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Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech

Robert D. Richards[*] *and Clay Calvert*[**]

I. INTRODUCTION

Justice Louis Brandeis, in his concurring opinion nearly seventy-five years ago in the criminal syndicalism case of *Whitney v. California*,[1] articulated the premise of what today is known as the doctrine of counterspeech.[2] When it came to expression that was perceived by some to be dangerous, threatening, or harmful, Brandeis famously wrote, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[3]

At the heart of the counterspeech doctrine is the principle, as Laurence Tribe writes, that "whenever 'more speech' could eliminate a feared injury, more speech is the constitutionally-mandated remedy."[4] Rather than censor allegedly harmful speech and thereby risk violating the First Amendment[5] protection of expression, or file a

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1. 274 U.S. 357 (1927).

2. *See generally* Michael Kent Curtis, *"Free Speech" and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 433 (1996) (observing that Justice Brandeis "insisted that in spite of dangers, the only appropriate remedy for much evil speech is counter-speech and reason" (footnote omitted)).

3. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

4. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 834 (2d ed. 1988).

5. The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

lawsuit that threatens to punish speech perceived as harmful, the preferred remedy is to add more speech to the metaphorical marketplace of ideas.[6] In defamation law,[7] for instance, the United States Supreme Court has held that "the first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."[8]

The idea that "bad speech" can be effectively countered or cured with more speech, however, has recently come under fire in some quarters.[9] The effectiveness of counterspeech, for instance, may be limited by the amount of time available to refute the pernicious speech in question and "whether the counter-message comes to the attention of all the persons who were swayed by the original idea."[10] Critical race theorists have argued as well that some minority groups experience "diminished access to private remedies such as effective

6. The marketplace of ideas "is perhaps the most powerful metaphor in the free speech tradition." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992). The marketplace metaphor "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989) (footnote omitted). The metaphor is used frequently today, more than seventy-five years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes Jr.'s often-quoted admonition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See generally* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a recent review of the Court's use of the marketplace metaphor).

7. Defamation includes both the libel and slander torts. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). The basic elements to state a cause of action for defamation include: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault . . .; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1977). "Libel is written or visual defamation; slander is oral or aural defamation." ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 67 (2d ed. 1994) (footnote omitted).

8. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

9. Kathleen Sullivan, current Dean of the Stanford Law School, writes:

> In common with the anti-pornography feminists, hate speech regulators view such speech as subordination and think that *more* speech—that old common cure for bad speech—is in these cases an inadequate remedy. This is not an area, they say, where we can rely on good counsel to drive out bad.

Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 974 (1995) (footnote omitted).

10. Vincent Blasi, *Propter Honoris Respectum: Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1357 (1997).

counterspeech."[11] Hate speech also may have what Professor Owen Fiss describes as a "silencing effect" on its victims, disabling and discrediting "a would-be speaker" and thereby reducing the effectiveness of counterspeech.[12]

Catharine A. MacKinnon, the outspoken feminist legal scholar, suggests that the same problem observed by critical race theorists—limited access to the means of communication—plagues those who would use counterspeech to criticize individuals in power. She writes that "silencing" may occur through "the refusal of publishers and editors to publish, or publish well, uncompromised expressions of dissent that make them uncomfortable by challenging the distribution of power, including sexual power."[13] It is, in other words, an unfair marketplace of ideas in which unequal access to the means of communication denies some groups the remedy of counterspeech. As legal scholars Robert Jensen and Elvia Arriola write from a critical perspective, "those who have power continue to have the greatest opportunities to speak in an effective manner."[14]

Even the United States Supreme Court has recognized that in some cases counterspeech may *not* be an effective remedy for harmful speech. In *Hustler Magazine, Inc. v. Falwell*,[15] for instance, the Court suggested, "False statements of fact are particularly valueless" because "they cause damage to an individual's reputation that cannot easily be repaired by *counterspeech*, however persuasive or effective."[16]

Counterspeech, in brief, is seen as a constitutionally preferred yet somewhat suspect and sketchy remedy for harmful speech. Although counterspeech is not always a perfect remedy, individuals and courts should seriously consider it as a solution. When used wisely, counterspeech may prove to be a very effective solution for harmful or threatening expression.

11. MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 48 (1993).

12. OWEN M. FISS, THE IRONY OF FREE SPEECH 25 (1996). Even Fiss, however, acknowledges that in individual cases involving hate speech, "[t]he traditional remedy—more speech—might be far better" than other remedies. *Id*. Thus, he does not preclude counterspeech as a useful avenue of redress.

13. CATHARINE A. MACKINNON, ONLY WORDS 77 (1993).

14. Robert Jensen & Elvia R. Arriola, *Feminism and Free Expression: Silence and Voice*, *in* FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION 195, 197 (David S. Allen & Robert Jensen eds., 1995).

15. 485 U.S. 46 (1988).

16. *Id*. at 52 (emphasis added).

This article examines an eclectic collection of recent free-speech battles in which various manners and modes of counterspeech have been used—some perhaps more effectively than others—as antidotes for allegedly harmful speech. The examples of counterspeech described here take many forms, stretching from the thoroughly low-tech use of billboards by concerned citizens in Missouri to counteract expression by the Ku Klux Klan[17] to the very high-tech employment of the World Wide Web[18] by the maker of a diet pill to launch a pre-emptive counter strike against an allegedly critical television broadcast.[19] In yet another case, the Food Lion supermarket chain employed a major public relations firm to disseminate video tapes and packets of information to members of the press and legal commentators as part of the non-legal portion of its counterattack against an unflattering report by ABC's now-defunct television news magazine, *PrimeTime Live*.[20] Then there is the ongoing battle against underage smoking, a fight in which counterspeech in the form of televised antismoking public service announcements now has taken center stage under the forty-six-state settlement with the tobacco industry.[21] And finally, in the never-ending fight over controversial artistic expression, counterspeech takes some of its most primitive yet perhaps most effective forms—organized protests, picket signs, and chanting.[22]

While the common thread running through these cases is the use of speech to oppose allegedly harmful or negative expression, this article also draws attention to some critical differences in the tactics and strategies used to implement the counterspeech. The different strategies, in turn, influence the efficacy of the counter expression. Ultimately, this article suggests that counterspeech is most effective when its proponents are able to call journalistic attention to their message, place it on the media's agenda, and thereby exponentially increase the audience to whom the message is disseminated.

17. *See infra* notes 25-48 and accompanying text.

18. The World Wide Web "is a global hypertext system that runs on the Internet" and allows one to navigate "by clicking on hyperlinks (embedded links) that connect to other documents or graphic, audio or video resources." Joseph Kershenbaum, *E-Commerce Primer: A Concise Guide to the New Public Network*, E-COM. L. REP. 14, 14-15 (Sept. 1999).

19. *See infra* notes 101-37 and accompanying text.

20. *See infra* notes 49-100 and accompanying text.

21. *See infra* notes 138-76 and accompanying text.

22. *See infra* notes 177-98 and accompanying text.

II. "GARBAGE" SPEECH AND THE KU KLUX KLAN: THE EFFECTIVE USE OF PUBLIC DISPLAYS OF DISAFFECTION

Like many states, Missouri has a voluntary adopt-a-highway program to help clean up refuse along its roadways.[23] In exchange for picking up litter, a group gets its name posted on a sign along its adopted stretch of highway.[24] By 1999, there were 5000 groups across Missouri that participated in the program.[25] Hundreds of signs recognizing groups and individuals, in turn, are posted today on the state's highways.[26]

Two of those signs, however, have caused considerable controversy. In May 1994, the Knights of the Ku Klux Klan filed an application to adopt a half-mile stretch of Interstate 55 within the City of St. Louis.[27] After a bitter and protracted battle in federal court with the Missouri State Highway Transportation Commission, a federal trial court ruled in April 1999 that the Klan had a right to participate in the state-run program.[28] The judge concluded, "As lacking as the Klansman's ideology may be of any redeeming social, intellectual or spiritual value, the Constitution of the United States protects his right to express that ideology as freely as one whose views society embraces."[29]

Although the Klan did not get the original piece of highway it sought inside the City of St. Louis, it nonetheless ended up with a one-mile strip of Interstate 55 in south St. Louis County.[30] And in late November 1999, the Missouri Department of Transportation dutifully erected two brown, adopt-a-highway signs announcing that the Ku Klux Klan would pick up trash, plant flowers, and mow the land near its portion of roadway.[31]

23. *See* Tim Bryant, *KKK is Free to Pick Up Litter, but Not in St. Louis*, ST. LOUIS POST-DISPATCH, Apr. 14, 1999, at B1.

24. *See id.*

25. *See id.*

26. *See* Lorraine Kee & Tim Bryant, *State Again Tries to Block KKK from Litter Program*, ST. LOUIS POST-DISPATCH, Sept. 24, 1999, at C1.

27. *See* Missouri v. Cuffley, 927 F. Supp. 1248, 1252 (E.D. Mo. 1996), *vacated on jurisdictional grounds*, 112 F.3d 1332 (8th Cir. 1997).

28. *See* Cuffley v. Mickes, 44 F. Supp. 2d 1023, 1029-30 (E.D. Mo. 1999).

29. *Id.* at 1030.

30. *See* Carolyn Tuft, *KKK "Adopt-A-Highway" Signs Go Up Along I-55*, ST. LOUIS POST-DISPATCH, Dec. 1, 1999, at A1.

31. *See id.*

The initial response? One sign was chopped down by vandals less than twenty-four hours after it was erected.[32] The Missouri Department of Transportation quickly put the sign back up at the taxpayer's expense.[33] But that same evening after the vandalized sign was fixed, both signs were stolen.[34]

These swift measures of vigilante justice—private censorship, really—extracted against the Klan's message represent one form of response to speech with which we disagree. That response is to stifle the speech altogether—to, quite literally, steal the message and thereby effectively remove it from the marketplace (at least, from the roadside marketplace in the Missouri case) of ideas. In fact, in response to the Klan's highway signs, one Missouri politician even called for the end of the entire adopt-a-highway program, apparently concluding that stifling offensive speech was more important than promoting a clean environment and volunteerism.[35]

Is this the proper response to the expression of a group whose ideas are offensive to the vast majority of people? No. As Justice William Brennan wrote in holding that flag burning is a form of speech protected by the First Amendment, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[36] Justice Brennan's point is just as applicable to government action like the Missouri Department of Transportation's attempt to deny the Klan's application based on its discriminatory viewpoints as it is to the private action of the thieves who pilfered the signs. Especially in a case like this in which there is plenty of time to refute the message, counterspeech should be the action of first resort.[37]

32. *See* Carolyn Tuft, *Highway Workers Re-Erect KKK Sign on Interstate 55 After Vandals Saw It Down*, ST. LOUIS POST-DISPATCH, Dec. 2, 1999, at A1.

33. *See id.*

34. *See* Carolyn Tuft & Donald E. Franklin, *Ku Klux Klan's Adopt-A-Highway Signs Are Stolen from Interstate 55*, ST. LOUIS POST-DISPATCH, Dec. 2, 1999, at A1.

35. *See* Carolyn Tuft, *Vandals Zero In on KKK Sign; County Lawmaker Asks State to End Cleanup Program*, ST. LOUIS POST-DISPATCH, Dec. 3, 1999, at A1.

36. Texas v. Johnson, 491 U.S. 397, 414 (1989).

37. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the government cannot forbid even the advocacy of force or illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

Counterspeech, in this case, proved to be the perfect self-help remedy for those offended by the presence of the Klan's name on litter-removal highway signs. In December 1999, a coalition of civil rights groups decided to place a carefully crafted message of both unity *and* diversity on a billboard near the location of the Klan's own signs.[38] The billboard's message was simple and eloquent: "*Freedom of speech protects all people even if they are wrong*."[39]

This remedy was effective for three reasons. First, the message struck at the importance of freedom of speech and the noble (if somewhat ironic) principle of tolerating intolerant expression in a free society.[40] The billboard, which was donated for forty-five days by a local media group,[41] not only made the point that the First Amendment protects minority viewpoints like the Klan's, but that it also protects the majority viewpoint that the Klan's speech simply is "wrong." To the vandals who swiped the highway signs, the billboard suggests that their actions were also wrong and that they must come to recognize that freedom of speech protects even the Klan. In brief, the message not only addresses the Klan, but also, at least implicitly, the individual or individuals who stole the signs.

Moreover, counterspeech serves another important function. It allows a third audience, namely the residents of St. Louis and St. Louis County who believe in freedom of speech and yet object to the Klan, to feel good about themselves. The message is a form of self-realization and self-fulfillment achieved through speech. The counterspeech in this case thus serves not only a substantive purpose in counteracting the Klan's racist ideologies and the vandals' criminal propensities, but also serves as a therapeutic measure of healing for the vast majority of people in St. Louis.

Finally, the counterspeech was particularly effective because the message on the 672-square-foot billboard received substantial coverage in the local news media. In brief, the message of tolerance was

38. *See* Donald E. Franklin, *Civil Rights Groups Will Counter KKK with Message of Diversity*, ST. LOUIS POST-DISPATCH, Dec. 23, 1999, at B5.

39. *Id*. (emphasis added).

40. *See generally* LEE C. BOLLINGER, THE TOLERANT SOCIETY 10 (1986) (arguing that "free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters").

41. *See* Lorraine Kee, *Civic Groups Will Put Up Billboard Near Site of Klan Signs*, ST. LOUIS POST-DISPATCH, Jan. 7, 2000, at B1.

received by more than just those drivers who happened to pass by the billboard on their way to or from work; it was also conveyed to *anyone* who read the local newspaper, *The St. Louis Post-Dispatch*. The newspaper even went so far as to publish its own editorial lauding the counterspeech measure employed by the coalition of civil rights groups.[42] Evoking the marketplace of ideas metaphor, the editorial quoted poet John Milton's famous statement: "Truth be in the field . . . Let her and Falsehood grapple; who ever knew Truth to be put to the worse in an free and open encounter?"[43] Perhaps more importantly, the editorial recognized the doctrine of counterspeech, expounding that "[t]he best answer for hate speech is more speech, not less."[44]

The coverage given by the mainstream media suggests an important lesson for those who choose to engage in the self-help remedy of counterspeech: create a simple, pithy message that resonates with journalists. If the message appeals to journalists, it eventually will find its way to their news agenda, and the media then will republish it to a larger audience. The *Post-Dispatch*, in other words, spread the counterspeech message for free when it wrote news stories and editorials about the billboard. This is an effective use of free publicity by practitioners of counterspeech that should not be lost on others.

Furthermore, the principle of counterspeech, kick-started by the billboard, spread through St. Louis. In late January 2000, another clever counterspeech remedy was proposed: naming the same stretch of highway on which the Klan's signs are posted in honor of seamstress-turned-civil-rights-activist Rosa Parks.[45] Signs signaling the Klan's litter removal project would be countered with signs signaling the Rosa Parks freeway. Thus, this situation represents the height of counterspeech in a very public place in a very public manner.

In summary, the battle in Missouri over the Klan's efforts to adopt a highway demonstrates several possible responses to speech with which we may disagree or find offensive. One simply is for the government to censor the speech; that was Missouri's initial response when it attempted to deny the Klan's application. A second response—vigilante justice in stealing the speech once it reaches the

42. *See Truth Is in the Field*, ST. LOUIS POST-DISPATCH, Dec. 26, 1999, at B2.

43. *Id.*

44. *Id.*

45. *See A Symphony of Protest*, ST. LOUIS POST-DISPATCH, Jan. 23, 2000, at B2.

marketplace of ideas—amounts to private censorship. The third remedy is counterspeech, and in this case it proved highly effective. Thus, it should be the preferred remedy.

The Klan case suggests the effective use of billboards as a medium for conveying messages to counteract hate speech. This is particularly important because it helps to refute the attack of critical race theorists, as set forth in the Introduction, that counterspeech is an ineffective remedy to hate speech.[46] The next section explores the very different use of public relations counterspeech to refute a very different message.

III. A SUPERMARKET CHAIN'S MARCH: IN LIKE A LION, OUT LIKE A LAMB

There are at least two very distinct, yet not mutually exclusive, ways to attack harmful speech. The first is *legal*: to file a lawsuit and, by doing so, to contest that harmful speech behind courtroom doors and in the pages of points and authorities. The second is *non-legal*: to employ the self-help remedy of counterspeech and to contest that adverse speech more openly, in the court of public opinion.

In the case described below, a major supermarket chain employed *both* tactics in an ill-fated, two-pronged attack against a major news organization. Although both the legal and counterspeech offensives arguably failed in this case, a close inspection reveals that counterspeech may have been much more productive and effective had the aggrieved party simply followed some basic public relations[47] principles.

A. The Legal Offensive: Was It Worth Two Dollars in Damages?

In October 1999, the United States Court of Appeals for the Fourth Circuit handed ABC News a resounding and hard fought victory[48] in a case that both challenged journalistic practices[49] and

46. *See supra* notes 11-18 and accompanying text.

47. Although definitions vary, public relations practice may be defined as "the planned and sustained effort to establish and maintain goodwill and mutual understanding between an organization and its publics." FRANK JEFKINS, PUBLIC RELATIONS TECHNIQUES 7 (2d ed. 1994).

48. ABC News President David Westin called the appellate decision "a victory for the American tradition of investigative journalism." Lisa de Moraes, *With Appeals Court Ruling, ABC Won't Pay Food Lion's Share*, WASH. POST, Oct. 21, 1999, at E1.

49. *See generally* JAY BLACK ET AL., DOING ETHICS IN JOURNALISM 164-68 (3d ed.

heightened awareness of the power and pitfalls of counterspeech. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*[50] was the cross-appeal of a $5.5 million jury verdict[51] (later reduced by the trial judge to $315,000)[52] against ABC's *PrimeTime Live* news magazine for a story it ran about allegedly unsanitary food-handling practices at the Food Lion supermarket chain.[53] ABC's report contained video footage purporting to show store workers repackaging fish with a new expiration date, combining expired ground beef with fresh meat, and applying barbecue sauce to dated chicken and selling it as a gourmet selection.[54]

The truth of ABC's broadcast was *not* at issue in the case.[55] Instead, the focus was the network's tactics in gathering information.[56] To gain access, producers Lynne Dale and Susan Barnett applied for jobs at two Food Lion stores, one in North Carolina and the other in South Carolina.[57] They lied on their applications and created fictitious references.[58] The scheme worked, and the pair was hired in spring 1992.[59] Once inside the grocery stores, the media moles used miniature hidden cameras to record footage that would later become the mainstay of the broadcast and create an image crisis of historic proportions for Food Lion.[60]

After the report first aired on November 5, 1992, Food Lion sued ABC and its producers on four counts:[61] fraud,[62] breach of duty

1999) (analyzing ethical issues raised by the deceptive journalistic practices of ABC employees in gathering information about the Food Lion supermarket chain).

50. 194 F.3d 505 (4th Cir. 1999).

51. *See* Howard Kurtz & Sue Anne Pressley, *Jury Finds Against ABC for $5.5 Million*, WASH. POST, Jan. 23, 1997, at A01 (describing the jury verdict).

52. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 940 (M.D.N.C. 1997).

53. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).

54. *See id.* at 511.

55. *See id.*

56. *See id.* at 510 (explaining that "Food Lion did not sue for defamation, but focused on how ABC gathered its information").

57. *See id.*

58. *See id.*

59. *See id.*

60. The two producers recorded "approximately 45 hours of concealed camera footage." *Id.* at 511.

61. *See id.* at 510.

62. The fraud allegation requires proof that the defendant made a false representation of material fact, either knowing it was false or making it with reckless disregard of its truth or fal-

of loyalty,[63] trespass,[64] and unfair trade practices.[65] The supermarket sought damages for the administrative costs associated with hiring the two producers, as well as publication damages for lost profits resulting from the broadcast.[66] The trial judge ruled, however, that publication damages were not appropriate because Food Lion could not show that its loss of profits and sales, along with diminished stock value, were proximately caused by the *PrimeTime Live* newsgathering tactics.[67] The jury found for Food Lion on the other counts.[68]

On appeal, the Fourth Circuit rejected both the fraud and unfair trade practices claims. It ruled that the misrepresentations by the reporters did not justify damages on fraud grounds because the company could not successfully show that it had reasonably relied on the statements made on the job applications.[69] While the reporters knowingly misrepresented their credentials, they did *not* represent that they would work longer than a week or two.[70] In fact, the application itself contained a statement that "employment is for an indefinite period of time" and both the employee and the company

sity, with the intent that the plaintiff rely upon it. *See id.* at 512. In addition, the plaintiff must be injured through reasonable reliance on the false representation. *See id.*

63. A breach of duty of loyalty occurs if an employee: (1) competes directly with her employer; (2) misappropriates her employer's profits, property, or business opportunities; or (3) breaches her employer's confidences. *See id.* at 515-16.

64. Trespass is an entry upon another's property without consent. *See id.* at 517. In addition, an individual who exceeds the scope of consent to enter property commits a trespass. *See id.* at 518.

65. This claim was made under North Carolina's Unfair Trade Practices Act, which "prohibits '[u]nfair methods of competition' and 'unfair or deceptive acts or practices' that are 'in or affecting commerce.'" *Id.* at 519 (quoting N.C. Gen. Stat. § 75-1.1(a)).

66. *See id.* at 511. Note that Food Lion did not claim defamation—the usual method for recovering reputation damages—in its lawsuit. Libel plaintiffs recognize the difficulty in overcoming the First Amendment hurdles associated with suing the news media for the content of their publications. More recently, a litigation tactic has been to sue on the basis of the newsgathering process. *Cf.* DON R. PEMBER, MASS MEDIA LAW 129 (2000) (observing that "some aggrieved parties who don't think they can win a libel suit against the press use other kinds of lawsuits to try to harass or frighten their critics," including suits for trespass and invasion of privacy).

67. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 966 (M.D.N.C. 1997).

68. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (4th Cir. 1999).

69. *See id.* at 513.

70. *See id.*

have a right to terminate employment at any time.[71] Thus, Food Lion's claim that it needlessly paid administrative costs associated with hiring these two "workers," who never intended to stay beyond a few weeks, was unfounded in an at-will employment situation.[72] Similarly, Food Lion was not entitled to recoup the wages it paid to Dale and Barnett because they were compensated for the work tasks they did. In reversing the fraud verdict, the appellate court noted that one supervisor had even said shortly before Dale quit that "she would 'make a good meat wrapper.'"[73]

The court of appeals also ruled that the district court erred in assessing liability under North Carolina's Unfair Trade Practices Act.[74] The Act principally protects the public that may be harmed by unfair competition. Clearly, ABC did not intend to harm the public. Quite to the contrary, as the court pointed out, "[p]resumably, ABC intended to benefit the consuming public by letting it know about Food Lion's food handling practices."[75]

Despite these rulings against Food Lion on the fraud and unfair trade practices claim, all was not yet lost for the supermarket chain. The appellate court upheld the jury's finding that Dale and Barnett breached their duty of loyalty to their employer by videotaping for *PrimeTime Live* while employed at Food Lion. As the opinion noted, "ABC's interest was to expose Food Lion to the public as a food chain that engaged in unsanitary and deceptive practices. Dale and Barnett served ABC's interest, at the expense of Food Lion . . . ."[76] The appellate court further found that the reporters committed trespass "because the breach of duty of loyalty—triggered by the filming in non-public areas, which was adverse to Food Lion—was a wrongful act in excess of Dale and Barnett's authority to enter Food Lion's premises as employees."[77]

Food Lion's victories on the trespass and breach of loyalty claims, however, would prove virtually meaningless from a financial

71. *Id.*

72. *See id.*

73. *Id.* at 514.

74. *See id.* at 520 (noting that there is a limited business-to-business use of the Act, but that usage applied only when the businesses are competitors or engaged in trade dealings with each other, which clearly did not apply in this instance).

75. *Id.*

76. *Id.* at 516.

77. *Id.* at 518.

perspective because the Fourth Circuit refused to allow recovery of the big money sought by the supermarket chain: publication damages for loss of good will and lost sales caused by the broadcast.[78] In reaching this result, the court focused on Food Lion's crafty yet transparent avoidance of the tort of defamation. The supermarket chain opted to make an "end-run around First Amendment strictures"[79] of defamation law such as proof of actual malice.[80] The court was not fooled by this tactic, noting that "[w]hat Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim."[81] Accordingly, Food Lion was awarded the nominal sum of two dollars.

At best, the legal challenge to ABC's report can be described as a turbulent and expensive ride for the Food Lion supermarket chain. At worst, it can be looked upon as a poor management decision to emphasize legal rather than pure counterspeech solutions to an image crisis. While the company certainly could have viewed the jury's original verdict as exoneration, it may have missed the more substantial point—the jury was reacting to a newsgathering practice it found abhorrent rather than absolving the supermarket chain of wrongdoing.[82] After the appellate court sorted through the legal issues, ultimately allowing the news industry to breathe a collective sigh of

78. *See id.* at 523-24.

79. *Id.* at 522.

80. Actual malice, as defined by the United States Supreme Court, requires proof that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). It requires an assessment of the state of mind of the defendant at the time the statement was published. *See generally* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §5.5, at 5-58 (3d ed. 1999).

81. *Food Lion*, 194 F. 3d at 522.

82. As technology has improved and recording devices have become smaller, easier to hide, and more visually vivid, news organizations are more likely to engage in deceptive information-gathering tactics. *See* LOUIS A. DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 85-86 (2d ed. 2000) (observing that "in their search for visual intensity and ratings, both the tabloid TV shows and the profitable prime-time news magazine shows . . . have turned 'sleuth journalism' and undercover news-gathering techniques into an art form"). Arguably, the improved technology has "increased the news media's incentive to assume fictitious identities for the purpose of securing access to places where their miniature cameras can record that which was previously shielded from public view." C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW § 13-8, at 710 (2d ed. 1999).

relief,[83] Food Lion was left to sift through the remains of its image—arguably a wreckage it had, in large part, heaped upon itself.

B. The Counterspeech Offensive: Mounting a Public Relations Attack

Food Lion did more, however, than simply challenge ABC in court. It also embarked upon a concerted public relations campaign. For instance, shortly after one of the authors of this article was quoted in the online version of the *Greensboro News & Record*, the site of the trial in the federal case, about his views of ABC's tactics,[84] he received a packet of information called "Food Lion v. ABC: Fakes, Lies and Videotape," sent on behalf of Food Lion. He also received a fifteen-minute videotape created by a public relations firm, Sitrick & Co., giving the supermarket chain's views and featuring outtakes from the *PrimeTime Live* broadcast.[85] It seemed as if Food Lion was trying to win the hearts and minds of legal commentators through counterspeech and, in so doing, influence the battle of the sound bites in the media.

Another creative counterspeech approach employed by Food Lion was to enlist the assistance of Jean Folkerts, Director of the School of Media and Public Affairs at George Washington University and Editor of *Journalism & Mass Communication Quarterly*.[86] Specifically, Folkerts prepared a case study on journalism ethics based on the ABC/Food Lion controversy.[87] The case study was bundled up with the above-mentioned videotape and other information and sent to mass communication professors to, as the cover letter from Food Lion put it, "assist you and your students in engaging these issues."[88]

This tactic represents a unique and interesting method of counterspeech: causing future journalists while still attending school and developing journalistic ideals to consider not only Food Lion's per-

83. Media defense attorney Lee Levine remarked after the appellate court's decision, "This case has been the poster child for whether or not these kinds of claims are viable. The result is going to be that these cases are worth two dollars." de Moraes, *supra* note 50, at E1.

84. *See* Len Alexander, *ABC Case Puts Spotlight on Journalists' Ethics*, NEWS & RECORD ONLINE, Jan. 24, 1997 <http://www.newslibrary.krmediastream.com/cgibin/search/gb/.htm> (visited Apr. 5, 2000) (quoting Clay Calvert).

85. Both the videotape and information packet are on file with author Clay Calvert.

86. *See* Letter from Chris Ahearn, Director, Communications and Public Affairs, Food Lion, to "Dear Mass Communications Professor" (July 15, 1998) (on file with author Clay Calvert).

87. *See id.*

88. *Id.*

spective in the case, but also the long-term ethical implications of ABC's news-gathering tactics. Just as Food Lion launched a counter-speech offensive targeting legal commentators and hoping they might influence public opinion favorably toward the supermarket chain, the company did much the same in the classroom with journalism educators who might influence budding journalistic practitioners.

Food Lion also attempted to enlist—perhaps the word "use" is more fitting—at least one other major cable network as its mouthpiece in its war of counterspeech. Specifically, it sent outtakes from the ABC broadcast to the Fox News Channel.[89] The use of those outtakes by Fox drew the wrath of ABC. Said ABC News President David Westin, "I find it outrageously unfair that a news organization would proceed that way. The tape that Food Lion presented is a gross distortion of what actually occurred."[90] Ironically, ABC, a network that had its employees lie and use hidden cameras, called Fox News Channel's approach unfair.

However, Food Lion's strategy clearly emphasized winning the legal battle against ABC and telegraphing that victory to the public. In the view of some public relations professionals, this strategy was a mistake. As one commentator observed, "Rather than follow the PR industry's conventional wisdom of admitting guilt up front, apologizing and fixing whatever was perceived to be wrong, Food Lion fought back like the tenacious lion on its logo."[91] Public relations expert William Schechter also criticized Food Lion's response in *Public Relations Quarterly*:

> When companies circle their wagons and craft news releases which purport to prove their innocence of any allegations, they too easily dismiss how they will be judged in the court of public opinion. Yes, the public is down on the media, increasingly so, for providing a stream of discomfiting news. But while most people believe that the media often are unfair, very few suspect that news organizations invent stories. Exaggerate, yes. Completely fabricate, no.[92]

89. *See* Bill Carter, *Fox's Use Of Footage Irks ABC*, N.Y. TIMES, Jan. 23, 1997, at B11.

90. *Id.*

91. Mark Albright, *After Trial, ABC, Food Lion Battle for PR Verdict*, ST. PETERSBURG TIMES, Feb. 14, 1997, at 1E.

92. William Schechter, *Food Lion's "Victory"—But at What Price?*, 42 PUB. RELATIONS Q. 20, 21 (1997).

Schechter argues that an aggressive campaign employing the time-honored remedy of counterspeech is the more appropriate response when a company faces a major crisis. Instead of protesting innocence, the company should counter the journalistic attack with its own forward-looking campaign and "express a sincere, paramount concern for the safety and well-being of customers."[93] The company should assure the public that it will launch its own investigation to root out the causes of the problem.

Other public relations practitioners and scholars similarly favor the counterspeech remedy over the legal response, but recognize that the tactic often places the company's communicators at odds with its corporate attorneys. Lawyers typically shun the counterspeech approach, fearing the message will be construed as an admission of wrongdoing.

As Kathy R. Fitzpatrick and Maureen Shubow Rubin observed in *Public Relations Review*, "Defense attorneys seldom advise organizational decision makers to agree with this type of proactive public relations advice."[94] The lawyerly response often is to "say nothing" or "say as little as possible and release it as quietly as possible."[95] In their study, Fitzpatrick and Rubin found that company executives relied more often on the legal rather than public relations strategy, leading them to conclude that "[g]iven the clear public relations and legal consequences for organizations that ignore the public implications of statements made during such times, this dominance is shortsighted and costly."[96]

Curiously, the public relations industry has caught up with Justice Brandeis's prescription from the early part of the last century—"to avert the evil by the processes of education"[97]—but the legal profession has not. Strategic issues management requires a company to actively counter bad press with positive information. "Gone are the days when companies could handle public relations emergencies

93. *Id.*

94. Kathy R. Fitzpatrick & Maureen Shubow Rubin, *Public Relations vs. Legal Strategies in Organizational Crisis Decisions*, 21 PUB. REL. REV. 21, 22 (1995).

95. *Id.*

96. *Id.* at 31.

97. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

by hunkering down in the boardroom and tossing out a 'no comment' every few days until the press and public grew bored."[98]

Employing a counterspeech campaign can be a tremendously efficient and effective way to refocus the public's attention in a more positive direction, but Food Lion's tactics, emphasizing legal remedies over public safety concerns, turned out to be misguided. Although Food Lion's approach to ABC may have defied recommended, textbook public relations strategies, diet pill maker Metabolife's full frontal assault and pre-emptive strike against the network's *20/20* news magazine provides a useful example of how to use new technology to accomplish the counterspeech remedy.

IV. LOSING WEIGHT BUT GAINING GROUND: METABOLIFE'S "20/20" VISION

The diet craze in the United States[99] has long provided plenty of fodder for researchers and journalists, not to mention advertising executives. A seemingly endless barrage of diet plans and pills contributes to the steady stream of messages heralding the benefits or forecasting the dangers associated with the latest weight-loss system. So when Metabolife International, Inc. introduced its product into the market in the mid-1990s, the skeptics were quickly summoned to task.[100]

Known as Metabolife 356, the product is an herbal supplement, which purports to speed up the body's metabolism.[101] The increased metabolic rate, in turn, is supposed to stimulate weight loss and

98. *Executive Update: Public Relations*, INVESTOR'S BUS. DAILY, Feb. 17, 1993, *available in* LEXIS, News Group File, All.

99. Americans' obsession with dieting caught the attention of Congress in 1992. After a two-year inquiry, members learned from witnesses about fraudulent and abusive practices in the commercial diet industry. *See, e.g.*, *Deception and Fraud in the Diet Industry, Part IV: Hearing before the Subcommittee on Regulation, Business Opportunities, and Energy of the House Committee on Small Business*, 102d Cong. 52 (1992) (statement of Barry J. Cutler, Director, Bureau of Consumer Protection).

100. Metabolife filed a defamation action against WCVB-TV, an ABC affiliate in Boston, regarding an investigative series about Metabolife that quoted Harvard Professor George Blackburn as saying, "'You can die from taking this product.'" Metabolife Int'l, Inc. v. Wornick, 72 F. Supp. 2d 1160, 1163 (S.D. Cal. 1999). U.S. District Judge John S. Rhoades Sr. dismissed the lawsuit in November 1999. *See id.* The company vowed to pursue the case. *See* Thomas Kupper, *Defamation Suit by Metabolife Rejected*, SAN DIEGO UNION-TRIB., Nov. 18, 1999, at C1.

101. *See* Jill Burcum, *Metabo-right?*, STAR TRIB. (Minneapolis), Oct. 20, 1999, at 1E.

combat fatigue.[102] Most of the ingredients in the Metabolife 356 pills reportedly are harmless,[103] but one, a Chinese herb called *ma huang*,[104] naturally produces the stimulant ephedrine. This stimulant speeds up the heart rate, increasing blood pressure.[105] The FDA found that for some people, particularly those with cardiovascular conditions, ephedrine could increase the risk of heart attack and related diseases.[106]

In October 1999, ABC's *20/20* was working on a story that looked at the diet claims made by Metabolife.[107] As part of its report, ABC interviewed Metabolife Chairman Michael Ellis. Correspondent Arnold Diaz conducted the interview with Ellis, with ABC's cameras rolling alongside Metabolife's own video equipment for the entire seventy minutes.[108] Moreover, Ellis requested that the interview be videotaped in front of more than 300 Metabolife employees and guests, and ABC agreed.[109]

Only a portion of the interview eventually aired in the *20/20* segment, broadcast on October 15, 1999. Metabolife, however, decided to distribute its *entire* videotape of the unedited interview in advance on October 7 on a special World Wide Web site created to preemptively counter the ABC report.[110] The site also included supporting product-safety data.[111]

Why did Ellis beat ABC to the punch and webcast the entire interview? He said he was worried "that the whole story [wouldn't] be out there" with just the ABC report, and that *20/20* might "have [had] a different agenda on how they want[ed] this story to go."[112]

102. *See id.*

103. The product "contains 14 substances, including ginseng, ginger root, spirulina algae, bee pollen and something called royal jelly, which the Metabolife company claims is good for the skin." *Id.*

104. This herb, grown throughout Asia, is used in more than two hundred varieties of diet aids. *See* Mary Duffy, *Side Effects Raise Flag on Dangers of Ephedra*, N.Y. TIMES, Oct. 12, 1999, at F7.

105. *See id.*

106. *See* Burcum, *supra* note 103, at 1E.

107. *See* David Bauder, *Metabolife Outflanks "20/20,"* CHI. SUN-TIMES, Oct. 7, 1999 (Late Sports Final ed.), at 46.

108. *See id.*

109. *See id.*

110. *See News Interview*, (visited Apr. 4, 2000) <http://www.newsinterview.com/>.

111. *See* Peter Johnson, *"20/20" Metabolife Report Survives Internet Attack*, USA TODAY, Oct. 13, 1999, at 3D.

112. Bauder, *supra* note 109, at 46.

In a statement released by the company, Ellis said, "Metabolife was concerned because '20/20' appeared to be basing its story on the comments of a doctor who is a trustee of the Slim-Fast Nutrition Institute, a competitor."[113]

He emphasized, however, that he did not create the website in the hopes of stifling ABC's report; rather, he explained its purpose on National Public Radio:

> We're just putting the video out there. "20/20" can run this story any way they [sic] want to run it. We're not going to stop them from the First Amendment; that's not our intent. But, you know, in America, we all have our First Amendment rights, and "20/20" has no proprietary information over our videotape. If they felt it was proprietary, they probably shouldn't have done a public interview. Over 300 people were there, and they knew we were videotaping it.[114]

Michael Ellis also offered an altruistic motive as part of his explanation for the website, saying the increased attention would help him underscore a point that diet supplements are "another form of medicine."[115]

Ellis's motives notwithstanding, the tactics employed by his company invoke traditional First Amendment doctrine. Indeed, Ellis confidently stated that "'Metabolife welcomes vigorous debate and public scrutiny, but it should be open and honest.'"[116] He followed up by inviting the public to "'[v]iew the complete, unedited videotape footage, review the relevant data and then watch the broadcast and judge for yourself.'"[117] This remark can, without much of a stretch, be seen as a modern restatement of Justice Brandeis's 1929 admonition that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced si-

113. Jon Lafayette, *Countering "20/20" on Net; Company Posts Its Interview Online*, ELECTRONIC MEDIA, Oct. 11, 1999, at 2.

114. *All Things Considered: Diet Product Company Challenges How "20/20" Will Edit a Report and Airs Its Entire Interview on its Web Site* (NPR radio broadcast, Oct. 7, 1999) (transcript on file with authors).

115. Duffy, *supra* note 106, at F7.

116. *Metabolife Posts On Web Complete Unedited Footage of 20/20 Interview Before the Show Airs*, PR NEWSWIRE, Oct. 6, 1999, *available in* LEXIS, News Group File, All.

117. *Id.*

lence."[118] By getting out ahead of ABC, Metabolife hoped to shape a more favorable message.

To help make Ellis's points, Metabolife not only posted the interview on its special website but also purchased advertisements publicizing it in several newspapers, including *The New York Times*[119] and *The New York Post*.[120] The company also ran commercial spots on 1,500 radio stations.[121] These advertisements, in turn, generated extensive news coverage about Metabolife's high-tech, counter-speech campaign.[122] And that coverage, in turn, prompted concern from news managers. Media critic Bill Carter of *The New York Times* reported that "news executives from ABC, as well as from CBS and NBC, acknowledged that the move had implications for journalism, especially because making interview material public before it is broadcast or published makes the information available to competing news organizations."[123]

In the end, Metabolife spent some $2 million on its publicity campaign.[124] It may seem like a high price to pay for counterspeech, but CEO Ellis credits the campaign with "holding '20/20's' feet to the fire to some degree,"[125] an indication that the televised report turned out more balanced than he had expected. Nonetheless, to ensure that the *20/20* audience had the chance to see the full story, Metabolife also ran a fifteen-second commercial during the *20/20* broadcast on October 15, 1999.

Metabolife's counterspeech did much more. The preemptive strike enabled Metabolife to prepare for the worst. Professor of Communication Robert L. Heath suggests that handling a crisis in an organization should be viewed *prospectively* as "an issues man-

118. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

119. *See* N.Y. TIMES, Oct. 6, 1999, at A19 (containing a full-page advertisement for Metabolife).

120. *See* N.Y. POST, Oct. 6, 1999, at 23 (containing a full-page advertisement for Metabolife).

121. *See* Duffy, *supra* note 106, at F7.

122. *See, e.g.*, Don Aucoin, *ABC's Metabolife Report Airs Tonight*, BOSTON GLOBE, Oct. 15, 1999, at D20; Bill Carter, *Anxious Pill Maker Puts ABC Interview of Its Chief on the Web*, N.Y. TIMES, Oct. 7, 1999, at A23; *Metabolife Founder's Past is Past*, SAN DIEGO UNION-TRIB., Oct. 17, 1999 at G-3.

123. Carter, *supra* note 124, at A23.

124. *See* Howard Kurtz, *Over-the-Counter Strategy; Preemptive Interview a Coup for Metabolife*, WASH. POST, Oct. 25, 1999, at C01.

125. *Id.*

agement function that entails issues monitoring, strategic planning, and getting the house in order, to try to avoid events that trigger outrage and uncertainty and have the potential of maturing into public policy issues."[126] Metabolife recognized the early warning signs—an investigation by a major network television news magazine—and launched a strategy to redirect the public's attention. As the trade magazine *Electronic Media* reported, "The move by Metabolife is a new form of a company countering a news organization when it is the focus of an investigative report."[127]

Significantly, Metabolife used counterspeech to combat what Fordham Professor Marion K. Pinsdorf refers to as "Mike fright," a reference to long-time *60 Minutes* investigative journalist Mike Wallace.[128] Wallace has long been known for his unique style of interviewing where he "uses confrontational tactics [by] provoking subjects and attempting to trap the innocent with his friendly manner—between you and me (and millions of viewers)."[129] This tenacious style of reporting has become popular among television investigative reporters.[130]

The real power of programs such as *60 Minutes* and *20/20*, however, comes in the editing process, in which hours of interview time is pared down to a few precious minutes or even seconds that create an angle the journalist wants for the story. Fear of what ABC *might* do with the interview is precisely what motivated Metabolife to make available its side of the story through a medium it controlled.[131] Metabolife's countermeasures diffused the editorial power with the Internet's capacity to stream video onto the company's website by presenting a more complete picture. Further, Metabolife followed up the *20/20* piece with its own message touting the safety and effectiveness of its product, further emphasizing its point.

126. ROBERT L. HEATH, STRATEGIC ISSUES MANAGEMENT: ORGANIZATIONS AND PUBLIC POLICY CHALLENGES 289-90 (1997).

127. Lafayette, *supra* note 115, at 2.

128. MARION K. PINSDORF, COMMUNICATING WHEN YOUR COMPANY IS UNDER SIEGE 49 (3d ed. 1999).

129. *Id.* at 52.

130. *See* EDWARD BLISS, JR., NOW THE NEWS: THE STORY OF BROADCAST JOURNALISM 288 (1991).

131. *See* Jack O'Dwyer, *Sitrick Helps Metabolife with ABC*, JACK O'DWYER'S NEWSL., Oct. 13, 1999, at 5.

By using established media to promote its Web report, the publicity for the company mushroomed.[132] According to the company's public relations firm, Sitrick & Company,[133] millions of people have visited the Metabolife website.[134] With other news organizations covering the story of Metabolife's response,[135] the company was proactive rather than reactive—a useful public relations model. By launching its website and thoroughly publicizing this effort *before* ABC's report aired, Metabolife took full advantage of the counterspeech remedy in the fashion first envisioned by Justice Brandeis almost three-quarters of a century ago. Once again, this time-tested approach provided a creative solution and helped to diffuse what might have been a nightmarish period in Metabolife's company history.

The next section explores another counterspeech campaign on a much grander scale than typically could be launched by a single company such as Metabolife. In particular, the current anti-smoking advertising campaign, financed by a massive settlement between the states and tobacco industry, is designed to counter the effect of tobacco-product advertising, and thus reduce the high levels of underage smoking in the United States.

V. UNSELLING CIGARETTES: COMPELLED COUNTERSPEECH

The number of teenagers who became daily smokers increased a remarkable seventy-three percent from 1988 to 1996.[136] The Centers for Disease Control and Prevention ("CDC") reported that more than 1.2 million Americans under age eighteen started smoking on a daily basis in 1996 alone.[137] A study released in late 1999 by the University of Michigan's Institute for Social Research found that 34.6 percent of high school seniors it surveyed nationwide said they

132. *See* Jerry Walker, *Millions Visit Metabolife's Web Site*, JACK O'DWYER'S NEWSL., Oct. 27, 1999, at 3.

133. Sitrick & Co. is the same public relations firm that Food Lion, Inc. used in its campaign against ABC. *See supra* note 87 and accompanying text. *See also*, Lafayette, *supra* note 115, at 2.

134. *See* Walker, *supra* note 134, at 3.

135. *See supra* note 124 and accompanying text.

136. *See Youth Smoking Rises 73% in 9 Years*, N.Y. TIMES, Oct. 9, 1998, at A14.

137. *See id.*

had smoked one or more cigarettes in the previous month, a rate well above that of the early 1990s.[138]

In some states, the numbers are astonishing. A 1997 study conducted by the CDC, for instance, found that forty-seven percent of students in grades nine through twelve in Kentucky reported smoking in the month before the survey.[139] But high rates are not limited to tobacco-producing states. A recent study conducted by the American Heart Association found that thirty-six percent of children between the ages of twelve and seventeen in supposedly health-conscious Colorado are regular smokers.[140] The Massachusetts Department of Education reported in 1999 that the smoking rate among high school students in that New England state was thirty percent.[141]

Studies suggest that the problem starts before high school. The results of a national survey released by the CDC in January 2000, for instance, reveal that one in eight middle-school students currently is experimenting with tobacco.[142] The same survey found that almost thirty-five percent of high school students use tobacco in some form.[143] In total, the federal government estimates that nearly three thousand American children and adolescents under age eighteen become regular smokers each day.[144]

Many have pinned the blame for the high rates of teen smoking on speech by tobacco companies and, in particular, on advertisements featuring cartoon camels and costumed cowboys hawking

138. *See* David A. Vise & Lorraine Adams, *Study Indicates Teen Drug Use May Be Leveling Off*, WASH. POST, Dec. 18, 1999, at A02.

139. *See* James Pilcher, *Study Says Anti-Smoking Efforts Pay Off But States With Few Controls Show Tobacco Use is on Upswing*, BUFFALO NEWS, Aug. 25, 1999, at 7A. The same study found that the state with the lowest teenage smoking rate was Utah, where just 16.4 percent of teens reported smoking in the previous month. *See id.*

140. *See* Cindy Brovsky, *Teen Smoking at Record Levels*, DENVER POST, Jan. 1, 2000, at B-04.

141. *See* Doug Hanchett, *Study Shows Smoking Among Mass. Teens Finally Declining*, BOSTON HERALD, Nov. 24, 1999, at 23. The thirty percent figure represents a decrease from the thirty-six percent rate found in 1995. *See id.*

142. *See* Marc Kaufman, *Many Trying Tobacco in Grades 6-8*, WASH. POST, Jan. 28, 2000, at A1. The survey was conducted in September and October of 1999, questioning 15,000 students at 130 locations. *See id.*

143. *See id.* A new smoking behavior that is growing among youth in the United States is the consumption of bidis—small, brown and hand-rolled cigarettes primarily made in India and produced in flavors such as cherry and chocolate that appeal to children. *See Bidi Use Among Urban Youth—Massachusetts, March–April 1999*, 282 JAMA 1416 (1999).

144. *See* Mi Young Hwang, *Kids Lighting Up*, 282 JAMA 1692 (1999).

cigarettes.[145] The $206 billion settlement reached in November 1998 between forty-six states and the tobacco industry, in fact, banned the use of cartoon characters in cigarette advertisements.[146] The Federal Trade Commission even attacked the Joe Camel advertising campaign[147] used by R.J. Reynolds Tobacco Co. to sell Camel cigarettes as an unfair trade practice, given the character's appeal to children.[148] It dropped those charges in 1999, however, in light of the settlement[149] and over a year after R.J. Reynolds voluntarily abandoned the controversial campaign.[150] The Joe Camel campaign had been criticized almost since its inception for its alleged ability to capture the attention of teenagers and children.[151]

How should the problem of underage smoking be addressed? One key component of the massive settlement mentioned above involves counterspeech. In particular, it includes $1.5 billion—about $300 million each year for five years—for a major anti-smoking campaign.[152] Specifically, the settlement provides that the money be used "only for public education and advertising regarding the addictiveness, health effects and social costs related to the use of tobacco products and shall not be used for any personal attack on, or vilification, of any person . . . company or government agency whether individually or collectively."[153] Counterspeech is now part of a legally enforceable remedy against Big Tobacco.

145. *See generally* Clay Calvert, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science and the Regulation of Tobacco Advertising*, 27 SW. U. L. REV. 401 (1998) (examining assumptions about the influence of cigarette advertisements on smoking behavior).

146. *See* Joseph P. Shapiro, *Industry Foes Fume Over the Tobacco Deal*, U.S. NEWS & WORLD REP., Nov. 30, 1998, at 30 (observing that "[t]obacco companies will be banned from using cartoon characters—which attract young smokers—in ads").

147. *See generally* RICHARD KLUGER, ASHES TO ASHES 701-03 (describing the evolution of the Joe Camel and "smooth character" advertising campaign).

148. *See* Stephen Labaton, *The Media Business: Advertising: Out of Work for a Year, R.J. Reynolds Tobacco's Cartoon Endorser Now Faces Government Charges*, N.Y. TIMES, Nov. 9, 1998, at C8.

149. *See FTC Drops Joe Camel Case In Light of Settlement*, WALL ST. J., Jan. 28, 1999, at B18.

150. *See* David Segal, *Joe Camel Fired*, WASH. POST, July 11, 1997, at A01 (describing Reynolds's decision to drop the campaign and calling it "the latest conciliatory gesture" from the tobacco industry).

151. *See* William Booth, *California Sends Joe Camel to an Earlier Retirement*, WASH. POST, Sept. 10, 1997, at A10.

152. *See* Ira Teinowitz, *After the Tobacco Settlement*, WASH. POST, Dec. 6, 1998, at C01.

153. *Id.*

This situation creates a classic counterspeech scenario, one in which anti-smoking messages do battle against pro-smoking messages. Pro-cigarette and pro-tobacco-product ads, it must be remembered, are *not* completely leaving the marketplace of ideas under the settlement.[154] Although the agreement scraps the use of cartoon characters to sell cigarettes and bans the use of billboards,[155] it does *not* prohibit the use of often-appealing photographs, for example, of the Marlboro Man,[156] in cigarette advertisements.[157] The failed 1997 agreement, in contrast, would have banished human figures from cigarette ads.[158] Some of those human figures apparently are very enticing to today's youth—about two-thirds of the cigarettes that children smoke today are Marlboros.[159] Advertisements for cigarettes still flourish in the pages of many magazines[160] and, in fact, cigarette

154. As a spokesperson for Philip Morris stated in 1999, "we will continue to employ a number of activities that allow us to build brand equity by focusing on adults who choose to smoke." Greg Johnson, *Billboards into the Ashcan*, L.A. TIMES, Apr. 22, 1999, at C1. It is interesting to note how carefully that statement is parsed—it expresses the sentiment that cigarettes are marketed to adults—not children—and that people "choose to smoke" rather than become addicted to tobacco.

155. Cigarette billboards officially came down or were painted-over in April 1999, under the terms of the mega-settlement. *See* Saundra Torry, *Giving the Medium a New Message*, WASH. POST, Apr. 23, 1999, at A03. Some were replaced with antismoking billboards. *See id.*

156. The Marlboro Man has been described as a "cultural icon" symbolizing "the most masculine type of man." JULIANN SIVULKA, SOAP, SEX, AND CIGARETTES: A CULTURAL HISTORY OF AMERICAN ADVERTISING 279 (1998).

157. *See* Shapiro, *supra* note 148, at 30 (observing that "the Marlboro Man and other appealing tobacco symbols stay" under the agreement and writing that stores can still post cigarette ads).

158. Saundra Torry & John Schwartz, *States Approve $206 Billion Deal With Big Tobacco*, WASH. POST, Nov. 21, 1998, at A01.

159. *See* Eric Brazil, *$206 Billion Tobacco Deal*, S.F. EXAMINER, Nov. 15, 1998, at A1 (quoting University of California at San Francisco Professor Stanton Glantz as stating that the settlement agreement "does nothing about the Marlboro cowboy, and two-thirds of the cigarettes kids smoke are Marlboros").

160. Although cigarette advertisements continue to proliferate in magazines, a number of major newspapers in 1999 voluntarily stopped accepting tobacco-related advertisements. In particular, *The New York Times* announced in late April 1999 that it would ban cigarette advertising in its pages. *See* Doreen Carvajal, *The New York Times Bans Cigarette Ads*, N.Y. TIMES, Apr. 28, 1999, at C2. Several months later, the Los Angeles Times announced that it was also banning cigarette advertisements. *See* Narda Zacchino, *Why the Times Plans to Ban Tobacco Ads*, L.A. TIMES, Sept. 26, 1999, at M5. The Boston Globe joined the growing crowd in November 1999, proclaiming that it would no longer accept or carry advertisements that promote tobacco products and smoking. *See* Globe Staff, *Globe to Stop Carrying Tobacco-Related Ads*, BOSTON GLOBE, Nov. 12, 1999, at C3.

companies actually now publish their very own magazines, replete with cigarette ads.[161]

The case for using anti-smoking advertisements as a form of counterspeech is particularly important today, not so much because it may reduce smoking, but because it brings into focus the plethora of problems that threaten the efficacy of *any* speech that is designed to serve as an antidote for allegedly harmful expression.

Although the states' attorneys general who negotiated the settlement surely believed that negative smoking messages would be effective in reducing teenage smoking (as evidenced by their insistence that $1.5 billion be set aside for that purpose), it is clear that not just any counterspeech will necessarily lead to this result. Anti-smoking messages may, in other words, prove to be a decidedly ineffective form of counterspeech if not carefully crafted to reach a particular target audience.

In particular, a number of questions arise that will influence the efficacy of the counterspeech/anti-smoking media campaign:

> 1. *Who* should the advertisements target? Preteens? Teens? Whites? African-Americans? Asians? Latinos? All of the above?
>
> 2. *What* types of appeals will work best? Scare tactics and fear appeals regarding adverse health effects? Humor? Bashing the tobacco industry? Ads featuring children? Ads featuring adults?
>
> 3. *How* often should the target audience receive the messages on television—once a day, twice a day, more, or less?
>
> 4. *Where* should the messages be placed? On billboards? In magazines? On television? In schools? On the Web? Which media, in other words, are most appropriate?

161. *See* Alex Kuczynski, *Big Tobacco's Newest Billboards Are on the Pages of Its Magazines*, N.Y. TIMES, Dec. 12, 1999, at § 1, 1 (observing that tobacco companies are now "drawing the major publishers of consumer magazines into their marketing fold" and noting that "three tobacco giants—Brown & Williamson, Philip Morris and R.J. Reynolds Tobacco—have recently joined with Time, Inc., Hearst Magazines, Hachette Filipacchi Magazines and EMAP Peterson to produce five magazines"); *see also* Constance L. Hays, *With Joe Camel Put Out to Pasture, Tobacco Makers Like R.J.R. Try a More Direct Approach*, N.Y. TIMES, Nov. 24, 1999, at C5 (describing a so-called "magalog"—a hybrid of a magazine and a catalog—produced by R.J. Reynolds, maker of Camel cigarettes).

These same questions, if tweaked slightly, are relevant to *any* counterspeech campaign in the mass media, whether it is directed against cigarette smoking, alcohol consumption, marijuana usage, or gang violence.[162] Identifying a target audience, designing a message directed toward that target audience, and reaching the audience with that message in an effective forum and for a useful number of times are crucial for the success of any counterspeech public information campaign.[163]

Not knowing how to reach the target audience effectively is one potential problem with counterspeech. This danger is particularly true with anti-smoking messages. As Dr. Ronald M. Davis, editor of the *Tobacco Control* journal remarked in 1998, "I'm not sure we really know how to reach kids effectively with health messages.... Kids feel they're invulnerable, and that makes them hard to reach."[164] John Pierce, a professor of cancer prevention at the University of California at San Diego, concurs. He observes that the tobacco industry "associates its product with an image that kids want. How do you counter that image? We don't really know, because nobody's gotten there yet."[165]

The process of countering the image with counterspeech funded by the multi-state settlement is directed by an organization called The American Legacy Foundation ("Foundation"), located in Washington, D.C. which did not select the agencies that would produce the campaign until September 1999, nearly a year after settlement. [166] To help design ads that might be effective, the Foundation brought two teenagers from each of the fifty states to Washington to brain-

162. *See generally* PLANNING AND IMPLEMENTING EFFECTIVE TOBACCO EDUCATION AND PREVENTION PROGRAMS (Martin L. Frost ed., 1999) (containing a very recent collection of original articles by leading experts in the field of tobacco education and prevention that cover a range of tactics and strategies for reaching specific target populations, including youth and ethnic groups).

163. *See generally* Ronald E. Rice & Charles Atkin, *Principles of Successful Public Communication Campaigns*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, 365, 365 (Jennings Bryant & Dolf Zillmann eds., 1994) (describing "ways in which communication campaign developers, implementers, and researchers can improve the likelihood of campaign success").

164. Scott Shane, *Ads Against Kid Smoking Have Had Little Effect*, HOUSTON CHRON., Nov. 30, 1998, at A12.

165. *Id.*

166. *See* Stuart Elliott, *Arnold Communications is Leading What may be the Biggest Campaign Against Smoking*, N.Y. TIMES, Sept. 16, 1999, at C8.

storm ideas.[167] Some of the initial versions of the counterspeech produced on behalf of the Foundation, however, faced an unexpected obstacle, one not even identified above in the laundry list of concerns: network television executives.

The preliminary versions of the television advertisements created by Arnold Communications of Boston that were inspected by network officials in January 2000 did not go over well.[168] In fact, the networks called for changes in the advertisements, a move that prompted the head of the Foundation to remark, "Some networks, apparently, are uncomfortable with effective anti-tobacco advertising."[169] Those networks probably fear economic repercussions for running negative advertisements from some of the giant conglomerates that produce not only cigarettes, but a myriad of other products that are currently advertised on television.

In addition to television advertisements, this counterspeech antismoking campaign also makes use of the radio, print, and Internet media.[170] Will all of this counterspeech be effective as an antidote to pro-smoking advertisements? It is hard to tell, although some states that have launched their own media blitzes have experienced some success.

Florida, for instance, experienced an eight percent drop in smoking among high school students after its edgy advertising campaign attacking the tobacco industry began on television in 1998.[171] This was one of the largest decreases ever observed in the United States.[172] In California, which launched an anti-smoking media campaign in early 1990s, teenage smoking initially declined, but has since risen.[173]

167. *See* Kevin Murphy, *States Pooling Resources*, KANSAS CITY STAR, Sept. 23, 1999, at A7.

168. *See Networks Unhappy With Early Versions of Antismoking Ads*, WALL ST. J., Jan. 25, 2000, at A4.

169. *Id.*

170. *See* Elliott, *supra* note 168, at C8.

171. *See A Year After Tobacco Deal, Anti-Smoking Ads Lag*, USA TODAY, Nov. 26, 1999, at 16A; *Student Smoking Declines Amid a State Campaign*, N.Y. TIMES, Apr. 2, 1999, at A14 (describing the early results of the Florida anti-tobacco campaign, and describing the "cornerstone" of the campaign as "television and radio advertisements in which angry teenagers accuse tobacco companies of lying").

172. *See id.*

173. *See* Marques G. Harper, *A Pack of Proposals Vie for Tobacco Money*, N.Y. TIMES, Mar. 7, 1999, § 14NJ, at 7.

In summary, the settlement between forty-six states and the tobacco industry calls attention to the use of counter speech as a legally sanctioned and enforceable remedy to counteract corporate-produced speech that allegedly contributes to harmful behavior. The anti-smoking campaign now underway allows future advocates of counterspeech a valuable opportunity to observe what works and what fails in counterspeech campaigns on a nationwide basis. As for now, however, the bottom line is perhaps best summed up by Dr. Gina Agostinelli, a researcher with the Prevention Research Center in Berkeley, California: "We know very little about the most basic question: Is tobacco counter-advertising effective?"[174]

VI. TAKING IT TO THE STREETS: COUNTERSPEECH AND THE ART OF PROTEST

Everyone, or so it seems these days, is a critic. This is especially true when it comes to expression called art, and even more so when the government is subsidizing or funding that art. Consider the following quotation: "It is dispirited, degrading, disgusting, sacrilegious, blasphemous, and an insult to the mother of God."[175] The source of that review was the sometime politician, sometime journalist, and apparently now part-time art aficionado, Patrick J. Buchanan.[176] New York City Mayor, Rudolph Giuliani, was even more to the point: "sick stuff."[177]

The object of this scorn was a controversial 1999 exhibit at the Brooklyn Museum of Art called "Sensation: Young British Artists from the Saatchi Collection."[178] One work, in particular, appeared to bear the brunt of the wrath of the conservative critique—Chris Ofili's "Holy Virgin Mary."[179] Michael Kimmelman, art critic for *The New York Times*, described the work this way:

174. Jeff Stryker, *Ideas and Trends: Fear, Itself: The Right Dose of Scare Tactics*, N.Y. TIMES, Oct. 31, 1999, § 4, at 5.

175. Kit R. Roane, *Buchanan Visits Art Exhibit in Brooklyn and Doesn't Like It*, N.Y. TIMES, Nov. 6, 1999, at B5.

176. *See id.*

177. Paul Lieberman, *Court Tells Giuliani to Back Off in Feud Over Art Show*, L.A. TIMES, Nov. 2, 1999, at A1.

178. *See id.*

179. As one protestor told *The New York Times* in reference to this work, "We hope with our prayers we may send this picture back to hell [from] whence it came." David Barstow, *'Sensation' Closes as It Opened, to Cheers and Criticism*, N.Y. TIMES, Jan. 10, 2000, at B3.

> The Virgin, simply drawn, is black, in a flowing blue-gray robe, a flowerlike form, flat against a flat gold backdrop. Small cutouts of vaginas and buttocks from pornographic magazines are stuck to the picture to suggest putti. Another ball of dung is meant to be one of the Virgin's breasts. Like all of Mr. Ofili's collages, the work is colorful and glowing. The first impression it makes, before you decipher the little cutouts, is that it's cheerful, even sweet.[180]

Kimmelman wryly added that had the artist "called his picture 'My Friend Mildred,' no one would be standing in line to see it. Visually speaking, there's not a lot to it."[181] But there certainly *was* "a lot to it" in terms of the reactions that the speech drew. Those responses encompass both the use of counterspeech as well as other, more severe measures that actually attempt to stifle and silence the offensive expression rather than rebut it.

The possible responses to offensive art are many. One is to silence the art, either *physically* or *financially*. The "Sensation" exhibit was witness to both of these responses. The physical response came from a rather unlikely source—a seventy-two-year-old man from Manhattan named Dennis Heiner who reportedly prayed daily to the Virgin Mary.[182] He allegedly breached Brooklyn Museum of Art ("Museum") security and smeared white paint over the artwork.[183] The devout Catholic allegedly faked a heart attack to draw a guard's attention away from the exhibit, and then scampered under a rope to the artwork with what a Museum spokesperson described as "an amazing burst of speed."[184]

This response—defacing the artwork—should sound familiar. It is tantamount to the response of the vandals in Missouri who first chopped down and then later stole the highway clean-up signs described earlier in the article that bore the Ku Klux Klan name.[185] The response is to physically remove objectionable speech from the marketplace of ideas through any means, even criminal tactics.

180. Michael Kimmelman, *Critic's Notebook: A Madonna's Many Meanings in the Art World*, N.Y. TIMES, Oct. 5, 1999, at E1.

181. *Id.*

182. *See* Roberto Santiago et al., *Virgin Mary Canvas Defaced in B'klyn*, DAILY NEWS (N.Y.), Dec. 17, 1999, at 7.

183. *See id.*

184. *Id.*

185. *See supra* notes 25-48 and accompanying text.

The other attempt—this one financial, not physical—to silence the speech in Brooklyn came from Manhattan and, more specifically, from the office of Mayor Giuliani. In particular, Mayor Giuliani attempted to jettison the government subsidy the Museum received for operating expenses and maintenance.[186] The theory appeared to be quite simple: cutting off the purse strings would cut off the speech. The Museum, however, filed a motion in federal court to enjoin the action, claiming that it amounted to a government-imposed penalty against the valid exercise of First Amendment rights.[187] Judge Nina Gershon granted the Museum's request for a preliminary injunction, barring the City of New York and its Mayor from "inflicting, or taking any steps to inflict, any punishment, retaliation, discrimination, or sanction of any kind" against the Museum as a result of the Sensation exhibit.[188]

Although this fiscal attempt to silence offensive speech does not involve physical desecration, its impact—had it been successful—is the same. Expression is removed from the marketplace of ideas. The speech market is sanitized, rendering only the least objectionable content.

Yet clearly both of these responses to silence allegedly offensive artwork are erroneous. The United States Supreme Court has offered a series of aphorisms suggesting the subjectivity of meaning of any piece of expression—artwork or otherwise—that militates in favor of its protection. For instance, the Court famously proclaimed in *Cohen v. California*[189] that it is "often true that one man's vulgarity is another's lyric."[190] As applied to artwork, one clearly may view the Holy Virgin Mary as vulgar, just as one may find it beautiful.

Over fifty years ago, the Court remarked in a dispute involving censorship by the Postmaster General that "[w]hat is good literature,

186. *See* Brooklyn Institute of Arts v. City of New York, 64 F. Supp. 2d 184, 186 (E.D.N.Y. 1999).

187. *See id.*

188. *Id.* at 205. The City of New York did not go down easily. Even after the controversial exhibit had left the Brooklyn Museum of Art, the City took its case to the Second Circuit of Appeals in an effort to terminate the Museum's lease. *See* Greg B. Smith, *Brooklyn Museum Must Go, City Tells Judges*, DAILY NEWS (N.Y.), Jan. 12, 2000, at 54. In late March 2000, Mayor Giuliani agreed to abandon his attack on the Museum and to restore the monthly payments the Museum previously received from the City. *See* Alan Feuer, *Giuliani Dropping His Bitter Battle with Art Museum*, N.Y. TIMES, Mar. 28, 2000, at A1.

189. 403 U.S. 15 (1971).

190. *Id.* at 25.

what has educational value, what is refined public information, *what is good art*, varies with individuals as it does from one generation to another."[191] The Court added that "[t]here doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."[192]

What is the proper response to art that we find offensive? Is it the response of Messrs. Heiner and Giuliani to silence the speech by one means or another? No. Another response that took place in Brooklyn actually *expanded* rather than *contracted* the marketplace of ideas. That was counterspeech.

On the first day of the "Sensation" exhibit, nearly one thousand, mostly Catholic, protesters showed up outside of the Museum, clutching rosary beads and holding signs denouncing the exhibit.[193] Some might argue that this counterspeech was counterproductive because it actually may have *increased* the number of visitors who saw the exhibit. But this conclusion runs contrary to the very purpose of counterspeech: to promote discussion, not to censor it. Controversial art does its job when it provokes thought and debate on established values and mores,[194] and the counterspeech of the protestors did the same in Brooklyn. It helped to draw attention to the exhibit and expose people to speech—contemporary artwork—they might ordinarily have avoided or ignored.

The controversy in Brooklyn ultimately proves that despite our "inclination to bracket art from the political culture,"[195] art is political speech. And because political speech is often said to lie at the core of free speech in a self-governing democracy,[196] art, in turn, must re-

191. Hannegan v. Esquire, Inc. 327 U.S. 146, 157 (1946) (emphasis added).

192. *Id.* at 157-58.

193. *See* Michael O. Allen, *Protestors, Crowds Turn Out for Exhibit Debut and Rosaries Rage, Raves*, DAILY NEWS (N.Y.), Oct. 3, 1999, News, at 5.

194. In rallying in support of the exhibit, Gary Schwartz, executive director of the National Campaign for Freedom of Expression observed, "The purpose of art is to challenge. Whether it offends some people shouldn't determine whether other people can see a painting." *Id.*

195. Marci A. Hamilton, *Art Speech*, 49 VANDERBILT L. REV. 73, 76 (1996).

196. *See* Texas v. Johnson, 491 U.S. 397, 411 (1989) (observing that speech expressing political dissatisfaction is "situated at the core of our First Amendment values"). In an earlier case, the Supreme Court observed that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that

ceive the most protection. The proper response to art that we object to is counterspeech, not its suppression through either physical or fiscal censorship.

The fact that legal efforts in New York failed to shut down the exhibit by cutting off funding is also important. Government censorship was not the solution; indeed, it was illegal. Judges such as Nina Gershon, who wisely ruled against Mayor Giuliani's efforts, would do even better by going a step further to advise—perhaps in dictum—parties who feel aggrieved by supposedly offensive speech to take up counterspeech as the proper means of response.

VII. Conclusion

Counterspeech takes many forms in many media today, from orchestrated public relations campaigns like that in the Food Lion example which included videocassette messages distributed to journalism professors and media gadflies, to the more primitive hand-painted protest signs outside the Brooklyn Museum of Art. The eclectic mix of cases culled for this article illustrates this point and (the authors certainly hope) something more. In particular, as we grapple with First Amendment issues that affect new communications technologies, we must not abandon the timeworn principle that sometimes the best response to the speech to which we object is neither a lawsuit nor its destruction. It is counterspeech.

The counterspeech principle is neither novel nor untested in First Amendment jurisprudence. An unpopular viewpoint quite naturally invites counterspeech, and the resultant discussion has the potential to contribute to the vitality of society.[197] As the District of Columbia Circuit Court of Appeals suggested in a flag-burning case from the early 1970s, "speech can also be provocative but it provokes a response in kind rather than those which tend to fill the marketplace of ideas with the sound of thudding fists."[198] In short, counterspeech fills a purgative role, allowing a dissatisfied message recipient to ventilate his or her thoughts rather than engage in destructive conduct.

Counterspeech also has been recognized as a way to balance the equities in public discourse. More than thirty years ago, the United

Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966).

197. *See* Joyce v. United States, 454 F.2d 971, 987 (D.C. Cir. 1971).

198. *Id*. at 987-88.

States Supreme Court upheld the Federal Communications Commission's ability to impose counterspeech obligations on broadcasters.[199] These obligations remain in force today through the personal attack[200] and political editorial rules.[201] If someone attacks the integrity of another over the air, broadcasters must offer the opportunity for an on-air response to counter the original remarks. Similarly, if a station endorses a political candidate—or opposes one—in an editorial, the offer of free reply time is required. Both of these regulations fully embrace counterspeech as the appropriate remedy.

Whether the goal is to restore the image of a beleaguered corporation, protest a vile painting, enhance the national debate, or simply ward off a common street fight, counterspeech provides the tools for leveling the field of expression. We undoubtedly still have a lot to learn about the effectiveness of counterspeech in remedying some evils, as evidenced by the anti-smoking campaign financed under the tobacco industry settlement.[202] Despite the problems with counterspeech, it should be the remedy of *first resort*, not an afterthought discarded in the ash can of First Amendment jurisprudence past. New media provide new opportunities for counterspeech, and new chances to explore its potential. We must not miss them.

199. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Court upheld the constitutionality of the fairness doctrine—a requirement that broadcasters actively seek out issues of public importance to their listeners and viewers and then program a balance of opposing viewpoints. The Federal Communications Commission abolished the fairness doctrine on August 4, 1987, citing the chilling effect it had on broadcasters' speech. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043, 5047 (1987). For a discussion of the controversial history of the fairness doctrine, see Robert D. Richards, *Resurrecting the Fairness Doctrine: The Quandary of Enforcement Continues*, 37 CLEV. ST. L. REV. 557 (1989).

200. *See* 47 C.F.R. § 73.1920 (2000) (setting forth the personal attack rule requiring broadcasters that air an attack upon the "honesty, character, integrity or like personal qualities" of a person or group to provide an opportunity for an on-air response).

201. *See* 47 C.F.R. § 73.1930 (2000) (setting forth the political editorial rule requiring broadcasters that endorse or oppose a candidate in an editorial to provide an opportunity to the other candidates for that office or the candidate opposed (or their spokespersons) to respond over the air).

202. *See supra* notes 138-76 and accompanying text.