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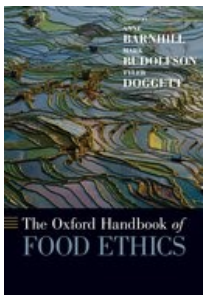
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CHAPTER

21 Deceptive Advertising and Taking Responsibility for Others

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Abstract

This chapter considers how the U.S. law of deceptive advertising embeds within it an extended form of responsibility, making advertisers sometimes responsible for consumers' mistakes. The chapter justifies this pattern of liability as a division of moral labor that bolsters consumers' ability to trust the quality of the food supply and the representations made about it. It answers worries about paternalism, arguing that the law is not predicated on distrust of consumers, but facilitates consumer autonomy, permitting consumers to direct their scarce time and energy to projects of their own choosing. The chapter also answers freedom of speech concerns about restricting advertisers' ability to make factually true representations. It emphasizes that commercial speakers have a special responsibility to ensure accurate uptake by consumers because property law affords commercial producers the ability to exclude consumers and their representatives from verifying speech about speakers' products for themselves.

Keywords: deception, deceptive advertising, uptake, paternalism, freedom of speech, First Amendment, food and drug, misrepresentation

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Most of us do not grow (or concoct) the majority of what we eat and consume.[1] We rely on farmers, producers, and vendors not only for our food and drug supply but also for information about those goods, including: their identity, their sources, their healthfulness, and other effects associated with their consumption. A large network of laws and regulations govern both aspects of this dependence relationship, setting standards for what may be produced and sold, and under what description.

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Not only does the law of commercial misrepresentation function as an important component of the system of regulation of information about food and drugs, its structure and application embody a philosophically interesting division of labor in the practice of assigning responsibility. By "responsibility," I do not mean to invoke considerations of praise, blame, or causal responsibility. I am interested in the sense of responsibility for something that means to bear the burdens associated with that thing, such as taking appropriate care with respect to it, maintaining apt conditions for its proper use (and understanding), preventing mishaps and bearing the costs of such mishaps as occur.

As I will discuss, the law of commercial misrepresentation in the United States sometimes assigns responsibility without fault. Indeed, it sometimes assigns responsibility to speakers for errors made by
p. 471 consumers. Under California laws banning deceptive ↳ practices, Gerber would be legally liable for a label truthfully touting a product for children made with "real fruit juices and other all natural ingredients," assuming plaintiffs could prove, as alleged, that the label had a tendency to mislead many consumers into thinking that *all* the product's ingredients were natural.[2] As this example illustrates, liability may attach even when what the speaker says is true, there is no evidence the speaker aims to deceive, and the misled audience members' false inference is unreasonable, although understandable. In this and like cases, the law encapsulates some interesting ideas about deception and responsibility that I will explore and defend. Indeed, the phenomena to which I will draw attention are not confined to legal domains. Much of it occurs in everyday life, but has flown under the philosophers' radar.

There is a tension between this legal doctrine and some general moral precepts such as "there shall be no liability without fault" and "one should internalize the costs of one's own choices, but not the costs of arbitrary misfortune or the costs of others' decisions." [3] I attribute the tension between the law and our moral thinking more to the prevalence of broad moral generalizations in these areas, than to a well-considered rejection in moral thought of the law's inherent moral position with respect to specific contexts. By thinking through the examples, my aim is to make explicit an implicit moral position that assigns responsibility without fault and to defend it as philosophically interesting and plausible.

One way to pursue this idea would be to ask why we require and respond to fault, when we do. Then, one would show that some forms of liability do not fit this model because fault requirements make sense mainly when blame, punishment, and certain forms of remediation are at issue, but some other reasonable forms of liability
p. 472 are not occupied with these issues. That approach has merit, but I plan to take a different path ↳ and will explore what is gained, in some domains, by loosening the grip that considerations of fault have on liability and other assignments of responsibility. My defense will argue that, at least in some domains, this assignment of responsibility facilitates justifiable and valuable relationships of reliance-inducing trust and cooperation.

Defending these positions requires overcoming some moral hurdles. As I have noted, some have the strong conviction that fault should be a prerequisite of moral and legal liability. Some may think it involves a further implausible stretch to extend one's moral and legal responsibility to encompass the mistakes of others. Although I am sympathetic to the instincts that drive these moral convictions, further reflection on these legal doctrines and cases illuminates the limitations of these intuitions. What is revealed is an important aspect of moral life in which we expand our responsibility to include more than is under our control and to bear responsibility for others' mistakes, even those of strangers.

This expansion of responsibility is integral to a form of cooperation that does not conform to Hume's prototype of two people rowing a boat, both actively performing (indeed identically performing) for amplified effect, where the trust involved is merely the trust that the other has the good faith to do his part.[4] The trust Hume's rowers have for each other is a condition, but not a constituent, of cooperation. The examples I will explore involve another form of cooperation in which one party's performance enables a form of substantive trust that goes beyond trusting in another's good will as a condition of one's willingness to perform or of the performance's achieving its purpose. In the cases I consider, achieving trust is an element of the end of

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cooperation and not only a means or condition of cooperation. It is a form of substantive trust because it involves not only trust in the other party's cooperative good will but also trust in her epistemic accuracy. Interestingly enough, that substantive trust and the cooperative end itself are often better realized by one party's playing a more passive role rather than the stereotypical active role of the cooperator who oars alongside.

To make out this defense, I'll offer a fuller, but not comprehensive, description[5] of the pattern of liability I have in mind, one embedded in the law of deceptive advertising in the United States.[6] Along the way, I will highlight how attending to the law of misrepresentation may suggest interesting conclusions about our philosophical positions about fault, cooperation, and the nature of deception. I'll then offer a defense of this form of liability that aims to respond to concerns about paternalism and freedom of speech. A final preliminary note: I will refer to "speakers," "advertisers," and "producers" interchangeably and I will refer to the "audience," "listeners" and "consumers" interchangeably. Of course, the chains of food production, labeling, communication, and
p. 473 advertising can be quite complicated and compartmentalized (as well as the chains ↳ of purchase and consumption), but for the purposes of this essay, those complications may be put aside.

The law of deceptive advertising: an incomplete introduction

I'll start with an abbreviated introduction to some elements of the law of deceptive advertising. Under the doctrine of puffery, advertisers may issue general and vague statements about their products without much accountability for their sincerity or truth. This doctrine is justified on the questionable grounds that given difficulties in verification and in containing one's exuberance for one's products, it is too difficult to police insincerity and inaccuracy about highly general, laudatory statements such as "Better Ingredients. Better Pizza,"[7] and "America's Favorite Pasta."[8] The American Italian Pasta Company touted Mueller's pasta as "America's Favorite," despite the fact that Mueller's pasta was not marketed nationally (making it dubitable that it was *America*'s favorite). There was no evidence to support the sincerity of the phrase, such as a consumer survey or other objective criteria showing that, despite its regional circulation, the product enjoyed a high level of national popularity. Given these facts, the slogan could not represent the credible (even if unverifiable) belief of the advertiser. Nevertheless, the phrase was upheld as a form of protected puffery.[9] Whatever the merits of this doctrine, consumers are advised to withhold credence from advertisers' general positive claims about their products and not to expect that those claims offer dependable warrants of quality or sincerity.[10]

The law of misrepresentation has sharper teeth, however, when it comes to more specific claims. That is where it becomes morally interesting. Unsurprisingly, advertisers are prohibited from issuing specific lies and other explicitly false statements about their products. For example, a court found "false on its face" a Tropicana
p. 474 advertisement in which a famous American Olympic athlete squeezed an orange declaring, "It's pure, ↳ pasteurized juice as it comes from the orange," and then poured the fresh-squeezed juice into a Tropicana carton. Juice, of course, does not emerge pasteurized from the orange but must undergo processing first.[11]

Because the law is interested in prohibiting deception, it offers protection not only against explicitly false statements, but extends further to recognize liability for other false claims indirectly implied by the advertiser's utterance, including specific implicatures[12] and other false intimations, such as presuppositions, of
p. 475 advertiser speech.[13] ↳ Although consumers are asked to exercise skepticism about very general claims about quality ("the best!"), when it comes to specific claims, they are not generally expected to restrict their credence to what is explicitly said, but may also rely on reasonable, specific inferences from what is said. For example, the Federal Trade Commission found some POM Wonderful ads run in the *New York Times* and in *Time Magazine* to be misleading. The ads boasted that a study found that after surgery or radiation treatment, prostate cancer patients who drank "eight ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years . . . experienced significantly slower PSA doubling times" (a measure of the growth of cancer cells).[14]

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POM's statement, while true, carried the deceptive implicature that patients who did not drink pomegranate juice had worse outcomes. Whereas, in fact, "patients who have undergone radical prostatectomy or radiation therapy for prostate cancer commonly experience a lengthening in PSA doubling time regardless of whether they consume pomegranate juice."[15]

Responsibility without Fault

The contrast that I have just described between the different approaches the law takes toward general and specific claims is itself interesting. What is more striking is that advertiser fault is not a prerequisite of many forms of liability for misrepresentation and deception.[16] The law looks more to the effect of the speech on the audience than to the intent of the speaker.[17] For example, the federal Lanham Act prohibits the use in commercial advertising of "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact," which "misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities."[18] Liability inquiries under the Lanham Act focus on
p. 476 whether advertising ↳ has a tendency to mislead or deceive consumers and not upon the speaker's intent. The Federal Trade Commission Act likewise renders unlawful "unfair or deceptive" commercial practices.[19] The Federal Food, Drug, and Cosmetic Act prohibits misbranding, which occurs for food when its label is "false or misleading in any particular."[20] Many state laws follow suit.[21] Remedies may range from cease and desist orders and injunctions to damages and restitution.

What counts as having a tendency to mislead or deceive presents a topic of even greater philosophical interest. Although the standard typically asks what would mislead or deceive the reasonable consumer, the "reasonable consumer" includes those whose knowledge may be limited and who may make fairly straightforward inferential mistakes. In some cases, the mistakes seem clearly reasonable. For example, the reasonable consumer may not know that 30% of milk's calcium is lost in the process of producing cheese. So, to urge consumers to buy processed cheese over imitation cheese because calcium is important and because a processed cheese slice is made from "5 ounces of milk" may encourage reasonable consumers falsely to infer that each slice has all the calcium of 5 ounces of milk and therefore that it has greater nutritional value than it in fact has. I was such a reasonable consumer before I read the relevant case.[22]

The law also allows that the "reasonable consumer" may fail to read or to appreciate disclosed and readily available information. For example, the company named "vitaminwater" agreed to alter its labeling after a class-action suit was filed complaining that consumers were deceived by the beverage's name and slogans such as "vitamins + water = that's all you need" and "vitamins + water = what's in your hand." Plaintiffs alleged that the labels and slogans persuaded them that the drink was purely a health drink composed of only vitamins and water, although its sugar content rivals that of a classic soda. Its sugar content, however, is not hidden but is
p. 477 disclosed on every bottle ↳ on the nutritional panel. But, as a court opined at a preliminary stage of the litigation, "the presence of a nutritional panel, though relevant, does not as a matter of law extinguish the possibility that reasonable consumers could be misled by vitaminwater's labeling and marketing" that "even reasonable consumers may not read the nutritional label prior to every purchase of a new product."[23]

Other cases present grayer areas with respect to whether the "reasonable consumer" within the scope of the law really is reasonable or perhaps is a touch gullible. The FDA requires that food labels identify ingredients by their "common and usual name" and for that reason, currently advises manufacturers not to use the term "evaporated cane juice."[24] I appreciate that demand because, were I not thinking carefully, as a stereotypical Californian who loves juice, I might prefer yogurts with evaporated cane juice over one whose label admits "added sugar." Although, if I took a moment to consider, I would cotton on to the term "evaporated cane juice" as a euphemism for sugar, albeit one that is bizarrely accurate as few euphemisms are.

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Or, consider the label in dispute in *POM Wonderful v. Coca-Cola*,[25] a case heard by the U.S. Supreme Court in 2014. The label of Coca-Cola's Minute Maid juice product prominently featured a large pomegranate half, three large blueberries, three red grapes, and two raspberries in the foreground and a large apple half in the background. The label stated in bold capitals "POMEGRANATE BLUEBERRY" and then in smaller print "flavored blend of 5 juices." Coca-Cola's attitude toward pomegranate juice, however, closely resembled Alfred Hitchcock's view of vermouth's role in the gin martini. Hitchcock, as you may recall, advised "five parts gin and a quick glance at a bottle of vermouth." Coca-Cola's flirtation with pomegranate and blueberry juices only barely progressed beyond an initial glance. Its "Pomegranate Blueberry" beverage featured 99.4% apple and grape juice with only a .3% dash of pomegranate and even smaller dashes of blueberry and raspberry juices.[26] FDA regulations permitted Coca-Cola to call it "Pomegranate Blueberry" because of the "flavored blend of five juices" qualifier. What was at issue in the case was whether the fact of the FDA permission should perforce settle the issue of whether POM Wonderful, as a competitor, could pursue a claim of misrepresentation under the Lanham Act. In oral argument, counsel for Coca-Cola opined that consumers are not "quite as unintelligent as POM must think they are. They know when something is a f[l]avored blend of five juices . . . [that] the nonpredominant juices are just a flavor."[27] That is to say, in her mind, the reasonable consumer is a close-reading, skeptical sophisticate who has internalized FDA regulations. Hence, he knows that "pomegranate flavored" conveys "pomegranate, not so much" and when the term "flavored" is on the scene, he resists counter-suggestions offered by a name
p. 478 and the scale of the pictures. ↳ Justice Kennedy, in reply, copped to the fact that he had believed "this was pomegranate juice," eliciting Justice Scalia's observation that Justice Kennedy "sometimes doesn't read closely enough."[28] Justice Kennedy survived the ridicule and prevailed, writing the unanimous opinion of the Court.

The Court did not settle the factual question of whether the ad was misleading, but held that the FDA permission did not preclude a case for misrepresentation. It thereby allowed for the possibility that the reasonable consumer is not expected to read carefully and cynically, tailoring his interpretation to reflect the latest FDA and USDA concessions to business interests.[29] This seems like the right posture. Most of us are now on alert that "cherry flavored" means that the laboratory, not the orchard, produced the red flavor, but we should not, as a general policy, insist that the reasonable person become a connoisseur of Madison Avenue market-speak.

In other cases, we move past gray into black and white where I think we can confidently say that the mistakes involve intellectually culpable errors. In this domain, the term "reasonable consumer" works as a conclusory label, not as a guide to what is and is not permissible advertising. In the examples of interest to me, it's a point of pride, especially among those philosophers reading along, that you do not resemble the reasonable consumer. You are not so gullible.[30] At least if you were paying attention, you would not make the earlier mentioned mistake of confusing the claim that Gerber Fruit Juice Snacks are made with "real fruit juice and other all natural ingredients," for the claim that *all* their ingredients are natural.[31] Statements that are true and
p. 479 that might meaningfully be advanced for their literal truth may still be illegal because they have a tendency ↳ to mislead listeners, even those listeners who are not attentive or careful and who make mistaken inferences.[32]

Consider another example: a Lanham Act violation was found when American Home Products advertised that "hospitals recommend acetaminophen, the aspirin-free pain reliever in Anacin-3, more than any other pain reliever."[33] This statement is literally true and, more importantly, might be offered (cooperatively) for its literal truth. Still, in practice, it might have a tendency to mislead the consumer into thinking that the *brand* Anacin-3 is recommended more than any other pain reliever when in fact the acetaminophen-carrier commonly used in hospitals is packaged under the Tylenol brand. The advertiser was liable even though the more straightforward way to convey the message that the listener mistakenly absorbed would have been to say that "hospitals recommend Anacin-3, an aspirin-free pain reliever containing acetaminophen, more than any other pain reliever." Of course, that's not what the ad said. The more indirect construction chosen by the advertiser should alert a good listener that something else was being conveyed. Even so, the advertiser had the obligation to protect the listener from making an incorrect inference by breaking the grammar into more easily digestible

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bits, saying something more like "[H]ospitals have recommended a product containing acetaminophen more
p. 480 than all other types of pain reliever combined. Anacin-3 contains acetaminophen."[34] ↳

In one way, the law of deception regards fault as relevant to liability because remedies may be enhanced when deception is intentional or reckless. But in two other philosophically interesting respects, these examples illustrate how fault is sidelined as a relevant factor in this corner of the law: first, the fault of the speaker is not a prerequisite of liability and second, speakers may be liable for some false beliefs that are due to an intellectual fault of the audience.

First, whereas many philosophers tend to describe deception as requiring an intention to manipulate the subject or an intention to deceive the subject, legal liability for deception may attach when speech is likely to deceive and/or when a speaker has reason to know the audience will draw a relevantly false conclusion from one's statement.[35] Under these legal doctrines, a speaker may deceive a listener even when the speaker does not intend for the listener to form a false belief. One can imagine the Anacin-3 ad being written by an innocent, grammatically careful copywriter. On this conception, deception can occur through negligence or even when the speaker speaks properly and reasonably, with an innocent motive, and the misapprehension arises from the listener's own carelessness or inattention.

This conception of deception might, at first, raise alarms for philosophers because the philosophical tradition has tended to analyze the wrong of deception in terms of the wrong of aiming to manipulate someone's mental contents for one's own purposes. If the wrong is analyzed in terms of intentional manipulation, then there is a mismatch between the legal wrong of deception (or misrepresentation) and the moral wrong. I think these alarms go off prematurely and that the moral wrong of deception is better understood in terms of the failure to exercise due care to ensure one does not impart or reinforce inaccurate beliefs in another. As will emerge, what due care demands varies according to the circumstances and relations of the parties.

This understanding of deception not only makes room for the possibility of negligent deception but also, to its credit, for deceptions without wronging. Deception without wronging transpires when one imparts inaccurate beliefs to another without lying and without violating a standard of due care toward the listener. This may occur, for example, when a person's truthful remarks nonetheless induce inaccurate beliefs in the listener about the speaker and the true facts are ones the speaker has a right to keep private. Purportedly, Athanasius of Alexandria was fleeing hostile pursuers who approached his boat and asked where Athanasius was. Unrecognized, Athanasius allegedly truthfully replied, "He is not far." The false implicature (that he was not also "here") deceived its recipients into believing the speaker was not Athanasius and that Athanasius was not
p. 481 on the boat. [36] Assuming his pursuers were not entitled to pursue him and had no right to ↳ information about his location, the deception does not seem wrongful. In this case, there may well have been an aim to manipulate, but one can imagine like cases where there is no aim to manipulate. Suppose a sailor on Athanasius' boat aspired to neutrality. He did not wish to be the source of the information that would doom Athanasius, and he had no obligation to assist his pursuers, but wasn't all that concerned to save Athanasius either. He would not have stopped another sailor from revealing Athanasius' identity. Our sailor may reasonably feel conversational pressure to respond to an inquiry and moral pressure not to lie. Satisfying these three desiderata (to respond, to do so without lying, and to do so without being the one to doom Athanasius) may lead to a terse, misleading response like "he is not far" even when there is no aim to manipulate. Although it is quite common to conceive of deception as involving intentional manipulation, a conception of deception that allows for some deception that is not wrongful and even some that is not driven by manipulative ends seems, on reflection, consonant with our experience.[37]

A second concern one might have about the legal doctrine of deception is that, even where the unwarranted inference is the fault of the audience, legal responsibility can still lie with the speaker where the audience's mistake is likely. Advertisers may be liable even for misunderstandings for which, arguably, the consumer is at

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intellectual and prudential fault. That's interesting because it renders the speaker responsible to avoid or to obstruct listeners' errors.

Two criticisms might be made of this doctrine that makes commercial speakers liable for some consumers'
p. 482 intellectual errors occasioned by ignorance, inattention, or faulty ↳ reasoning: first, that it is paternalist and second, that it places undue responsibility on a speaker for the fault of the listener. This second objection may find deeper roots in worries about holding people responsible for other people's faults and in worries about an apparent tension with the principle of freedom of speech. That principle thrives on the notion that speakers are not responsible for the beliefs formed by listeners but that all of us are individually responsible for making up our own minds about the information, opinions, and arguments presented to us. Neither objection seems apt to me. Exploring why not may help us understand the implicit picture of moral relations between speaker and listener embedded in the law.

Paternalism

Let me first address the potential complaint that the legal doctrine is (objectionably) paternalist because it holds the speaker responsible for misunderstandings by the listener that the listener could have forestalled on her own, thereby shielding the listener from having to shoulder the consequences of her own mistakes. The doctrine is paternalist either in shielding listeners from their mistakes or by assuming listeners fall short of being rational and autonomous.

I think this complaint involves an overly simple view of what constitutes (objectionable) paternalism, conflating it with a sort of radical libertarianism. "Paternalism," as I will use the term, involves the unwelcome substitution of one party's agency or judgment for another's, in the latter's rightful sphere of autonomy, that emanates from an implicit or explicit judgment by the former of the inferiority of the latter's judgment or agency.[38] To start with, it is unclear that the legal doctrine of deception and its justification, when charitably interpreted, must involve any initial, even implicit, assessment of the inferiority of judgment or agency about consumers. Rather, it represents an assignment of responsibility that serves the interests of consumers and renders their autonomy more meaningful by allowing them to devote their careful energies and attentions elsewhere.

Consider a non-speech example. Given adequate study, it lies in the range of our capacities to become experts on the pharmacology of purity and adulteration in water. We could devote some portion of our education, each of us, to learning about the integrity of our water supply, to testing our water as it comes out of the tap, to mending the water pipes ourselves, and to de-salinating where necessary. That we decide instead, as a community, to relieve each of us of that responsibility and to locate that responsibility in the government or in quasi-public utilities is not a sign of contempt for each other's abilities.[39] It is also, therefore, less a substitution
p. 483 of agency than a well-motivated *delegation* ↳ of agency. It should instead be understood as our effort to permit each of us to focus our attention elsewhere, while ensuring our safety. The fact that we have a capacity that we could develop into an ability we routinely exercise does not suggest that we must do so or that forms of social organization that relieve us of the need to do so are paternalist.[40]

My suggestion about the law of deceptive advertising is that we view it much as we view the division of labor over the water supply. We could, of course, install a thorough-going regime of caveat emptor and caveat auditor in which we were made fully responsible for investigating the truth and accuracy of the representations made by sellers. Where sellers' claims turned out to be false or where we could not ascertain their accuracy, we could just abstain from relying on their claims in our decisions whether to buy their wares.[41] But, we have good reason to elect a different division of labor and responsibility, reasons not based on a sense of our inferiority of judgment or agency. Given our finite time and resources, shouldering that responsibility would divert our attention from other projects and pursuits that we choose to pursue and that more closely jibe with our

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individual passions and needs. Locating that responsibility in the speaker offers us greater opportunities to devote ourselves, in terms of time and capacity development, to our own chosen interests and pursuits, rather than to fact-checking the agenda of the claims made by speakers to promote their own interests in hocking their wares.

One might object that this account explains why listeners are shielded from responsibility for catching the errors and inaccuracies of speakers and why we might defend *some* deceptive advertising law as non-paternalist. But, the objection would go, how would this defense extend to include speaker responsibility for (some) listener error? The water board can be vested with full responsibility for the quality of the water delivered to your home but not for the arsenic you unwittingly spoon into your coffee. Similarly, one might
p. 484 think that the speaker may reasonably be responsible for his own accuracy and sincerity, ↳ but not for the mistakes, even the predictable mistakes, of the listener. That additional move of relieving the listener of responsibility for her own mistakes and communicating in ways that are proof against misunderstanding may be thought to drift into paternalism because this part of the law is predicated on sheltering the listener from her own errors during activities the listener herself *must* conduct. (The objection might be put: You can assign the tasks of accurate speech, fact-checking, and sincerity to the speaker but you cannot make the speaker listen and process the information for the listener.) Here, again, I want to resist.

Our admission to ourselves and the acknowledgment of others that we may make errors is not a self-admission of inferiority or inability to conduct oneself autonomously. Our picture of autonomous agency that others must respect and that we must respect about ourselves need not be one of perfect agency or dogged independence and self-reliance. We *could* self-police but in some domains, it may not be a profitable expenditure of our time and energies. We may reasonably arrange matters so that others must take charge and police against our own potential errors, thereby allowing us to pay minimal attention in this domain so that we can attend to other domains of our choosing. To be sure, there are some things we should not outsource, compatible with maintaining our status and identity as autonomous agents. For example, we should not outsource our judgments about our interpersonal moral duties, who to befriend, and how to conduct those friendships, our career choices, and our political affiliations and judgments. But, outsourcing our responsibility to safeguard against error in the comprehension of commercial solicitations does not seem to fall in these categories.

It seems more like the law regarding overpayment. If I erroneously overpay a bill to a vendor, the vendor must return the money. She cannot pocket the proceeds of my error, even though the error was directly mine and I gave her the money deliberately.[42] She has no claim to retain the funds when her possession is the product of an error, not a gift, and she has performed no service and provided no good that merits payment. Indeed, she must take some steps to return it, thereby insulating me from some of the consequences of my irresponsibility. Just as with the law of deceptive advertising, this rule relieves some pressure to institute further protocols and
p. 485 layers of self-review and compulsive checking for error.[43] ↳

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Freedom of Speech

The more interesting complaint than paternalism may be one that issues initially from the speaker's perspective, although it ultimately touches on both speaker and listener interests. I have argued elsewhere that it is a cornerstone of First Amendment jurisprudence that, in core cases of freedom of speech, sincere speakers should not be held legally responsible for their listeners' reactions, including their listeners' predictable but unwarranted and mistaken conclusions.[44] A speaker who decries the corruption of the intellectual property regime may predict that this speech will inspire some audience members to conclude that legal disobedience is warranted and to pirate films and music, although this conclusion is not entailed by the speech. The speaker is not and should not be responsible for any pirating that results. Morally, the speaker may bear some responsibility to clarify predicted errors in entailment and to advocate at least plausible views, but even granting some such responsibility in some cases, it cannot be a comprehensive moral responsibility to addend all speeches with warnings about possible errors. It certainly cannot be a *legal* responsibility compatible with a regime of freedom. Indeed, so long as the speaker is not urging a mentally incapacitated audience under her spell, that is, so long as she is not *inciting*, the speaker who makes the abstract case for piracy should not be held legally responsible for convincing the audience that piracy is warranted or for any piracy that consequently ensues. As a general matter, a regime of freedom of speech must assign legal responsibility for drawing reasonable conclusions from speech to the listener. Even where the speaker advocates illegal activity, the listener cannot be considered her pawn but must be charged, as a citizen, with the responsibility to evaluate the argument and arrive at the proper conclusion with respect to her own practical agenda. A contrary regime will presuppose a conception of right answers that may be fallible and in any case should be contested and worked through by listeners. Further, a contrary regime would fail to offer speakers a sufficiently broad-ranging outlet for speakers to share their thoughts, and thereby to benefit from codifying them and having them recognized and responded to by other thinkers.

Yet, I defend the doctrine of misrepresentation for commercial solicitations which holds the speaker responsible not only for mistaken conclusions drawn from the speaker's false or insincere utterances, but for some predictable, mistaken conclusions drawn from the speaker's true, sincere utterances. Why, in such cases, should we say the listener was deceived by the *speaker* rather than by himself? How can assigning the duty of care over the listener's mental contents be compatible with the division of responsibility embedded within our freedom of speech commitments?

No one feature of the relationship between commercial solicitor and listener is dispositive. A cluster of features together justify this relation. First, in a competitive market, sellers' expressions reflect a compressed set of
p. 486
motives governed by an overriding end of ↳ survival in the market. Sellers are not primarily communicating to express themselves as human beings or to contribute to an understanding of the world with whatever content that may involve; the content of what they communicate about their products is, largely, driven and limited by the expected benefit of that communication in terms of sales and whatever legal regulation applies.[45] (It is also worth noting that were expressing that particular content important to them as human beings, other avenues exist besides commercial advertisements.) The dominant values of freedom of speech that accrue to speakers do not range freely in commercial speech. This fact constrains the degree to which we should be worried about legal regulations that place more responsibility on speakers than listeners in these communicative transactions. The constrained circumstances as well as the restricted range and ends speakers pursue in this domain already mark a departure from the speaker-listener relation celebrated and protected by our tradition of freedom of speech.[46]

Second, listeners are not well situated to assume the sort of responsibility that we ask of them in other domains of speech. It is not merely that there is an inequity of position, namely the speakers are experts about the subject of the speech but the listeners are not. That inequity holds true about a variety of topics covered by

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political speech, such as the economy and Iran's true nuclear ambitions. It is also true about any manner of personal topics concerning the speaker's life or mind.

Two further factors here make a difference. First, with much speech about matters of public concern, any listener is welcome to become equally expert on the issues and the efforts she makes to do so enhance the public dialogue. Whereas, with commercial solicitations and other advertisements, the listener is not welcome to become equally expert on the issues. Second, as I have already discussed, in a well-operating economic system, her efforts would not importantly enhance the public dialogue but would detract from the achievement of the cooperative ends and the listener's individual chosen ends that our economic division of labor should facilitate.

What do I mean when I say that as things now stand, in the commercial case, the listener is not welcome to become equally expert on the relevant matter? Most commercial advertisements do not exactly invite a dialogue in which the consumer may clarify exactly what was meant and what evidence the speaker relies
p. 487 upon for his claims.[47] ↳ Representatives are not loitering in the market aisles standing ready to answer your questions about the label. Whether to evade communication or, to perhaps more charitably, to serve a mass of consumers in a cost-efficient way, many companies impose structural barriers that make meaningful contact difficult through hidden phone numbers, automated recordings, time-consuming phone trees and wait times, and by staffing those responsible for consumer service with workers neither trained nor authorized to respond to questions that go beyond the elementary.[48] This deliberate elusiveness makes the effort to clarify information about a single product a daunting, discouraging task. Few consumers have the time to tackle one inquiry and pursue it to a satisfying resolution, much less to assume much responsibility for becoming expert on all the alleged features of the products advertised to her. Nonetheless, with foodstuffs, she will need to buy and consume many. Although consumers lack the time to develop expertise about the range of foods they need to acquire, producers have the luxury of a more focused agenda, perfecting the labels and advertisements for only their products.

Not only does a consumer face practical barriers to gaining full information about the foods they consider, it is further unavailable to her (and her representatives) as a matter of legal right. She cannot enter the factory, examine the ingredients, tour the farm, read the internal studies commissioned by the company, or scrutinize company contracts to ensure labor is treated fairly. The speaker is free to exclude her. Our system of property and rules of trespass make it the case that the listener is designed to occupy an epistemically subordinate stature. Although, prudentially, I would counsel consumers to pay close attention to advertising for their own sake, when consumers (and their representatives) are precluded from pursuing many relevant lines of inquiry
p. 488 to test or verify claims, it becomes more difficult to assess *ex ante* which mistakes of understanding represent ↳ one's own fault and which are due to exclusion. Consumers may reasonably not even know which questions to ask or what the range of relevant information is from which they are excluded, although these matters are entirely relevant to them.[49]

I suggest that the following principle holds: when we grant a monopoly, whether partial or total, to one party over information relevant to both parties, over which both parties have entitlements and/or strong moral interests, the party with exclusive access should bear a substantially higher level of responsibility for ensuring that communications concerning this information are successful in imparting *accurate* uptake. This responsibility seems all the more apt when the scope of the monopoly is nontransparent. It is one thing to demand the exercise of intellectual responsibility from a party who has the ability to investigate freely as she sees fit; it is another when the boundaries of one's investigation are artificially curtailed for the other party's benefit. In the latter case, it seems reasonable to lay an additional duty of care on the party with greater control and to permit the party already constrained to adopt a posture of trust, one that is both epistemically and normatively justified. We could hold consumers responsible for doing their best with the materials available to them, but why would we demand they invest that effort and attention toward an endeavor in which they are constrained from the start?

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Holding consumers to a high level of responsibility for making independent, sound judgments about products and for thoroughly understanding of advertisements is epistemically infeasible given that much relevant information is tightly held and given the legally protected confidential structure of most corporate production. Hence, I contend that consumers are not equally welcome to inform themselves and develop independent judgments about these products and the claims made about them. Furthermore, assigning a large portion of such responsibility on consumers, rather than placing it predominantly on producers who have close access to the relevant information, burdens the ability of consumers to pursue life projects of their own choosing. This burden conflicts with the underlying mission of our joint cooperative economic enterprise. Rather than expecting the parties to check one another and to stand in an adversarial relation to one another given that the non-expert party also has her hands tied behind her back, it makes more sense to complement the property right and the ability to exclude with a quasi-fiduciary duty towards the excluded who the property owner hopes to entice into a commercial relationship. This quasi-fiduciary duty involves, among other charges, not providing the occasion in which one party might predictably make a mistake to the other party's benefit. We
p. 489 could instead free consumers' limited time and attention ↳ so consumers may direct them toward their own individual projects and concerns on which there are no artificial constraints.

Conceiving producers as having quasi-fiduciary responsibilities to consumers is a way of underscoring that, if it is to be justified, our property and production system must be regarded as a decentralized yet cooperative project for mutual gain; thus, its design should follow that conception. Then, the assignment of greater responsibility for consumers follows as a natural complement to affording producers greater control and access to the modes of production. The producer has these property rights as a decentralized agent of the public cooperative project and heightened communicative responsibilities figure among the complementary components of that role as an agent.[50]

By establishing these expectations as well as guidance through direct governmental enforcement (as well as through indirect enforcement from competitors), the law of deceptive advertising gets it right.[51] It gets it right whereas our doctrine of puffery, applying to communications of general opinion, gets it wrong and demands that consumers be distrusting and adversarial.

Once we establish that the "reasonable" consumer may make mistakes of this kind and that the commercial speaker bears the responsibility to ensure accurate uptake, you may question my depiction of this relationship as one in which the commercial speaker must take responsibility for the fault of others. If the mistake is not unreasonable, then there is no fault. In a sense, of course, that's right, but in another sense, it internalizes a conclusion too quickly rather than appreciating the elements that lead us to it. I'd rather say that in cases like the Anacin-3 advertisement, there is an intellectual mistake traceable to a cognitive fault, but, then, that we should not and do not regard that fault as relevant to who should bear the ultimate responsibility for that
p. 490 mistake. The consumer ↳ who makes the poor inference that Anacin-3 is used in most hospitals really does make a poor inference. In other contexts, we acknowledge that mistake as an intellectual fault (e.g. on the LSAT, grammar exams, or our own logic quizzes) but, here, given the moral relationships and purposes of the advertising context, we think this intellectual fault is not the dispositive factor determining ultimate responsibility.

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Other cases

I have been emphasizing that consumer disempowerment in the oversight of commercial production offers special reasons to assign high levels of responsibility for consumer understanding to advertisers and to erect and maintain a legal infrastructure that would justify and redeem a relationship of trust, rather than one of suspicion. Of course, listeners are not excluded from free investigation and verification in this domain alone. Similar points might be made about some government speech, particularly when that speech concerns issues about or bordering on classified activities. Generally, I do think that the government has special obligations to ensure that its speech is not misleading in fact and not merely that it is truthful as far as it goes or that careful, informed listeners would not get the wrong impression. Government speech is, famously, both by and for the people; the public is not a distinct and separate entity from a democratic government. If one left notes to oneself, one would surely wish them to be effective, rather than merely strictly accurate. One wouldn't escape a charge of self-deception by maintaining that one's notes to one's later self were strictly accurate even if predictably misleading. Here, though, it isn't that a quasi-fiduciary relationship is warranted given an imbalance of information but rather that there is a sort of normative identity between speaker and listener.

There is then the special matter of speech touching on classified matters. I remain on the fence about whether any information about governmental operations that does not protect the reasonable privacy of particular individuals really should be classified. But, however it may be justified, suppose there are justifications for some sorts of temporally limited classification of information about governmental actions. Given the normative identity of the public and the government, at best that justification will have to square with the idea that classified information is still information that belongs to the people but is being held in a sort of trust for them. When the government speaks about related, non-classified matters, there is an additional reason for it to ensure that it is understood and not merely accurate. Because citizens are impeded from following what may be or what may seem like reasonable avenues of verification or challenge, to facilitate democratic governance, it is essential both that what information is conveyed is reliable and that the uptake is accurate —because some of the standard avenues of self-correction will have been blocked.

The arguments I have been offering, however, do not extend as a general matter to impute higher levels of
p. 491 speaker responsibility for listener understanding with respect ↳ to much self-regarding personal speech, even though the separateness of persons and the maintenance of boundaries of privacy pose obstacles to wide-ranging independent forms of verification and investigation by listeners. In the case of advertisers, the listener has an interest in and reasonable claim to accurate understanding of the product, its quality and its safety, but self-pursuit of that interest is blocked by other conditions. Speaker responsibility both compensates for those conditions and also facilitates other legitimate interests of the listener. In the case of government speech, listeners have moral interests and claims in discharging their responsibilities as members of the system of self-governance through accurate understanding of information relevant to state action; greater governmental responsibility for citizen understanding compensates for imposed conditions that block self-pursuit of that interest.

Whereas, with respect to private speech about personal matters, there is no standing listener interest and claim to the information that obstacles to verification and understanding frustrate; those obstacles facilitate justifiable speaker privacy but do not, as with the other cases, frustrate legitimate listener interests. So, there is nothing to compensate for. Speakers *may* generate special responsibilities for listener uptake by creating certain sorts of close relationships that give listeners special claims to private information. In such cases, of friendship, for instance, speakers assume responsibility for their actual understanding and even to prevent and correct some misunderstandings that represent carelessness or some other form of listeners' intellectual fault. As a general matter, though, speakers do not bear responsibility for listeners' erroneous interpretations of speakers' self-regarding personal speech.

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Conclusions

My intermediate conclusions are these. The law has it in some cases that some speakers can be liable for deceiving some listeners, even without intending to do so and even when the listeners' inaccurate conclusions are the product of some intellectual fault on the part of the listener. I think this position is defensible and interesting, both for these features, and because it supports the idea that whether a particular utterance is deceptive may turn on whether the subject matter and other moral relations between the parties dictate that the speaker has a duty of care toward the listeners' mental contents.

If these ideas are correct, they suggest some revision in how, morally, we think about deception through speech; we cannot simply ask what the speaker said, what the reasonable interpretation of the utterance would be (including implicatures), and what the speaker's intentions were. We also need to think about whether, independently, other features of the moral and epistemic environment impose a heightened duty of care on the speaker for the listener's mental contents. Where there is such a heightened duty of care, the speaker can (but should not) culpably deceive the listener when she speaks in a way that courts misunderstanding—even when
p. 492 the listener bears intellectual fault for the error. ↳

Taking this stance provides philosophical support for an approach to the law of commercial misrepresentation that emphasizes what listeners understand and what they predictably misinterpret, without investigating whether the listener is at fault or the speech was otherwise reasonably constructed. Such an approach has broader implications beyond supporting a number of legal decisions involving misleading discursive advertisements and the embedded conception of the "reasonable consumer" as one whose attention is rather distracted. This argument also provides support for recent efforts to require graphical depictions of messages whose impact may be diminished or incompletely absorbed when those messages are exclusively conveyed through words. Promoting actual consumer understanding was the impetus behind the FDA's failed, but commendable, effort to require cigarette packages to carry visual warnings, such as images of autopsies, diseased lungs, stained teeth, tracheotomy holes, and oxygen masks, to supplement and vivify the discursive health warnings.[52] It likewise supports supplementing the rather dry and sometimes esoteric discursive nutritional labels on food packaging by adding color-coded graphs that quickly convey the bottom line about whether the food is a healthy choice.[53]

Greater use of graphics in advertisements might also partly address the needs of our multi-linguistic population. Nearly 21% of the U.S. population speaks English as a second language, 22.4% of whom report they do not speak English well.[54] An only partly overlapping group of 14% of the adult population of the United States is functionally illiterate in English.[55] Relying more heavily on graphic warnings and disclosures may address both the barriers to communication posed by a multi-lingual population and the complaints of advertisers about the challenges of offering translations in the 300 other salient languages spoken in the
p. 493 United States.[56] Making audience uptake a ↳ priority would not, however, perfectly correlate with a graphics-heavy approach to commercial communications. For example, given the lack of geographical literacy among the U.S. population, a label declaring that a piece of meat was "Slaughtered in Mexico" would probably be more effective in conveying that information than stamping a package with an outline of Mexico's borders.[57]

My larger theoretical conclusion is that both legally and morally, we should continue to recalibrate how we think about the relationship between fault and responsibility. In law, our rules of negligence liability have encouraged the idea that, as a general matter, one party's responsibility begins with fault and then ends where another's fault begins.[58] In moral and political philosophy, the dominance of the rhetoric of luck insensitivity and choice sensitivity has encouraged a similar conception. One is to be held responsible for the consequences of one's choices, whether good or bad, but not for mere misfortune and not for others' choices; they are to internalize the costs of their choices (including relevant omissions), whether good or bad.

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A growing stream of qualifications and objections to this idea has emerged.[59] I hope here to have given some new reasons for hesitation by identifying some forms of cooperation in the economic sphere whose value sounds in terms other than those of mere economic efficiency. Some morally valuable and mutually supportive forms of cooperation are better achieved on models in which parties extend their responsibility past their degree of fault and even assume responsibility to absorb the costs of others' errors.

Notes

1 Sabine Tsuruda's contribution in this volume, *Temporary Farmwork*, discusses some of the philosophical issues associated with using temporary workers to satisfy agricultural needs in a culture in which most members do not grow what they need.

2 *See* Williams v. Gerber Products Co., 552 F.3d 934 (9th Cir. 2008) (reversing lower court's dismissal of claim).

3 Although there are some distinctively interesting features of deceptive advertising doctrine, the conception of responsibility extending past fault is not anomalous. Doctrines of strict liability also assign responsibility without fault in both torts and contracts. My defense of strict liability in contracts draws on some of the same arguments I offer here. *See* Seana Valentine Shiffrin, *Enhancing Moral Relationships Through Strict Liability*, 66 U. TORONTO L.J. 353 (2016). Deceptive advertising doctrines go beyond standard forms of strict liability in contract by assigning responsibility to advertisers to encompass not only inadvertent deception but also cases where the other party (the consumer) is at moral or prudential fault. With respect to the strict liability performance doctrines in contract, the promisee's fault will act as a defense to breach. CORBIN ON CONTRACTS (2001) § 74.3 (where a party to a contract makes it impossible for the other party to perform, the latter's nonperformance will be excused and, more generally, "if one party makes performance materially more difficult or expensive, the other party will be discharged and the party causing the difficulty may even be held liable for breach"). In strict liability cases in tort, the fault of the plaintiff may operate as a defense, usually to limit damages. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17 cmt. a (1998) ("A strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions."). *See also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 25 cmt. a (2010) ("[E]ven if the case is of a general type that renders strict liability applicable, in the particular case the plaintiff may have failed to exercise reasonable care in a way that invites the application of the defense of comparative responsibility.").

4 DAVID HUME, ENQUIRY CONCERNING THE PRINCIPLES OF MORALS, at Appendix II (1751).

5 More extensive detail may be found in Eric Goldman&Rebecca Tushnet, Advertising and Marketing Law: Cases and Materials (3d ed. 2016).

6 This pattern is not uniform, however. The Seventh Federal Circuit (covering the Midwest including Chicago), for example, is more resistant to it. *See also infra* note 32.

7 *See* Pizza Hut v. Papa John's International, Inc., 227 F.3d 489, 499 (5th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001) (holding that, on its own, Papa John's slogan "Better Ingredients. Better Pizza" was mere puffery on which reasonable consumers could not justifiably rely for purposes of the Lanham Act's protection against misrepresentation of facts).

8 *See* American Italian Pasta Company v. New World Pasta Company, 371 F.3d 387 (8th Cir. 2004).

9 *Id*.

10 Although consumers are advised to withhold credence from these claims, those who claim that the free market will regulate excesses presuppose that consumers will pay some attention to them. "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 . . . . " *Id*. at 391. It is fairly demanding to ask consumers to attend to these general statements, police them for accuracy, but at the same time, reflexively disregard their contents as potential warrants. I discuss and criticize the doctrine of puffery at greater length in SEANA VALENTINE SHIFFRIN, SPEECH MATTERS 188–91 (2014).

11 *See* Coca-Cola v. Tropicana Products, Inc., 690 F.2d 312, 318 (2d Cir. 1982) (finding sufficient evidence to warrant preliminary injunction of the advertisement under the Lanham Act).

12 In the canonical philosophical treatment of implicatures, Paul Grice observes that utterances may mean more than they literally say because the speaker either complies with or deliberately flouts various maxims of conversational cooperation to generate further meanings (and to warrant various inferences) that go beyond the literal meaning of the uttered statement. Paul Grice, Studies in the Way of Words 22–40 (1989). He posited that a broad Cooperative Principle governs conversations or, as he often put it, "talk-exchanges": "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged." This

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principle gives rise to maxims of: quantity (make your contribution as informative, but no more, as required for the purposes of the conversation); quality (contributions should be truthful and supported by adequate evidence); relevance; and manner (roughly, speak clearly and without ambiguity). We may interpret utterances in light both of what they literally say and what they imply, given these background maxims.

Notably, though, advertisements, like many signs and orders, are not exactly contributions to a conversation or a talk-exchange. The speaker utters, without expectation of a reply from or a communicative exchange with the listener. Although Grice gestures at the category of nonconversational (and nonconventional) implicatures, he and other commentators do not much elaborate on them. *See, e.g., id*. at 28; Jennifer Saul, *Speaker Meaning, What Is Said, and What Is Implicated*, 36 NOUS 228, 229–30 (2002); Michael Haugh, Im/politeness Implicatures 60–62 (2015). But, what they seem to have in mind are not implicatures generated in communicative, but nonconversational contexts, such as advertisements, messages, orders, and signs. Rather, they seem to have in mind implicatures generated in conversation through compliance with or meaningful flouting of nonconversational maxims (such as those of politeness), i.e., maxims that achieve other purposes than to make the communicative aspect of the conversation meaningful. Adherence to and defiance of these maxims contributes to moral, social, and aesthetic aims of the participants that are putatively distinct from specific informational and persuasive communicative aims of conversation.

I will simply note and bracket here that there are interesting, under-explored questions about whether the Cooperative Principle and its subordinate maxims apply not only to conversational discourse but to discursive communication more generally or at least to nonconversational communicative contexts involving distinct speakers and listeners. For the purposes of this essay, I will assume that the maxims apply to advertisements, because, although outside of a conversation, the speaker and listener are both cooperating to relay and receive information through communication. (There is, incidentally, empirical evidence that advertisers try to exploit the maxims and that consumers' inference patterns reflect the belief that advertisers adhere to the Cooperative Principle. *See* Michaela Wänke, *What Is Said and What Is Meant: Conversational Implicatures in Natural Conversations, Research Settings, Media, and Advertising*, *in* Social Communication 223, 223–56 (Klaus Fiedler ed., 2007). Although, as I discuss *infra* in note 47, the strength of the demands these maxims place on the speaker may be higher because the speaker and listener do not directly interact or otherwise engage in "talk-exchange."

13 The evidentiary burdens on plaintiffs may differ depending upon whether the claim at issue is purportedly an explicitly false statement or an implied false one. The former may not require a showing that consumers materially relied on the statement but for the latter, plaintiffs may need to show that the implied false claim was material and believed by the plaintiff. *See, e.g.,* Papa John's, *supra* note 7, at 497.

14 *See In the Matter of Pom Wonderful LLC and Roll Global LLC*, Federal Trade Commission, POM Figures Appendix B, Figs. 21, 27 (January 16, 2013),https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130116pomappendixb.pdf.

15 POM Wonderful, LLC v. FTC, 777 F.3d 478, 487 (D.C. Cir. 2015).

16 *See generally*, Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565 (2006); Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657 (1985).

17 Ordinary contract law does not focus on the intent to deceive per se. But, in contrast with some anti-deception statutes, it does place more emphasis on whether the non-mistaken party knew or should have known the other party was misled. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 161 (b) (c) (grounding liability for some non-disclosures when a party knows disclosure would correct a mistake of the other party about a fact and good faith would require disclosure or when the other party is mistaken about the content of a written contract); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 153 (permitting the voidability of some contracts on the basis of one party's mistaken understanding where that party does not bear the risk of the mistake and either enforcement would be unconscionable or the other party knew or was at fault for the mistake).

18 15 U.S.C. § 1125(a)(B)(2012).

19 15 U.S.C. §§ 45, 52(2012).

20 21 U.S.C. § 343(2012).

21 In addition to parallel deceptive advertising statutes, most states recognize causes of action for negligent misrepresentation. 3 Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, The Law of Torts, § 666 (2d ed. 2011) (identifying Arkansas and Idaho as outliers without a negligent misrepresentation cause of action). Many recent food-labeling suits have drawn on California law which provides private rights of action for inaccurate and deceptive labels. *See* California Health and Safety Code § 109875, in conjunction with California's Unfair Competition Law, Bus. and Prof. Code §§ 17200–17210 (West 2017), its False Advertising Law, Bus. & Prof. Code §§ 17500–17509 (West 2017), and its Consumer Legal Remedies Act, Civil Code §§ 1750–1784 (West 2009 & Supp. 2017). *See also* Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the "Food Court": An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, 28 TOXICS L. REP. 881 (2013).

22 Kraft, Inc. v. Federal Trade Commission, 970 F.2d 311, 322 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Or, consider the

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facts behind *Zauderer* v. *Office of Disciplinary Counsel*, a case involving an unsuccessful First Amendment challenge to a state levied sanction against an attorney for misleading advertising. 471 U.S. 626, 652–53 (1985). The Ohio lawyer truthfully advertised that unsuccessful clients would not have to pay "legal fees" but did not reveal clients would be charged for costs; although what the lawyer said was truthful, because many consumers would not know that legal fees do not encompass all litigation costs, such as court costs, photocopy costs, and expert witness fees, and might conclude that an unsuccessful legal representation would be entirely free, the speech was deemed deceptive. Although the mistake occurs because of the listener's ignorance, the advertiser may not take advantage of the mistake.

23 Ackerman v. Coca-Cola Co., No. CV-09-0395 (JG), 2010 WL 2925955, at *16 (E.D.N.Y. July 21, 2010). *See also* Gerber, *supra* note 2, at 939–40.

24 See the discussion in *Ivie v. Kraft Foods Global, Inc.*, 2013 WL 685372, at *12 (N.D. Cal. 2013).

25 134 S.Ct. 2228 (2014).

26 *Id*. at 2233, 2235.

27 Transcript of Oral Argument at 40, POM Wonderful, LLC v. Coca-Cola, 134 S.Ct. 2228 (2014) (No. 12-76).

28 *Id*.

29 Lisa Henzerling details some of these concessions in *The Varieties and Limits of Transparency in U.S. Food Law*, 70 FOOD & DRUG L. J. 11, 16–20 (2015) (describing the USDA's complacency over the application of "fresh" to highly processed meats and poultry at or over 26 degrees Fahrenheit, the FDA's permission to label foods with 20 ppm of gluten as nonetheless "gluten free," and the FDA's permission to label foods with .5 grams of trans fat as containing 0 grams of trans fat).

30 The reasonable consumer's knowledge, apparently, might be even more restricted than mere ignorance of dairy chemistry; he might believe that weight-loss pills could suffice on their own to cause substantial weight loss while eating as much as and anything one likes. And, he may be a reasonable consumer even though he does not question whether ads making such claims might be leaving out other relevant material facts, such as that the offered testimonials may be atypical or may not apply to those with serious medical conditions like diabetes or high blood pressure. Porter & Dietsch, Inc. v. F.T.C., 605 F.2d 294 (1979).

31 Might "only other all natural ingredients" be the implicature of "other all natural ingredients"? If so, then the audience's interpretation that Gerber meant to convey the former would be reasonable and would not involve fault by the audience. Although I take the audience's interpretation to be understandable, I don't think the audience's inference is a Gricean implicature of Gerber's statement because it is not necessary to infer that all the ingredients of the snacks are natural to interpret "other all natural ingredients" as saying something requisitely informative, as demanded by the maxims of quantity to make one's statement as, but no more, informative as is required by the purposes of the exchange. GRICE, *supra* note 12, at 26. Just as many attempt to reduce but not eliminate sugar intake, a consumer might aim to reduce the amount of artificial ingredients in her foods by selecting foods with more, rather than fewer, natural ingredients and with more, rather than fewer, ingredients processed with artificial additives. That these snacks had fruit juice and other all natural ingredients might convey useful information even if the snacks did not contain only natural ingredients.

32 *See* Gerber, *supra* note 2 at 939 (disclaiming a responsibility for consumers to look beyond the front of the box and to "discover the truth" from the ingredient list on the side of the box).There is jurisdictional variation on this issue. Some courts are more demanding of consumers than others. Judge Easterbrook has written an influential opinion for the Seventh Circuit, for example, about an infant formula label declaring it the "1st choice of doctors." The formula was favored by the plurality of doctors but 80% of consumers surveyed understood the phrase to suggest that a majority of doctors favor the product. The court found that the high level of consumer misunderstanding was insufficient to show the label was misleading. Mead Johnson & Co. v. Abbott Laboratories, 201 F.3d 883, 885 (2000). The court articulated a reasonable criticism of the survey, but also insisted that that however soundly constructed, survey research should not be used "to set the standard to which objectively verifiable claims must be held." *Id*. at 886. As it stressed, "'[m]isleading' is not a synonym for 'misunderstood,'" and a standard that hews closely to consumer confusion would lead to the (further) dumbing down of advertisements because consumers would not bother to read and digest more elaborate explanations. Mead Johnson & Co. v. Abbott Laboratories, 209 F.3d 1033, 1034 (2000) (revising wording of earlier opinion).
Judge Easterbrook's concerns about the quality of commercial conversation as well as the consumer's limited attention span are recurrent themes in his opinions. In *ProCD* and *Gateway*, two famous cases that enforced box-top contract terms against parties who arguably had formed contracts before those terms were revealed, Judge Easterbrook's opinion worried that the approach favored by consumers and buyers would stimulate too much lecturing by merchants to consumers about legalities which would bore consumers. So, he crafted an approach that would permit merchants to specify binding contractual terms without having to reveal those terms to consumers at the time of purchase. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (1996); Hill v. Gateway, 105 F.3d 1147 (1997). Apparently, our legal regime should not encourage "dumbing down" commercial conversations but it can encourage their suppression when it redounds to the benefit of commercial entities. That's a hard position to make sense of. Judge Easterbrook's voiced concern to privilege

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the quality of conversation over consumer understanding seems to operate as a cover for re-invigorating a strong regime of caveat emptor.

33 American Home Products Corp. v. Johnson & Johnson, 654 F. Supp. 568, 588–89 (1987).

34 *Id*. at 589.

35 *See, e.g.,* Gerber, *supra* note 2, at 938 (discussing California law prohibiting statements "which, although true, [are] actually misleading or which ha[ve] a capacity, likelihood, or tendency to deceive or confuse the public."). Deception may also involve images, as some of my examples will bring out.

36 *See* F. A. M. FORBES, ST. ATHANASIUS 102 (1919). A less familiar type of example goes a step further. In my view, except in heightened circumstances of urgency or special relationships (like fiduciary relationships or relationships of employment), other than respecting the duty not to lie, non-expert strangers do not have much by way of a duty of care to ensure experts do not make mistakes about topics in their expertise. For instance, suppose a layperson patient sincerely, but mistakenly, told a doctor that stevia was one of the sugar substitutes recently found to precipitate glucose resistance and suppose the doctor were to believe this claim without checking. I do not believe the patient deceives the doctor and I certainly do not believe the patient wrongfully deceives the doctor (or otherwise engages in the wrong of deception). But, if in another scenario, the doctor were to form the same erroneous belief about stevia after reading the article about glucose resistance and passed this mistake onto another patient or doctor who believed her, then I think she may wrongfully deceive. After all, the doctor's duty of care to others with respect to medical facts is greater than a layperson's duty with respect to an expert.

37 Why not conceive of these cases as cases of misrepresentation, reserving the term "deception" to cases of intentional (or intentional and manipulative) misrepresentation? I resist this suggestion primarily because misrepresentation may occur without infecting the listener with a false belief. I may engage in misrepresentation when I give a false name to you even if you do not accept my alias as valid. Here, I think I misrepresent but I do not deceive and there is no deception. Misrepresentation is a concept focused on the relationship between what the speaker says and the truth (and perhaps the speaker's beliefs or those she should have). Whereas, deception is a concept focused on the listener and the listener's acquisition of false beliefs as a consequence of another's false or misleading representation. Second, but more diffidently, misrepresentation seems to involve some effort by the misrepresenter to represent something (whether through depiction or through speech). Whereas, although it is not the common case and not the focus of this essay, deception can occur without misrepresentation. A friend has stowed boxes of chocolate bars in my pantry just for the afternoon. I know you are worried that I forgot to get Halloween treats but you are biting your tongue not to mention it. Indeed, I did forget to pick up Halloween treats. To assuage your concerns, I leave the pantry door open while I futz in the kitchen so you can catch a glimpse of my friend's stash. You leave thinking I am prepared for Halloween. I think this is a case of deception but not misrepresentation because I made no representations at all. Rather, I let you see something and I let you draw false conclusions, but I didn't do it as part of any communication.

38 This is a rough abbreviation of the view I defend in Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine and Accommodation*, 29 PHIL. & PUB. AFF. 205 (2000).

39 See the related discussion in Sarah Conly's essay, *Paternalism, Food, and Personal Freedom,* in this volume.

40 More interesting problems arise when there is a division within the beneficiary community. See Dana Goodyear, *Raw Deal*, THE NEW YORKER, April 30, 2012; Richard Bernstein, *Raw Milk Becomes Contentious*, N.Y. TIMES, March 24, 2010. For example, the majority wants to drink milk without having to worry and to investigate the sanitary conditions at the bottling location; thus, they are willing to authorize strict regulations and a pasteurizing scheme that puts us well beyond any envelope of risk. But the minority rues the loss of raw milk and resents that its choice to run the risks associated with raw milk is stymied by the majority's risk aversion. Where a minority actively wants to assume burdens of agency that the majority wants to avoid out of a preference for other projects and the relevant system ties their fortunes together, does the minority have a reasonable complaint? I do not think they may complain of paternalism but they may reasonably rue that their preferred exercise of autonomy conflicts with the preferred conditions of others' exercise of autonomy. For that reason, they may have sound grounds for exemption from the joint scheme, where it can be accommodated. It may be reasonable and important in such cases, to require that such minority groups form small, close coalitions with high standards of consent for admission, to ensure that unwitting members of the majority do not stumble in and inadvertently import their confident trust to the wrong milieu.

41 *See* Lillian BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 3 (1992) (concluding "that advertising in general promotes consumer welfare and that in the absence of any legal regulation false advertising would not pose a major threat to consumers.")

42 *See also* WARD FARNSWORTH, RESTITUTION 14–15 (2014).

43 A related argument dismisses the attempted defense to fraud that the deceived could have protected themselves against the defendant's lies through further investigation: "Requiring all lenders, investors, and so on to investigate every representation made to them would be extravagantly wasteful, compared with a legal regime that unconditionally

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requires speakers to tell the truth on every material topic if they speak at all. Thus investors' gullibility and carelessness do not excuse willfully false statements or reduce the damages available to the victims. 'The recipient of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation.' " U.S. v. Rosby, 454 F.3d 670 (7th Cir. 2006) (quoting the RESTATEMENT (SECOND) OF TORTS § 540 (1977)). Although Judge Easterbrook adopts a listener-sensitive position here with respect to investors, in other opinions, he has placed more demanding requirements of self-protection on consumers, whether as listeners or as purchasers. *See, supra,* note 32.

44 *See* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135 (2003).

45 I discuss some exceptions to this claim and some First Amendment implications of those exceptions in Seana Valentine Shiffrin, *Compelled Association, Morality and Market Dynamics*, 41 LOY. L.A. L. REV. 317 (2007).

46 I pursue a longer discussion of this point in chapter 3 in SPEECH MATTERS (2014).

47 As I mentioned earlier, advertisements are not really contributions to a conversational context. *See also supra* note 12. At least where a speaker initiates non-conversational communication for gain or under the guise of providing information relevant to the recipient's welfare, we might reasonably hold the speaker responsible for framing her contribution in a way that will be understood by most audiences without great effort or careful attention. This normative expectation seems all the more apt when we know listeners will be bombarded by many like communications. Where parties expect to collaborate together in a conversation, we may tolerate greater levels of ambiguity, unclarity, and predictable audience-error because an extended conversation affords opportunities for achieving understanding as both parties clarify their meanings and their uptake. Put another way, Grice's Cooperative Principle (for conversations) includes, for example, the maxim of quantity: "Make your contribution as informative as is required (for the current purpose of the exchange)." GRICE, *supra* note 12 at 26–27. We might think the same maxim applies in non-conversational contexts, e.g., signs, advertisements, and orders transmitted with no expectation of reply, but that the requisite degree of informativeness is heightened because the communication happens outside of a talk-exchange and thus follow-up is difficult or impossible. In conversational contexts, by contrast, it is sometimes important for reasons of uptake, of conviviality, and of dignity to reveal information at a slower pace and to allow information and precision to emerge through the back-and-forth.

48 *See, e.g.,* FORBES INSIGHTS, MODERN CUSTOMER SERVICE: ARE YOU OUTPACING YOUR EXECUTIVE PEERS? 10–11 (2015), http://www.forbes.com/forbesinsights/oracle_customer_service/index.html (an industry commissioned survey of business executives reported that minimizing time to handle customer issues was a very high priority). Another industry source describes that posting material on the internet may enable "help desks and call centers . . . to practice call avoidance and deflection by driving problem resolution to self-service . . . [allowing] support workers to concentrate on more difficult . . .technical problems and . . . customer service workers to spend time on cross-selling and up-selling. " It also quotes an H & R Block (a tax preparation service) executive's description of the aims of customer service technology as "call deflection followed by email deflection," and his company's efforts to discourage consumer phone calls. SUPPORT INDUSTRY.COM, TRENDS AND DIRECTIONS IN WEBBASED CUSTOMER SERVICE 2, 7 (2002), http://www.gotoassist.com/downloads/pdf/s/DesktopStreaming_ESupport_White_Paper.pdf. *See generally* EMILY YELLIN, YOUR CALL IS (NOT THAT) IMPORTANT TO US (2009) (discussing anecdotal and field-gathered evidence of consumer frustration and service worker overload).

49 This argument would also justify the asymmetry of legal burden litigated in *Kasky* v. *Nike*. In that case, Nike falsely touted sound labor conditions in its factories, but complained that its self-congratulatory advertisements were subject to different standards of accuracy than statements by its critics. See Kasky v. Nike Inc., 45 P.3d 243 (Cal. 2002), *cert. denied*, 539 U.S. 654 (2003). Most of the discussion of that case focused on Nike's status as a commercial speaker (and a corporate, nonindividual speaker), but it seems also relevant to the argument that Nike had a special obligation of accuracy that Nike is an expert on conditions in its own factories, with special access to information and the legal ability to exclude others who wished to visit to verify or disconfirm Nike's allegations.

50 I hasten to add that fiduciary agents are still reasonably subject to public oversight, even with respect to those activities over which they enjoy some justified discretion. That is, by making an argument about the further ramifications of a legally-produced epistemic inequality, I do not mean to endorse the entrenchment or the current scope of that epistemic inequality. Even if some epistemic division of labor and asymmetrical control over information is justified, that does not mean that the current configuration of powers and burdens is sound. We might be better off with greater public access and transparency to the means of production. Indeed, even if companies have a reasonable interest in exerting some control over when they must host observers and how much information they must share, their reasonable interest and the responsibilities it entails are consistent with insisting that their control is not absolute and that they must submit to oversight, both by the government and by private watchdogs. The recent successful efforts of some agricultural producers to prevent observation and reporting on their methods of poultry and cattle husbandry are appalling. Further, the cooperation of some states with these efforts is a dereliction of their duties of supervision and of protecting freedom of

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speech. *See, e.g.,* Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, 70 FOOD & DRUG L.J. 11, 21 (2015); Sara Lacy, *Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127 (2013); Jessica Pitts, *Ag-Gag Legislation and Public Choice Theory: Maintaining a Diffuse Public by Limiting Information*, 40 AM. J. CRIM. L. 95 (2012).

51 Although the theoretical posture behind the law is sound, the law is not achieving its aims due to under-enforcement. *See* Heinzerling, *supra* note 50. *See also* Linda J. Demaine, *Seeing Is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 ARIZ. L. REV. 719, 740 (2012) (arguing that deceptive advertising using visual imagery is under-regulated).

52 R. J. Reynolds Tobacco Co. v. Food and Drug Administration, 696 F.3d 1205 (D.C. Cir. 2012) (overturning the FDA's graphic warnings regulation on First Amendment grounds).

53 *See* Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411 (2015); *see also* Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861, 915–16 (2011) (discussing evidence of greater effectiveness of visual warnings on tobacco packages and graphic nutritional labels as compared to discursive measures). At the same time, given the persuasive power of visual imagery and other visual cues, we must pay greater attention to the problems associated with non-discursive deception. *See* Demaine, *supra* note 51; Tushnet, *id*. (discussing the power of imagery in ads and some of the complexities associated with regulating deceptive imagery).

54 Camille Ryan, *Language Use in the United States 2011*, AMERICAN COMMUNITY SURVEY REPORTS (August 2013), https://www.census.gov/prod/2013pubs/acs-22.pdf.

55 NATIONAL CENTER FOR EDUCATION STATISTICS, NATIONAL ASSESSMENT OF ADULT LITERACY: KEY FINDINGS (2003), http://nces.ed.gov/naal/kf_demographics.asp.

56 *See* Ramirez v. Plough, Inc., 6 Cal. 4th 539, 553 (1993) (denying a requirement to provide Spanish language warning that aspirin could cause Reyes Syndrome and discussing challenges of demanding translations in multi-linguistic communities); Farias v. Mr. Heater, Inc., 757 F. Supp. 2d 1284 (2010); *but see* Nam Soon Jeon v. 445 Seaside, Inc., 2013 WL 431846 (D. Haw. Jan. 31, 2013) (declining to follow Ramirez and holding that a jury might reasonably find a hotel catering to Korean tourists had an obligation to post warning signs about the absence of a lifeguard in both English and Korean). Although the issue was not squarely presented, in a footnote, the court in *Ramirez* rather abruptly dismissed the ability of pictorial representation to convey complex warnings. Yet, as Jolls' article suggests, *supra* note 53, even simple pictures may combine with background knowledge to generate inferences beyond what is conveyed. In the *Ramirez* case, a pictorial warning would not have been difficult to construct: a drawing of an infant and of a child with a hazard symbol across them and of a adult without the hazard sign would have conveyed that aspirin was unsafe for the former but safe for the latter.

57 American Meat Institute v. U.S. Dep't of Agriculture, 760 F.3d 1, 18 (D.C. Cir. 2014) (describing Department of Agriculture's country-of-origin labeling requirements).

58 That doctrine was once rather extreme when it took the form of contributory negligence which eliminated defendant's liability when there was any or sufficient plaintiff fault. Now, the doctrine has achieved a more appropriate balance in comparative negligence regimes in which where both parties are at fault, parties will share liability and responsibility for damage. *See generally* DAN B. DOBBS et al., *supra* note 21, vol. 1, chapter 19 (2011).

59 *See, e.g.*, Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* Reason and Value: Themes from the Work of Joseph Raz 270 (Philip Pettit et al. ed., 2004); Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 299 (2003); Samuel Scheffler, *Choice, Circumstance and the Value of Equality*, 4 POLITICS, PHILOSOPHY, & ECONOMICS 5 (2005); Elizabeth Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999); Jonathan Wolff, *Fairness, Respect and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 27 (1998).

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