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SYMPOSIUM ARTICLES

THE PUFFERY OF LAWYERS

*Rodney A. Smolla**

Lawyers advertise to attract clients. Politicians advertise to attract voters. Businesses advertise to attract customers. All of these advertisers advertise with a common subtext: choose me, because I'm better than the rest. Hire me, vote for me, buy my product, and good things will happen. The message may be blunt, explicit, direct, linear. But often it is not. The bludgeon is not the tool of choice in modern mass advertising. The message, more commonly, is presented with subtlety, often merely suggested, often presented with indirection, irony, camp, or comedy. *Information* as such is not the point. The stuff of modern advertising is not information, but imagery.[1] Advertisers sell imagery. The honest politician, compassionate for the common man and tough as nails on crime. The enterprising business, primed for the technologies of the new millennium, creative, responsive, ready and able to serve the customer's needs. And the lawyer, tough and aggressive, able to stand up to insurance companies and fight for the rights of the injured and wronged.

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* George E. Allen Professor of Law, University of Richmond, T.C. Williams School of Law. This annual Allen Chair Symposium issue of the *University of Richmond Law Review* was supported by the generosity of the Allen family, in honor of George E. Allen. On behalf of everyone within the University of Richmond Law School community, I wish to thank the Allen family for its gracious support.

1. *See generally* Ronald K. L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697 (1992) (arguing that influential advertisers can reshape the media in their own image, encouraging a discourse in the service of waste, and turning what was once a citizen-democracy into a consumer-democracy, and claiming that political leaders in turn mimic the strategies of advertisers, further blurring the line between political and commercial discourse).

The First Amendment does not provide immunity for a politician who makes a false statement of fact about an opponent.[2] The wronged politician may sue his or her political rival for libel, and may recover if it is demonstrated that the false statement of fact was published with knowledge of its falsity or reckless disregard for the truth.[3] The First Amendment does protect the politician, however, who merely states the *opinion* that he or she is better than the other guy—more experienced, more responsible, more conservative, more liberal, more compassionate, or more intrepid. The substance of the opinion does not matter.[4] What matters is that it is just opinion, and not fact. A statement that is not reasonably understood by recipients of the communication as a statement of fact is simply not actionable.[5]

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2. To be actionable as defamation, the statements at issue must be reasonably understood as assertions of *fact* about the plaintiff. *See generally* RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 6:1–2 (2001). Statements that are not factual, including statements of "opinion," "rhetorical hyperbole," or mere "insult" or "epithet," are not actionable. The touchstone most often employed to determine whether a statement is a "fact" or an "opinion" is whether the statement is susceptible to objective proof or disproof. In determining whether a communication is actionable, judges and juries must contend not merely with the literal meaning of a statement, but with statements that may reasonably be understood as implied by what is literally stated. *Id.*

3. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

4. This elemental proposition of defamation law may be expressed under a variety of rubrics. The non-factual statement may be labeled an "opinion," "rhetorical hyperbole," or mere "insult," "verbal abuse," or "epithet." Whatever the label, the underlying concept is the same: unless defamatory facts are expressed or reasonably implied, no action for defamation may be maintained. Statements that are merely "rhetorical hyperbole," and are thus not to be taken literally as factual, are also deemed by the law not to be statements of fact. To call a doctor who performs abortions a "murderer," for example, will typically not qualify as a "statement of fact," but will be treated as "opinion" or "rhetorical hyperbole" designed to express the speaker's ideological view that abortion is murder. *See* SMOLLA, *supra* note 2, §§ 4:1–18, 6:1–2.

5. This is not to imply that separating "fact" from "opinion" is always easy. To the contrary, this inquiry is one of the most elusive and hotly litigated problems of contemporary defamation law. The starting point for analysis is the holding of the United States Supreme Court in the landmark decision of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Prior to *Milkovich*, there was a spreading consensus among lower courts that the First Amendment contained a free-standing constitutional protection for statements of opinion in defamation actions. This constitutional protection of opinion was seen as superseding and augmenting the protections embodied in the "fair comment" privilege recognized at common law. The basis of this belief was traced most famously to language in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Supreme Court stated with seemingly emphatic certitude that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339–40. Building on this pronouncement in *Gertz*, as well as other statements from the Supreme Court protecting "rhetorical hyperbole," *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970), "lusty and imaginative expression of contempt," *Old Dominion*

So, too, the First Amendment provides immunity for self-promoting political ads that radiate the politician in various suggestive hues of image or persona, but that fall short of any documented factual falsehood. Under the First Amendment, no truth in politicking statute or civil libel law could be brought to bear against a politician portrayed through imagery as "tough on crime" or "concerned for the elderly," even if these claims seemed largely whole-cloth concoctions for the credulous.[6]

Business advertisers enjoy somewhat less protection than politicians because the First Amendment standards governing com-

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Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974), or vicious parody, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), lower courts not only treated opinion as independently protected by the First Amendment, but constructed various multi-part doctrinal tests to define "opinion" generously. These judicial decisions tended to emphasize such factors as (1) the author's choice of words; (2) whether the challenged statement is capable of being objectively characterized as true or false; (3) the context of the challenged statement within the writing or speech as a whole; and (4) the broader social context into which the statement fits. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). The Supreme Court's decision in *Milkovich* dramatically altered this picture. In *Milkovich*, the Court held that there is no free-standing First Amendment privilege protecting "opinion" in defamation suits. *Milkovich*, 497 U.S. at 19–20. Yet at the same time, the Supreme Court in *Milkovich* held that in defamation suits against media defendants involving stories on issues on "matters of public concern," the First Amendment requires that the defamatory statement, whether express or implied, be provable as false before there can be liability. *Id.* at 20; *see also* Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990) ("[T]he threshold question in defamation suits is not whether a statement 'might be labeled opinion,' but rather whether a reasonable factfinder could conclude that the statement 'implies an assertion of objective fact' [that is provable as false]." (quoting *Milkovich*, 497 U.S. at 18)), *cert. denied*, 499 U.S. 961 (1991).

6. I speak here of neither self-laudatory primping nor statements attacking an opponent which might be actionable as a form of "defamation by implication." This problem of "defamation by implication" is a generic issue dealing with the interpretation of the meaning of the allegedly defamatory statements that cuts through several of the more specific doctrinal issues posed by libel litigation. Under First Amendment principles established by the United States Supreme Court, plaintiffs have the burden of proving that allegedly defamatory statements on matters of public concern are false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986). Minor, trivial, technical falsehoods will not support a defamation action. Rather, the test is whether the "gist" or the "sting" of the allegedly defamatory statements were different than publication of the literal truth would have been. The defendants are protected from liability for minor or trivial inaccuracies, but may be held liable for statements that deviate in a material way from the truth. Masson v. New Yorker Magazine, 501 U.S. 496, 516 (1991). The concept is a simple one: a charge is not "substantially true" if the average reader would think differently of the plaintiff had the actual facts been presented correctly. As the Supreme Court in *Masson* explained: "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* at 517 (quoting ROBERT SLACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980)); *see also* Wehling v. Columbia Broad. Sys., 721 F.2d 506, 509 (5th Cir. 1983); SMOLLA, *supra* note 2, § 5.08.

mercial speech are less protective than those governing political discourse.[7] We demand more verisimilitude from those who sell us soap than from those who seek our votes. Yet even under the intermediate scrutiny standards of orthodox commercial speech doctrines, advertisers today receive generous protection.[8] False or misleading advertising is not protected, and increasingly demanding standards apply to government regulation of truthful speech about lawful products and services.[9] Advertisers may not be punished by the government or subjected to civil liability by competitors merely for self-promoting puffing, nor may they be sanctioned for attempting to seduce consumers by wrapping their products and services in alluring imagery.[10]

Lawyers, however, do not fare so well. If commercial advertisers are First Amendment step-children, lawyers come closer to abandoned orphans. Nominally, lawyer advertising is a form of commercial speech, and nominally, lawyer advertising ought to receive the same level of protection as those who advertise athletic wear or car repair. Yet it does not, at least if you sample the prevailing view among the present powers-at-be who administer the ethical standards for lawyers in most American jurisdictions.[11]

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7. *See infra* note 76 and accompanying text.

8. *See infra* notes 53, 70, and accompanying text.

9. *See infra* notes 54–58, 76, and accompanying text.

10. *See generally* Daniel Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979) (arguing for more clarity in doctrinal applications to commercial speech protections, looking specifically at contract versus content regulations); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (arguing that the distinction between commercial and noncommercial speech is not based on the Constitution or the First Amendment and only suppresses noncommercial speech); Daniel H. Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988) (suggesting that the Supreme Court should not use doctrinal tests to determine First Amendment protection of commercial speech in order to correctly expand the area's protection); David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359 (1990) (suggesting that the Supreme Court should define commercial speech in content terms, but has instead given no definition of commercial speech due to the focus on the speaker's motive); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988) (discussing concern for First Amendment protection of commercial speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983) (arguing that the Supreme Court's treatment of commercial speech is inadequate due to the frequent applications of generalized First Amendment theories).

11. *See* William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49 (2002).

The second-class pedigree of lawyer advertising is most visibly demonstrated by ethical standards that seek to prevent or severely retard any attempt by lawyers to use imagery, suggestion, comedy, irony, fictional vignette, or other creative tools of modern mass advertising to propagate the message that they are in some sense better than other lawyers—tougher, meaner, cleverer, more caring and concerned, whatever—on the theory that such self-adulation and puffery is inherently false or misleading.[12] The precise pretenses and pufferies excused under the First Amendment when engaged in by political and business advertisers are *verboten* when it comes to legal advertisers. The governing principles are turned on their head. While the First Amendment would not permit the law to punish such puffery by politicians or non-legal business—on the assumptions that the messages conveyed cannot be *proven* factually false and cannot be *documented* as actually causing any significant social harm[13]—when it comes to lawyer advertising the opposite assumptions reign. Today, a lawyer who advertises his or her services may be punished *not* because a statement is proven to be false, but because it cannot be proven to be true. Moreover, punishment is justified despite the lack of any empirical evidence that the message actually deceived or harmed any consumer of legal services, or that the quality of any services rendered as a result of the advertising was by any measure substandard.[14]

The three fine lead articles presented in this symposium issue of *The University of Richmond Law Review*, an annual symposium graciously supported by the generosity of the family of George E. Allen, one of Virginia's great legal figures, well demonstrates these propositions. William E. Hornsby, Jr., in his article *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*,[15] carefully recounts the history of state-based regulation of lawyer advertising, including the entrenched hostility of most state governing bodies to legal advertising, particularly advertising that is perceived as self-

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12. *See, e.g.*, Farrin v. Thigpen, 173 F. Supp. 2d 427 (M.D.N.C. 2001) (sustaining bar association claim that lawyer advertisements featuring fictional vignettes in which insurance companies are portrayed as more inclined to settle claims when they determine the identity of the plaintiff's law firm were a violation of ethics restrictions and not protected by the First Amendment).

13. See *infra* notes 53, 70, 76, and accompanying text.

14. See *infra* notes 80, 88, and accompanying text.

15. 36 U. RICH. L. REV. 49 (2002).

laudatory and undignified. Professor Louise L. Hill, in her article *Change Is in the Air: Lawyer Advertising and the First Amendment*,[16] explains how these policies interact with the new world of lawyer advertising in cyberspace. And Professor Ronald D. Rotunda, in his article *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*,[17] documents the dissonance between the animating philosophical assumptions of First Amendment jurisprudence and the curmudgeonly paternalistic approach that seems to permeate much of the regulation of lawyer advertising.

My own purpose in this introductory essay is modest: to offer an indictment and a *prima facie* case against the ascendant *ethos* of most bar regulations—an *ethos* that presupposes that lawyers who insist on advertising ought to be restrained, antiseptic, and modest in their messages, both stated and implied. The nation's bars command in chorus: *Thou shalt not puff.* This essay asks why.

On its face, this hostility toward self-promotion is in tension with the trajectory of modern commercial speech doctrine. In the past thirty years, the Supreme Court has been activist in the commercial speech field, deciding many cases dealing with restrictions on lawyer advertising and solicitation. While some restrictions on lawyer advertising and marketing practices have been sustained, on the whole the broad arc of these cases reflects a steady expansion of First Amendment protection of lawyer advertising.[18] The modern epoch began in *Bates v. State Bar of Ari-*

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16. 36 U. RICH. L. REV. 21 (2002).

17. 36 U. RICH. L. REV. 91 (2002).

18. *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (sustaining a thirty-day restriction on targeted direct-mail solicitation to accident victims); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) (striking down a disciplinary action against an attorney for listing truthful non-misleading information on certification on letterhead); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (striking down a blanket prohibition on targeted direct-mail solicitation); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (striking down a disciplinary action against an attorney for advertising containing truthful, nondeceptive information and legal advice); *In re* R.M.J., 455 U.S. 191 (1982) (striking down lawyer advertising limitations dealing with listings of areas of practice); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (sustaining limitations on in-person solicitation); *In re* Primus, 436 U.S. 412 (1978) (striking down limitations on solicitation as applied to public interest groups such as the American Civil Liberties Union); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (striking down a blanket ban on lawyer advertising); *see also* Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, 512 U.S. 136 (1994) (striking down a disciplinary action by the Board of Accountancy against an attorney who was also a certified public accountant for placing CPA and Certified Financial

zona,[19] in which the Supreme Court held that the First Amendment gives lawyers the right to advertise the prices of routine services, such as simple real estate closings, uncontested divorces, uncontested adoptions, and personal bankruptcies.[20] *Bates* was followed by *In re R.M.J.*,[21] in which the Court held that (1) states may not limit the terms attorneys use to advertise their services, as long as the terms used are not deceptive, (2) states may not restrict an attorney's ability to include in his or her advertisement the jurisdictions in which the attorney is licensed to practice law, and (3) states may not limit the content of mailing lists for announcements of the opening of an attorney's law office.[22]

Then, in *Shapero v. Kentucky Bar Ass'n*,[23] the Court invalidated state prohibitions against targeted, direct-mail advertising by attorneys, observing that the recipient of a letter can simply toss the unwanted letter in the garbage.[24] The Court found that the state's interest in preventing such advertising was not sufficiently substantial to overcome the constitutional protection generally afforded commercial advertising.[25]

The Court went in the other direction, however, in *Ohralik v. Ohio State Bar Ass'n*,[26] by upholding certain Ohio disciplinary rules prohibiting direct in-person solicitation of a client's business.[27] Ohralik was an Ohio attorney who contacted an eighteen-year-old girl in the hospital after learning that she had been involved in a traffic accident.[28] Ohralik challenged the disciplinary action taken against him, arguing that meeting with prospective clients and informing them of their legal rights was "'presumptively an exercise of his free speech rights'" and could not be "curtailed in the absence of proof that it actually caused a specific

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Planner designations in her law office advertising); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down a Florida ban on personal solicitation of prospective clients by certified public accountants).

19. 433 U.S. 350 (1977).
20. *See id.* at 372–73.
21. 455 U.S. 191 (1982).
22. *See id.* at 205–06.
23. 486 U.S. 466 (1988).
24. *See id.* at 475–76.
25. *See id.* at 476–78.
26. 436 U.S. 447 (1978).
27. *See id.* at 455–59.
28. *See id.* at 449–50.

harm that the State has a compelling interest in preventing."[29] While Ohralik conceded that the state had a strong interest in regulating the solicitation of employment by an attorney in order to prevent actual evils, he argued that the First Amendment prevented the state from punishing solicitation per se.[30]

The Supreme Court repudiated the claim,[31] and in so doing made a number of observations that, in my view, have emboldened bar authorities for decades. The Court held that in-person solicitation provides "no opportunity for intervention or counter-education by agencies of the bar, supervisory authorities, or persons close to the solicited individual."[32] The Court explained that the protection of the public from overreaching and the exertion of undue influence on lay persons, the protection of one's privacy, and the avoidance of situations where an attorney's judgment may be clouded by self-interest were legitimate and important state concerns.[33] The Court further explained that rules prohibiting solicitation were prophylactic in nature and imposed sanctions upon a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in adverse consequences of the sort Ohio sought to avert.[34] Noting that in-person solicitation is not generally open to public scrutiny, the Court stated that requiring the state to prove actual harm as a result of such solicitation would largely undermine the efficacy of the rule, and ought not be countenanced in light of the state's strong interest in averting the harm that in-person solicitation is likely to cause.[35]

The decision in *Ohralik* was somewhat counter-balanced by *In re Primus*,[36] in which a member of the South Carolina Bar was disciplined for writing to an indigent woman, informing her that free legal service was available from the American Civil Liberties Union ("ACLU") should she wish to bring suit for the sterilization she had undergone as a condition of receiving public medical assistance.[37] The Supreme Court distinguished *Primus* from

29. *Id.* at 455.
30. *See id.* at 462–63.
31. *See id.* at 456–57.
32. *Id.* at 457.
33. *Id.* at 461–62.
34. *Id.* at 464.
35. *Id.* at 466.
36. 436 U.S. 412 (1978).
37. *Id.* at 414–16.

Ohralik by pointing out that the imposition of disciplinary measures in *Ohralik* resulted after the attorney had made an in-person solicitation of a purely commercial nature.[38] Primus had instead sent written information about the free legal assistance provided by ACLU lawyers, an action taken not in anticipation of a personal pecuniary gain, but rather in an effort to express personal political beliefs and to advance the civil-liberties objectives of the ACLU.[39]

Despite the decision in *Ohralik*, the broad trend by the Supreme Court has been to favor freeing the speech of lawyers. Thus, in *Peel v. Attorney Registration & Disciplinary Commission*,[40] the Supreme Court held that an attorney has a First Amendment right to state on his letterhead that he is certified as a trial specialist by the National Board of Trial Advocacy.[41] Similarly, in *Ibanez v. Florida Department of Business & Professional Regulation*,[42] the Court held that a lawyer who was also a certified public accountant and a certified financial planner could not be reprimanded by Florida's Board of Accountancy merely for listing the designations "CPA" and "CFP" next to her name in her yellow pages listing, business cards, and law office stationary.[43] The Court held that given the "'complete absence of any evidence of deception'" regarding the attorney's truthful representations that she held these credentials, the Florida Board of Accountancy's "'concern about the possibility of deception in hypothetical

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38. *Id.* at 422.

39. *Id.* Citing *NAACP v. Button*, 371 U.S. 415 (1963), the Court observed that the First Amendment protects the right of collective organizations to solicit potential litigants "for the purpose of furthering the civil-rights objectives of the organization." *Primus*, 436 U.S. at 423–24.

40. 496 U.S. 91 (1990) (plurality opinion).

41. The plurality opinion of Justice Stevens found that while the public may not understand exactly what National Board of Trial Advocacy certification entails and how it relates to licensure and admission to a state bar, the public was not so gullible or naive as to be misled by the letterhead. *See id.* at 103–06. The plurality opinion did not grant carte blanche to lawyers to engage in unrestricted advertising of certification by national organizations. *See id.* at 100 (citing *In re* R.M.J., 455 U.S. 191, 203 (1982)). The First Amendment would not protect the lawyer if the organization was "bogus" or the certification process a "sham." *Id.* at 109. In a key passage in their opinion, the plurality held that states could require a demonstration "that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law." *Id.*

42. 512 U.S. 136 (1994).

43. *Id.* at 138–39.

cases [was] not sufficient to rebut the constitutional presumption favoring disclosure over concealment.'"[44]

The pendulum swung back slightly toward bar authorities with *Florida Bar v. Went For It, Inc.*,[45] in which the Court sustained certain Florida bar rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster.[46] In a 5-4 decision, the Court held that Florida's thirty-day ban on targeted direct-mail solicitation satisfied the intermediate level of scrutiny mandated by *Central Hudson Gas & Electric Corp. v. Public Service Commission*[47] and its progeny, reasoning that the state had substantial interests both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers "and in preventing the erosion of confidence in the profession that such repeated invasions have engendered."[48] The Court found persuasive the documentation of the harms targeted by the ban.[49] The documentation was based on a Florida State Bar study that contained extensive statistical and anecdotal data suggesting that "the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession."[50] Finally, the Court found that the ban's scope was reasonably well-tailored to effectuate its stated objectives: its duration was limited to a brief thirty-day period, and there were "many other ways for injured Floridians to learn about the availability of legal representation during that time."[51] While *Florida Bar* might be seen as a victory for bar authorities, it was a limited victory at best—one that emphasized both the narrow tailoring of the rule and the fact that the bar had supported its regulation with empirical data.[52]

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44. *Id.* at 145 (quoting *Peel*, 496 U.S. at 111).
45. 515 U.S. 618 (1995).
46. *Id.* at 635.
47. 447 U.S. 557 (1980). For a more detailed discussion regarding the *Central Hudson* test, see *infra* notes 54–55 and accompanying text.
48. *Florida Bar*, 515 U.S. at 635.
49. *See id.* at 626.
50. *Id.*
51. *See id.* at 634–35.
52. *Id.*

In sum, while the Supreme Court has not found every restriction on lawyer advertising or marketing that has come before it unconstitutional, it certainly has created substantial momentum for the proposition that the commercial speech of lawyers deserves a healthy level of protection—as broad a level as that granted to other commercial advertisers. Thus, the decisions in lawyer advertising cases ought to be considered one piece of a larger movement in commercial speech jurisprudence—a movement that has expanded First Amendment protection for commercial speech. Particularly in the last decade, the Supreme Court has been increasingly antagonistic toward restrictions on commercial speech, especially restrictions that single out commercial speech for uniquely disfavorable treatment or that are grounded largely in paternalistic concerns for consumer protection.[53]

Commercial speech cases continue to be governed by the four-part test articulated by the Court in *Central Hudson*. The Court explained the value of having commercial information disseminated to the public through advertising, reasoning that in cases where this information is not shown to be misleading, a state's content-based regulation of such speech must be circumspect.[54] The Court then announced the four-prong standard:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[55]

Seasoned commercial speech litigators will tell you that the battles in contemporary commercial speech litigation tend to be over whether the speech is or is not "misleading," and whether,

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53. *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (striking down limitations on broadcasting of casino advertising); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down limitations on price information in liquor advertising); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down limits on advertising alcohol content in beer); Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (striking down restrictions on vending kiosks on city sidewalks for exclusively commercial publications when the city permitted similar kiosks for newspapers).

54. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

55. *Id.* at 566.

assuming it is not misleading, the regulation "directly" advances the governmental interest and is "not more extensive than necessary" to serve the interest.[56] This is often encapsulated in contemporary cases by the Supreme Court's emphasis on the requirement that the government regulation directly *and materially* advance the government interest.[57] The Supreme Court now repeatedly emphasizes that the government must have *real evidence* that the regulation it is defending is effective, refusing to accept mere "common sense" or legislative speculation as a sufficient basis for advertising restrictions.[58] As the Supreme Court explained in *Greater New Orleans Broadcasting Ass'n v. United States*:[59]

> The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." We have observed that "this requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'"[60]

The Supreme Court's most recent application of these principles came in *Lorillard Tobacco Co. v. Reilly*,[61] in which the Court used the *Central Hudson* test to strike down regulations imposed

56. *Id.*

57. *44 Liquormart*, 517 U.S. at 505 ("For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993))).

58. *See, e.g., id.* at 503 ("Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."); Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 147 (1994) (striking down a disclaimer requirement because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform"); *Edenfield*, 507 U.S. at 770–71 (rejecting the state's asserted harm because the state had presented neither studies nor anecdotal evidence to support its position); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990) (rejecting a claim that certain speech was potentially misleading for lack of empirical evidence); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985) (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions").

59. 527 U.S. 173 (1999).

60. *Id.* at 188 (citations omitted).

61. 121 S. Ct. 2404 (2001).

by the state of Massachusetts against certain smokeless tobacco and cigar advertising. One provision of the law banned such tobacco advertising within 1,000 feet of a school or playground.[62] Another provision—a "five-foot rule"—required that tobacco advertising at the point of sale (such as in a convenience store) within 1,000 feet of a school or playground be at least five feet above the ground.[63] A third set of regulations prevented the products from being displayed in open areas where they could be accessed without the help of a salesperson (thus effectively requiring that they be placed behind counters or in locked enclosures in stores).[64] The Court accepted the government's argument that there was a major problem with underage use of smokeless tobacco and cigars, and it rejected the tobacco company's claim that there was no evidence that preventing targeted advertising campaigns and limiting youth exposure to advertising would decrease underage use of those products. At least for the purposes of defeating the company's motion for summary judgment, it could not be concluded that the decision to regulate smokeless tobacco and cigar advertising in an effort to combat the use of tobacco products by minors was based on mere speculation and conjecture.[65] Nevertheless, the Court struck down the 1,000-foot regulation, because, the Court held, it failed prong four of the *Central Hudson* test. Troubled by the very broad sweep of the ban, the Court held that the government had failed to meet its burden of proving that the regulations were no broader than necessary to accomplish its objectives.[66] Specifically, the Court emphasized that the impact of the 1,000-foot rule was to prevent advertising of the products in a substantial portion of Massachusetts's major metropolitan areas. In some cities, the regulations amounted to

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62. *Id.* at 2411.

63. *Id.*

64. *Id.*

65. *Id.* at 2425.

> Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture."

Id. (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1933)).

66. *Lorillard*, 121 S. Ct. at 2426.

nearly complete bans.[67] Moreover, the regulations restricted advertisements of any size, including oral statements. Accordingly, the Court concluded that the uniformly broad sweep of the geographical limitation and the range of communications restricted demonstrated a lack of tailoring.[68] Although the governmental interest in preventing underage tobacco use is substantial, and even compelling, the Court observed, it was also true that the sale and use of tobacco products by *adults* is a legal activity.[69] A speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about lawful products. The Court, therefore, concluded that the state had failed to show that the regulations at issue were not more extensive than necessary.[70] Among other infirmities, the Court noted that a retailer in Massachusetts would have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an immediate and spontaneous commercial transaction in the way that on-site advertising does.[71]

Similarly, the Court applied the *Central Hudson* test to strike down the five-foot rule. Not all children are less than five feet tall, the Court reasoned, and those who are can look up and take in their surroundings.[72] The Court did uphold, however, the regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

> The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."

Id. (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997)) (citations omitted); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."); Butler v. Michigan, 352 U.S. 380, 383 (1957) ("The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children.").

71. *Lorillard*, 121 S. Ct. at 2427.

72. *Id.* at 2428.

before they are able to handle the products.[73] Because "unattended displays of [such products] present an opportunity for access without the proper age verification required by law," the State prohibition on self-service and other displays that would allow an individual to obtain tobacco without direct contact with a salesperson were constitutional.[74] The Court held that these "regulations [left] open ample channels of communication" and "[did] not significantly impede adult access to tobacco products," noting that vendors could still "place empty tobacco packaging on open display, and display actual tobacco products so long as that display [was] only accessible to sales personnel."[75]

Lorillard is not a lawyer advertising case, of course, but a tobacco advertising case. Yet it is difficult to believe that the Constitution regards attorneys as more toxic than cigarettes. What *Lorrilard* demonstrates is the Supreme Court's gathering antipathy toward overly broad advertising regulations which are not backed by plausible evidence to support them.

Most bar regulators have not internalized the spirit of these judicial pronouncements. Instead, they appear to approach the notion that the First Amendment presumptively protects commercial speech, and that it demands of the government sound empirical proof before the government may restrict commercial advertising.[76] When applying such rules to lawyers, the same

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73. *Id.* at 2429.

74. *Id.*

75. *Id.*

76. *See, e.g.,* Jeffrey Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60 (1977) (arguing in favor of treating all speech as protected under rigorous heightened review standards, without regard to categories such as "commercial speech" or "libel"). It may thus be asserted that commercial speech, *as speech*, should presumptively enter the debate with full First Amendment protection. *See* Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 448–53 (1980) (arguing that commercial speech deserves greater protection than it currently receives to ensure that data necessary for economic and political decisionmaking is available); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971) (arguing that certain commercial speech, such as informational and artistic advertising, should receive protection); Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553 (1997); Martin H. Redish, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080 (agreeing with the result of a recent Supreme Court case that seemed to reject a notion of affording a different protection for commercial speech and arguing that the distinction between commercial and noncommercial speech is untenable

principles seem to apply with diminished force, if they apply at all. Bar regulators seem largely unwilling to get with the free speech program. Ignoring the broad movement and driving philosophy behind modern commercial speech jurisprudence, they look instead for loopholes.[77]

The loophole most commonly invoked is that lawyers who huff and puff about their superior aggressiveness and tenacity are engaged in advertising that is inherently misleading.[78] This conclusion, the bar regulators claim, need not be buttressed with any empirical evidence, for it is a judgment that falls within the well-honed expertise and wisdom of the bar regulators. For example, one federal district court, relying on a somewhat casual statement by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel*,[79] was recently willing to find an advertisement inherently misleading. The ad featured a relatively comic and innocuous fictional vignette in which an insurance company is depicted as caving into a settlement upon learning the identify of the plaintiff's personal injury firm. The court made this ruling despite an utter lack of any empirical data demonstrating that consumers were actually misled, or that any client of the firm was less than satisfied with the zeal or ethics of the attorneys who purchased the advertising.[80]

Fortunately, not all lower courts have been willing to so acquiesce. In *Mason v. Florida Bar*,[81] for example, the Eleventh Circuit Court of Appeals struck down a Florida prohibition on lawyer advertising containing "self-laudatory statements."[82] The Florida rule provided that: "'A lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communication . . . .'"[83] In *Mason*, the court struck down the ap-

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and unwise).

77. *See* Hornsby, *supra* note 11, at 64–69; Rotunda, *supra* note 76, at 1081.

78. *See* Hornsby, *supra* note 11, at 64–69; Rotunda, *supra* note 76, at 1081.

79. 471 U.S. 626 (1985). The statement indicated that a state need not conduct a survey of the public before it determines that an advertisement has a tendency to mislead when "the possibility of deception is as self-evident as it is in this case." *Id.* at 652.

80. Farrin v. Thigpen, 173 F. Supp. 2d 427 (M.D.N.C. 2001). (Author's disclosure: The author, Rod Smolla, briefly served as appellate counsel in this litigation on behalf of the lawyers and advertisers, prior to the appeal being withdrawn and dismissed.)

81. 208 F.3d 952 (11th Cir. 2000).

82. *Id.* at 954.

83. *Id.* (quoting Rules Regulating the Florida Bar, Rule 4-7.2(c)(10)(J), *available at*

plication of this standard to an advertisement in the Yellow Pages stating that a lawyer was "'AV' Rated, the highest rating in the Martindale-Hubbell National Law Directory."[84] The court held that this advertising could not be disciplined under the Florida standard on either the theory that it was misleading or potentially misleading because the state had failed to support its claims with any evidence other than the claim that it was "common sense" that such advertising could mislead an unsophisticated public.[85] In a critical passage in *Mason*, the court stated:

> Moreover, the Bar presented no studies, nor empirical evidence of any sort to suggest that Mason's statement would mislead the unsophisticated public. While empirical data supporting the existence of an identifiable harm is not a sine qua non for a finding of constitutionality, the Supreme Court has not accepted "common sense" alone to prove the existence of a concrete, non-speculative harm. To the contrary, the law in this field has emphatically dictated that "rote invocation of the words 'potentially misleading,'" does not relieve the state's burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[86]

There are many cogent reasons why the analysis in *Mason* ought to be respected by bar regulators around the nation, who should cease and desist restricting lawyer puffing in the absence of convincing empirical data that such practices in fact confuse or harm consumers of legal services.

First, general commercial speech principles dictate that the government bears the burden of proof in justifying commercial speech regulation.[87] If bar regulators are permitted to rely on "common sense" and their "accumulated expertise" in declaring by mere fiat that self-promoting messages are inherently misleading, this burden is effectively reversed.

Second, the requirement of actual evidence that a regulation is misleading serves the core First Amendment value of ensuring that the regulation is justified by the necessity of alleviating some

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http://www.flabar.org/newflabar/lawpractice) (last visited Feb. 7, 2002).

84. *Id.*

85. *Id.*

86. *Id.* at 957–58 (citing Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146–47 (1994); Edenfeld v. Fane, 507 U.S. 761, 770–71 (1993); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648–49 (1985)) (internal citations omitted).

87. *See, e.g.*, Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71, n.20 (1983).

palpable social harm, and not by the perceived offensiveness of the message.[88] In the context of lawyer advertising, this is not a makeweight. To many segments of the bar, aggressive advertising is cheesy at best and downright undignified and unprofessional at worst. The cheese-puff television spots of some cheeky lawyers may not be tasteful to many or even most lawyers, but that does not render them socially harmful, nor their prohibition constitutional. Many consumers are in fact turned off by goofy or overly aggressive lawyer ads. So be it. Let the marketplace work itself pure.

Third, classic First Amendment theory posits that the best remedy for evil counsels are good ones.[89] If undignified advertising offends some in the bar, they can counter with dignified advertising. Insurance companies or insurance trade groups who do not cotton to claims that certain angry lawyers will make them cower with fear can take out advertising explaining their views of such claims.

Fourth, to prevent lawyers from engaging in low-grade puffery—self-touting that may partake of hyperbole or hubris but cannot conscientiously be labeled an outright "falsehood" in any hard sense—is to deny lawyers the right to engage in the entrepreneurial braggadocio that made this country great. At a time in American life in which a revival of entrepreneurial enterprise is a core national concern, the nation ought not treat advertising boldness as beneath the dignity of the First Amendment. Lawyer advertising, like advertising in general, should be protected by the First Amendment in a manner commensurate with its vital and valuable place in a robust entrepreneurial society.[90]

Fifth, the claim that consumers of legal services need special protection against lawyers who make self-promoting claims about their skills or their tenacity is a claim steeped in paternalism and in dire need of a reality check. Consumers are simply not that gullible. If they *are* that gullible, it is no great imposition on bar authorities to garner the empirical proof to demonstrate this fact. We are a nation of sellers and traders, a nation of advertisers,

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88. *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down hate speech conviction).

89. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

90. *See generally* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993).

and we hawk our wares and services with image, metaphor, hype, and humor. Anything to catch the consumer's eye and ear, sear a name or trademark in the consumer's memory. It is the American marketplace. Consumers know this, understand this, and they account and discount accordingly.[91] This is not a nation prone to thinking that lawyers never exaggerate to make a point.

Sixth, there is an inherent hypocrisy of sorts in denying lawyers the right to tout themselves. Bar regulators often seem hung up on the notion that legal disputes are supposed to be decided on their "merits," legal and factual, and thus balk at claims by lawyers that they, the *lawyers*, can make an outcome-dispositive difference. Now, it is one thing for a lawyer to advertise that she can make a difference because she has the connections to put in a fix with the judge. Bribery is illegal, and advertising one's bribing skills can be banned outright. But no lawyer is going to advertise bribery. What lawyers do advertise are claims to superior skill, superior smarts, superior experience, superior tenacity. Thus, the fascinating question is posed: what is wrong with that? What is wrong with advertising that takes the form of self-promotion about skill and experience and the projection of an image of toughness and fight?

We ought to approach these questions with a healthy injection of realism. Does the outcome of a legal dispute sometimes turn on the quality or reputation of a lawyer? If we admit that, in the real world, the quality of an attorney's representation, or even the attorney's reputation, may sometimes influence outcomes, turning a loser into a winner, or a non-lucrative case into a more lucrative case, does this mean that such cases have been decided other than "on their merits?" Or does it merely mean that in our adversarial system, assessing the "merits" of a case is something that is itself often contingent and filled with risk and uncertainty? Everyday, *informally*, consumers search for "a good lawyer," and members of the bar refer persons to "good lawyers." Realistically, in the everyday world this means a lawyer may be capable, either through skill or reputation, of increasing the odds of success for a client. The public generally knows this, and lawyers generally know this. For regulators to pretend otherwise is for regulators to regulate in denial.

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91. *See id.* at 797.

Finally, and perhaps most importantly, the requirement that regulations be supported by actual proof of harm, and proof that they will directly and materially alleviate that harm, serves the elemental First Amendment value of ferreting out speaker-based prejudice and viewpoint bias on the part of government regulators. The great bulk of lawyer puffery comes from one small segment of the legal profession—plaintiffs' personal injury lawyers. This is not to say that all plaintiffs' lawyers puff—many either do not advertise or advertise only in the most genteel tones. But it is to say that when self-promoting advertising offends the sensibilities of bar regulators, that advertising will often come from a particular strata of personal injury plaintiffs' lawyers. There is a danger here of professional class-bias, a danger that regulators will over-value the claims of segments of the profession deemed more elite and dignified and undervalue claims from segments of the profession deemed marginal. Again, I am not saying that bar regulators are prejudiced against swashbuckling personal injury lawyers and biased in favor of blue-blood corporate firms. My claim is more circumspect: I note merely that, historically, one of the purposes of the First Amendment is to guard against the *possibility* that such biases will work their way into law, consciously or unconsciously, in the form of viewpoint-based or speaker-based discrimination. And one of the great bulwarks against such biases creeping into the system is the requirement that regulation of speech be justified by real objective proof, and not by the mere invocation of such self-serving and easy justifications as "common sense" or "agency expertise."

I don't have all the answers here, or even all the questions. I do have, however, the proud knowledge that the *University of Richmond Law Review* has served the profession well in bringing to the marketplace of ideas the fine contributions of my colleagues Louise Hill, William Hornsby, and Ronald Rotunda to these debates. I wish to thank them for their articles, and thank again the Allen family for its generosity, and the many students, faculty members, and administrators at the law school who worked to make the symposium, and this symposium issue of the *Law Review*, such a success.