1

Baselines for Ethical Advocacy in the "Marketplace of Ideas"

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"[Public relations professionals] serve the public interest by serving as responsible advocates for those we represent."

"We provide a voice in the marketplace of ideas, facts, and viewpoints to aid informed public debate."

"Protecting and advancing the free flow of accurate and truthful information is essential to serving the public interest and contributing to informed decision making in a democratic society."

Public Relations Society of America Member Code of Ethics 2000

These core concepts of advocacy in the Public Relations Society of America's (PRSA) Code of Ethics reflect democratic ideals grounded in First Amendment legal theory. The "marketplace of ideas" concept was introduced in law by U.S. Supreme Court Justice Oliver Wendell Holmes in his dissent to a 1918 case in which the U.S. Supreme Court ruled that a prohibition on criticism of American symbols and ideals did not violate the

free speech provision of the First Amendment. Holmes's argument that the "ultimate good" was better reached by "the free trade in ideas" resonated and, for almost a century, has been the dominant philosophy of freedom of expression law in the United States.[1] The concepts of "protecting and advancing the free flow of accurate and truthful information," and "informed decision making" have long, too, been recognized as democratic principles important in both lawmaking and judicial decision making in the United States.

It may seem odd that legal principles form the basis of the PRSA code since most people believe the law falls short of providing acceptable principles on which to base ethical conduct. Indeed, ethics scholars and educators (including the author of this chapter), as well as professional ethics advisors, routinely counsel students, organizational leaders, and others to look beyond laws and regulations for aids to ethical decision making.[2] Law is about what people *must* do, while ethics is about what people *should* do, they advise. Ethics begins where the law ends. Law is about compliance with set rules and procedures, while ethics involves more discretionary decision making. Legal violations can send perpetrators to the jailhouse and/or the poorhouse, while ethical violations typically result in slapped hands and (sometimes) feelings of remorse. For these and other reasons, law is not an appropriate guide for determining parameters of ethical behavior.

Such advice is technically valid. Yet, there is a fine line between law and ethics. Societal norms inform the laws and regulations by which democratic societies function. Certainly, moral principles are inherent in American jurisprudence. And, as the PRSA code illustrates, the reverse is also true: legal principles inform ethics. In many respects, legal standards define minimal expectations for ethical performance. As Don Welch observed in *Law and Morality,* "legal obligations are essentially subsets of moral questions . . . the nature of law makes a perceived legal obligation a very powerful ingredient in the mix that we consider as we decide upon a responsible course of action."[3]

Thus, there is much to be gained by exploring the application of legal principles to questions of ethics. In examining the legal concept of responsibility, for example, Peter Cane pointed out,

> Because law is underwritten by the coercive power of the state, courts cannot leave disputes about responsibility (for instance) unresolved. . . . Morality can afford to be vague and indeterminate to an extent that law cannot. It is for this reason that law can make a contribution to thinking and judgement about responsibility outside the law as well as within it.[4]

By studying the symbiotic relationship between law and ethics, Cane argued, "we may appeal to the law as providing a pointer to sound thinking in the moral sphere."[5]

Just as the law provides a mechanism for resolving complex questions concerning rights and freedoms in courts, it provides a model for managing the careful balancing of competing values and interests required in the practice of public relations. This chapter examines the core concepts of the "marketplace of ideas" in an effort to identify legal principles that might be useful in both better understanding and defining the parameters of ethical advocacy in public relations. Following a brief introduction to marketplace theory, the chapter reviews how marketplace concepts are applied in the legal regulation of political and commercial advocacy in the United States. The work identifies four marketplace principles that have shaped First Amendment jurisprudence and that have particular application for the ethical practice of public relations: access, process, truth, and disclosure. The chapter concludes with a look at the convergence of legal and ethical standards for regulating communication and the importance of responsible advocacy in sustaining First Amendment protection for public relations expression.

In addition to increasing understanding of the philosophical underpinnings of political and commercial speech regulation in the United States, this discussion of marketplace theory also provides insight into the primary concept relied on by public relations scholars and professionals to justify public relations' social role. As public relations scholar Scott Cutlip stated,

> The social justification for public relations in a free society is to ethically and effectively plead the cause of a client or organization in the free-wheeling forum of public debate. It is a basic democratic right that every idea, individual, and institution shall have a full and fair hearing in the public forum—and that their merit ultimately must be determined by their ability to be accepted in the marketplace.[6]

Rhetorical scholar Robert Heath made a similar argument, noting that public relations is essential to the free exchange of, and fair competition among, ideas in society.[7]

If, as the PRSA Code of Ethics suggests, the "marketplace of ideas" is to also provide the philosophical foundation for the development of professional ethics standards in public relations, then an examination of how marketplace theory is applied in law should be instructive in establishing ethical baselines for public relations advocacy.

The Marketplace of Ideas and the First Amendment

The concept of a marketplace of ideas in democratic societies governed by the people reflects a deep and sustained belief that self-government is made possible by properly informed citizens who engage in informed decision making. The public interest is best served when the voices of diverse special interests are heard. Marketplace theory rests on the premise that "truth" will emerge from robust public debate and be determined by the people who evaluate competing ideas and messages. The works of English poet John Milton, who introduced the marketplace concept in *Areopagitica* in 1644, and British philosopher John Stuart Mill, who two centuries later wrote the influential essay *On Liberty,* provided the framework for the familiar words later institutionalized in American jurisprudence by Justice Holmes: "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[8]

Marketplace theory is predicated, first, on the existence of an objective "truth" that will emerge from a cacophony of voices promoting various interests; second, on a marketplace in which all citizens have the right—and perhaps the means—to be both heard and informed; and, third, on the rational ability of people to discern "truth." Notwithstanding considerable debate regarding the logic of such assumptions,[9] marketplace theory has endured as the most "deeply entrenched [metaphor] in the language of First Amendment jurisprudence" and the philosophical model for resolving free speech cases.[10] In fact, one recent study that evaluated the use of the marketplace metaphor in U.S. Supreme Court decisions found that its use rose dramatically in the 1970s and "continues to increase."[11]

Regulating Political Advocacy

In resolving First Amendment cases in which government restrictions on speech are challenged, the Supreme Court has consistently ruled that although the protection for free speech is not absolute, ideological, or *political,* speech that makes a "direct contribution to the interchange of ideas"[12] . . . "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[13] The fundamental purpose of the First Amendment, according to the Court, is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[14]

Toward this end, in addition to safeguarding the people's right to speak, the Supreme Court has also recognized the people's right to hear by emphasizing the listener's right to receive information that is indispensable to decision making in a democracy. In 1965, Justice William Brennan observed,

"The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[15] The Court later said that because the "people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," they are entitled to receive information needed to "evaluate the arguments to which they are being subjected."[16]

In so ruling, the Court has recognized that both individuals and organizations enjoy First Amendment protection to participate in public discussion and debate on matters of public interest and concern. Thus, corporate political speech is not subjected to greater regulation simply because of the commercial nature of the enterprise. In a 1978 case in which the government argued that those with more resources could be restrained in order to enhance the political voice of those with fewer resources, the Court said,

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered exchange of ideas for the bringing about of political and societal changes desired by the people.[17]

As Justice Powell observed, First Amendment protection is determined by "the inherent worth of the speech in terms of its capacity for informing the public."[18]

At the same time, the Court has recognized the need to protect the sanctity of the marketplace in situations where speech "threatened imminently to undermine democratic processes."[19] Thus, the Court has allowed certain speech restrictions intended to safeguard the efficient functioning of government. While laws restricting particular viewpoints are presumptively unconstitutional, narrowly drawn regulations designed to prevent undue influences in the marketplace and/or unfair advantage to certain speakers have been upheld. The most significant exceptions have occurred in cases involving corporate speech related to election campaigns and financial matters, where the Court has recognized a need to ensure just elections and protect fair investment markets. For example, in a case involving corporate participation in political activities, the Court found that corporations should not be allowed to gain an unfair advantage in the political marketplace because of their ability to amass substantial wealth in the economic marketplace.[20]

In determining the constitutionality of a particular regulation on individual or corporate speech, the Supreme Court applies a balancing approach, weighing the right to free speech against a government's interest in protecting

other important rights or in preventing particular harms. The process recognizes both the inherent worth of avoiding the "chilling" of speech created by burdensome regulation and the need to protect the sanctity of the marketplace. In order for a restriction to be upheld, the government must demonstrate a compelling interest that is directly advanced by the regulation. For example, such an interest might be the need to prevent corruption, or the appearance of corruption, in political processes.[21]

The perceived value of free speech in a democratic society is reflected in the Supreme Court's recognition that even *false* political speech "must be protected if the freedoms of expression are to have the 'breathing space' needed to survive."[22] Although the Court has found that "false statements of fact are particularly valueless" because "they interfere with the truth-seeking function of the marketplace of ideas,"[23] the Court has consistently emphasized the need for some tolerance of falsehoods to prevent the chilling effect of strict liability for false statements. Because "some erroneous statement is inevitable in free debate,"[24] abuses of speech freedoms are dealt with after the fact, for example, in suits based on claims of defamation or other violations of private rights.[25]

In addressing potential harms caused by certain types of speech, the Court has demonstrated a clear preference for disclosure requirements over prior restraints on the core content of communication. For example, in a case in which the Court struck down a prohibition on promotional advertising by electric utilities, Justice Powell wrote in the majority opinion: "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'"[26]

Disclosure requirements are less burdensome means for addressing potentially deceptive communication practices, according to the Court, because they "do not prevent anyone from speaking."[27]

This brief review of the regulation of political advocacy in the United States demonstrates that public relations professionals have substantial freedom to communicate on behalf of clients and employers in the political marketplace. The Court has provided both the access required and the "breathing space" needed for organizations—and their public relations representatives—to fully participate in the marketplace of ideas. Indeed, one recent study of U.S. Supreme Court cases in which the term "public relations" or one of its many synonyms was used concluded that "even when the justices pointed out publicity practices they deemed unethical, they still emphasized the fact that constitutionally, such practices are protected alongside other contentious exchanges in the marketplace of ideas."[28]

At the same time, a look at the regulation of political communication alone provides an incomplete picture of the legal restrictions placed on public

relations communication. Public relations professionals working on behalf of corporate clients and employers also must consider the stricter legal constraints on *commercial* communication. While companies have a First Amendment right to participate in the commercial marketplace, the Supreme Court has ruled that nonideological, or commercial, speech should be afforded only limited constitutional protection.[29]

Regulating Commercial Advocacy

Although the marketplace of ideas concept is most often applied in the context of political communication involving matters of public interest and concern, the U.S. Supreme Court has extended marketplace principles to the commercial arena. Recognizing an informational value in commercial speech—alternatively defined by the Court as "speech which does no more than propose a commercial transaction" or "expression related solely to the economic interests of the speaker and its audience"—the Court has observed that "the relationship of speech to the marketplace of products or services does not make it valueless in the marketplace of ideas."[30]

Yet, commercial speech occupies a lower rung on the Supreme Court's hierarchy of First Amendment values and, therefore, is subjected to a higher degree of regulation, requiring the government to show only that a substantial interest is advanced by a particular restriction. Because commercial speech is "the offspring of economic self-interest," it is less likely to be chilled by regulation, according to the Court.[31] This second-class status is also warranted, the Court said, because commercial speech is more easily verified since it deals with matters about which the speaker has knowledge and control.[32]

Indeed, the Court has made clear that commercial speech that is "false, deceptive, or misleading" is entitled to *no* First Amendment protection and the states and federal government are free to prevent its dissemination.[33] The purpose of regulation, according to the Court, is "to ensure that commercial communication flows cleanly as well as freely."[34]

The Federal Trade Commission (FTC) and state governments are primarily responsible for regulating commercial advocacy in the United States. Institutions found to have engaged in deceptive or misleading communication practices, as defined by the FTC and the states, are held legally liable for their actions and subjected to the penalties outlined in the respective rules and laws. For example, under FTC guidelines, deception is defined as a material representation, omission, or practice that is likely to mislead a reasonable consumer.[35] Falsehoods may be express or implied, meaning that deceptive information may be either technically false *or* may simply mislead

listeners because it is incomplete or in some other way creates a false impression.[36] Sanctions for violations range from cease-and-desist orders to corrective advertising. The intent is to prevent injury to individuals who rely on deceptive information in the commercial marketplace.

All fifty states have enacted legislation aimed at preventing unfair or deceptive commercial "advertising" practices, adopting language similar to FTC rules for both defining deceptive communication practices and in determining appropriate sanctions. For example, New York's statute explains that "in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations . . ."[37]

Importantly, under FTC guidelines, participants in the commercial marketplace must be able to verify the truthfulness of their claims. Additionally, the intentions of a speaker are irrelevant in judicial determinations regarding the deceptive nature of particular communications. Liability is determined on the basis of whether an omission or representation is *likely* to mislead a *reasonable* consumer. Deception is determined by the overall impression of a particular communication. In other words, there is little room for error. The only "breathing space" in the commercial marketplace is that a misrepresentation or omission must be *material,* or important to a consumer's decision to purchase a product or service.

When this strict standard of liability in the commercial marketplace is compared to the broad freedom to communicate in the political marketplace, the significance of distinguishing commercial and political advocacy—at least for regulatory purposes—is clear. Communication practices in the marketplace of ideas are subjected to different legal standards depending on their classification as either political or commercial speech. Thus, the threshold issue in determining the *legal* requirements for public relations advocacy in the United States is whether a particular message is categorized as political speech or commercial speech.

As noted above, public relations communication historically has been viewed as *political* expression broadly protected under the First Amendment. However, the potential for at least some public relations expression to be categorized as *commercial* speech and regulated accordingly is quite real.[38] For example, a recent California Supreme Court decision found that public relations messages disseminated by Nike, Inc., about the company's labor practices were commercial speech subject to the state's strict requirements for truth and accuracy in "advertising" practices.[39]

Baselines for Responsible Advocacy in Public Relations

This discussion demonstrates the complexity of legal regulation of political and commercial advocacy in the United States. The two-pronged approach adopted by Congress and the courts has created a complicated scheme that privileges political communication over commercial communication, providing broad freedom to deceive in the political marketplace and strict liability for deception in the commercial marketplace. In essence, there is not *a* marketplace of ideas but two marketplaces of ideas in which public relations professionals practice and two regulatory schemes under which public relations advocacy might be judged.[40]

At the same time, a common philosophy and shared values and interests are evident in the law's application of marketplace concepts in both the political and commercial arenas. This section discusses four principles fundamental to the application of marketplace theory in law that may be useful in establishing ethical baselines for responsible advocacy in public relations: access, process, truth, and disclosure.

Access

Two interests are dominant in free speech jurisprudence in the United States: the speaker's right to free expression and the listener's right to receive information important to informed decision making. The speaker's access to the market and a listener's access to information are of paramount importance to the proper functioning of the marketplace. If certain voices are stifled or listeners do not receive information needed to make informed decisions, then the marketplace fails to operate properly. Just as the U.S. Supreme Court has recognized the need for certain legal limitations to ensure that these important interests are protected, public relations professionals must consider the ethical requirements needed to ensure responsible participation in both political and commercial contexts.

Determining whether public relations advocacy helps equalize access to the marketplace or, rather, creates an imbalance of power in the marketplace is an important issue in determining the limits of responsible advocacy. Actions intended to monopolize the marketplace freeze out other voices and violate fundamental democratic principles. Public relations practitioners must ask how their work contributes to—rather than interferes with—the efficient functioning of the marketplace. At the same time, they also must ask whether every special interest deserves a voice. For example, are public

relations professionals obligated to "open channels of communication to the traditionally underrepresented?"[41] Is it morally sound to serve as professional "hired guns" whose services are available only to clients and employers with deep pockets? Is it "ethically permissible to accept those clients advancing views/agenda with which the practitioner has serious ethical/moral reservations?"[42]

Answers to such questions are not provided by industry guidelines. In fact, the PRSA Code of Ethics is virtually silent on the issue of representation, requiring only that PRSA members "decline representation of clients and organizations that urge or require actions contrary to this Code." Thus, practitioners and firms must wrestle with the moral issues associated with the representation of various causes and interests.

In addressing such matters, ethics scholar David Martinson has argued that it is incumbent on all communication professionals to "guard against a form of censorship where unpopular ideas are denied a hearing not because of formal governmental legal restrictions, but because of the informal—and oftentimes much more insidious—restrictions that are so often responsible for restricting *genuine* access to the marketplace of ideas."[43] Martinson maintains that public relations practitioners have a special responsibility to open the marketplace of ideas to a "broad variety" of viewpoints.[44]

Process

The marketplace of ideas requires a properly functioning forum of public dialogue and debate. For this reason, the U.S. Supreme Court has upheld limited regulations intended to prevent corruption of—or undue influences on—political processes. While competition is a sign of a healthy marketplace, unfair competition that privileges a particular special interest over others fails to serve the common good. As John Warburton observed about democratic societies, "there is no one public interest, only numerous competing versions, which evolve as a function of the complex process of national discourse."[45] For that reason, "it is the *process* of deciding policy that is important, not the policy itself."[46]

Public relations professionals must consider whether their advocacy contributes to or interferes with marketplace processes. They must question whether their advocacy promotes—or stifles—public dialogue and debate. In a properly functioning marketplace of ideas, truthful information flows to and from marketplace participants. In that regard, both public relations professionals and the news media play critical roles. News consumers rely on a range of media sources for objective reporting on issues of public interest and concern. The news media rely heavily on public relations sources for much of the information reported.

To maintain marketplace equilibrium, public relations professionals must provide honest and accurate information to the media, and the media must present a neutral and balanced view of stories covered. Given the symbiotic relationship among journalists and public relations sources, it is particularly important that any relationships that could create real or perceived conflicts of interest be disclosed. A recent PRSA "Professional Standards Advisory" addressed such issues in response to reports of a media commentator being paid by a public relations firm to promote the viewpoint of the firm's client in news broadcasts:

> One of the foundations of a system of free expression is the presumed fairness and independence of reportage, analysis and commentary in the news media. In this system, a diversity of viewpoints and opinions needs to be heard, but must compete on the merits of argument and fact. When a point of view, organization or product is given an unfair advantage as a result of financial payments, it undermines the integrity of the system itself.[47]

While abuses of communication processes are damaging in all areas of public relations practice, interference with processes of government are particularly egregious. Indeed, "whenever and however public relations professionals are involved in the processes of government, they assume ethical responsibilities commensurate with importance of safeguarding democratic institutions."[48] Whether campaigning on behalf of a candidate for office, lobbying for legislative change on behalf of a client or employer, or representing an institution involved in litigation or other government actions, public relations professionals should not interfere with the integrity of political and judicial systems.

Truth

Under First Amendment doctrine, the value of communication is judged by whether it makes a *meaningful* contribution to the marketplace of ideas. In making such determinations, the Court has emphasized the importance of truthful information and recognized possible harms resulting from the communication of false statements of fact in the political marketplace and deceptive omissions or false representations of material information in the commercial marketplace. While the Court has relied primarily on the self-righting process of the marketplace and postspeech remedies to expose falsehoods in the political forum, it has identified a need for closer scrutiny and stricter standards in commercial communication.

Undeniably, "truth" is an elusive term in both law and public relations. Yet, it is the singular most important element in the efficient operation of the marketplace of ideas in American society. Indeed, the marketplace concept

rests on the fundamental premise that "truth" will emerge from ideas and messages competing in a public forum. Thus, any effort to achieve an alternative end (i.e., to create "false truths") interferes with the basic intent of the marketplace. To the extent that communication deceives or misinforms, it interferes with informed decision making and violates the listener's right to receive accurate and truthful information.

Media ethics scholars Ralph Barney and Jay Black address this issue in arguing that the "persuasive ethic" of public relations "is defensible and laudable in a participatory democracy."[49] Likening public relations professionals to attorneys operating in an adversarial society, they contend that public relations advocates may advance their clients' interests by distributing "selectively favorable information" and they may "rightfully assume that others will accept the social role of generating counterbalancing messages."[50] The authors go on to note, however, that while the advocate's role relieves the public relations professional of any obligation to tell "objective" truth, it "leaves unanswered the question of outer limits of ethical behavior."[51]

In defining "truth," public relations professionals might begin with the strict legal standards applied to deceptive commercial communication. As a baseline for legal conduct, FTC guidelines provide a high bar. But, as noted early in this chapter, ethical guidelines should go beyond legal requirements. For example, while the moral motivation of a commercial speaker might be irrelevant for regulatory purposes, it is an important consideration in ethical decision making. Thus, while such laws provide starting points for ethical decision making, they seldom address the full expectations of institutional stakeholders for ethical performance.

Public relations professionals should acknowledge and respect the informational needs and interests of those with whom they are communicating. They should consider the potential harms that could result from their communication. They should counsel clients and employers to "tell the truth" in their public communications, helping them to ethically balance constituent interests with the interests of the institution. They should acknowledge and abide by the duty to inquire about the truthfulness of information they disseminate and be able to *verify* the truthfulness of their communications. They should ensure that the truth is advanced by the full disclosure of information needed to fully inform their audiences. Quite simply, when operating in the marketplace of ideas, *responsible* public relations professionals should be "advocates of truth."

Disclosure

A theme running through political and commercial speech regulation is the need for citizens, consumers, and policy makers to have the information

needed to make informed decisions. In the commercial marketplace, where full disclosure of material information is required, this theme is particularly evident. In the political marketplace, where speakers historically have been afforded considerable discretion to decide how much and what information to provide, there is some evidence of an increased willingness by Congress and the courts to compel responsible behavior through stricter disclosure requirements requiring greater transparency.

For example, legal mandates such as the Sarbanes-Oxley legislation passed in the wake of the Enron scandal recognize the importance of investors having access to information needed in order to make informed judgments. In financial and other areas, however, legal requirements may stop short of requiring "full" disclosure of information. Practitioners must ask what information would be sufficient to enable the reasonable person to make an informed choice. As one example, Martinson recommends a policy of "substantial completeness" based on "what needs to be communicated to achieve genuine understanding."[52]

According to the PRSA Code of Ethics, a policy of "open communication" is intended "to build trust with the public by revealing all information needed for responsible decision making." The code states that lying by omission is "improper." Omissions might include *not* revealing the true sponsor of an advocacy campaign, *not* releasing financial information that could be relevant to an investor's view of a corporation's performance, or *not* revealing that third parties have been paid to speak on behalf of a client or employer.

Disclosure of timely, relevant, and complete information is particularly important in times of crisis when information voids can be particularly harmful. In many respects, crisis public relations is an "ethical testing ground for public relations professionals,"[53] who must perform the dual role of organizational spokesperson and counselor. In both instances, stakeholders' informational needs and interests must be considered. "No comment" is not an option. Ethical public relations professionals are forthright and honest and counsel clients and employers to adopt responsible communication policies built on principles of openness and transparency.

Principles in Practice

These fundamental marketplace principles—access, process, truth, and disclosure—provide a template for evaluating the ethical validity of public relations practices. For example, one commonly used advocacy technique that has been widely criticized as unethical is the use of "front groups," or artificial third-party coalitions designed to deceive citizens and/or lawmakers about election or policy matters.

Here's how front groups work: an organization with a special interest in the outcome of a referendum or policy debate forms a "citizens" group to advocate on its behalf. The group is typically named on behalf of the citizens it purports to represent, such as "Citizens for a Free Kuwait" or "Citizens for Energy Relief." Such groups serve as the "voices" of institutions (e.g., nations or corporations) that want to hide their participation in the marketplace of ideas. The thinking is that citizens and policymakers who believe that a particular policy or position has broad-based public support are more likely to support that view themselves. The problem is that, despite their names, front groups have few, or sometimes no, citizen members.[54] The "false front" is created to deceive policymakers into believing that citizens support the view of the sponsoring organization.

It is clear that such practices violate marketplace principles. First, well-funded front group practices tend to monopolize the marketplace and diminish other voices, limiting access to the marketplace of ideas and interfering with citizens' and/or policymakers' *access* to information needed to help them reach informed decisions about issues or policies of public interest and concern. Second, front groups corrupt communication *processes* by deceiving marketplace participants about both the source of communication and the true level of support for particular perspectives. Third, front groups create false truths—rather than contribute to the achievement of "objective" *truth*—by misleading marketplace participants about either the potential impact of proposed policies or genuine citizen support for them. Finally, the lack of transparency regarding the true sources of communication violates the marketplace principle of *disclosure,* which requires that information needed to aid informed decision making be revealed.

In addition to helping gauge the ethical legitimacy of specific public relations practices, marketplace principles also might be useful in helping identify unethical public relations activities likely to invite government scrutiny. For example, while front group practices have continued unabated—and essentially unregulated—for more than half a century,[55] Congress and the courts recently recognized the potential damage caused by such practices to American institutions. For example, in 2003, Congress enacted sweeping changes in campaign finance rules that acknowledged the value of listeners being able to "consider the source" of information disseminated in the political marketplace of ideas.

The new legislation, which imposed strict new disclosure requirements on sponsors of political advocacy, included a provision requiring that sponsors of "electioneering communication" be identified in broadcast messages. The impact of this new rule was evident in the 2004 presidential election, in which presidential candidates routinely announced their endorsements in campaign advertisements—"I'm John Kerry and I approved this message."

When the new disclosure regulations were challenged as unconstitutional, the U.S. Supreme Court upheld the restrictions, finding in part that organizations engaging in front group practices could be required to disclose their participation in such efforts.[56] The new disclosure law was needed, the Court said in McConnell v. FCC, because of the significant interest in assuring that voters received "relevant information."[57] The Court chastised those who had challenged the new rules for wanting to preserve the ability to run election ads "while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (backed by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly)."[58] According to the Court, such efforts do "not reinforce the precious First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."[59]

Notwithstanding the fact that these new standards were applied in the election context, an area in which both Congress and the courts historically have been most vigilant in their efforts to protect fair government processes, the McConnell decision offers important insights for public relations ethics. For example, the Supreme Court obviously believes there is some value in allowing citizens and policymakers to consider the sources of communication when weighing the merits of information. Although the Court has recognized the need to allow some anonymity to protect individuals from fears of reprisal based on their views,[60] it carved out an exception in situations involving potential distortions of election processes. Additionally, the Court seems to have become less tolerant of deceptive communication practices that threaten democratic ideals and political processes. Certainly, the McConnell Court exhibited a willingness to hold organizations legally accountable for communication practices traditionally judged by ethical discretion.

This blurring of lines between law and ethics in First Amendment jurisprudence has significant implications for public relations professionals, as well as the clients and employers they represent. Most important, such decisions could indicate that constitutional protection for public relations expression may be shrinking and that responsible advocacy in the marketplace of ideas may be judged by heightened legal standards as well as ethical norms.

Converging Legal and Ethical Standards

While it might be premature to suggest that cases such as McConnell reflect a trend toward judicial encroachment into ethical decision making in public relations, it is worth noting that a convergence of legal and ethical standards has been noted in other areas of communication as well. For example, in a 1996 study that analyzed "ethical choices" that became "legal problems" for

the news media, Laurence Alexander concluded that "the judiciary is crossing the imaginary ethical barrier, thus infringing on the sanctity of policies and decisions previously reserved for editorial executives."[61]

In a 2000 study examining journalists' views toward law and ethics in ethical decision making, Paul Voakes found that over the last thirty-five years, the U.S. Supreme Court has taken "a decidedly 'Social Responsibility' attitude toward freedom of expression."[62] He observed that "each time what is traditionally a moral obligation becomes somehow written into the law, the media (and all speakers and writers) lose another small measure of expressive freedom."[63]

Although the reasons for the legalization of ethical principles in communication are unclear, Voakes suggested that such movement may reflect judicial views regarding the special ethical responsibilities associated with constitutional freedoms. For example, with respect to the news media, he found that, "whenever a matter of journalistic practice ends up in court, the courts consider whether the press has been performing its First Amendment responsibilities and duties (in exchange for the continued protection of its rights). The more responsive the press appears to be, the less urgent the need to invoke correctives."[64]

The same reasoning might be applied to public relations. Of course, public relations professionals do not enjoy the special status of the "Fourth Estate." Indeed, as representatives of *special* interests—as compared to the *public* interest—they and their clients and employers may have less protection from judicial forays into questions of ethics. Public relations professionals must consider both whether the special obligations associated with the freedom to communicate are being met and whether, in the absence of effective *self*-regulation, the government might step in to hold practitioners accountable for irresponsible behavior.

A recent example makes the point. In early 2005, *USA Today* revealed that conservative commentator Armstrong Williams had been paid $240,000 by the U.S. Department of Education to promote the Bush Administration's No Child Left Behind policy in a deal reportedly brokered by Ketchum, Inc., a leading public relations firm.[65] Williams's relationship with the administration was not publicly disclosed by Ketchum or Williams. After learning that other media "pundits" also had been paid by the administration to influence public opinion on Bush policies, Democratic lawmakers called for new legislation to prohibit such actions. Their argument for heightened regulation was supported by a report issued just months earlier by a Congressional watchdog agency that found the Bush administration in violation of federal law for using taxpayer dollars for purposes of propaganda not approved by Congress. According to the report, the administration—again with the assistance of Ketchum—engaged in "covert propaganda" to

promote the president's health care policies by producing and distributing prepackaged video news releases that provided a skewed view of the Medicare reform program and disguised the fact that the government was the source of the information.[66]

These examples, which created considerable controversy regarding the ethics of the government officials, members of the public relations firm, and media representatives involved, illustrate both the importance of adhering to marketplace principles and the potential for heightened legal regulation of communication activities. While the actions were widely condemned in some public relations circles—for example, PRSA called the Williams incident "disturbing" and "harmful," and the editor-in-chief of *PR Week* said it was "an extraordinarily dismal situation" that "reinforces many of the worst perceptions of the [public relations] industry"—the implications are yet to be determined. As one public relations executive said about the so-called pay-for-play deal involving Williams, "I'm worried that if the industry doesn't deal with this ourselves, others will deal with it for us. . . . And that would be a nightmare."[67]

Such examples also demonstrate the fragility of the line between law and ethics and the importance of responsible advocacy in sustaining First Amendment protection for public relations expression. Irresponsible behavior attracts the bright light of public scrutiny and invites increased legal restrictions on public relations work. Indeed, as the distinctions between *legal* public relations and *ethical* public relations narrow, legal standards may become increasingly important gauges of acceptable professional conduct. Although still only baselines for ethical performance, evolving legal requirements provide valuable direction for defining the limits of responsible public relations advocacy in the marketplace of ideas.

Conclusion

This chapter proposes that marketplace principles—as defined by First Amendment jurisprudence—be used to evaluate the ethical soundness of public relations advocacy. The adoption of free speech principles as ethical baselines in public relations acknowledges both the primacy of marketplace philosophy in U.S. society—as reflected in the laws of the land—and the utility of legal reasoning in ethical decision making. The legal principles applied by the courts in balancing the rights and freedoms of various special interests offer a model for addressing the competing values and concerns of an institution's strategic constituents. The fundamental marketplace principles of access, process, truth, and disclosure provide an ethical floor on which public relations practice standards can be built.