

Against Freedom of Commercial Expression: Some Reflections on Existing and Potential Costs

© 2005 Tamara R. Piety*

“A government should not be called upon to defend its regulation of advertising in a court of human rights...”¹

“At bottom, the Enron and WorldCom cases are about false advertising.”²

“[T]here is no use trying to find villains, because the problem is in the structure of the situation.”³

If you open a newspaper in the United States these days it is difficult to escape the fallout from the last decade of corporate excesses. WorldCom. Enron. Arthur Andersen. Tyco. American International Group.⁴ Citibank agreed to pay a \$2 billion dollar settlement in relation to its role in the Enron fiasco.⁵ As large as that amount seems, it may have gotten away with a bargain since, according to some observers, Citibank’s exposure could have been even greater than \$2 billion.⁶ Other firms, Chase, Merrill

* Associate Professor, University of Tulsa College of Law. This Essay was first presented at the Annual Conference for the Association for Legal and Social Philosophy in the U.K. in 2005 at the University of Strathclyde in Scotland. Thanks to all of the participants for their comments. Thanks also to Keith Aoki, Ed Baker, Daniel Greenwood, Russell Christopher, Kathryn Christopher, Brian Foley, Jon Hansen, Paddy Ireland, Valerie Phillips, Jamin Raskin and Gerald Torres for helpful suggestions and support for this project and to my research assistants, Kelly O’Neill, Jason Seay and Wendy Higgins. I am particularly thankful to David Vladeck, Ronald Collins and Robert Chapman who raised good critical questions which improved the end result.

¹ **ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION** (Oxford University Press, Oxford, U.K., 2003) at 3 (emphasis in original).

² Edward J. Janger, *Brandeis, Business Ethics, and Enron* at 69 in **NANCY B. RAPOPORT AND BALA G. DHARAN, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS** (Foundation Press, New York, N.Y., 2004).

³ **THOM HARTMANN, UNEQUAL PROTECTION; THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS** at 22 (Rodale, 2002).

⁴ The Saturday, June 4, 2005 issue of *The New York Times* carried at least 5 stories related to corporate misfeasance. Julie Creswell, *Citigroup Agrees to Pay 2 \$ Billion in Enron Scandal*, page 1, B13, *Jurors in Trial of Two Tyco Executives End the Week Without Completing a Verdict*, Business Briefs, B2; *A Second Guilty Plea in A.I.G.-Related Case*, B13; Eric Dash, *Former Wal-Mart Executive Stripped of Benefits*, B13; Ken Belson, *Ebbers Pleads for Leniency in Sentencing*, B13.

⁵ *Id.*

⁶ *Id.* “The potential exposure to the banks in this case could have been really large,” said Joseph A. Grundfest, a law professor at Stanford University and a former commissioner at the Securities and Exchange Commission. “It was not in the best interest of Citigroup to push the issue through to a jury verdict.” *Id.*

Lynch have yet to settle (or will probably have settled by the time this goes to press).⁷ Ebbers, Kozlowski, Rigas and Quattrone have been convicted, and the trials of top Enron executives, Ken Lay, Jeffrey Skilling and Richard Causey are still ahead.⁸ Furthermore, largely in response to spectacular failures like Enron, the Sarbanes-Oxley (SOX) law was passed in 2002⁹ as an attempt to tighten up corporate responsibility and accountability.

Yet, for many reasons, real accountability has been elusive. First, the legal structure of a corporation most often shields the flesh and blood actors in the corporation – shareholders, officers and directors, executives – from personal liability.¹⁰ And, in those circumstances where an exception would apply and liability could theoretically attach, corporate officers, directors and managers act within a collectivity¹¹ that diffuses both knowledge and responsibility such that no one person may really possess the sort of guilty knowledge that serves in many minds as a prerequisite for liability.¹² Undoubtedly many of those few who did find themselves convicted could say, along with former WorldCom, Inc accountant, Betty Vinson, “I never expected to be here.”¹³ Thus, ultimately, it has been difficult to satisfactorily hold *anyone* to account in way that offers any comfort that the future will be fundamentally different from the past.¹⁴ Citibank’s \$2

⁷ On June 15, 2005 J.P. Morgan announced its agreement to settle and pay investors \$2.2 billion for damages arising out of the Enron failure.

⁸ *Id.* at B13.

⁹ SOX, Pub. L. No. 107-204, 2002 U.S.C.C.A.N. (116 Stat.) 745 (to be codified in scattered sections of 15 and 18 U.S.C.).

¹⁰ See **BAUMAN, WEISS & PALMITER, CORPORATIONS LAW & POLICY**, 5th ed. West Publishing 2003 at 1 describing limited liability as one of the distinctive features of the corporate form. Of course under exceptional circumstances officers, directors and/or shareholders can be held liable for the debts or obligations of the firm where there are grounds for piercing the corporate veil. It is also difficult to hold a firm liable for anything where intent or state of mind is relevant. See, e.g., Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 **COL. L. REV.** 459 (2004) (describing difficulties assigning mens rea where responsibility is diffused).

¹¹ For a description of the collective nature of the firm see Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 **IOWA L. REV.** 995, 1021-34.

¹² See *Arthur Andersen v. United States*, 125 S.Ct. 2129 (2005) (conviction overturned because jury instruction failed to adequately convey to jury the requirement of intent).

¹³ Erin McClam (Associated Press), *WorldCom figures sentenced*, **TULSA WORLD**, Saturday, Aug. 6, 2005, E6 (quoting Betty Vinson at her sentencing). While it may be unclear on its face whether she meant she was sorry and surprised because she hadn’t started out to do wrong, or she just meant that she hadn’t expect to get caught, her subsequent comment that she would never “do anything like this again” seems to put the slant in the direction of the first interpretation. But even if she just didn’t expect to get caught, it may be fair to say that most corporate crimes have an even better chance of succeeding and leading to no penalties than for their perpetrators than crime in general.

¹⁴ For example the Supreme Court of the United States just reversed the criminal conviction of the Arthur Andersen accounting firm on the grounds that “the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.” *Arthur Andersen, LLP v. United States*, 125 S.Ct. 2129, 2136 (2005). The metaphysics of locating a corporation’s consciousness is not too far removed from that of asking where it is located. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 **COLUM. L. REV.** 809 (1935). Nevertheless, even if we take a functional approach and say that the individual employees stand in for the corporation, the disaggregation of tasks into many smaller bits, the dispersal of authority for discrete tasks among many actors, the credo of profit maximization for shareholders – these facts and perhaps others seemingly make it more difficult to locate the requisite state of mind in any one employee and hence to attribute the same to the corporation. See also, **WILLIAM A.**

billion dollar settlement isn't nothing, but it isn't certain just how large the settlement would have to be to discourage future officers and directors from ever engaging in similar conduct.¹⁵ Put another way, it isn't possible to know whether Citigroup has been "punished" without knowing how much money it made on these transactions with Enron. If it made a \$20 billion profit for example, a \$2 billion reduction in that profit still leaves a healthy \$18 billion profit. That number, and the question of whether any profit at all is left after all the associated costs of the Enron collapse are factored in, is pure speculation. And while we cannot assume that the specter of criminal sanctions or public relations scandals have no effect on deterring undesirable, it still seems that the primary motivating factor in decision-making is whether the action will be profitable.

Nevertheless, the question illustrates one of the principal difficulties with regulating corporate conduct – including speech: "For a corporation, compliance with law, like everything else, is a matter of costs and benefits."¹⁶ If the benefits outweigh the costs Citigroup presumably will do again what it did with Enron. In fact, according to some, it may have a duty to shareholders to do so.¹⁷ And the evidence suggests that while the past 10 years have included more spectacular corporate misconduct, the existence of corporate law breaking in pursuit of profit is not only *not* anomalous, it is endemic.¹⁸ The catalog of ways in which corporate misconduct has contributed to social ills, such as environmental pollution, harmful products, lost pensions, and so forth, seems sufficiently manifest as to cut off the question of whether there is a problem. The question rather is what to do about it.

KLEIN AND JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE, (9th ed. 2002) (Foundation Press) at 117-122 (critiquing the reification illusion).

¹⁵ See **JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER** (Penguin Canada, Ontario Canada, 2004) (describing the profit motive as the single unifying aim of corporate behavior).

¹⁶ *Id.* at 79.

¹⁷ In a contractarian view of the theory of corporations, firms are run for the benefit of shareholders. See, e.g., **BAUMAN, WEISS & PALMITER**, *supra* note 10 at 465. That theory could (but does not) require officers and directors to do everything possible to maximize the value of those stockholders' shares. However, the business judgment rule acts as a check on judicial imposition of a strict sort of profit only interpretation of management's duties. And judicial interpretation of the business judgment rule had been fairly deferential to management decision-making. For a lengthy discussion of why corporate law does not, in fact, and ought not create a duty to maximize shareholder value to the exclusion of some, limited profit sacrificing behavior see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 **N.Y. U. L. REV.** 733 (2005). For discussions of the shareholder primacy theory that equate it with a duty to profit maximize as well as the argument that this position accords with the best social outcomes see Henry Hansmann & Reinier Kraakman, *The End of Corporate History for Corporate Law*, 89 **GEO. L.J.** 439, 441 (2001). For a discussion comparing the development of differing norms as between U.S. and Europe with respect to this issue see Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 **U. PA. L. REV.** 2063 (2001). Of course one could say that there is never a fiduciary duty to break the law. But the problem with this statement is that it is often unclear that the law has been broken until after the fact.

¹⁸ For example see the four-page list of violations committed by General Electric between 1990 and 2001. in Professor Bakan's study of the corporation. *Id.* at 75-78. Most of the listed instances involve civil not criminal allegations. Nevertheless, they all appear to involve issues that are regulated by the government and suggest disregard for that regulation.

While many observers focus on ethical issues, recalibrating executive compensation, or the possibility of changes to corporate structure and to accounting rules for the prevention of future “Enrons,”¹⁹ far too little attention has been paid to a key factor making Enron possible – the nature of corporate communication. Enron’s management systematically *failed* to communicate important facts that investors, employees and the public might want to know, while simultaneously flooding the market with ersatz “information” designed to package, promote and “sell” the public on its own version of the corporation’s worth.²⁰ It could do this because of a legal environment in which duties to disclose are sometimes ambiguous and may be laxly enforced (even in the absence of an intent to deceive), while there is a virtually unbridled freedom for corporate speech that takes the form of marketing and public relations.

In other words communication, or the lack thereof, is a key factor in both the development of Enron-like disasters and in their prevention. *New York Times* media columnist Frank Rich claims that it was public relations propaganda that propped up Enron’s “house of cards.”²¹ It is difficult to understand how else to explain how the company managed to succeed in selling itself to investors, the financial media and the public at large when there was so little in the way of hard factual support for its claims of profits.²² But it seems that facts and empirical support were not very significant to investors or the media. And there is little evidence of a change in the media climate. Instead, “spin,” how it plays, the spectacle,²³ is all-important in influencing behavior of

¹⁹ **RAPOPORT & DHARAN, ENRON: CORPORATE FIASCOS**, *supra* note 2 (collected essays dissecting what happened and some proposed remedies).

²⁰ *Id.* Jeffrey D. Van Niel & Nancy B. Rapoport, *Dr. Jekyll & Mr. Skilling: How Enron’s Public Image Morphed from the Most Innovative Company in the Fortune 500 to the Most Notorious Company Ever*, in **RAPOPORT & DHARAN, ENRON: CORPORATE FIASCOS** (describing public relations success) and Frank Rich, *Enron: Patron Saint of Bush’s Fake News*, **THE NEW YORK TIMES**, March 20, 2005. (detailing some of the P.R. exercises that created the image that Rapoport and Van Niel describe).

²¹ *Id.* One example of such P.R. efforts was a tour Enron executives gave financial analysts of Enron’s newly launched EES division in 1998. The analysts were taken to the 6th floor in Enron’s headquarters.

There, they beheld the very picture of a sophisticated, booming business: a big open room, bustling with people, all busily working the telephones and hunched over computer terminals, seemingly cutting deals and trading energy. Giant plasma screens displayed electronic maps, which could show the sites of EES’s many contracts and prospects. Commodity priced danced across an electronic ticker. “IT was very impressive,” recalls analyst John Olson, who at the time, covered the company for Merrill Lynch. “It was a veritable beehive of activity.”

It was also a veritable sham. The war room had been rapidly fitted out explicitly to impress the analysts.

BETHANY MCLEAN AND PETER ELKIND, THE SMARTEST GUYS IN THE ROOM, (Portfolio, Penguin Group, 2003) at 179-80.

²² Enron’s continuing to post profits despite being unable to show how it generated them, and in spite of a refusal to offer balance sheets and cash flow statements led some observers to refer to it as a “black box.” **MCLEAN AND ELKIND, supra** note 21 at 320-321.

²³ How else to explain the apparent widespread apathy or collective shrug of the shoulders at the gradual revelation that Iraq apparently had no weapons of mass destruction?

all kinds – consumer, political,²⁴ personal – and all of these behaviors are heavily influenced by massive “speech” efforts on the part of corporate speakers.²⁵

According to Judge Richard Posner, news itself is a commodity like everything else. “Being profit-driven, the media respond to actual demands of their audience rather than to the idealized ‘thirst’ for knowledge’ demand posited by public intellectuals and deans of journalism schools.”²⁶ However, he theorizes that fortunately for those who *are* interested in the truth there is nevertheless, “a market demand for correcting the errors and ferreting out the misdeeds of one’s enemies...”²⁷ Alas, for Enron’s stockholders, creditors and other investors, these motives apparently didn’t arise soon enough.²⁸ Nor are they likely to in the future with respect to any future “Enrons.” This is because very often there is no “enemy” for a company in which everything seems to be going well, at least judging by stock prices.²⁹ In addition, the news media have become so dependent upon the corporations themselves for the information about companies that too often their reporters rely exclusively on information from the companies themselves, rather than on independent newsgathering. Such information is supplied largely in the form of press releases, web postings, press conferences, and other public relations tools. And most of the content of that is unregulated.

Since the 1970s governmental regulation of advertising in the United States has come under increasing scrutiny as a burden on “speech” or freedom of expression.³⁰ While it is difficult to identify the cause, during that same period corporations have pressed for and increasingly obtained, greater roles in politics in the form of contribution to candidates or causes,³¹ the formation of political action committees or other groups to

²⁴ One of the most offensive examples of this is President Bush’s Chief of Staff Andrew Card explaining the timing of the Iraq war invasion with, “You don’t introduce new products in August.” George Packer, *Comment: Name Calling*, in *Talk of the Town*, **THE NEW YORKER**, August 8 & 15, 2005 at 33.

²⁵ By “corporations” I mean principally large, publicly traded corporations. If of sufficient size, even the close corporation could have widespread impact on the tenor and type of speech in the market. The key components of the problem I deal with here are the aggregations of large amounts of capital combined with a commercial purpose.

²⁶ Richard A. Posner, *Bad News*, **THE NEW YORK TIMES BOOK REVIEW**, July 31, 2005 at 9.

²⁷ *Id.* at 9-10.

²⁸ They did arise eventually. The Enron story apparently was broken by an inquisitive *Fortune* reporter, Bethany McLean. See **MCLEAN AND ELKIN**, **THE SMARTEST GUYS IN THE ROOM**, *supra*, note 21.

²⁹ Many investors and analysts were unwilling to talk to McLean on the record. See **MCLEAN AND ELKIN**, *supra* note 21 at 321.

³⁰ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-60 (1976) (discussing the historical movement of the Court’s decisions to greater protection for commercial speech). See also **SHINER**, *supra* note 1 at 25-69 (discussing history of freedom for commercial expression in the United States); Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist’s Recollections*, 54 **CASE WESTERN RES. L. REV.** 1189 (2004) (discussing doctrinal setting in which Virginia Pharmacy case took place and strategic considerations from one of the lawyers for one of the plaintiffs in the case).

³¹ *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978)(extending First Amendment rights to corporations’ expenditures for advertising that related to political lobbying). *But see* *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (retreating from *Bellotti* to the extent that *Bellotti* suggested no distinction between human and corporate speakers; maintaining that corporations were creatures of the state and enjoyed certain advantages pursuant to law that human beings did not, advantages that may at times justify corresponding restrictions not applicable to people).

lobby on their behalf,³² and proposing legislation designed to address their interests.³³ A key component on which this trend has been built is the identification of the corporation as a “person”³⁴ – a person with rights to freedom of expression.³⁵

This trend, to push for corporate rights paralleling those of human beings, is not one limited to the United States. The same trend can be observed in Canada and Europe.³⁶ Thus, corporations have, among other tactics, claimed that some restrictions on advertising are violations of the right of freedom of expression set forth in Article 10 of

³² See, e.g., JOHN C. STAUBER AND SHELDON RAMPTON, **TOXIC SLUDGE IS GOOD FOR YOU!**, (Common Courage Press, Monroe, MA, U.S.A., 1995) (describing influence of public relations lobbying, primarily, but not exclusively, on behalf of business interests). For a similar thesis which has a Canadian focus and which was conducted almost a decade earlier see JOYCE NELSON, **SULTANS OF SLEAZE: PUBLIC RELATIONS AND MEDIA**, (Between the Lines, Toronto, Canada 1989).

³³ For example the recent bankruptcy reforms in the United States making it more difficult for individuals to declare bankruptcy was largely drawn up and promoted by the credit card industry to make it more difficult to discharge credit card debt. See, e.g., Michael Schroeder & Suein Hwang, *Revised Chapters: Sweeping New Bankruptcy Law to Make Life Harder for Debtors; After 8 Years, Legislation Finally Nears Passage; No Limits on Card Giants; A Day Trader's Bills Come Due*, **WALL ST. J.**, Apr. 6, 2005, at A1. “On April 20, President Bush signed what has been termed the biggest rewrite of U.S. bankruptcy law in a quarter century. The bill, titled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Bill”), takes direct aim at the ability of consumers to discharge their debts through Chapter 7 Liquidation and Chapter 13 Reorganization by making the process more difficult and more expensive for consumers.” Michael J. Davis, *The New Bankruptcy Code: Goodbye Consumer Chapter 7 Cases*, 17 **DCBA BRIEF** 16 (June 2005).

³⁴ Initially corporations were thought to have only those rights that were explicitly granted to them. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629, 636-37 (1819). However, in the late nineteenth century the Court began shifting to the view that corporations were “persons” for purposes of the analysis of some rights. This shift is commonly attributed to the Court’s decision in *Santa Clara Co. v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886). “Thus, the Court converted an amendment primarily designed to protect the rights of blacks into an amendment whose major effect, for the next seventy years, was to protect the rights of corporations.” Mark Tushnet, *Corporations and Free Speech*, in **THE POLITICS OF LAW**, DAVID KAIRYS, Ed., (Pantheon, New York 1982) at 256. For an excellent discussion of the history of the development of corporate theory as well as an argument that what Justice Field meant by corporate personhood in 1886 is significantly different from the natural entity theory that later developed see MORTON J. HORWITZ, **THE TRANSFORMATION OF AMERICAN LAW: 1870-1960** at 65-107 (Chapt. 3, *Santa Clara Revisited: The Development of Corporate Theory*). See also KLEIN AND COFFEE, JR., **BUSINESS ORGANIZATION AND FINANCE**, *supra* note 14 at 112-117 (discussing development of current doctrine); TED NACE, **GANGS OF AMERICA**, (Berrett-Koehler Publishers, San Francisco, CA, 2003) (describing rise of corporate power).

³⁵ See, e.g., Brief for the Petitioners, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (Nike arguing that a lawsuit by a California activist charging that Nike had issued false statements in its press releases infringed on its first amendment rights); Brief of Exxonmobil, Microsoft, Morgan Stanley and Glaxosmithkline as Amici Curiae in Support of Petitioners, *Nike, Inc. v. Kasky*, 2003 WL 835523 at *2 (“Nike’s speech and speech by corporations on other matter of public concern merit the highest level of First Amendment protection.”). One might expect such positions from commercial entities. More surprising were the statements of support from organizations like the ACLU and the Thomas Jefferson Center for the Protection of Freedom of Expression. Both entities filed briefs in support of the notion that freedom for corporate speech was an essential component of freedom of speech for all. See 2003 WL 1192678, Amici Curiae Brief of the Thomas Jefferson Center for the protection of Free Expression and the Media Institute (Feb. 28, 2005) and 2003 WL 721563, Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner (Feb. 24, 2003).

³⁶ See SHINER, *supra* note 1 at 70-93 & 94-110 (describing similar moves to greater protections for commercial expression in Canada and Europe respectively).

the Convention for the Protection of Human Rights and Fundamental Freedoms.³⁷ Given that some European countries have regulations which are significantly more restrictive of advertising than U.S. law,³⁸ it is clear that the adoption of a theory that corporations have speech rights completely analogous to those of persons will pose a threat to the continued viability of those regulatory efforts, particularly as the notion that human rights require explicit and vigorous protection gains ground. But “human rights” may represent a Trojan horse through which corporations obtain a legal argument that acts as a shield against all manner of governmental regulation.

Less well examined (although not by any means unexamined)³⁹ is the question: Why *should* corporations have “human rights”? Arguably they should not. But once the corporation was identified as a person for some purposes, the parallels apparently became irresistible to some and the rational basis for distinguishing between natural and fictitious persons (it appears) harder to summon up. This trend is one with enormous rhetorical power. By claiming expressive rights, corporations tap into cherished notions of autonomy, freedom and fairness.⁴⁰ And it is a fraud. As Professor Shiner of the University of Alberta puts it:

³⁷ See, e.g., Notice for the OJ 11, Sept. 2003 by Kreuzer Medien GmbH against the European Parliament and the Council for the European Union challenging the regulation of tobacco products as “infring[ing]” on “the freedom of expression safeguarded by Article 11 of the Charter of fundamental rights of the European Union and Article 1091) of the ECHR.” So far, to this author’s knowledge, such attempts to limit the regulation of products causing health risks have been rebuffed, see, e.g., Decision of the Court of Arbitration of Belgium, 102/99, 30 September 1999 (banning advertising for tobacco products not at variance with freedom of expression), Opinion of Advocate General Fennelly, 15 June 2000, Case C-376/98 Federal Republic of Germany v. European Parliament and Council of Europe and Case C-74/99 The Queen V. Secretary of State for Health and Other, *ex parte* Imperial Tobacco Ltd. and others, “I conclude, therefore, that the Advertising Directive does not constitute a disproportionate restriction of freedom of expression in so far as it imposes a comprehensive prohibition on the advertising of tobacco products.” ¶175. Although I recognize that the effect of these decisions and their applicability is ambiguous, see Benjamin Apt, *On the Right to Freedom of Expression in the European Union*, 4 COLUM. J. EUR. L. 69, 86-87 (1998) (“The legal status of the Convention in the EU has [] been perpetually ambiguous.”), such decisions are instructive because they shape perceptions.

³⁸ For example, Sweden prohibits ads targeting children under the age of 12. LORD CAMPBELL OF ALLOWAY, Q.C. & ZAHD YAQUB, *THE EUROPEAN HANDBOOK ON ADVERTISING LAW* (Cavendish Publishing, Ltd., London, U.K., 1999) at 789 (Ch. 6, s 1 of the Radio and Television Act, 1996)(*Radio-och TV-lagen* 1996:844)(“advertising must not be targeted at children below the age of 12...”). And British regulators recently “introduced new rules barring depictions of links between sex and drinking in alcohol advertisements.” Eric Pfanner, *No Hunks in the Alcohol Advertisements, Please, We’re British*, THE NEW YORK TIMES C4, (Aug. 1, 2005).

³⁹ Many of the arguments and objections I advance here, or some version thereof, have been forcefully set out by others, most notably by professors Daniel Greenwood, Roger Shiner, Joel Bakan, and C. Edwin Baker. See Greenwood, *Essential Speech*, *supra* note 11; SHINER, *FREEDOM OF COMMERCIAL EXPRESSION*, *supra* note 1; BAKAN, *THE CORPORATION*, *supra* note 15; C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: the Commercial Speech Quandary in Nike*, 54 CASE WES. RES. L. REV. 1161 (2204); C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS*, (Princeton University Press, Princeton, N.J. 1994).

⁴⁰ Although it is worthwhile to take extravagant statements about the deep commitment to freedom of speech with a grain of salt given that there is very little of such freedom in the workplace, that is, if one wants to keep his job. And work is where a number of citizens spend most of their waking hours. An analysis of the way in which employers are able to punish speech with which they disagree suggests that as a society, or at least in law, deference to property mostly trumps deference to freedom of speech. See, e.g.,

Behind the respect traditionally given in liberal democratic thought to freedom of expression as an ideal lies an attractive picture of human beings as autonomous choosers, and of human flourishing as relying on freely chosen sociality. The corporate domination of both the real market and the market-place of ideas defaces this attractive picture. The predatory attempt by corporations to appropriate the picture in order to justify constitutional protection for the contribution made by corporate expression to that domination needs to be exposed as the conceptual and normative fraud that it is.⁴¹

Alas, there are few signs that the trend to treat corporations as “persons” with expressive rights is slowing. If anything, it appears to have gained ground. In the U.S. the recent *Nike* case resulted in an opinion that, while not ruling in Nike’s favor because of jurisdictional issues, nevertheless suggested that a majority of the Supreme Court seemed to think that fairness and equal time for all viewpoints required that Nike’s “viewpoint” be given constitutional protection, lest its communication be unduly “chilled.”⁴² Completed elided by this argument is the fact that Nike’s views are largely organized around the corporate necessity of profit, a single-mindedness of purpose that

Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 **IND. L. J.** 101 (1995); Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 **CARDOZO L. REV.** 729 (1989). Moreover, there is some evidence that the whistleblower protection provisions of Sarbanes-Oxley have proven particularly effective.

Three years ago, the Sarbanes-Oxley Act was signed into law and hailed as a safety net for employees who stepped forward and revealed wrongdoing at their companies. But of the hundreds of people who lost jobs and filed complaints since the act was passed, only two are actually back at their jobs.

Jayne O’Donnell, *Blowing the whistle can lead to harsh aftermath, despite law*, **USA TODAY**, August 1, 2005 at 1B.

⁴¹ **SHINER**, *supra* note 1 at 3.

⁴² The Stevens opinion concurring in the dismissal, which was joined by Ginsburg and Souter in the relevant part, reflects a concern for the potential “chilling effect” if Kasky’s lawsuit was able to proceed, a concern that presumes that corporations offer valuable input in this context and that overlooks the significance of the demurrer. *See Nike Inc. v. Kasky*, 539 U.S. 654, 123 S.Ct. 2554, 2558-59 (Stevens, J. concurring). Kennedy dissented without opinion, but in an earlier opinion he suggested, and was joined in this opinion by Justice Scalia, that, in his view, the *Central Hudson* test was insufficiently protective of “truthful, nonmisleading speech.” He didn’t say how it was insufficiently protected, but it is a statement suggesting more rather than less protection for commercial speech. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001)(Kennedy, J. concurring). Justice Breyer wrote a dissent from the decision to dismiss, thus indicating he would have preferred to decide the Nike case. And his opinion, joined by Justice O’Connor, left little doubt about what he thought of Nike’s argument. He appeared to agree that allowing Kasky’s lawsuit to proceed would generate a “chilling effect” on future speech. *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S.Ct. 2554, 2568 (Breyer, J., dissenting). Justice Thomas has straightforwardly announced his support for treating advertising speech like political speech in earlier opinions. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring)(“I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment.”). By my count, this suggests that a majority of the Court is receptive, at least in part, to arguments such as Nike advanced. Note that even if the members of the Court agreed in principle that false speech was not protected by the First Amendment, the procedural structure would virtually guarantee no meaningful restriction on false speech. For different analysis of this case see David C. Vladeck, *Lessons From A Story Untold: Nike v. Kasky Reconsidered*, 54 **CASE WES.RES. L. REV.** 1049 (2004).

(perhaps thankfully) natural persons rarely possess.⁴³ And its resources are such that only the willfully blind could claim that Nike had not had an opportunity to air its views.⁴⁴ According to Kasky, the plaintiff in that case, the problem was that Nike had aired its “views” far too widely and thereby intentionally misled consumers, investors and the general public as to its labor and manufacturing practices.

What was at issue in the Nike case was whether Nike could be held liable if its statements concerning its labor practices were false. What it wanted was the ability to say whatever it deemed in its best interest without any liability should some of its statements later be deemed false, even if the false statements were made knowing that they were false, with the erection of a constitutional shield from costs, imposed by fines, judgments and the other impedimenta of governmental regulation associated with untrue claims.⁴⁵ But a key issue in the Enron and WorldCom fiascos, and many others of the corporate rogues’ gallery, involved whether these organizations, or rather, the people speaking on their behalf, told the truth – whether they disclosed what needed to be disclosed or had said something that was intended to mislead investors or others who might be expected to rely on their statements. If Nike had gotten what it wanted, a constitutional shield for such statements, would Sarbanes-Oxley matter?⁴⁶ Or would a constitutional defense be available which would trump any legislative intervention?

Although the proponents of freedom for commercial expression claim that such protection is needed because without it the debate will be unbalanced because one speaker is unduly chilled, one need not look much farther than the infamous “McLibel” case in the U.K. to see what is wrong with this argument.⁴⁷ In this case McDonald’s sued two impecunious members of London Greenpeace for libel on the basis of their distribution of leaflets that protested a number of McDonald’s business practices, primarily on environmental, labor and nutritional issues. The lawsuit came at the end of

⁴³ “Unlike groups of citizens, who must always debate the proper and shifting balance of conflicting values, corporations will pursue a single value to the detriment of all others.” Greenwood, *Essential Speech*, *supra* note 11 at 1051. “There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.” Hansmann and Kraakman, *The End of History for Corporate Law*, *supra* note 17, 89 **GEORGETOWN L.J.** at 439. For a critique of the notion that this state of affairs is unproblematic because a broader than ever class of persons own stock, primarily through pension funds, see Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth*, 68 **THE MODERN L. REV.** 49 (2005). This is also to some extent an oversimplification. See *infra* note 63 and accompanying text. See also EDWARD N. WOLFF, **TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA** (2002).

⁴⁴ For example, in the Nike suit, the plaintiff Kasky alleged that in 1997 Nike spent “almost \$1 billion” dollars on advertising and promotion. *Kasky v. Nike, Inc.*, Amended Complaint at 5, Case No. 994446 (Jul 2, 1998).

⁴⁵ I have analyzed this aspect of Nike’s claim in some detail in an earlier piece. Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 **TEMPLE L. REV.** 151 (2005).

⁴⁶ Some observers have argued that Sarbanes-Oxley is mostly not responsive to fixing the problems that led to the Enron fiasco and that many of its provisions are likely to do little to advance the goal of greater corporate responsibility. See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 **YALE L.J.** 1521 (2005).

⁴⁷ See <http://www.mcspotlight.org/case/index.html>. A feature length documentary was recently released about the case. See <http://www.spannerfilms.net/?lid=161> “McLibel: The Postman and the Gardner Who Took on McDonald’s” (last visited on Aug. 27, 2005).

a period of several months during which McDonald's hired private investigators to infiltrate London Greenpeace's meetings.⁴⁸ At the conclusion of this period of surveillance, McDonald's sued five members of the group and extracted apologies and retractions from them with the threat of libel liability⁴⁹ – from all that is but Helen Steel and David Morris. They refused to apologize and so McDonald's sued. Steel and Morris were too poor to hire legal representation and were clearly not economic competitors,⁵⁰ yet McDonalds saw fit to launch what became the longest trial in English history⁵¹ in order to “stop people telling lies.”⁵² Because of the single-mindedness of corporate purpose, profit, corporations' management is most interested in freedom of expression (particularly freedom from liability) for the corporations' speech. They are less keen to extend the freedom of expression to others – even when those others offer very little commercial threat and appear to be engaged in quintessential political speech activities.⁵³

Still, perhaps it might be said that McDonald's was acting in this case no differently than a natural person might. As Thomas Emerson noted, “It has been common for individuals and groups who demanded freedom of expression for themselves to insist that it be denied to others.”⁵⁴ Although it might be argued that disparity in resources and abilities to project one's message are just a necessary corollary of freedom, this argument focuses too much on the way corporate “persons” might be said to resemble natural persons and glosses over their very significant *structural* and moral differences from natural persons, differences that suggest that corporate entities neither need, nor should be granted the sorts of liberal speech rights that are (theoretically) the birthright of natural persons. In this essay I review some of those differences and argue that both in theory and in practice it is not only *permissible* to differentiate between natural and “legal” persons but *necessary* to do so in order to retain even a modicum of governmental impact on important social goals.

⁴⁸ See <http://www.mcspotlight.org/case/trial/story.html> (last visited on Aug. 27, 2005).

⁴⁹ McDonald's had earlier extracted apologies and retractions from some media organizations which had reproduced the leaflet or discussed the claims. *Id.*

⁵⁰ *Id.*

⁵¹ “*McLibel*” pair win legal case: Two activists should have been given legal aid in their long fight against a McDonald's libel action, a court says, **BBC NEWS UK EDITION**, Feb. 15, 2005.

⁵² 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 Steel and Morris. Available at http://www.mcspotlight.org/case/pretrial/factsheet_reply.html (last visited Apr. 5, 2005).

⁵³ Lest anyone think that the *McLibel* case represented an anomaly because of the relative strictness of English libel law and that corporations would not think to launch similar suppression efforts in the United States, one has only to look at the Fox case brought against comedian Al Franken. See *infra* note 149. That case was quickly dismissed. *Id.* Yet it is an indication both of the incentive structure, that is, what will be attempted if possible, and of which way the opinion seems to be moving since it is arguably remarkable that Fox's lawyers didn't dismiss out of hand as unwarranted by existing law, see **FED.R.CIV.P.** 11(b)(2), the theory proposed by their client. Indeed, that is part of what makes it such a good example, that the court and most observers seemed to think the claim was facially ridiculous. Apparently it wasn't ridiculous enough to deter Fox's lawyers. For a survey of much more troubling cases where corporations have been more successful in suppressing expression see Vladeck, *Lessons From a Story Untold*, *supra* note 42 at 112-118 and accompanying text. For a book length treatment of the subject see **KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY** (Doubleday, 2005).

⁵⁴ Thomas Emerson, *Toward A General Theory of the First Amendment*, 72 **YALE L. J.** 877, 888 (1963).

The argument is in three parts. First, in Part I, I review the structure and laws governing corporations (at least in the United States) to explore the theory of corporate personhood and its implications as well as the structural incentives that reduce all corporate communication to a single aim - profits.⁵⁵ Part II takes Thomas Emerson's seminal work on the theoretical basis for protecting freedom of expression and argues that none of the arguments Emerson identifies offer any grounds, let alone compelling ones, for granting anything like complete protection to commercial expression by corporations. Part III addresses some of the persistent counter-arguments and why they should not represent an obstacle to limitations on corporate speech. In conclusion, I argue these factors suggest that treating corporations as entitled to the same rights to freedom of expression as human beings represents a gross distortion of the values freedom of expression is meant to protect and imperils legitimate governmental health, safety and other social welfare goals without the prospect of any offsetting gains or realistic checks on the predictable abuse of power by corporations to be forthcoming from any sources other than government.

PART I – The Structure of A Corporation

It appears to have always been a matter of some conceptual difficulty how the law ought to deal with corporations. The idea that corporations are “persons” for purposes of the law is one of long standing.⁵⁶ Initially, corporations were thought to have a right to existence based upon the grant of a charter from the government.⁵⁷ But the understanding was that such charters were to be sparingly granted and only where the proposed corporate enterprise served some greater purpose for the common good rather than merely the maximization of wealth for investors. As a creature of the state the corporation was entirely subject to the state, which often prescribed in some detail how the corporation was to be governed internally. This concept of the corporation – with its quasi-public function and strict regulation by government situates the corporation as a kind of extension of the government.⁵⁸

However, from the beginning, this notion of charter was mitigated somewhat by being interpreted as a charter that had been negotiated with the government in question and thus also involved contractual rights that once established could be protected from interference.⁵⁹ As the use of the corporate form expanded, this understanding, of the

⁵⁵ Although there continue to be arguments that corporate goals are more nuanced than pure profit, certainly short-term profit, it is still fair to say that profit in some form is the only goal on which there is unanimity of opinion regarding its legitimacy.

⁵⁶ See *supra* note 34.

⁵⁷ See HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, *supra* note 34 at 72 -73.

⁵⁸ See, e.g., *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995). ([W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”).

⁵⁹ See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (a corporation only possesses the attributes that its charter bestow upon it and it does so to the same degree a natural person would have such rights via contract and thus the state could not unilaterally amend that contract).

meaning of the corporate form, seemed less suitable or even practicable once states began to enter into a competition to offer the most attractive legal environment for incorporation by relaxing or dispensing with much of the regulatory supervision.⁶⁰ “Gradually, by making the corporate form universally available, free incorporation undermined the grant theory. Incorporation eventually came to be regarded not as a special state-conferred privilege but as a normal and regular mode of doing business.”⁶¹ Instead of being a creature of the law the corporate form seemed a natural and reasonable form of organization for the conduct of business, a form for which there was no burning need for government to micro-manage outside of those industries that might be deemed “natural monopolies” and thus still fitting somewhat comfortably into this schema that required corporations to serve a “public” function.

As the free incorporation model came to predominate, the entity theory and notions of corporate personhood continued to gain ground. “By rendering the corporate form normal and regular, late-nineteenth-century corporate theory shifted the presumption of corporate regulation against the state. Since corporations could no longer be treated as special creatures of the state, they were entitled to the same privileges as all other individuals and groups.”⁶² So today it apparently seems completely natural and reasonable for corporations’ representatives to claim that the corporation has expressive rights as an aspect of personhood. But it is important to remember that the metaphor of corporate personhood is just that. A metaphor. Nevertheless, this metaphor elides several aspects of the corporate form that make corporate expression relentlessly one-sided and, ultimately, untrustworthy.

The Primacy of the Profit Motive

Pursuant to conventional interpretations of black letter corporate law the corporation’s officers and directors have *primarily* one duty – to maximize shareholder value.⁶³ Furthermore, this duty accrues not to the real people who happen to be shareholders and the multiplicity of concerns that they can be expected to have as human

⁶⁰ See, e.g., HORWITZ, *TRANSFORMATION*, *supra* note 34 at 73.

⁶¹ *Id.*

⁶² *Id.* at 74.

⁶³ As Professor Elhauge has pointed out, this “black letter” law has always been fairly significantly modified by the business judgment rule in a fashion that not only permits some profit-sacrificing behavior but actually virtually guarantees it because of the moral and social pressures on managers. See Elhauge, *Sacrificing Corporate Profits*, *supra* note 17 80 N.Y. U. L. REV. at 740-4. However, even Professor Elhauge agrees that profit maximization is the management’s “primary obligation” to shareholders. *Id.* at 745. The business judgment rule arguably represents an implicit understanding that transferring the decision to the courts of what specific action would be “profit maximizing” in any particular situation would result in significant increases in transaction costs and that the resultant inefficiency would virtually guarantee further reductions in profits. Nevertheless, the existence of such discretion represents no assurance that the discretion will be exercised in a manner consistent with the public interest. See, *The Good Company*, THE ECONOMIST, January 22-28th, 2005 (Special section at 3-22). Moreover, this conventional understanding has been trenchantly criticized by Professor Daniel Greenwood. See Greenwood, Daniel J.H., “Are Shareholders Entitled to the Residual?” (September 2, 2005). Utah Legal Studies Paper No. 05-10 Available at SSRN: <http://ssrn.com/abstract=799144>.

beings. Rather, this duty only accrues to a fictional shareholder who cares for nothing but short-term financial gain.

[H]uman shareholders who are also neighbors or employees or customers or friends may have other commitments beyond an extra nickel in the quarterly dividend. Even on purely economic issues, since shareholdings in this country are not only wide but shallow, many shareholders will find that their basic interests are aligned more with employees, stability or customers than with the highest possible value for their shareholdings: a decrease in your phone bill is likely to be worth more to you than the commensurate drop in the price of the telephone company shares held by your pension fund. Only foreign shareholders with little connection to the American economy or politics beyond their shareholdings approximate this conventional image of a shareholder always interested in higher stock returns.⁶⁴

Since the fictional shareholder is just an investor, it is immortal and time indifferent--the market allows any investor to transform future income into present income, short term gains into long terms ones, and so on, simply by applying the correct discount rate. It is context indifferent--since money is perfectly fungible, a pure shareholder is indifferent between money earned in Salt Lake City or Cambridge; Flint or Manilla. It has no commitment to particular enterprises: so long as the investment is on the capital frontier, offering the appropriate risk adjusted rate of return, one project is as good as any other. Tin cans and insurance, news magazines and amusement parks--what the company does is a matter of entire indifference. It is universalist in the modernist, not the post-identity, sense: the fictional shareholder recognizes no boundaries, professes no nationality (or, more precisely, will change nationalities at the current or future monetary exchange rate), has no religion, no community, no union, no gender and, oddly enough, no class: the invested funds of the unions are no different from the invested funds of the capitalists against which they struggle. It is, in short, radically uncommitted, cosmopolitan, deracinated, tied to no religion, language, nation or community. Perhaps most important for bargaining purposes, the shareholder is fully mobile--able to leap borders (and professions, commitments and projects) at a single bound.⁶⁵

This vision of the shareholder has a lot in common with the economists' darling, the rational person, primarily in its lack of correspondence in characteristics to any real person since real human beings are not so narrowly focused. Yet, like the fictional rational person, the fictional rational shareholder offers analysts and managers an

⁶⁴ Greenwood, *supra* note 11 at 1036. It may be that Greenwood underestimates the degree to which institutional investors, primarily the managers of pension funds, *do* behave this way because the aggregation of many shareholders into a fund has the same affect -- this is, of reducing the variety of shareholder interests to a single value, profit. However, the growth of institutional funds that are formed with the objective of investing only in certain types of companies may have made the fictional shareholder model less relevant as an empirical matter than in times past. However, my sense is that such investment funds still represent the minority of investors. They are also not indifferent to profit.

⁶⁵ *Id.* at 1043 (internal footnotes omitted).

attractively simple, and comparatively straightforward way to analyze performance since attempting to address all the multiplicity of factors that may actually motivate shareholders would probably be impossibly complex and certainly unwieldy. So the fictional shareholder continues to be the yardstick against which management and analysts measure the performance of a company.

The only limitations on how corporations carry out that duty to shareholders are those imposed by law, that is, what the law says they can and cannot do in aid of maximizing shareholder value. That makes corporate “behavior” and “speech” very narrow, shallow and one-dimensional. All roads, all expression, all actions, lead back to the (hoped for, if often unrealized) maximization of shareholder value. That makes the corporation a very unusual “person” since few people can be said to hold one, and only one value. It might, additionally, be protested that it is an inaccurate picture since, because corporations are run by persons, and persons *do* have other interests, that those interests and personalities inevitably are reflected in the corporation. To a limited extent this is true.

Around the margins of the ambiguity about what exactly *is* best for shareholders – long run stability, short term gain, corporate image, etc., the personalities and the choices made by a corporation’s executive can and do make a difference – and not solely in the negative ways of a Dennis Kozlowski or a Jeffrey Skilling, but also in positive ways such as a Warren Buffet or a Ray Anderson.⁶⁶ Additionally, the business judgment rule and management perceptions of what sorts of profit-sacrificing behavior is appropriate and necessary to conform to social norms, allows for some behavior that is not straightforwardly profit-seeking to occur.⁶⁷ Still, ultimately the relentless forces of the market, and the legal imperatives supporting resort to the market, force even the most vociferous advocates of a “different” kind of corporate model into the same old model— certainly this is the case with respect to large, public corporations. Thus, Anita Roddick, founder of The Body Shop, had to step down from her position as chair of the company and relinquish control of the company, including its much vaunted social responsibility programs.⁶⁸ Ben and Jerry’s was bought by Unilever.⁶⁹ As Professor Joel Bakan reports, Roddick’s successor at The Body Shop asserted, “We believe in social responsibility but we are very hard-nosed about profit. We know that success is measured by the bottom line.”⁷⁰ “Roddick’s story illustrates how an executive’s moral concerns and altruistic desires must ultimately succumb to her corporations overriding goals.”⁷¹

⁶⁶ Ray Anderson is “the founder and chairman of Interface, Inc., the world’s largest commercial carpet manufacturer,” and an outspoken proponent of a switch to manufacturing processes that contribute to sustainability. BAKAN, *supra* note 15 at 71.

⁶⁷ See Elhauge, *supra* note 17.

⁶⁸ BAKAN, *supra* note 15 at 51-53.

⁶⁹ Janger, *supra* 2 at 74 (citing Ben and Jerry’s Financial History, available at http://www.benjerry.com/our_company/research_library/fin/ (last visited on Aug. 24, 2005).

⁷⁰ BAKAN, *supra* note 15 at 53.

⁷¹ *Id.* It is worth noting that Roddick has been questioned about the consistency of these goals in a number of quarters with claims that her much vaunted values have been (how ironic) more cosmetic than substantive. See, e.g., STAUBER AND RAMPTON, TOXIC SLUDGE, *supra* note 32 at 73 -76 (exploring conflicts between Body Shop founder’s stated business objectives and principles and the actual conduct of the company).

Although the idea of Corporate Social Responsibility [CSR], that is the practice of a corporation taking account of the interests of constituencies beyond shareholders,⁷² has gained popularity, that movement suffers from the absence of a legal structure that will offer officers and directors clear guidance on what is a permissible departure from the pure profit, shareholder maximization, model. On the one hand, as Professor Einer Elhauge points out, the business judgment rule and existing structures are capacious enough to protect judgments that trade off short term profits for long term benefits.⁷³ So shifting between long and short term payoffs could (theoretically) offer no obstacle to the implementation of CSR. On the other hand, when the magnitude of long term gains are difficult to predict with any certainty, or are intangible, management could still conceivably expose themselves to shareholder liability if the alleged long term benefits are intangible *enough* and the sacrificed short term profits (or costs incurred) are very large for and CSR project.⁷⁴

In addition, there are no clear definition of what “corporate social responsibility” consists of and very little in the way of standards assessing it.⁷⁵ “[C]ompanies fasten the label to a quite bewildering variety of supposedly enlightened, progressive or charitable corporate actions.”⁷⁶ Moreover, the results are inconsistent.

This may be why *The Economist* offered the editorial opinion that CSR was ill conceived.

The goal of a well-run company may be to make profits for its shareholders, but merely in doing that – provided it faces the competition in its markets, behaves honestly and obeys the law⁷⁷ – the company, without even trying, is doing good works. Its employees willingly work for the company in exchange for wages; the transaction makes them better off. Its customers willing pay for the company’s products; the transaction makes them better off also. All the while, for strictly selfish reasons, well-run companies will strive for friendly long-term relations with employees, suppliers and customers. There is no need for selfless sacrifice when it comes to stakeholders. It goes with the territory.

⁷² See, e.g., BAUMAN, WEISS & PALMITER, *CORPORATIONS LAW & POLICY*, *supra* note 10 at 116-117 (discussing state statutes providing shelter within business judgment rule for constituencies such as employees, suppliers, creditors, etc.); Cynthia Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002); Paul Cox, *The Public the Private and the Corporation*, 80 MARQ. L. REV. 391 (1997).

⁷³ See Elhauge, *supra* note 63.

⁷⁴ Professor Bakan reports that the famous economist, Milton Friedman suggests that there is only “one instance when corporate social responsibility can be tolerated ...—when it is insincere.” BAKAN, *THE CORPORATION*, *supra* note 15 at 34.

⁷⁵ *The Union of Concerned Executive: CSR as practised means many different things*, THE ECONOMIST, January 22, 2005 at 6in a special report, *A Survey of Corporate Social Responsibility*.

⁷⁶ *Id.*

⁷⁷ This is both a very big “provided” and tautological since the very thing that some CSR proponents are suggesting is that the law require it. Thus, “obeying the law” provides both no inkling of the law’s content and no limitation.

All things considered, there is much to be said for leaving social and economic policy to governments. They are least accountable to voters.⁷⁸

That this rosy picture contains a number of enormous caveats or questionable empirical assumptions seems obvious.⁷⁹ From the beginning of this country's existence the question of what sorts of regulatory limits should be placed on the pursuit of the accumulation of capital and whether it can always be said that what is in the best interest of business is necessarily in the best interest of society as well has been an issue of fierce debate and fluctuating legislative trends. The existence of the minimum wage and antitrust laws, just to mention two examples, would seem to suggest that public sentiment has not always found the two, corporate interests and the public interest, to be coextensive. Nevertheless, this argument seems to have enjoyed a resurgence in the later part of the 20th century and into our present time.⁸⁰ So it is worthwhile to reiterate what may seem to be obvious questions. First, the editorial offers the observation that, of course, the company may only maximize profits within the limits of the law. But when it comes to corporate speech, this may be precisely the problem: What does the law permit? If it permits lying, does a corporation have a duty to do so? And if the law virtually *demand*s that the company communicate in ways that are deceptive, it is difficult to see how that adds to the general well-being, even if one were inclined to accept the other dubious assertions about workers and consumers always being "better" off as a result of this imperative. In fact, there is little reason to expect that they will be.

Corporations as Externalizing Machines

Corporations generate what economists call "externalities," that is cost to others associated with the production of their goods and services. Something is "external" by virtue of its cost being absorbed outside the company.⁸¹ Environmental pollution is a familiar example of an externality. Less familiar, perhaps more subtle externalities might be the social costs to individuals of the requirement that human capital, particularly for top executives, be highly mobile⁸² or requiring working hours incompatible with raising a family or caring for an elderly parent or other dependent person.⁸³ "The corporation [] is

⁷⁸ *The Good Company*, **THE ECONOMIST**, January 22, 2005 at 11.

⁷⁹ Characterizing workers as "willingly" working in exchange for wages when some sort of work is necessary for survival for most people and where the wage for most work is set by the employer, not negotiated by the worker borders is disingenuous. Claiming that consumers are better off for having "willingly" paid for products that were relentlessly promoted to them and which they may not need or may be affirmatively hazardous to their health (such as cigarettes) borders on the delusional.

⁸⁰ See, e.g., Hansmann and Kraakman, *supra* note 17.

⁸¹ Identifying internal and external may be very sensitive to assessments of causal relationships. For example, if rootlessness contributes to reduced social support networks and long hours add to stress and both make workers more vulnerable to depression, alcoholism and drug abuse or other mental disorders or to stress-related physical ailments like heart-attacks, the corporation does not succeed in completely externalizing costs because of lost worker productivity, health care costs and the like. However these connections are disputed.

⁸² See Peter T. Kilborn, *The Five Bedroom, Six Figure Rootless Life*, **THE NEW YORK TIMES**, June 1, 2005.

⁸³ See Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 **S. CAL. L. REV.** 1255 (2004).

an externalizing machine, in the same way that a shark is a killing machine.”⁸⁴ “The corporation [] is deliberately programmed, indeed legally compelled, to externalize costs without regard for the harm it may cause to people, communities and the natural environment.”⁸⁵

This doesn’t make the corporation form evil, just amoral.⁸⁶ If slave labor became legal, corporations might arguably have a duty to engage in it under the current legal regime.⁸⁷ If it became legal to kill rival executives, or steal trade secrets, or kill people for lucrative body parts, then presumably all corporations would do those things too – not just the renegade few. It is the law that sets these limits. Because a corporation has “no body to kick and no soul to damn,”⁸⁸ these penalties largely consist of monetary penalties. But calibrating the amount of the penalty to represent a real disincentive has always been difficult. And because the profits are so enormous, the penalties assume a size that, taken in a vacuum, seem self-evidently excessive to some. But if it looked at in the context of the amount at stake may not seem so excessive. For example, the recent \$253.5 million dollar verdict entered against Merck in the Vioxx case included a figure

⁸⁴ **BAKAN**, *supra* note 15 at 70 quoting businessman Robert Monks from an interview with the author.

⁸⁵ *Id.* at 72-73.

⁸⁶ In a recent article Professor Douglas Litowitz asks the question, “Are Corporations Evil?” and concludes that although there is much to be said for what he calls the criticisms of the structural problems in the organization of corporations, he concludes that it is actually size, not the corporate form which is most at fault. Douglas Litowitz, *Are Corporations Evil?*, 58 **U. MIAMI L. REV.** 811, 814-15 (2004). He notes that most corporate critics don’t extend their criticisms to “mom-and-pop corporations.” *Id.* He has a point and many of the observations here apply only to the large, publicly held corporations. However, given that some observers consider the close corporation virtually “obsolete” and that large scale partnerships and limited partnerships that Litowitz identifies as occasionally perpetrators of misconduct that makes the news, operate under the same imperatives for profit, focus on the form may be just an argument about details. All of the arguments herein can be applied to the partnership or other business organizational forms to the extent that they diffuse responsibility and focus on profits for shareholders, partners or investors. The key may be whether there is any real accountability to anyone but themselves.

⁸⁷ Some would say that corporations like Nike (or its subcontractors) already *do* engage in something that falls short of “slave labor” only insofar as it does not include legal ownership of employees’ person, but otherwise involves much of its aspects – lack of real freedom, oppressive working conditions, physical punishment, control through sexual battery, etc. *See Kasky v. Nike, Inc., Amended Complaint, supra* note 44 at 10-15 (describing alleged corporeal punishment and other oppressive labor practices of Nike subcontractors’ factories in Vietnam, Indonesia and China). But one doesn’t need to travel outside of the U.S. to encounter businesses willing to engage in tactics bordering on the employment of slave labor. The use of illegal immigrants as migrant farmer workers who are controlled by the threat of disclosure to the authorities offer one persistent example. And in Tulsa, Oklahoma, a local business was charged with slavery for allegedly importing workers from India and then holding them hostage on the premises, denying them adequate wages, freedom of movement, etc. that would enable them to leave. The employer, John Pickle Co., was found to have violated minimum wage laws by importing workers from India for what it described as a “training” program, even though the workers were actually highly skilled welders and the like, so as to evade the minimum wage law. Michael Overall, *Verdict blasts Pickle: The company displaced U.S. workers with cheap foreign labor a judge rules in part one of the trial*, **TULSA WORLD** at A1, 8/27/2004. Those workers also alleged that the company held them prisoner in a factory dormitory, confiscated their passports and other documents and would not allow them to leave the factory even when off duty and had lied to them about the status of the immigration visas that would be obtained for them. *Id.*

⁸⁸ **NACE, GANGS OF AMERICA**, *supra* note 34 at 5 (“As Baron Thurlow said some three centuries ago, ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?’”).

for punitive damages that was “not picked at random.”⁸⁹ Rather it was a figure pulled from “a 2001 Merck estimate of *additional profit* the company might make *if it could delay an F.D.A. warning* on Vioxx’s heart risk.”⁹⁰ Note the calculus that Merck engaged in – what truthful communication *would cost it*. Nevertheless, because defendants such as Merck have successfully managed to convince the public and the legislatures to focus on the size of such verdicts in isolation, they have succeeded in securing the passage of caps on liability that reduce such awards, and thereby diminish their effectiveness as penalties.⁹¹

Even these limits will be exceeded if a corporation’s executives conclude that the penalties exacted by the law will not diminish profits sufficient to represent a deterrence to similar misconduct in the future.⁹² As Professor Bakan observes, “Corporate illegalities are rife throughout the economy. Many major corporations engage in unlawful behavior, and some are habitual offenders with records that would be the envy of even the most prolific human criminals.”⁹³ As an example he lists the 42 violations or judgments, most relating to environmental issues, against General Electric for the period between 1990 and 2001.⁹⁴

On the other hand, not all outcomes driven by the profit motive are necessarily bad. If images and entertainment about gay and lesbians are more prominent in the culture it may have a lot to do with manufacturers playing to a market.⁹⁵ Many of us view this as a morally worthwhile phenomenon that contributes to a more inclusive society. But not everyone agrees.⁹⁶ And those who don’t could point to this as another outgrowth of the “immorality” of corporate tunnel vision with respect to the profit motive. Similarly, many companies have integrated the images in their advertising to include more people of color, more women (outside of advertising for cosmetics, clothing and the like) and have discovered it “pays” to recognize the Hispanic market or the

⁸⁹ Alex Berenson, *For Merck, the Vioxx Paper Trail Won’t Go Away*, **THE NEW YORK TIMES**, Sunday, August 21, 2005, 1 & 17.

⁹⁰ *Id.* at 17 (emphasis added).

⁹¹ For example, Texas law caps on punitive damages apparently mean that the Vioxx verdict will be automatically reduced to \$26.1 million. *Id.* at 1.

⁹² A cap on damages may not completely eliminate the deterrent effect of damage awards where the company, as does Merck, faces several thousand lawsuits. *Id.*

⁹³ **BAKAN**, *supra*, note 15 at 75.

⁹⁴ *Id.* 75-79.

⁹⁵ See, e.g., David M. Skover & Kellye Y. Testy, *Lesbigay Identity as Commodity*, 90 **CAL. L. REV.** 223 (2002).

⁹⁶ See Russell Shorto, *What’s Their Real Problem With Gay Marriage? It’s the Gay Part*, **THE NEW YORK TIMES SUNDAY MAGAZINE**, Late Edition - Final, Section 6, Page 34, Column 1 June 19, 2005 (recounting the fierce objection on moral grounds, by some anti-gay marriage activists, to homosexual behavior on the grounds of a belief that it represents an immoral choice). The stunning ignorance of history, science and any sense of the cultural context for the institution of marriage displayed by some of the subjects interviewed for this article is fairly dispiriting if one believes that good government and a good society is even, in part, dependent upon information and education. Nevertheless, it is clear that the individuals interviewed are animated by fervent convictions that they label “moral.” For another example of the profit motive contributing to equality see Ellen Waldman and Marybeth Herald, *Eyes Wide Shut: Erasing Women’s Experiences from the Clinic to the Courtroom*, 28 **HARV. J. OF LAW & GENDER** 285, 300-03 (2005).

African-American market, etc. These may all represent social advances for which we can thank corporate indifference to anything but the profit motive – that is, its moral neutrality may lead to the morally worthwhile as well as the morally bankrupt. Of course that may represent little net gain if many of the marketing efforts are for harmful products.⁹⁷ Certainly the images of people of color in advertising are arguably still far from being representative of the people of color in the population. The point though is that I am not offering any reflexive condemnation of corporations. They are neither moral nor immoral. They are amoral. They aren't people. While this fact has side effects that may be applauded insofar as they are indifferent to any particular moral or political position, that is not a feature that offers much protection for the minority view or the outsider.

The . . . internal mechanisms of the corporation do not differentiate between making money by creating a good product or lobbying the law to avoid the costs of a bad one. A corporation driven by the profit motive is morally indifferent: it will lobby to repeal the eight hour day or the EPA, or, alternatively, invest in additional automation or pollution control devices indifferently, based only on a cost benefit analysis of which option is likely to cost the shares less. It will compete with a competitor, or lobby to create a legally regulated monopoly, indifferent except as to the relative risk-adjusted projected net present values of the alternatives. It will adapt to a world of long-term employment and family wages, or advocate one of employee mobility, over-work for some and under-employment for the rest, entirely indifferent to effects on children or civil society because those effects are not reflected in the returns to the shares.⁹⁸

In addition to the primacy of the profit motive directed toward the fictional shareholder and driving the corporation to externalize any costs that it can, the large, publicly traded corporations are also bureaucracies that increase the potential to diffuse and dissipate whatever individual, human moral impulses its officers, directors and employees may have and to contribute ambiguity about moral and legal responsibilities on the part of employees,⁹⁹ a convenient instrument for suppressing guilt feelings about particular transactions¹⁰⁰ and a difficulty in locating responsibility when things do go wrong.¹⁰¹ Given these features of corporate structure the notion that corporations require special protection for their expression is troubling. It is difficult to locate any support for this claim in the theoretical basis on which freedom of expression is protected.

⁹⁷ See, e.g., Michael Fletcher, *Tobacco's Ties to Minority Groups Put Their Leaders in a Bind*, Washington Post, (May 17, 1998) (available at <http://www.columbia.edu/itc/hs/pubhealth/p9740/readings/tobacco-fletcher.html>) (last visited Aug. 13, 12005) (“Native Americans and African Americans have the highest smoking rates in the nation, and African Americans are more likely than others to die from smoking-related diseases.”).

⁹⁸ Greenwood, *supra* note 11 at 1053 (emphasis added).

⁹⁹ See, e.g., Jayne O'Donnell, *Blowing the whistle can lead to harsh aftermath, despite law*, USA TODAY at 1 (Aug. 1, 2005)

¹⁰⁰ See, e.g., Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of the Criminal Law in Preventing Corporate Crime*, in RAPOPORT AND DHARAN, *ENRON: CORPORATE FIASCOS*, *supra* note 2 at 431, 448-50.

¹⁰¹ *Id.* at 450-52.

PART – II Theory and Practice in Protection for Freedom of Expression

Some of those who consider themselves First Amendment purists are fond of offering a quote attributed to Voltaire along the lines (and I paraphrase), “I disagree with everything you say but will defend to the death your right to say it,” in support of what is often described as an absolutist position on the protection of speech. However, at no time in this country’s history has anything like an absolutist position on the application of the First Amendment ever held sway in the government or on the Court. Reviewing the decisions of the Supreme Court on issues of speech one is left with the uncomfortable feeling that the government is somewhat willing to permit the hostile speech of the ineffectual crackpots and malcontents and very much less sanguine about hostile or critical speech when it even appears to pose a threat to some government project or plan.¹⁰² Still, this observation also highlights the fact that one of the principal concerns supporting the right to freedom of expression is concern about the mandate of a governmental orthodoxy.¹⁰³

Nevertheless, as Professor Fredrick Schauer and others have so convincingly demonstrated, it has never been the case that all speech was equal for purposes of protection under the First Amendment.¹⁰⁴ There has never been in theory a First Amendment defense to a fraud claim, or to an offer of a bribe or a solicitation of a murder. All of these may be acts committed by speech, but that speech has not been

¹⁰² For example, the Bush Administration recently asked the National Academy of Sciences to refrain from publishing a work on biological terrorism by a Stanford researcher. “The paper ... details how terrorists might attack the nation’s milk supply with botulinum toxin and offers suggestions for how to thwart such an attack.” Kelly Field, *Federal Officials Ask Journal Not to Publish Bioterrorism Paper*, **THE CHRONICLE OF HIGHER EDUCATION**, June 17, 2005 at A11.

¹⁰³ “[T]he First Amendment ‘presupposes that right conclusions are more likely to be gather out of a multitude of tongues, than through any kind of authoritative selection.’” Brief for Petitioners, Nike, Inc. v. Kaksy, 2003 WL 899100 (U.S. Feb. 28, 2003) at 50. Most of Nike’s amici also suggested that the truth was more likely to be arrived at through permission for Nike to speak, although note that what was at issue was not whether Nike would be permitted to speak, but whether it would be liable for damages if what it said wasn’t true. The concerns about the chilling effect raised in the concurring and dissenting opinions, see supra note 42, suggest in the Nike case presumably also rest on the assumption that a “chill” is to be avoided because more speech is better because it will more likely lead to the discovery of the truth. This theme was echoed by many of the media reports on the case, see Jonathan Rauch, *Corporate Lying Is Bad. But Allowing It Is Good*, **THE ATLANTIC MONTHLY**, June 10, 2003 (<http://www.theatlantic.com/politics/nj/rauch2003-06-10.htm>); Associated Press, *If Nike suit upheld, a critic becomes a censor, solicitor says*, **USA TODAY**, June 28, 2003 (<http://www.usatoday.com/money/industries/retail/2003-04-23-nike-s..>), as well as the amicus brief filed by some 40 media organizations. See Brief Amici Curiae of Forty Leading Newspaper, Magazines, Broadcaster, Wire Services, and Media-Related Professional and Trade Associations in Support of Petitioners, 2003 WL 835613 (U.S., Feb. 28, 2003) (arguing that a decision for Kasky would represent an undesirable chill on news sources from corporations as well as resulting in a lack of balance in reporting on issues).

¹⁰⁴ Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 **VANDERBILT L. REV.** 265, 270-71 (1981). See also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 **IND. L. J.** 1, 21 (1971) (“In framing a theory of free speech the first obstacle is the insistence of many very intelligent people that the “first amendment is an absolute.”...Any such reading is of course impossible.”).

thought to be protected by the First Amendment. Until fairly recently, commercial speech fell into this unprotected category. Commercial speech, or speech by corporations, (and the definition of what constitutes “commercial speech” is contentious and unsettled)¹⁰⁵ was only extended protection in the late 70’s.¹⁰⁶ So there is no venerable tradition supporting freedom of expression for corporations.¹⁰⁷

So what sort of speech was protected and why? In so complicated an area where no hard and fast lines exist, it is not really possible to fully answer this question as the scope of protection appears to have always been a work in progress, a tug-of-war between political currents and powerful interests. But it is possible to identify with some precision some of the theoretical grounds for protection of freedom of expression, even if the practical application of those theories, or the question of whether there is any empirical fit between the theory and practice, are distinct questions. Thomas Emerson, the prominent First Amendment theorist proposed four purposes for protecting freedom of expression and despite tweakings of this formula, or claims that no unifying theory is possible, Emerson’s architecture of the theory for why freedom of expression is protected remains one of the most influential.¹⁰⁸

First, Emerson claimed freedom of expression is a necessary part of self-expression and thus of personal fulfillment.¹⁰⁹ Second, as has been repeated in numerous court decisions and academic writings, freedom of expression is thought to be the best method of ensuring discovery of truth.¹¹⁰ (It was on this ground, refusal to shield consumers from the truth, that a limited amount of protection for commercial speech was

¹⁰⁵ For an excellent discussion of the definition problem see Erwin Chemerinsky and Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 **CASE WES. RES. L. REV.** 1143 (2004). While I do not agree with the place where the authors draw the line between what constitutes “commercial” speech (since I would include all for profit corporate communication, including that in the editorial format), this article clearly outlines the current doctrinal ambiguities.

¹⁰⁶ The *Virginia Pharmacy* decision in 1976 is generally credited with establishing the commercial speech doctrine because it was in this decision that the Court first articulated a developed theory for some limited protection for commercial speech. See *supra* note 30. However, another candidate is the earlier decision of *Bigelow v. Virginia*, 421 U.S. 809 (1975) in which the Court held that a newspaper publisher could not be prohibited by the criminal law from running an ad noting the availability of abortions in New York that were illegal in Virginia. But because the Court’s holding was identified as “limited” it was not rally clear what the parameters of protection for commercial speech were, or on what theory it was grounded, until *Virginia Pharmacy*. See *Virginia Pharmacy*, *supra* note 30 at 760.

¹⁰⁷ See C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 **CASE WES. RES. L. REV.** 1161, 1162 (2004) (“[O]ur strongest advocates of free speech [John Stuart Mill, Thomas Emerson, and Hugo Black] each consistently rejected granting any protection to commercial speech....Neither Mill nor Black nor Emerson saw freedom of speech as about, or as including, a business’s speech promoting its sales and profits.”).

¹⁰⁸ See **JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER**, 2nd ed. (West Publishing Co., St. Paul, MN 1996) at 35-123, (Chapt. II – Philosophical Foundations of Freedom of Speech) (discussing primarily Emerson’s structure and introducing variations and other arguments in Chapt III, entitled *Additional Perspectives*, at 126-67).

¹⁰⁹ Emerson, *supra* note 54 at 878.

¹¹⁰ *Id.* at 878. This argument was repeated by Nike and by most of the amici supporting Nike. See *supra* note 103. But see Posner, *Bad News*, *supra* note 26 (offering the opinion that the market for news doesn’t necessarily produce the truth even if it produces the opportunity to receive information from which one can synthesize the truth).

extended in the first place.)¹¹¹. Third, freedom of speech is argued to offer a basis for participation in a democracy.¹¹² Fourth, Emerson argued freedom of expression helped to maintain a balance between impulses to change and those to stability in a society.¹¹³

All of these arguments have been offered in support of freedom of *commercial* speech.¹¹⁴ In addition, supporters have argued that the failure to protect (that is, render immune from liability) commercial speech will have bad policy consequences with respect to corporate transparency and social responsibility reporting¹¹⁵ which in turn is argued will have a negative impact on commercial relations with Europe to the extent that such transparency is required in order to do business there.¹¹⁶ It has also been argued that

¹¹¹ See *Virginia Pharmacy* *supra* note 30 at 763-65.

¹¹² Emerson, *supra* note 54 at 878. This argument is also the one offered by Alexander Meiklejohn in his influential writing on First Amendment theory. See, e.g., Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 **SUP. CT. REV.** 245 (1961) It is worth noting that Meiklejohn's observation, that the First Amendment doesn't require that every citizen speak to all issues, "but that everything worth saying shall be said," also seems to be based on notions that allowing everything worthwhile will be a better route to discovery of the truth since it is hard to imagine that "worthwhile" doesn't encompass "true" as part of its value although it may not be either a necessary or complete description of what Meiklejohn thought "worthwhile" meant. See **ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT** (1948) at 25.

¹¹³ Emerson, *supra* note 54 at 878-79. To make things even more complicated, Schauer argues that it may be a mistake to look for a single "core" value rather than a multiplicity of values underlying protection for speech. Schauer, *supra* note 104 at 276-77.

¹¹⁴ Professor James Weinstein offered one the latest rebuttals of the first two arguments. According to Weinstein both the self actualization and truth arguments are supported by the decisions. See, James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons From Nike v. Kasky*, 54 **CASE WES. RES. L. REV.** 1091, 1100-01 (2004).

¹¹⁵ See Brief for Petitioners, *Nike, Inc. v. Kasky*, *supra* note 103 at 39 (noting that Nike had not released its Corporate Responsibility Report because of fears of liability unless the California Supreme Court's decision was overturned). Not everyone agrees that the decision hurts corporate social responsibility reporting. Some argument that without the ability to test the truth of such reporting the usefulness of it will be minimal. See Adam M. Kanzer and Cynthia A. Williams, *The Future of Social Reporting Is On the Line*, *Business Ethics* (Summer 2003) (http://www.business-ethics.com/nike_vs_kasky.htm) ("[V]irtually everything a company says is commercial speech, and must be accurate."). We might have some reason to question the sincerity of Nike's alleged reluctance to issue a Corporate Responsibility Report since it in fact issued one for 2004 despite the fact that although it had settled the Kasky case, the judicial precedent from the California Supreme Court, with its allegedly "chilling" definition of commercial speech, has not been withdrawn and is still the law. See *nikebiz.com* press release, April 16, 2005, *Nike Issues FY04 Corporate Responsibility Report Highlighting Multi-Stakeholder Engagement and New Levels of Transparency*, available at http://www.nike.com/nikebiz/news/pressrelease_print.jhtml?year=2005&month=04&letter). Of course Nike's renewed confidence in the safety of such reporting may be due to their success in contributing to an effort in California to pass law reform to remove the private attorneys general provision that allowed Kasky to sue on behalf of the citizens of California. See 2004 **CAL. LEGIS. SERV.** (Proposition 64) [Approved by voters November 2, 2005]. Now with only the state and federal government able to sue, perhaps Nike's management feels that with the appropriate lobbying efforts there is not much to fear from the governments and, given the response to their arguments, another lawsuit might simply offer them the opportunity to get from the courts the additional protection they seek. Ironically, the 2004 corporate responsibility report's disclosures suggest that Kasky's allegations may have been true.

¹¹⁶ See, e.g., Thomas H. Clarke, Jr., *Will Nike v. Kasky Ignite Corporate Social Responsibility Trade Wars between the U.S. and European Union ?*, *SRI Media, Corporate Governance News*, (June 28, 2003) (http://www.srimedia.com/artman/publish/article_419.shtml) ("Those companies that do not publish CSR reports, or generally obfuscate their positions on matter diverse as global warming to supply chain economics, will be much less inclined to publicize their progress for fear of California litigation.").

a failure to offer the same protection to business that is offered to its critics would be “unfair” and represent an “imbalance” in the debate.¹¹⁷ (This is perhaps a variation on the theory that more open debate is more likely to lead to the truth). All of these claims will be discussed and rebutted in more detail below.

Self-realization

None of Emerson’s theoretical justifications for the protection of freedom of expression appear to offer much in the way of support for freedom of *commercial* expression. First, as a non-human entity a corporation cannot be said to have the expressive interests related to self-actualization and freedom that persons do. As Emerson put it, the right to freedom of expression is necessary to *human beings* because:

[E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.¹¹⁸

Corporations don’t have a “self” to be actualized or affirmed. Its employees may have them. Its shareholders may have them. But corporations don’t. When a corporation’s agents speak on its behalf they are not expressing themselves they are following orders or fulfilling duties and they are doing so responsive to the corporation’s single objective: Profit maximization. Thus,

[c]orporate speech is coerced, not free. It is compelled, legally mandated speech, not the result of anyone’s autonomous behavior. It does not reflect the views of shareholders, nor, if management is acting in good faith, those of managers or other corporate agents. *Instead, corporate speech reflects the hypothetical interests of a creature given reality by the market and the law: the fictional shareholder.*¹¹⁹

The fictional shareholder is just that, a fiction, a mental construction no more embodied than the “+” in an equation. It is a principle if you will. As Professor Greenwood puts it, a corporation’s “principal is merely a principle, an abstraction, not a human being. [Principles, unlike principals, do not have any autonomy rights to be respected.]”¹²⁰ Nor do the people speaking on behalf of the corporation have autonomy rights with respect to their expression since it is not their *own* expression. However much their own creativity and interests may align with the corporation’s, at the end of the day they are agents speaking on the corporation’s behalf – following orders, whether or not they agree with those orders. And “...as Eichmann has taught us, people who are just following orders are neither full moral subjects nor appropriate participants in the difficult debates of the political forum.”¹²¹

Thus, if there is a justification for the protection for commercial speech self-expression does not seem to be a part of that justification – at least not speaker self-

¹¹⁷ See, e.g., Brief Amici Curiae of Forty Leading Newspapers, *supra* note 103.

¹¹⁸ Emerson, *supra* note 54 at 879.

¹¹⁹ Greenwood, *supra*, note 11 at 1002 (emphasis added).

¹²⁰ Greenwood, *supra* note 11 at 1056.

¹²¹ Greenwood, *supra* note 11 at 1057.

expression.¹²² Still, Professor Martin Redish has suggested that perhaps “the function of self-rule is fostered by *the receipt of information* that enables the individual to make life-affecting decisions in a more informed fashion.”¹²³ In other words, perhaps by giving corporations freedom to speak, more information is generated that in turn supports the goal of self-actualization or development. There may be something to this. But in this sense the speech generated by corporations represents the “clay” from which individuals model their statements about self. But how does false speech that enhances a corporation’s profitability enhance this goal other than by making a particular brand of symbol, perhaps like the availability of a particular color on the palette of an artist? And if there are significant social costs, for example environmental pollution or perpetuation of a labor practice that consumers actually intend to disavow with their purchases but end up supporting with them instead – do the expressive benefits of the availability of the Nike brand with which to signify something about oneself offset these social costs? Arguably they do not.

Traditionally the law has regulated false speech on the grounds of the social costs associated with it and the notion that the law has a role in enforcing truth in certain situations. It is difficult to conclude however, for the reasons explored above that for profit corporations will ever disseminate *unfavorable* information except under compulsion.¹²⁴ However, much of the speech issued by for profit corporations is persuasive speech that is not necessarily informative. Indeed, one would be hard-pressed to identify the “information” in much advertising. But more importantly, can speech that is not true *ever* be considered “information”?

Truth

The most emphasized theoretical basis provided protection to freedom of speech is the notion that it is only through an open exchange of ideas that the truth is most likely to emerge.¹²⁵ Virtually all the variations on the theoretical framework proposed by Emerson turn around this idea that truth, or at least that the individual’s “truth” as expressed through their choices representing the maximization of their utilities, will best

¹²² As David Vladeck notes the Supreme Court appears to have incorporated some notion of speaker’s rights into the commercial speech doctrine, despite the absence of this element in the earlier law, in two recent cases. See Vladeck, *Lessons From a Story Untold*, *supra* note 42 at 1072-73 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002)). While this is definitely a shift in the doctrine it appears to have been under-theorized one and there is no telling if it is deliberate or will be permanent. In neither case did the Court acknowledge explicitly that it was introducing a justification not found in the foundational cases. Instead, the Court appeared to assume that it was self-evidently true that the doctrine protected this interest. This is not surprising, given the metaphor of corporate personhood. One of the goals of this article is to expose this shift as a departure from the original justifications for the doctrine and one with potentially far reaching consequences that it is not clear that the Court has fully considered, given that the shift was not remarked.

¹²³ Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply To Professor Baker*, 130 *U.P.A.L.REV.* 678 (1982) (emphasis added).

¹²⁴ See *supra* notes 89-92 and accompanying text (discussion of Merck’s calculation of the costs of disseminating information about the heart risks of Vioxx).

¹²⁵ See, e.g., Debra J. LaFetra, *Kick It Up A Notch: First Amendment Protection for Commercial Speech*, 54 *CASE WES. RES. L. REV.* 1205 (2004).

find expression or satisfaction through minimal restraint on the marketplace of ideas. This is certainly the claim most emphasized by Nike and its supporters during the course of that case.¹²⁶ This is also the basis on which one of the most prominent proponents of freedom of commercial expression, Professor Martin Redish, has based his argument.¹²⁷ “Information received in the commercial context...is specifically designed to assist the individual in the decision-making process,” he claims.¹²⁸ One might quarrel with several characterizations in this sentence, but the principal one of concern here is “information.” As Redish himself noted in 1971, even “[a] cursory examination of current television and periodical advertising reveals that in practice, comparatively little commercial promotion performs a purely informational function.”¹²⁹

It would seem that commercial advertising (which is what Redish was describing, not public relations or advocacy speech), is even less “informative” now, in 2005, than it was then, more than thirty years ago. Nevertheless, Professor Redish’s arguments won out when some five years after the publication of his article arguing for some protection for advertising, the Supreme Court decided that the public did indeed have as much interest in hearing correct price information as it did hearing about the news of the day.¹³⁰ It was on this basis, the consumer’s right to receive information, that the Court extended a limited protection to commercial speech. But self-expression *for the corporation* played *no part* in the justification for this extension. The Court reserved to the government the right to regulate commercial speech for its truth.¹³¹

If the prospect of getting to the truth is the justification for extending protection for speech, it would seem that justification *similarly* offers a basis for *the regulation of speech* under conditions where the structural incentives are so clearly slanted toward communication that will persuade, regardless of whether it will “inform.”¹³² Marketing is the paradigmatic example of such a context. Some marketing professionals openly claim that truth is irrelevant to sales.¹³³ This is, of course, not an astonishing observation.

¹²⁶ See *supra*, notes 103 and 115.

¹²⁷ See Martin H. Redish, *The First Amendment in the Marketplace*, 39 **GEO. WASH. L. REV.** 429 (1971). In fact he also convincingly folds self-government into self-actualization claiming that Emerson’s third value is really just a manifestation of the first value. *Id.* at 439.

¹²⁸ *Id. supra* note 127 at 445.

¹²⁹ *Id.* at 433.

¹³⁰ As the Court in *Virginia Pharmacy* noted, “[T]he particular consumer’s interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” *Virginia Pharmacy*, *supra* note 30 at 763.

¹³¹ “In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated... Untruthful speech, commercial or otherwise, has never been protected for its own sake. ... The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.” *Virginia Pharmacy*, *supra* note 30 at 770-72 (internal citations omitted). See also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980) (in order for commercial speech to be protected by the First Amendment the speech “must concern lawful activity and not be misleading”).

¹³² See, e.g., Sarah C. Haan, *The “Persuasion Route” of the Law: Advertising and Legal Persuasion*, 100 **COLUM. L. REV.** 1281 (2000).

¹³³ “The facts are irrelevant. In the short run, it doesn’t matter one bit whether something is actually better or faster or more efficient. What matters is what the consumer believes.” Seth Godin, *The Storytellers*

Rather it predictable and intuitive, if only because consumers have a limited amount of time and access to reliable information from which to assess marketing claims, quite apart from whether or not marketing operates on non-rational thought processes in the first place.

If, as I explored more fully above, corporations have a duty to communicate in ways that will maximize shareholder value by generating profits and good publicity, then if they are *permitted* to communicate *false* information that will generate value and they can do so without legal consequences they *will* do so.¹³⁴ In fact, as noted in the introduction, even *with existing laws* governing fraud and dealing with corporate statements it always possible that a corporation will decide that it is not cost effective to follow the law. Consider the case of Phillip Morris. On September 22, 1999 the United States brought a case against several tobacco companies and some of their public relations arms, alleging a conspiracy to commit fraud to endanger the lives of millions of Americans by concealing or misrepresenting the evidence of the negative health consequences of smoking.¹³⁵ The government alleged that “[i]n order to avoid discovery of their fraudulent conduct and the possibility that they might be called to account for their conduct, defendants engaged in a widespread scheme to frustrate public scrutiny by making false and deceptive statements and by concealing documents and research that they knew would have exposed their public campaign of deceit.”¹³⁶ The motive? “[T]he shared goals of maximizing profits.”¹³⁷ The tobacco companies largely furthered this conspiracy by maintaining that the question of whether smoking had negative health questions was a matter of debate. In 2005 the negative health consequences of smoking appear beyond “debate.” But it appears from the case that the behavior of concealing evidence or violating the law did not end with the collapse of that “debate.”

Instead this pattern of “concealing” documents continued into the trial itself, for on July 21, 2004, Judge Kessler, the presiding judge, ordered Phillips Morris to pay a monetary discovery sanction of \$2.75 million dollars for spoliation, or destruction, of the evidence. The sanction was assessed because the judge found that Phillip Morris’ failure to comply with a court order requiring document retention reflected “reckless disregard and gross indifference [by Phillip Morris and its parent Altria Group] toward their discovery and document preservation obligation.”¹³⁸ Defendants had destroyed, pursuant to their document destruction policy, some email records that an earlier court order required them to preserve. Then when the destruction was discovered, defendants failed to notify the government and the court of that fact for several months.

CMO MAGAZINE (June 2005). *See also* Lew McCreary, Lies, Damn Lies and Puffery, CMO Magazine (august 3, 2005) (http://www.cmomagazine.com/read/070105/lies_puffery.html).

¹³⁴ Indeed the law currently permits some false statements if they can be characterized as “puffing” – that is, assertions so obviously inflated that no rational person would believe they were literally true. *See, e.g.,* Tamara R. Piety, *Merchants of Discontent: An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE L. REV. 377, 394-96 and accompanying footnotes (2001) (describing puffing doctrine).

¹³⁵ *See* Amended Complaint, United States v. Phillip Morris, et. al., Case no. 99-C V-02496(GK) at 2-3.

¹³⁶ Amended Complaint at 3, ¶ 5.

¹³⁷ *Id.*

¹³⁸ *See* Order # 600, of July 21, 2004 at 7, available on line at <http://www.usdoj.gov/civ/cases/tobacco2/>

Why would a good corporate citizen, as Altria, the parent company for Phillip Morris, undoubtedly like to be viewed by the public,¹³⁹ flout a court order? Could this be a rogue company?¹⁴⁰ A hint might be found in the judge's own opinion. She noted that it was difficult to calculate a proportional sanction, as is required by the rules,¹⁴¹ "because we have no way of knowing what, if any value those destroyed emails had to Plaintiff's case..."¹⁴² In other words, there was no way of knowing what value the evidence was to plaintiff. But it was possible to look at what was at stake for the defendants. The government had originally sought \$280 billion in damages. Although an appellate court rejected the claim for anything but forward-looking damages,¹⁴³ the possibility still existed that liability would run into the billions, not the millions. In that light, \$ 2.75 million would be a small price to pay if the evidence that was destroyed reduced the probabilities of a multi-billion dollar verdict.¹⁴⁴

Apart from the ubiquitous profit motive, there is the additional problem that even when a corporation is found to have "lied," it may be difficult to attribute that lie and the requisite intentionality to any person, thereby making a corporate criminal conviction virtually impossible. For example, the government succeeded in garnering a conviction against Arthur Andersen for its role in the Enron debacle. But that conviction was later overturned by the United States Supreme Court's conclusion that the jury instructions were too vague on the *mens rea* issue and therefore might permit a conviction without evidence of the requisite criminal intent.¹⁴⁵ Of course establishing corporate intent is itself a somewhat metaphysical proposition since we can only find "intent" in its employees, but the dispersal of authority, knowledge and responsibility may mean that everyone can plausibly claim they didn't know what they were doing was wrong so a criminal conviction of any individual may be elusive as well.

¹³⁹ "The Altria family of companies is firmly committed to pursuing its business objectives with integrity and in full compliance with the law." http://www.altria.com/responsibility/4_2_complianceandintegrity.asp (last visited 8/10/05). See also http://www.altria.com/responsibility/4_4_societalexpectations.asp (description of commitments to various "stakeholders" beyond shareholders).

¹⁴⁰ Well, perhaps since the tobacco companies are in a difficult spot, they produce a legal product that predictably kills a certain percentage of their customers; "rogue" may be inevitable.

¹⁴¹ See **FED.R.CIV.P. 37(b)(2) Sanctions by Court in Which Action Is Pending** ("the court ...may make such orders in regard to the failure as are just...").

¹⁴² Order #600 at 6.

¹⁴³ See report on decision at JoinTogether Online at <http://www.jointogethr.org/sa/news/summaries/reader/o,1854,575945,00.html>. The additional difficulty with the ability to adequately deter corporate misconduct, even with existing laws and regulations, was highlighted when in early June of 2005 the government announced it was inexplicably backing off of its revised damages claim in excess of \$100 billion, in favor of only \$10 billion.

¹⁴⁴ In fact the defendants got a further break when the government voluntarily scaled back its damages request from \$130 billion to \$10 billion. It defended the move on the grounds that the court of appeals limitation of damages to forward-looking damages made a larger request unlikely to be sustained with skepticism in some quarters and allegations that the change was politically motivated. Eric Lichtblau, *Lawyers Fought U.S. Move to Curb Tobacco Penalty*, **THE NEW YORK TIMES**, (June 16, 2005) (<http://nytimes.com/2005/06/16/politics/16tobacco.html>).

¹⁴⁵ *Arthur Andersen v. United States*, 125 S.Ct. 2129 (2005).

In addition to the problems of financial incentives and metaphysical challenges when it comes to holding corporations liable for misstatements (thus giving little structural incentive to tell unpleasant truths), there are yet other roadblocks to the truth function – sometimes the regulatory authorities themselves support corporate reluctance to be more forthcoming. For example, it is not much help for a particular regulatory effort if the head of that effort, be it an agency or a prosecution, views his or her job as being in “partnership” with business¹⁴⁶ or, even worse, decides he or she is not in favor of a particular regulatory or disciplinary effort and thus wants to withdraw it. This happened in the 70s with the head of the FTC.¹⁴⁷ And it has happened more recently when the Department of Justice submitted a request for “only” \$ 10 billion in damages in the above mentioned tobacco prosecution, instead of the expected \$130 billion or so indicating that it had not done so as a result of political pressure but leaving many observers skeptical about that statement.¹⁴⁸ In the face of the evidence of such enormous influence in the political process, the argument that these entities, corporations, need additional advantages and protection beggars belief.

As if this were not enough, as the McLibel case in the U.K. and Fox Network’s lawsuit in the U.S. [against comedian Al Franken for the use of the words “fair and balanced”] illustrate,¹⁴⁹ corporate interests often aggressively litigate against the speech of others that they find offensive. This undoubtedly has, *and is meant to have* a chilling effect on anyone else who has a mind to criticize the companies in question.¹⁵⁰ Moreover, advertisers often have enormous influence on media content and can withdraw their advertising dollars from media and from messages with which they disagree or which they find presents the “wrong” environment for their ads.¹⁵¹ Corporations have no interest in democracy per se. They have an interest in supporting whatever legal regime guarantees the most congenial environment in which to generate profits. Thus, corporations do not hesitate to re-incorporate in Liberia or the Bahamas or to move certain parts of their operations to other countries simply because they were initially incorporated in the United States. Kasky alleged that Nike spent almost \$1 billion in fiscal year 1997 on marketing,¹⁵² yet Nike argued to the Supreme Court that without

¹⁴⁶ “The notion that business and government are and should be partners is ubiquitous, unremarkable, and repeated like a mantra by leaders in both domains.” **BAKAN, THE COPORATION**, *supra* note 15 at 108.

¹⁴⁷

¹⁴⁸ See, e.g., Eric Lichtblau, *Lawyers Fought U.S. Move to Curb Tobacco Penalty*, **THE NEW YORK TIMES** June 16, 2005.

¹⁴⁹ See *Fox News Network, LLC v. Penguin Group (USA), Inc.*, No. 03 Civ. 6162 (RLC), 2003 WL 23281520 (S.D.N.Y. Aug. 20, 2003) (denying temporary restraining order on humorist Al Franken’s use of the term “fair and balanced”).

¹⁵⁰ In secret tapes made of the settlement negotiations in the McLibel case some unidentified representative of McDonald’s appear to concede that the lawsuit in that case was intended to discourage others with similar opinions as Steel and Morris from voicing their opinions publicly.

¹⁵¹ It hardly seems necessary to support this assertion since it seems so obvious, as with the famous Janet Jackson “nipplegate” which resulted in loss of sponsorship opportunities to Ms. Jackson as well as tangles over program content. Nevertheless, some discussion of this phenomenon can be found in **C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS**, (Princeton University Press, 1994) (describing some of the distortions introduced of caused by advertising influence). See also, **NELSON, SULTANS OF SLEAZE**, *supra* note 32; **ROBERT MCCHESENEY, RICH MEDIA, POOR DEMOCRACY** (The New Press, New York, N.Y., 1999).

¹⁵² See Amended Complaint at 5.

constitutional protection from liability for false speech it would be “silenced” and it would not be able to participate in the “debate” about globalization.¹⁵³ A billion dollars is a lot of speech. Given the economic imperatives discussed above, it is unlikely that Nike will be silenced by any penalties. What this adds up to is the conclusion that it is naive to think that in this environment *more* protection for commercial speech, that is, removing the flimsy existing constraints on it, is likely to lead to more truth, a better debate or any more information.

Participation in Democracy

A third justification offered for the protection for freedom of expression is that freedom of expression is a prerequisite to democracy. A democracy isn’t really a democracy without the participation of its citizens. Citizens require protection for their expression in order to fully participate. However, although Nike characterized itself in the case before the Supreme Court as a “citizen” it is not. Corporations are not citizens. And as such have (or rather *ought* to have) *no* role in the participation in democracy.¹⁵⁴ This is not to say of course that their representatives can’t offer opinions. But it *is* to say that corporations are not *entitled* to opinions. Corporations do not vote. Yet it is apparent to the meanest intelligence that of course corporations have a major, if not the *dominant* role in our democracy. Corporations play key roles in urging legislation upon Congress and with a large measure of success, as the recent revisions to the bankruptcy code, urged by the credit card companies for their benefit illustrate.¹⁵⁵ Corporations can offer legislators attractive trips to luxurious locales under the pretext of “education.”¹⁵⁶ They can invest billions in non-profit organizations to act as fronts, such as alleged in the tobacco litigation with the Tobacco Research Institute.¹⁵⁷ They can invest billions in putting together “astroturf” organizations to lobby legislators – that is, organizations that resemble grassroots organizations pulled together by citizens but which are really made up of persons paid by the industry in question to pose as “concerned citizens.”¹⁵⁸ All of these represent influences on government. They suggest that the average large corporation has far more “voice,” far more participation in our democracy than most real citizens do. It is difficult to understand how requiring such communications be truthful, where the truth can be ascertained, will injure democracy.

In addition, the opinions of corporations need not be respected as the collective voice of its shareholders. “[O]pinions offered by corporations are not themselves the product of a democratic struggle to formulate a point of view in the face of conflicting or multiple values.”¹⁵⁹ As noted above, corporations have one value-maximizing

¹⁵³ See *supra* notes 103 and 115.

¹⁵⁴ See, e.g., Baker, *supra* note 39 at 1178 -83 (Part III – A Corporation is Not A Citizen).

¹⁵⁵ See *supra* note 33.

¹⁵⁶ On the issue of corporate lobbying see STAUBER AND RAMPTON, TOXIC SLUDGE, *supra* note 32 and NELSON, SULTANS OF SLEAZE, *supra* note 32

¹⁵⁷ Examples are the institute set up by the tobacco industry to act as fronts for opinions that the harm caused by smoking was an open question.

¹⁵⁸ See STAUBER AND RAMPTON, TOXIC SLUDGE, *supra* note 32 at 79 (describing astroturf lobbying efforts).

¹⁵⁹

shareholder value. Their participation in political issues is invariably centered on that value.

When a corporation lobbies, however, its goal is set by law and market: it lobbies on behalf of the principle of the fictional shareholder, to maximize the returns to an imaginary being with no interests other than its shares in the corporation. No internal debate, coalition building or political process sets the corporate goal; the views of the various human participants in the firm are largely irrelevant. Unlike the group of citizens, then, the corporation speaks in a unified voice on behalf of a single principle rather than an ever-recreated compromise.¹⁶⁰

Fictional shareholders ... will sacrifice almost anything in the interest of higher profit...; in contrast, the citizens behind the fiction can be expected to have far more diverse and conflicted opinions on ...important political struggles.¹⁶¹

This picture of the corporation acting on behalf of a fictional shareholder leads to the conclusion that corporations are defined by the law and the market in a way that makes them inappropriate participants in political debate.¹⁶²

The question raised by the problem of should corporations be treated as human beings, that is, have extended to them legal protection for their “speech,” is whether they will be extended advantages *in addition* to those they already enjoy. Although the Supreme Court held in *First National Bank of Boston v. Bellotti*¹⁶³ that a corporation had a right to participate in political debates in some fashion, it stepped back from this position in *Austin v. Michigan Chamber of Commerce*¹⁶⁴ with a reminder that corporations are, after all, creatures of the state and recipients of special benefits and advantages from the state not enjoyed by natural persons.

State law grants corporations special advantages--such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets--that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.¹⁶⁵

Also, as the Court in *Austin* noted,

[T]he political advantage of corporations is unfair because “[t]he resources in the treasury of a business corporation ... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated

¹⁶⁰ Greenwood, *supra* note 11 at 1054.

¹⁶¹ *Id.* at 1004

¹⁶² *Id.* at 1003.

¹⁶³ 435 U.S. 765 (1978).

¹⁶⁴ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

¹⁶⁵ *Id.* at 658-59 (internal quotations and citations omitted).

decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."¹⁶⁶

Even the participation they enjoy at present is arguably too much. It beggars belief that this justification for protection for speech offers much support to extending *more* protections to corporations than they already have.

Balance

Finally Emerson suggested that protection for freedom of expression offered some play in the joints of democracy, some possibility for blowing off steam and thereby contributed to social stability. But those persons he envisioned needing a place to vent were undoubtedly the poor and dispossessed, whom those in power must always fear should they get excessively disgruntled. Corporations as non-human entities don't, in the first place, have an *emotional* need to blow off steam. But given their privileged position in the American economy and in the political realm, it is difficult to characterize corporations as a despised and powerless minority having a grudge they need to vent lest they upset the government. To the contrary, given corporations' privileged position, their request for *more* privilege under the guise of "balance" looks more like the petulant demands of a spoiled child. The environment in which discussion of alternative ways of life can take place is already severely imbalanced and compromised by the firm grip consumerism and corporate structuring of our wants and needs has in all of our lives – whether in the first world or elsewhere. Only the truly poor are really free of it since they don't present a good market. But then they too suffer the effects. Interest in "balance" hardly seems to argue in favor of more protection for corporate speech.

In fact, we already live in an environment in which the need for balance goes in the other direction because pro-corporate speech appears "neutral. If anything, it is the *anti-corporate* position which has difficulty getting aired. For example, in *Sultans of Sleaze*, author Joyce Nelson describes the efforts in 1988 of the British Columbia Council of Forest Industries to re-position their industries as "green."

[The council mounted a massive and expensive campaign to convince the public of its 'sound forest and stewardship and reforestation programs.' The campaign included educational displays in shopping malls, huge posters at bus stops, ads inside buses, and colour supplements delivered to most households in the province. ... Bu the biggest irritant in the whole PR effort was the Council's 'Forests Forever' ads a \$2 million pitch on billboards and TV and in print media in which the Council spokespeople say what a wonderful job they are doing in managing B.C. forests.¹⁶⁷

The ads ran for over a year on CBC-TV despite protests by environmental groups; but when a counter-ad, "Mystical Forests", detailing the actual practices of the

¹⁶⁶ *Id.* at 659 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, (MFCL) 479 U.S. 238, 258 ((1986)).

¹⁶⁷ NELSON, *SULTANS OF SLEAZE*, *supra* note 32at 133.

logging industry was proposed by environmentalists and presented for CBC approval, it was turned down as “too controversial.”¹⁶⁸ Canadian journalist and social activist Kalle Lasn has had similar problems getting the broadcast media to air his organization, AdBusters’ ad for “Buy Nothing Day” or for advertising parodies, leading the Adbusters Media Foundation to initiate legal action that has (so far) apparently been unsuccessful.¹⁶⁹

Similarly, Amtrak attempted to refuse artist Michael Ledron’s ad, which entailed a photo-commentary on Coors Brewing Company’s support for the Nicaraguan contras and other right wing causes by parodying the company’s ad campaign which proclaimed Coor’s to be the Right Beer, with the slogan, “Is it the Right’s Beer Now?”, on the grounds that Amtrak did not allow “political” advertising on the particular display in question.¹⁷⁰ The characterization of Ledron’s ad as “political” implies Coor’s ad is not.¹⁷¹ Amtrak attempted to assert its status as a corporation to argue that Lebron could not claim a violation of his First Amendment rights in connection with its refusal of what it characterized as political speech.¹⁷² The Supreme Court rejected this argument as to Amtrak, holding that where the government retains complete control over the corporation, the corporate form may be disregarded and the corporation viewed as an arm of the government. Nevertheless, it seems clear that a private media company would be free to reject any ad it found controversial without fear of a First Amendment claim. And since one of the things of greatest concern for the principal advertisers, the lifeblood of all media, is that all content in the media present the appropriate selling environment for their goods, it is easy to see why “[a] message in support of the status quo is typically considered to be ‘neutral,’ ‘objective,’ and ‘non-controversial’”, while a message that departs from the status quo position or criticizes it is considered to have a ‘point of view’ and ‘bias.’”¹⁷³ That does not suggest that a “balance” is likely to emerge from the current environment given the distribution of resources and incentives.

But it seems a little silly to have to state what seems to be obvious – that the corporate form offers an unparalleled opportunity for the accumulation of wealth and

¹⁶⁸ *Id.* Another example of this phenomenon is the characterization, in *Brill’s Content*, of Consumer’s Union as having a compromised neutrality because, for instance, it “accepted grant money from foundations with specific agendas – such as limiting the use of pesticides – and the magazine has then run stories supporting those foundations’ goals.” Jennifer Greenstein, *Testing Consumer Reports*, **BRILL’S CONTENT**, September 1999 at 72. The author doesn’t appear to consider that advertisers and manufacturers also have a “point of view” that undermines the impartiality of the information imparted about advertised products. One gets the impression that the desire to sell a product *is* seen as morally neutral.

¹⁶⁹ See **KALLE LASN, CULTURE JAM: THE UNCOOLING OF AMERICA™** (Eagle Brook, New York, N.Y. , 1999) at 196-197

¹⁷⁰ *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 376-77 (1995). The adoption of the Coor’s company slogan to more effectively convey the message is an example of the “culture jamming” described by LASN, *see supra*, note 169.

¹⁷¹ I agree that the Coor’s ad is not “political” in the same way as Ledron’s speech was. But the characterization of Ledron’s speech as having a position suggests that in some sense the Coor’s ad is neutral.

¹⁷² *Id.* at 377-78.

¹⁷³ **NELSON, SULTANS OF SLEAZE**, *supra*, note 32 at 133.

power while at the same time diffusing responsibility. While corporate frustration may represent a threat to the government, that threat is unlikely to be diffused by offering corporations freedom from liability for their speech. Large corporations in this world are powerful. So such regulations as have been passed by the United States and the EU, member and non-member countries and any other government in the world which limit corporate speech seem to be engaged in uphill sledding. Why it is so difficult to see this and why, when Kreuzer Medien GmbH claimed that article 10 of the Human Rights charter granted protection for freedom of expression for its advertising, was that claim not rapidly dismissed? It is hard to know, but it might be the power of the metaphor. Having once named the corporate form as a “person” it may have been difficult to turn back. Metaphors like the legal “personhood” of corporations and “the marketplace of ideas” have demonstrated that they have enduring power¹⁷⁴ and can apparently, even in the minds of the most intelligent observers, represent a more appealing starting point of analysis than one grounded in an analysis of observed characteristics and operation. But in the case of corporate speech what has happened is that metaphor has taken over the doctrine and moved the Courts and observers away from the grounds on which *limited* protection was offered to commercial expression in the first place – protection of consumers’ autonomy rights to make their own decisions with all the *truthful* information – into a freestanding entitlement for corporations to be free of governmental regulation of their communications. To the extent that this would shield *untruthful* communications it represents a perversion of the doctrine.

Part III - Dealing with the Persistent Objections

Maybe it is the fault of the metaphor.¹⁷⁵ But a persistent objection raised to the argument here is one of speaker discrimination and meaningful line drawing. To the first objection it is enough to simply point out that if a corporation is not an appropriate “speaker” then there is no discrimination. Furthermore, there is nothing inherently inappropriate under existing doctrine about differing standards depending upon the identity of the speaker. For example, differing standards have been upheld with respect to attorneys¹⁷⁶ than other commercial speakers or the public at large. But this, it might be

¹⁷⁴ See GEORGE LAKOFF AND MARK JOHNSON, *METAPHORS WE LIVE BY*, (University of Chicago Press, Chicago, 1980); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1988).

¹⁷⁵ As Professor Mark Hager put it, “Social and legal struggles will continue to be iconic, that is, metaphorical struggles.... Antiprogressive conceptions must be fought with competing conceptions. ... Conceptual struggles will persist, even though it be recognized that these are contests of metaphor and symbol, not of logic, and are won through eloquence and imagery, not through showdowns in pure reason.” Mark M. Hager, *Bodies Politic: The Progressive History of Organizational ‘Real Entity’ Theory*, 50 U. PITT. L. REV. 575 (1989). See also, Winter, *Transcendental Nonsense, supra*, note 174 at 1164 (“They [the courts] will not be able to purge metaphors from their analyses, but will be driven to other metaphors.”)

¹⁷⁶ Fla. Bar v. Went for It, Inc. 515 U.S. 618, 635 (1995) (“We believe that the Bar’s 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered.”); *Ohralik v. Ohio State Bar Ass’n*, 36 U.S. 447, 459 (1978) (“A lawyer’s procurement of remunerative employment is a subject only marginally

argued, is inadequate because I distinguish between for-profit and not for profit corporations and the argument is made, “What about the NAACP, the NRA or other organization formed for political purposes but organized as a corporation?” Furthermore, what prevents corporations such as Wal-Mart or Phillip-Morris from setting up non-profits to do their speaking for them? Finally, the argument is made that discriminating on the basis of marketing versus non-marketing content is inappropriate content regulation. These are good questions but ultimately not persuasive obstacles to the argument offered here.¹⁷⁷

A. *Speaker discrimination and line-drawing*

In the first place, the corporate entity is a legal creation, so one response to this objection is that corporations have the qualities and the rights given to them by law, no more no less. And just as the law already distinguishes between for-profit and not-for profit, close and public corporations, with differing rules applicable depending upon the status of the corporation, so it is not immediately obvious why, if a not-for-profit is subject to different tax laws it could not be subject to different treatment for purposes of the first amendment. Additionally, because of differing legal structures, there are very real differences in the incentive structures as between corporations and non-corporate business that make differing treatment as to status eminently sensible. As discussed above, the way in which corporations operate offer a basis for distinguishing between them and human beings. As professor Elhauge noted with respect to regulating corporate conduct generally:

Compared to noncorporate businesses, the corporate structure creates two problems for this supplemental means [social and moral sanctions] of regulating conduct: (1) Shareholders are insulated from the exposure and knowledge that creates social and moral sanctions, and (2) shareholders have collective action problems that make it difficult for them to act on any social or moral impulses they do feel. *Managerial conduct that perfectly represented shareholders would thus tend to produce socially suboptimal conduct.*¹⁷⁸

If one were to judge by the tidal wave of “suboptimal” conduct that appears to be occurring lately, one might be justified in concluding that in general management has been rather successful in representing at least the fictional shareholder fairly perfectly.

The coverage of corporations under the first amendment is a matter of finding a theoretical fit between the purpose of the amendment and the “nature” of corporations. But corporations have no organic “nature.”¹⁷⁹ They have the form they are given and

affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation.”).

¹⁷⁷ It is worth noting that in both the *Austin* case and the MCFL case the Court was confronted with non-profits. So the issue of distinguishing between types of corporate organizations and organizations and individuals is one with which the Court already has grappled. *See supra* notes 164-166 and accompanying text.

¹⁷⁸ Elhauge, *supra* note 17 at 740 (emphasis added).

¹⁷⁹ It may be that groups, including corporations, exhibit phenomena that suggest some organic elements or systematic characteristics. *See, e.g.,* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (Harvard University Press, Cambridge, MA, 1971). However, saying groups have an some dynamics that we might

thus whether their nature fits the purpose depends on their legal construction. All that is required is for them to be seen in that light rather than as organic creatures with some mysterious natural essence. “[R]eification is a device for making something that is in fact complex seem simple, and that can be dangerous. In reality, only individuals enjoy benefits, or bear the burdens and responsibilities, of actions affecting other individuals.”¹⁸⁰ While it is obviously over-simplified to add to that quote that “only individuals have opinions or speech rights,” given that non-profit organizations are often organized precisely for generating speech, the conclusion that *all* organizations should have speech rights doesn’t follow either. The Framers noted the potential for large, for-profit, organizations to accumulate the type of power that can threaten the stability of democracy.¹⁸¹ The late nineteenth century also saw the growth of massive trust arrangements that held such power over the markets and government that it culminated in the government reasserting control over business interests in the form of such trust-busting devices as the Sherman Antitrust Act.¹⁸² Thus, “[i]t is [] sensible for a Constitution which defends individual free expression and associational freedom to recognize free expression rights for many organization entities *but not for corporate capital.*”¹⁸³ For example,

[in] a union vote, persons are equal. In a corporate vote, shares of capital are equal, *but persons are unequal* according to how much capital they respectively own. The corporate voice then, represents not a plurality and a unity of people or citizens, *but a plurality and unity of capital.*¹⁸⁴

But this does not avoid the practical objection that the borders are nevertheless permeable. And when it is difficult to sort out news from promotion or art from product placement, not every case may be so easy to resolve. Some entities may represent real mixed purposes entities. Corporations fund real grass roots and non-profits as well as astroturf organizations and front operations. How are we to tell the difference? If the local mom & pop grocery store want to protest government zoning regulations and add the prominence and power of its trade name in lieu of the perhaps less well known names of the individual owners, well isn’t that permissible and isn’t this proposal starting us down the slippery slope in which all sorts of valuable speech will be regulated away?

This is an objection that goes to the heart of our more cherished illusions about the potential of law for establishing certainty. The objection seems so persuasive when launched in the context of this question of protection for speech. Yet when ones looks

analogize to an organic character is a far cry from saying they have the same *dignitary* rights accorded human beings.

¹⁸⁰ KLEIN & COFFEE, *BUSINESS ORGANIZATION*, *supra* note 14 at 118.

¹⁸¹ Thomas Jefferson once said, "I hope we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength, and bid defiance to the laws of our country." William Meyers, *The Santa Clara Blues: Corporate Personhood versus Democracy*, III PUBL’G, Nov. 13, 2000, at 3, at <http://www.iiipublishing.com/afd/SantaClara.pdf> (last visited Aug.13, 2005).

¹⁸² For a description of the rise and fall of the trusts and what he calls the “robbers and the barons” see Steven Harmon Wilson, Ph.D., *Malefactors of Great Wealth: A Short History of “Aggressive” Accounting*, in RAPOPORT & DHARAN, *ENRON: CORPORATE FIASCOS*, *supra* note 2 at 41-61.

¹⁸³ Hager, *Bodies Politic* *supra* note 175 at 653 (emphasis added).

¹⁸⁴ *Id.* (emphasis added).

more closely it is clear that almost *all* of the law is made up of such difficult line-drawing exercises¹⁸⁵ and that in fact, the argument that we must protect the for-profit corporation's speech because we cannot tell where to draw the law is an objection that doesn't hold up to close scrutiny. The law already makes exceptions as between corporations on the basis of size for purposes of compliance with laws like Sarbanes-Oxley. In September of 2005 the Securities and Exchange Commission extended a second extension of time for small business to comply with certain of the provisions of Sarbanes Oxley.¹⁸⁶ "Small" is defined as companies with "a market capitalization of less than \$75 million."¹⁸⁷ As with all line drawing exercises the question could be raised, "Why \$75 million and not \$65 million or \$100 million?" Drawing a bright-line rule always runs the risk of over and under-inclusiveness that some of the cases included in the scope of the rule's application don't actually raise the risk of the evils the rule is meant to address and that some of the cases meant to be controlled by the rule fall outside of its operation. That is not however a reason not to draw a line. It does not seem at all absurd to suggest that there may be material and significant differences between for-profit and non-profit, between the corner grocery store and Time-Warner that make a difference for purposes of the First Amendment.

So the issue here, properly understood, is whether there is *more* harm to be anticipated by drawing the line as I propose, to exclude for-profit corporations, or least *large* for-profit corporations, from any more speech rights than those announced in the *Virginia Pharmacy* case – that is, protection for truthful, non-misleading statements, than would be the harms flowing from the virtual absence of governmental regulation. A parallel inquiry might be whether the benefits anticipated from the regulation exceed the costs or whether, conversely, the benefits of freedom of commercial expression outweigh any costs. Given that there is no human

To be sure, just as when the Court in *New York Times v. Sullivan* drew a line of "actual malice" for sustaining libel claims against public officials on matters of public concern, it was possible that some meritorious claims would be lost, some libels would go unpunished and perhaps some new, unanticipated evil would arise as a result which might require a reassessment of the standard in light of that evil, [although so far it has not], this proposal, to reject the notion of freedom for commercial expression may run into future difficulties. But to refuse to act on the basis of a speculative harm or a speculative difficulty as to how to draw the line in some future cases not yet brought seems wrong when the dangers and problems arising from the current system are so manifest. It cannot be overemphasized that what is primarily at issue here is whether to hand over a constitutional *shield* to commercial interests for speech *contrary* to the public

¹⁸⁵ For example, how is one to tell "legitimate" discipline of an employee from retaliatory discipline for the employee's whistle blowing activities? Does the right to bear arms mean the right to bear nuclear arms? What standard of care is "reasonable"?

¹⁸⁶ Carrie Johnson, *Small Firms Get More Time on Sarbanes-Oxley Rules*, WASHINGTONPOST.COM, (Thursday, Sept. 22, 2005) (available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/09/21/AR2005092102219_pf.html) (last accessed on 9/24/05).

¹⁸⁷ *Id.*

interest. That corporate actions often are anti-democratic or in some conflict with democratic principles seems undeniable.¹⁸⁸

B. Content Discrimination

Some observers argue that the suggestion that promotional speech is entitled to less First Amendment protection than political or expressive speech is inappropriate content discrimination. To some extent the content discrimination objection is really an argument that the Court in *Virginia Pharmacy* should have recognized the speech at issue as completely protected, rather than setting up a secondary status for commercial speech. But couched in terms of content discrimination it elides the fact that prior to *Virginia Pharmacy* (and indeed to a large extent afterwards) this was acceptable content discrimination. Promotional (or commercial) speech was simply not thought to be covered by the First Amendment at all in much the same way that restraints on speech imposed by an entity other than the government, for instance by an employer, were similarly not seen as triggering First Amendment scrutiny. So if it is not covered, it seems difficult to say that by extending limited protection you are engaging in content discrimination. By its terms the amendment acts as a restraint on government. Even within the framework of the restraint on government exceptions were made for certain types of speech, libel, obscenity, sedition, treason, etc. *Virginia Pharmacy* had the effect of extending limited First Amendment protection to a previously uncovered content category – commercial speech. So we must undertake the question of the permissibility of content discrimination from the standpoint that the existing law permits content discrimination in this area. Commercial speech is *defined* by its content. So the question is not whether we shall *initiate* content discrimination, but whether content discrimination of this type is rational and should be extended, modified or abolished.

The *Virginia Pharmacy* Court began from the premise that commercial speech is less valuable to the values the First Amendment was intended to protect than other types of speech that were protected by the Amendment. But it concluded that this did not mean that it was of no value. Even though as was noted in other contexts, the Constitution does not require subscription to any particular economic theory, the Court found there was some social benefit to be derived from not unduly restricting speech in the commercial context. The Court found some value, coupled with a keen public interest, in certain types of commercial speech – in truthful commercial speech. This distinguishes this speech from expressive speech protected not because of its content or who the speaker is but because its existence furthers human freedom. And commercial speech by corporations offered to further its interests in the marketplace is very different from that of an organization of persons, such as the ACLU, formed for the purpose of political participation.

Just as is so often recited in other contexts, false speech has never been protected for its own sake. The question is whether there is some countervailing reason to protect the false speech. In the political context, as the Court in *New York Times v. Sullivan*

¹⁸⁸ See Daniel J.H. Greenwood, *Markets & Democracy: The Illegitimacy of Corporate Law*, 74 **UMKC L. REV.** 41 (2005).

noted, protection for even false statements in the political context allows for vigorous debate, the airing of all views, etc. It furthers individual's self-expression and protects the expression of dissident viewpoints. But value does false commercial speech protect? Arguably none. False commercial speech may give the speaker a commercial advantage, but it is not one that it is socially desirable to extend. And when the speaker is a for-profit corporation there is no expressive interest to be protected either.

Finally, although I my arguments here, taken at their strongest suggest abrogation of the commercial speech doctrine and of *Bellotti* and its progeny altogether, that is not this article's principal target. Rather, its principal aim is to generate agreement that, *if nothing else*, freedom for commercial expression should not be expanded beyond the current doctrine and that the current doctrine ought to be interpreted more capaciously to include all for-profit motivated, promotional speech that takes place under the umbrella of marketing. Let it be left to the facts of the particular case whether some speech is primarily "marketing" or not. Presumably, in the process of hearing such cases, facts heretofore not considered can be analyzed with an eye to whether or not they fit primarily in the marketing or primarily in the political speech category and the outlines of the doctrine further sketched out. This is the way a common law system works.

Conclusion

Corporations (or large business interests) have greater and more subtle influences on our lives than the governments under which we live. They influence what we think is attractive in a mate, what we think our weddings should look like, how we feel about ourselves given our looks and possessions. They frame some of our most urgent desires and tell us what we ought to think is important. They may even have a role in manipulating war and peace and political candidacies. They accumulate massive amounts of wealth and wield substantial influence with governments in a way that few individuals or any political coalition would ever hope to do. Their access to means of communicating their message affect our ability to understand the issues, frame them or make choices. And the frames that they supply often affect our health, the environment, our peace of mind and the values of our children. All of this and yet they want more. They want to use the metaphor of corporate personhood to shield them further from the costs of these activities. That is an outrageous request. Yet they have succeeded in framing the debate. It is time to reframe it.