties for deceptive advertising in light of the First Amendment and the

[529] Sheepish, even.
[530] The sheep ripped off the tag in reaction to hearing another Serta mattress had eliminated the need for them to be counted.

desire for such as a matter of policy in an era of arguable overcriminalization. Count One of the car-dealer indictment was labeled "Conspiracy to Commit Wire Fraud as to Fraudulent Marketing," followed by language regarding "a scheme … to defraud and to obtain money from the purchasers of automobiles by means of false and fraudulent pretenses." It cites the dealership's television and radio commercials as the scheme's primary element.

Considered in totality, the Count One language invites two potential readings. One is that the indictment was about a scheme to defraud prospective car buyers and that broadcast advertising was used to lure consumers into the scheme. With this reading, the scheme was in existence apart from the advertising; commercial messages were used to bring people into the scheme but were not part of the actual fraud, and their existence served as a jurisdictional hook for federal prosecutorial authority over fraudulent conduct. In other words, the prosecution was advertising-induced but not advertising-inspired; that is, the advertising itself was not necessarily regarded as the fraud, but the advertising played a role in bringing the conduct under federal control.

Under this reading, the advertising's mention in the indictment would have been necessary not because it was putatively deceptive, but because radio and television are covered by the wire-fraud statute, meaning their dissemination converts the fraud into something punishable under federal criminal law. With this interpretation of the indictment, the description of dubious advertising messages serves solely to provide support within the indictment for the notion that the sales operation was the fraud; if no one purchased or financed a car at the advertised price or rate, the sales operation must, therefore, have been fraudulent.

An alternative reading, equally if not more plausible given that Count One was labeled "Wire Fraud as to Fraudulent Marketing," as opposed to "Wire Fraud as to Commercial Transactions" or something similar, is that the fraud described in Count One was the advertising itself—that the prosecution was advertising-inspired, as opposed to advertising-induced. Although the Count describes some in-person interactions between sales staff and prospective buyers, their role in the indictment could be reasonably regarded as providing support for the Government's belief that the advertising itself was the problematic conduct—the sales talk and paperwork didn't match the advertised prices, therefore the advertising must have been deceptive. Indeed, the bulk of Count One focuses on the dealership's "fraudulent" messaging technique of "false and misleading advertising and advertising materials including radio and television advertisements." Additional language in Count One seems to specify that the alleged "deceptive marketing" consisted primarily of the information communicated to prospective customers via the broadcast commercials; this supports the notion that the broadcast advertising itself was the fraud and not just something that used "the wire" to advance the fraud.

Irrespective of which interpretation controls, Chapter Five confirmed that most fraudulent schemes that result in federal indictment are conceived of and executed solely for the purpose of allowing the seller to make a dishonest dollar. In such scenarios, the seller fails to deliver on the agreed-upon bargain and, in fact, never intended—or had the ability—to do so. With respect to the South Carolina car dealer, there is little question that the dealership was, in fact, in the business of selling cars. It is also likely that many customers drove away with exactly the car and deal for which they bargained. In

addition, had the car dealer eschewed broadcast advertising and relied instead on intrastate communications—word of mouth, signage, or other "local" means of attracting prospective customers—the first charged count of the indictment would have been a legal impossibility. But for the broadcast advertising, the dealer/customer interaction could have been the same, but there could not have been a Count One.

Count One, then, with its reliance on broadcast communications, highlights the potential vagaries of the wire-fraud statute with respect to choice of media: choose this medium and you're safe; choose that medium and you're in jeopardy. Count One also is ambiguous as to whether the alleged fraud was a sales scheme that happened to make use of deceptive broadcast advertising, or if the fraud was instead the dealership's allegedly deceptive broadcast advertising. If one assumes the latter reading to be correct, it would mean deceptive broadcast advertising properly may be, for wire-fraud purposes, both the fraudulent scheme and the "wire" used for purposes of executing the scheme. This places deceptive advertising in the shared custody of the FTC and DOJ, effectively permitting the criminalizing of deceptive advertising apart from any severable fraudulent scheme.

Clean Flow Versus Free Flow

Given the speech interests involved, concern for assuring the *clean flow* of commercial information must not overly interfere with the *free flow* of commercial information. Flexibility in the federal mail- and wire-fraud statutes arguably serves public policy ends,[531] but broad application of criminal laws to conduct regulated by the FTC may conflict with First Amendment freedoms and chill protected commercial speech. The Supreme Court has not specifically addressed the applicability of criminal statutes to

[531] William T. Neese, Linda Ferrell, O.C. *Ferrell, An analysis of federal mail and wire fraud cases related to marketing*, J. OF BUSI. RES. 58 (2005) 910-918.

deceptive commercial speech. It has consistently held, however—often in perfunctory fashion, as if no explanation was necessary[532]—that the First Amendment does not shield fraud. At issue is the point at which commercial speech ceases to be merely deceptive and morphs into the more sinister thing called fraud, and the point at which punishment for fraud is in reality punishment for speech. Potential solutions may reside elsewhere in the law, in the Court's larger body of First Amendment jurisprudence, or perhaps in some combination of the two.

Referencing concepts encountered in previous chapters and borrowing from other areas of the law where applicable, it is possible to craft potential approaches that neither undermine the fraud statutes nor unduly suppress speech. Multiple parties—prosecutors, the courts, defense attorneys, advertisers, advertising agencies, media and consumers—have potential roles in assuring an acceptable balance between speech rights and consumer-protection efforts. Following are practical considerations that relate to each of these actors, beginning with the legal community.

Prosecutors

Unless Congress restricts application of the fraud statutes, primary responsibility for maintaining the speech-rights/consumer-protection balance must rest with federal prosecutors, defense counsel and the courts. Prosecutors should use restraint in exercising prosecutorial discretion, and courts should manage such prosecutions with skepticism. Congress, in adopting the wire-fraud statute, clearly intended for federal prosecutors to have a means of dealing with fraudsters, some of whose schemes use radio or television advertising to identify potential victims. A potential first step would be for United States

[532] As noted in Chapter Two, Kozinski and Banner made a similar observation about the origins of the commercial speech doctrine.

Attorneys to adopt a policy that allegedly deceptive advertising transmitted interstate by television or radio (or by mail) may serve as the jurisdictional basis for a fraud charge only when three factors are present.

A Three-Factor Analysis

First, it should be apparent that the seller's entire business model, or at least the aspect of the business that is the subject of the advertising, is a scam and exists for no purpose other than the perpetuation of a fraud. Legitimate businesses whose advertising merely over-promises and under-delivers should be dealt with by either the FTC, state attorneys general or private lawsuits. This is not unlike the copyright law concept that protects technologies capable of substantially noninfringing uses but assigns liability to those whose sole or essential purpose is copyright infringement.[533] Additional support for this factor comes from criminal libel laws based on breach of the peace, which are disfavored because they presuppose a speaker can control how a listener will react to his objectionable message. Advertisers who "push the envelope" with aggressive sales messages should not be presumed to either intend or believe listeners will be duped into entering into disappointing transactions.

Second, the entire transaction between seller and buyer/victim must have been conducted at arm's length, with no opportunity for the victim to assess the credibility of the seller or truly reflect on the transaction prior to being ensnared. This borrows from the *Brandenburg* incitement test used by courts to distinguish between protected speech that merely advocates violence and unprotected speech that actually incites it. Because most such transactions necessarily will be performed using email, the telephone or the mails,

[533] *See*: Sony Corp of Amer. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, LTD, 545 U.S. 913 (2005).

this requirement also makes it more likely that jurisdiction may be established without reliance on the presence of broadcast advertising.

Third, the transaction must not have included the signing of a contract. When a buyer agrees to terms in a written contract that differ from terms presented in an advertisement, the fraud may not relate back to the advertisement; the advertising, therefore, cannot be deemed to be part of the fraud for jurisdictional or other purposes.[534]

Observing these factors will aid prosecutors in focusing on true fraud, as contemplated by Congress in enacting the fraud statutes, and leave deceptive advertising to the FTC.[535]

The Judiciary

As the check on the legislative and judicial branches, the judiciary should not rubber-stamp statutes and fraud prosecutions applied to deceptive advertising. Procedurally, courts should require prosecutors to be specific in identifying fraud separate from any advertising. The Supreme Court has said governments seeking to ban, restrict or punish deceptive commercial speech may not avoid the potentially difficult task of discerning the deceptive from the truthful. The right to control unprotected speech comes with the corresponding responsibility to assure that the speech being brought to heel is in fact in an unprotected category.

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[534] A fourth potential factor would focus on the dollar value associated with the fraud. Prosecutors could establish a monetary threshold that must be crossed to trigger a wire-fraud prosecution. Although the statute does not concern itself with the victim's loss—it addresses the mere intent to deceive in a way that results in financial or property loss—the establishment of a monetary threshold could function as a prosecutorial filter and means of prioritization.

[535] Concerns about selective enforcement and a focus on potential, versus actual, deception, also extend to the FTC. Potential conscriptions on FTC discretion, however, is a topic for another study.

When deceptive advertising is alleged to be the culprit, courts should require the Government to identify with specificity those particular advertisements believed to be deceptive and provide some objective support for that contention, either at a preliminary proceeding or at trial. For example, courts could require objective evidence in the form of survey research that demonstrates actual deception in accordance with some community standard for deception. In addition, it should be demonstrated that specific consumers allegedly victimized had "actual exposure" to specific advertisements deemed deceptive. Actual exposure should include some measure that the exposure was frequent enough to be effective.[536] This borrows from the legal concept in copyright-infringement cases that alleged infringers must have had access to the work in question for there to be a specific finding of infringement. Without an access requirement, criminal prosecutions could advance on the view that advertising was potentially, as opposed to actually deceptive. A "potentially deceptive" (deceptiveness) standard may be appropriate for the FTC, but is too close to strict liability to be appropriate for DOJ actions, which should advance only with a showing of actual deception.

Another approach would be for federal courts to adjudicate the elements of wire fraud with a more restrictive eye, particularly when deceptive advertising appears to be the focus of the prosecution. For example, the Second Circuit Court of Appeals has declined to equate deceit with intent in fraud cases. The Second Circuit's minority view requires evidence of tangible injury for a finding of intent to defraud in a mail- or wire-

[536] Media buyers—those who purchase advertising time and space on behalf of clients—are concerned with both the reach and frequency of a given advertisement. Simply reaching a viewer so that he or she is exposed to a commercial does not mean the exposure was effective. Multiple exposures typically are required before a commercial message is attended to and remembered.

fraud prosecution. Mere deceit that entices a customer to enter into a bargain is inadequate:

> We conclude that the defendants intended to deceive their customers but they did not intend to defraud them, because the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception.[537]

Defense Counsel

As a first line of defense, defense attorneys representing advertisers charged with criminal fraud should request that courts require the Government to identify allegedly deceptive advertising with specificity, rather than claiming the advertiser's commercials were deceptive in general. Another approach is to argue lack of deception, particularly when the terms of a transaction necessarily will differ from customer to customer—as with the financing and purchase of a new car or the hiring of a lawyer—and when additional, face-to-face contact with the seller or service provider leaves the prospective consumer in no worse position than before exposure to the advertisement. *Bates*[538] in particular, addresses advertising for these types of transactions and could prove instructive for courts overseeing such cases.

An additional strategy may be to argue that aggressive sales pitches featuring too-good-to-be-true offers amount to protected puffery in some circumstances, even though the claims range beyond opinion and include seemingly verifiable statements of fact. When resources permit it, the introduction of objective survey research as to the

[537] U.S. v. Regent Office Supply, 421 F.2d 1174 (2d Cir. 1970).
[538] Bates, 433 U.S. 350.

believability of specific advertising claims may aid in establishing that, as with puffery, no deception exists.

In addition, defense attorneys should raise First-Amendment-based arguments where deceptive advertising is concerned. Supreme Court precedent regarding deceptive commercial speech overwhelmingly has sprung from cases where the deterrent or punishment consisted of civil or administrative remedies. Room may exist to convince courts that civil penalties are adequate and criminal penalties are inappropriate. Deceptive advertising is distinguishable from obscenity, incitement to violence and other unprotected categories of speech where societal harm is more readily apparent and contributions to enlightened society are less so.

Despite such arguments having gained little traction in the past, defense counsel and courts should be open to the possibility that Supreme Court precedent has not completely precluded a role for the First Amendment in the criminalization of deceptive advertising. Given the Supreme Court's holdings that constitutional protection does not extend to fraud, there would seem to be little utility in examining the issue further. Considered in totality, however, the foregoing chapters suggest that First Amendment concerns regarding deceptive advertising perhaps should not be dismissed quite so summarily.

The First Amendment

Understanding why the First Amendment should weigh more prominently in this discussion requires a return to theoretical concerns and the public-purpose perspective ostensibly underpinning the First Amendment's free-speech clause and—by extension—the Supreme Court's commercial-speech doctrine. As presented in Chapter Two, jurists and scholars largely agree that the protections found in the First Amendment were meant

to assure a well-functioning democracy. Ideological speech, it was presumed, must be protected because such is vital in a democratic society. Almost concurrently, the body of protected speech was expanded beyond speech by and about governance. Because of the constitutional framers' affinity for art and literature and their belief such pursuits were essential to enlightened society, it was neither a stretch nor controversial for the Supreme Court to conclude that "speech about matters of public concern" should be defined broadly to include artistic and literary expression as well as speech about political matters. By 1976, when the body of protected speech was broadened to include commercial speech, First-Amendment-protected expression included speech capable of contributing to the exposition of ideas,[539] and to truth, science, morality, and arts in general.[540]

Commerce was business, however, and speech related to its conduct also was business, not expression worthy of First Amendment protection. And so it remained until 1976, when the Court determined commercial speech was not so far removed from those pursuits that it lacked all constitutional protection. In fact, said the Court, any given consumer's interest in the free flow of commercial information may exceed his or her interest in political goings on.

Despite acknowledging the potential importance of commercial speech to those operating within society, the Court was reluctant to regard it as a constitutional equal to noncommercial speech. Commercial speech is First-Amendment protected—just not to the same extent. In a nod to the public-purpose perspective, the Court rationalized the withholding of full protection for commercial speech by reference to "commonsense"

[539] Chaplinsky v. New Hampshire, 315 U.S. 568.
[540] 354 U.S. at 484.

distinctions between it and other varieties of speech. Commercial speech is easier to verify than news reports or political commentary. And commercial speech may be more durable than other kinds of speech, because of the motivation to make a profit.

These rationales, in turn, prompted the Court to further subordinate false or deceptive commercial speech in the constitutional hierarchy, the result being that deceptive noncommercial speech arguably enjoys a greater degree of First Amendment protection than truthful commercial speech.

In this hierarchy, the supposed enhanced verifiability of commercial speech compared to noncommercial speech looms large. Such a belief in the verifiability of commercial speech presupposes that sellers have the ability, and therefore, a responsibility, to understand their goods or services and represent them truthfully. It also assumes relative uniformity among consumers and the ability of sellers to assume that their commercial statements will be consistently received and understood as to each prospective buyer. Although this commonsense difference between commercial speech and other varieties of speech continues to undergird the commercial speech doctrine and the "commercial falsehood doctrine" identified in Chapter Two, the Supreme Court's decision in *Alvarez* turns the verifiability distinction on its ear. It simultaneously upsets the public-purpose perspective that rationalizes the subordination of commercial speech.

Recall that *Alvarez* involved a speaker—a public official new to a local municipal governing board—who falsely claimed to have been awarded the Congressional Medal of Honor and was charged with violating the Stolen Valor Act. The federal statute prohibited lying about having received such military decorations or honors and prescribed criminal penalties, including up to a year in prison. In holding the Act to be

unconstitutional, the Court seemed persuaded that because the lie was not made to secure employment or financial benefits reserved for Medal earners—it was made instead to enhance the speaker's standing in the community—it was harmless. Alvarez's lie was a "stand-alone" falsehood not associated with some kind of fraud, defamation or other legally cognizable harm and was, therefore, protected speech.

While the Court may have been absolutely correct in finding Alvarez's self-promoting lie to be protected speech, in holding it to be so, the Court also suggested that if Alvarez had directed his lie toward financial gain instead of social and political standing, his transgression might have merited punishment. In other words, the *Alvarez* decision elevates concern for monetary gain (normally present in the commercial arena) over concern for information sharing in the democratic process (normally present in the noncommercial arena) and ignores the fact that Alvarez, in promoting himself, actively chose to bypass verified statements in favor of wholly fabricated ones.

These observations are not made to suggest that noncommercial falsehood has been accorded "too much" constitutional protection in the hierarchy of values, or to suggest that noncommercial falsehood has been denied undue protection. They are offered to highlight the difficulties inherent in maintaining the hierarchy and to note that some leveling may be inevitable. In any hierarchical system, leveling necessarily is accomplished in one of three ways: either by elevating the subordinate, subordinating the superior, or both. The criminalization of deceptive advertising may further subordinate commercial speech (and commercial falsehood) and could have the unintended consequence of eroding First Amendment protection for noncommercial speech, including noncommercial falsehood.

Advertisers

Prosecutorial discretion and constitutional theory aside, advertisers, media and consumers also have roles to play. Legitimate commercial speakers can advance their own interests by recognizing the seriousness of consumer deception, the seriousness of potential remedies and penalties, and cleaning up their advertising copy. An appropriate mantra may be "When in doubt, leave it out." Part of this reform should include a shift away from "keeping up with the Joneses." The fact that every other directly competing car dealership, for example, seems to be running similar advertising does not make problematic advertising claims less problematic. Advertisers should look to trade groups or other industry advisory groups for guidance. Advertisers also must take responsibility for alerting their agencies that deception will not be tolerated.

Agencies

Advertising agencies must recognize that they are not shielded from liability, including criminal liability, for deceptive advertising claims made on clients' behalf. In particular, agencies that have an industry-specific focus and churn out "stock" commercials for sale to advertisers across the country should recognize their potential liability for dubious advertising may be increased if they, not their clients, are in the creative and messaging driver's seat.

Advertisers and agencies also should have an understanding of how media choices may enhance the potential legal jeopardy associated with advertising. Distributing commercial messages through the mails or advertising on television or radio can catapult advertisers (and, potentially their agencies) into the federal judicial system and subject them to broadly written and applied criminal statutes and a process that at best will be anxiety provoking and expensive and that at worst may result in prison time.

The Media

Although potentially difficult in an environment where advertising revenues have been in steady decline, media outlets can discourage deceptive advertising by refusing to carry advertising that appears to be selling a fraud. Media that provide creative services for prospective advertisers should refuse to aid in the creation of "too-good-to-be-true" messages and recognize that their immunity from civil fines or prosecution could be at risk if they actively participate in creating such messages. On the editorial side, media and consumer groups availing themselves of media can contribute to educating the public about consumer fraud, as the Court contemplated in *Bates*[541] when it said public naiveté that causes advertising to be misleading can be addressed by helping the populace be sufficiently informed to place advertising in its proper perspective.

Consumers

Relatedly, consumers can take greater responsibility for their interactions with advertising messages and with sellers in the marketplace. A consumer whose response to an advertising message is to think "That's too good to be true" should bear some responsibility for deciding to believe such a claim when his or her neighbors dismiss it as sales talk or puffing. This borrows from the "contemporary community standards" approach to distinguishing protected pornography from unprotected obscenity. Contemporary consumers, however sheltered, have access to a tremendous amount of online information with which to potentially assess the legitimacy of a commercial transaction. Consumers should be presumed to have taken some steps to insulate themselves from fraudulent transactions. Such a requirement is not unlike the tort law

[541] Bates, 453 U.S. 350.

concept of contributory negligence, where a civil plaintiff bears responsibility if his conduct falls below a standard necessary for his own protection.

Limitations and Recommendations for Future Study

As noted in the Introduction, this study's chief purpose was to examine the connection between advertising and federal, criminal fraud statutes and bring attention to a potential expansion of those statutes' application. As a policy and allocation-of-resources matter, concerns about overcriminalization suggest that any expansion of the fraud statutes, particularly where free-speech considerations exist, should be undertaken soberly and carefully.

This study has been a first step in understanding how advertising impacts the fraud statutes and vice versa. Additional studies, both to monitor this potential trend and enhance understanding of the fraud statutes' operation and their larger context, will be useful. For example, a comprehensive examination of fraud indictments should provide greater understanding of how advertising-related crimes are being charged. An examination of parallel FTC and DOJ proceedings will enhance understanding of the types and scope of conduct that gives rise to federal civil and criminal remedies. Examinations that draw from social science research and include more direct consideration of advertising typology and effects, as well as considerations of factors such as media planning measures and source credibility, also may help inform the discussion.

Conclusion

A concerned Congress in 1914 clearly intended for the FTC to marshal its resources and expertise to protect consumers from "false advertising of all industries and all commodities" in a "harmonized and unified way" with "consistent and uniform

methods of enforcement and penalization."[542] The same Congress also envisioned DOJ involvement for the intentional false advertising of foods, drugs, devices and cosmetics whose use threatened physical well being. Murkier is Congress' intent with respect to the fraud statutes and their general application to advertising deception.

In his examination of overcriminalization, attorney Harvey A. Silverglate suggests that, owing to the nature of modern federal criminal laws in the United States, the average professional likely commits several felonies a day. Silverglate critically points to, among other examples, efforts by federal prosecutors to bring criminal cases against corporations and their managers over workplace injuries and deaths:

> In other words, the statutes enacted by the Congress to deal with workplace safety issues were not sufficiently all-encompassing and onerous for the taste of federal prosecutors. So they have decided to do precisely what Attorney General Robert Jackson, in 1940, warned his U.S. attorneys against: 'pick people that he thinks he should get' … and 'then [search] the law books … to pin some offense on him.'"[543]

Silverglate concludes that Congress should legislate in ways it deems essential and that reflect contemporary times. "But it is unacceptable meanwhile," he says, "to tease prosecutions out of statutes that do not clearly proscribe the conduct involved. … Liberty and fairness are at stake."[544]

Notwithstanding the Supreme Court's pronouncements that deceptive commercial speech is categorically excluded from First Amendment protection, the protected status of truthful commercial speech requires precision and diligence in separating deception from truth and in separating protected speech from fraud. The Supreme Court has said so in the

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[542] DUNN, *supra* note 313, at 168-170.
[543] HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 255 (1990).
[544] *Id.*

context of civil or other regulatory penalties applied to deceptive commercial speech; such is no doubt more crucial when the proposed remedy is criminal sanctions. As Judge Kozinski has said, "Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal."[545]

Returning one final time to the South Carolina car dealer's federal prosecution as an exemplar, the true constitutional danger lies in allowing an environment where "I don't like your ads" becomes motivation for federal prosecutors to investigate an advertiser's business practices in search of conduct to which the fraud and related statutes may be applied.[546] Unfettered application of the federal fraud statues in the arena of deceptive commercial speech could send consumer-protection efforts hurtling off track, making a return to course difficult.

[545] *Id.*, at xxii. Quoting Judge Kozinski's concurrence in United States v. Prabhat Goyal (9th Cir., 2010) (Koziinski, C.J., concurring), at 19761-19762.

[546] Recall that Count Three of the aforementioned indictment charged conspiracy to commit wire fraud as to "false reports to American Suzuki Motor Corporation," the manufacturer whose automobiles the dealer represented. Allegedly, the dealer was reporting sales where there had been none in order to collect dealer bonuses and rebates. As to that count, the federal prosecution—ostensibly on behalf of society—was compelled for a contractual and business matter between an international automobile manufacturer and a local dealership.

REFERENCES

C. Edwin Baker, *A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

Nancy T. Bernstine, *Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices*, 20 HOW. L.J. 247, 249 (1977).

Gordon F. Bowley, *Law Enforcement's Role in Consumer Protection*, 14 SANTA CLARA L. REV. 555, 556 (1974).

William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965).

Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657 (1985).

Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 550 (1991).

Matthew Creamer, *Think Different: Maybe the Web's Not a Place to Stick Your Ads* ADVERTISING AGE, (March 17, 2008), http://adage.com/article/digital/web-s-a-place-stick-ads/125741/.

CHARLES DOYLE, CONG. RESEARCH SERV., R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 14 (2010).

CHARLES DOYLE, CONG. RESEARCH SERV., R41930, MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW (2011).

CHARLES WESLEY DUNN, WHEELER-LEA ACT: A STATEMENT OF ITS LEGISLATIVE RECORD 31 (1938).

Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 373 (1979).

Lee Greenwood, Article, *Mail and Wire Fraud*, 45 AM. CRIM. L. REV. 717 (2008);
vii

Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. Rev., 1093 (1991).

Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1 DUKE L.J. 1 (1984).

Bruce Johnson, *Online Symposium on Supreme Court Justice Clarence Thomas's First Amendment Jurisprudence: Justice Thomas and Commercial Speech* (Oct. 8, 2007), *available at* http://www.firstamendmentcenter.org/justice-thomas-and-commercial-speech.

Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527 (1979).

Bill Kenworthy and Beth Chesterman, *Criminal-libel statutes, state by state*, FIRSTAMENDMENTCENTER.ORG http://www.firstamendmentcenter.org/criminal-libel-statutes-state-by-state.

Thomas C. Kinnear & Ann R. Root, *The FTC and Deceptive Advertising in the 1980s: Are Consumers Being Adequately Protected?*, J. PUB. POLICY & MARKETING, vol. 7, 1988, at 40, 41.

Earl W. Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269 (1966).

Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990).

Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993).

Paul J. Larkin, Jr., Article, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013).

Louis J. Lefkowitz, *Consumer Protection: Meeting the Challenge*, 4 NEW ENG. L. REV. 67, 67 (1968-1969).

Gregory C. Lisby, *Criminal Libel*, FIRSTAMENDMENTCENTER.ORG (Tuesday, April 18, 2006), http://www.firstamendmentcenter.org/criminal-libel.

Lauren D. Lunsford, Note, *Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age*, 99 KY. L. J. 379, 379 (2010-2011).

FRANK J. MARINE & PATRICE M. MULKERN, CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS 2, (2007).

FRANK J. MARINE, CRIMINAL RICO: A MANUAL FOR FEDERAL PROSECUTORS 28, (Frank J. Marine et al. eds., 5th ed. 2009)

Mike Masnick, Advertising is Content; Content is Advertising, TECHDIRT (Wed., Mar. 19th 2008, 12:10 PM), https://www.techdirt.com/articles/20080318/004136567/advertising-is-content-content-is-advertising.shtml.

Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 HASTINGS CONST. L.Q 131 (2010).

JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947).

JOHN MILTON, Areopagitica, in COMPLETE PROSE WORKS OF JOHN MILTON, vol. 2, 561 (Ernest Sireluck ed., Yale University Press 1959).

Jon Mize, Comment, *Fencing Off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653 (2005).

Geraldine Szott Moohr, *Playing With the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685 (2011).

William T. Neese, Linda Ferrell, O.C. *Ferrell, An analysis of federal mail and wire fraud cases related to marketing*, J. OF BUSI. RES. 58 (2005) 910-918.

Note, *Dissent, Corporate Cartels and the Commercial Speech Doctrine*, 120 HARV. L. REV. 1892 (2007).

THOMAS C. O'GUINN ET AL., ADVERTISING AND INTEGRATED BRAND PROMOTION 84 (6th ed. 2012).

Deborah K. Owen & Joyce E. Plyler, *The Role of Empirical Evidence in the Federal Regulation of Advertising*, J. PUB. POL'Y & MARKETING, vol. 10, 1991, at 1.

Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution?*, 30 AM. BUS. L.J. 1, 31–32 (1992).

Elizabeth Qagner Pittman, Article, *Mail and Wire Fraud*, 47 AM. CRIM. L. REV. 797 (2010).

Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

Ivan L. Preston, *Reasonable Consumer or Ignorant Consumer? How the FTC Decides*, 8 J. CONSUMER AFFAIRS 131 (1974)

Ivan L. Preston, The Compatibility of Advertising Regulation and the First Amendment, 9 J. OF ADVERTISING 12 (1980).

Ivan L. Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 U. CINN. L. REV. 1243 (1988).

Ivan L. Preston, *Data-Free at the FTC? How the Federal Trade Commission Decides Whether Extrinsic Evidence of Deception is Required*, 24 AM. BUSI. LAW J. l 359 (1988).

Ivan L. Preston and Ralph H. Johnson, *Puffery: A Problem the FTC Didn't Want (and May Try to Eliminate)*, 49 JOUR. & MASS COMM. Q'TERLY 558 (1992).

Ivan L. Preston & Jef. I Richards, The Costs of Prohibiting Deceptive Advertising—Are They as Substantial as Economic Analysis Impies?, 16 ADVANCES CONSUMER RES. 209 (1989).

Ivan L. Preston & Jef I. Richards, *A Role for Consumer Belief in FTC and Lanham Act Cases*, 31 AM. BUS. L.J. 1 (1993)

Dee Pridgen & Ivan L. Preston, Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission, 14 GA. L. REV. 635 (1980).

Martin H. Redish and Abby Marie Mollen, Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression, 103 Nw. U. L. REV. 1303 (2009).

Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 805 (1979).

Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013), available at http://www.columbialawreview.org/ham-sandwich-nation_Reynolds.

JEF I. RICHARDS, DECEPTIVE ADVERTISING: A BEHAVIORAL STUDY OF A LEGAL CONCEPT 12 (1990).

Jef I. Richards & Ivan L. Preston, *Proving and Disproving Materiality of Deceptive Advertising Claims*, 11 J. PUB. POL'Y & MARKETING, no. 2, 1992, 45–56.

Jack E. Robinson, *The Federal Mail and Wire Fraud Statutes: Correct Standards for Determining Jurisdiction and Venue*, 44 WILLAMETTE L. REV. 479 (2008).

William B. Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968).

Richard M. Schmidt, Jr. & Robert Clifton Burns, *Proof or Consequences: False Advertising and The Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1282 (1988).

HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 255 (1990).

Christopher Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W. L. REV. 391(1977).

Christopher J. Stuart, Article, *Mail and Wire Fraud*, 46 AM. CRIM. L. REV. 813 (2009)

Ann Marie Tracey and Paul Fiorelli, Nothing Concentrates the Mind Like the Prospect of a Hanging, 25 N. Ill. U. L. REV. 125, 125 n.1 (Fall 2004).

See Belinda Welti, Note, *The Need for a Statutory Definition of "Deceptive" Advertising,* 19 NEW ENG. L. REV. 127 (1984).

Gary L. Wright, *Federal Judge Raps Rules on Sentencing*, CHARLOTTE OBSERVER, May 29, 2006, at 1A.

APPENDIX A

TYPOLOGY OF FRAUDULENT SCHEMES USING ADVERTISING

Scheme P-1:
Print ad in newspaper or magazine + customer response by telephone + payment.

Scheme P-2:
Print ad in newspaper or magazine + customer response by telephone + in-person meeting + payment.

Scheme P-3:
Print ad in newspaper or magazine + customer response by in-store visit + payment

Scheme B-1:
Broadcast ad on TV or radio + customer response by telephone + payment.

Scheme B-2:
Broadcast ad on TV or radio + customer response by in-store visit + payment.

Scheme M-1:
Ads in multiple print and broadcast media + customer response by telephone + payment

Scheme I-1:
Email from seller to buyer + customer response by email or telephone + payment

Scheme I-2:
Internet ad + customer response by email or telephone + payment

P=Print

B=Broadcast

I=Internet

APPENDIX B

TABLE OF CASES EXAMINED IN CHAPTER FIVE

United States v. Aggarwal, 17 F.3d 737 (5th Cir. 1994)

United States v. Andreadis, 366 F.2d 423 (2nd Cir. 1966)

United States v. Anglin, No. 10-3857, 2012 U.S. App. LEXIS 5984.

Any v. United States, No. 94-1340, 1995 U.S. App. LEXIS 4028

United States v. Barson, No. 95-5174, 1995 U.S. App. LEXIS 35719

United States v. Blanchett, No. 01-3285, 2002 U.S. App. LEXIS 6412

United States v. Boling, 869 F.2d (6th Cir. 1989)

United States v. Bowman, No. 95-5203, 1996 U.S. App. LEXIS 17057

United States v. Caine, 441 F.2d 454 (2nd Cir. 1971)

United States v. Calvin, No. 05-2146, 2006 U.S. App. LEXIS 19833

United States v. Cheal, 389 F.3d 35 (1st Cir. 2004)

United States v. Choate, 101 F.3d 562 (8th Cir. 1996)

United States v. Christiansen, 594 F.3d 571 (7th Cir. 2010)

United States v. Condolon, 660 F.2d 7 (4th Cir.1979)

United States v. Cowart, 595 F.2d 1023 (5th Cir. 1979)

United States v. Curry, 461 F.3d 452 (4th Cir. 2006)

United States v. Davis No97-1410 1998 U.S. App. LEXIS 18862

United States v. Dees, 34 F.3d 838 (9th Cir. 1994)

United States v. Duliga, 204 F.3d 97 (3rd Cir. 2000)

United States v. Earles, 955 F.2d 1175 (8th Cir. 1992)

United States v. Farrington, 499 F.3d 854 (8th Cir. 2007)

United States v. Frazin, 780 F.2d 1461 (9th Cir. 1986)

United States v. Haley, No. 96-6430, 1998 U.S. App. LEXIS 6886

United States v. Halicki, No. 90-2076, 1991 U.S. App. LEXIS 13878

United States v. Jacobson, No. 92-5046, 1993 U.S. App. LEXIS 22534

United States v. Keller, 14 F.3d 1051 (5th Cir.1994)

United States v. Keller, 784 F.2d 1296 (5th Cir. 1986)

United States v. Kellett, No. 92-3208, 1993 U.S. App. LEXIS 11017

United States v. Lacefield, No. 06-5569, 2007 U.S. App. LEXIS 23977

United States v. Litchfield, 959 F.2d 1514 (10th Cir. 1992)

United States v. Lutz, 621 F.2d 940 (9th Cir. 1980)

United States v. Mann, 884 F.2d 532 (10th Cir. 1989)

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995)

United States v. Marks, No. 95050290, 1996 U.S. App. LEXIS 24990

United States v. Marvin, 28 F.3d 663 (7th Cir. 1994)

United States v. Matsumaru, 244 F.3d 1092 (9th Cir. 2001)

United States v. McHenry, 952 F.2d 1991 (9th Cir. 1991)

United States v. Mornan, No. 04-1319, 2006 U.S. App. LEXIS 16694

United States v. Munoz, 430 F.3d 1357 (11th Cir. 2005)

United States v. Obasi, 435 F.3d 847 (8th Cir. 2006)

United States v. Parker, No. 07-13578, 2008 U.S. App. LEXIS 25059

United States v. Pearson, 340 F.3d 459 (4th Cir. 2003)

United States v. Pepsny, No. 05-346, 2006 U.S. App. LEXIS 17410

United States v. Pirello, 255 F.3d (9th Cir. 2001)

United States v. Queen, 4 F.3d 925 (10th Cir. 1993)

United States v. Ranney, 719 F.2d 1183 (1st Cir. 1983)

United States v. Rodriguez, 732 F.3d 1299 (11th Cir. 2013)

United States v. Semulka, NO. 07-2717, 2011 U.S. App. LEXIS 12566

United States v. Serian, 895 F.2d 432 (8th Cir. 1990)

United States v. Sharpe, 995 F.2d 49 (5th Cir. 1993)

United States v. Sloan, 492 F.3d 884 (7th Cir. 2007)

United States v. Tankersley, No, 03-3229, 2004 U.S. App. LEXIS 9490

United States v. Tibor, No. 09-2882, 2010 U.S. App. LEXIS 21733

United States v. Ward, 486 F.3d 1212 (11th Cir. 2007)

United States v. Waters, No. 94-5292, 1995 U.S. App. LEXIS 16930

United States v. White, 737 F.3d 1121 (7th Cir. 2013)

United States v. Wild, 92 F.3d 304 (5th Cir. 1996)

United States v. Wiley, 846 F.2d 150 (2nd Cir. 1988)

United States v. Williams, No. 91-1473, 1992 U.S. App. LEXIS 29350

United States v. Williams, No. 12-4167, 2013 U.S. App. LEXIS 23863