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GROUNDING NIKE: EXPOSING NIKE'S QUEST FOR A CONSTITUTIONAL RIGHT TO LIE

Tamara R. Piety*

"[T]here is no truth except the truth you create for yourself."¹

"This action is not about freedom of speech; it is about the right to stop people telling lies."²

In 2003, the Supreme Court set the legal world aflutter by agreeing to hear *Nike, Inc. v. Kasky*,³ a commercial speech case. In taking the case, the Court appeared to signal that a significant revision of the commercial speech doctrine would be forthcoming.⁴ Many thought that revision was long overdue.⁵ The

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1. SHELDON RAMPTON & JOHN STAUBER, TRUST US, WE'RE EXPERTS! 58 (2001) (quoting Richard Edelman of Edelman Worldwide, one of the world's largest public relations firms).

2. Statement distributed by McDonald's Restaurants, Ltd. via leaflets in McDonald's restaurants in London in April and May of 1994, explaining why it was suing two impecunious members of London Greenpeace for libel over statements made about, among other things, the nutritional value (or lack thereof) of McDonald's food. Available at http://www.mcspotlight.org/case/pretrial/factsheet_reply.html (last visited Apr. 5, 2005).

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

4. See, e.g., Linda Greenhouse, *Free Speech for Companies on Justices' Agenda*, N.Y. TIMES, Apr. 20, 2003, at A17 (noting that Nike presented Court with opportunity to make important decision on commercial speech); Linda Greenhouse, *Supreme Court to Review Nike Case in Major Look at Free Speech Rights of Companies*, N.Y. TIMES, Jan. 11, 2003, at A12 (noting that Court faced important decision on commercial speech in Nike); Associated Press, *Supreme Court Examines Corporate Free Speech in Nike Case*, Apr. 23, 2003 (stating that Nike gave Court chance to rule on corporate speech), available at <http://www.firstamendmentcenter.org/news.aspx?id=11380> (last visited Apr. 5, 2005); Jonathan Rauch, *Corporate Lying Is Bad. But Allowing It Is Good*, NAT'L J., May 10, 2003 (explaining that Court's decision could significantly impact free speech in corporate context), available at <http://reason.com/rauch/060903.shtml> (April 10, 2005).

5. See, e.g., Motion for Leave to File Amicus Curiae Brief and Brief for Amicus Curiae Center for the Advancement of Capitalism at 5-9, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (explaining how evolution of commercial speech doctrine has created an "unworkable standard" that has existed since at least 1983). See also Deborah J. LaFetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1206-07 (2004) (arguing that Supreme Court's "inconsistent approach to commercial speech has led to confusion in the lower

commercial speech doctrine had been under pressure almost from its inception.⁶ The *Nike* case raised issues with respect to the doctrine that had never before been presented to the Court, although these issues caused difficulties in the lower courts⁷ and had perhaps generated some governmental and regulatory uncertainty.⁸ Thus, more than twenty organizations and the Solicitor General of the United States filed briefs as friends of the Court on behalf of Nike.⁹ Seven

courts" and describing dismissal of the *Nike* case as unfortunate.)

6. See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) (describing the doctrine as "unstable and contentious"); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1212-16 (1983) (describing various conceptual difficulties and problems with commercial speech doctrine and widespread criticism of the doctrine by others when the doctrine was less than a decade old); David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1052-61 (2004) (detailing controversy that has accompanied the doctrine from its inception and its gradual, but unmistakable shift towards more protection for commercial speakers).

7. See LaFetra, *supra* note 5 (arguing that Supreme Court's approach has led to confusion in lower courts).

8. See, e.g., Robert M. O'Neil, *Nike v. Kasky—What Might Have Been . . .*, 54 CASE W. RES. L. REV. 1259, 1264-66 (2004) (describing difficulties deciding what constitutes "commercial speech" in some cases before some district courts, including question of whether the First Amendment protects various marketing practices of drug companies, designed to encourage doctors to use drugs for "off label" uses). Cf. Gardiner Harris, *Pfizer to Pay \$420 [sic] Million in Illegal Marketing Case*, N.Y. TIMES, May 14, 2004, at C1 (describing case against Pfizer as "one of many undertaken in recent years by federal prosecutors in Boston and Philadelphia . . . [to examine] efforts by drug companies to market their drugs for unapproved uses"). Pfizer's case with the government highlights just how keen its interest was in the resolution of the *Nike* case and puts its amicus brief in context. See Brief of Amicus Curiae Pfizer, Inc., *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (supporting Nike).

9. According to one observer, there were twenty-two amicus briefs filed in support of Nike. See Vladeck, *supra* note 6, at 1051 (noting that many amicus briefs were filed). A sample of the organizations filing in support of Nike include Exxon-Mobil, Microsoft, the Center for Individual Freedom, the Council of Public Relations Firms, the American Advertising Association, the Center for the Advancement of Capitalism, and forty news organizations, including all the major networks.

At least one filing was allegedly on no one's behalf, even though it urged the Court to support much of Nike's argument. See Brief of Amicus Curiae American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) at 12-13, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575). Although the AFL-CIO asserted that Nike's public statements about its labor practices "have been calculated more to mislead than inform the public," the organization nevertheless defended Nike's right to make these statements free from the threat of liability if they turned out to be wrong. *Id.* at 3. As a labor organization, the AFL-CIO's leaders are undoubtedly concerned about the prospect that any restriction on organizational speech will have a negative impact on its own operations and membership.

Given the Court's history of willingness to restrict unions' freedom in relation to speech related activities, this is not a frivolous concern. See, e.g., LIZABETH COHEN, A CONSUMER'S PUBLIC 153 (2004) (describing how Taft-Hartley Act made a variety of arguably speech-related activities, such as mass picketing, sympathy strikes, and secondary boycotts a form of "unfair labor practice," thereby undermining union power). See generally Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 CARDOZO L. REV. 729 (1989) (describing some anomalies in employment and labor context with respect to First Amendment protection). The AFL-CIO is probably right to be concerned even though it arguably ought not to be difficult to distinguish, for purposes of a First Amendment analysis, for-profit corporations from those organized for purposes other than profit. See, e.g., C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1178-80 (2004) (discussing

briefs, including a brief on behalf of eighteen states and Puerto Rico,¹⁰ were filed in support of Kasky. The Court heard oral argument with the redoubtable Laurence Tribe arguing on behalf of Nike.¹¹ Relevant legal communities were rife with speculation about how the Court might revise the doctrine, but a change of *some* kind seemed certain.

Then, unexpectedly, the Court dismissed the case without rendering a decision, characterizing certiorari as “improvidently granted.”¹² Some concluded that the Court had lost a valuable opportunity to revise a doctrine that was plagued with uncertainty.¹³ Others argued that the Court’s failure to address the uncertainty of the commercial speech doctrine would have grave negative impacts on the willingness of corporations to disclose information about their operations and thereby cut off a valuable source of information.¹⁴

However, just how much real “information” was at issue in the case is a matter of some dispute because Kasky alleged that the information disseminated by Nike was false.¹⁵ And herein lies much of the meat of the case. Kasky didn’t just allege that Nike had disseminated false information. He alleged that Nike had *intentionally* disseminated false information.¹⁶ He claimed Nike lied, and Nike replied (in effect), “So what? The First Amendment protects everything your lawsuit alleges we said, even *if* we lied.” However, although Nike asked the Supreme Court to affirm the Court of Appeals’ judgment, finding Kasky’s claims “absolutely barred” by the First Amendment, this is *not* how Nike presented its case to the Supreme Court. .

The story of how the case got to the Supreme Court, and how the argument shifted on its way there, is the subject of this paper. It presents a point that many commentators have missed – that Nike was asking for a constitutional right to lie. This point is important because the ramifications of Nike’s arguments, both its initial argument and its reconstituted argument in the Supreme Court, would be serious if the Court ever adopted them, something that the concurring and

distinction between commercial and regular speech).

10. Brief of Amici Curiae State of California et al. at 1, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

11. Transcript of Oral Argument at *1, Apr. 23, 2003, 2003 U.S. Trans LEXIS, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

12. *Nike, Inc.*, 539 U.S. at 655.

13. See, e.g., J. Wesley Earnhardt, Comment, *Nike, Inc. v. Kasky: A Golden Opportunity to Define Commercial Speech—Why Wouldn’t the Supreme Court Finally “Just Do It™”?*, 82 N.C. L. REV. 797, 797-98 (2004) (arguing that the Court missed a good opportunity to clarify its position on commercial speech).

14. See, e.g., Vicki McIntyre, Note, *Nike v. Kasky: Leaving Corporate America Speechless*, 30 WM. MITCHELL L. REV. 1531, 1562 (2004) (asserting that the Supreme Court’s decision will have “chilling effect” on flow of corporate information); Alyssa L. Paladino, Note, *Just [Can’t] Do It: The Supreme Court of California Overly Restricted Nike’s First Amendment Rights in Holding That Its Public Statements Were Commercial Speech*, 33 U. BALT. L. REV. 283, 293-96 (2004) (arguing that corporate expression of commercial speech will never be the same).

15. See *Nike, Inc.*, 539 U.S. at 581 (asserting that Nike “made a number of ‘false statements’”).

16. *Id.*

dissenting opinions to the dismissal of certiorari suggest that it is inclined to do.¹⁷

The case arose in the context of ongoing media and public scrutiny of Nike's overseas labor practices. Nike had been trenchantly criticized for its labor practices, particularly in Asia, and had experienced a decline in sales due to the effect of these criticisms on consumers.¹⁸ Nike responded to the criticisms and decline in market position with a vigorous public relations campaign that took many forms. Among other things, these included: letters to the editor, hiring consultants to do an audit of its practices and to publish the results of the audit, paid advertisements, and direct mail campaigns.¹⁹ Marc Kasky, a citizen of California and a consumer activist,²⁰ filed suit against Nike in California under California's unfair trade practices and false advertising laws²¹ alleging that Nike's various statements in the course of this public relations effort were false and/or misleading.²² The complaint included counts for both negligent and intentional misrepresentation.²³

In response to this complaint, Nike filed a demurrer on the grounds that "it failed to state facts sufficient to constitute a cause of action,"²⁴ and that the relief sought was "*absolutely barred by the First Amendment to the United States Constitution.*"²⁵ The trial court ruled in Nike's favor, dismissing the complaint without leave to amend, and the appellate court affirmed.²⁶ A divided California Supreme Court reversed, holding that Nike's allegedly false statements about its working conditions and practices constituted commercial speech.²⁷

In reviewing the decision, the California Supreme Court faced a dilemma. Pursuant to the leading commercial speech case, *Central Hudson Gas & Electric*

17. See Transcript of Oral Argument at *4-5, Apr. 23, 2003, *Nike, Inc.* 2003 U.S. Trans. LEXIS (No. 02-575) (arguing that restrictions must not be imposed for activity within the zone of First Amendment protection without significant leeway).

18. The background facts leading up to the case are more fully explored in the introductory piece to a symposium issue of the Case Western Reserve Law Review, *Symposium: Nike v. Kasky and The Modern Commercial Speech Doctrine*, 54 CASE W. RES. L. REV. 965 (2004), which contains ten articles discussing the *Nike* case. Ronald K.L. Collins & David M. Skover, *Foreword: The Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 968-76 (2004).

19. *Id.* at 975-76, 1011-12.

20. *Id.* at 1045 (describing Kasky as an "anti-corporate crusader").

21. Complaint for Statutory, Equitable and Injunctive Relief ¶ 62, *Kasky v. Nike, Inc.* (Cal. Super. Ct. 1998) (No. 994446), available at <http://www.corpwatch.org/article.php?id=3448> (last visited Apr. 5, 2005).

22. *Id.*

23. *Id.* ¶¶ 61-67a. Count I sought relief for the alleged misrepresentations on a negligence theory. *Id.* ¶ 61-64a. Counts III and IV were statutory claims that appear to encompass both negligence and intentional misrepresentation. *Id.* ¶¶ 68a-71a. However, for purposes of this article, the most important claim was in Count II for fraud and deceit. Complaint for Statutory, Equitable and Injunctive Relief ¶¶ 65a-67a, *Kasky* (No. 994446).

24. *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002).

25. *Id.* (quoting Nike's demurrer although no citation is given) (emphasis added).

26. *Id.* at 249.

27. *Id.* at 261-62.

Co. v. Public Service Commission of New York,²⁸ the definition of commercial speech begins with the requirement that the speech be truthful and not misleading in order to further analyze whether that speech can be protected from government regulation or interference.²⁹ Of course, truth or falsity is ultimately a factual issue. Here, what the court had before it was a demurrer, that is, a claim that Kasky's complaint failed to state a cause of action.³⁰ At the demurrer stage, the court must assume that all the allegations in the complaint are true, and the complaint alleged that Nike's speech was false. It would now remain to be seen whether discovery would permit Kasky to *prove* that the statements were false. In any event, the California Supreme Court did not decide that Nike's communications *were* false and misleading as alleged.³¹ It simply reversed the ruling that the complaint was *facially* defective,³² thereby allowing the case to move into the discovery phase.

Discovery may well have been precisely what Nike was most anxious to avoid, if only because of the expense. The demurrer may have been its attempt at a "slam dunk" in order to avoid a lengthy exploration into its corporate records. Whatever Nike's motivations were, the fact remains that what it pleaded and then defended all the way to the Supreme Court was that Kasky's complaint *failed to state a cause of action*. However, along the way, that defense underwent a subtle metamorphosis. From the "absolutely barred" stance taken in the trial court, Nike altered its defense to offer a fallback claim that Kasky's complaint was deficient because it failed to allege (or to be more specific, the California statutes on which Kasky's claims were based failed to require) actual malice according to the *New York Times Co. v. Sullivan*³³ standard.³⁴ In other words, Nike argued that Kasky's complaint was defective because it failed to allege that Nike's false statements were *intentionally* false.

Aside from the observation that Nike's use of *New York Times* turns the doctrine stated in that case on its head, the biggest problem with Nike's argument (that Kasky's complaint failed to allege that Nike *intentionally* made false statements)³⁵ is that it is not true. Yet, inexplicably, Nike, many of the

28. 447 U.S. 557 (1980).

29. *Cent. Hudson Gas & Elec. Co.*, 447 U.S. at 566.

30. *Campbell v. Regents of the Univ. of Cal.*, 35 Cal. 4th 311, 321 (2005) (detailing standard of review for a demurrer).

31. *Kasky*, 45 P.3d at 262 (stating that "[i]n concluding, contrary to the Court of Appeal, that Nike's speech at issue here is commercial speech, we do not decide whether that speech was, as plaintiff has alleged, false or misleading . . .").

32. *Id.* at 262-63.

33. 376 U.S. 254 (1964).

34. Petitioners' Brief at 43-44, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575). Notice that although the heading for this subsection of the brief refers to the desirability of the application of the actual malice standard, the majority of this subsection actually disputes the appropriateness of allowing a private citizen to bring such a suit without the actual malice standard. This emphasis was necessary to avoid an open challenge to the numerous governmental regulatory efforts regarding false advertising and consumer protection, which have no such actual malice component.

35. Robert L. Kerr, *From Sullivan to Nike: Will the Noble Purpose of the Landmark Free Speech Case Be Subverted to Immunize False Advertising?*, 9 COMM. L. & POL'Y 525, 535 (2004). Although I

amici, and several commentators characterized the issue before the Court as one of strict liability or negligence, observing that the issue of intentional misrepresentation was not before the Court.³⁶ Even Justice Stevens appears to have believed that the initial complaint did not allege that Nike's statements were made intentionally with knowledge that they were false.³⁷

In fairness to Justice Stevens and to the academic observers, as the case moved toward the Supreme Court, these issues became blurred.³⁸ Nike's argument was masterful in its recharacterization of the issues. Moreover, because Kasky's counsel appropriately focused on attempting to win the case at the broadest level of protection (negligence or strict liability) rather than at the narrowest (actual malice), and in the Supreme Court wanted to keep the focus on the argument that eventually prevailed (lack of a final judgment), Kasky did not engage with Nike's argument as vigorously as it might have done had it

generally agree with this observation about the application of the *New York Times* standard in the *Nike* case, I note that Professor Kerr appears not to have understood that to the extent Kasky was suing under what was described as the "private attorney general" provision of the California law, it was *not* "preposterous" to treat him as if he had power of the "same magnitude of a government official." That was precisely the posture such a provision puts him in. However, this does not obviate the larger point made in the article: that the goals of *New York Times*, preserving "the people's" right to criticize the government, is not at all analogous to Nike's "right" to self-promotion.

36. See, e.g., Collins & Skover, *supra* note 18, at 973 n.31, 1030; Bruce E.H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, Is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243, 1243 & n.2 (2004) (noting that consumer protection laws permit liability whether or not the speaker is aware of the speech's misleading character and observing in the footnote that, although some participants in the symposium "assume" that Kasky alleged malice, "Kasky did not so characterize his complaint in the Supreme Court").

37. *Nike, Inc.*, 539 U.S. at 660 (Stevens, J., concurring) (describing possible decisions of the Court that would resolve all issues below and suggesting that if the Court found the actual malice standard to apply, then Kasky may want "to amend his complaint to allege such malice"). There may be a distinction between whether the initial complaint was, in fact, sufficient and whether what the parties argued was even at issue before the Court. Kasky's counsel made several statements, both in the brief and in oral argument that lent themselves to the interpretation that Kasky was, in fact, only arguing the sufficiency of the negligence claim. See, e.g., Respondent's Brief at 15, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (stating that "[i]f the Court reversed on the ground that the first amended complaint does not adequately allege that Nike should have known that the statements at issue were false . . .") (emphasis added). Note that this quote is preceded by a reference to the strict liability claim that Nike made that Kasky argued was not raised below. *Id.* Moreover, the word "adequately" can be read as reflecting an understanding that although Kasky pleaded knowledge, it may not have been pleaded "sufficiently." See also Transcript of Oral Argument at 34-39, *Nike, Inc.* (No. 02-575). At oral argument, Paul Hoeber, counsel for Kasky, made jurisdictional arguments that there was no final judgment and thus no standing because the California Supreme Court's judgment dealt with a demurrer, and unless the Court was prepared to find all of Nike's speech absolutely protected, there would be no jurisdiction because even a ruling that the *New York Times* standard applied would allow Kasky the opportunity to amend, assuming that Kasky had inadequately pleaded knowledge. For further analysis of this question, see *infra* notes 141-158 and accompanying text. However, that does not obviate the fact that there was a count in the Complaint for intentional misstatement, see *supra* note 23, not to mention a number of other allegations from which one could reasonably infer an allegation of intentional misstatement, see *infra* notes 126-140 and accompanying text, making it unclear what amendments would have been necessary if the Court had remanded it. Had the Court actually reviewed this issue, Justice Stevens might well have come to a different conclusion.

38. See *infra* Part I.B for a discussion of the procedural history of *Nike*.

agreed that the *New York Times v. Sullivan* standard applied. That does not mean that the complaint did not already allege precisely what Nike claimed later the Supreme Court should have required, that is, an allegation that Nike had intentionally lied. It did. This is important. It is important because the concurring and dissenting opinions in the dismissal of certiorari demonstrate that many of the arguments advanced by Nike in support of its position were persuasive to a majority of the Court. This suggests that the next case that the Court accepts may give commercial speakers what Nike hoped to get from this case—a constitutional right to lie.³⁹

It is unclear whether, as a doctrinal matter, there is a constitutional right to utter intentionally false statements under any circumstances. Obviously there is no constitutional right to commit fraud, perjury, libel or myriad other wrongs that can be committed through speech. And some statements of the Supreme Court suggest the Constitution provides no protection for false statements.⁴⁰ On the other hand, in other statements the Court has suggested that even if no constitutional protection exists for false statements for their own sake, the theory that the costs associated with policing the veracity of speech on matters of public concern are higher than those associated with permitting false expression may nevertheless make intentionally false statements relatively immune from liability in some contexts.⁴¹ But whether there is any precedent for a constitutional right to lie, an analysis of Nike's pleadings reveals this is precisely what Nike sought.

In making the case for protection for its public statements about its labor practices Nike claimed that what was at stake was whether its voice⁴² would be

39. There is, of course, a distinction between a false statement and an *intentionally* false statement. I hope to illustrate here that Kasky's complaint included the latter, as well as the former, so that by demurring to this claim, and then asking the Supreme Court to affirm the trial court's dismissal without leave to amend, Nike was, in effect, asking for a constitutional shield from what Kasky alleged were intentional misstatements. Given that some members of the Court appeared to accept the argument that intentional misstatement was *not* at issue, it might well be that any opinion substantially broadening the scope of protection for speech by corporations would still stop short of endorsing protection for intentional lies. Nevertheless, if the Court were to adopt the *New York Times* standard it might very well be the functional equivalent of a right to lie even if the doctrinal position remains that intentional lies may be regulated and prohibited.

40. See *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 340 (1974) (stating in dicta that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues").

41. See *New York Times Co.*, 376 U.S. at 271-72 (arguing that "erroneous 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 . . .'" (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963))). Although this observation might arguably only apply to unintentional misstatements, the majority opinion makes clear in a later footnote that this value may arguably even apply to intentional misstatements to the extent that it is difficult to distinguish the patently erroneous statement, which is nevertheless made in good faith, from the erroneous statement made in bad faith. *Id.* at 272, n.13 (citing *J.S. MILL, ON LIBERTY* 47 (1947)). The concurring opinions by Justices Black (joined by Justice Douglas) and Goldberg (also joined by Douglas) went further and unequivocally stated that even the actual malice standard represented an abridgment of speech rights in these circumstances. *Id.* at 293 (Black, J., concurring) & 297 (Goldberg, J., concurring).

42. See Petitioners' Brief at 44, *Nike, Inc.* (No. 02-575) (describing California ruling as limiting corporate "voice").

heard in a matter of public concern, a concern which it characterized as “globalization” rather than as “Nike’s labor practices.”⁴³ Nike could not claim that it had been censored or muzzled, because it had not been. And no doubts remained that its claims had in fact been heard. Indeed, this was precisely the problem according to Kasky—according to Kasky Nike’s statements had been heard by too many people who were likely to be misled by them. Nike nevertheless claimed that Kasky’s lawsuit challenged the truth of those statements. According to Nike, calling Nike to account would represent an unbearable burden that would effectively “chill”⁴⁴ its future participation in the “marketplace of ideas”⁴⁵ unless Nike was afforded the constitutional equivalent of a blank check. Nike wanted a dismissal of Kasky’s suit on the pleadings and claimed that the California court’s refusal to grant dismissal would result in a serious imbalance in the “debate,”⁴⁶ an imbalance to the public’s detriment (not to mention its own) since the public would not have all the “information”⁴⁷ about the issue. It ended the argument in its Supreme Court brief with a stirring call to uphold First Amendment values, quoting Learned Hand’s observation that “right conclusions are more likely to be gathered out of a multitude of tongues, than through any authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”⁴⁸

I would not have thought it possible for Nike, or its supporters like Exxon-Mobil, Microsoft, Pfizer, Bank of America, and other large multinational corporations generating larger revenues than the gross domestic product of more than half of the world’s nations,⁴⁹ to cast itself as a victim and draw parallels between its claims and those made by the defendants in *New York Times*, without inspiring hoots of derision.⁵⁰ However, it did not.⁵¹ The fact that it did

43. See *id.* at 17-18 (stating that the case raises issues of “public concern” and engaging in debate about “globalization”).

44. See *id.* at 38 (noting that California Supreme Court’s ruling would “chill” corporate speech).

45. See *id.* at 17 (arguing that majority in California Supreme Court’s decision “distorts the marketplace of ideas”).

46. *Id.* at 18 (quoting *Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002) (Chin, J., dissenting)).

47. Petitioners’ Brief at 40, *Nike, Inc.* (No. 02-575) (arguing that, if California decision is upheld, corporations would be “foolish” to provide “information” to media).

48. *Id.* at 50 (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

49. For example, Exxon-Mobil reported \$21.5 billion in revenues for 2003. Available at http://www2.exxonmobil.com/corporate/files/corporate/earnings_4q03.pdf (last visited Apr. 5, 2005). That figure exceeded the GDP of 115 out of 183 countries according to the World Bank’s figures for 2003. Available at <http://www.worldbank.org/data/databytopic/GDP.pdf> (last visited Apr. 5, 2005).

50. It calls to mind Charles Black’s response to Herbert Weschsler’s “neutral principles” argument decrying the Supreme Court’s decision in *Brown v. Board of Education*, 349 U.S. 294 (1955), where Black suggested that when the question of whether segregation and the South’s Jim Crow laws offended “equality” was “solemnly propounded,” he thought one “ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.” Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960).

51. As difficult as it may be to envision amici such as Exxon-Mobil, Bank of America, Monsanto, Microsoft, Pfizer, the Council on Public Relations, the Association of National Advertising, and groups such as the Center for the Advancement of Capitalism, as “freedom fighters,” on par with the labor organizers and lunch counter demonstrators of yore, they staked out a position identifying

not is, I argue in this article, a matter of some concern because it suggests that some future corporate speaker will advance a similar argument and win. And this is problematic because the market cannot be trusted to sort out truth from falsity in this context for a host of reasons.⁵² And much about the legal regulation of corporations with respect to their duties to shareholders suggests that they cannot be trusted to tell the truth in the absence of a legal requirement to do so. This prediction gains some force when one observes that both the dissenting and concurring opinions to the Nike dismissal reflect acceptance of some or all of Nike's arguments about "balance" and "information."⁵³

Completely overlooked in this argument is the question of how much value

themselves with such groups. Many serious people took these positions seriously. The list of those serious people starts with Justices Stevens, Ginsburg, Souter, Breyer and O'Connor, whose concurring or dissenting opinions, or joining of the same, reflect that they took at least some of Nike's argument seriously. In this they join Justices Thomas and Scalia, who have already indicated some warmth, if not (in Justice Thomas's case) outright enthusiasm for the position that corporations' speech ought to be treated as political or expressive speech. This is also the position that Professor Rodney Smolla was spoofing (at least in part) with the title of his contribution to the Case Western symposium: Rodney A. Smolla, *Afterword: Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277 (2004). In addition, a number of distinguished lawyers and law professors were arrayed on the side of Nike and its amici, many of whom drew these parallels—apparently without irony. See, e.g., McIntyre, *supra* note 14, at 1562. Also, in the first couple of law review pieces treating the case, the student authors argue that the Supreme Court missed an opportunity in *Nike* to clarify the commercial speech doctrine and that such clarification should take the form of expanding the protection for commercial speech in the way Nike or some of its amici argued it should be expanded. See, e.g., *Free Speech Protections for Corporations: Competing in the Markets of Commerce and Ideas*, 117 HARV. L. REV. 2272, 2274 (2004) (arguing that the Supreme Court failed to define adequately the commercial speech doctrine); Earnhardt, *supra* note 13, at 798 (arguing that the Court missed a good opportunity to clarify its position on commercial speech); Paladino, *supra* note 14, at 285 (arguing that the Court's decision will chill corporate speech).

As an aside, it should perhaps not be a surprise that some of the individual corporations filing amicus briefs were among the top twenty corporations listed by at least one knowledgeable observer as having a "corporate credibility gap" as a result of receiving the lowest scores for "corporate sincerity" of those listed in a 2002 Harris study. See RONALD J. ALSOP, *THE 18 IMMUTABLE LAWS OF CORPORATE REPUTATION* 253 (2004) (listing Exxon-Mobil at number eleven, Microsoft at number seventeen, and Nike at number twenty). Of course, in addition to the problem of whether a nonhuman entity like a corporation can be said to be "sincere," there is the problem that this poll could be capturing the resulting perceptions from bad publicity, not the reality of the corporate "personality." However, the author, a long-time marketing columnist and commentator for the *Wall Street Journal*, observes that all three of these companies "have long been viewed cynically." *Id.*

52. Why the market cannot be trusted to sort out truth from falsity in this context is a topic for another article and cannot be adequately addressed in this article.

53. In his concurrence, Justice Stevens seemed receptive to the argument that Nike's speech was, at least in part, contributing to "debate on an issue of public importance." *Nike, Inc.*, 539 U.S. at 663 (Stevens, J., concurring). Justice Stevens also signaled that he was prepared to consider whether the Court's prior assertion, that there was "no constitutional value in false statements of fact," was perhaps "overbroad." *Id.* at 664. Justice Breyer's dissent goes even further, stating "the questions presented directly concern the freedom of Americans to speak about public matters in public debates." *Id.* at 667 (Breyer, J., dissenting). Justice Breyer's dissent appears to agree with most of Nike's substantive points and concludes that "if this Court were to reach the merits, it would hold that heightened scrutiny applies," a decision he believes would result in a reversal of the California Supreme Court's. *Id.* at 681.

the public derives from false information, which is what Kasky claimed was being put into the information stream by virtue of Nike's press releases, advertorials, and other claims about its manufacturing processes. The basic premise of the commercial speech doctrine, which many argue represents Nike's sole basis to any First Amendment protection in this context,⁵⁴ is that there is a public good to be derived from transmitting truthful information to consumers which justifies limited protection for commercial speech. Put another way, the commercial speech doctrine was intended to limit the government's ability to prohibit or censor *truthful* information relating to commercial interests. The commercial speech doctrine does not preclude government regulation of advertising or a corporation's self-promotion to ensure that these communications are truthful. The right of a natural person to express him or herself, whether those expressions are truthful or not, good or not, has never had any parallel in the commercial speech doctrine. In the context of commercial speech, the limiting principle has always been that freedom of expression only exists with respect to truthful expressions.⁵⁵

This allegation was precisely what Kasky claimed, that Nike was not telling the truth. Yet somehow Nike managed to shift the focus away from this fact and took most of the Court and commentators with it. In so doing, Nike painted a picture of itself as an embattled citizen⁵⁶ merely trying to defend itself in a public debate⁵⁷ against an unfair attempt to stifle its voice—as opposed to a multi-billion dollar corporation attempting to engage in damage control and regain market share through the free advertising of press releases.⁵⁸ But then “constitutional protection for free advertising” just wouldn't have the same ring

54. Whether Nike's speech was commercial speech was, for many, the central issue. If the speech was commercial speech, then *all* of it could be tested for its truth, and Nike might be liable for false statements or enjoined from further false speech. If Nike's speech was not commercial speech but rather traditional speech protected by the First Amendment, then, arguably, none of it could be tested for its truth. See *infra* Part II.A. for a discussion of the evolution of the commercial speech doctrine.

55. See *Nike, Inc.*, 539 U.S. at 664 (Stevens, J., concurring) (discussing commercial speech and stating that there is “no constitutional value in false statements of fact”) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

56. Nike's brief on the merits to the Supreme Court posed as the first of the “Questions Presented” whether the speech of a corporation could expose it to liability for misstatements if the speech involved matters of “public debate” arguably affecting consumers' impressions of that entity as a “good corporate citizen.” Petitioners' Brief at i, *Nike, Inc.* (No. 02-575).

57. *Id.*

58. One textbook on advertising and promotion suggests that public relations (at least the public relations with a marketing thrust) is a particularly useful component of an overall marketing strategy “because the airtime or newspaper space is *provided free of charge* by the newspaper, magazine, radio, or television station that prints or airs the message.” TERENCE A. SHIMP, *ADVERTISING, PROMOTION, AND SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS* 569 (6th ed. 2003) (emphasis added). In addition, the text notes that such messages are often more effective because they have more credibility. “MPR [marketing-oriented public relations] messages come across not as advertisements *but as unbiased reports from journalists*. An MPR message in comparison with an advertisement assumes a mantle of credibility.” *Id.* (emphasis added). The author observes in an endnote, “the dividing line between marketing PR and general PR is not perfectly clear.” *Id.* at 623 n.1.

to it.

The ascendancy of the “corporate free speech” argument is of concern because, if arguments such as Nike’s win support, they will provide a basis for undermining much of the government’s power to regulate business effectively in a myriad of contexts (even if those arguments are not matched by the political will to implement that power). Thus, although the weight of popular opinion seems to lean in the opposite direction, it nevertheless seems worthwhile to bring what are arguably the real issues in *Nike* back into focus and to place them in the context in which they occur, particularly with respect to standard marketing practices and governmental attempts to regulate those practices consistent with the public good.

Part I of the article analyzes the complaint and Nike’s responses from their inception all the way to the Supreme Court. Part I.A describes Kasky’s complaint in detail to show that, contrary to the understanding of many observers, Kasky made allegations in the complaint that meet the actual malice standard set forth in *New York Times v. Sullivan* case. Part I.B reviews the arguments made on appeal and tries to piece together how such an important fact appeared to have gotten lost in the course of the proceeding.

Part II reviews the significance of what Nike sought from the courts. Part II.A analyzes Nike’s request with respect to the commercial speech doctrine and the importance of truth to the protection of commercial speech.⁵⁹ Then Part II.B analyzes Nike’s request pursuant to general First Amendment doctrine.⁶⁰ This Part explores the question of whether there is *ever* a constitutional right to lie and concludes that while perhaps no “right” to lie exists generally, the constitutional interpretation that Nike sought would effectively have given it that right. Thus, “a right to lie” is a fair characterization of what Nike sought from the courts.

Part III discusses some of the implications of Nike’s request in the context where corporate speech takes place.⁶¹ Others have discussed many of these potential implications. Some have not. This discussion is meant to be primarily suggestive of additional points of inquiry and research, rather than an exhaustive review. Moreover, given how little is already actually regulated (or regulable) by the commercial speech doctrine, the implications of Nike’s argument in the *Nike* case suggest that little will be left of governmental regulation over corporate communications if these communications are broadly constitutionalized. Finally, in this Part I describe some of the current governmental attempts to regulate marketing that would have been imperiled if Nike’s argument had prevailed, and which are at risk if a future corporate defendant successfully makes Nike’s arguments to the Court. In conclusion, I argue that these facts are grounds for pause before enthusiastically adopting the rhetoric that corporate interests such

58. See *infra* Part II.A for a discussion of Nike’s request in the context of the commercial speech doctrine.

59. See *infra* Part II.B for a discussion of Nike’s request in the context of First Amendment doctrine generally.

60. See *infra* Part III for a discussion of the implications of adopting Nike’s request and argument.

as Nike have been so successful at selling, because that rhetoric doesn't, in the end, hold up to close scrutiny.

*“When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”*⁶²

PART I

A. *Kasky’s Complaint*

A few of Nike’s key claims to the Supreme Court were the following: (1) that its statements about its labor practices—that is, how much it paid its workers, working conditions, et cetera—were “matters of great public importance”⁶³ and as such entitled to the highest level of constitutional protection; (2) that Kasky’s concerns about Nike’s statements regarding its labor practices went to “moral judgments,” not to the “commercial harms”⁶⁴ covered by the commercial speech doctrine; (3) that a chilling effect, due to fear of litigation, would result without First Amendment protection, which would cause “valuable corporate contributions”⁶⁵ touching on these “social and moral issues” to be lost; and finally, (4) that a failure to extend this constitutional protection to speech such as Nike’s would be “unfair” because it would disadvantage or handicap one “side” of the “debate” against the other.⁶⁶ In examining the complaint, it is worthwhile to keep these assertions in mind.

1. The Alleged Misstatements

Kasky’s complaint alleged Nike’s representatives made several representations, in numerous communications, that he summed up as constituting seven misstatements of fact:

- “workers who make NIKE Products are protected from and not subjected to corporal punishment and/or sexual abuse.”⁶⁷
- “NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours;”⁶⁸
- “NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions;”⁶⁹

62. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 94 (Special ed., Random House 1946).

63. Petitioners’ Brief at 19, *Nike, Inc.* (No. 02-575).

64. *Id.*

65. *Id.* at 41.

66. *Id.* at 18. In his dissenting opinion, Justice Chin of the California Supreme Court offered this argument in its strongest form. *Kasky v. Nike, Inc.*, 45 P.3d 243, 263 (2002) (Chin, J., dissenting) (stating that “[h]andicapping one side in this important worldwide debate is both ill considered and unconstitutional”).

67. Complaint for Statutory, Equitable and Injunctive Relief ¶ 1(a), *Kasky* (No. 994446).

68. *Id.* ¶ 1(b).

69. *Id.* ¶ 1(c).

- “NIKE pays average line-workers double-the-minimum wage in Southeast Asia;”⁷⁰
- “workers who produce NIKE products receive free meals and health care;”⁷¹
- “the GoodWorks International (Andrew Young) report proves that NIKE is doing a good job and ‘operating morally;’”⁷² and
- “NIKE guarantees a ‘living wage’ for all workers who make NIKE products.”⁷³

2. The Form of the Communications

Characterizing its statements as speech on a matter of public concern was central to Nike’s rhetorical strategy and critical to every point that followed. Nike claimed, therefore, that “[t]his is not a close case . . . [w]hatever the exact margins of the category of ‘commercial speech,’ the statements at issue here fall well outside them.”⁷⁴ Of course, an advocate typically states his or her case in perhaps stronger language than the situation warrants. However, viewed from the perspective of the *form* of Nike’s communications, the Supreme Court has never dealt with communications that, in the main, fell so far from what some might describe as traditional advertising.⁷⁵ Therefore, this situation makes it worthwhile to pause and describe the form in which Nike made the alleged misrepresentations.

None of the communications on which Kasky based his complaint

70. *Id.* ¶ 1(d).

71. *Id.* ¶ 1(e).

72. Complaint for Statutory, Equitable and Injunctive Relief, ¶ 1(f), *Kasky* (No. 994446). This is probably the most tenuous candidate for a “statement of fact” given that what constitutes “operating morally” seems to be open to debate. Assuming, however, that whatever “operating morally” means encompasses the factual claims Nike made in other statements, it follows that Nike may not be “operating morally” if these claims are not true.

73. *Id.* ¶ 1(g). As with the preceding claim about “operating morally,” the phrase “living wage” cannot be reduced to a fixed term in the same way that “legal minimum wage” can be reduced to a fixed term. Taking all of the pleadings in *Kasky*’s complaint as true, however, one would be forced to conclude that whatever a “living wage” might be, Nike was aware that it was not paying it and, furthermore, had no intention of paying it. See *infra* notes 139-40 and accompanying text discussing the references made by Nike personnel to a “living wage.”

74. Petition for Certiorari at 9, *Nike, Inc.* (No. 02-575).

75. See, e.g., David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1060 (2004) (noting that “most of the cases before the Court involved classic advertising for goods or services, and thus fell comfortably within the Court’s commercial speech definition”). The most familiar exception may have been raised in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), where a condom manufacturer included general information about condom use and the health implications of contraception in its promotional brochure for its own brand of condoms. *Bolger*, 463 U.S. at 62. The California Supreme Court relied heavily on *Bolger* for its analysis in the *Nike* case. *Kasky v. Nike, Inc.*, 45 P.3d 243, 251-52 (Cal. 2002). For a discussion of how the California Supreme Court relied on *Bolger* in deciding the *Nike* case, see Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004).

constituted “advertising” as traditionally conceived.⁷⁶ Instead, Nike’s communications consisted of:

- letters to University Presidents and Athletic Directors, including to some officials at schools with which Nike had contracts to give the school money in exchange for its being a “Nike school,” purporting to explain or defend Nike’s labor practices;⁷⁷
- a letter to the editor of the *San Francisco-Examiner* from Nike’s Director of Communication, Lee Weinstein, acknowledging that Nike is aware that “[c]onsumers are savvy and want to know they support companies with good products and practices . . .”⁷⁸ and encouraging holiday shoppers “to remember that Nike is the industry’s leader in improving factory conditions;”⁷⁹
- Nike press kits which included a Nike “Code of Conduct,” a “Memorandum of Understanding,” and a document entitled “Nike Production Primer;”⁸⁰ all of which contained information about Nike’s labor practices;
- statements made by Nike CEO, Phillip Knight, at a shareholders meeting, where he claimed that the air quality in some of Nike’s factories was “better than it is in Los Angeles;”⁸¹
- statements made by various Nike representatives to newspaper reporters that, despite reports pursuant to an Ernst & Young audit of dangerous levels of exposure to toxic chemicals in Nike’s factories, the danger was minimal because workers “do not stay more than two or three years in the factories” and that the

76. Attempting to articulate what constitutes advertising illustrates the problem in this case. Promotional activities of for-profit entities are so multifarious and widespread in the media that advertising variety has become the norm. See, e.g., JULIET B. SCHOR, *BORN TO BUY*, 79-81 (Scribner, New York, N.Y., 2004) (*Under the Radar: 101 Ways to Disguise an Ad*). Consequently, trying to determine what constitutes “advertising” has become a challenge. To illustrate, one textbook defined advertising as follows:

A form of either mass communication or direct-to-consumer communication that is non-personal and is paid for by various business firms, nonprofit organizations, and individuals who are in some way identified in the advertising message and who hope to inform or persuade members of a particular audience.

TERENCE A. SHIMP, *ADVERTISING, PROMOTION, AND SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS* 648 (6th ed. 2003). In addition, two prominent commentators offered another analysis on this subject:

In an era when corporations increasingly see news coverage as a form of PR, and news shows as crucial forum in their advertising and public relations campaigns, the line between news and advertising is blurred. But that does not mean that the line should not or does not exist. Nike’s statements were on the PR side of that line.

Chemierinsky & Fisk, *supra* note 75, at 1148.

77. Complaint for Statutory, Equitable and Injunctive Relief ¶ 22, *Kasky* (No. 994446).

78. *Id.* ¶ 24.

79. *Id.*

80. *Id.* ¶ 25.

81. *Id.* ¶ 37.

improvement of the working conditions was “a work in progress;”⁸²

- a letter to the editor in which CEO Knight claims that workers are given free meals in addition to their wages and overtime;⁸³
- and numerous press releases and advertorials⁸⁴ dedicated to refuting the charges made against Nike’s factory working conditions and labor practices worldwide.

Nike characterized these statements as speech contributing to the debate about globalization.⁸⁵ Of course, *another* way to characterize these statements is that they were a part of a public relations campaign to polish and resuscitate Nike’s image with the aim of improving sales, retaining sponsorship agreements with athletes and schools, and bolstering shareholder and market confidence in its ultimate profitability through these sales. Given a corporation’s obligations to its shareholders, the second characterization is more plausible than Nike’s characterization.⁸⁶

Kasky claimed that these representations violated the California laws governing unlawful business practices for unfair competition and false advertising because Nike’s statements were false and made with the intent of improving Nike’s financial performance, with respect to both consumer and institutional sales and Nike’s performance in the stock market.⁸⁷ Kasky’s complaint did not rely on a single standard of liability for the false statements. Instead, the complaint alleged multiple theories of liability—from (perhaps) strict liability,⁸⁸ to negligence, to intentional fraud and deceit.⁸⁹ Count I is

82. Complaint for Statutory, Equitable and Injunctive Relief ¶ 42, *Kasky* (No. 994446).

83. *Id.* ¶ 49.

84. The term “advertorial” attempts to capture the quality of advertising that purports to argue an issue or take a position on some issue of public interest. It is an amalgam of “advertisement” and “editorial,” meant to signal that it has qualities of both. Nike is correct that the “ad” at issue in *New York Times* was a precursor of this genre. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (appendix). That is, in *New York Times*, the NAACP and others paid for newspaper space—space that ordinarily would be devoted to traditional advertising—to publish an editorial comment about the civil rights movement and solicit funds for Dr. King’s defense. *Id.* at 258-61. In both *New York Times* and the instant case, the content of the advertorial consisted principally of text that was intended to persuade. Of course, the difference is that the “product” in *New York Times* was civil rights. While we all can be said to profit, both materially and spiritually, from an end to discrimination and racism, Nike aimed its claim at a more tangible, monetary profit.

85. Petitioners’ Brief at 1-3, *Nike, Inc.* (No. 02-575).

86. These two aims are not, of course, mutually exclusive. But the dominant purpose from Nike’s perspective is surely the second one and arguably its only legitimate one given its obligations to shareholders. It would seem then perverse to extend protection to speech that not only fills no public good but is also not responsive to the principal motivations for the speech – unless of course it is deemed a public good to allow a company to say anything that might increase its value, regardless of the truth of its representations.

87. Respondent’s Brief at 6, *Nike, Inc.* (No. 02-575).

88. Nike claimed that the California law permitted strict liability for statements that are “literally true” which the “Court later deems misleading; and that such liability attaches notwithstanding the speaker’s best efforts to ensure the statements’ accuracy.” Petitioner’s Brief at 3, *Nike, Inc.* (No. 02-575). Because the parties did not actually litigate this issue, it remains uncertain. However, the California Supreme Court suggested that strict liability is indeed a possibility in such cases when it

explicitly labeled as a claim for “Negligent Misrepresentation.”⁹⁰ Counts III and IV do not specify a state of mind.⁹¹ However, in Count II Kasky alleged “Fraud and Deceit,”⁹² thereby claiming that Nike’s representatives made these statements with *knowledge that they were false*.

Thus, it is simply not the case, as some observers remarked, that Kasky failed to raise the issue of intentional misstatement. At the demurrer stage (the equivalent of a motion to dismiss for failure to state a claim), all of the plaintiff’s allegations must be accepted as true.⁹³ Moreover, pursuant to California law, the reviewing court is to “give the pleading *a reasonable interpretation by reading it as a whole and all of its parts in their context*.”⁹⁴ The demurrer raises the question, “Does this state a cause of action?” and not, “Are these allegations true?” Whether a claim states a cause of action must be analyzed by looking at what the law requires and what the plaintiff alleged.

3. California Law

The California Supreme Court noted California’s unfair competition law (“UCL”) defines “unfair competition” to include “any *unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising* and any act prohibited by [the false advertising law (sections 17500 to 17930)].”⁹⁵ Counts I to III of Kasky’s complaint specifically relied on this provision.⁹⁶ In examining California’s false advertising law (“FAL”), the court noted the law:

makes it “unlawful for any person, . . . corporation . . . , or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading”⁹⁷

observed that California laws encompass not only false statements, but also statements which may be literally true yet are nevertheless capable of deceiving the public. *Kasky*, 45 P.3d at 250.

89. Complaint for Statutory, Equitable and Injunctive Relief ¶¶ 61-67a, *Kasky* (No. 994446).

90. *Id.* ¶ 61-64a.

91. *Id.* ¶¶ 68a-71a.

92. *Id.* ¶ 65a-67a.

93. *See, e.g.,* *Sunset Drive Corp. v. City of Redlands*, 86 Cal. Rptr. 2d 209, 212 (Cal. Ct. App. 1999) (noting requirement that all pleaded facts be taken as true).

94. *Id.* (citing *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990)) (emphasis added).

95. *Kasky*, 45 P.3d at 249 (citing CAL. BUS. & PROF. CODE § 17500 (West 2002)) (emphasis added).

96. *See* Complaint for Statutory, Equitable and Injunctive Relief ¶¶ 61-69a(b), *Kasky* (No. 994446) (alleging Nike engaged in unlawful business practices in violation of California law).

97. *Kasky*, 45 P.3d at 250 (citing CAL. BUS. & PROF. CODE § 17500).

Indeed, Count IV of Kasky's complaint specifically rested on section 17500 of the California Business and Professions Code.⁹⁸

The court further noted the UCL's scope was "broad"⁹⁹ and permitted the violations "of other laws to be treated as unfair competition that is independently actionable."¹⁰⁰ The court added:

Here, for instance, plaintiff's first amended complaint alleged that Nike and the individual defendants violated the UCL by committing actual fraud as defined in and prohibited by Civil Code section 1572 and deceit as defined in and prohibited by Civil Code sections 1709 and 1710.¹⁰¹

It is instructive to see what these laws provide.

Pursuant to section 1572 of the California Civil Code, "actual fraud" includes all of the following:

1. The suggestion, as a fact, of that which is not true, *by one who does not believe it to be true*;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, *by one having knowledge or belief of the fact*;
4. A promise made without any intention of performing it; or
5. Any other act fitted to deceive.¹⁰²

Similarly, section 1710 of the California Civil Code defines "deceit" as:

1. The suggestion, as a fact, of that which is not true, *by one who does not believe it to be true*;
2. The assertion, as a fact, of that which is not true, *by one who has no reasonable ground for believing it to be true*;
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing it.¹⁰³

Although the definitions of both fraud and deceit include negligent misrepresentation,¹⁰⁴ they also unmistakably include intentional misstatement. In light of the negligence claims already made elsewhere, the most "reasonable interpretation" is that Kasky intended to allege intentional misstatement.¹⁰⁵

98. See Complaint for Statutory, Equitable and Injunctive Relief ¶¶ 33-34, *Kasky* (No. 994446).

99. *Kasky*, 45 P.3d at 249.

100. *Id.*

101. *Id.*

102. CAL. CIV. CODE § 1572 (West 2004) (emphasis added).

103. CAL. CIV. CODE § 1710 (West 2004) (defining deceit as prohibited per section 1709) (emphasis added).

104. See, e.g., *id.* § 1572 (finding actual fraud where a person makes positive assertion that is "not true, though [the person making it] believes it to be true").

105. See *Sunset Drive Corp. v. City of Redlands*, 86 Cal. Rptr. 2d 209, 212 (Cal. Ct. App. 1999)

Indeed, the specific factual allegations support this reading.¹⁰⁶

Nevertheless, Nike represented in its Brief to the Supreme Court that “*the counts of Kasky’s complaint do not allege that Nike was anything more than negligent in making the statements he claims were false or misleading.*”¹⁰⁷ As evidenced by the above analysis of the complaint, the statutes in question, and the facts alleged, Nike’s representation is simply not true. Why and how, then, did this representation become (for at least some observers, including Justice Stevens) the posture of the case? Although it may not be possible to definitively answer this question, reviewing the record offers some hints. Perhaps an even more thorough analysis of the docket and transcripts would definitively settle the matter. Even so, if a definitive answer exists, it did not make its way into the briefs filed with the Supreme Court. However, the complaint is part of the record, and the claims it raised are there for all to see.

“‘*The question is,*’ said Alice, ‘*whether you can make words mean so many different things.*’”¹⁰⁸

B. *The Road to the Court*

One can construe Nike’s demurrer as an admission, only for purposes of considering the demurrer, that all Kasky’s pleaded allegations are true but nevertheless, fail to state a cause of action.¹⁰⁹ Because Kasky did claim in his complaint that Nike’s representatives knowingly and intentionally misrepresented the seven alleged statements of “fact,”¹¹⁰ the inescapable conclusion is that Nike was asserting that the First Amendment protects such knowing and intentional misstatements.

Despite its earlier position in the California courts, that no amendment would suffice to save the complaint, Nike suggested in the Supreme Court that an amendment to the pleadings might save the complaint from a demurrer. It urged the Court to adopt the “actual malice” standard of *New York Times Co. v. Sullivan*¹¹¹ as an alternative to simply reversing the California Supreme Court’s ruling.¹¹² This was not the argument Nike made in the California trial and

(stating court gives pleading “a reasonable interpretation by reading it as a whole and all of its parts in their context”) (citing *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990)).

106. See *infra* notes 126-40 and accompanying text.

107. Petitioners’ Brief at 6, *Nike, Inc.* (No. 02-575) (emphasis added).

108. CARROLL, *supra* note 62, at 94.

109. See *Sunset Drive Corp.*, 86 Cal. Rptr. 2d at 212 (stating that for purposes of considering a demurrer, the court will “assume the truth of all material facts which have been properly pleaded, of facts which may be inferred from those expressly pleaded, and of any material facts of which judicial notice has been requested and may be taken”).

110. See *supra* notes 67-73 and accompanying text for a discussion of the seven alleged statements of “fact” listed in Kasky’s complaint.

111. 376 U.S. 254 (1964).

112. Petitioners’ Brief at 43-44, *Nike, Inc.* (No. 02-575). It is interesting to note that this argument is a second-line of defense. That is, it comes toward the end of the brief, and although the heading suggests that this section of the brief is directed at the adoption of the *New York Times*

appellate courts when it claimed the First Amendment “absolutely barred” a cause of action such as that pled by Kasky.¹¹³ And both California courts adopted this position; the trial court by dismissing the complaint *without leave to amend* and the appellate court by affirming the dismissal.¹¹⁴ Thus, in making the suggestion to the Supreme Court that an amendment was necessary in order for Kasky to state a cause of action, Nike not only retreated from its earlier “absolutely barred/no amendment possible” position taken earlier, but it also necessarily implied that Kasky had made no claim that amounted to an allegation of “actual malice.” Yet, as set forth above, this is not true. Thus, the question arises, how did Nike make this argument, and why did it succeed? Some possibilities are discussed below.

1. Actual Malice

One possibility is that “fraud” and “deceit” did not immediately suggest the same standard as “actual malice” to some readers. An examination of the factual circumstances in *New York Times* illustrates why this might be so, as well as the absurdity of the parallel Nike attempted to draw between itself and the defendants in *New York Times*. Most importantly, the case makes clear that the standard the Court imposed in *New York Times* is the same one Kasky pleaded. That is, “actual malice” and “fraud” and “deceit,” as defined by the California statutes in question, represent essentially the same standard.

In *New York Times*, the defendants were various individuals, as well as the *New York Times Co.*, who had purchased and run an advocacy advertisement soliciting contributions for the defense of Dr. Martin Luther King, Jr. in an upcoming trial in Montgomery, Alabama.¹¹⁵ The advertisement made allegations about police practices in Montgomery regarding the civil rights movement.¹¹⁶ Although the advertisement did not mention him by name, a Montgomery-elected commissioner accused the defendants of libel.¹¹⁷ Because he was the supervising commissioner of the police department, the plaintiff claimed statements in the advertisement libeled him by making several allegations that the police under his supervision had engaged in improper

“actual malice” standard, most of this section is actually an attack on the “private attorney general” provision of the California statute that allows individual citizens to sue on behalf of the public. Compare Petitioner’s Brief at 43-44, *Nike, Inc.* (No. 02-575) (section II, B entitled “Because California’s Legal Regime Will Predictably Chill Much Protected Speech, This is An *A Fortiori* Case for the Application of the “Actual Malice” Standard” and discussing the standard) with Petitioner’s Brief at 44-50, *Nike, Inc.* (No. 02-575) (discussing private attorney general provision). Also, the prayer for relief simply claims “the judgment of the California Supreme Court should be reversed.” *Id.* at 50. It does not specify whether it is seeking affirmance of the appellate court’s decision to affirm the grant of the demurrer without leave to amend. *Id.* Nevertheless, it seems fairly obvious that this would have been the optimal result for Nike.

113. Petitioner’s Brief at 43-44, *Nike, Inc.* (No. 02-575).

110. *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 857 (Cal. Ct. App. 2000).

115. *New York Times Co.*, 376 U.S. at 256-57.

116. *Id.* at 256-58.

117. *Id.*

conduct.¹¹⁸ Justice Brennan, writing for the majority of the Court, announced that in order for the plaintiff to prevail in his libel action, he would have to prove that any misstatements of fact were made with “actual malice.”¹¹⁹ Justice Brennan defined “actual malice” as “knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not.”¹²⁰ Justice Brennan’s definition clearly parallels section 1572 of the California Civil Code, which provides for liability if a defendant makes a “suggestion, as a fact, of that which is not true, by one who does not believe it to be true.”¹²¹

Even so, the lower court in *New York Times* rejected a jury instruction on malice that contained a slightly different definition,¹²² thereby highlighting the inapt comparison between the *New York Times* defendants and Nike. The trial court rejected the defendants’ request for a jury instruction denying available punitive damages upon a showing of “malice,” if there was no evidence that the misstatements in question were “*motivated by personal ill will, [sic] that is actual intent to do the plaintiff harm.*”¹²³ In other words, in order to receive punitive damages pursuant to this instruction, the *New York Times* plaintiff would have had to show that the defendants knowingly intended to harm him with falsehoods in making their allegations and that the defendants had done so because they were motivated by “ill will.” Had the trial court given this instruction, the jury could have conceivably concluded that the defendants had knowingly made false statements but were nevertheless off the hook if they had not done so pursuant to “personal ill will.” Both the words “personal ill will” and “malice” connote a bad intent toward the target of the speech, an intent to harm. Although the consensus reading of the *New York Times* “malice” standard means “intentional,”¹²⁴ intentional misstatements about others made with the intent to do them harm is different from intentional misstatements about oneself intended to do oneself good. “Malice” is not a word that attaches very comfortably to the latter situation.

It would clearly be absurd to require Kasky to show that Nike made its statements pursuant to “personal ill will.” In the *Nike* case, Kasky alleged that Nike made misstatements about *itself*. One can hardly be expected to prove that Nike’s misstatements were “motivated by ill will” toward *itself*, or that they were calculated to do itself harm. To the contrary, the falsity, if the statements were

118. *Id.*

119. *Id.* at 279-80.

120. *New York Times Co.*, 376 U.S. at 280.

121. CAL. CIV. CODE § 1572 (West 2004).

122. See *New York Times Co.*, 376 U.S. at 262 (noting that the trial judge refused to charge “that the jury must be ‘convinced’ of malice, in the sense of ‘actual intent’ to harm or ‘gross negligence and recklessness’”).

123. *Id.* at 284 & n.24 (emphasis added).

124. See, e.g., Boyd C. Farnam, *Free Speech and Freedom from Speech: Hustler Magazine v. Falwell, The New York Times Actual Malice Standard and Intentional Infliction of Emotional Distress*, 63 IND. L.J. 877, 883 (1988) (noting that actual malice standard requires “intentional or reckless false speech”).

false,¹²⁵ would benefit Nike. The motivation for a false statement about *oneself* runs in the other direction because Nike was not motivated by malice, but rather self-inflation. Nevertheless, these subtle differences may have confused observers.

2. Pleading Ambiguities

A second possibility for the ease with which Nike steered observers away from the truth of the pleadings is a pleading ambiguity in the complaint that was raised by Nike in its brief to the Supreme Court. In making the claim that Kasky's complaint never alleged that Nike was "anything more than negligent,"¹²⁶ Nike observed, "[Kasky] pointedly alleges not that Nike misspoke purposefully or with reckless disregard of *the truth* but rather . . . 'with reckless disregard of *the laws of California* prohibiting false and misleading statements.'"¹²⁷ With due respect to Nike's counsel, this seems to be hairsplitting. What is the difference between speaking with reckless disregard of the truth and reckless disregard of a law that requires you tell the truth? None it would seem. While some inherent value may exist in knowledge of the law for its own sake, the intent of the allegations in Count II of the complaint seems fairly straightforward.¹²⁸ Moreover, as noted above, California law requires that the complaint be given a "*reasonable interpretation by reading it as a whole and all of its parts in their context.*"¹²⁹

Viewed as a whole, with "all of its parts in context," it seems fairly clear that Kasky intended to allege intentional misstatement by Nike, as well as negligent misstatement or strict liability. In the first place, paragraph 28 of the complaint specifically notes that certain representations with respect to wages and hours were "intentionally and/or recklessly misleading and deceptive."¹³⁰ Moreover, in paragraph 36 he alleges "Nike's representation that its products are manufactured in compliance with applicable laws governing wages and hours is *deceitful.*"¹³¹

Nike acknowledges that the first of these assertions is in the complaint but claims that Kasky did not "advance" this assertion in the actual counts of the complaint.¹³² Left unexplained is how a claim for "fraud" and "deceit" can *fail* to advance such a claim, given that the fraud statute prohibits, among other

125. Recent disclosures by Nike suggest that, as Kasky alleged, many of Nike's claims were false. See David Teather, *Nike lists abuses at Asian factories*, THE GUARDIAN, April 14, 2005 at <http://www.guardian.co.uk/ethicalbusiness/story/0,14713,1459135,00.html> (last accessed on 5/18/05).

126. Petitioners' Brief at 6, *Nike, Inc.* (No. 02-575).

127. *Id.* (emphasis added).

128. See Complaint for Statutory, Equitable and Injunctive Relief ¶¶ 65a-67a, *Kasky* (No. 994446) (alleging fraud and deceit).

129. See *Sunset Drive Corp.*, 86 Cal. Rptr. 2d at 218 (citing *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990)) (emphasis added).

130. First Amended Complaint for Statutory, Equitable and Injunctive Relief ¶ 30, *Kasky* (No. 994446).

131. *Id.* ¶ 36 (emphasis added).

132. Petitioners' Brief at 6 & n.1, *Nike, Inc.* (No. 02-575).

things, “[t]he suggestion, as a fact, of that which is not true, *by one who does not believe it to be true.*”¹³³ Intentional disregard of a law that prohibits one from making a suggestion that he or she knows is not true would seem to encompass an allegation of intentional misrepresentation. Likewise, it appears Kasky intended to allege intentional misstatements by Nike with regard to its “Memorandum of Understanding.” Nike states in its “Memorandum of Understanding” that its products are “manufactured in compliance with applicable laws and regulations regulating wages and overtime.”¹³⁴ Kasky alleges that representation is false because it fails to inform readers of “documented violations of the prohibitions of China’s and Vietnam’s labor laws against forced overtime and against excessive overtime.”¹³⁵ In doing so, Kasky suggests this omission was not only *intentional* but also “fraudulent” and “deceitful” as those terms are defined in the applicable laws recited in Count II.

In addition, it is reasonable to draw an inference of intent from the allegations taken as a whole. Although not necessarily paralleled in California law, the federal pleading rules require fraud to be pled with specificity, but provide that malice, intent, and other states of mind may be pled generally.¹³⁶ This, therefore, requires enough detail with respect to fraud as to allow an opponent to be able to adequately respond.¹³⁷ However, state of mind requires no such detail.¹³⁸ A review of the complaint as a whole, read reasonably, certainly allows for the inference that several, if not all, of the misstatements Kasky attributes to Nike were intentionally made. One of the most obvious of these is the reference to a “living wage.”

In paragraph 59 of the complaint, Kasky alleges that Nike issued a press release on October 27, 1997 in which Kathryn Reith, Nike’s Manager of Women’s Sports Issues, is quoted as follows:

NIKE is fulfilling our responsibility as a global corporate citizen each and every day by guaranteeing a *living wage for all workers* . . . and creating opportunities for women’s financial independence.¹³⁹

However, the next paragraph asserts that this claim is false and offers the following statement made a month earlier by Dusty Kidd, Director of Nike’s Labor Practices Department, to Prema Mattai-Davis, Ph.D., Chief Executive

133. CAL. CIV. CODE § 1572(1) (West 2004).

134. Complaint for Statutory, Equitable and Injunctive Relief ¶ 28, *Kasky* (No. 994446).

135. *Id.*

136. FED. R. CIV. P. 9(b) (stating that “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally”).

137. See William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959 (stating that “The purpose of [requiring fraud to be pled with particularity] is to give the defendant fair notice of exactly what the charge against him consists of in order that he may fairly answer the charge.”).

138. The absurdity of charging a corporation with a “state of mind” represents a distinct challenge and could be the topic of an entirely separate article.

139. First Amended Complaint for Statutory, Equitable and Injunctive Relief ¶ 59, *Kasky* (No. 994446).

Officer of YWCA of America:

I am fully cognizant of the call on the part of some for a “living wage.” That is generally defined as sufficient income to support the needs of a family of four. *We simply cannot ask our contractors to raise wages to that level—whatever that may be—while driving us all out of business, and destroying jobs, in the process.*¹⁴⁰

This passage certainly supports the reasonable inference that—whatever a living wage may be—Nike knows that it does not pay it, does not intend to pay it, and indeed views requests for a living wage as tantamount to an attempt to drive it out of business. That further supports the reasonable inference that Kasky, in claiming that the first statement by Kathryn Reith on behalf of Nike is false, means that it is *intentionally* false. Ultimately, Nike’s attempt to engage in hairsplitting legal analysis and semantic games to avoid acknowledging that Kasky’s complaint alleges intentional misstatement, in addition to negligence, is simply unpersuasive.

3. Ambiguity in Argument

There remains one more potential source for the perception that Kasky did not allege intentional false statements: according to Nike this was the statement made by Kasky’s counsel. And it is *possible* to interpret some of those statements, made at various points during the trip to the Supreme Court, as conceding that intentional misstatement had not been pled. However, when analyzed more closely, it does not appear that *any* of these statements amounted to such a concession. At most, they could constitute a waiver of arguments that had been pleaded.¹⁴¹ However, a waiver of an argument is not the same as never having pleaded the argument in the first place. Further, it does not undermine the argument that what Nike sought was a constitutional right to lie when it filed its demurrer. Indeed, some of the confusion that subsequently arose is possibly attributable to this pleading stance, a stance that Nike attempted to shift once it appeared before the Supreme Court.

As reviewed above, in response to Kasky’s complaint, Nike filed a demurrer on the grounds that, among other things, the First Amendment “absolutely barred” the plaintiff’s claims. Apparently, the parties made no mention of the possibility of dismissal with leave to amend to properly plead under the *New York Times* standard. Moreover, the trial court dismissed without leave to amend, leading to the conclusion that it believed the First Amendment was an “absolute bar” to Kasky’s complaint, notwithstanding the allegations of intentional misstatement. Nike briefed and argued the case on this basis to the California appellate court, which agreed with the trial court and affirmed its ruling of dismissal *without* leave to amend.

The crux of the argument in the California courts was that Nike’s speech

140. *Id.* ¶ 60 (emphasis added).

141. In a conversation with the author, Alan M. Caplan, Esq., one of Kasky’s lawyers, asserted that to his knowledge no such waiver had ever been made or intended. Telephone Interview with Alan M. Caplan, Esq., Partner, Bushnell, Caplan & Fielding, LLP (Sept. 14, 2004).

was “political,” not “commercial” speech, and therefore, the First Amendment was a *complete bar* to Kasky’s action. On Kasky’s appeal to the California Supreme Court, Nike dedicated its entire brief to various aspects of this argument.¹⁴² Likewise, Kasky’s appellate brief stated that the issue was whether Nike’s statements were “commercial speech” and recognized that if the court resolved this issue in Nike’s favor, the statements are “immune from regulation.”¹⁴³ Of course that would be a concession of immunity from regulation under the unfair trade practices and false advertising law, which was the basis of the lawsuit. Such a concession would not have any bearing on whether there might be liability under libel law. But since this was not a libel case and Nike wasn’t accused of libeling itself, there was no reason for any one to raise the *New York Times* standard.

Thus, Nike’s counsel, Kasky’s counsel, and the judges at both the trial and appellate level seemed to be operating with the understanding that if Nike’s speech constituted political speech, then Kasky could not bring suit at all. Indeed, the granting of a demurrer to Nike suggests that this was the lower courts’ reasoning. As Nike reports, the appellate court apparently saw “‘no reasonable possibility that [the complaint] could be amended to’ satisfy the First Amendment.”¹⁴⁴ No one mentioned the *New York Times* actual malice standard. Kasky own argument reflected the understanding of all concerned because, at that point, Nike had not yet raised its *New York Times* claim. Once the issue was before the Supreme Court, Nike changed strategies (and counsel)¹⁴⁵ and apparently awoke to the fact that a possible *New York Times* claim existed, even if its speech fell within political speech. At that point, apparently for the first time, Nike asserted that the *New York Times* standard was the proper standard for evaluating Kasky’s claims.¹⁴⁶ In making this argument, Nike faced an obstacle—Kasky *had* alleged intentional misstatement (the equivalent of the actual malice claim). In order to avoid any misrepresentation to the Supreme Court, Nike’s brief had to very carefully parse Kasky’s complaint, looking for ambiguities and using the utmost care in its own representations of the facts to avoid an outright misrepresentation itself. Thus, the assertions in Nike’s brief that appear to claim Kasky never pleaded intent are themselves somewhat ambiguous. The brief contains the following statements: “Respondent invokes statutes that impose liability without requiring that Nike spoke with reckless disregard for the truth or purposefully lied. To the contrary, liability under the

142. Respondents’ Brief at 5-37, *Kasky v. Nike, Inc.*, 2000 WL 108256 (Cal. 2000) (No. S087859).

138. Respondent’s Brief at 41-46, *Nike, Inc.* (No. 02-575) (arguing that “Nike’s representations about the conditions under which its products are made . . . have no immunity from laws regulating false or misleading commercial messages”).

144. Petitioners’ Brief at 14, *Nike, Inc.* (No. 02-575) (citations omitted) (emphasis added).

145. Counsel for Nike in the California Supreme Court was Brobeck, Phleger & Harrison LLP. *Kasky v. Nike, Inc.*, 45 P.3d 243, 246 (Cal. 2002). Counsel of record for the certiorari petition added O’Melveny & Myers LLP, as well as Professor Laurence H. Tribe. *Petition for Certiorari, Nike, Inc. v. Kasky*, 2002 WL 32101098 (U.S. 2002) (No. 02-575).

146. Even so, this claim appears to be nothing more than a “back up” claim. Nike’s clear preference was (and logically would be) for the Court to affirm the dismissal.

state Unfair Competition Law is 'strict.'"¹⁴⁷

Whether the statutes Nike referred to in its brief require reckless disregard or purposeful lies does not address whether Kasky pled such intent (which the above analysis illustrates he did). Moreover, while Kasky invoked a statute that apparently does not *require* (which does not mean it *excludes*) purposeful lies or reckless disregard, he *did* invoke the statutes involving fraud and deceit that do.

Similarly, Nike attempts to fold its semantic distinction (between reckless disregard for the truth and reckless disregard for the laws of California that require the truth) into a claim that "the counts of Kasky's complaint do not allege that Nike was anything more than negligent in making the statements he claims were false or misleading."¹⁴⁸ As discussed above, this distinction is disingenuous and unconvincing.

With respect to the demurrer, Nike attempted to argue, in light of its new theory, that because Kasky "did not assert that he could plead that Nike had acted with reckless or deliberate disregard for the truth,"¹⁴⁹ he must have waived this argument, presumably on the theory that if it was not raised, it was waived. Nike *did* acknowledge that there was what it characterized as a "scattershot" attempt to argue that he could amend his complaint" on other grounds.¹⁵⁰ However, it is hardly surprising that Kasky would not offer to amend in order to add something that was already there. Nike seemed to take the position that unless Kasky *conceded* the complaint *needed* to be amended, he waived this claim. However, it is easy to understand why Kasky would not be prepared to concede the arguments on negligence or strict liability, given that these would be broader bases for a finding of liability.

Given all this verbal legerdemain in the pleadings before the Supreme Court, it is understandable that, in oral argument before the Court, counsel for Kasky, Paul Hoeber came to be discussing this issue with a Court that apparently had a different understanding of the facts in mind.¹⁵¹ In this discussion, Hoeber made comments that appeared to some to represent a concession that the complaint needed to be amended. The better reading is that he was merely agreeing with the observation that the California court's reversal of the grant of the demurrer did not obviate the possibility of an amendment, *should the lower court think one was necessary*. This is just a matter of basic civil procedure. It is not a concession that an amendment was necessary.

The key exchange took place in the context of Hoeber's (winning) argument that the Supreme Court lacked jurisdiction. He argued that reversing the grant of a demurrer simply allowed the case to go to trial and thus there was no final judgment as required by Article III and the Court's prior precedent in

147. Petitioners' Brief at 1, *Nike, Inc.* (No. 02-575).

148. *Id.* at 6. This claim is repeated on page twelve, presumably relying on the argument made earlier on page six. *Id.* at 12.

149. *Id.* at 14.

150. *Id.*

151. Transcript of Oral Argument at 32-44, *Nike, Inc.* (No. 02-575).

ASARCO, Inc. v. Kadish.¹⁵² Hoeber began his argument on this point¹⁵³ and became embroiled in the following line of questioning with respect to an amendment to the pleading.

MR. HOEBER: [T]here is no final judgment because this is . . . the overruling of a demurrer,

[B]ecause it's a—it's a demurrer, and the question is the sufficiency of the complaint against the demurrer, Nike has to show that plaintiff could not amend the complaint in response to, or respondent could not amend the complaint in response to the—whatever defect might be—

. . .

QUESTION: I don't see that—

QUESTION: —that's what the intermediate court of appeals said in California. I would think that's pretty good authority.

MR. HOEBER: What the court of appeals said in California was that we could not amend the complaint, or the facts in the—in the complaint could not be amended to allege noncommercial speech, noncommercial speech, and that's true.

We don't claim that we would allege noncommercial speech. For one thing, the statute only covers commercial speech,¹⁵⁴ and it's a red herring in that sense, where under us—that we would lose the course of action and we couldn't proceed, so yes, the court of appeal did finish by saying, we don't see any reasonable possibility that the complaint can be amended to allege noncommercial speech, so that—¹⁵⁵

Here, Hoeber was referring to the fact that at the intermediate appellate level, the entire argument focused on whether Nike's comments were within the definition of commercial speech because, if they were not commercial speech, the Unfair Competition and False Advertising laws would not provide a basis for the suit. Thus, Kasky could not amend his claim under this construction of the issue because no amendment, including one to incorporate the *New York Times* "actual malice" standard, would offer a basis for the claim. Obviously the cause of action involved in the *New York Times* case, libel, also does not offer a basis for the suit.

What Nike attempted to do, and succeeded in doing, was to inject into the proceedings an argument that even if the Court should find that its speech was "commercial speech" for purposes of the California statute, it should *engraft onto that statute* an "actual malice" requirement. This was a new argument. However, as Hoeber got ever more entangled in arguments attempting to

152. Respondent's Brief at 6, *Nike, Inc.* (No. 02-575) (citing *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989)).

153. Transcript of Oral Argument at 28-30, *Nike, Inc.* (No. 02-575).

154. Of course, if by "the statute" Hoeber meant the Unfair Competition Law, it encompasses far more than commercial speech. What seems clear in this reference is that Hoeber meant that if this is not commercial activity falling within the scope of the government's regulation of economic activity, that particular statute would no longer provide a basis for a claim. This does not mean that some other statute might not provide a basis for a claim.

155. Transcript of Oral Argument at 32-33, *Nike, Inc.* (No. 02-575).

illustrate that no final judgment existed, he made more statements that were capable of being interpreted by those who accepted Nike's characterizations of the pleadings as concessions that Kasky had not pleaded intentional misstatement.

QUESTION: May I—may I interrupt to go back to your article, your final judgment argument for just a moment with respect to this? Supposing that we should hold that in a case like this, where you don't have Article III standing, that the case may not go forward unless the plaintiff can meet the *New York Times* standard, prove actual malice and gross negligence and all the rest, but it could theoretically go forward if those allegations were made.

My question is, is it your understanding, as a matter of California law and a matter of the history of this case, that you would have the right to—to file an amendment to your complaint making those allegations?¹⁵⁶

It was at this point that Hoerber perhaps should have answered something like, "Absolutely your honor, *although in this case we would not have to amend because the complaint already contains allegations to that effect.*" Instead, he simply answered: "Absolutely, Absolutely."¹⁵⁷ (Of course this observation, made in hindsight, requires him to have anticipated that the Court was operating from a fundamental misunderstanding.)

Simple agreement at this point, even though it was only to a hypothetical proposed by the Court, could have been construed as agreement that, in fact, such an amendment was *already* necessary because no allegation meeting the *New York Times* standard was in the complaint. Of course, this was not accurate. It was in the complaint,¹⁵⁸ albeit not in the form of an explicit reference to the *New York Times* standard—which is not surprising because *Nike* was not a libel case.

At the end of the day, despite all the ambiguities in the briefs and the arguments described above, it simply cannot be said that Kasky did not raise the issue of intentional misrepresentation in the complaint. Given that he did raise intentional misrepresentation, one cannot similarly deny that in demurring to the complaint, as opposed to simply defending itself on the merits of the question of intentional versus any other kind of misrepresentation, Nike was asking for a

156. *Id.* at 40-41.

157. *Id.* at 41.

158. To illustrate just how confusing the argument became, at one point Hoerber appeared to suggest that the complaint did not allege negligence either. Hoerber stated the following:

We appealed to the California Supreme Court because we felt we were right on the law, and the California Supreme Court agreed with us. If—the California Supreme Court had said, you're wrong on the law, you've got to prove negligence, maybe the California Supreme Court would have done that. We would have then amended the complaint and proved negligence.

Id. at 37. Throughout, Hoerber was trying to underscore the argument that a denial of a demurrer is not a final judgment. Ultimately, he proved convincing on this ground since the absence of jurisdiction was the basis for the denial of certiorari. *Nike, Inc.*, 539 U.S. at 655 (stating that "[t]he writ of certiorari is dismissed as improvidently granted").

constitutional shield for intentional misrepresentations. Even in the First Amendment context this is neither a trivial request nor one to which the answer is a forgone conclusion. However, as will be discussed below, it is a particularly egregious request in the context of commercial speech.

Of course, whether or not Nike's speech was "commercial speech" or some other kind of speech was precisely the issue as Nike framed it. However, concluding that something is not *commercial* speech does *not* make it speech that is immune from liability. Arguably, this is an insight that occurred to Nike's counsel in the process of framing the petition for certiorari and that had apparently not occurred to them before, resulting in the addition of the *New York Times* wrinkle to its argument.

All manner of speech may be actionable: fraud, libel, defamation, perjury, sexual harassment, obstruction of justice, bribery, and so on. The list may go on and on. However, it appears that what Nike wanted, and thought it could get, was a constitutional blank check with respect to speech on matters of "public concern." Why it wanted that and what the implications for society as a whole may be is the subject of Part II of this article. What is at stake is the government's power to regulate commerce and economic activity because, at the end of the day, Nike's speech in this case was self-promotion directed at economic ends. However, it is worth starting with an examination of what Nike was attempting to get out from under (or around) in arguing that the commercial speech doctrine did not apply to its speech here. This article will then more fully consider whether a "constitutional right to lie" exists and whether, even if such a right exists as a practical matter in some contexts, this case represents the sort of context that merits one. I propose that an examination of the circumstances of this case suggest the answer to that question is a resounding "no."

*"The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"*¹⁵⁹

PART II

A. *Truth and Commercial Speech*

Truth has a particular relevance in the context of the commercial speech doctrine. Indeed, the doctrine's premise is the assumption that whatever protection commercial speech may or may not be entitled to, its protection is dependent upon the communication being truthful. However, as a threshold matter, it was not always clear that commercial speech was entitled to *any* protection at all.¹⁶⁰ In all the fuss about freedom of speech for corporations and

159. CARROLL, *supra* note 62 at 94.

160. For the proposition that the First Amendment did not protect commercial speech prior to *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), see Thomas W. Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 205 (1976) (noting that "[u]ntil recently, the majority of courts upheld such

references to the venerable status of the rights of freedom of expression under the First Amendment,¹⁶¹ it is easy to lose sight of the fact that mere *possibility* of such a claim is a product of late-twentieth century thought, not a venerable principle of long standing. Previously, the majority opinion seemed to be that corporations, at least their corporate advertising,¹⁶² did not enjoy any First

regulations [of advertising] under the Supreme Court's ruling in *Valentine v. Chrestensen* that 'purely commercial advertising' is unprotected by the [F]irst [A]mendment"; Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189, 1189 (2004) (noting that "[u]ntil the mid-1970s, 'purely commercial advertising' was considered outside the scope of the First Amendment, and hence entitled to no protection"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) (stating that "[i]n 1976, the United States Supreme Court reversed its long standing conclusion that 'the Constitution imposes no . . . restraint on government' regulation of 'purely commercial advertising'"). But for an apparently contrary position see Robert M. O'Neil, *Nike v. Kasky—What Might Have Been . . .*, 54 CASE W. RES. L. REV. 1259, 1261 (2004) (stating that "[t]here can be little doubt that some (if not all) of the corporate communications at issue in this case would, before 1976, [the year *Va. State Bd. of Pharmacy* was decided] have been fully protected") (I rather suspect that this statement is not meant to suggest that commercial speech was protected prior to 1976, but rather to characterize the statements at issue here as clearly political and to suggest that it was the advent of the commercial speech doctrine that called into question whether they were protected by calling into question whether they ought to be classified as commercial speech.).

For the proposition that the idea of "commercial speech" as a category dates from *Valentine v. Chrestensen*, 316 U.S. 52 (1942), see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993) (discussing how the First Amendment makes no distinction among types of speech, how we have no evidence that the framers of the Constitution envisioned speech as divisible into the categories of commercial and noncommercial, and how it was not until 1942 that the Supreme Court made the distinction explicit); and Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 627 (1990) (stating that "[i]n 1942, the Supreme Court plucked the commercial speech doctrine out of thin air" in *Valentine v. Chrestensen*).

For the unusual position that protection dates from *New York Times Co. v. Sullivan*, see Robert L. Kerr, *From Sullivan to Nike: Will the Noble Purpose of the Landmark Free Speech Case Be Subverted to Immunize False Advertising?*, 9 COMM. L. & POL'Y 525, 526 (2004) (stating that "the Court opened the door to First Amendment protection for commercial speech in *New York Times Co. v. Sullivan*").

161. Nike's own brief offers one of the most florid examples. In discussing the undesirability of the government testing Nike's statements in this case for their truth, Nike noted:

[L]aw is a great teacher, and the lesson taught by the state's gratuitous assumption of that awesome power [to test for truth] must be how superfluous it is for individuals to participate vigorously in public debate and to evaluate for themselves the statements of others: the promise that an *official* truth may be obtained through citizen-initiated litigation threatens to reduce the informal process of public controversy that the First Amendment thus far has been understood to embrace at its core to little more than a dress rehearsal.

Petitioner's Brief at 50, *Nike, Inc.* (No. 02-575) (emphasis added). Stirring rhetoric. A closer examination of the circumstances here suggests that the urgency is misplaced—at least as to the *public's* interest.

162. There is some confusion about the definition of commercial advertising. See, e.g., Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1145 (defending the line between commercial and noncommercial speech); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons From Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1091-92 (2004) (discussing the California Supreme Court's split as to classification of Nike's speech). The quotes above, *supra* note 160, reflect

Amendment protection at all. That was the opinion of the Supreme Court in *Valentine v. Chrestensen*,¹⁶³ a case where the distributor of a handbill tried to circumvent anti-littering ordinances that would limit distribution of his advertising circular by appending discussion of an issue of public concern on the reverse side of his advertising handbill.¹⁶⁴

Chrestensen had a submarine docked at a pier on the East River for which he planned to charge admission to view.¹⁶⁵ Chrestensen had initially distributed a flyer advertising its presence when the Police Commissioner advised him that distributing such advertising handbills was illegal.¹⁶⁶ The Commissioner noted, however, that handbills related to public information or protest could be distributed freely.¹⁶⁷ Showing that he was not a man to be easily deterred from his objective, Chrestensen had his handbills reprinted so that on one side they had the advertising information and on the other side they carried a protest against the City Dock Department's failure to offer him wharfage facilities.¹⁶⁸ Even with the addition of this non-advertising "protest," the police restrained Chrestensen's attempt to distribute his handbill, and so he brought suit seeking an injunction against interference with their distribution.¹⁶⁹ Chrestensen claimed that the additional material entitled his handbill to protection under the First Amendment and that the Commissioner's action in enforcing the ordinance against him represented an unconstitutional abridgment of this right.¹⁷⁰

When the dispute reached the Supreme Court, the Court found little difficulty in reconciling the proposition that "the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion"¹⁷¹ with the notion that the government might regulate commercial activity on those same streets.¹⁷² With respect to the former, the Court noted that significant restraints existed on what sorts of burdens any governmental entity could place on those rights.¹⁷³ At the same time, the Court noted, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."¹⁷⁴ The Court found Chrestensen's argument that the advertising and public information portions of his handbill

this confusion. From one standpoint it is obviously not the case that commercial speech is only advertising because cases such as *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), clearly extend the scope of commercial speech to more than advertising. On the other hand, as these quotes indicate, "advertising" is often used as if it is coextensive with "commercial speech."

163. 316 U.S. 52 (1942).

164. *Valentine*, 316 U.S. at 52-53.

165. *Id.* at 52.

166. *Id.* at 53.

167. *Id.*

168. *Id.*

169. *Valentine*, 316 U.S. at 53-54.

170. *Id.* at 54.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Valentine*, 316 U.S. at 54 (emphasis added).

were “inextricably attached”¹⁷⁵ to be unpersuasive. It found that the case’s facts led to the inescapable conclusion that the protest was added “with the intent, and for the purpose, of evading the prohibition of the ordinance.”¹⁷⁶

The opinion in *Valentine* is a brief one.¹⁷⁷ Apparently, the Court in 1942 did not think that Chrestensen’s argument about the intertwined nature of the advertising and the non-advertising content warranted much discussion or attention. It appeared self-evident to the Court, as well as to most commentators, that commercial advertising simply was not “speech” for purposes of the First Amendment.¹⁷⁸ It would be over three decades before the Court would revisit this conclusion and introduce a limited exception.

The Court introduced an exception in *Bigelow v. Virginia*¹⁷⁹ in 1975. In *Bigelow*, the Court addressed the constitutionality of a statewide prohibition on advertising of abortion services.¹⁸⁰ The statute provided criminal penalties.¹⁸¹ The state prosecuted the editor of a newspaper that carried advertisements announcing the availability of legal abortions in the state of New York, and he was convicted.¹⁸² The Supreme Court reversed the conviction and observed that the Virginia courts had “erred in their assumptions that advertising, as such, was entitled to no First Amendment protection.”¹⁸³ Of course, the “error” was understandable in light of *Valentine*. However, the Court in *Bigelow* did not offer much more guidance about what sorts of protection advertising *did* have.

The Court ameliorated that lack of direction when, in the following year, it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.¹⁸⁴ There, a citizens’ advocacy group sued the State Board of Pharmacy, the licensing body for pharmacists in Virginia, objecting to its prohibition on pharmacists advertising prescription drug prices.¹⁸⁵ The Board’s position was that such advertising could lead to unprofessional price wars, with detrimental effects on the profession and ultimately the public.¹⁸⁶ The citizens’ group responded that such arguments smack of paternalism and that the government

175. *Id.* at 55.

176. *Id.*

177. Indeed, the opinion is only four pages in length. *Id.* at 52-55.

178. An additional issue is whether “advertising” is a subset of “commercial speech.” While it is possible that at its inception the two labels might arguably have been viewed as coextensive or as synonymous, this is no longer the case. The word “advertising” now seems to be one arm of what might be called marketing. The issue of whether the commercial speech doctrine should be extended to cover marketing efforts that are more difficult to classify as “advertising” is one way to characterize this case.

179. 421 U.S. 809 (1975).

180. *Bigelow*, 421 U.S. at 811.

181. *Id.*

182. *Id.* at 812-13.

183. *Id.* at 825.

184. 425 U.S. 748 (1976).

185. *Va. State Bd. of Pharmacy*, 425 U.S. at 749-51.

186. *Id.* at 767-69. As I have noted elsewhere, this argument, while based on some dubious factual grounds, was not clearly spurious or incredible.

had no business keeping people in the dark about simple factual issues as price simply for their own good.¹⁸⁷ The Supreme Court agreed.

First, the Court noted, perhaps unnecessarily because newspapers and books would be governed by a contrary rule, that speech “does not lose its First Amendment protection because money is spent to project it.”¹⁸⁸ Still, the Court was *not* prepared to accord what it termed “commercial speech”¹⁸⁹ the same status as political speech or artistic expression.¹⁹⁰ The Court had traditionally seen these categories as having potentially multiple sources of justification, but one justification was almost certainly the expressive component.¹⁹¹ In contrast, the Court extended protection to commercial speech on the premise that its value was almost exclusively in the listeners’ *right* to hear it rather than in any right of the speaker to *say* it.¹⁹² Virtually all of the Court’s justifications in this case for protecting commercial speech to any degree involve the consumer’s right to hear about the information. The Court stated the following:

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 economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those

187. *Id.* at 769-70.

188. *Id.* at 761.

189. Once again, note the tendency to conflate “advertising” with “commercial speech,” even though the latter is a larger category than the former. The Court noted that, in contrast to *Bigelow* where the advertisement in question arguably contained non-commercial elements to the extent that it advertised the availability of abortions, the advertising of drug prices “squarely” presented “the question [of] whether there is a First Amendment exception for ‘commercial speech.’” *Id.* at 760-61.

190. *Va. State Bd. of Pharmacy*, 425 U.S. at 770-73. In particular, footnote 24 of the opinion makes some attempt to differentiate between commercial speech and other types of protected speech, concluding, “a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.” *Id.* at 771-72 n.24.

191. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 602-03 (1998) (explaining that constitutional protection of artistic works turns “simply on their expressive character”).

192. For a fascinating exposition of how this argument made its way to the Supreme Court and eventually won the day, see Morrison, *supra* note 160. Professor Morrison participated in the *Virginia Pharmacy* case through Public Citizen. *Id.* at 1189. The case’s genesis makes clear that from the outset this issue was framed as one of consumer protection. Although, as Collins and Skover note, “the path to the courthouse door is not a one-way street,” Ronald K.L. Collins & David M. Skover, *Foreword: The Landmark Free-Speech Case That Wasn’t: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 1045 (2004), that *does not* mean that a shift from consumer protection to expressive interest protection is either inevitable or that the second argument is inherent in the first. It certainly is not inevitable if one is able to distinguish human beings and interest groups or organizations from for-profit enterprises, a distinction that is neither invidious nor nonsensical. *See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH* 202 (1989) (stating that “the domination of profit . . . breaks the intrinsic connection between speech and any vision, or attitude, or value of the individual or group engaged in advocacy”) (emphasis in original); *see also* C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1163 (2004) (stating that it is “idiocy” to argue that “society consists of two opposing types of ‘beings,’ each equally worthy of moral and legal concern - people and corporations”).

decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹⁹³

It goes without saying that this observation presupposes that the information is truthful and accurate since it would hardly seem that the “free flow” of false information is “indispensable,”¹⁹⁴ (except of course if one is attempting to perpetrate a fraud). The Court did not, in fact, leave this unsaid. Indeed, it premised this new protection, which it found” to be encompassed in the First Amendment,¹⁹⁵ on the observation that it applied only to commercial speech that was truthful and not misleading.¹⁹⁶

The Supreme Court reaffirmed this understanding in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*,¹⁹⁷ in which the Court set forth the test for commercial speech that still controls today.¹⁹⁸ There, the Court noted, “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”¹⁹⁹ The Court has never disavowed this foundation for commercial speech, even as it appears to have moved toward a more protective understanding of the corporate interest in speaking.²⁰⁰ This requirement, that the speech be truthful, is in fact what has made the commercial speech doctrine serve, in some ways, as the mirror image of First Amendment doctrine with respect to issues of public concern. It is often

193. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

194. Actually, although I make this argument here and the commercial speech doctrine is premised on it, economists might disagree. Arguably, if people had accurate information on, for instance, the real cost of interest on credit cards or the comparative benefits of bargain versus salon shampoo, or any number of other things, they might not consume at such high rates as they do at present. I have written an article which suggests that consumption is dependent far more on emotional and other “irrational” processes than rational ones, see Tamara R. Piety, “*Merchants of Discontent: An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*,” 25 SEATTLE U. L. REV. 377 (2001), but this does not mean that rational processes *never* operate to affect purchasing decisions. To the extent that rational processes might affect consumption in negative ways, it may very well be plausibly argued that our economy *does* depend upon the injection of a lot of false or misleading information for its stability. It seems undeniable that the nation’s economy is now dependent upon what might be called “irrational,” or hyper-consumption. Much of that consumption is surely generated by material that is “informational” only in the very loosest sense of that term.

195. It is interesting to note the semantic issues raised in the way the Court phrases what it is doing—using terms that suggest its holding is found or immanent in the law—and what commentators fairly universally agree the Court is doing—making new law. That, too, is the subject of another paper altogether.

196. *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72.

197. 447 U.S. 557 (1980).

198. *Central Hudson Gas & Elec. Co.*, 447 U.S. at 564.

199. *Id.* at 563 (emphasis added) (internal citations omitted).

200. See David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1059 (2004) (stating that “[t]he *Central Hudson* test no longer gives deference to government judgments or upholds restraints on commercial speech as long as they are reasonable and proportionate to the interests served, as it did as recently as a decade ago”).

observed that in the paradigmatic First Amendment case, "truth" is the very thing that the government cannot regulate or test, even while it remains free to impose reasonable time, place, and manner restrictions in some circumstances. This raises the next question that Nike's pleadings suggested: does the Constitution forbid a lawsuit (hence the demurrer) alleging the defendant intentionally made a false statement, even *outside* the commercial speech doctrine, where clearly no such rule exists?

B. *Is There a Constitutional Right to Lie?*

From a lawyer's perspective, the obvious response to this question is another question—"In what context?"—because, of course, fraud and deceit are actionable in both tort and contract law. Similarly, criminal law prohibits perjury. The commission of lies can result in committing or evidencing many other violations of criminal law. Thus, the real question is: in the context of the First Amendment, does a constitutional "right" to lie exist in *any* context? The answer to that question may depend, as it so often does, on whether one asks: "does a right to lie exist as a doctrinal matter?" versus "does a right to lie exist as a practical matter?"

Doctrinally, the answer is "maybe," in some circumstances. On the one hand, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²⁰¹ the Court noted: "Untruthful speech, commercial or otherwise, has never been protected for its own sake."²⁰² Moreover, as noted above, obviously, there is no constitutional right to commit perjury, no constitutional right to engage in theft by fraud or deceit, no constitutional right to lie in the course of the execution of a contract, and no constitutional right to lie to a federal investigator conducting a criminal investigation—or in any one of a number of areas in which it must be said that there is no right to lie.²⁰³ Nevertheless, some of the resolution to this question may be found in the observation that lies have never been protected "for their own sake," suggesting that in fact they *may* be protected for *other* reasons. Indeed, First Amendment law dealing with speech involving matters of public concern is replete with rhetoric suggesting that such a right may exist as a *byproduct* of the protection of superior interests to the governmental interest in punishing lies, that is, protection of free and open discussion of matters of public concern.

In *New York Times Co. v. Sullivan*,²⁰⁴ the Court observed, "[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,'" thereby clearly indicating protection for erroneous statements of fact in the context of political speech.²⁰⁵ On the other hand, protection for *error* is

201. 425 U.S. 748 (1976).

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

203. See *supra* Part II.B, first paragraph, for a discussion of contexts in which there is no right to lie.

204. 376 U.S. 254 (1964).

205. *Id.* at 271-72.

not the same as protection for deliberate falsehood. Nevertheless, the Court suggested, in a citation to John Stuart Mill, that to the extent a claim of deliberate falsehood might be an easy one to make, the Constitution might entitle even statements *alleged* to be lies to a certain level of protection.²⁰⁶

In support of this observation, the Court quoted from *On Liberty* where Mill wrote:

[T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, *even to the most aggravated degree*, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is *rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere* with this kind of controversial misconduct.²⁰⁷

Although the Court, in adopting the “actual malice” standard of proof for libel involving public figures and issues of public concern, ultimately declined to adopt Mill’s position that the law should not “presume to interfere” in such cases,²⁰⁸ the citation reflects some comfort with the notion that occasional protection for even intentional falsehoods is defensible in this area. The concurring Justices, Black and Goldberg, joined by Douglas, went further and endorsed this more radical position.²⁰⁹ In the commercial speech area, the Court has steadfastly held to the position that in order to qualify for First Amendment protection, the speech must not be “misleading.”²¹⁰ The Court has stated that “[t]here is no constitutional value in false statements of fact.”²¹¹ However, the Court’s statements have been more equivocal with respect to speech involving matters of public concern. Here, its proclamations lend themselves to the interpretation that even if there is not precisely a constitutional “right” to lie, the constitution will nevertheless shield speakers in *some* circumstances from judicial or other governmental inquiry into whether what they say is true.

Thus, at least with respect to libel, there is no constitutional right to lie *per se* to the extent that a speaker may still be held liable for intentional misstatements that amount to libel, even with respect to a public figure and matters of public concern if those statements were made with actual malice. Still, the Court clearly intended the actual malice standard to be a high one, a standard that would be difficult to meet and which would provide for early

206. *Id.*

207. *Id.* at 272 n.13 (quoting JOHN STUART MILL, *ON LIBERTY* 47 (1947)) (emphasis added).

208. *Id.* at 279-80.

209. See *New York Times Co.*, 376 U.S. at 293 (Black, J. concurring) (offering opinion that malice is too “elusive” and “abstract” a concept to sufficiently protect First Amendment rights at issue); see also *id.* at 298 (Goldberg, J., concurring in result) (arguing in favor of “absolute, unconditional” privilege to criticize public officials).

210. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (quoting *Central Hudson*, 447 U.S. at 566) (stating that “[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading”).

211. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

disposal of cases not meeting this standard. There is some evidence that the Court has been successful in that aim.²¹²

When Nike filed its demurrer to Kasky's claim of fraud and deceit, it was asking for more than even *New York Times* provided with respect to intentional misstatements. In its brief to the California Supreme Court, Nike argued:

The truth and validity of statements comprising a public dialogue on matters of public interest must be resolved by the public without the intervention of the courts. As this Court stated in *Wilson*, 13 Cal. 3d at 659: "The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form."

Because the First Amendment operates to ensure that the people decide what is true or false on matters of public interest through unfettered debate . . . the courts have "consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials." *New York Times*, 376 U.S. at 271. Erroneous statements are inevitable in free debate, and must be tolerated to ensure that freedom of expression maintains the "breathing space" necessary to survive. *Id.* at 271-272. Thus, when speech addresses public issues in the public forum, truth is irrelevant.²¹³

"Truth is irrelevant." This is the argument Nike made to the California Supreme Court in defense of the lower courts' decisions—that Kasky's claim could not be heard, notwithstanding its allegations (as set forth above) that Nike's statements included *intentional* misrepresentations. "Truth is irrelevant." Whether Nike's interpretation of the Supreme Court precedent is correct, and perhaps it is not, it is pretty clear that what Nike wanted was a constitutional shield for *any* statements it made that it believed could be characterized as a statement "on matters of public concern."²¹⁴ Its argument suggested that the primary way one could identify whether something was a matter of public concern was with reference to the speech's format, i.e., letters to the editor responding to commentary in the *New York Times* and *San Francisco Chronicle*, as well as a variety of press interviews, press releases, and open letters.²¹⁵

As David Vladeck so cogently noted, however, this argument, that Nike's

212. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1985) (holding that the *New York Times* evidentiary standard applied to motions for summary judgment, thereby justifying a grant of summary judgment in favor of journalists in that case upon a showing, not adequately controverted, that reporters in question engaged in appropriate due diligence). It is not clear whether this higher burden of proof has in fact sheltered more defendants from libel suits, but it seems clear that this was the intent. That intent would seem to encompass sheltering some intentional misstatements where the plaintiff is simply not able to muster sufficient evidence of intent as the price to be paid to protect those statements made in good faith.

213. Respondents' Brief at *13, *Kasky*, 2000 WL 1508256 (Cal.) (No. S087859).

214. See *id.* at *2 (arguing First Amendment protected Nike's comments on public issues because the statements clearly were not advertisements) (emphasis added).

215. See *id.* (asserting Nike's comments are noncommercial because the company "responded to charges . . . in an open debate" via media outlets traditionally afforded First Amendment protection).

speech was a matter of public concern, “would apply with equal force to deliberate, calculated lies as well as unintentional falsehoods. *Nike would thus be open to the charge that it was asking the Court to give corporations a ‘right to lie’—an accusation Nike understandably was anxious to avoid.*”²¹⁶ Vladeck suggests that Nike added a “second leg to its argument” precisely to avoid the charge that it was asking for a constitutional right to lie,²¹⁷ by suggesting that intentionally false statements are actionable if they meet the *New York Times* actual malice standard, when the object of the speech is a public figure, and the speech involves matters of public concern.²¹⁸ It was too late. Nike could not avoid its earlier claims.

It is undoubtedly true that Nike was anxious²¹⁹ to avoid the appearance of making such a request. To the extent that observers such as Vladeck, Collins, Skover, and a host of others read the record as not raising the issue of intentional misstatements, then I suppose that Nike’s efforts were successful. It succeeded in conveying the impression that the complaint never alleged that Nike had intentionally lied. Of course, as described in detail above, this is simply untrue. Regardless of misunderstandings may have arisen in oral argument, and no matter how artfully Nike dodged the reference in the complaint to intentional and knowing misstatement, the fact remains that an allegation of intentional misstatement was in Kasky’s complaint. Nike’s principal position, throughout the case, was that the ruling of the lower courts should have been reinstated and the demurrer sustained without leave to amend on the grounds that the first amendment provided it immunity from suit for these statements. That is a request for a constitutional right to lie.

Nike’s attempt, at the eleventh hour, to analogize itself to the defendants in *New York Times* also bears the hallmarks of an afterthought because the analogy does not really hold up. As noted above, in *New York Times*, the Court protected defendants accused of making false statements about *others*, specifically governmental officials from liability for those statements unless they were made with actual malice. Nike wanted protection for its *own* statements about *itself*. Put another way, Nike was seeking the actual malice standard protection for what Nike itself said about itself, *not* for what others said about Nike. The word “malice” is surely an awkward fit in this context because one cannot expect Nike to have malice against itself. But perhaps the focus on *New York Times* helped make more plausible what was arguably was otherwise a

216. Vladeck, *supra* note 200, at 1062-63 (emphasis added).

217. *Id.* at 1063.

218. *New York Times Co.*, 376 U.S. at 279-80 (stating that when speech involves a public figure, the plaintiff must show that allegedly defamatory statements were made with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”) (emphasis added).

219. It is perhaps more appropriate to say that Nike’s “officers, directors and lawyers were anxious.” But such sentences emphasize how deeply the anthropomorphism of corporations goes in our language. It requires conscious effort to purge sentences of the attribution to corporations of feelings, motivations, sentiments, intentions, etc. Exploration of examples of the same and explorations of the potential sources for it could probably provide the basis for a separate article.

risible contention, that Nike was a victim.

It is “telling,”²²⁰ as Collins and Skover note, that although “Nike vigorously refuted Marc Kasky’s claims, it never filed a defamation suit against him.”²²¹ Nor did it ever bring a Strategic Lawsuit Against Public Participation (“SLAPP”) suit against Kasky arguing that his lawsuit represented an attempt to impede the exercise of Nike’s speech rights.²²² Collins and Skover describe the failure to bring a SLAPP suit as “curious.”²²³ Maybe it is “telling,” but arguably it is not at all “curious,” given that in either scenario, Nike would have been the plaintiff and thus would have had the burden of proving that Kasky’s allegations were *false*. It seems fairly clear that this is precisely the issue Nike wanted to avoid having aired. Rather, what it sought was protection from liability for any misrepresentations made in what was, in effect, an attempt to boost sales through better public relations.

Public relations, as a subset of marketing, is ultimately about sales, not about ideas. That is the heart of the issue here—could a court hold Nike liable for false statements made in the context and format of public relations, rather than in a traditional advertising format, which were intended to boost its corporate image and thus, ultimately, its profits? This is an important question because at least two major government prosecutions, in progress or recently concluded, rely upon the ability of the government to monitor statements made by corporations in the format of public relations. Had Nike’s argument won that day, these prosecutions, and a number of other areas of governmental regulation, might well have been in jeopardy.

*‘[I]t would be just as well if you’d mention what you mean to do next, as I suppose you don’t mean to stop here’ [said Humpty Dumpty].*²²⁴

PART III

A. *Misstatements Outside of Traditional Advertising*

Modern marketing requires that product marketing consist of far more than a simple communication of the nature of the goods and their price. It includes the creation of all types of associations, not all of them overt sales pitches.²²⁵

220. Collins & Skover, *supra* note 192, at 1043.

221. *Id.*

222. *Id.* at 974 & n.34.

223. *Id.* at 974 n.34.

224. CARROLL, *supra* note 62, at 94-95.

225. As one author of a popular college text on copywriting and advertising puts it:

Advertising isn’t a thing.

It’s an active relationship.

It’s something that happens *to* a person, whether reader, viewer, listener or someone not paying much attention.

It’s not just the ad, it’s *the response* to the ad.

Marketing vehicles create these associations, in ways that range from traditional forms like direct mail and advertising, to such innovations as “corporate image advertising,”²²⁶ product placements in movies, and stealth marketing campaigns where actors pose as consumers to tout the benefits of a particular vodka or camera to targets who think they are simply friendly strangers.²²⁷ All these efforts begin with the intent of adding to the bottom line. *Everything* about the company becomes relevant to its bottom line because, as Nike itself noted, one of the things its customers care about, both ultimate consumers and institutional consumers such as schools, is the manufacturer’s reputation.²²⁸ This includes statements made through the vehicle of public relations press releases.

The argument that for-profit, corporate speech made in the public relations context ought to be encompassed within the commercial speech doctrine is an issue I take up in another article.²²⁹ However, for present purposes it is enough to note that much of the promotional activity engaged in by for-profit corporations takes place in this context—some of it in the form of the “advertorial,” like Wal-Mart recently took out with respect to its labor practices,²³⁰ and some of it in more subtle forms intending to serve as “news.”²³¹ At present, the government has viewed statements made in this context as susceptible to testing and liability.

The most prominent example of this position is the current racketeering case against various tobacco companies, their parent companies, and two of the nonprofit organizations set up to operate as public relations arms of the tobacco industry, namely, the Council for Tobacco Research and its predecessor, the Tobacco Industry Research Committee and the Tobacco Institute.²³² The

It’s not what happens in the ad, it’s what happens *inside the person*.

That’s how advertising works. Advertising that does not do that merely “talks to itself.”

BRUCE BENDINGER, *THE COPY WORKSHOP WORKBOOK*, *The Copy Workshop*, 90 (1993) (layout and emphasis in original).

226. TERENCE A. SHIMP, *ADVERTISING, PROMOTION, AND SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS* 325 (6th ed. 2003).

227. See Deborah Branscum, Editorial, *Under the Radar*, CMO, Dec. 2004 (describing “stealth marketing”) available at http://www.cmomagazine.com/read/120104/under_the_radar.html (last visited Jan. 23, 2005).

228. See Complaint for Statutory, Equitable and Injunctive Relief ¶ 24, *Kasky* (No. 994446) (stating that “[c]onsumers are savvy and want to know they support companies with good products and practices . . .”) (quoting Nike’s Director of Communications Lee Weinstein’s letter to the editor, published in *SAN FRANCISCO EXAMINER*, Dec. 14, 1997) (emphasis added).

229. Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech* (unpublished manuscript) (on file with author).

230. See Nat Ives, *Wal-Mart Turns to Ads to Address Its Critics*, N.Y. TIMES, Jan. 14, 2005 (reporting that Wal-Mart took out full-page ad to defend its labor practices) available at <http://nytimes.com/2005/01/14/business/media/14adco.html?8seia> (last visited Jan. 18, 2005).

231. See JOHN C. STAUBER & SHELDON RAMPTON, *TOXIC SLUDGE IS GOOD FOR YOU!* 179-96 (1995) (describing in Chapter 11, *All the News That’s Fit to Print*, practice of item “placement” where PR appears as “news”).

232. See generally First Amended Complaint for Damages and Injunctive and Declaratory Relief, *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005) (No. 99-CV-02496) (bringing action to recover health care costs paid by federal government for tobacco-related illnesses caused by

government alleged that the non-profits helped tobacco companies “carry out their fraudulent course of conduct [by acting] as public relations and lobbying arms of the Cigarette Companies.”²³³ The complaint alleges a conspiracy on the part of these parties “to deceive the American public about the health effects of smoking.”²³⁴ The strategy alleged in the conspiracy claim is that the tobacco companies conspired to present a united front on the health issues raised by smoking. The complaint alleges they agreed to “deny that smoking caused disease and to maintain that whether smoking caused disease was an ‘open question,’ despite having actual knowledge that smoking did cause disease.”²³⁵ In furtherance of this conspiracy, the government claimed that, among other acts, the defendants “made false and misleading statements to the *public through press releases, advertising, and public statements*, such as before Congress, *that were intended to be heard by the consuming public.*”²³⁶

Had Nike prevailed, would the tobacco companies now be able to assert a First Amendment defense to these claims? Might this not be the sort of defense that the tobacco industry so desperately needs now that the wall of impenetrability to liability it had built up over the years has crumbled? Like the tobacco company defendants, Nike’s alleged misstatements were not restricted to traditional advertising. Surely the health consequences of smoking are as much matters of public concern as is globalization. Like the tobacco companies’ interest in the health effects of smoking, Nike has a more than academic interest in this issue. Of course, arguably Nike’s labor practices do not concern matters of public health—at least not Americans’ health. However, the parallels are striking.

Similarly, according to an article in *The New York Times*, the drug giant Pfizer entered into a plea agreement last year with the United States in response to an indictment that the activities of the marketing representatives of its merger partner, Warner-Lambert, represented illegal marketing.²³⁷ The company pled guilty and agreed to pay \$430 million dollars to resolve the criminal and civil charges.²³⁸ The United States had accused the drug giant of engaging in various marketing and promotional activities with respect to its epilepsy drug, Neurontin.²³⁹ The complaint alleged that the company encouraged doctors, to whom it marketed directly, to prescribe the drug for off-label uses, such as to treat bipolar disorder, Lou Gehrig’s disease, attention deficit disorder, and

products made and sold to consumers by various tobacco companies), *available at* <http://www.usdoj.gov/civil/cases/tobacco2/DOJ%20Web%20-%20Amended%20Complaint.pdf> (last visited Jan. 23, 2005).

233. *Id.* at 11.

234. *Id.* at 2.

235. *Id.* at 15.

236. *Id.* (emphasis added).

237. Gardiner Harris, *Pfizer to Pay \$420 [sic] Million in Illegal Marketing Case*, N.Y. TIMES (Late Edition), May 14, 2004, at C1 (correction appended June 10, 2004).

238. *Id.*

239. *Id.*

several others.²⁴⁰ The issue of advertising and marketing practices for prescription drugs is one of great public interest at the moment, given Vioxx's recall and the questions raised by prescription drugs' direct to consumer marketing, a separate issue from the subject of the Pfizer case, which was its marketing efforts made to doctors.²⁴¹

Why wouldn't the acceptance of Nike's argument in the *Nike* case imperil prosecutions such as this one against Pfizer? Perhaps it is also no accident that Pfizer filed an amicus brief²⁴² in *Nike*? Like in the tobacco cases, the marketing efforts that were, in part, a target of this lawsuit, did not take the form of traditional advertising. Why might Nike's argument, had it prevailed, not implicate *any* sort of speech activity that could be construed as part of a "legitimate debate"? Assuming doctors are free to prescribe a particular drug for a use not yet approved by the FDA, and scientific support exists that use for this "off-label" purpose is appropriate, then why can't the drug companies argue that when sales representatives engage doctors in conversations to alert them to these uses and to urge them to prescribe the drug for these uses, they are part of a "debate" (or as the tobacco companies put it, an "open question") about the efficacy of the drug for this purpose? Perhaps it could be argued that such promotional activities constitute a "protest" against unfair FDA restrictions. In this case, wouldn't these arguments arguably represent an obstacle to the government's attempts to regulate drugs and drugmakers if First Amendment defenses could be raised in this context?²⁴³

240. *Id.* An update to this piece clarifies that the company's guilty plea did *not* include a plea with respect to the marketing issue:

An article in *Business Day* on May 14 about Warner-Lambert's settlement of a federal lawsuit over the marketing of the epilepsy drug Neurontin referred imprecisely to a related plea of guilty by the company. Warner-Lambert, now part of Pfizer, pleaded guilty to two criminal charges—that it failed to provide adequate directions for Neurontin's use and that it engaged in interstate sale of an unapproved drug. While Warner-Lambert had been accused of paying doctors to prescribe the drug for unapproved use, that charge was not part of the guilty plea. The guilty plea and a fine settled all of Pfizer's civil and criminal liability to the federal and state governments.

The correction appeared June 10, 2004, available at <http://query.nytimes.com/gst/abstract.html?res=FB0A1FFD34580C778DDDAC0894DC404482&incamp=archive:search> (last visited Jan. 23, 2005).

241. See, e.g., Lisa Belkin, *Prime Time Pushers*, MOTHER JONES, Mar./Apr. 2001 (stating that "Pharmaceutical companies spent an estimated \$1.7 billion on TV advertising in 2000"), available at <http://www.motherjones.com/news/feature/2001/03/drug.html> (last visited Jan. 23, 2005); Nat Ives, *Madison Ave. Sharing Drug Makers' Pain*, N.Y. TIMES, Dec. 21, 2004, at C1 (stating that Pfizer suspended advertising of Celebrex after spending \$87.6 million in major media ads in 2003); Stuart Elliott, *With or Without Vioxx, Drug Ads Proliferate*, N.Y. TIMES, Dec. 6, 2004, at C17 (noting that critics complained that marketing of Vioxx directly to consumers over-stimulated demand for the drug, which had to be withdrawn because of its health risks).

Like Nike, the pharmaceutical companies view their advertising pitches as "information." "From our point of view, one of the main purposes of direct-to-consumer advertising is education," says Emily Denney, a program manager in public affairs at AstraZeneca." Belkin, *supra*.

242. See generally Brief of Amicus Curiae Pfizer, Inc., Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (arguing that First Amendment should protect Nike's statements).

243. Apparently even some marketing professionals don't think that drug companies should be left to self-police advertising claims. CMO magazine, a magazine for marketing executives, offered the

Tobacco and prescription drugs are only two areas of current interest involving questions of protection of public health, not just protection of consumer information, which could be affected if an argument like Nike's prevails in the future. However, there are a number of other areas related to the public interest, which may be similarly detrimentally affected because the government's ability to regulate in these areas might be curtailed or imperiled if the Court accepts the corporate free speech argument offered by Nike. Therefore, it is useful to review in a little more detail some of the arguments Nike used to make its claim in the *Kasky* case. Many of these arguments have been discussed in more detail elsewhere, but a brief review is useful to underscore the point of the potential scope of impact if its claim had prevailed.

B. Environmental, Labor, and Other "Moral" Claims

One of the claims that Nike hit hardest on, and which many of its supporters echoed, was that when consumers seek information about labor or environmental practices, these are non-commercial areas. Thus, if they receive false or bad information the harm is not a *commercial* harm.²⁴⁴ It may harm consumers' *moral* interests to get false information about these topics, but these interests, Nike claims, are not the proper targets of government regulation. "There is only the most *attenuated link* between public statements *on important social, political, and moral issues*—which generate heated responses and debate—and consumer purchasing decisions."²⁴⁵

This statement raises several possibilities. First, if you accept the proposition that the statements by Nike to which Kasky objected addressed "important social, political and moral issues," then you have to conclude that Nike was willing to spend an enormous amount of time and money on an issue with only the most "attenuated" link to purchasing decisions. That seems implausible. If, on the other hand, these issues had a strong, rather than "attenuated," link to consumer purchasing decisions, such as suggested by the letter urging consumers during the Christmas season to remember Nike was a "leader" in its labor practices,²⁴⁶ then maybe they were not statements that were *primarily* concerned "important social, political and moral issues" as much as important *commercial* issues—at least for Nike. And if these categories overlap, that is, if these "important social, political and moral issues" implicate Nike's commercial interests, why wouldn't that be true for consumers as well? Thus, why wouldn't it be the case that false statements related to those interests would be every bit as harmful to consumers interested in Nike's labor practices as would be *false* statements about quality, i.e., that the shoes were manufactured

following question in a poll to readers: "Should the government increase its regulation of pharmaceutical ads, or can the industry be trusted to make truthful claims and warn consumers of health risks?" As of May 18, 2005 78% of respondents felt that "more regulation is needed." See <http://www.cmomagazine.com/poll/> (last accessed on 5/18/05).

244. Petitioners' Brief at 35-38, *Nike, Inc.* (No. 02-575).

245. *Id.* at 36 (emphasis added).

246. Complaint for Statutory, Equitable and Injunctive Relief ¶ 24, *Kasky* (No. 994446).

with leather when they were not?²⁴⁷

It is unclear that labor or environmental practices are any less legitimate areas of consumer interest (and thus regulation) than whether the products are made in America, (as opposed to overseas) or by the blind or by Native Americans,²⁴⁸ assertions that are the subject of government regulation and have been around for awhile. These regulations would have been placed in jeopardy if Nike's position had prevailed. However, the problem is not limited to existing regulations. Problems such as environmental degradation are too large to be solved solely by governmental regulation. They require consumer cooperation in order to have real effect.

To make real dents in problems like global warming will require widespread changes in consumer behavior. This is not to say that governmental regulation is irrelevant. It is not. And one of government regulation's values is, as an exemplar, to provide leadership as to social goals. However, these goals will remain elusive without widespread voluntary compliance. One of the ways to accomplish compliance is through purchasing decisions. Consumers can use purchasing decisions to indicate preferences for certain types of labor and environmental practices, and bring to bear that powerful economic incentive, the profit motive, which the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*²⁴⁹ noted would provide some assurance that proper regulation would not wholly chill commercial speech.²⁵⁰ Harnessing that incentive to social goals like a cleaner environment is a legitimate governmental goal. Simply setting out as a limitation that assertions with respect to these areas must be demonstrably true does not seem to be an onerous burden on for-profit entities. Indeed, despite protests in Nike's briefs of the difficulties inherent in ensuring that any statement made about Nike's far-flung empire is accurate,²⁵¹

247. Douglas Kysar has made a convincing argument that such concerns, at least where "moral" concerns can be construed as "process" concerns, are of legitimate interest to consumers and are worthy of protection from fraudulent misrepresentation as product features such as price and quality. See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004).

248. See Brief for the National Association of Consumer Advocates as Amicus Curiae at *16-20, 2003 WL 1844784, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (arguing some of Nike's statements were commercial speech because a claim about a company's manufacturing facilities is as easily verifiable as one referencing all particular products, and government has an interest in regulating all such factual claims).

249. 425 U.S. 748 (1976).

250. See *Va. State Bd. of Pharmacy*, 425 U.S. at 767-70 (finding that in regulating the professional standards of its pharmacists, Virginia cannot suppress flow of prescription drug price information because that information is protected by the First Amendment). For a broader discussion of the interconnection between the status of consumer and that of citizens and historical efforts to mobilize consumption power and choices for political ends, see generally LIZABETH COHEN, *A CONSUMERS' REPUBLIC* (2003).

251. See Petitioners' Brief at 40, *Nike, Inc.* (No. 02-575) (describing difficulties of making "on-the-spot responses to accusations . . . about the more than half-million individuals employed not by it but by its subcontractors halfway around the world"). Note that one of the factors present in that observation, which may not be true with respect to reporting on taxes and so forth, is the time element. Presumably tax returns do not have to be prepared "on the spot." Nevertheless, the best source of the

various laws, such as those governing taxes and securities regulation, require Nike to compile this information. Any difficulties with compliance that arise due to a business' large size are generally seen as ones the business must solve, not as grounds for absolving the entity of the duty to truthfully report the information.

That this is the price of doing business does not seem unfair. The consequences of a failure to recognize such concerns as labor and environmental practices as legitimate *commercial* concerns for consumers is that consumers will not be able to verify claims about labor, environmental, or other "moral" practices. If a product is advertised as "cruelty-free," consumers will have no way to determine whether this statement is true or not. If consumers cannot verify such claims, some manufacturers will be able to free ride on the efforts of others, that is, they will be able to make the claim without incurring any of the costs that may be involved in ensuring the truth of the claim.

Ultimately, this will likely discourage manufacturers from incurring those costs or changing their practices. No method would exist to ensure that they could benefit from such investments by appealing to the segment of the market interested in so limiting their purchases. The market would be cluttered with similar products making similar claims but presumably being marketed at lower prices – lower prices that are the result, for example, of not having to pay the extra manufacturing costs of a "living wage." When that happens, not only does the consumer lose what he or she was seeking, but also the government's ability to pursue goals such as a cleaner environment are seriously hampered.

There is no real dispute that consumers have become increasingly concerned about environmental issues and that many wish to base their purchasing decisions on the criteria of which products are most "green." This increased concern has created a "virtual explosion throughout the United States in 'green marketing.'"²⁵²

Common household products boast that they are recyclable, biodegradable, compostable, ozone-friendly, or some other shade of green. Manufacturers claim that they produce wood products only from sustainable harvesting practices, free from clear-cutting, or other environmental abuse. Organic food is advertised as being produced without reliance upon agricultural chemicals or biotechnology. Energy is marketed as "clean," generated from wind, water, or solar power, not from the burning of coal or use of nuclear power. Even tuna fish is claimed to be dolphin-free.²⁵³

It surely cannot be the case that the government ought to be powerless to regulate such claims.²⁵⁴

information is still the company.

252. Brief of Amici Curiae of Sierra Club et al. at *6, 2002 U.S. Briefs 575, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

253. *Id.* at 6-7 (citing David Hoch & Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441 (1994)). See also, Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 U. TOL. L. REV. 31, 31 (1991) (recommending that Federal Trade Commission adopt federal guidelines for environmental claims in advertising).

254. The Federal Trade commission actually has issued guidelines for assessing environmental

C. *The Implications for Consumer Protection*

A central theme in the *Nike* case was harm—where’s the harm and to whom? Much was made of the fact that Kasky did not claim he was personally injured in any way by Nike’s alleged misstatements. The United States intervened as an amicus on just this ground,²⁵⁵ stating it was Kasky’s status as a “private attorney general” that represented the objectionable part of the California decision, apparently overlooking the fact that Nike’s arguments would seem to apply with equal force to the “public” attorney general.²⁵⁶ This question of harms, i.e., who is harmed and what is the harm, is central to whether or not a consumer is “harmed” if he is told that a product is not made under sweatshop conditions when in fact it is (whatever a “sweatshop” may be). Nike’s position would seem to be that such harms, if any, are inchoate and incapable of redress through the courts because they are harms to moral or ethical sensibilities—presumably sensibilities outside of the purview of government regulation.

Consumer interest in these topics is no more irrational or inchoate than its interest in purchasing Borden milk rather than the house brand, even if the products are identical.²⁵⁷ Corporations like Nike are quick to defend *this* consumer interest because this “difference” in brands is, while in some sense not “real,” manufactured by virtue of commercial advertising. This advertising creates a consumer impression (however unfounded or irrational) that the name brand is somehow better and thus can be claimed as a commercial interest.²⁵⁸ Such differences are supported, in part, by the argument that product investment in the form of advertising has created this “difference.” It is just as real as corporate goodwill, an item that represents a real asset on the balance sheet, despite its somewhat inchoate form and ephemeral quality.²⁵⁹ This element

claims. See 16 C.F.R. 260 (1994). However, the guidelines are not enforceable rules. And according to some, the FTC has not been very effective in policing environmental claims. See Eric Orts, *Reflexive Environmental Law*, 8 NW. U. L. REV. 1227, 1250-52 & n.103 (1995) (“[T]he effectiveness of FTC enforcement in environmental marketing is questionable.”).

255. See Brief for the United States as Amicus Curiae at *7-8, 2003 WL 899100, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (arguing First Amendment does not protect private plaintiffs from a company’s misrepresentation absent reliance and actual injury).

256. Of course, it is possible to argue that if the government, state and federal, were doing its job, it would not be left to private attorney generals to bring such law suits. It is a matter of some note that the California law was amended in the wake of the *Nike* case to eliminate the private attorneys’ general provision. See 2004 CAL. LEGIS. SERV. PROP. 64 (Proposition 64) [Approved by voters November 2, 2005].

257. *FTC v. Borden Co.*, 383 U.S. 637, 649-52 (1966).

258. *Id.* at 649 & n.3 (citing Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1181 (1948) (who wrote that “[t]he buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker”).

259. For a discussion and a critique of this point see Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1725 (1999) (stating that “[t]here has been inexorable pressure to recognize as an axiom the principle that if something appears to have substantial value to someone, the law must and should protect it as property”). Professor Litman actually rejects this argument that trade symbols must necessarily be protected as property but

reveals the degree to which Nike's argument imperils consumer protection regulation.

As noted above, a number of laws, both state and federal, prohibit manufacturers from labeling products as "Made in America," or by the blind, or by Native Americans, unless these statements are demonstrably true.²⁶⁰ Had Nike prevailed, its argument would seem to render all of these regulations unconstitutional to the extent that these claims are "moral" ones and not ones going to "quality" or some product difference. However, this is by no means the only sort of legislation that might be imperiled. As the National Association of Consumer Advocates argued in its amicus brief in support of Kasky, much consumer protection regulation shares the same "infirmities" that the Solicitor General identified with the California statute in the *Nike* case, and "would require [the] Court to effectively declare unconstitutional a large number of unrelated statutes, including the Truth in Lending Act, the Fair Debt Collection Practices Act, the Consumer Leasing Act, and the Truth in Savings Act."²⁶¹

D. Antitrust, Tax, Securities, Trademark: More Unintended Consequences?

Much more regulation would seem to be directly affected, all of which, to some extent or another, involve what for-profit corporations may or may not say. Securities regulations are one example. Why should statements made in offering circulars, prospectuses, and the like, which are also in a non-traditional advertising format²⁶² and clearly represent "commercial speech" in some fashion, not be affected by the acceptance of Nike's argument?

What about antitrust? As moribund as this area of the law seems to currently be, (witness the United States backing away from the Microsoft case

suggests that they may serve the public interest by serving a competitive interest. *Id.* at 1730-31. Another theory offered for protection of brands and trademarks is the reduction of transaction costs by allowing a consumer to quickly associate a known product with its symbol. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (stating by "[a] trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants."). The anonymous student author of a 2003 *Harvard Law Review* article suggests that consumer protection ought to perhaps preserve the "badwill" inherent in trade names where the name is associated with a bad product or service by not permitting companies to erase badwill by virtue of a simple name change. Note, *Badwill*, 116 HARV. L. REV. 1845, 1866-67 (2003). Presumably this suggestion too would be made more difficult, if not impossible, were Nike's position have won the Court's support.

260. See Brief for the National Association of Consumer Advocates at *17-19, *Nike, Inc.*, 2003 WL 1844784 (No. 02-575) (discussing state statutes that regulate a company's manufacturing claims in order to protect consumers).

261. *Id.* at *3 (referring to provision in California law that allowed for statutory damages even in absence of proven injury, a point that the Solicitor General argued made the California statute at issue infirm).

262. Of course, it is possible to point out that the reason they do so, the whole notion of a "traditional advertising format," is itself an artifact of the laws that have dictated the format for offering circulars and the like. Without those laws it is not clear that prospectuses and offering circulars would even exist in their present form. However, this observation may take us in a circular inquiry in more ways than one and is certainly beyond the scope of this article.

after the election of George Bush), might acceptance of Nike's argument present some additional challenges where anticompetitive behavior is alleged to occur almost exclusively in the area of advertising, as it was with what was known as "the Cereal Case"?²⁶³ As it stands right now, the government already faces the obstacle that product differentiation through advertising is not considered inherently wasteful or anticompetitive. If all those marketing efforts were constitutionally protected, particularly if they take place outside of the traditional advertising format, how much more would that insulate industries from claims of anticompetitive behavior related to advertising and other marketing efforts?

Even more problematic, given that the subject matter is almost wholly comprised of speech or expressive content, is trademark law, including passing off and unfair competition generally, and copyright law. Here it appears safe to assume that Nike and its supporters would vigorously assert that its arguments should *not* apply to these areas, although it is not immediately clear why not. If Nike's "contributions" to the debate about globalization are to be subject to absolute protection, then it seems that similar claims about the safety of hamburger in fast food restaurants²⁶⁴ or of fruits and vegetables that may have been sprayed with the pesticide AlarTM²⁶⁵ should be similarly protected. For the most part, they have been. However, that does not mean that the pervasive influence of corporate press releases, leverage of advertising monies, use of "Astroturf" consumer groups,²⁶⁶ and industry-funded think tanks acting as fronts for these interests do not result in something perhaps less informative than the romantic notions about the "multitude of voices" Nike would have us believe is necessary for an issue to be fully aired. To the contrary, it appears that the problem is not that they can't be heard, but that they drown out dissent. For instance in the case of AlarTM:

Industry-funded think tanks such as the Cato Institute, Heartland Institute, and the Competitive Enterprise Institute hammered home

263. See Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321, 336-37 (1990) (discussing the Cereal Case).

264. For a discussion of the criticisms launched against Eric Schlosser's indictment of the fast-food industry, see ERIC SCHLOSSER, *FAST FOOD NATION* 276-80 (2002) (Afterword). Schlosser describes in the Afterword various reactions, including widespread criticisms of the book after its first publication, but notes "thus far its critics have failed to cite any errors in the text." *Id.* at 276.

265. See SHELDON RAMPTON & JOHN STAUBER, *TRUST US, WE'RE EXPERTS!* 226-29 (2001).

266. Authors John Stauber and Sheldon Rampton describe "Astroturf," a term used to describe pseudo-grassroots movements:

Lloyd Bentsen, himself a long-time Washington and Wall Street insider, is credited with coining the term "Astroturf lobbying" to describe the synthetic grassroots movements that can now be manufactured for a fee by companies like Hill & Knowlton, Direct Impact, Optima Direct, National Grassroots & Communications, Beckel Cowan, Burson-Marsteller, Davies Communications or Bonner & Associates. *Campaigns & Elections* magazine defines "Astroturf" as a "grassroots program that involves the instant manufacturing of public support for a point of view in which either uninformed activists are recruited or means of deception are used to recruit them.

STAUBER & RAMPTON, *supra* note 231, at 79.

the argument that the "Alar scare" was an irrational episode of public hysteria produced by unscrupulous manipulators of media sensationalism.

Since 1989, this revisionist version of the Alar story has been repeated over and over again, distorting events and omitting facts to transform the story into a morality tale about the dangers of environmental fearmongering, governmental regulatory excess, and media irresponsibility.²⁶⁷

Apparently not satisfied with the results of such intensive public relations campaigns, sometimes corporate interests have tried to suppress criticism of their products or practices by bringing libel, trademark, unfair competition, or disparagement actions.²⁶⁸

The vast sums poured into creating a logo and an image create incentives to protect these investments by trying to ensure that other manufacturers cannot free-ride off the efforts of others by appropriating their label and logos and thus confusing consumers about the origin of the product. This is the basis of the protection for trademarks, trade dress, and the like.²⁶⁹ However, it also creates incentives for corporations to try to suppress information about their practices that may affect consumer impressions associated with that logo or that image, including attempts to make political, policy, or social statements by appropriating the corporate image.²⁷⁰ An example of such an appropriation is

267. RAMPTON & STAUBER, *supra* note 265, at 228-29. In the late Seventies and early Eighties, the Environmental Protection Agency (EPA) conducted studies and concluded that Alar, a chemical sprayed by American apple growers to make apples ripen more quickly, was a "probable human carcinogen." *Id.* at 226. However, the EPA allowed the product to remain on the market. *Id.* In 1989, CBS-TV's *60 Minutes* aired a segment featuring a commercial prepared by a public relations committee for environmental groups which warned that Alar had been found in bottles of children's apple juice. *Id.* at 227. After the broadcast, many American consumers boycotted apple products. *Id.* Following the "Alar Scare," the apple industry initiated a massive campaign attacking Alar studies as "junk science" and calling the *60 Minutes* special "irresponsible journalism." RAMPTON & STAUBER, *supra* note 265, at 228. As a result, many people today think the "Alar Scare" was overblown. *Id.* at 229.

268. See, e.g., *World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F. Supp. 2d 514, 525 (S.D.N.Y. 2001) (finding, on a motion to dismiss the WWF's defamation claim, that defendants' public criticisms of wrestling programs created by plaintiff as responsible for deaths of four children constituted "commercial speech" despite the fact that defendants were a non-profit organization formed to engage in public criticism of media, its chairman, and a Florida defense attorney were not engaged in the promotion of any product). For a criticism of this decision see *Symposium Panel: Trademark Dilution: Mosley and Beyond*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 849, 888-89, n.204 (2004) (describing opinion as "incredibly overbroad and problematical"; presumably because "the defendants were not in business and did not produce any product"). See also *MasterCard Int'l Inc. v. Nader*, 2004 U.S. Dist. LEXIS 3644 (March 8, 2004) (court granted summary judgment for Nader campaign against MasterCard's attempt to claim that Nader's use of the "priceless" tag in his campaign that mirrored MasterCard's ad campaigns was unfair competition, trademark dilution, etc.).

269. See Brian A. Jacobs, *Trademark Dilution on the Constitutional Edge*, 104 COLUM. L. REV. 161, 175 (2004) (stating that "[u]nless courts find the FTDA [Federal Trademark Dilution Act] narrowly tailored in service of a substantial government interest, the Act should be deemed an unconstitutionally broad regulation of commercial speech under the First Amendment").

270. For an explanation of the concept, see KALLE LASN, *CULTURE JAM: THE UNCOOLING OF*

when advertising critics, wanting to take aim at the difference between what the advertiser is selling and what it is providing, spoof Absolut Vodka ads with a picture of an Absolut bottle bending over in a sagging posture with the tag line, “Absolut Impotence.”²⁷¹

Predictably, the corporations that own these logos and images regularly attempt to suppress such parody uses of what they view as their property. Witness the effort made by Fox media to challenge humorist Al Franken’s use of the terms “fair and balanced.”²⁷² The network claimed that these terms were part of its trademarked logo and promotional material, and as such, were proprietary.²⁷³ The judge did not find the claim credible, but it should be of concern that Fox’s lawyers did not find such a claim so facially incredible, so obviously unconstitutional or lacking in merit, that they felt an ethical obligation to refuse to file the claim.²⁷⁴ Moreover, the owners of logos, trademarks, and copyrighted material often do not even need to resort to legal action because very often the organized media will not even run these ads in print or other media.²⁷⁵ It seems beyond dispute that Nike’s commitment to a multitude of tongues and open debate does not extend to appropriation of the “swoosh.” And if such appropriation was limited to commercial purposes, a distinction would be viable. However, giant multinational corporations and corporate interests have made clear that at least some of them will attempt to suppress not only commercial uses of their copyrighted material, but also *any* use, whether related to public debate or not, that threatens to tarnish the value of the investment—even if only by the production of truthful information.

CONCLUSION

What is at stake here is the ambit of the exercise of legitimate governmental regulatory authority. Nike and its corporate supporters like Exxon-Mobil and

AMERICA™ 131-32 (1999).

271. See <http://www.adbusters.org/spoofads/alcohol/absolutimpotence/> (providing picture of spoof on Absolut Vodka) (last visited Jan. 22, 2005). Adbusters is a magazine and website dedicated to challenging consumer culture. Parodies like the “Absolut Impotence” are a feature of Adbusters’ “culture jamming” project. See also NAOMI KLEIN, *NO LOGO* 279-309 (1999) (describing culture jamming, the concept of parodying ads so as to change their messages).

272. See Fox News Network, LLC v. Penguin Group (USA), Inc., No. 03 Civ. 6162(RLC), 2003 WL 23281520, at *1 (S.D.N.Y. Aug. 20, 2003) (denying Fox temporary restraining order).

273. *Id.* See also Phil Hirschhorn, *Fox News Loses Attempt to Block Satirist’s Book* (Aug. 22, 2003), available at <http://www.cnn.com/2003/LAW/08/22/fox.franken/index.html> (last visited Aug. 23, 2003).

274. FED. R. CIV. P. 11(a)-(b) imposes upon lawyers the ethical obligation to ensure that all claims are either supported under the law or merited by a good faith argument for the extension, modification, or reversal of existing law. Presumably Fox’s lawyers were traveling under the latter clause. Nevertheless, it is worth a moment’s pause that Fox could consider this argument “in good faith” while simultaneously arguing for Nike’s “freedom” to offer whatever self-promoting statements its executives care to make, without regard to whether they are truthful or will mislead the public because of the contribution to a matter of public debate.

275. See, e.g., <http://www.mediacarta.org> (discussing major media outlets’ refusal to carry an Adbusters’ parody ad criticizing fat content of McDonald’s food) (last visited Apr. 6, 2005).

Microsoft, as well as the industries which depend on them, including advertising and public relations,²⁷⁶ would like to confine the subject of governmental regulation to explicit, factual claims in the context of traditional advertising. Such a restriction would leave the government watching an ever-emptier field, because these companies increasingly make few explicit, verifiable claims in that context. These corporations would like to restrict the basis of consumer choice to those factors they control: price, appearance, and the intangible "attributes" that advertising creates. They would like to discourage consumer ability to make buying decisions on the basis of things like labor and environmental practices, where statements can be subject to legal sanction if false. Of course, they have no problem encouraging consumers to purchase products on the basis of whether or not they are "green" or "sweatshop free." They would just like to be spared the nuisance of actually having to show that such claims are *true* or, perhaps more to the point because such practices often involve costs, of making them *be* true. For-profit corporations cannot be permitted to exercise such power. That would be the real "imbalance."

276. One might add to this list traditional media because of the degree to which advertising supports media and lowers the cost of supplying information to the public. Of course, it sometimes does so at the cost of distorting the debate. *See generally* C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994) (arguing advertising hurts mass media's commitment to democratic society).