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The Best Puffery Article Ever

David A. Hoffman[*]

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I. INTRODUCTION

Glenn Gold had a hard choice to make: where to attend law school. Considering his alternatives, he decided on the Bridgeport School of Law, claiming to have relied particularly on the Dean's boast of a "friendly interaction" between students and professors.[1] Gold—like many aspiring lawyers—would soon meet a professor who "bombarded him with questions that culminated in a violent vocal outburst when he perceived that [Gold] had not properly prepared for class."[2] After his first year, when the school dismissed him for failing to maintain a minimum grade point average, Gold sued for fraud.

A jury found for Gold, but the Appellate Court of Connecticut reversed, holding that the challenged statements were "akin to mere 'puffing'" and could not give "rise to liability."[3] Why? Because, "'favorable comments by sellers with respect to their products are universally accepted and expected in the market-place.'"[4] That is, Bridgeport won because—in the court's view—it is incredible that law students and their professors will get along, even though the school had allegedly sold itself based on that very quality.

We are constantly exposed to speech like that of Bridgeport, encouraging us to buy goods, invest in stocks, and transact for services. This speech is often intentionally misleading, is usually vivid and memorable, and induces many of us to rely on it. But the law, which normally punishes lies for profit, encourages this speech by immunizing it as "mere puffery." "Puffery" is an increasingly important defense against criminal and civil actions in common law and regulatory settings, resulting in thousands of citations in cases and law reviews.[5] However, puffery doctrine, a major element of the law of fraud and promissory obligation, is missing an explanatory theory.[6]

Most scholarly discussions of puffery have focused on one of the many discrete legal regimes in which puffery arguments are articulated:[7] e.g., mail fraud,[8] securities fraud,[9] common-law fraud,[10] legal ethics,[11] common-law

1. Gold v. Univ. of Bridgeport Sch. of Law, 562 A.2d 570, 572 (Conn. App. Ct. 1989).

2. *Id.* at 573.

3. *Id*.

4. *Id.* (quoting Web Press Servs. Corp. v. New London Motors, Inc., 533 A.2d 1211, 1213 (Conn. 1987)).

5. A search in the Westlaw "JLR" database alone for "puff or puffing or puffery" produces 3,182 citations. A search in the "ALLCASES" database returns 5,695 uses of those terms in caselaw.

6. *But cf.* IVAN PRESTON, THE GREAT AMERICAN BLOW-UP (rev. ed. 1996) (discussing puffery across areas of law); Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657 (1985) (articulating a theory of deception in advertising law).

7. Preston, whose authoritative work is the foundation of modern attempts to study puffing speech, does not give a full treatment of such speech's potential benefits, and he does not set out to tie his experimental and historical evidence to a normative theory of the law of fraud or promise. *See generally* PRESTON, *supra* note 6.

8. Ryan Y. Blumel, *Mail and Wire Fraud*, 42 AM. CRIM. L. REV. 677, 689 (2005) (linking findings of puffery to a seller's "good faith").

9. *See generally* Jennifer O'Hare, *The Resurrection of the Dodo: The Unfortunate Re-emergence*

contracts,[12] Uniform Commercial Code warranty cases,[13] promissory misrepresentation,[14] false advertising,[15] and even law-review-publication decisions.[16] Such articles are usually directed at practitioners and tell a simple story. Puffery is a "vague statement" boosting the appeal of a service or product that, because of its vagueness and unreliability, is immunized from regulation. Unfortunately, according to the story, judges sometimes are inconsistent in applying the "vague statement" standard;[17] therefore, risk-averse clients would be well-advised to avoid hyperbolic posturing as much as possible.

Because each legal context where puffery appears serves quite different ends, it is possible to see courts' use of the word "puffery" as an example of convergent evolution.[18] That is, there is no core theme unifying applications of the puffery defense. Such concerns have led many jurists to conclude that the puffery defense is lawless.[19] This view is simply wrong.

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of the Puffery Defense in Private Securities Fraud Actions, 59 OHIO ST. L.J. 1697 (1998) (linking findings of puffery to the nature of securities disclosures).

10. Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring,* 41 WILLAMETTE L. REV. 233, 262–75 (2005) (criticizing courts for their incoherent application of the puffery defense to intentional torts, and synthesizing the doctrine and finding similarities in the application of the defense).

11. *See generally* Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1 (2002) (analyzing the constitutional and doctrinal footings of professional codes prohibiting puffery by lawyers).

12. Keith A. Rowley, *You Asked For It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law,* 3 NEV. L.J. 526, 543 (2003) (discussing "sham" or "joke" offers).

13. *Cf.* Joshua Honigwachs, *Is It Safe to Call Something Safe? The Law of Puffing in Advertising*, 6 J. PUB. POL'Y & MKTG. 157, 163 (1987) (comparing UCC warranty cases with the false-advertising regime).

14. Joe E. Manuel & Stuart F. James, *Tennessee's Theories of Misrepresentation*, 22 MEM. ST. U. L. REV. 633, 650 (1992) ("The practical effect of promissory misrepresentation may be that, in some instances, typical sales talk and puffery is [sic] elevated to a level of actionable misrepresentation.").

15. Courtland L. Reichman & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 FRANCHISE L.J. 187, 189 (2002) (discussing the difficulty in distinguishing puffery from actionable advertising).

16. *See generally* Ross E. Davies, *The Most Important Article of All Time*, 5 GREEN BAG 2D 351 (2002) (extolling the role of puffery in placement of law-review articles).

17. Sometimes regulators are inconsistent as well.

18. Convergent evolution is the biological hypothesis that "different organisms may develop similar features through adaptations when faced with similar environments or architectural demands." Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 143 (2003).

19. *See, e.g.*, Mark F. Grady, *Regulating Information: Advertising Overview*, *in* THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 222, 235 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981) (describing the FTC puffery doctrine as "practically def[ying] description" and a "matter of unstated prosecutorial discretion"); C. Edward Fletcher, III, *Sophisticated Investors Under the Federal Securities Laws*, 1988 DUKE L.J. 1081, 1097 (arguing that courts' treatment of puffery and sophisticated investors "results in unsatisfying, unprincipled, and almost incoherent caselaw"); Richard J. Leighton, *Making Puffery Determinations in Lanham Act False Advertising Cases: Surveys, Dictionaries, Judicial Edicts and Materiality Tests*, 95 TRADEMARK REP. 615, 618 (2005) (discussing incoherence in Lanham Act cases).

The basic claim I explore in this Article is that when courts confront fraud claims, they do so guided by a view of "bad" and "good" consumption.[20] Courts seek to discourage speech leading to "bad" consumption and to protect speech leading to "good" consumption.[21] Courts believe that "bad consumption" happens when consumers purchase something as a result of believing false facts stated or implied by commercial speech. "Good consumption" is purchasing in the absence of false facts. Thus, the law views the consumption process as *rational and factual*, and it seeks to protect regretted purchasing decisions through liability and regulation only when those decisions are influenced by untruthful sellers' speech.

The "puffery defense" functions to draw a line between lawful and unlawful speech, based on legal authorities' assumptions about the rationality of consumption. To the extent that regulators and courts believe that some speech produced consumption that could not possibly have been "bad" (consumers could not have relied on the speech, or it implied no false facts), the law is more likely to label that speech "puffery" and immunize it. By contrast, if the speech could produce "bad" consumption, then the puffery defense will fail. Thus, the defense is an implicit indication of what legal authorities perceive as the motivation behind economic transactions.

Therefore, rule-of-law objections to the puffery defense are misdirected. The problem with puffery doctrine is not doctrinal chaos; courts and regulators have simply chosen a normative target that they are institutionally ill-suited to hit. In this context, walking the line between overdeterrence of speech and underdeterrence of fraud turns out to be beyond courts' competence. This institutional incapacity, coupled with a traditional fear of overregulating speech, leads authorities to overprotect commercial speech from liability.

Part II of this Article begins to deconstruct the myth of the puffery defense's incoherence by analyzing its application in a number of common law and regulatory actions. By comparing uses of the puffery defense in false-advertising, securities, Uniform Commercial Code, and promissory estoppel settings, I unearth the implicit goals courts and regulators are advancing when they protect often wildly misleading speech.

Part III of this Article considers whether current puffery doctrine is required by the First Amendment. The question is significant because it provides a baseline for reforms that would better tailor applications of the puffery defense to a realistic view of consumption. As the Supreme Court has held, the Free Speech Clause "requires that we protect some falsehood . . . to protect speech that matters."[22] Is

20. I do not use consumption in its technical sense, i.e., the using-up of a resource. Instead, I am using the word to refer to the decision to purchase both consumable goods and investment vehicles. That decision is obviously contestable and is made for the purposes of clarity in the text above. There is evidence, discussed below, that many investors treat stock purchasing as a process involving similar emotional factors as ordinary purchase decisions.

21. By describing the courts' view of good and bad consumption, I do not mean to imply agreement that such a distinction is coherent or even desirable.

22. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

puffery the type of "falsehood" that must be protected under current First Amendment doctrine? We do not know, because no court has authoritatively resolved the issue, and also because scholarship to date has not considered the First Amendment implications of puffery doctrine. Nevertheless, the Supreme Court is highly likely to confront the puffery problem, or a variant, in the near future as part of its unsettled commercial-speech jurisprudence.[23] Thus, Part III develops a constitutional framework the Court could use when it considers future commercial-speech cases involving puffery, and suggests how that framework ought to be applied to the regulatory and common-law contexts introduced in Part II.

To the extent that puffery doctrine is not constitutionally required, is it good policy to immunize exaggerated commercial lies? I consider this question in Parts IV and V of this Article.

Part IV considers the policy case for expanding the scope of puffery immunity using both rational and heterodox models of consumption. As I show, both models depend on assumptions about the relationship between puffery and purchasing decisions, which fail to describe actual behavior particularly well. I offer an alternative model of the relationship between puffing speech and consumption, based on a rich literature found in advertising and marketing journals.

Part V demonstrates institutional problems with the current formulations of the puffery defense. Courts and regulators are bad at distinguishing speech that produces "good" or "bad" consumption because they systematically underestimate when consumers rely on hyperbolic speech and the extent to which this speech communicates facts. Instead of this problematic approach, I develop a novel model of puffery as a type of speech that implies false facts as an externality. I then offer a burden-shifting scheme of liability for puffery, which would force sellers to consider the consumption-distorting aspects of their speech as part of their expected liability costs. This approach would help courts and regulators to accomplish their line-drawing task by reducing the number of puffing claims in general, and by systematically providing decision makers with evidence on the puffery question. It would, therefore, significantly improve the policy and constitutional underpinnings of our consumer-protection laws.

23. *See infra* notes 152–54 and accompanying text (citing and summarizing the issues in several commercial free-speech cases).

II. WHAT IS PUFFERY?

Puffery has a common,[24] a commercial,[25] and a legal definition. Legally, the most significant characteristic of "puffery" is that it is a *defense* to a charge of misleading purchasers of goods, investments, or services, or to a charge that a promisor has made a legally cognizable promise. That defense, whether or not actually asserted by a commercial speaker, highlights the general rule that speech that misleads consumers is presumptively unlawful. Defendants in turn argue: "This speech, which would otherwise be unlawful because it is alleged to have misled consumption, could not have done so. It is puffery and should be immune from liability."

Applications of the puffery defense share two other telling characteristics. *First*, speech found to be puffery almost always seeks to encourage consumption, making *optimistic* claims about goods unsupported by observed reality.[26] This is not to say that courts believe that sellers are never pessimistic about their products. Rather, they believe buyers will almost never actually buy because of misplaced seller pessimism: no one would purchase a car sold as "Not particularly zippy!"[27] *Second*, the puffery defense is related to a particular model of consumption, in which purchase decisions are reasonably made based on facts revealed by sellers. Thus, across the law, judges and regulators look for false facts uttered by sellers as the touchstone of their analyses.

To explore these commonalities, I examine puffery defenses in four doctrinal contexts: federal false advertising; federal securities laws; the Uniform Commercial Code's warranty provisions; and the scope of a "promise" in the contract/tort claim of promissory estoppel. I chose these three areas, from the many in which the puffery defense appears,[28] for a number of reasons. Most

24. Puffery is "exaggerated commendation especially for promotional purposes: Hype." Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/puffery (last visited Feb. 12, 2006).

25. A definition of puffery in a marketing text is:

> Puffery: advertising copy that indulges in subjective exaggeration in its descriptions of a product or service, such as "an outstanding piece of luggage." Puffery is always a matter of opinion on the part of the advertiser and often will use words such as "the best" or "the greatest" in describing the good qualities of a product or service. Sometimes puffery is extended into an exaggeration that is obviously untrue and becomes an outright parody, such as, "This perfume will bring out the beast in every man!"

JANE IMBLER & BETSY-ANN TOFFLER, DICTIONARY OF MARKETING TERMS 458 (2000).

26. Optimism can exaggerate qualities a good has, or it can make claims about a good that no reasonable person would credit. Jef I. Richards, *A "New and Improved" View of Puffery*, 9 J. PUB. POL'Y & MKTG. 73, 76–78 (1990); *cf.* Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts*, 94 TRADEMARK REP. 585, 620–23 (2004) (identifying two types of Lanham Act puffery as "Puffery by Exaggeration, Bluster, Boast or Humor" and "Puffery by Vagueness and/or Seller's Opinion").

27. In the absence of a purchase, there will be no grounds for liability under either a contract or tort cause of action.

28. Another classic application of puffery is the common-law action for misrepresentation, synthesized in the *Restatement (Second) of Torts*. A comment to the Restatement explains that "[t]he habit of vendors to exaggerate the advantages of the bargain that they are offering to make is a well

significantly, each area of law can be seen as a stop along a continuum from contract to tort law. As I explore in Part V of this Article, puffing speech presents an analogue to the externality problem most closely associated with tort law.[29] It is interesting, therefore, to observe as I do in this Part that courts' analysis of puffery is less satisfying in those areas of law that look more like "torts" than "contracts."[30]

A. THE PUFFERY DEFENSE IN FALSE-ADVERTISING CASES

Federal law[31] protects consumers from misleading advertising through Federal Trade Commission ("FTC") suits[32] and from private competitors' deceptive advertising claims through Section 43(a) of the Lanham Act.[33] For our purposes, the anti-deception standards created by these different regimes are the same.[34]

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recognized fact." RESTATEMENT (SECOND) OF TORTS § 539 cmt. c, subsec. 2 (1977). Cases that arise under the *Restatement* turn on an analysis of whether the allegedly puffed service was "calculated to deceive and . . . made with intent to deceive," and may be actionable even if otherwise nonactionable puffery. 9 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 32.26 (1992). One unique feature in misrepresentation cases is that the puffing question appears to sometimes go to the jury, instead of being resolved as a matter of law. *See, e.g.*, Angelo Broad., Inc. v. Satellite Music Network, Inc., 836 S.W.2d 726, 735 (Tex. App. 1992) (holding that it was error not to submit a "puffery" instruction to the jury in a fraud case where some claims were potentially puffing and not actionable misrepresentation).

29. *See infra* Part V (discussing puffery and persuasion).

30. Additional reasons for these particular areas of law include: variety in courts' application of puffing speech; availability of a sufficient universe of cases from which to draw conclusions; practical significance; and the evident need for clarification in the law (in the securities arena particularly).

31. For the purposes of this Article, I do not address "little FTC Acts" on a state-by-state basis. *See* Debra Burke & E. Malcolm Abel, II, *Franchising Fraud: The Continuing Need for Reform*, 40 AM. BUS. L.J. 355, 375 (2003) (noting that "[a]ll states have passed Deceptive Trade Practices Acts, ... [which] are patterned after the FTC's statutory authority"). I also put to one side industry self-regulation. The National Advertising Review Board sets the policies for the two main sources of advertising regulation: the National Advertising Division (NAD) and the Children's Advertising Unit (CAU). The primary purposes of self-regulation are to ensure that (1) advertising is truthful, accurate, and not misleading or deceptive, (2) all claims are adequately substantiated, and (3) there is compliance with federal, state, and local laws and regulations. *See generally* Jeffrey S. Edelstein, *Self-Regulation of Advertising: An Alternative to Litigation and Government Action*, 43 IDEA 509 (2003). The NAD reviews and corrects only national advertisements. Its review seems relatively confined (3,800 total cases, of which only five percent are referred to the FTC). *Id.* The CAU is responsible for monitoring and reviewing national advertising directed at children under twelve. *See generally* CARU SELF-REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING (7th ed. 2003), *available at* http://www.caru.org/guidelines/guidelines.pdf.

32. Wheeler-Lea Act, § 3, 52 Stat. 111 (1938). A full list of statutes enforced by the FTC can be found on its Web site at http://www.ftc.gov/ogc/stats.htm. Among the most important statutes are: The Federal Trade Commission Act**,** 15 U.S.C. §§ 41–58 (2000) (as amended) (empowering commission to prevent unfair or deceptive acts or practices affecting commerce); and The Magnuson Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. §§ 2301–2312 (2000) (authorizing the FTC to develop regulations for implied and express warranties).

33. 15 U.S.C. § 1125(a) (2000).

34. *See* Ivan Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1040–41 (1990) (discussing elements of the Lanham Act and FTC

The purpose of false-advertising law is to ensure that consumers receive accurate information about products and services that are being sold.[35] Through the media, advertisers provide information to consumers so that they can make meaningful choices and for that reason, misleading information can be dangerous to the consumer.[36] When goods are praised to the point of untruth, "the result is not informed, intelligent choice, but rather its [sic] perversion; there is no 'choice' when selection is a function of competing untruths, deceits, and misleading comparisons."[37] Thus, the law judges deception based upon advertisements that, on a whole, are likely to mislead the general public.[38]

The puffery defense in false-advertising cases protects accused defendant-speakers whose speech is not factual, i.e., is of a type capable of being falsified.[39] The question of falsifiability is one of law,[40] and courts and regulators routinely decide puffery problems by articulating a line between falsifiable and non-falsifiable speech. This position arises from the FTC's "Statement on Deception," which does not use data to determine when speech is falsifiable.[41] Instead, false-advertising law defines the puffery defense categorically: claims "not capable of measurement" that "consumers would not take seriously."[42] This position is based on several assumptions.

First, false-advertising authorities assume it is possible to distinguish factual from nonfactual speech by looking at the speech itself.[43]

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claims).

35. *See* Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 875 (1999) (offering the principal purposes of laws that restrict false advertising).

36. Earl W. Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1272 (1966).

37. *Id.* at 1270.

38. *See* Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849, 851 (1984) (analyzing the legal standards for deception).

39. Preston, *supra* note 34, at 1046. Finally, the claims must damage consumers or be likely to damage them. *Id.* at 1047–48.

40. Burns, *supra* note 35, at 867–69; *see also* Preston, *supra* note 34, at 1057–58 (discussing the lack of a need for substantiation for those claims regulators find to be puffery).

41. *See* FTC Policy Statement on Deception, Letter from James C. Miller, III, FTC Comm'r, to Representative John D. Dingell (Oct. 14, 1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm [hereinafter Statement on Deception].

42. *In re* Bristol-Myers Co., 102 F.T.C. 21, 321 (1983) (emphasis added).

43. This assumption has come under a significant amount of criticism by researchers who claim that it is not easy to distinguish speech conveying factual claims from speech that does not, and that much of the speech that the FTC refers to as puffery in fact *implies* facts, which themselves might be false. *See* Ivan L. Preston, *Researchers at the Federal Trade Commission—Peril and Promise*, *in* COMMUNICATION RESEARCHERS AND POLICY-MAKING 511, 524 (Sandra Braman ed., 2003) [hereinafter Preston, *Peril or Promise*] (arguing that the FTC's decision not to investigate puffery results from "institutional inertia," not methodological impossibility); Ivan L. Preston, *Puffery and Other "Loophole" Claims: How the Law's "Don't Ask, Don't Tell" Policy Condones Fraudulent Falsity in Advertising*, 18 J.L. & COM. 49, 57 (1998) [hereinafter Preston, *Loophole Claims*] (stating that the FTC views puffery as a "subcategory" of opinion statements that "convey[] no facts explicitly or impliedly and so cannot be deceptive"); Ivan L. Preston, *Regulatory Positions Toward Advertising Puffery of the Uniform Commercial Code and the Federal Trade Commission*, 16 J. PUB. POL'Y &

Second, the authorities assume "consumers acting reasonably" are unlikely to be deceived by speech-assertions that are not "capable of measurement."[44] As the FTC explained in its Statement on Deception, puffery is a subcategory of opinion statements that is unlikely to imply a statement of fact and that "ordinary consumers do not take seriously."[45] This particular assumption has led courts to focus on specificity as the key feature of the puffery defense, assuming that "consumer reliance will be induced by specific rather than general assertions."[46]

Third, the authorities assume that the speaker's scienter bears on the strength of a speaker's claim to immunity. For example, if the puffing speech helps to support a larger deceptive plan, the FTC grants that it might be actionable: "[s]tatements made for the purpose of deceiving prospective purchasers cannot properly be characterized as mere puffing."[47] This assumption embodies an underlying purpose of the federal false-advertising regime: to prevent savvy corporate actors from deliberately exploiting consumers' vulnerabilities.[48]

The first of these assumptions about factual versus nonfactual speech appears to cause the most problems in practice. Because neither courts nor regulators consider empirical evidence about which claims imply facts, their application of a nominally coherent doctrine creates a host of decisions in which relatively similar language receives different levels of protection. Almost every scholarly discussion of false-advertising puffery cases bemoans the doctrine's incoherent aspects.[49] There is similar uncertainty in advertising-trade journals about the contours of puffery doctrine.[50]

A few examples illustrate the confusion. Advil's claim that it, "like Tylenol," "doesn't upset . . . [the] stomach" was found not to be immune puffery because a court believed that consumers would have viewed the statements to be a factual comparison with other brands.[51] Similarly, a motor-oil company's claim to provide "longer engine life and better engine protection" was not held to be puffery.[52] By contrast, a puffery defense succeeded with respect to Bayer's statement that it

MKTG. 336, 337–38 (1997) [hereinafter Preston, *Regulatory Positions*] (criticizing the FTC for refusing to examine actual evidence of customer reaction to puffery as a part of its "definitional process").

44. Statement on Deception, *supra* note 41.

45. *Id.*

46. Tylka v. Gerber Prods. Co., No. 96 C 1647, 1999 WL 495126, at *6 (N.D. Ill. July 1, 1999) (summarizing courts' applications of the puffery defense in false-advertising cases).

47. *In re* Wilmington Chem. Corp., 69 F.T.C. 828, 865 (1966).

48. *See supra* notes 35–38 and accompanying text (discussing the purposes of false-advertising law).

49. *See generally, e.g.*, Robert Pitosfsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977) (describing various shifts in the ideology underlying advertising regulation); *see also supra* note 19 (noting the numerous questions and inconsistencies in puffery doctrine).

50. *See, e.g.*, Barbara Metcalf et al., *Identifying Misleading Advertising*, 8 J. CONSUMER RES. 119, 119 (1981) (explaining that "determining whether an ad is misleading continues to prove difficult and controversial").

51. McNeilab, Inc. v. Am. Home Prods. Corp., 675 F. Supp. 819, 822 (S.D.N.Y. 1987).

52. Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 953 (3d Cir. 1993).

made the "the world's best aspirin" that "works wonders."[53] And a videogame manufacturer escaped liability, despite claiming to have made "The Most Advanced Home Gaming System in the Universe."[54] The difference between these cases appears to rest on judges' different understandings of when speech implies facts. In the latter two cases, judges were simply unwilling to, or incapable of, "constructing" facts from puffing speech that consumers could have either believed or disbelieved.

Statements regarding nutritional benefits provide an interesting soufflé for puffery theorists. The claim that yogurt is "nature's perfect food" apparently may be falsified and is not puffery.[55] But, to enthusiasts' chagrin, Nestlé's boast that it sells the "very best chocolate" is a meaningless puff.[56] If, upon eating too much chocolate yogurt, one needed a diet, the makers of topical gel could be liable for claiming to "dramatically interfere[] with the process of converting calories to fat" and "inhibit[] the creation of new fat cells."[57] But, the makers of a weight-loss pill trumpeting the drug's ability to cause you to "Lose Weight Fast" would be protected.[58]

Courts have even found puffery in statements that technically asserted facts when those facts were thought to be particularly unbelievable. Thus, when Colt defended the statement that its "Model P" handgun was the "gun that won the west" by arguing that the claim was unbelievable, a court accepted this puffery defense. The court helpfully explained that "an inanimate object, such as a gun, cannot literally win anything such as a war or the drive to colonize the western region of this country."[59]

That courts apply the puffery defense inconsistently on similar facts is obviously problematic. Not only does it create uncertainty for speakers, but it also raises rule-of-law objections to the entire regime of fraud regulation.[60] Moreover, if courts wish to use the law of fraud to distinguish good from bad consumption-inducing speech, the inability to coherently draw lines is troublesome. These concerns are relevant for other areas of law discussed below.

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53. *In re* Sterling Drug, Inc., 102 F.T.C. 395, § II.A.1 (1983).

54. Atari Corp. v. 3DO Co., No. C 94-20298 RMW (EAI), 1994 WL 723601, at *1 (N.D. Cal. May 16, 1994).

55. *In re* Dannon Milk Prods., Inc., 61 F.T.C. 840, 840 (1962).

56. *See generally* PRESTON, *supra* note 6, at 134–36 (collecting cases).

57. Memorandum in Opposition to Motion to Compel at pt. B, *In re* Basic Research, No. 9318, 2004 WL 3142854 (F.T.C. Nov. 24, 2004).

58. Thompson Med. Co. v. Ciba-Geigy Corp., 643 F. Supp. 1190, 1199–1200 (S.D.N.Y. 1986) (holding that statements were puffery, even though package insert material suggested that consumers would lose up to 1.2 pounds per week).

59. New Colt Holding Corp. v. RJG Holdings of Fla., Inc., 312 F. Supp. 2d 195, 235 (D. Conn. 2004) (citations and internal footnotes omitted) ("Defendants argue that it is not true that Plaintiffs' revolvers won the west and that the Winchester 73 rifle is the gun that won the west.").

60. For a lucid discussion of "rule of law" arguments, see Richard K. Greenstein, *Why the Rule of Law*, 66 LA. L. REV. 63, 69–75 (2005); but see Kaimipono D. Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1131–33 (critiquing the application of rule-of-law critiques as an aspect of law-reform scholarship).

B. THE PUFFERY DEFENSE IN SECURITIES CASES

Under the federal-securities-regulation framework, private and public plaintiffs seeking to recover for fraud must prove by a substantial likelihood that a suspect corporate disclosure omitted (or misrepresented) "material" facts.[61] An "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[62] Materiality "depends on the significance the reasonable investor would place on the withheld or misrepresented information."[63]

The puffery defense in the securities context exists in the interpretative space created by this vague standard.[64] In recent years, and despite hostility from scholars, defendants have been increasingly successful in obtaining dismissals based on puffery arguments.[65] Formally, puffery is a "vague statement of corporate optimism"[66] that is said to be "'so obviously unimportant to a reasonable investor that reasonable minds could not differ.'"[67] But a close reading of the puffery cases discloses that not all defendants' arguments that their optimism was harmless are equally successful. It turns out that courts view optimism about the present with considerably more skepticism than optimism about the future.[68]

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61. *See* LOUIS LOSS & JOEL SELIGMAN, IV SECURITIES REGULATION 2074–75 (3d ed. rev. 2000) (stating that the materiality precedent is interchangeable in federal-securities laws); *see also* Yvonne Ching Ling Lee, *The Elusive Concept of "Materiality" Under U.S. Federal Securities Laws*, 40 WILLAMETTE L. REV. 661, 663 (2004) (describing the close relationship between SEC materiality standard and Supreme Court caselaw).

62. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976) (adopting this rule for 14a–9 proxy actions); *see also* Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988) (adopting expressly "the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b–5 context").

63. *Basic, Inc.*, 485 U.S. at 240; *see also* David A. Hoffman, *The "Duty" to Be a Rational Shareholder*, 90 MINN. L. REV. 537, 540–41 (2006) (summarizing the law of immateriality).

64. Gregory Roussel, in 1998, suggested three ways that puffery might appear in materiality analyses: a "vagueness standard" by which "facially vague" disclosures would be protected; a "guarantee" standard that protected all statements except those that warranted future performance; and a "contextual" standard that looks to the circumstances surrounding disclosure to determine materiality. R. Gregory Roussel, Note, *Securities Fraud or Mere Puffery: Refinement of the Corporate Puffery Defense*, 51 VAND. L. REV. 1049, 1057–64 (1998). The passage of time has tended to blur the distinctions between these standards, although it is still true that jurisdictional variance is—and will always be—an important factor in explaining case outcomes.

65. *See* LOSS & SELIGMAN, *supra* note 61, at VII, 3424 ("[A]las, however, the puffing concept in the securities context, which for decades had all but gone the way of the dodo, has recently experienced a revival."); Hoffman, *supra* note 63, at 583 (using statistical analysis of 472 securities-law decisions and concluding that puffery has been used more over time in New York federal courts' published opinions); *see also* O'Hare, *supra* note 9, at 1709–11 (examining a selection of cases and suggesting a rise in the application of puffery).

66. *See* O'Hare, *supra* note 9, at 1697.

67. Ganino v. Citizens Utils. Co., 228 F.3d 154, 162 (2d Cir. 2000) (quoting Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985)).

68. *Cf.* O'Hare, *supra* note 9, at 1737–38 (suggesting that vague, forward-looking statements *should* be more immunized in the materiality doctrine than vague statements about present conditions).

Puffery finds its strongest expression in the context of forward-looking statements.[69] Until 1979, the Securities and Exchange Commission generally prohibited forward-looking statements by companies it regulated.[70] Once that prohibition was relaxed, some questioned whether forward-looking statements could be actionable, because such projections might be seen as non-fraudulent opinions.[71] The Supreme Court, in *Virginia Bankshares, Inc. v. Sandberg*,[72] put some doubts to rest with respect to opinions regarding current facts. Such opinions "rest on a factual basis that justifies them as accurate, the absence of which renders them misleading."[73]

Two years later, the Fourth Circuit, in *Raab v. General Physics Corp.*,[74] considered whether opinions about the future could similarly give rise to liability. In this first significant application of the puffery defense after *Virginia Bankshares*, the court evaluated two disclosures: (1) that certain future corporate earnings would be "in line with analysts' current projections"; and (2) that "an expected annual growth rate of 10% to 30% over the next several years" with resulting "growth and success" would continue "well into the future."[75] Despite the allegation that these projections were intentionally and falsely made, the Fourth Circuit held they were immaterial puffery as a matter of law.

The court justified this decision on two grounds. *First*, the court stated that the "market price of a share is not inflated by vague statements predicting growth . . . . No reasonable investor would rely on these statements . . . ."[76] The court distinguished these kinds of predictions from "guarantees" that it said might be material. The court's descriptive claim about investors' reliance was unadorned by empirical evidence, such as non-movement in General Physics' stock price after the disclosures.

Second, the court advanced a policy argument:

> [P]redictions of future growth . . . will almost always prove to be wrong in hindsight . . . . Imposing liability would put companies in a whipsaw,

69. *See* No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp., 320 F.3d 920, 936 (9th Cir. 2003) (stating that a "'forward-looking statement' is any statement regarding (1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions 'underlying or related to' any of these issues").

70. Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362, [1972–1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,211, at 82,666 (Feb. 2, 1973) ("It has been the longstanding policy generally not to permit projections to be included in prospectuses and reports filed with the Commission."). The Rule changed to permit forward-looking statements through safe-harbor provisions. *See* Roussel, *supra* note 64, at 1055–56 and accompanying notes.

71. *See generally* Bruce A. Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 MD. L. REV. 1114, 1158–72 (1987) (discussing different judicial approaches).

72. 501 U.S. 1083 (1991).

73. *Id.* at 1093.

74. 4 F.3d 286 (4th Cir. 1993).

75. *Id.* at 288–91.

76. *Id.* at 289.

> with a lawsuit almost a certainty. Such liability would deter companies from discussing their prospects, and the securities markets would be *deprived of the information those predictions offer*.[77]

The *Raab* court ignored the dissonance between an explanation that defined forward-looking puffery as speech that reasonable investors would ignore, and an explanation that depended on the informational value of such puffery to the securities markets. Nevertheless, following *Raab*,[78] courts generally held that forward-looking puffery is only actionable if it creates a "substantial certainty" about the company's predicted course or if the statement is made with "actual knowledge" that it is false.[79] The end result is a doctrine that is quite protective of

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77. *Id.* at 290 (emphasis added). Notably, this precise problem was foreseen by Justice Powell, in a 1975 concurring opinion:

> The stated purpose of the 1933 Act was '[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce . . . .' See preamble to Act, 48 Stat. 74. *The evil addressed was the tendency of the seller to exaggerate, to 'puff,' and sometimes fraudulently to overstate the prospects and earning capabilities of the issuing corporation.* The decade of the 1920's was marked by financings in which the buying public was oversold, and often misled, by the buoyant optimism of issuers and underwriters. The 1933 Act was intended to compel moderation and caution in prospectuses, and this is precisely the way that Act has been administered by the SEC for more than 40 years. Precise factual accuracy with respect to a corporate enterprise is frequently impossible, except with respect to hard facts. The outcome of pending litigation, the effect of relatively new legislation, the possible enactment of adverse legislation, the cost of projected construction or of entering new markets, the expenditures needed to meet changing environmental regulations, the likelihood and effect of new competition or of new technology, and many similar matters of potential relevancy must be addressed in registration statements and prospectuses. In administering the 1933 Act, the SEC traditionally and consistently has encouraged and often required offerors to take conservative postures in prospectuses, especially with respect to judgmental and possibly unfavorable matters. If a different philosophy now were to be read into the 1934 Act, inviting litigation for arguably misleading understatement as well as for overstatement of the issuer's prospects, the hazard of 'going to market'—already not inconsequential—would be immeasurably increased.

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 759 n.4 (1975) (Powell, J., concurring) (emphasis added). *Blue Chip Stamps* was a case involving the reverse-puffery problem, where an issuer had allegedly been unduly pessimistic about its prospects to certain protected potential shareholders to allow for a more lucrative public offering. The reverse-puffery problem—corporate depression—rarely invites litigation. However, in an interesting, forthcoming Article, Andrew Ward and Lyle Brenner have found that "acknowledging a negative quality led perceivers to evaluate that quality less negatively than when no acknowledgement was provided." *See* Andrew Ward & Lyle Brenner, *Accentuate the Negative: The Positive Effects of Negative Acknowledgement*, 19 PSYCHOL. SCI. (forthcoming 2006) (on file with the Iowa Law Review). The relationship between reverse puffery and positive puffery, and the explanation for their similar psychological effects, is beyond the scope of this Article.

78. *See, e.g.*, Parnes v. Gateway 2000 Inc., 122 F.3d 539, 546 (8th Cir. 1997). In *Parnes*, the plaintiffs alleged that they had traded based on statements in Gateway's prospectus predicting "significant growth" in the company's earnings, when those statements were intentionally false. The court described these statements as "obvious hyperbole that no reasonable investor would rely upon," because "the market price of a share is not inflated by vague statements predicting growth." *Id.* at 547 (citing Hillson Partners Ltd. P'ship v. Adage, Inc., 42 F.3d 204, 211, 213 (4th Cir. 1994)).

79. *See, e.g.*, *In re* Apple Computer, Inc., 127 F. App'x 296, 300 (9th Cir. 2005) (stating that a

vague but intentionally false optimism about the future.[80] Most reported appellate decisions in this arena favor defendants' arguments.[81]

The few decisions denying the puffery defense for forward-looking statements focus on the intersection between scienter and materiality.[82] Statements

forecast is actionably false if "'there is no reasonable basis for the belief'" or "'the speaker is aware of undisclosed facts tending seriously to undermine the statements' accuracy'" (quoting Prounz v Miller, 102 F.3d 1478, 1487 (9th Cir. 1996))); San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 811 (2d Cir. 1996) (acknowledging that "even the most positive statements by Philip Morris representatives at that time consisted of relatively subdued general comments" and that "such puffery is not actionable").

80. The Private Securities Litigation Reform Act of 1995, H.R. 1058, Pub. L. No. 104-67, 104th Cong. (1995), provides additional safeguards for predictions under its "safe harbor" provision. 15 U.S.C. § 77z-2(c) (2000). The provision protects forward-looking statements that are (1) so-identified and accompanied by cautions; or (2) are themselves immaterial. *See id.* § 77z-2(c)(1)(A). Thus, as one author notes, the safe-harbor provision creates a space for judges to continue to apply precisely the same forward-looking materiality doctrine that had sprung up in advance of the Act's passage. *See* Roussel, *supra* note 64, at 1082–83.

81. *See, e.g.*, Southland Sec. Corp. v. Inspire Ins. Solutions, Inc., 365 F.3d 353, 372 (5th Cir. 2004) (dismissing a claim in part on puffery grounds based on "positive statements about the company's competitive strengths, experienced management, and future prospects"); Rombach v. Chang, 355 F.3d 164, 172–73 (2d Cir. 2004) (holding that misstating a company's growth, such as a statement that the company was "'optimistic'" about future performance and was "'working hard to complete [construction of entertainment facility],'" was puffery (quoting a March 1999 press release by the company)); Rosenzweig v. Azurix Corp., 332 F.3d 854, 860, 869 (5th Cir. 2003) (holding that statements, including one stating that a contract would "establish[] the company as a major participant in the Argentine water market" when the defendant did not have the financial capacity to become such a player, were immaterial puffery because, in part, "Azuri was under no duty to cast its business in a pejorative, rather than a positive, light"); *In re* Advanta Corp. Sec. Litig., 180 F.3d 525, 537–38 (3d Cir. 1999) (holding that statements expressing optimism such as "'prospects with great potential for profitability,'" "'superior cost structure,'" an "'experienced management team,'" and "'our credit quality remained excellent'" were immaterial puffery even where the company was aware of facts tending to suggest that the corporation's financial situation was about to turn for the worse (quoting statements made by the company)); Parnes v. Gateway 2000, Inc., 122 F.3d 539, 547 (8th Cir. 1997) (holding that "Gateway's prospectus of "'significant growth'" was puffery (quoting the plaintiff's complaint)); Grossman v. Novell, Inc., 120 F.3d 1112, 1121–22 (10th Cir. 1997) (holding that statements such as a claim of "'substantial success'" in post-merger integration, that the merger was "moving 'faster than we thought,'" and that the company "'expects that network applications will quickly reshape customer expectations'" were "the sort of soft, puffing statements, incapable of objective verification," that should be dismissed as puffery); Lasker v. N.Y. State Elec. & Gas Corp., 85 F.3d 55, 57, 59 (2d Cir. 1996) (finding puffery where a company stated in its annual report that its proposed diversification into marketing of software related to the natural-gas industry would "lead to continued prosperity"); Searls v. Glasser, 64 F.3d 1061, 1066–67 (7th Cir. 1995) (holding that predictions that further gains would be "high" were "best characterized as loose predictions" that lacked sufficient definiteness to constitute a material representation); Harman v. Harper, Nos. 86-2916, 87-1531, 1990 WL 121073, at *12 (9th Cir. Aug. 21, 1990) (finding puffery where a business made statements about property values and future events).

82. *See, e.g.*, Dunn v. Borta, 369 F.3d 421, 431 (4th Cir. 2004) (finding that statements that the company planned to introduce a product with specific characteristics were "not simply sales pitches"); Helwig v. Vencor, Inc., 251 F.3d 540, 555–56 (6th Cir. 2001) (en banc) (finding that statements that Vencor was "comfortable" with earning projections were "material reassurances of continued good fortune" and could not be determined to be immaterial as a matter of law); Casella v. Webb, 883 F.2d 805, 808 (9th Cir. 1989) (finding that a statement that an investment would be a "sure thing" was not

about current conditions are treated quite differently.[83] Although courts will sometimes accept the puffery defense for disclosures evincing vague optimism about present facts,[84] especially where the optimism concerns the corporation's own products,[85] courts will make the finding less frequently in the future-prospects context.[86]

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puffery when considered in the context of "misrepresentations of fact as to the future profitability of [and investments in] [the company] and the tax benefits that [it would produce]").

83. For an early discussion of vague puffing regarding present facts, see O'Hare, *supra* note 9, at 1073–74.

84. *See, e.g.*, *Rosenzweig*, 332 F.3d at 869–70 (holding that statements such as "our fundamentals are strong" and "[t]he pipeline of private transactions and announced public tenders that we are pursuing remains strong" were "obviously immaterial puffery"); Freedman v. Value Health, Inc., 34 F. App'x 408, 411 (2d Cir. 2002) (finding that press-release statements that a corporation had reviewed the target company and reported that it had a "thriving business" were "at worst non-actionable puffery"); *cf.* Longman v. Food Lion, Inc., 197 F.3d 675, 684 & n.2 (4th Cir. 1999) (holding that statements that "Food Lion is one of the best-managed high growth operators in the food retailing industry" were "immaterial puffery"); Raab v. Gen. Physics Corp., 4 F.3d 286, 290 (4th Cir. 1993) (distinguishing present from future statements of opinion); *Searls*, 64 F.3d at 1066 (finding that a description of the company as "recession-resistant" was "too vague" to be material and was a statement that had a reasonable basis in fact); *In re* Royal Appliance Sec. Litig., No. 94-3284, 1995 WL 490131, at *3 (6th Cir. Aug. 15, 1995) (ruling that misrepresentation claims based on statements such as "'Royal [is] on track to have a terrific year' were properly dismissed").

85. *See* City of Monroe Employees Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 670–71 (6th Cir. 2005) (holding that statements such as a claim that the corporation sold the "best tires in the world," that it had "global consistent quality," that its sales success was due to "high regard among automakers for [its] strengths in product quality," and that "[its] experience with Radial ATX indicates high consumer satisfaction with the quality and reliability of these tires" were "too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision"); *see also In re* Ford Motor Co. Sec. Litig., 381 F.3d 563, 570 (6th Cir. 2004) (holding that similar statements on a similar topic were "either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information"). The *Ford* court noted that "[a]ll public companies praise their products and their objectives. Courts everywhere 'have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace . . . .'" *Id.* at 570–71 (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1217 (1st Cir. 1996)).

86. For example, in *Beloit Corp. v. Emett & Chandler Cos.*, No. 90-55154, 1991 WL 153459, at *3 (9th Cir. Aug. 14, 1991), the court considered the defendant's argument that a statement that existing financial reserves were "very adequate" was puffery. The court, notably, treated the statement as a description of the present, although it could have been conceived of merely as a prediction about the future adequacy of the reserves in light of economic conditions not then extant. Although the statement standing alone was "of questionable import," the court did not uphold its dismissal. Instead, it looked to the context of the disclosure, notably other alleged misrepresentations of a more definite character. The court held that present-tense speech should be evaluated to see if it is an "integral part" of a large scheme to "induce reliance." *Id.*; *see also Dunn*, 369 F.3d at 431 (finding that a seller's allegations of specific sales figures, when they were not in negotiations with major consumers, were not mere sales talk but rather "can be proven true or false"); Novak v. Kasaks, 216 F.3d 300, 315 (2d Cir. 1999) (holding that statements that a company's inventory was "in good shape" or "under control," in the face of alleged knowledge that these statements were untrue, were "plainly false and misleading" and not puffery); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 201 (3d Cir. 1990) (affirming a district-court holding, as not clearly erroneous, that claims that a brokerage firm's "research department" was extensive and well trained, when, in fact, the research department contained one individual who only

This synthesis suggests that the puffery defense in the securities context operates on two tracks. Puffing about the future is almost always immune because courts decide that such disclosures should not affect consumption. By contrast, puffing about current conditions is analyzed closely to determine its effect on actual purchasing decisions.

C. THE PUFFERY DEFENSE IN UCC WARRANTY CASES

Uniform Commercial Code § 2-313 codifies the creation of warranties during the sale of goods.[87] Such warranties occur when (1) sellers affirm a fact or promise, that (2) relates to the goods being sold, and (3) becomes part of the basis of the bargain between the parties.[88] However, "an affirmation merely of the value of the goods, or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[89] Comments to the Code acknowledge that some opinion statements will be treated as warranties;[90] the Code directs courts to look to the circumstances of selling statements, asking if the buyer was reasonable in believing the statement and relying on it.[91] Courts deem statements that could not induce reasonable reliance to be nonactionable puffery.[92]

In the 1995 version of their treatise, White and Summers noted that:

Only a foolish lawyer will be quick to label a seller's statement as puffs

"researched" securities the firm had underwritten, were not puffery). A good example of the rigor that courts use to evaluate present-tense puffery claims is *Shaw*, 82 F.3d at 1212–14 (considering a "[statement that the] financial reserve . . . is adequate to cover presently planned restructuring actions" and concluding that the statement was neither too vague in itself nor sufficiently surrounded by specific disclaiming caution to escape liability as a matter of law).

87. The UCC is continually undergoing revision. Article 2, in particular, has endured substantial debate, mainly because advances in technology have changed the way that contracts are formed and completed. *See generally* Thomas L. Lockhart & Patrick A. Miles, Jr., *Computer Law: No More Pulp Fiction: Proposed UCC Article 2 Revisions Embrace Paperless Electronic Transactions*, 75 MICH. B.J. 516 (1996). In 2002 and 2003, Amended Article 2 was passed by the American Law Institute and then by the National Conference of Commissioners on Uniform State Laws, but it is unlikely that the states will adopt this amendment any time soon. *See* James J. White, *Revised Article 1 and the Warranty Provisions of Amended Article 2*, 3 DEPAUL BUS. & COM. L.J. 519, 521 (2005) (discussing the revisions to Article 2 and stating that "it will be a long time before any substantial part gets adopted in any state").

88. U.C.C. § 2-313 (1977); *see also* Royal Bus. Mach. v. Lorraine, 633 F.2d 34, 41 (7th Cir. 1980) (stating that "when each of these three elements is present, a warranty is created that the goods shall conform to the affirmation of fact or to the promise").

89. U.C.C. § 2-313(2).

90. For example, the Code will treat such statements as warranties when the statements are part of the basis of the bargain or when the seller is holding himself out as an expert. *See* U.C.C. § 2-313, cmt. 8.

91. *See* Honigwachs, *supra* note 13, at 163 (using examples of warranty cases that demonstrate that judges rule differently on a puffery determination based on factors other than the claim at issue, due to the leeway judges have in interpreting the provisions of U.C.C. § 2-313).

92. *See* Alexander Simonson & Morris B. Holbrook, *Permissible Puffery Versus Actionable Warranty in Advertising and Salestalk: An Empirical Investigation*, 12(2) J. PUB. POL'Y & MKTG. 216, 218 (1993) (describing the UCC approach as a "case-by-case" method, mixing objective and subjective accounts of appropriate buyer behavior).

> or not puffs, and only a reckless one will label a seller's statement at all without carefully examining such factors as the nature of the defect (was it obvious or not) and the buyer's and seller's relative knowledge.[93]

Simonson and Holbrook, based on a dataset of opinions from 1900 through 1993 examining whether a communication was a puff or a warranty, confirmed this intuition by applying a statistical-regression model.[94] They concluded that buyer and seller expertise significantly affects courts' willingness to find a warranty. Expert sellers were less likely to successfully argue that their speech was mere puffery; conversely, expert buyers faced increased judicial skepticism in attempting to assert warranty claims.[95] Buyers with opportunities to inspect goods, when inspection would have helped to ascertain the goods' characteristics, were less likely to prevail in their warranty claims.[96] Purchasers of goods were more successful at defeating a puffery defense than purchasers of services.[97] Makers of new goods had more latitude to puff without sanction than those of established products.[98] Overall, the content of the speech alone was a poor predictor of its immunity. Rather, "the determination of permissibility [had to be] made in connection with the situational circumstances of a case."[99]

Independent examination of warranty cases supports Simonson and Holbrook's empirical study. Judges indeed hesitate to find warranties based on statements about a product's general qualities or condition in the absence of specific false facts.[100] For example, in *Guess v. Lorenz*, a statement that "the car is in good shape" was too general and thus not an express warranty of the car's condition.[101]

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93. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 336 (4th ed. 1995).

94. Simonson & Holbrook, *supra* note 92, at 221 (describing their methodology). Simonson and Holbrook's study faces potential selection-bias problems that they discount, which may make their results significantly less reliable as a predictor of what courts are actually doing in response to warranty claims. *See generally* Hoffman, *supra* note 63, at 610–11 (discussing problems of bias in using judicial opinions as a proxy for judicial decision making).

95. Simonson & Holbrook, *supra* note 92, at 225.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 226.

100. *See* Young & Cooper, Inc. v. Vestring, 521 P.2d 281, 290 (Kan. 1974) (stating that "mere expressions of opinion, belief, judgment, or estimate by a dealer in sales talk" are not warranties).

101. 612 S.W.2d 831, 833 (Mo. Ct. App. 1981); *see also* Hubbard v. Gen. Motors Corp., No. 95 Civ. 4362, 1996 WL 274018, at *7 (S.D.N.Y. 1996) (holding that statements describing Suburbans, such as "like a rock," "popular," and "the most dependable, long-lasting trucks on the planet" do not create express warranties because they are generalized and exaggerated claims upon which a consumer could not reasonably rely); Web Press Servs. Corp. v. New London Motors, Inc., 525 A.2d 57, 62 (Conn. 1987) (holding that statements to the effect that a motor vehicle was "excellent" and in "mint" condition and that an automobile was in "very good" condition were general and did not rise to the level of an express warranty, and were thus examples of puffing); Serbalik v. General Motors Corp., 667 N.Y.S.2d 503, 504 (N.Y. App. Div. 1998) (determining that a statement that an automobile was "of high quality" was "nothing more than innocent 'puffery'"); Scaringe v. Holstein, 477 N.Y.S.2d 903, 904 (N.Y. App. Div. 1984) (finding that the defendant's statement in an advertisement that a car was in

On the other hand, opinions coupled with representations of fact that are "susceptible of exact knowledge" do create warranties.[102] For example, in *Wiseman v. Wolfe's Terre Haute Auto Auction, Inc.*, the seller's repeated statement that his truck was "road ready" was held to be an express warranty even though the seller contended that he had merely expressed his own opinion.[103] In so holding, the court looked to *Kemp v. Mays*, which held that a seller's statement that "there is no hog cholera in the country that I know of, and the pigs are all right" amounted to an express warranty about hog quality.[104]

Despite the supposed objectivity of the warranty test ("reasonable reliance" and specific, factually intensive, promises), much of the courts' analysis is based on subjective determinations, such as the plaintiff's vulnerability.[105] "[J]udgmentally impaired person[s]" are given greater protection, especially where speakers have specialized experience and extensive knowledge about their products.[106] For example, in *Roth v. Ray-Stel's Hair Stylists, Inc.*, a woman received a warranty, and not a puff, when her hair bleaching experience left her with "a considerable reduction in the quantity and attractiveness of her hair."[107] After the hairdresser's testimony that he had read the box, relied on it, and

"excellent condition" was "puffery"). In another case, the plaintiff alleged that the defendants expressly warranted that their bungee cord was "a good, strong, top notch American-made product," because "Made in the USA" and "Premium Quality" labels appeared on the outside of a cord's package, but that the warranty was breached when a rebounding cord hit plaintiff in the eye. Anderson v. Bungee Int'l Mfg. Corp., 44 F. Supp. 2d 534, 540–41 (S.D.N.Y. 1999). The court determined that the statements on the package did not constitute an express warranty because they were not descriptions of particular characteristics of the goods. *Id.* at 541.

102. *Young & Cooper, Inc.*, 521 P.2d at 290; *see also* Teter v. Shultz, 39 N.E.2d 802, 804 (Ind. Ct. App. 1942) (holding that a seller's statement that dairy cows would give six gallons of milk per day was an "affirmation of fact by the seller relating to the goods"); Hawkins Constr. Co. v. Matthews Co., Inc., 209 N.W.2d 643, 654–55 (Neb. 1973) (holding that a statement that a piece of equipment was "designed to safely carry working loads up to 20,000 pounds per panel" constituted an express warranty because it concerned specific performance capabilities (internal quotation marks omitted)).

103. Wiseman v. Wolfe's Terre Haute Auto Auction, Inc., 459 N.E.2d 736, 737–38 (Ind. Ct. App. 1984).

104. Kemp v. Mays, 127 N.E. 156, 156 (Ind. Ct. App. 1920) (noting the rule that "[a] direct and positive affirmation that an animal is sound amounts to a warranty of soundness").

105. *See* Goldwater v. Ollie's Garage, No. 357372, 1998 WL 83144, at *4 (Conn. Super. Ct. Feb. 18, 1998) (stating that "although 'oral statements by used-car salesmen are notoriously unreliable,' the vulnerability of the buyer is an important factor even in used-car cases" (quoting WHITE & SUMMERS, *supra* note 93, § 9-4, at 488–89); Wedding v. Duncan, 220 S.W.2d 564, 567 (Ky. 1949) (noting that the test is "whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment").

106. *Goldwater*, 1998 WL 83144, at *1.

107. Roth v. Ray-Stel's Hair Stylists, Inc., 470 N.E.2d 137, 138 (Mass. App. Ct. 1984). The box contained the following words: "Doesn't creep or swell. Stay-put consistency. Applies Easily. Consistency equal to and in some cases better than competitive bleaches. Gentle Blond does not run or creep, swell or puff. Stays where it is put for an easy application." *Id.* The hairdresser testified that after using the product on plaintiff's hair, "the product did swell rapidly and that, in doing so, it very quickly caused the damage to the hair." *Id.* One cannot help but admire the court's forbearing from making a number of obvious jokes about this hair-raising problem.

recommended its use to the plaintiff, the court stated that the jury was justified in finding that the plaintiff was the type of person that defendant manufacturer "might reasonably have expected to . . . be affected by the goods."[108] Courts thus focus on the actual bargaining position of both parties: this relational approach provides less protection for puffing speech than in the market contexts discussed in the previous parts.

D. THE PUFFERY DEFENSE IN PROMISSORY ESTOPPEL CASES

As most students learn in the first-year contracts course, promissory estoppel fills the gap between contract and tort law, enforcing promises that contract law does not normally countenance.[109] Enforcement requires an "actual, clear"[110] promise of sufficient definiteness to induce reasonable reliance.[111] The puffery defense is a response to both the "promise" and the "reasonable reliance" components of the test.[112]

As in the warranty context, a statement's specificity is the jumping-off point for most analyses of puffery defenses. Thus, when a truck maker sued a foreign steel manufacturer for alleged defects in a new type of steel, the court rejected a puffery defense regarding "fact-specific and highly technical" promises, such as "[the steel] could be welded without preheating for joints up to 50 mm thick."[113]

More commonly, however, courts dismiss promissory estoppel claims based on puffery defenses. For example, a school district told a teacher that there was "no problem with her teaching . . . the following year" and "everything looked fine for her rehire." Notwithstanding the teacher's reliance, the promises were neither "sufficiently promissory nor sufficiently definite" to create liability; they were puffery.[114]

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108. *Id.* at 139; *see also* Barton v. Am. Dodge, Inc., 194 A.2d 720, 722 (Conn. Cir. Ct. 1963) (finding that the buyer was a "young man with little business experience" relevant to determining the existence of a warranty).

109. The elements of promissory estoppel are: (1) a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee; (2) that does in fact induce such reliance; (3) the presence of injustice absent enforcement. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

110. Ypsilanti v. Gen. Motors Corp., 506 N.W.2d 556, 559 (Mich. Ct. App. 1993).

111. Garwood Packaging, Inc. v. Allen & Co., 378 F.3d 698, 702 (7th Cir. 2004).

112. *See, e.g.*, All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 868 (7th Cir. 1999) (citing Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275 (Wis. 1965)).

113. Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 681 (N.D. Ill. 2005).

114. D'Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch., 520 A.2d 217, 221 (Conn. 1987); *see also* Heidi Ott A.G. v. Target Corp., 153 F. Supp. 2d 1055, 1076–77 (D. Minn. 2001) (holding that a promise to "aggressively promote and advertise" Ott's dolls was not sufficiently clear and definite enough to support a claim of promissory estoppel). Similarly, in *Shore v. Motorola Inc.*, the defendant advertised to recruit "best-in-class" experts to contribute articles for publication. The plaintiff produced articles according to the defendant's criteria, but those articles were never approved for publication. The court determined that the defendant's recruitment literature did not establish an express and unconditional promise to publish the plaintiff's works, but rather Motorola's call for authors "merely employed puffery" and stated "aspirations for a novel and grand project" and therefore were not promises that could constitute a contract. Shore v. Motorola Inc., No. 98-4227, 2000 WL 51143, at *3

Even if the promisee relied on the promise, the promise must be one that the promisor should reasonably anticipate will cause the promisee to act or to forbear.[115] A paradigmatic case is *Garwood Packaging, Inc. v. Allen & Co.*, where the plaintiffs alleged that the defendant, an investment company, told them its commitment was unconditional and that the company would salvage plaintiff's failing business "come hell or high water."[116] The court determined that whether reliance is reasonable depends upon the "knowledge that the promisee brings to the table."[117] Plaintiff "*had* to know that Martin could not mean *literally* that the deal would go through 'come hell or high water,' since if Satan or a tsunami obliterated Ohio that would kill the deal."[118] Because the plaintiff was an experienced businessman, not "blinded by optimism or desperation," he could not have reasonably understood the defendants' statements to be serious promises rather than mere expressions of optimism.[119]

Similarly, in *Ypsilanti v. General Motors Corp.*, the Michigan Court of Appeals found that General Motors' statement that given "favorable market demand," General Motors would "continue production and maintain continuous employment"[120] was mere "hyperbole and puffery,"[121] not the type of promise on which reasonable individuals rely. The court held further that defendant's statements were inconsequential expressions of optimism and hopeful expectations to keep a manufacturing plant open, i.e., speech one should "reasonably expect" from a company hoping to take advantage of tax abatements, but should not take seriously.[122]

E. SYNTHESIS OF PUFFERY DOCTRINE

It is not surprising, reading these cases side by side, that some scholars have concluded that the puffery defense is a lawless enterprise, a classic example of an

(7th Cir. Jan. 18, 2000) (stating that "[t]he parties had no prior dealings, and the record contains nothing about the customary publication schedule of a world-class encyclopedia of statistical tools").

115. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

116. *Garwood Packaging, Inc.,* 378 F.3d at 704.

117. *Id.*

118. *Id*.

119. *Id.*; *see also* Chesus v. Watts, 967 S.W.2d 97, 112 (Mo. Ct. App. 1998) (holding that "[n]one of the Watts' promises were speculative of what might happen, nor did the promises require predicting events over which he had no control . . . . [n]or could Watts' promises be deemed as 'mere puffery'").

120. Ypsilanti v. Gen. Motors Corp., 506 N.W.2d 556, 561 (Mich. Ct. App. 1993) (emphasis omitted).

121. *Id.* at 559.

122. *Id.* The court also noted that many people acknowledged during the public hearings that General Motors was not making any promises. For example, one man stated: "I have eighteen years in and I'd like to see them stay here twelve years so I can retire, but they are not promising anything." *Id.* at 562.

"I know it when I see it" jurisprudence.[123] Moreover, the reader might fairly suspect that courts are using the same name (puffery) to describe unique conclusions in lawsuits across starkly different legal regimes. After all, what does market-wide fraud protection have to do with the individualized inquiry of promissory estoppel? What does the sale of securities have to do with the sale of trucks, pigs, and hair products?

On the other hand, legal authorities in all these cases are confronting a similar problem. To appreciate the core similarity, it may help to model the problem abstractly. Consumer C alleges that she only purchased product or stock X because seller S said speech P. Insofar as preferences are stable and self-maximizing, a consumer alleging that she acted where she would not have absent speech P is claiming that P distorted efficient consumption.

Now, courts must decide how to evaluate C's claim of distortion. C's statement is not itself decisive. After all, C may simply regret her choice or may misremember the reasons for buying X. Or perhaps S was simply offering an opinion about X that implied no facts (either true or false). Liability for P under these circumstances would be an unbounded principle, suggesting immediate constitutional and economic objections.[124] And, even if P itself is false, or implies false facts, punishing all false speech would potentially chill true speech.

In an ideal world, courts would have a sophisticated set of fact-finding devices on hand to distinguish actionable from immune speech P.[125] Most importantly, the court would want a time machine to allow it to travel back to the moment that C decided to buy X.[126] Once there, the court would run three experiments. In the first, the court would apply a probe to C's mind and determine if speech P was a decisive factor in the decision to buy X. Second, the court would run a survey of all of the potential hearers of P to determine what facts it conveyed, and then determine whether those facts were false. Finally, the court would apply a sophisticated lie detector to S, asking if S *intended* to induce C to purchase X under circumstances that a fully informed C would have declined to buy.[127]

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123. Leighton, *supra* note 19, at 618 ("Frequently, puffery is defined both by what it is and what it is not . . . . In some cases, puffery appears to be an I-know-it-when-I-see-it phenomenon to which the closest of the many broad definitions of the concept is then applied or extended after the fact to cover the claim.").

124. I will elaborate on these objections in the next two parts of this Article.

125. *Cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–10 (1935) (hypothesizing a whimsical "dialectic-hydraulic-interpretation press" to aid in interpreting obscure texts).

126. If the machine was a retrofitted 1982 DeLorean DMC-12 sports car, so much the better for the court's self-image.

127. An analogue to such a testing machine might be an fMRI. An fMRI is a brain-scanning device that tracks blood flow throughout the brain as a person performs a certain mental task. Sandra Blakeslee, *Just What's Going on Inside That Head of Yours?*, N.Y. TIMES, Mar. 14, 2000, at F6. Specific regions in the brain light up and are projected onto a screen to show increased blood flow when a person is engaged in a particular task, such as decision making, remembering, paying attention, and imagining. *Id.* Unlike MRI scans, which take a snapshot of the brain, fMRI images can capture the brain while it is in the process of completing its tasks. *Id.* Proponents of the fMRI, or "brain fingerprinting,"

Sadly, such machines do not exist, or, for those tests for which they do, are not available to courts in a world of scarce resources.[128] Instead, courts struggle with the reality of hindsight judgments, limited resources, and doctrinal constraints that make it quite difficult to distinguish lawful "P" from unlawful "P." In each of the areas of law discussed, therefore, courts have taken slightly different approaches to determining if consumers have been misled. Such differences relate to how the plaintiffs raise claims of deception, and to judicial deference to parties with the most relevant expertise about purchase decisions.

Differences between the securities and false-advertising cases are in part a function of the distinct views of the SEC and the FTC. The SEC and the securities laws generally have long been concerned about the distorting effects of puffing by issuers, and evidence substantial hostility to the defense of puffery.[129] As a result, courts in securities cases dismiss present-tense puffery most of the time. Courts' willingness to apply this defense with respect to forward-looking statements likely stems from their view that rational shareholders never buy based on optimistic predictions. By contrast, the FTC has charted the course for the current puffery defense in the false-advertising context, notwithstanding a highly critical scholarly reception.[130] Courts have largely deferred to the agency's view of puffery, even as they have had some trouble applying the FTC's test in a consistent way.

Notably, both of these contexts usually consider the aggregate claims of thousands or millions of C's whose behavior was allegedly distorted by the speech of one S. Because the claims of each C are not capable of being disaggregated, courts usually try to devise rules that apply to the content of the speech itself,

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say that it can detect brain activity that is associated with particular kinds of recollection. For example, in an appeal of a murder conviction in Iowa, a brain scan was introduced that suggested that the murderer's brain did not contain information about the murder, but instead contained information consistent with his alibi. In this sense, fMRI scanners can be used as a kind of lie detector. Jeffrey Rosen, *Roberts v. the Future*, N.Y. TIMES, Aug. 28, 2005, § 6 (Magazine), at 24. Research as to whether fMRI scanners can be used to detect lies accurately is still in its early stages, and it is unclear whether fMRI scanners will be more accurate than polygraphs. Malcom Ritter, ABC News, *Brain Scans May Be Used as Lie Detectors*, Jan. 29, 2006, http://abcnews.go.com/Technology/wireStory?id=1553625&page=1.

128. An fMRI scanner, for example, currently costs around $3,000,000, excluding the cost of operation by a trained expert. *See* Sean Kevin Thompson, Note, *The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation*, 90 CORNELL L. REV. 1601, 1608 (2005). Ivan Preston, reading this Article in draft, notes that he has presented a survey to the FTC that would in some ways replicate the "second experiment" in the text above, but that the FTC has chosen not to use it. *See* E-mail from Ivan Preston, Journal Commc'ns Professor Emeritus, Univ. of Wis.–Madison Sch. of Journalism & Mass Commc'n, to David Hoffman, Assistant Professor of Law, Temple Univ. Beasley Sch. of Law (Apr. 10, 2006) (on file with the Iowa Law Review).

129. *In re* George J. Kolar, No. 3-9570, 1999 SEC LEXIS 2300, at *79 n.31 (Oct. 28, 1999) (stating that the "commission has not generally been hospitable to claims that statements made by a registered representative in the course of customer solicitation are 'mere puffery'" and also that, where courts have held that puffery is not actionable fraud, "the Commission considers such cases 'extreme'"); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 759 n.4 (discussing the history and purpose of the 1933 Act).

130. *See, e.g.*, PRESTON, *supra* note 6, at 134–38 (discussing the FTC's puffery policy).

rather than each individual consumption experience. For reasons that I will explore in the following two parts, courts consider it unwise to proceed in such aggregate investigations by demanding that the parties recreate the three-machine ideal suggested earlier in this section. Instead, courts proceed by developing intuitive heuristics, which help them distinguish quickly between puffery and nonpuffery.[131]

Both the UCC and the promissory estoppel applications of puffery similarly look to a neutral authority in trying to find the limits of "bad" consumption. For courts interpreting the UCC, the words of the Code and its comments focus on overweening *bargaining power*. When S has power over C, then P is likely to be seen as part of the reason C consumed (technically, it will be read into the bargain as a warranty). In the absence of such power, courts will revert to the analysis of the securities and false-advertising cases, looking to the language of the speech itself. Notably, this move in the UCC cases does not reflect a different view of what constitutes puffing speech, but rather the differing level of specificity which courts can bring to the analysis.

Similarly, in the promissory estoppel context, courts are trying to determine which promises mislead consumption. Rather than focusing on bargaining power (a function of both the plaintiff's and defendant's characteristics), courts focus to a great extent on the knowledge "the promisee brings to the table"[132]: naive promisees are protected, while sophisticated promisees are not. When this analysis is indeterminate, courts return to the factual/content-based analysis of the market-wide contexts and display considerable skepticism about the ability of law, rather than markets, to protect buyers. In the words of one court, "a healthy skepticism is a better protection against being fooled by [sellers] than the costly remedies of the law."[133]

I summarize the previous discussion in Table 1.

TABLE 1: PUFFERY DOCTRINE

131. *See generally* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002) (arguing that judges in securities cases use heuristics to distinguish quickly between actionable and immune disclosures).

132. Garwood Packaging, Inc. v. Allen & Co., Inc., 378 F.3d 698, 704 (7th Cir. 2004).

133. Weeks v. Samsung Heavy Indus. Co., 126 F.3d 926, 942 (7th Cir. 1997) (considering whether a statement is actually a promise or whether it belongs "to the realm of puffery, bragging, 'mere words'" (quoting Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1354 (7th Cir. 1995))).

	Factors Influencing Courts' Decisions					
	Opinion/Fact Distinction	Tense	Specificity	Scienter	Plaintiff Characteristics	Defendant Characteristics
Advertising	X		X	X		
Securities Law		X	X	X		
Promissory Estoppel			X	X	X	
UCC	X		X	X	X	X

This description of current puffery doctrine is valuable because it illustrates that courts are not using the same word for a very different set of legal defenses. Rather, each application of the defense seeks to distinguish protected speech inducing good consumption from unprotected speech inducing bad consumption. Differences in how courts accomplish this goal are explained, as explored above, as a function of courts' (1) deference to appropriate expert authorities on the rationales for consumption and (2) varying competence in looking at the actual purchase decision. In each of the areas depicted in this Part, moreover, we have seen that S's scienter—its awareness that it is intended to take advantage of C's bad decision making—is an important factor in distinguishing actionable speech from puffery.

Now that we have explored this modulated coherence, it is worthwhile to ask: why has the doctrine turned out to look like this? That is, we could imagine a situation where all self-aggrandizing speech about a product, service, or stock was immune, per se. This possibility—similar to early applications of *caveat emptor*[134]—has not been adopted in any area this Article has explored.

Alternatively, we could imagine courts refusing any immunity for self-aggrandizement, instead applying a test that would force speakers to demonstrate that their comments did not deceive listeners explicitly or by implication. This view also is not the law.

Instead, the law rests in the middle, and it does so for a number of reasons. The next two parts of this Article explore, *first*, the constitutional, and *second*, the economic policies supporting current puffery doctrine. These two parts inform the

134. *See* Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 872 (2005) ("[H]istorically, parties to a transaction were expected to fend for themselves in the information gathering process . . . . [but, i]n recent decades, the law has recognized the injustice and inefficiency perpetrated as a result of this approach and has largely abandoned *caveat emptor*.").

reform agenda that I will introduce in Part V. The goal of that Part is to improve current puffery doctrine's compromised scheme of consumer protection.

III. CONSTITUTIONALIZING PUFFERY

Because even lying is a form of speech, an obvious question is whether the First Amendment requires puffery to be immunized. This section considers the problem and demonstrates that puffery's constitutional aspects throw considerable light on the model of "good" purchasing that courts have in mind when they set out to analyze claims by allegedly misled buyers.

Despite recent opportunities,[135] the Supreme Court has yet to provide a clear explanation of the contours of First Amendment protection for commercial speech.[136] Such confusion makes conclusions about the constitutional status of puffery defenses to public and private litigation somewhat tentative.[137] Nevertheless, this section comprehensively describes aspects of current puffery doctrine that might be constitutionally necessary. Given the likelihood that the Court will take up these issues again soon, this is a particularly appropriate time to consider the possibilities.

The Court's commercial-speech movement, beginning in the mid-1970s, suggested some bounds on government regulation of speech that proposes commercial transactions.[138] The Court reasoned that commercial-speech protections encourage the "indispensable" nature of the "free flow of commercial

135. *See generally, e.g.*, Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *and cert. dismissed*, 539 U.S. 654, 665 (2003) ("[T]he Court has wisely decided not to address the constitutional questions presented by the certiorari petition at this stage of the litigation.") (Stevens, J., concurring).

136. *See, e.g.*, Elliott L. Dozier, Case Note, Kasky v. Nike*: The Effect of the Commercial Speech Classification on Corporate Statements*, 33 STETSON L. REV. 1035, 1037 (2004) (stating that speech often has both commercial and noncommercial elements, and "the United States Supreme Court's current definitions for commercial speech do not account for the potential problems of mixed speech"); William Warner Eldridge, IV, Case Note, *Just Do It:* Kasky v. Nike, Inc. *Illustrates That It Is Time to Abandon the Commercial Speech Doctrine*, 12 GEO. MASON L. REV. 179, 180–81 (2003) (arguing that the United States Supreme Court should abandon the commercial-speech distinction); Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the* Central Hudson *Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1630 (1997) (examining the commercial-speech doctrine and suggesting a different approach).

137. *See* Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1279 n.12 (2004) (noting that the prevailing commercial-speech tests do not speak to puffery, but it is "often dismissed as outside the ambit of 'falsity' of the sort that constitutes false advertising"); *see also* Charles Gardner Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1, 24 n.67 (1990) (arguing that "the government has tended not to take action against the expression of opinion in the commercial arena, for reasons independent of, though not entirely unrelated to, concerns underlying the first amendment").

138. *See generally* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

information,"[139] but limited this "new protection" to speech that is not misleading.[140]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[141] the Court created a more detailed framework for regulation. The Court held that the "First Amendment . . . protects commercial speech from unwarranted governmental regulation."[142] However, the Court was quick to note that its recent decisions distinguished "speech proposing a commercial transaction"[143] from other "varieties of speech . . . [not] traditionally subject to government regulation."[144] Thus, the Court held that commercial speech is less protected by the First Amendment than other types of "constitutionally guaranteed" expression.[145]

Then the *Central Hudson* Court, focusing on the "informational function of advertising" and the requirement of accuracy within commercial transactions, announced that the State may prevent any form of commercial speech that is "more likely to deceive . . . than to inform . . . ."[146] The Court held that for the State to restrict *nondeceptive* commercial speech lawfully, however, it must set forth a "substantial interest"[147] supporting the regulation, and the restrictions must be "'narrowly drawn'" to that interest.[148]

Central Hudson's progeny have not substantially clarified commercial-speech doctrine.[149] Most commentators agree that current doctrine does not protect false or misleading speech under *Central Hudson*'s heightened (but still not fully fledged) scrutiny.[150] However, at least three of the current Justices appear to

139. *Va. Citizens Consumer Council*, 425 U.S. at 765.

140. *Id.* at 771.

141. 447 U.S. 557 (1980).

142. *Id.* at 561.

143. *Id.* at 562.

144. *Id.*

145. *Id.* at 562–63.

146. *Central Hudson*, 447 U.S. at 563. For more on the informational function of advertising, see *infra* Part IV. Some of this early jurisprudence can be traced to an early, oft-cited, Article by Professor Redish. *See generally* Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

147. *Central Hudson*, 447 U.S. at 564.

148. *Id.* at 565 (quoting *In re* Primus, 436 U.S. 412, 438 (1978)).

149. *See* Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1206–07 (2004) (arguing that the Court's "inconsistent approach" to commercial-speech-doctrine cases "has led to confusion in the lower courts"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) (finding the doctrine "unstable and contentious"). Justice Breyer, in a recent dissent from a denial of certiorari, forecast his sympathy with expanded commercial-speech protections: "In my view . . . the questions presented directly concern the freedoms of Americans to speak about public matters in public debate . . . and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on." Nike, Inc. v. Kasky, 539 U.S. 654, 667 (2003) (Breyer, J., dissenting).

150. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1776 n.49 (2004) (suggesting that

support eliminating any exception for misleading speech, providing it with a significantly higher level of First Amendment protection.[151]

Insofar as current doctrine suggests constitutional problems with government regulations concerning *nonmisleading* commercial speech,[152] we confront a key definitional question: what does the Court mean by misleading speech?

The answer to that question is unknown. The Court's current commercial-speech jurisprudence is confused as to why speech with the latent possibility of being false—misleading speech—should receive "less" constitutional protection than fully truthful speech.[153] In the political arena, the Court has often stated that "there is no such thing as a false idea,"[154] but in the commercial context, it finds that misleading speech—that is, speech that only *implies* falsehoods to some potential audience members—somehow pollutes the goals that constitutional speech protections ought to serve.

Robert Post, in an important recent Article, suggests three different accounts of why misleading speech is subject to regulation.[155] A narrow view limits "misleading" speech to contexts where speakers have the power, by virtue of their special, often one-on-one, relationships with listeners, to overwhelm rational relations.[156] Let us call this the "relationship approach" to distorted consumption.

A second view—which appeals most to the Court—focuses on the content of the speech itself.[157] Let us call this the "content approach" to distorted consumption. Where speech is potentially misleading based on the words used, it is

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"misleading commercial advertisements are akin to legally obscene materials in that they are regulable under minimal rational basis scrutiny without regard to First Amendment standards or values"); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 152 (summarizing the interplay between *Central Hudson* and *Virginia Citizens Consumer Council*).

151. Sullivan, *supra* note 150, at 153–55 (discussing the views of Justices Stevens, Kennedy, and Ginsburg).

152. *See* Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 137 (1994) (finding that it was not misleading for an attorney, who was also a certified public accountant and certified financial planner, to place CFP and CPA next to her name in her yellow-pages advertisement (under "Attorneys") and also on her business card); Posadas de P.R. Assoc. v. Tourism Co., 478 U.S. 328, 340–41 (1986) (finding that advertising of a casino was "not misleading or fraudulent"); Lowe v. SEC, 472 U.S. 181, 186 (1985) (finding "no contention that any of the information published in the advisory services had been false or materially misleading"); *In re* R.M.J., 455 U.S. 191, 205 (1982) (noting that the parties did not argue over whether the published listing was misleading); Friedman v. Rogers, 440 U.S. 1, 12–13 (1979) (finding an optometrists' use of a trade name to be misleading); Bates v. State Bar of Ariz., 433 U.S. 350, 372 (1977) (finding that an attorney's advertisement was not misleading).

153. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 645 (1985) (bemoaning "exceedingly complex and technical factual issues and the consideration of nice questions of semantics").

154. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

155. *See* Post, *supra* note 149, at 36 (discussing the relationship between Meiklejohn's political theory of commercial-speech protection and a market-efficiency-based theory).

156. *Id.* at 38.

157. *Id.* at 38–39.

subject to regulation even in the absence of evidence that any one speaker has actually believed facts which were untrue.[158] This view of speech imagines consumers as highly manipulable, lacking sophistication, and, most significantly, unable to self-correct advertisers' misleading claims.[159]

A third approach the Court sometimes uses is more contextual, focusing instead "on the specific *conditions* that might be understood to render consumers dependent and vulnerable."[160] Call this the "content plus context" view of distorted consumption. This account of consumption has some obvious advantages over the preceding two alternatives.[161] It is better than the relationship approach because it recognizes that distortion is possible outside the individualized context of one buyer and one seller; certain markets, even at a structural level, can allocate goods in suboptimal ways. It is also better than the content approach because it does not assume that all participants in a market act in the same way.

A recent Supreme Court case provides a preview of what the content-plus-context approach looks like in practice. In *California Dental Ass'n v. F.T.C.*, the Court considered a prohibition on puffery by a private dental organization in the context of an antitrust suit.[162] The Court's majority opinion suggested that unverifiable claims by professionals would likely be trusted by consumers.[163] Thus, a ban on "puffery" could be "pro-competitive" by improving consumer decision making and facilitating the success of superior services.[164]

California Dental's perspective on puffery hints that the content-plus-context approach might permit the regulation of vague and optimistic speech (puffery) when consumers would reasonably be expected to rely on it, and the opinion further suggests that advertising by professionals was one such context. However, the majority did not go as far as to say that all restrictions on puffery would be pro-competitive—only those that limit puffery particularly likely to mislead.[165] Indeed,

158. Sullivan, *supra* note 150, at 153 (discussing the relationship between this view of speech and the continued viability of the consumer-protective administrative state).

159. *Id.* at 156.

160. Post, *supra* note 149, at 41 (emphasis added).

161. *See* Daniel H. Lowenstein, *Too Much Puff: Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1228 (1988) (discussing the difference between informative and persuasive advertising, and concluding that "the more the speech being restricted is 'informational' in the sense of facilitating rational consumer choice, the more likely that the Court will strike down the restriction").

162. 526 U.S. 756, 778 (1999).

163. Justice Souter's opinion is not entirely clear on this point, and in general the majority's opinion has met with severe criticism. *See, e.g.*, Stephen Calkins, California Dental Association*: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 504 (2000) (describing the opinion as an "enigma"); Salil Kumar Mehra, *Information in an Antitrust Age*, 2000 U. CHI. LEGAL F. 219, 224 (discussing the difficulty in judicial evaluation of the competitive benefits of puffing speech); Timothy J. Muris, California Dental Association v. Federal Trade Commission*: The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265, 286–88 (2000) (summarizing the interplay between professional advertising and free-speech cases).

164. *California Dental Ass'n*, 526 U.S. at 778.

165. Several have questioned the Court's hostility toward puffery in *California Dental Ass'n* and

the Court explicitly reserved the question of whether puffing speech would be entitled to First Amendment protection from government interference.[166]

The Court's development of the meaning of "misleading" thus might proceed in dramatically different ways. Because "puffery" is a paradigmatic example of potentially misleading speech, its constitutional status depends, a great deal, on further doctrinal developments in the commercial-speech context. Taking Post's three alternatives as a guide,[167] what are the range of possible outcomes?

As I have shown, promissory estoppel and warranty promissory estoppel defenses regulate only speech that misleads through direct and sustained pressure by buyers on sellers. Thus, in those contexts, regulation of puffery is likely not vulnerable to challenge under any of the approaches to the constitutional status of misleading speech Post identifies. Only if judicial regulation of misleading but nonfalse speech were entirely prohibited would warranty and promissory estoppel versions of puffery face pressure. This doctrinal change is unlikely, notwithstanding the views of three members of the Court,[168] because applying robust free-speech protections to common-law fraud and contract cases would unsettle a great deal of existing law.[169]

The false-advertising cases follow the content approach to distorted consumption. They address the rights of a single speaker and assume the existence of a rational and homogenous market of buyers. The speaker is liable whenever her speech has the potential to mislead her audience, which is easy to do insofar as buyers are credulous and unsophisticated. Moreover, buyers are unable to research for themselves and distinguish true from false speech.[170]

Nonetheless, puffery survives as a protected form of speech because the FTC has made an administrative decision that buyers—no matter how naive—do not rely upon it. We can see this assumption most clearly in recent Lanham Act litigation dealing with consumer confusion. In defining the meaning of a litigant's statement that it made "'Americans' Favorite Pasta,'" the Eighth Circuit rejected the use of a survey to determine if "'Americans' Favorite Pasta'" implied false facts to a subset of consumers.[171] A competitor's survey had found that a

questioned why, "[i]f no reasonable consumer would rely on the claims," is it possible that a "ban on such claims be pro-competitive?" Muris, *supra* note 163, at 292 n.164. This view of reliance tracks more obviously with the "ignorant consumers" view of reliance discussed in the text above.

166. *California Dental Ass'n*, 526 U.S. at 778 n.14.

167. *See* Post, *supra* note 149, at 25 (introducing the three rules of commercial speech).

168. *See supra* note 151 and accompanying text (citing descriptions of the opinions of Justices Stevens, Kennedy, and Ginsberg).

169. Post, for example, doubts that ordinary common-law regulation of speech could create commercial-speech problems. Post, *supra* note 149, at 21. Nevertheless, the Court has previously found that state enforcement of promissory estoppel obligation against certain speakers raises First Amendment issues. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (holding that the obligation "is enough to constitute 'state action' for the purposes of the Fourteenth Amendment"). *But cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164–66 (1978) (upholding a warehouse's sale of goods under the Uniform Commercial Code for lack of state action).

170. This view seems particularly dated in the age of Google.

171. *See* Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 391, 393–94 (8th Cir. 2004)

substantial minority of consumers understood "favorite pasta" to mean "the number one brand" or at least a "national brand."[172] Neither implication was correct. The Eighth Circuit, however, upheld a puffery defense, noting that the dictionary's definition of "favorite" was not falsifiable, being instead just the type of vague claim that ordinarily the FTC would consider immune from regulation.[173] Permitting litigants to transform such vague claims into falsifiable claims through use of surveys would be contrary to public policy:

> A manufacturer or advertiser who expended significant resources to substantiate a statement or forge a puffing statement could be blind-sided by a consumer survey that defines the advertising statement differently, subjecting the advertiser or manufacturer to unintended liability for a wholly unanticipated claim the advertisement's plain language would not support. The resulting unpredictability *could chill commercial speech, eliminating useful claims from packaging and advertisement*s. . . . [T]he Lanham Act protects against misleading and false statements of fact, not misunderstood statements.[174]

This approach, which mixes a concern for overbroad regulation with a narrow focus on what was actually said, is a classic application of the FTC's puffery policy.[175] More importantly, the Eighth Circuit clearly hinted that regulation of puffery entails First Amendment problems.

Securities-law cases are harder to categorize.[176] The model of misleading speech they appear most closely to track is the content-plus-context approach, looking to a combination of the content (tense, vagueness) and its context (other comments by the disclosing entity as a measure of scienter, etc.) Thus, were the Court to adopt the relationship approach, requiring a direct relationship between buyers and sellers to dispel First Amendment protection, securities defendants would win more puffery defenses. Courts would hold that the market ought to correct reliance on non-factual, though potentially misleading speech, and that the Constitution itself prohibits the SEC from regulating vague statements of optimism that mislead buyers.

(noting that use of the surveys "would reduce ads and packaging to puffery").

172. *Id.* at 393.

173. *Id.* at 391–92.

174. *Id.* at 393–94 (internal citations omitted; emphasis added).

175. *See, e.g.*, Leighton, *supra* note 19, at 631–32 (discussing the problems of the dictionary approach and arguing that many jurists misread the purpose of the Lanham Act).

176. It is not entirely clear what type of First Amendment framework to apply to the securities-disclosure regime. For a general discussion of some of these problems, see NICHOLAS WOLFSON, CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC 122–54 (1990). *See generally* Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1 (2005) (articulating constitutional problems with SEC regulations that mandate certain types of truthful speech and arguing that "the SEC is normally concerned with whether information is false and misleading"). *Cf.* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 n.9 (1988) (suggesting that SEC regulation involved commercial-speech problems); Lowe v. SEC, 472 U.S. 181, 234 (1985) (White, J., concurring) (avoiding the question of whether the SEC regulates "commercial" speech).

The preceding discussion illustrates that the constitutional status of current approaches to puffery is contested and depends on a yet-to-be-articulated theory of when commercial speech misleads. If the Court adopts a stricter test for misleading speech, e.g., the relationship approach, the current false advertising and securities treatment of puffery would likely be found unconstitutional. Similarly, were the Court to adopt the content-plus-context approach, the FTC might have to start examining puffery on an advertisement-by-advertisement basis, instead of adopting prophylactic rules. *California Dental* suggests that the Court is not averse to applying the content-plus-context approach, and therefore current FTC views on puffery are vulnerable.

The basic questions in play are: (1) whether the Court will continue to find an exception in First Amendment protection for misleading commercial speech; and (2) if not, what is the constitutional definition of "misleading"? The Court clearly wishes to expand First Amendment protections for commercial speech generally. However, it has struggled to find a limit to its quest, and the current stopping place it has settled on—"misleading" speech may be banned—is itself ambiguous. That ambiguity in turn is a result of the Court's inability to articulate and defend any particular model of "bad" consumption. If we do no't know what the law ought to discourage, and if the First Amendment in the commercial context is tied to notions of economically efficient consumption, then it is no surprise that the doctrine is confused.

Thus, we need a realistic account of the relationship between puffing speech and consumption. The next Part takes on that challenge.

IV. HOW DO CONSUMERS RESPOND TO PUFFERY?

The constitutional status of puffery, as Part III demonstrated, is tied to courts' shifting understanding of how consumption works. The Supreme Court and other legal authorities wish to encourage speech leading to "good" consumption and discourage speech leading to "bad" consumption, and they believe that the First Amendment's speech-protecting role might essentially be consistent with that goal.

Current doctrine depends, to a great degree, on intuitions about the law's ability to promote and to discourage commercial speech. Thus, jurists assume that if they were to prohibit puffery because puffery distorts consumption, then their intervention would be effective. This 'Part's goal is, in part, to consider the realism of this assumption, utilizing traditional and heterodox economic approaches.

In Section A, I show why economists believe that prohibitions on puffery and other forms of misleading speech will be ineffectual at best and possibly self-defeating. Section B continues the analysis by relaxing traditional assumptions about consumer rationality and discussing how evidence of optimism strengthens the case for immunizing puffing speech. These analyses together suggest that both the First Amendment analysis discussed in Part III and the existing puffery landscape detailed in Part II overestimate the law's ability to change consumption behavior.

But, as I demonstrate in Section C of this Part, these highly stylized approaches do not realistically take into account evidence of consumers' actual reactions to puffing speech. Rather than ignoring and disbelieving puffing speech, consumers believe it and use it to make their purchase decisions. Evidence collected from the marketing and behavioral-psychology literature together highlight the need for a reform agenda that would better tie doctrine to actual evidence of consumer behavior.

A. EXPLANATIONS ASSUMING RATIONAL BUYERS AND SELLERS

The economic approach to puffery begins by identifying it as a type of "persuasive" selling speech. Persuasive speech is economic jargon for speech that achieves its consumption-inciting effect not through the conveyance of facts but instead "through an emotional appeal or in some similar way."[177] Early economic analyses, based on the rational-actor model,[178] disapproved of such emotional appeals, as economists could not explain (1) why buyers would react to sales pitches lacking obvious informational content and (2) why sellers would purchase such advertising.[179]

Economists' later work attempted to rescue puffing speech from claims that it was waste.[180] They argued that persuasive sales talk could aid consumers to

177. R.H. Coase, *Advertising and Free Speech*, *in* ADVERTISING AND FREE SPEECH, PROCEEDINGS OF A LIBERTY FUND CONFERENCE ON "ADVERTISING VS. FREE SPEECH: DILEMMA OR INVENTION" 1, 8 (Allen Hyman & M. Bruce Johnson eds., 1977) [hereinafter ADVERTISING AND FREE SPEECH]; *see also* Kyle Bagwell, *The Economic Analysis of Advertising*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION, VOLUME 3, 9–16 (Armstrong & Porter eds., forthcoming), *available at* http://www.columbia.edu/~kwb8/adchapterPost082605.pdf (describing the history of the economic approach to persuasive advertising).

178. *See* Richard A. Posner, *Rational Choice, Behavioral Economics and the Law*, 50 STAN. L. REV. 1551, 1551 (1998) (analogizing rational persons to rats, which "are at least as rational as human beings when rationality is defined as achieving one's ends . . . at least cost"). Another way of describing the expected-utility theory is to note its four principal decision-making principles: ordering (people "must either prefer one [object to another] or be indifferent to both"); continuity ("if the odds are right, a person will always gamble"); independence ("[a] person's preferences between two objects should remain unchanged when the objects are substituted into identical lotteries"); and invariance (individuals should express the same preferences when different descriptions of the same outcome are presented). Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 641–42 (1999). For a discussion of the "rationality debate" among current practitioners of law and economics, see David A. Hoffman, *Punitive Damages: How Relevant is Jury Rationality?*, 2003 U. ILL. L. REV. 507, 509–11 (book review).

179. *See* Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 QUART. J. ECON. 941, 956 (1993) (citing sources).

180. An important example of such work, by Klein and Leffler, explained the mechanism by which consumers would seek to pay for brand protections to avoid harms caused by "difficult-to-measure" contractual-performance obligations. *See* Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) (describing indirection-information theory of advertising). An early empirical work that influenced legal perception of advertising found that states with constrained advertising regimes had higher eyeglass prices than states that permitted advertising. *See* Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 4 J.L. & ECON. 337, 352 (1972) (finding that prices for eyeglasses in states without restrictions were

cultivate tastes for "cleanliness and beauty"[181] and might encourage the act of consumption. These taste-shaping and inciting aspects of persuasion in turn would lead consumers to experience product facts for themselves. But these advantages paled before persuasive speech's (particularly, advertising's) ability to inform consumers through brands.[182]

Brand theory posits that consumers benefit through strong brands in part because they reduce search costs.[183] Ambler and Hollier expressed the idea in vivid terms: "[J]ust as female peacocks are drawn to mates with the largest, most spectacular tail feathers because the display signals superior biological fitness, consumers are attracted to brands that invest in lavish displays like Superbowl commercials because such extravagance signals a high-quality, successful brand."[184]

Speakers that create robust brands encourage buyers to spend less money investigating subsidiary characteristics.[185] Strong brands help consumers by offering them assurances that the good they are buying will fulfill expectations; thus, there should be a correlation "between advertising intensity and the extent of quality that is costly to determine prepurchase."[186] That is, the more it costs

"substantially lower" than prices in states with restrictions).

181. Coase, *supra* note 177, at 10 (internal comma omitted). For a useful modern-literature review on the taste-changing aspect of advertising, see Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-Informational Advertisements*, 27 WHITTIER L. REV. 435, 447 (2005).

182. Phillip Nelson, *Comments on Advertising and Free Speech*, *in* ADVERTISING AND FREE SPEECH, *supra* note 177, at 52. The creation and diffusion of brands was arguably necessary to the formation of modern market economies, even though the meaning of "brand" itself is contested. *See generally* Thomas C. O'Guinn & Albert M. Muñiz Jr., *Communal Consumption and the Brand*, *in* INSIDE CONSUMPTION: CONSUMER MOTIVES, GOALS AND DESIRES 252 (S. Ratneshwar & David Glen Mick eds., 2005) [hereinafter INSIDE CONSUMPTION] (discussing identification of consumers into communities through brand loyalty).

183. *See* Nelson, *supra* note 182, at 52–53. *See generally* Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970).

184. Tim Ambler & E. Ann Hollier, *The Waste in Advertising is the Part that Works*, 44 J. ADVER. RES. 375, 382 (2004). In one experiment, Ambler and Hollier showed consumers commercials that had identical scripts but different production values (some had been degraded visually or aurally). Advertisements that were perceived to cost more were significantly more persuasive to consumers in their purchase decisions. *Id.* at 379–81; *see also* Perry Haan & Cal Berkey, *A Study of the Believability of the Forms of Puffery*, 8 J. MKTG. COMM. 243, 253 (2002) (finding that puffing signals the competitive strength of the product); *cf.* Press Release, FKF Applied Research, Superbowl XL Ad Rank (Feb. 7, 2006), *available at* http://www.fkfadrank.com/index.asp?Type=B_ BASIC&SEC={D1C9ABB0-20AA-432D-8058-4F896C7FD38A} (ranking Super Bowl ads based on fMRI technology).

185. For example, a seller with a strong brand might also be trusted to have a good record in delivering the right goods on time or to be trusted not to insist on terms in adhesion contracts.

186. Klein & Leffler, *supra* note 180, at 631; *see* Bagwell, *supra* note 177, at 19–20 (summarizing empirical literature on correlation).

consumers to identify good quality (and thus, the harder it is to differentially price goods), the more valuable puffery theoretically would be.[187]

But, because such subsidiary characteristics may be hard to detect before purchase, persuasive advertising might help sellers create false stories about product traits that consumers are unlikely to be able to dispel. That is, puffery might convince consumers to buy when they would not otherwise do so, because consumers believe that puffed goods do not need further investigation.[188]

To use the peacock example, imagine an enterprising, large, clever, and dexterous pigeon painting its drab feathers a vivid hue. The economic analysis discussed thus far explains why consumers might be deceived and think that the pigeon really was a peacock, as search costs discourage further investigation. Upon buying the pigeon, consumers will obviously experience some degree of frustration.[189] This argument would suggest that regulation of puffing speech will lead to improved decision making and utility.

Scholars have challenged this pro-regulatory conclusion. Economists assert that in the absence of regulation, market forces will themselves prevent puffery. Over time, through repeated disappointing experiences with hyped goods, consumers will come to disbelieve puffery.[190] Puffing sellers will develop a brand reputation for dishonesty, helped along by competitors with incentives to expose those lies that are not readily available to consumers.[191] Thus, in the absence of regulation, puffery that fails to maximize consumer welfare should disappear.

When regulation is introduced, economists assume that consumers will (mistakenly) believe that government-run anti-fraud regimes are perfectly enforced.[192] This belief is false on at least two levels. First, and most obviously, in a world of limited resources and practically limited fines, the expected costs of fraud are almost never going to equal the expected benefits. Additionally, the market for advertising is heterogeneous. Thus, protections against fraud on a market-wide basis, unlike common-law protections involving one-on-one persuasion, will inevitably be directed only at segments of the audience. To the extent the costs of protection permit advertisers to disclose only a limited universe

187. The evidence of the relationship between persuasive advertising and good quality is mixed. *See* Bagwell, *supra* note 177, at 51–54 (suggesting a relationship between direct product-quality claims and product quality, but no general "strong support for a hypothesis of a systematic positive relationship between advertising and product quality").

188. In markets with repeat purchases, as Klein and Leffler explain, puffing speech may help to insure against this very problem. Klein & Leffler, *supra* note 180, at 616 (discussing assumption of repeat purchasing). That is, consumers will use puffing speech as an important nonprice guarantee of quality, subject to verification through repeated purchases.

189. The degree of frustration obviously depends on the point of the purchase. A clever pigeon is not so easy to find.

190. RICHARD POSNER, REGULATION OF ADVERTISING BY THE FTC 5 (1973). Posner further argued that rising education levels "have probably reduced the credulity of the average consumer." *Id.*

191. Although, as Posner argued, there will be circumstances where it will not benefit competitors to expose fraud due to, for example, transaction costs, and there will be further circumstances where group lying will benefit the business. *Id.* at 6.

192. Nelson, *supra* note 182, at 54–55.

of information, all advertising regulation will, in a sense, shift misleading speech burdens from one segment of the audience to another.[193]

Consumers thus will overestimate the protection offered by regulatory protection from puffing fraud. As Richard Parmentier explained, puffery traditionally advances a "second-level message: 'take this as a puff.'" If listeners are skeptical, which rational buyers will be in a *caveat emptor* legal regime, the "metamessage at least partially guarantees that consumers will properly" comprehend the metamessage and avoid reliance.[194] However, when authorities work to increase protections from fraud, consumers feel a "false confidence,"[195] their defenses to puffery are reduced, and advertisers are encouraged to puff at greater rates.[196]

Why? Because economists assume that sellers (unlike buyers) will have an accurate perception of the relationship between regulation and the expected legal costs of puffery. This assumption rests on an unarticulated belief that (1) sellers know when they are puffing and when they are not and (2) sellers subject to regulation are better positioned to understand its nature than buyers protected by it.

As a result of these factors, economists conclude that regulation of puffery and other forms of persuasive commercial speech is inevitably self-defeating.[197]

B. EXPLANATIONS ASSUMING EMOTIONAL BUYERS AND SELLERS

The economic analysis of the meaning and utility of puffery is also informed by recent work on human behavior.[198] That work too can be read to suggest that regulation of puffing speech will be ineffectual, because both speakers and

193. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 406 (5th ed. 1998).

194. RICHARD J. PARMENTIER, SIGNS IN SOCIETY: STUDIES IN SEMIOTIC ANTHROPOLOGY 144–45 (1994).

195. *Id.* at 154.

196. *Id.* at 151.

197. On its own terms, the claim is questionable. Imagine at time T_0, there is no enforcement regime against any false advertising. Under such circumstances, a consumer would only become aware of fraud in two ways: personal experience with nonconforming goods and informal gossip networks. Because consumers are distributed widely and there are barriers to transmission of information about erroneous choices, consumer knowledge of fraud would presumably be quite low, and a significant number of sales will occur that would not otherwise take place. Now imagine that the FTC announces a new anti-fraud regime, whereby all "deceptive" speech will be regulated. Accompanying this announcement is a press release noting important and recent vivid examples of fraud. At this time, T_1, consumers thus will be highly alert to the possibility of fraud in purchasing, not less alert, as Coase's analysis would suggest. As a result, consumers will increase their "metapragmatic defenses" to puffery and other forms of sales talk. Now, as that initial effect fades, it is possible (at time T_2) that the cognitive laziness born of living in a regulated market may create a net result of more misled purchases, but that intuition is untested. It would depend on the FTC's continued willingness to publicize its successful prosecutions (which, admittedly, they are likely to do). To know more about consumer vulnerability, we probably would want to establish a formula that analyzed the relationship between consumer care, regulatory publicity, and seller behavior. Needless to say, such a formula is not extant. *See* Craswell, *supra* note 6, at 695–96 (discussing the relationship between law and consumer belief).

198. *See* Hoffman, *supra* note 63, at 546–48 (discussing common assumptions and critiques of behavioral law and economics).

listeners are excessively optimistic. Because of such congenital overoptimism, legal regimes that do not immunize puffery may have little to no effect on consumption-distorting behavior.

Experiments detailed in the behavioral literature demonstrate a consistent "overconfidence bias," which encourages us to think that "good things are more likely than average to happen to [our property] and bad things are less likely than average to happen to [it]."[199] Although "the study of hope in the literature in marketing and psychology is limited,"[200]evidence for this bias is wide-ranging and is especially significant when individuals are motivated to want good outcomes.[201]

Although overoptimism is often discussed as a byproduct of other flaws in human-probability decision making,[202] this is probably itself a misconception. In an early study, Shelley Taylor and Jonathon Brown suggested that optimistic thinking makes us, in a sense, better people.[203] Unrealistic optimism is correlated with reported happiness,[204] decreased loneliness,[205] productivity,[206] and pro-social behavior.[207]

Optimism increases the amount of puffery on both supply and demand fronts. On the "supply side," optimism leads individuals to actually believe in their wrong estimations of future success. Individuals are less able to remember facts that suggest failure than facts that promise success.[208] Skills that we lack are dismissed as common and unimportant; skills that we perceive ourselves to have are relished as unique and crucial to the task at hand.[209] Sellers experience the "future . . . [as] great, especially for [them]."[210]

199. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091 (2000); *see* Christine Jolls, *On Law Enforcement with Boundedly Rational Actors*, *in* THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 268, 270–71 (Francesco Parisi & Vernon L. Smith eds., 2005) (discussing bias generally); Gustavo E. de Mello & Deborah J. MacInnis, *Why and How Consumers Hope: Motivated Reasoning and the Marketplace*, *in* INSIDE CONSUMPTION, *supra* note 182, at 44, 54–55 (collecting studies and connecting hope to optimism bias).

200. Mello & MacInnis, *supra* note 199, at 44.

201. There is a correlation between imagining positive future outcomes and the perceived likelihood of that outcome. *Id.* at 55.

202. *See generally* Aaron J. Wright, Note, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183 (2005) (arguing that cognitive biases such as overoptimism shape the method by which a person assesses future events).

203. *See generally* Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCH. BULL. 193 (1988).

204. *Id.* at 198 (noting that evidence of association is "largely correlational rather than causal").

205. Carolyn E. Cutrona, *Transition to College: Loneliness and the Process of Social Adjustment*, *in* LONELINESS: A SOURCEBOOK OF CURRENT THEORY, RESEARCH AND THERAPY 291, 304–05 (Letitia Anne Peplau & Daniel Perlman eds., 1982).

206. *See* Taylor & Brown, *supra* note 203, at 203–04 (citing studies).

207. *See id.* at 203 (citing studies).

208. *See generally* Irwin Silverman, *Self-Esteem and Differential Responsiveness to Success and Failure*, 69 J. ABNORMAL & SOC. PSYCH. 115 (1964).

209. *See, e.g.*, Taylor & Brown, *supra* note 203, at 196 (citing studies).

210. *Id.* at 200.

Similarly, on the demand side, "factories make products, which in the stores are sold as hope."[211] The marketplace is full of products with low efficacy and high cost,[212] but which nevertheless sell well.[213] Overoptimism may lead consumers to "overlook or ignore the dangers" involved in risky goods, and maintain false hope about their ability to perceive and avoid those very risks.[214]

Thus, when courts say that "people in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future,"[215] they may implicitly be making a policy case for puffery based on a lay understanding of the optimism bias. For instance, an early court concluded that "[e]xaggeration, puffing [and] boasting appear to be the very breath of salesmanship. We never expect detraction, always over emphasis."[216] Permitting puffery recognizes that seller compliance with any legal sanction of optimism is likely to be low, in part because individuals do not understand or know the law, but also because they do not actually think they are misleading anyone. Some sellers puff because they believe that they really are the best. Similarly, some buyers would be disappointed if puffing speech disappeared from commercial transactions, because part of what purchasers expect to buy is hope itself.

The relationship between optimism theory and puffery is supported by the work of marketers who examined the reaction of consumers to advertisements that puffed goods that did not actually live up to their sales talk. In one experiment, scholars found that overstatement (i.e., puffery) of product characteristics produces less negative later evaluations of the product than either realistic or negative evaluations of the product.[217] Another study examined the impact of so-called "two sided" claims; where advertisers mix puffing claims about product attributes that matter to consumers with pessimistic and inculpatory claims about product attributes of less importance. Consumers liked a degree of puffery—it increased their perception of advertising truthfulness.[218] When puffed to "an extreme degree," however, consumers were unhappy after using the product.[219]

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211. Mello & MacInnis, *supra* note 199, at 49; *see* Theodore Levitt, *The Morality (?) of Advertising*, HARV. BUS. REV., July/Aug. 1970, at 85 (paraphrasing Charles Revson: "In the factory, we make cosmetics; in the store we sell hope.").

212. Hair-loss cures are a classic example. Diet pills, as the discussion in Part II illustrates, is another commonly litigated dispute involving hope in a bottle. Optimism and hope often trump reality: few of us will end up thin and with a full head of hair.

213. The alternative-medicine market is said to approach $18 billion in sales yearly. Mello & MacInnis, *supra* note 199, at 50.

214. *Id.* at 61–62 (collecting studies).

215. Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1129–30 (2d Cir. 1994) ("People in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business that they manage."). A search of the "ALLCASES" database on Westlaw found seventeen citations to this formulation of the right to be optimistic, mostly in the Second Circuit.

216. Union Car Adver. Co. v. Collier, 189 N.E. 463, 468 (N.Y. 1934).

217. *See* Richard W. Olshavsky & John A. Miller, *Consumer Expectations, Product Performance, and Perceived Product Quality*, 9 J. MKT. RES. 19, 20 (1972).

218. *See* Michael A. Kamins & Lawrence J. Marks, *Advertising Puffery: The Impact of Using*

This evidence confirms that puffing speech benefits consumers and that the benefits ought to be included in any analysis of efficient puffery doctrine. Obviously, without a complete theory of when optimism generates happiness and when it does not, the weight we should assign to puffery's psychic value remains unknown.

C. SOME EVIDENCE OF CONSUMERS' EXPERIENCES WITH PUFFERY

The preceding two sections offered alternative model views of how consumers experience puffing speech. Economists assuming rationality conclude that misleading commercial talk will build economically useful brands, will help consumers to discern product quality absent price signals, and will build consumers' natural defenses to fraud. Those who relax the rationality assumption, on the other hand, assume that both buyers and sellers will react in unpredictable ways to incentives, and may be overly sanguine about the effect of selling speech on consumption.[220]

However, these arguments both rely on assumptions about behavior that are untrue or overgeneralized.[221] A more realistic description of puffery doctrine focuses on the actual relationship between behavior and sales talk, and not merely theorized views of such behavior.

Jurists and regulatory authorities routinely assume that buyers of goods, services, and securities ignore puffing statements.[222] This straightforward

Two-Sided Claims on Product Attitude and Purchase Intention, 16 J. ADVER., Fall 1987, at 4, 11.

219. Moderate puffing, by contrast, does not result in a loss of trust in the manufacturer. *Id.* at 13. However, other experiments were to the contrary. One study examined the relationship between puffing in a print advertisement and consumers' beliefs about a ballpoint pen. *See generally* Bruce G. Vanden Bergh & Leonard H. Reid, *Effects of Product Puffery on Response to Print Advertisements*, 3 J. CURRENT ISSUES RES. & ADVER. 123 (1980). One group (the treatment group) was shown an ad puffing the pen's value and received a pen of "less value than expected"; a second group was given an ad containing factually accurate statements; and a third group saw a pessimistic ad and received a pen containing (naturally) better characteristics than expected. *Id.* at 130. The researchers found that puffing produced a "significantly more negative change" in sponsor evaluation, credibility, and intent to purchase the good in the future than both accurate and undersold advertisements. *Id.* Interestingly, accurate ads also resulted in negative perceptions of the message sponsor and intent to purchase, versus ads that undersold the product in the first instance. *Id.*

220. *See supra* notes 198–219 and accompanying text (introducing the optimism bias).

221. *See supra* note 197 (discussing the arguably self-defeating nature of puffery doctrine).

222. *See* RESTATEMENT (SECOND) OF TORTS § 539 cmt. c, subsec. 2 (1977) ("An intending purchaser may not be justified in relying upon his vendor's statement of the value, quality or other advantages of a thing that he is intending to sell as carrying with it any assurance that the thing is such as to justify a reasonable man in praising it so highly."); *see also* Corley v. Rosewood Care Ctr., 388 F.3d 990, 1009 (7th Cir. 2004) (finding that the term "high quality" comes under the category of sales puffery "upon which no reasonable person could rely in making a decision"); Williams v. Aztar Ind. Gaming Corp., 351 F.3d 294, 299 (7th Cir. 2003) (finding promotional casino mailings that stated "Players win!" and "the winning is big!" to be nothing more than sales puffery on which no person of ordinary prudence and comprehension would rely); Peter C. Ward, FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE § 6.04 (1997): Policy Statement on Deception (1997) (stating that deception occurs "'if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances to the consumer's detriment.'" (quoting Letter from

application of many "individual [jurists'] personal theorizing"[223] is in tension with real-world evidence of the utility of persuasive advertising.[224] In any event, it is simply untrue. Marketing scholars have demonstrated that puffing statements are believed on their own terms and lead some individuals to further imply facts about the puffed speech that are untrue. This part details evidence of individuals' actual experiences with puffing speech.

A significant number of studies of sales talk show that "puffery is believed by large numbers of consumers."[225] In one early examination of nationally distributed commercials, marketing scholars found that, on average, 39.6 percent of puffing claims were "believed."[226] For example, 69 percent of respondents *believed* that Head & Shoulders shampoo "lathers nice"[227] (under the FTC's test, "nice" is probably an unfalsifiable claim that would be immunized puffery). In a different and rather unkind experiment, subjects were told by researchers that the coffee they were about to drink had "no bitterness." The coffee actually had been made particularly bitter by overbrewing. After drinking the coffee, subjects who had seen the claim were significantly more likely to believe that the coffee was not bitter than subjects who had not seen the claim and drank the bitter brew.[228]

James C. Miller, III, Chairman, to Hon. John D. Dingell, Oct. 14, 1983, reprinted at 1137 BNA ATRR 689 (Oct. 27, 1983))).

223. Klaus G. Grunert & Konrad Dedler, *Misleading Advertising: In Search of a Measurement Methodology*, 4 J. PUB. POL'Y & MKTG. 153, 154 (1985).

224. One scholar estimated that 58.5 percent of the assertions in common consumer advertisements were subjective, and not factual, claims. *See* Terence A. Shimp, *Social Psychological (Mis)Representations in Television Advertising*, 13 J. CONSUMER AFF. 28, 35 (1978).

225. Haan & Berkey, *supra* note 184, at 246 (citing studies); *see* Kamins & Marks, *supra* note 218, at 6 (same); Vanden Bergh & Reid, *supra* note 219, at 123–24 (same); *cf.* Bruce G. Vanden Bergh & Leonard H. Reid, *Puffery and Magazine Readership*, 44 J. MKTG., Spring 1980, at 78 (finding that puffing in car advertisements did not increase the attention readers paid to the sales claims).

226. Herbert J. Rotfeld & Kim B. Rotzoll, *Is Advertising Puffery Believed?*, 9 J. ADVER., Summer 1980, at 16, 19.

227. *Id.* at 20.

228. *See* Jerry C. Olson & Philip A. Dover, *Cognitive Effects of Deceptive Advertising*, 15 J. MKTG. RES. 29, 32, 36–37 (1978). An interesting variation of persuasive-speech theory questions the effect of brands on stock-market prices. The evidence is varied. One study found that announcement of advertising-agency switches were correlated to declines in stock price. *See generally* Lynette Knowles Mathur & Ike Mathur, *Is Value Associated with Initiating New Advertising Agency-Client Relations?*, 25 J. ADVER., Fall 1996, at 1 (finding also that announcements of new work for an already existing agency relationship were associated with a rising share price). Larger firms spending more on advertising experience significant gains in stock price and trading volume. *See* Keith W. Chauvin & Mark Hirschey, *Advertising, R&D Expenditures, and the Market Value of the Firm*, 22 FIN. MGMT., Winter 1993, at 128 (discussing the relationship among different potential determinants of stock price). Another study concluded that "markets react to advertising stimuli and, by extension, that some investors incorporate them into trading decisions." James Karrh, *Does Advertising Influence Investors? Evidence and Research Propositions*, 26 J. CURRENT ISSUES RES. & ADVER., Fall 2004, at 1, 3. Karrh, a business-school professor, connects advertising to stock price through the lens of behavioral finance. According to Karrh, evidence of investor behavior can help to explain why advertising might affect investing and consuming behavior in similar ways. *Id.* at 4. Karrh explains that this effect might be more significant with investors who are comparatively less expert and less able to access management. *Id.* at 6–7.

At a more granular level, Ivan Preston has divided puffing statements into six types: best, best possible, better, specially good, good, and other subjective qualities.[229] Several experiments have tested this spectrum to see if there is a hierarchy of persuasion between these types of puffing statements.[230] One experiment found no statistically significant difference between the different types of puffery, except that customers were significantly less likely to believe "subjective" claims—such as "There's a smile in every Hershey Bar"—than the more evaluative first five types[231] (this is not surprising, as the claim is literally impossible). In each of the first five types of puffery, the mean response found the puffing speech neither believable nor unbelievable, but more respondents found the claim either "believable" or "very believable" than those who found it "unbelievable" or "very unbelievable."[232]

A separate research question asks if consumers believe the facts implied by puffing statements. Marketing researchers thinking about puffery have developed the idea of a "pragmatic implication." For example, the statement "I can pick you up at eight," while not assuring a pick-up, would be perceived as a promise if spoken by a friend who knew you needed a ride.[233] To take an example from earlier in this Article,[234] Yogurt's claim to be "nature's perfect food" might imply multiple facts, such as "Yogurt is made from natural ingredients" and "Yogurt kills infections."[235]

Studies have shown that consumers believe the pragmatic fact implications of puffing speech. Most experiments have found that approximately 40 percent of puffing speech is believed on its own terms, and a smaller percentage of implied fact claims are understood to be true.[236] Belief in implied facts varies with listeners: "young adults confuse pragmatic implications with direct assertions 55 to 80 percent of the time."[237] When given time to study advertisements, young adults outperformed older adults in being able to discriminate between fact and non-fact claims.[238]

229. PRESTON, *supra* note 6, at 185–89.

230. Haan & Berkey, *supra* note 184, at 244.

231. *Id.* at 249.

232. *Id.* at 250 tbl.1. According to the study, 39 to 41 percent of respondents found the claim "believable" or "very believable"; 27 to 34 percent found it "unbelievable" or "very unbelievable."

233. *See, e.g.*, Gary J. Gaeth & Timothy B. Heath, *The Cognitive Processing of Misleading Advertising in Young and Old Adults: Assessment and Training*, 14 J. CONSUMER RES. 43, 43–44 (1987) (citing studies).

234. *See generally In re* Dannon Milk Prods., Inc., 61 F.T.C. 840 (1962).

235. For a list of health claims commonly associated with yogurt consumption, see Vicki Koenig, *Yogurt's History and Folklore*, *in* Stonyfield Farms—Moos Press Releases, *available at* http://www.stonyfield.com/Wellness/MooslettersDisplay.cfm?moos_id=16 (last visited Mar. 13, 2006).

236. Rotfeld & Rotzoll, *supra* note 226, at 19 (finding that 11 percent of implied-fact claims are believed).

237. Gaeth & Heath, *supra* note 233, at 44.

238. *Id.* at 50.

A third dimension of the marketing literature examines the confusion of fact and puffery. A study examined whether claims based on facts were believed more than claims based on mere puffery. Factual claims, such as that a medicine was the "[b]rand children's doctors recommend most" were believed at equivalent rates as a statement that the product provided "[f]ast and gentle" relief.[239] Notably, the latter statement would be nonactionable puffery under current doctrine. This empirical finding severely undercuts the commonplace intuition—evident in each of the areas of doctrine discussed in Part II—that more factual specificity leads to customer belief.[240]

Marketing scholars hypothesize that prior familiarity with goods increases the persuasive power of puffery.[241] This familiarity encompasses "knowledge of, . . . experience with and loyalty to a product."[242] Haan and Berkey's study of the gradients of puffery and the products and manufacturers selling them showed that a consumer's experience with the product was the most significant factor that causes her to believe the puffing claim.[243] Thus, in deciding whether to purchase a good, consumers believe and rely on puffery when they already know and like a product and trust the manufacturer.[244]

The persuasiveness of puffing claims is intensely fact specific. One study, for example, tested ads that compared Motrin to Tylenol.[245] Generally, consumers judged comparison claims to be more persuasive than self-boasting claims, but the difference depended on factors like format rather than content. Ads that compared products to each other were more persuasive when the comparisons appeared early in advertisements rather than later.[246]

Thus, the economists' view that consumers do not—in general—react to puffing speech by believing it for what it asserts is wrong. Even worse, consumers sometimes believe false facts that puffing speech implies. Moreover, repeated experiences with products appear to increase the distorting effects of puffing

239. Herbert J. Rotfeld & Kim B. Rotzoll, *Puffery vs. Fact Claims—Really Different?*, 4 J. CURRENT ISSUES RES. & ADVER. 85, 91 (1981).

240. *Cf.* M.B. Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 5 J. MKTG. RES. 545, 548 (1978) ("[T]he factualness of a message should influence its subjective credibility, and this intervening cognitive response should in turn enhance acceptance of the message's belief statements."); Rotfeld & Rotzoll, *supra* note 239, at 102 (finding that fact claims such as "helps control dandruff" were believed at similar rates to puffing claims such as "makes hair look terrific").

241. *See* Haan & Berkey, *supra* note 184, at 246 (citing studies by Fazio, conducted in 1986 and 1989, that conclude that unfamiliar products or brands are more scrutinized than familiar ones).

242. *Id.* (citing G.J. Tellis, *Effective Frequency: One Exposure or Three Factors?*, 37 J. ADVER. RES., July–Aug. 1997, at 75–82).

243. *Id.* at 253.

244. *Id.* at 246 (citing studies).

245. Michael J. Barone & Paul W. Miniard, *How and when Factual Ad Claims Mislead Consumers: Examining the Deceptive Consequences of Copy x Copy Interactions for Partial Comparative Advertisements*, 36 J. MKTG. RES. 58 (1999).

246. *Id.* at 72.

speech, making it difficult for consumers to learn and correct for falsehoods.[247] This effect is an important rejoinder to the argument—made by economists—that puffing speech could function to assure quality in a market of repeat purchasers.[248]

However, the assumptions of optimism theorists appear to find more substantial support in the experimental literature.[249] It is true, as the optimism bias would predict, that some buyers are unable to distinguish between truth and exaggerated lies. It is also true that some buyers appear to relate puffing speech to brand power, believing such speech when they are already predisposed to do so by virtue of prior product experiences.

An important aspect of the above literature little explored by jurists is the finding that consumers react in different ways to puffing speech.[250] Large segments of the market—but not the majority—believe sales talk for the truth of what it asserts. Smaller segments draw implications from puffing speech and believe them. Prior experiences with the product—which vary from consumer to consumer—affect belief, as does mood, age, and other demographic characteristics. If there is any general lesson to be taken from the literature, it is that puffing speech can seriously affect consumption preferences, and that small differences in the presentation and context of that speech may significantly change listeners' processing of the information it conveys.

What, then, to do? If consumers are sometimes deceived by puffing speech, how can judges and regulators best protect "good consumption"? As previous parts have explored, authorities' ability to determine before the fact when puffing speech will result in false factual implications is quite limited, and top-down control might have the self-defeating effects explored in this Part. What is needed, then, is a theory of puffery and its harms that would: (1) make sure that only speech that misled consumers was regulated; (2) not lead consumers to be overly confident about the scope of the protections available to them; and (3) correct for the optimism bias experienced by some sellers and buyers. The next Part of this Article takes on the project of solving these problems.

247. *Cf.* VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY ch. 3, § 1, at 103 (Ann S. Schwier trans., Ann S. Schwier & Alfred N. Page eds., 1971) (explaining that revealed preferences depend on observing repeated choices, so that prior learning can be fully incorporated).

248. *See supra* notes 180–86 and accompanying text. One way to harmonize the puffery marketing literature with rational-choice theory was indirectly suggested by Becker and Murphy, who observed that "greater consumption of advertised goods [should] raise the marginal utility from, and the demand for, advertising." Becker & Murphy, *supra* note 179, at 949. If we imagine advertising as a normal good that is complementary with the products it boosts, then it would make sense that demand for puffery—expressed through belief in it—rises together with experience in the puffed product. The full workings of this connection are unfortunately beyond the scope of this Article. *See* Bagwell, *supra* note 177, at 20–24 (summarizing the complementary theory of advertising).

249. *See, e.g.*, *supra* notes 215–19 and accompanying text (explaining how positive puffery may impact consumer purchases).

250. *See, e.g.*, Craswell, *supra* note 6, at 672–76 (discussing the problem of different meanings to different consumers, or even to the same consumer in different contexts).

V. PUFFERY AND PERSUASION

In the preceding parts, I have offered an account of puffery doctrine founded on an idea of modulated coherence. The basic question that the defense asks is deceptively simple: Will the speech lead to "bad," i.e., misled and inefficient, consumption? But the way that this question gets answered, through case-by-case application, creates constitutional and practical problems. The FTC, perhaps believing that its position is constitutionally required, has led many courts to assume that puffing speech is not believed and implies no facts.

The First Amendment does not require this level of confusion in consumer protection. Although current commercial-speech jurisprudence is very much in flux, the Supreme Court might eventually settle on a doctrinal rule that permits banning speech which, when considering its content and the context of its expression, would mislead even a segment of the marketplace.

Unfortunately, neither courts nor regulators can easily determine when puffery implies facts that are false. Courts are not experts in psychology, economics, statistics, or marketing, and therefore are unable to intuit the differences between good and bad speech as a matter of law. Regulators, who actually may be experts, are faced with a dilemma of either creating prophylactic rules, which are increasingly vulnerable to constitutional challenges, or relying on hindsight. Such hindsight judgments of puffing speech's appropriate scope are liable to be infected by the behavioral biases[251] and regulatory capture by industry.[252] Applying the three experiments discussed earlier to find causation, implication/falsity, and intent may not impossible in every case. But the FTC has long refused to take puffery seriously, leaving to courts the job of governing most misleading speech. Legal authorities—especially in the securities and advertising contexts—treat puffery doctrine as a kind of semantic inquiry. They believe themselves capable of divining consumption behavior from first principles, without considering evidence of actual consumer reaction to puffing speech. As Part IV.C demonstrated, this interpretative approach has led authorities to adopt a distorted view of consumption.

If we cannot trust courts and regulators to intuit an optimal amount of puffing speech, we should look to the other legal actors involved in the process. Current doctrine essentially puts the burden on buyers of stocks and services to avoid the harms that puffing speech creates. This decision has had pernicious effects.

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251. *See* Russell N. Laczniak & Sanford Grossbart, *An Assessment of Assumptions Underlying the Reasonable Consumer Element in Deceptive Advertising Policy*, 9 J. PUB. POL'Y & MKTG. 85, 95 (1990) (suggesting that experts are poor at evaluating puffing speech). *See generally* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEG. STUD. 107 (2001) (examining the hindsight bias in how juries and judges analyze risk).

252. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 202–06 (2005) (reciting the "basic story" of the mechanism of regulatory capture).

First, it has encouraged sellers to expand their use of persuasive speech significantly.[253] Thus, one student found that print advertising in *Time* contained less than half as many words in 2000 as in 1976.[254] Persuasive messages that "elicit only emotional responses, omitting virtually all information"[255] are more popular than ever.[256] To the extent that most persuasive advertising could also be characterized as puffery, such an expansion casts some doubt on the economic model of non-regulated advertising advanced in Part IV.A.[257]

Second, current doctrine encourages sellers to learn about the behavioral tics of buyers and exploit them. There is some evidence that sellers know that puffing speech works to encourage sales.[258] One insight from that marketing research, well-publicized to advertising agencies, is that emotion sells more than logic. Specifically, consumers seek to avoid cognitive effort: the more information contained in an ad, the less persuasive it may be.[259] More significantly, positive emotional effect, and not rational choice, drives purchasing decisions. [260] Humor sells more than facts.[261]

Third, and most perniciously, current doctrine encourages sellers to target their puffing speech at those buyers who will be most likely to be convinced by it.

253. *See generally* Hammer, *supra* note 181, at 438–44 (collecting evidence of a "noticeable decrease in the quantity of information contained in advertisements").

254. Sarah C. Haan, Note, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281, 1288 (2000).

255. *Id.*

256. *See* Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2047–49 (2005) (discussing the theory of "persuasion knowledge" as providing a more sophisticated view of customer behavior).

257. This is because puffing speech is almost always immune from regulation.

258. *See, e.g.*, Olshavsky & Miller, *supra* note 217, at 19 ("It is commonly believed by advertisers that a little positive exaggeration in product promotion favorably influences a consumer's judgment of product quality."); Preston, *Regulatory Positions*, *supra* note 43, at 341 (recounting letters written by advertising groups). Professor Hayden further argues that "[c]ommercial speech is a commodity like any other, whose price and availability are subject to the laws of supply and demand . . . 'Thus the extent to which sellers invest in it will be determined by the extent to which consumers rely on it.'" Paul T. Hayden, *A Goodly Apple Rotten at the Heart: Commercial Disparagement in Comparative Advertising as Common-Law Tortious Unfair Competition*, 76 IOWA L. REV. 67, 88 (1990) (quoting remarks by Robert Reich, Director, FTC Office of Policy Planning, before the National Conference on the First Amendment and the Corporation (Mar. 16, 1979), *reprinted in* FTC TRADE REGULATION: ADVERTISING, RULEMAKING, AND NEW CONSUMER PROTECTION 39, 50–51 (1979)).

259. Haan, *supra* note 254, at 1297.

260. Uzma Khan et al., *A Behavioral Decision Theory Perspective on Hedonic and Utilitarian Choice*, *in* INSIDE CONSUMPTION, *supra* note 182, at 144, 144–65 (collecting evidence and proposing model for when emotional choice predominates over rational choice, based on cycles of self-attribution); *see also* Richard P. Bagozzi et al., *The Role of Emotions in Goal-Directed Behavior, in* THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES 36, 37–48 (S. Ratneshwar et al. eds., 2000) (summarizing literature on the relationship between emotional effect and consumption).

261. Haan, *supra* note 254, at 1300; *see also* Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99, 102–08 (2005) (noting the effect of emotional decision making in financial markets).

That is, because in most of its aspects,[262] regulation of puffing speech treats consumers as homogenous, either *deceived* or *not deceived* as a group. Marketers who can identify specific groups within the class of consumers that are particularly vulnerable will be able to have their cake (immunity) and eat it too (exploitation of a small class of consumers). Thus, current doctrine creates an unwholesome paradox.[263] Sellers increasingly rely on persuasive, puffing, speech, but are protected from liability because such speech is assumed not to work.[264] Through learning strategies over time, marketers will "figure out" which types of puffing speech are most effective in building brands, selling implied facts that may not be true to particularly vulnerable sub-groups of the market.[265] Buyers' abilities to protect themselves by discovering fraud and learning from it are short-circuited because the power of puffing speech increases with exposure.

Possibly in response to this potential increase in consumer harm, much of puffery doctrine and scholarship to date has focused on buyer behavior.[266] This focus leads immediately to the constitutional problem discussed in Part III, which, as we have seen, equates the First Amendment's protections to a theory about when buyers will be misled by speech. Most proposals to reform current puffery defenses miss the import of this constitutional problem and argue that regulatory authorities could establish prophylactic rules preventing fraud. But such rules are constitutionally vulnerable.

A focus on seller behavior provides a better alternative. In an important sense, puffing speech is like the output from a productive factory. Like all such outputs, puffing speech creates some socially beneficial effects. Unlike a factory, puffing

262. With the exception of the one-on-one regimes in tort and contract law.

263. Leighton, *supra* note 19, at 617.

264. Haan & Berkey, *supra* note 184, at 245 (noting that "if puffery does not work, salespeople and advertisers would not use it"); Hayden, *supra* note 258, at 86 ("It seems an odd legal theory indeed that would allow a speaker to try mightily to persuade an audience of the seriousness of a claim, yet permits the speaker's actions to be defended on the ground that no one in the audience was entitled to take the claim seriously."); Rotfeld & Rotzoll, *supra* note 239, at 87 (asking "if puffery is not believed, why is it used by advertisers?"); Robert G. Wyckham, *Implied Superiority Claims*, 27 J. ADVERTISING RES., Feb.–Mar. 1987, at 56, 60 (noting that it "seems logical" that advertisers using implied-superiority claims "are not unaware of the nature of consumer interpretation").

265. As a reader of this Article in draft commented, "If buyers can't or won't learn to self-protect against fraud, and competitive buyers know this, then sellers will offer such buyers alternative benefits to capture market share." For example, sellers of goods will compete on price in markets where puffery "drowns out" quality comparisons. *But cf.* Bagwell, *supra* note 177, at 144 (noting that the "competitive pressure that is normally associated with price advertising may be suppressed when pricing is complex and some consumers are thus naïve"). Are consumers receiving such lower prices worse off? That answer would seem to depend on a more nuanced theory of consumer welfare than is currently available.

266. *But cf.* Craswell, *supra* note 6, at 678–79 (proposing a new definition of deception, administered by a regulatory agency, that would turn on the costs and benefits of speech to buyers and sellers). Craswell's view is in many ways similar to mine, except that his proposal (like current doctrine) assumes that authorities can appropriately draw lines between deceptive and nondeceptive speech, whereas I assume that the cost/benefit weighing in the first instance ought to be done by speakers.

speakers help society, not by fabricating widgets, but instead by increasing consumer satisfaction with their purchases, by reducing search costs and providing quality assurances through brands, and generally by fulfilling both buyer, and seller, optimistic world-views.

But like a factory, puffing speech also pollutes. Some percentage of hearers of puffing speech believe it as gospel; smaller percentages understand the speech to imply facts that are false. Consumption as a result of this polluted speech is not welfare maximizing. But regulators and courts, as we have seen, are either unable or constitutionally prohibited from making rules distinguishing polluting from clean speech.[267]

Thus, puffing-speech doctrine must confront an interesting variant of the classic negative externality problem from the field of tort law.[268] Puffing speakers create informational burdens currently borne by buyers, without compensation from sellers.[269] As a result of this externalization of costs, speakers may currently be puffing too much: the law fails to effectively regulate their conduct because of its focus on "good" and "bad" consumption.

The problem with the "good" and "bad" consumption approach is that it fails to recognize speakers' incentives to make speech intentionally more distorting. Jon Hanson and Douglas Kysar have explored a variant of this phenomenon in the products-liability arena.[270] Their research focuses on the manipulability of consumer behavior[271]: "Once it is acknowledged that consumer risk perceptions may be affected by, for instance, the manner in which information is framed, then it becomes inevitable that manufacturers will exploit those framing effects in a way that maximizes manufacturer profits."[272] They describe the vast industry devoted to developing better techniques to manipulate purchase decisions[273] and conclude

267. Authorities attempting to regulate puffing speech face both type 1 (failing to capture deceptive conduct) and type 2 (overdeterring utility-maximizing speech) risks. My thesis suggests that this line-drawing task is beyond their capabilities as currently constituted.

268. WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 613 (5th ed. 1991) ("An activity is said to generate a beneficial or detrimental externality if that activity causes incidental benefits or damages to others, and no corresponding compensation is provided to or paid by those who generate the externality.").

269. Notably, the puffing externality depends entirely on the processing of the "pollution" (speech) by the buyer. That is, we should imagine a factory located in a small town, where 40 percent of the population, because of a preexisting asthmatic condition, is vulnerable to the particulates in smoke, while 60 percent is totally immune. The vulnerable subset of the population processes the smoke and becomes quite sick, just like the vulnerable subset of the consumer population that believes puffery and is confused by it.

270. *See generally* Hanson & Kysar, *supra* note 178; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) [hereinafter Hanson & Kysar, *Some Evidence*]; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000) [hereinafter Hanson & Kysar, *A Response*].

271. Hanson & Kysar, *supra* note 178, at 721–42.

272. *Id.* at 724.

273. Hanson & Kysar, *Some Evidence*, *supra* note 270, at 1429–37.

that evidence of manipulation of consumer preferences reinvigorates the case for enterprise liability.[274]

Enterprise liability is, simply, a way to redistribute legally cognizable harms away from consumers and toward their originators.[275] The case for enterprise liability is especially strong where consumers are unable to self-correct their behavior and reduce the likelihood of suffering a legal injury.[276] Correspondingly, attacks on enterprise liability lament its inability to properly regulate the amount of consumer care[277] and its alleged pernicious effects on the insurance market.[278]

Nevertheless, as Hanson and Kysar observe, the desirability of enterprise liability turns on its relative success in properly deterring legal harm, as compared with regulatory and negligence alternatives. In the puffery context, the FTC's policy has the inevitable effect of permitting manufacturers to actually mislead some segment of the market through the transmission of false, implied facts. Similarly, in the securities context, courts immunizing forward-looking puffery deny some investors protection against disclosures that defrauded them.

I argue that we should apply these insights to the puffery defense by creating a regime of "presumed liability" for puffing speech. Presumed liability is distinct in significant ways from enterprise liability. I sketch out only the outline of this approach here, leaving a more complete development for a subsequent article.

Briefly, presumed liability for puffery would mean that if a court or a regulator identified puffery as a component of a particular piece of seller speech, it would be *presumed* to imply *false factual claims* that were relied upon.[279]

Speakers would then have the burden of rebutting the presumption. They could do this by making one of three evidentiary showings: (1) they did not intend to mislead consumers; (2) there was no reliance by most of the audience; or (3) the speech implied no false facts.

To understand why intent is relevant to the inquiry, imagine two stock disclosures, both containing the following phrase: "Next year, our company's prospects are exceedingly strong." In both situations, some buyers rush to the market based on this puffery. As it turns out, in the first situation, the disclosing entity honestly believed the statement; in the second, the disclosing entity did not believe the statement and hoped to use the puffery to create a short-term stock bubble as a prelude to an insider sale.

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274. *See generally* Hanson & Kysar, *A Response*, *supra* note 270.

275. *Id.* at 268–71.

276. *Id.* at 268–69.

277. *See, e.g.*, James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 250 (2000).

278. *See generally* Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129 (1990) (discussing the relationship between insurance and enterprise liability).

279. The claims would be presumed false because of the heterogeneous market. Listeners imply a variety of facts from puffing speech. At least some of those facts are likely to be in tension with others, and some will be false.

The law generally recognizes that the second seller is more culpable than the first, through its emphasis on scienter. Puffing doctrine should move toward a more intense focus on scienter and manipulation, and away from a current focus on rational consumption that leads courts to idealized models of behavior that are weakly predictive of actual consumption practices. By contrast, a focus on intent and motive is well within legal authorities' traditional zone of competence.

Courts should also consider evidence of actual reliance and implied false facts. Simply intending to manipulate consumers toward non-maximizing ends cannot be the sufficient condition for liability. Instead, liability for puffery should result from success at convincing consumers to buy when a sufficient percentage of the market has relied on facts implied from puffing speech that are false.[280]

In practice, rebutting the intent, reliance, and causation presumptions would require sellers to present laboratory or empirical studies of marketplace reaction to puffery. Sellers likely will have cheaper access to this information than courts and buyers. Sources of proof might include: (1) expert determination based on hindsight judgments;[281] (2) consumer surveys as to their perceptions of whether they were misled; and (3) deception as measured by the speech's effect on "certain of the consumer's cognitive variables."[282]

For example, in the securities context, sellers could rebut the presumption by showing that a stock's price did not move as a result of the puffery—a straight-forward application of current loss-causation techniques. In the warranty and promissory estoppel contexts, the law would change very little: factfinders would continue to ask about the relationship between the parties to look for causation and falsity as a product of the seller's persuasive power. In the FTC context, presumably, the current doctrine would be literally reversed.

The presumed-liability proposal has many advantages. *First* and most importantly, sellers would be forced to internalize the costs of their misleading speech. As a result, they would likely pass along those costs to purchasers through (in the product/service context) higher prices, or through (in the stock context) reduced likelihood to opine in disclosures or overall reduced stock prices. Consumers and investors would therefore be notified of the true price of goods and would reallocate their purchase decisions accordingly.

Second, presumed liability for puffing speech would make sellers more likely to test the implied factual claims of their puffery before using them in sales presentations. Such pre-testing could help sellers establish the scienter part of their defense to charges of fraud and would encourage sellers to create more accurate

280. I leave open the exact percentage of the marketplace that would have to imply the facts in question. Needless to say, requiring a seller to prove that no one implied facts from speech that were false would put it in an impossible position. One component of the "harm" analysis would necessarily depend on the costs of prosecuting and investigating fraud in distinct markets.

281. However, there is evidence that closer attention to puffing claims by experts decreases, not increases, the advertising's impact and believability. *See, e.g.*, Laczniak & Grossbart, *supra* note 251, at 95 (suggesting that these findings have implications for the FTC's policy on deception).

282. Grunert & Dedler, *supra* note 223, at 155.

speech.[283] As significantly, the presumption would help to correct the effects of seller-optimism bias. Sellers would soon learn of the many (false) expectations that listeners take from seller's vague and gauzy expressions of hope.

Third, by permitting sellers the latitude to deceive a small number of particularly credulous buyers (i.e., by setting a threshold for the percentage of consumers who believe a particular implied-fact claim), puffery doctrine could be made to conform to constitutional guarantees and would be significantly less vulnerable to challenge than proposals to ban persuasive advertising entirely.[284] Moreover, this aspect of the proposal would recognize that the increasing availability of consumer information on the Internet creates the possibility that puffing speech will be less effective in the future than it is today.

Fourth, the reform I have outlined would help move legal authorities toward a more coherent doctrine. As this Article has explored, the law now encourages judges and regulators to intuit the relationship between puffery and behavior. The presumed-liability approach, by contrast, is based on actual evidence of behavior and encourages parties to submit additional data to authorities about intent, reliance, and causation in a format that authorities are well positioned to process (i.e., through the adversarial process). Although sellers' rebuttals and buyers' counter-rebuttals may result in a battle of the experts before a jury regarding the effects of puffing speech, the law's truth-seeking function in such a context is more developed than by a single judge's arm-chair theorizing.

Fifth, my approach would go some way toward resolving the puffery "paradox."[285] A common objection to much of the current doctrine is that sellers consistently demonstrate that puffery is economically valuable speech, but are protected from liability by jurists claiming that it is not. This Article has suggested that the paradox is somewhat overstated. Sellers may be overoptimistic about their products and thus do not always intend to mislead when they puff.[286] Nonetheless, the central insight of the paradox is that puffery must be economically consequential for it to be so prevalent. My approach recognizes that the economic aspect of puffery is mixed: it produces both costs and benefits. While current doctrine ignores the costs of puffery and only vaguely accounts for its benefits, presumed liability deals with these variables directly.

However, an important potential objection to consider is the overdeterrence of a commercially valuable form of speech. Investigating the implied factual claims of sales talk is likely to prove expensive, especially for smaller businesses. We might see puffery driven out of some segments of the marketplace entirely

283. *See, e.g.*, James Heckman, *"Puffery" Claims No Longer So Easy to Make*, 34 MKTG. NEWS, Feb. 14, 2000, at 6 (discussing a rise in manufacturer care after private-party Lanham Act litigation increased the focus on puffery defenses).

284. *See, e.g.*, Hammer, *supra* note 181, at 480–90 (proposing a ban of non-informational messages in advertising and defending it against constitutional attack).

285. *See supra* notes 263–64 and accompanying text (discussing the puffery paradox).

286. This result holds even for sophisticated sellers because the law does not now force them to internalize the factual implications of selling speech.

(although if puffery is commercially valuable enough, sellers will continue to use it and absorb resulting liability costs). But the likelihood of this scenario should be somewhat discounted given the law's experiences with the sales of consumer goods under the UCC's restrictive-puffery policy. Because sellers still puff notwithstanding potential warranties, it seems hard to believe that the advertising market would be cleansed of exaggeration the day after presumed-liability policy for puffery goes into effect, or that stock disclosures would be devoid of all hype. Rather, the amount of fraud resulting from puffery would be moved to a more optimal level, which would better distribute puffing speech's true costs and benefits in the marketplace.

VI. CONCLUSION

> Puffery and statements of fact are mutually exclusive . . . . Defining puffery broadly provides advertisers and manufacturers considerable leeway to craft their statements, allowing the free market to hold advertisers and manufacturers accountable for their statements, ensuring vigorous competition, and protecting legitimate commercial speech.[287]

The court in *American Italian Pasta Co.* articulated an issue that is at the heart of modern First Amendment, economic- and consumer-protection debates: what is the law's role in protecting consumers from their own bad decisions? The puffery defense is an important locus of those debates. However, most of the scholarly discussion of puffery to date has treated it as a byproduct of the law of fraud or a holdover from previous *caveat emptor* traditions.

This Article has explored puffery as a compelling topic in its own right. For economists, the question of what to do with persuasive but literally nonfalse speech goes to the very heart of new and evolving theories of consumption behavior. For constitutional scholars, similarly, puffery is at the crux of the question of whether and how the First Amendment protects misleading speech. For behavioralists, puffery's powerful persuasive effect is yet more evidence suggesting the value of expanding liability to force sellers to internalize the cognitive costs of their products and services.[288]

The presumed-liability approach I have outlined is only one way to approach the problems posed by puffery doctrine, but it is most in tune with current research about consumption, as well as the emerging constitutional framework protecting commercial speech. Nevertheless, my approach might be vulnerable to critiques. All regimes of expanded liability for speech risk over-deterrence and chilling of pro-competitive speech. Further work on this topic might help us to quantify these costs and determine whether my liability solution is preferable to the status quo.

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287. *See* Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 391 (8th Cir. 2004).

288. *But cf.* David A. Hoffman & Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 414–15 (2002) (explaining that paternalism has been the dominant solution in the legal literature to increased sophistication about consumer reaction to legal rules).

I cannot, in conclusion, leave you with a false implication. I am not the first to try to sell a piece of scholarship using puffing speech.[289] Nor am I the first to attempt to use highly vivid examples of puffery to draw the reader into an otherwise technical and doctrinal morass.[290] Nonetheless, the title of this article hopefully serves as more than a mere misleading adornment. To the extent that you found yourself drawn in by a promise of comparative superiority, and feel let down, I will have demonstrated at least part of the point I had intended to make. So sue me.

289. *See, e.g.*, Burt A. Lazar, *This Column Is the Best One You'll Ever Read*, MKTG. NEWS, Aug. 15, 2005, at 8 (describing attributes of puffery doctrine and advising caution in making puffing statements). *See generally* Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 FLA. L. REV. 487 (1993) (proposing only minor changes to false-advertising law).

290. Leighton, *supra* note 19, at 615 ("You are about to enter a discussion involving over-the-top sales pitches for pasta, pizza, killer bee movies and roach bait, all of which were challenged in false advertising cases brought under Section 43(a) of the Lanham Act.").