

# Health Claims in Wine Labeling and Advertising: Is Government Regulation Taking the Veritas Out of the Vino?

## INTRODUCTION

American wineries have reported declining sales for several years, at a rate of approximately two percent per year due to a weak economy which reduced the demand for luxury items. Small family wineries are struggling. Many have filed for bankruptcy.<sup>1</sup> Consequently, the wine industry is desperate to find new ways to market its product.

On November 17, 1991, the CBS program "60 Minutes" aired a segment entitled "The French Paradox" which discussed the high fat, high cholesterol diet of the French population.<sup>2</sup> The program referred to medical studies which attribute protective benefits to red wine. The report pointed out the significantly lower incidence of heart disease among the French than among the American population, despite the apparently healthier eating habits of the Americans. The wine industry, in an effort to improve its own health, is eager to publicize the findings in newsletters, advertising, and other promotional materials.

The Bureau of Alcohol, Tobacco, and Firearms (BATF) is the regulatory agency charged with prohibiting false, misleading, and deceptive statements in alcohol advertising and labeling.<sup>3</sup> This agency, under

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<sup>1</sup> Twenty of California's 600 wineries filed for bankruptcy between September 1991 and February 1993. Fifteen percent of the remainder are for sale. *W. John Moore, Family Feuds*, NAT'L J., Feb. 27, 1993, at 500. See also Elizabeth Hansen, *Selling Wine Across the Water*, THE RECORDER, Mar. 25, 1993, at 8; *Wine Industry Entering Financial Turnaround*, WINE BUS. INSIDER, Jun. 10, 1993; *Bankers Slowly Moving Back Into Winery Lending?*, WINE BUS. INSIDER, Apr. 16, 1993; Kathleen Sullivan, *It's a Buyer's Market for California Wineries*, CHI. TRIB., Mar. 8, 1993, at Bus. 8; Frank J. Prial, *Wine Talk; Mondavi on Wall St., Wine in the Limelight*, N.Y. TIMES, May 19, 1993, at C1; Sally Lehrman, *Bureau Puts Cork in Wineries*, THE FRESNO BEE, Aug. 16, 1992, at E1.

<sup>2</sup> The segment was repeated on July 12, 1992.

<sup>3</sup> 27 U.S.C.S. § 201 (Law Co-op. 1992). Sections 205(e)-(f) authorize BATF to issue regulations for labeling and advertising which will prohibit consumer deception by statements related to "scientific or irrelevant matters" that the Secretary of the

pressure from the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and the Surgeon General's Office, refuses to allow reference to documented and corroborated health studies, fearing any statements relating wine and health are inherently misleading and deceptive.<sup>4</sup>

This Comment, examining the First Amendment doctrines of commercial speech, vagueness, and overbreadth as they apply to government restrictions on wine advertising, takes the position that promulgation of substantiated health claims merits commercial speech protection. Part I describes how the government regulates alcoholic beverage labeling and advertising through the Federal Alcohol Administration Act (FAA Act) and the Alcoholic Beverage Labeling Act (ABLA) to prevent dissemination of misleading or confusing information to consumers.<sup>5</sup> Part II traces the development of the commercial speech doctrine from its inception in 1976 through the Supreme Court's recent 1993 decisions, and defines the standard by which commercial speech protection is evaluated. Part III describes the medical phenomenon of the French Paradox, the catalyst giving rise to the issue of whether alcohol-related health claims deserve First Amendment protection based on the current legal standard.

Part IV engages in a commercial speech analysis of health-related wine advertising, paying special attention to the question of what constitutes false, misleading, and deceptive advertising. It recounts efforts by members of the wine industry to promulgate the findings correlating wine and health. The anecdotal data are presented as evidence of the conflict between commercial speech and consumer protection. This Part also illustrates the substantial government interest in regulating health claims, and describes the interagency review of promotional material. Finally, it reviews the economic importance to the wine industry of

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Treasury finds likely to be misleading. Regulations implementing provisions of § 105(e) pertinent to labeling and advertising wine are set forth in 27 C.F.R. §§ 4.39(a)(1) and 4.39(h) (1992).

Section 4.39(a)(1) prohibits "[a]ny statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression."

Section 4.39(h) prohibits wine labels from containing a curative or therapeutic statement if it is "untrue in any particular or tends to create a misleading impression."

<sup>4</sup> *ATF Set to Bar Bev/Al Firms, Associations From Promoting Health Benefits of Alcohol*, KANE'S BEVERAGE WEEK, May 17, 1993, at 1.

<sup>5</sup> *ATF Issues Industry Circular on Health Claims in Labeling and Advertising of Alcoholic Beverages*, ATF NEWS, Aug. 10, 1993.

advertising health benefits and provides insight into the importance of balancing the government's interest in controlling alcoholism against the ailing wine industry's efforts to survive. Part V queries whether the constitutional doctrines of vagueness and overbreadth may be invoked to attack the FAA Act. While these theories are not usually applied in a commercial speech context, the Comment suggests the Court may be willing to reflect on these axioms where the advertised matter consists primarily of non-commercial speech.

The Comment concludes that a government policy prohibiting all health claims violates the First Amendment. The free flow of consumer information is a necessary component of educating the public to make intelligent choices. That the speaker is economically motivated should not invalidate the importance of the speech.

#### I. HEALTH CLAIMS FOR ALCOHOLIC BEVERAGES ARE SEVERELY LIMITED BY GOVERNMENT REGULATION

The BATF began approving wine labels in 1935, when the FAA Act was enacted as a regulatory response to the end of Prohibition.<sup>6</sup> The Act bars false or misleading labels and advertising for alcoholic beverages<sup>7</sup> and authorizes a BATF regulation<sup>8</sup> which specifically prohibits claims that wine has curative or therapeutic effects. The FAA Act prohibits labels and advertisements from making claims about therapeutic powers of wine if the Secretary of the Treasury determines they are false or misleading.<sup>9</sup> The BATF's policy is to interpret the Act to mean all health claims are misleading because they fail to present every possible negative consequence of alcohol consumption and they create the effect of encouraging consumption of alcoholic beverages.<sup>10</sup> The BATF's position on health statements precludes even demonstrably true statements made by trade associations. BATF considers the statements to be "indirect advertisements" by industry members and therefore misleading.<sup>11</sup>

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<sup>6</sup> Federal Alcohol Administration Act, Act of Aug. 29, 1935, 49 Stat. 977 (1935), codified as 27 U.S.C.S. §§ 201-219 (Law Co-op. 1992).

<sup>7</sup> 27 U.S.C.S. §§ 205(e)-(f) (Law Co-op. 1992).

<sup>8</sup> 27 C.F.R. § 4.64(i).

<sup>9</sup> See *supra* note 3 and accompanying text.

<sup>10</sup> John E. Morris, *This Agency Keeps A Tight Cork on Wine Labels; But Industry Complains: We Can't Tell the Truth About Our Products*, LEGAL TIMES, June 1, 1992, at 4.

<sup>11</sup> The Bureau of Alcohol, Tobacco and Firearms (ATF) and its predecessor agencies have consistently taken a very strict view of the regulatory prohibition on curative and therapeutic claims about alcoholic beverages. 27

The BATF's enforcement duties include the ABLA, which was enacted by Congress in 1988 as an extension to the FAA Act, at the request of the Surgeon General.<sup>12</sup> The ABLA's "government warning" must be affixed to every wine label to admonish consumers about (1) risk of birth defects if the wine is imbibed by a pregnant woman, (2) possible impairment of one's ability to drive a car or operate machinery, and (3) risk of potential health problems.<sup>13</sup> A recently introduced Senate bill would require rotating health warnings to be included in all alcoholic beverage advertisements in both print and broadcast media.<sup>14</sup>

## II. EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

The United States Supreme Court has defined commercial speech as "speech which does 'no more than propose a commercial transaction.'"<sup>15</sup> Prior to 1976, the Supreme Court paid commercial speech little heed.<sup>16</sup> However, in recent years, the Court has recognized that commercial expression is deserving of some level of constitutional protection.<sup>17</sup> Simply because money is spent to promulgate speech does not

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C.F.R. § 4.64(i). This prohibition relating to wines (and similar prohibitions relating to distilled spirits and malt beverages) dates back to the original advertising regulations issued under the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. § 205(f). Additionally, we have consistently held that therapeutic claims made in advertisements sponsored by trade associations are within this regulatory prohibition because they are indirect advertisements by the industry members making up the trade association. While this regulatory prohibition only applies to untrue or misleading statements, in practice, we hold that all therapeutic claims despite their truthfulness to be inherently misleading and particularly deceptive in view of the possible social effect of encouraging the consumption of alcoholic beverages by those who for psychological or physical reasons are adversely affected thereby. This strict interpretation is founded on the fact that wine, as well as distilled spirits and malt beverages, is, in reality, an alcoholic beverage and not a medicine of any sort.

Letter from Daniel Black, Associate Director, Bureau of Alcohol, Tobacco and Firearms, to John Volpe, Executive Director The National Wine Coalition, (January 14, 1992) (on file with San Joaquin College of Law, Law Review office).

<sup>12</sup> 27 U.S.C.S. §§ 213-219a (Law Co-op. 1992).

<sup>13</sup> 27 U.S.C.S. § 215(a) (Law Co-op. 1992).

<sup>14</sup> S. 674, 103rd Cong., 1st Sess. (1993).

<sup>15</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburg Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

<sup>16</sup> See *e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (prohibiting the distribution of commercial advertising on public thoroughfares is not unconstitutional).

<sup>17</sup> See *Virginia Pharmacy*, 425 U.S. at 762-65 (merely because an advertiser's inter-

deprive it of First Amendment protection. Although economic motivation does not disqualify speaker, message, or audience from constitutional safekeeping, a lesser degree of protection is applied to commercial speech.<sup>18</sup> The Court recognizes that profitability of advertising makes commercial speech more durable and less likely to be "chilled by proper regulation."<sup>19</sup>

The Court's course has occasionally zigged and zagged down the road of commercial speech, yet recent decisions show that despite continuing deference to state legislatures, the Court remains committed to protecting the free flow of truthful information in commercial contexts absent truly compelling government interests to the contrary.<sup>20</sup>

#### A. Genesis - *Virginia Pharmacy* and *Central Hudson*

In *Virginia Pharmacy*,<sup>21</sup> the Court recognized that depriving commercial speech of First Amendment protection could result in the government keeping its citizens in ignorance of useful information.<sup>22</sup> The Court decried government suppression as highly paternalistic because it assumed people were incapable of perceiving their own best interests upon being well-informed.<sup>23</sup> The Court, propounding a view of self-determination in a free society, maintained that public ignorance as a result of suppression of information presented a real danger. It then suggested the danger could be avoided if the channels of communication were opened rather than closed.<sup>24</sup>

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est is economic does not disqualify her from First Amendment protection). *See also*, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (commercial speech protection turns on the nature of the expression and the governmental interest served by its regulation).

<sup>18</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech occupies a "subordinate position in the scale of First Amendment values" because it is more easily verifiable).

<sup>19</sup> *Virginia Pharmacy*, 425 U.S. at 772.

<sup>20</sup> *See, e.g.*, *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). *But see* *United States v. Edge*, 113 S. Ct. 2696 (1993), where the Court declined to permit a radio station licensed in a state where lotteries are illegal to advertise a neighboring state's legal lottery. Even though ninety percent of the radio audience resided in the state of the legal lottery, the Court, acting as peacemaker, deferred to the laws of the licensing state and upheld the ban.

<sup>21</sup> *Virginia Pharmacy*, 425 U.S. 748.

<sup>22</sup> *Id.* at 769.

<sup>23</sup> *Id.* at 770.

<sup>24</sup> *Id.* at 769-77. The Court balanced consumer interest in freely available, prescription drug price data against the state's interest in maintaining professional standards for pharmacists and struck down a ban on price advertisement. In doing so, the Court

The Court did not advocate unlimited protection for commercial speech. It conceded that time, place, and manner restrictions might be permissible, as well as restrictions on false, deceptive, or misleading advertisements.<sup>25</sup> For information which is truthful about lawful activity, however, the Court concluded the government may not suppress its dissemination merely out of fear of the effect on the public.<sup>26</sup>

*Central Hudson Gas and Electric Corp. v. Public Service Comm. of New York*<sup>27</sup> refined the doctrine by introducing a four-part test to govern decisions regarding commercial speech protection. For commercial speech to be protected, (1) the advertisement must concern lawful activity and not be misleading; (2) the government interest must be substantial; (3) the regulation must directly advance the government's asserted interest; and (4) the regulation must not be more extensive than necessary to serve the government's interest.<sup>28</sup> The Court repeated the limits it placed on protected speech in *Virginia Pharmacy* by holding that although the government may ban communication which is more likely to deceive than inform the public, there must be proportionality between the exigency giving rise to the governmental regulation and the degree of restrictiveness of the regulation itself.

### B. Beyond *Central Hudson*: The Decline of Self-Determination

An early sign of the Court's shift from protecting the audience's interest in receiving information came three years after *Central Hudson*

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noted:

[A]n alternative to this highly paternalistic approach . . . is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

*Id.* at 770.

<sup>25</sup> "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 771-772.

<sup>26</sup> *Id.* at 773.

<sup>27</sup> *Central Hudson Gas and Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557 (1980). A government regulation banning an electric utility from advertising to promote the use of electricity reduced consumer information, violating the First Amendment. The state agency had been concerned that advertising would send "misleading signals" by encouraging the public to use rather than conserve energy. The Court held that governmental interest in conserving energy did not outweigh the value to the public of the information contained in the advertisement.

<sup>28</sup> *Id.* at 566.

was decided. In *Bolger v. Youngs Drug Products Corp.*,<sup>29</sup> the Court conceded that a pharmaceutical company's informational pamphlets were more than "merely proposals to engage in commercial transactions."<sup>30</sup> Nevertheless, the Court restated its *Central Hudson* position that advertising a product linked to a current public debate does not afford the advertisement full constitutional freedom. Although it upheld the tenet of lesser protection for commercial speech, the *Bolger* Court struck down the federal prohibition against mailing an unsolicited advertisement about contraceptives on the ground it denied public access to truthful information about birth control, limiting parents' ability to make informed decisions.<sup>31</sup> The Court declared that the offensiveness of protected speech does not justify its suppression.<sup>32</sup> Where discussion informs the public of a significant issue, the First Amendment must protect the right to speak out on the issue without the limitations placed on commercial speech.

Ten years after the Burger Court adopted its antipaternalistic stance in *Virginia Pharmacy*, the Rehnquist Court veered sharply when it upheld a ban on advertising legal casino gambling in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>33</sup> This case left little doubt the Court was moving away from the notion of protecting audience interest in favor of deferring to a legislative interest.

The statute challenged in *Posadas* permitted casino gambling as a means of attracting tourism but prohibited casino advertisements inside Puerto Rico which were directed at residents. The rationale propounded by Justice Rehnquist was that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."<sup>34</sup> The Court, in applying the *Central Hudson* test, perceived potentially harmful effects of gambling on the health, safety, and welfare of Puerto Rican citizens, and concluded that

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<sup>29</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (informational pamphlets which not only promoted the manufacturer's contraceptives but also discussed venereal disease and family planning, subjects of important public interest and debate, were not entitled to full constitutional protection of noncommercial speech).

<sup>30</sup> *Id.* at 66.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 64. In his concurrence, Justice Stevens noted advertisements may be complex mixtures of commercial and noncommercial elements. He called for a focus more on the nature of the regulation than on the label of the communication. *Id.* at 72.

<sup>33</sup> *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

<sup>34</sup> *Id.* at 345-46.

curbing the harm was a "substantial" government interest.<sup>35</sup> The Court emphatically stated that the regulation "directly advances" the government's interest, and deferred to the legislature's view that advertising would increase the demand for the product.<sup>36</sup>

As to the fourth prong, the "least restrictive means" test, the Court postulated that the restriction was narrow enough to have no effect on tourists but would apply only to residents. The Court again deferred to the legislature on the issue of a "counterspeech" policy, which would have educated the public about the risks of casino gambling but would not have suppressed commercial speech.<sup>37</sup> A counterspeech approach would have been consistent with *Virginia Pharmacy's* disavowal of manipulating product demand through ignorance. It was rejected by the Court on the premise that Puerto Rican citizens were already aware of the risks but would nevertheless be induced by advertisements to participate in potentially harmful conduct.<sup>38</sup>

*Posadas* was a turning point in the commercial speech doctrine insofar as it allowed the government to suppress truthful commercial speech about a lawful activity. The decision permits regulating advertisements of legal "vices"<sup>39</sup> and has potential to impact the alcoholic beverage industry. If Justice Rehnquist's "greater includes the lesser power" argument were to be generally applied, it could mean the end of First Amendment protection for some commercial speech because, where the government has plenary power to ban a commercial activity, it possesses the lesser power to ban advertising of that activity.<sup>40</sup> *Posadas* illustrates that the Supreme Court will treat paternalistic laws which have been promulgated by state legislatures with great deference.<sup>41</sup> The consequence is approval of government paternalism previously excoriated in *Virginia Pharmacy* and *Central Hudson*.

The *Posadas* decision may be a harbinger of permissible advertising

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<sup>35</sup> *Id.* at 341.

<sup>36</sup> *Id.* at 341-42.

<sup>37</sup> *Id.* at 343-44.

<sup>38</sup> *Id.* at 344.

<sup>39</sup> *Posadas* identifies products and activities, such as cigarettes, alcoholic beverages, and prostitution, as harmful and therefore subject to legislative regulation. *Id.* at 346.

<sup>40</sup> Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1440-41 (1990).

<sup>41</sup> The Court noted that although Puerto Rico's status is that of a commonwealth rather than a state, it is entitled to the same respect and must be deemed sovereign over its own matters.

restrictions for the wine industry.<sup>42</sup> The Court recognized legislative authority to curtail stimulation of demand for harmful products and activity, specifically identifying alcoholic beverages as such a product.<sup>43</sup> However, the wine-health advertisement dispute is distinguishable from the gambling advertisement at issue in *Posadas*. The health claims contain information of conceivable societal benefit, even where abuse of wine may result in harm, thereby requiring the Court to balance the potential benefits against the possible harm. In *Posadas*, there was no suggestion that advertising gambling would benefit the citizens of Puerto Rico in any way other than to increase revenues. While then-Justice Rehnquist emphasized that it is acceptable for the government to prohibit the advertising of a product because it is less intrusive than banning the product itself, it must be noted that Congress has not yet chosen to prohibit wine advertising as a means to curb excessive drinking.

In 1989, the Court took a new look at *Central Hudson* in *Board of Trustees of the State University of New York v. Fox*<sup>44</sup> and reaffirmed its stance in *Bolger* that purely informational speech and commercial speech are not "inextricably intertwined" to the extent necessary to classify the entire speech as noncommercial.<sup>45</sup>

*Fox* also modified the fourth prong of the *Central Hudson* test. Justice Scalia, writing for the Court, examined whether governmental restrictions on commercial speech are invalid if they go beyond the least restrictive means necessary to satisfy the government's substantial inter-

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<sup>42</sup> On first blush, the Court's recent decision in *U.S. v. Edge*, 113 S. Ct. 2696 (1993), prohibiting broadcasting of advertisements for a neighboring state's legal lottery in a state where lotteries are unlawful, appears to mirror the *Posadas* decision. Closer analysis reveals that the government interest furthered by the regulation was not to put a damper on lottery participation but to balance the competing interests of lottery and non-lottery states. In other words, the Court perceived Congress' role as peacemaker in a conflict between neighboring states. Nevertheless, the advertising industry remains unconvinced that *Edge* is limited in its application and is concerned that alcohol advertising may become more restricted. See Stephen W. Colford, *Justices' Questions Seem to Favor FCC Gambling Ad Limit*, ADVERTISING AGE, Apr. 26, 1993, at 12, available in LEXIS, Nexis Library, ADAGE File.

<sup>43</sup> *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 346 (1986).

<sup>44</sup> *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). The university prohibited commercial enterprises from operating houseware parties hosted by students in dormitories. The Court upheld the regulation, saying the parties constituted commercial speech despite the fact that educational topics were also covered, such as financial responsibility and running an efficient home.

<sup>45</sup> *Id.* at 474.

est.<sup>46</sup> Justice Scalia disagreed with the *Central Hudson* interpretation of the word "necessary" as meaning the least possible amount of restriction on commercial speech that would further the government's substantial interest.<sup>47</sup> He cloaked the word in a looser, more flexible formulation and concluded that a "least restrictive means" standard is no longer required because it imposes too heavy a burden on the government.<sup>48</sup> Under the *Fox* formulation of the *Central Hudson* test, suppression of commercial speech is permissible even where the government has an alternative, so long as the restriction provides a reasonable fit and is narrowly tailored to achieve the government's objective.<sup>49</sup> Although Justice Scalia and the majority required a lower showing than the least restrictive means, they emphasized the requirement was greater than a showing of rational basis. The government's objective must be substantial and the cost to the speaker carefully calculated. The burden is on the government to justify its restrictions and affirmatively establish the reasonable fit.<sup>50</sup>

*Fox* is significant to the wine industry because the BATF has not calculated the cost to the speaker or to society. The BATF must demonstrate the health claim ban will affirmatively affect the problem of alcoholism. The BATF has a difficult task in proving the ban will benefit the health and safety of the nation's citizens to the extent necessary to overcome the costs to an industry trying to maintain solvency and to non-addicted drinkers who are deprived of potentially life-affecting information.

### C. *The Road Not Taken*

The *Fox* Court's adherence to *Central Hudson*'s basic, albeit modified, tenet is evidence that *Posadas* may be limited to state enactments regulating legal vices. The *Posadas* decision did not result in the demise of First Amendment protection for commercial speech. Two recent cases indicate support for the doctrine.

In *City of Cincinnati v. Discovery Network, Inc.*,<sup>51</sup> the city revoked permits of companies that placed newsracks on public property to distribute free magazines composed primarily of advertisements for the companies' services. Yet, the city permitted newspapers to be distrib-

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<sup>46</sup> *Id.* at 471.

<sup>47</sup> *Id.* at 476-77.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 478-81.

<sup>50</sup> *Id.* at 480.

<sup>51</sup> *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

uted by newsracks. The Court held the selective ban to be inconsistent with the First Amendment.

In applying the *Central Hudson/Fox* test, the Court did not find anything unlawful or misleading about the contents of the publications. It found the city's interest in safety and aesthetics substantial but did not agree that the city established a reasonable fit between the ban and the interest. The ordinance's purpose was to prevent visual blight from littering, rather than harm caused by newspaper dispensing machines. The city had not calculated the costs and benefits of removing 62 newsracks of commercial handbills while leaving 1,500 racks of newspapers in place. The Court paid particular attention to the availability of less onerous alternatives to suppression of commercial speech.<sup>52</sup> It admonished the city for placing unwarranted importance on the distinction between commercial and noncommercial speech, holding that the city "seriously underestimates the value of commercial speech."<sup>53</sup>

The *City of Cincinnati* decision is important because, although the Court accepted the city's assertion of a close fit between the ban on newsracks for commercial handbills and the city's interest in safety and aesthetics, it was not enough to overcome the serious consequences of proscribing commercial speech. Despite *Fox's* loosening of the fourth prong, the Court may nevertheless be inching back to the *Central Hudson* standard of "not more extensive than is necessary."<sup>54</sup> The decision paid respect to the doctrine of commercial speech in a manner reminiscent of *Virginia Pharmacy*, perhaps indicating the Court will be inclined to permit substantiated health claims in wine advertising. The decision suggests BATF may be required to prove there is no less-extensive measure to combat alcoholism than a categorical ban on wine advertising.

One month after the Court decided *City of Cincinnati*, it issued its decision in *Edenfield v. Fane*.<sup>55</sup> Although factually dissimilar to health claim promulgation for a potentially dangerous product, the case reaffirms the importance of commercial speech as a vehicle to provide the public with broad access to complete and accurate information.<sup>56</sup> The

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<sup>52</sup> *Id.* at 1510 n.13.

<sup>53</sup> *Id.* at 1511.

<sup>54</sup> *Central Hudson Gas and Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557, 566 (1980).

<sup>55</sup> *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (state statute prohibiting CPAs from soliciting new clients was deemed inconsistent with the First Amendment guarantee of free speech).

<sup>56</sup> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the

Court examined whether the regulation directly advanced the state's interest and posited that the government's burden cannot be satisfied by speculation or conjecture. The government must demonstrate the harm is real and the restriction will materially alleviate the harm.<sup>57</sup> If *Edenfield* is not limited to its facts, it may be construed as another step back to the *Virginia Pharmacy* standard. The result may well be the Court's recognition of the importance of individuals having access to consumer information to make up their own minds about matters of personal health.

### III. THE FRENCH PARADOX: TRIUMPH OVER CORONARY ARTERY DISEASE?

The French, as a nation, smoke heavily and their cuisine is rich in fat.<sup>58</sup> Notwithstanding, French citizens outlive their American counterparts, on average, by two and one-half years (age 76.5 versus age 74)<sup>59</sup> and the French population suffers forty percent fewer heart attacks than the American population. This variance is attributed to dietary and lifestyle factors known as the Mediterranean diet.<sup>60</sup> The French are regular consumers of moderate amounts of red wine with meals. They take longer to eat meals and refrain from between-meal snacks. They consume less red meat, whole milk, lard, and butter but eat more fresh fruits and vegetables, cheese, olive oil, and foie gras or other rich foods associated with a gourmet diet. The French Paradox suggests the negative effects of saturated fat are counteracted by the intake of red wine.<sup>61</sup>

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ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

*Id.* at 1798.

<sup>57</sup> *Id.* at 1800, 1803.

<sup>58</sup> LEWIS PERDUE, *THE FRENCH PARADOX AND BEYOND* 3 (1992). In 1989, the death rate in the United States from cardiovascular disease was 464 per 100,000, while in France the rate was only 310 per 100,000.

<sup>59</sup> *Id.*

<sup>60</sup> Serge Renaud & M. De Lorgeril, *Wine, Alcohol, Platelets, and the French Paradox for Coronary Heart Disease*, 339 *LANCET* 1523 (1992).

<sup>61</sup> *Id.* The authors refer to the MONICA project of the World Health Organization which confirms that the mortality rate from coronary heart disease is lower in France than in other western industrialized countries. Despite serum cholesterol concentrations similar to those in the United States or United Kingdom, the French mortality rate resembles rates in Japan and China, nations whose diets are traditionally low in fat.

Studies confirm that moderate intake of alcohol prevents coronary heart disease by up to fifty percent.<sup>62</sup> Moderate consumption is generally defined in medical studies as two to three four-ounce glasses of wine, approximately thirty to forty grams of alcohol per day.<sup>63</sup> Guidelines developed jointly by the United States Departments of Agriculture and Health and Human Services define moderate drinking as no more than one drink per day for women and the elderly, and two drinks per day for men. They specify that one drink contains five ounces of wine or twelve grams of alcohol.<sup>64</sup> These guidelines exclude women who are pregnant or trying to conceive, people planning to drive or engage in activities requiring special attention or skill, people taking medications, recovering alcoholics, and minors.

The protective effect of moderate wine consumption is known as the phenomenon of the "U-shaped curve" due to findings that abstainers and heavy drinkers have higher cardiovascular mortality rates than light or moderate drinkers.<sup>65</sup> When the level of alcohol increases, so does the risk of liver disease and certain cancers.<sup>66</sup> Abuse of wine counteracts the effect of quercetin, a compound found in wine which has a demonstrated anti-cancer effect.<sup>67</sup> Proper dosages appear to increase high-density lipoproteins (good cholesterol) and decrease low-density lipoproteins (bad cholesterol), creating a protective effect against heart disease.<sup>68</sup> The alcohol also decreases blood clotting in arteries and increases fibrinolysis, a process which dissolves clots that have already

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<sup>62</sup> See *infra* note 71.

<sup>63</sup> See generally, E.G. Marmot et al., *Alcohol and Mortality: A U-Shaped Curve*, 1 LANCET 580 (1981) (moderate alcohol intake is less than 35 grams per day); Charles H. Hennekens et al., *Effects of Beer, Wine, and Liquor in Coronary Deaths*, 242 JAMA 1973 (1979) (no more than two ounces of alcohol per day, beverage equivalent is twelve ounces of wine); Serge Renaud & M. De Lorgeril, *Wine, Alcohol, Platelets, and the French Paradox for Coronary Heart Disease*, 339 LANCET 1523 (1992) (moderate consumption is 30-50 grams per day). The last report found that in Toulouse, France, there is a 57% reduction of CHD and average consumption of alcohol is 38 grams per day of which 34 grams is in the form of wine.

<sup>64</sup> *Moderate Drinking*, ALCOHOL ALERT (Nat'l. Inst. on Alcohol Abuse and Alcoholism, D.C.), Apr. 1992, at 1.

<sup>65</sup> A.G. Shaper, *Alcohol and Mortality in British Men: Explaining the U-Shaped Curve*, 12 LANCET 1267 (1988).

<sup>66</sup> See generally, William C. Blackwelder et al., *Alcohol and Mortality: The Honolulu Heart Study*, 68 AMER. J. MED. Arthur L. Klatsky et al., *Alcohol and Mortality: A Ten-Year Kaiser Permanente Experience*, 95 ANNALS INTERN. MED. 139 (1981).

<sup>67</sup> Elisabeth Holmgren, *Health Issues*, WINES & VINES, June 1992, at 51.

<sup>68</sup> E.N. Frankel et al., *Inhibition of Oxidation of Human Low-Density Lipoprotein by Phenolic Substances in Red Wine*, 341 LANCET 454, 454-56 (1993).

formed.<sup>69</sup> Scientists believe the positive effect is caused by phenolic compounds in wine reputed to have cholesterol-lowering properties.<sup>70</sup>

The cardiovascular benefits of light to moderate drinking have been documented in numerous studies conducted on men and women of varying ethnicities which evidence that moderate drinking decreases the risk of death from coronary artery disease.<sup>71</sup> Although the findings have some critics,<sup>72</sup> they are generally accepted as true provided the risks of adverse consequences such as stroke, motor vehicle crashes, toxic interaction with medication, cancer, and birth defects are not overlooked.<sup>73</sup>

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<sup>69</sup> R.D. Moore & T. Pearson, *Moderate Alcohol Consumption and Coronary Artery Disease: A Review*, 65 MED. 242, 242-67 (1986); A.G. Shaper, *Alcohol and Mortality in British Men: Explaining the U- Shaped Curve*, 12 LANCET 1267, 1267 (1988).

<sup>70</sup> Frankel et al., *supra* note 68.

<sup>71</sup> See, e.g., William C. Blackwelder et al., *Alcohol and Mortality: The Honolulu Heart Study*, 68 AMER. J. MED. 164 (1980); E.N. Frankel et al., *Inhibition of Oxidation of Human Low-Density Lipoprotein by Phenolic Substances in Red Wine*, 341 LANCET 454 (1993); L.A. Friedman & A.W. Kimball, *Coronary Heart Disease Mortality and Alcohol Consumption in Framingham*, 124 AMER. J. EPIDEMIOLOGY 481 (1986); Rekha Garg et al., *Alcohol Consumption and Risk of Ischemic Heart Disease in Women*, 153 ARCH. INTERN. MED. 1211 (1993); Charles H. Hennekens et al., *Effects of Beer, Wine, and Liquor in Coronary Deaths*, 242 JAMA 1973 (1979); Arthur L. Klatsky, *Alcohol and Mortality: A Ten-Year Kaiser Permanente Experience*, 95 ANNALS INTERN. MED. 139 (1981); R.D. Moore & T. Pearson, *Moderate Alcohol Consumption and Coronary Heart Disease: A Review*, 65 MED. 242 (1986); S. Renaud & M. de Lorgeril, *Wine, Alcohol, Platelets, and the French Paradox for Coronary Heart Disease*, 339 LANCET 1523 (1992); Eric B. Rimm et al., *Prospective Study of Alcohol Consumption and Risk of Coronary Disease in Men*, 338 LANCET 464 (1991); A.S. St. Leger et al., *Factors Associated with Cardiac Mortality in Developed Countries with Particular Reference to the Consumption of Wine*, 1 LANCET 1017 (1979).

<sup>72</sup> M. Marmot & E. Brunner, *Alcohol and Cardiovascular Disease: The Status of the U-Shaped Curve*, 303 BRIT. MEDICAL J. 565 (1991); A.G. Shaper, *Alcohol and Mortality: A Review of Prospective Studies*, 85 BRIT. J. ADDICT. 837 (1990); A.G. Shaper et al., *Alcohol and Mortality in British Men: Explaining the U-Shaped Curve*, 12 LANCET 1267 (1988). These researchers suggest that moderate drinking is not protective against coronary artery disease. They argue the higher mortality found among abstainers is due to people who have stopped drinking because of ill health. They hypothesize that the comparative longevity of moderate drinkers is explained by the health problems of "sick quitters." This conclusion is refuted by studies which investigate the "sick quitter" effect. *Moderate Drinking*, ALCOHOL ALERT (Nat'l Inst. on Alcohol Abuse and Alcoholism, D.C.), Apr. 1992, at 2.

<sup>73</sup> *Moderate Drinking*, ALCOHOL ALERT (Nat'l Inst. on Alcohol Abuse and Alcoholism, D.C.), Apr. 1992, at 2. See also Doug Fischer, *Uncorking a Dilemma; Despite Contradictory Reports, Alcohol Researchers Now Say One Drink a Day Can be Healthy - For Some People*, OTTAWA CITIZEN, May 22, 1993, at B3. Fifty alcohol

IV. INDUSTRY ADVERTISEMENT OF THE FRENCH PARADOX: A  
*Central Hudson* Analysis

A. *Defining the Standard for False, Misleading, and Deceptive Advertising*

A *Central Hudson* analysis primarily focuses on the first prong: the advertisement must concern lawful activity and not be misleading. The lawfulness of drinking alcoholic beverages is not in dispute. More difficult to ascertain is the weighty question of whether a health claim constitutes a misleading advertisement.

1. FTC Sets the Advertising Standard

The Supreme Court has clearly indicated that false, misleading, or deceptive commercial speech is not entitled to constitutional protection, whereas commercial speech that neither deceives consumers nor propounds unlawful conduct is worthy of First Amendment shelter.<sup>74</sup> It is essential, then, to establish the standard of deceptive or misleading advertising before engaging in a determination of the government's boundaries in limiting commercial speech.

The FTC defines a false advertisement as one which is misleading in a material respect. In determining whether an advertisement is misleading, the FTC takes into account the "representations made or suggested" and "the extent to which the advertisement fails to reveal facts material in light of such misrepresentations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement . . . ."<sup>75</sup> A misrepresentation is an express or implied statement which is contrary to fact.<sup>76</sup> A misleading omission occurs when qualifying information necessary to prevent a practice, claim, represen-

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researchers from Europe, North America, New Zealand, and Australia met in Canada and cautiously reached consensus. A recommendation that alcohol control policies and public education target only heavy drinkers, rather than condemn all drinking, is expected due to recognition of the growing body of evidence that one to two drinks a day is good for some people's health under certain conditions.

<sup>74</sup> See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976); *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>75</sup> 15 U.S.C.S. § 55 (Law Co-op. 1992).

<sup>76</sup> Letter from James C. Miller, III, Chairman, Federal Trade Commission, to John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives 2 (Oct. 14, 1983) (FTC enforcement policy statement against deceptive acts or practices) (on file with San Joaquin College of Law, Law Review Office).

tation, or reasonable expectation or belief from being misleading is not disclosed. To determine whether an omission is deceptive, the FTC examines the overall impression which is created.<sup>77</sup>

Three elements underlie deception cases. First, there must be a representation, omission or practice that is likely to mislead the consumer.<sup>78</sup> The FTC will consider an omission to be deceptive where the representation creates a reasonable expectation or belief among consumers which is misleading. It is not a requirement that the misrepresentation, act, or practice actually cause deception. The issue is, rather, that it be likely to mislead.<sup>79</sup> It is the resulting impression which is conveyed to the public that is the important consideration.<sup>80</sup>

Second, the FTC examines the representation, omission, or practice from the viewpoint of a reasonable consumer under the circumstances.<sup>81</sup> A consumer's interpretation may be reasonable even when not shared by a majority of consumers in the targeted class or by sophisticated consumers. When a significant minority of reasonable consumers is misled, deception exists.<sup>82</sup>

Third, the representation, omission, or practice must be material. The determinant of materiality is whether the deception is likely to affect the consumer's decision to purchase the product. Material information is that which is important to consumers and which, if inaccurate or omitted, is likely to cause injury.<sup>83</sup> The FTC presumes that express claims are material,<sup>84</sup> relying on the *Central Hudson* Court's conclusion that "willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."<sup>85</sup> The FTC also considers as material claims or omissions which significantly involve health or safety.<sup>86</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976). The court remarked that "the likelihood or propensity of deception is the criterion by which advertising is measured."

<sup>80</sup> "The impression created by the advertisement, not its literal truth or falsity is the desideratum . . ." In the Matter of American Home Products Corp., 98 F.T.C. 136, 374 (1981), *aff'd*, 695 F.2d 681, 687 (3d Cir. 1982).

<sup>81</sup> *Miller*, *supra* note 76 at 3.

<sup>82</sup> *Id.* at 7.

<sup>83</sup> *Id.* at 15.

<sup>84</sup> *Id.* at 16.

<sup>85</sup> *Central Hudson Gas and Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557, 567 (1980).

<sup>86</sup> *Miller*, *supra* note 76. *See also*, *FTC v. Pharmtech*, 576 F.Supp. 294, 301 (D.D.C. 1983).

Advertising that lacks a reasonable basis is also deemed deceptive.<sup>87</sup> The FTC requires that the advertiser have specific grounds for substantiation of the claims on which the consumer relies.<sup>88</sup> Representations of substantiation are material to consumers because they would be less likely to rely on claims for products if they knew the advertiser did not have a reasonable basis to believe they were true. Failure to provide a reasonable basis constitutes an unfair and deceptive act or practice which may result in FTC enforcement.<sup>89</sup>

For therapeutic claims, a reasonable basis consists of competent and reliable scientific evidence produced by well-controlled clinical tests to support the claim.<sup>90</sup> The FTC presents the advertiser's substantiation evidence to the scientific community to ascertain whether the claims were previously established.<sup>91</sup> To avoid playing on the fears of consumers as a means to sell the product and to dispel the aura of deception, health claims must be supported by specific findings of the product's beneficial effect in reducing the risk of particular disease.<sup>92</sup>

## 2. The BATF Takes a Strict View

The definition of a wine advertisement includes written or verbal statements made in interstate commerce and disseminated by mail.<sup>93</sup> Advertisements are restricted from containing

[a]ny statement that is false or untrue in any material particular, or that, irrespective of falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter tends to create a misleading impression . . . [and] [a]ny statement . . . relating to analyses, standards, or tests, *irrespective of falsity*, which the Director finds to be likely to mislead the consumer.<sup>94</sup>

Advertisements are not permitted to make claims that wine has curative

<sup>87</sup> Benjamin I. Berman, Acting Secretary, Federal Trade Commission, FTC Policy Statement Regarding Advertising Substantiation, July 27, 1984.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Bristol-Myers Co. v. FTC*, 738 F.2d 554 (2d Cir. 1984).

<sup>91</sup> *Removatron International Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989).

<sup>92</sup> *FTC v. Pharmtech*, 576 F.Supp. 294, 301 (D.D.C. 1983).

<sup>93</sup> 27 C.F.R. § 4.61 (1992). Wine advertisements include any statement that "appears in a newspaper, magazine, trade booklet, menu, wine card, leaflet, circular, mailer, book insert, catalog, promotional material, or any other media . . . except . . . editorial or other reading material (i.e., news release) in any periodical or publication or newspaper for the publication of which no money or valuable consideration is paid or promised . . . and which is not written by or at the direction of the permittee."

<sup>94</sup> 27 C.F.R. § 4.64(a)(1)-(5) (1992) (emphasis added).

effects if the claims are untrue or create a misleading impression.<sup>95</sup>

The BATF has always taken a very strict view of the regulatory prohibition on curative and therapeutic claims about alcoholic beverages. It has consistently held that claims of this nature which have been made in advertisements or news releases by trade associations are within the regulatory prohibition because they are considered "indirect advertisements" by industry members.<sup>96</sup> In practice, this regulatory prohibition applies to all therapeutic claims, regardless of their truthfulness, because the BATF believes that any statement which may encourage consumption of alcohol is inherently misleading and deceptive due to the "possible social effect" on those who may be apt to have a psychologically or physically adverse reaction.<sup>97</sup> The BATF is concerned that wine may be regarded as medicine and be abused. The BATF considers, as "a matter of unsettled public debate,"<sup>98</sup> the assertion that health benefits derive from wine consumption. Any advertisement to that effect, regardless of scientific studies or medical evidence, is misleading if it does not present both sides of the issue and outline the categories of individuals who might be subject to health risks.<sup>99</sup>

In an effort to comply with this mandate, members of the wine industry developed a carefully worded statement which has been reviewed for completeness and balance by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) and submitted to the BATF for pre-clearance. All changes suggested by the NIAAA were incorporated,<sup>100</sup> but the BATF's policy did not change. The statement, although not product specific, is deemed misleading and deceptive advertising by the BATF, making the issue ripe for adjudication. Assuming the wine industry statement defines moderate consumption according to the NIAAA criteria, identifies persons at risk, and presents possible dangerous consequences of abuse, it is not likely to mislead or create unreasonable expectations on the part of the ordinary consumer under the FTC standard.

The BATF's mandate "is not to protect the health of consumers but

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<sup>95</sup> 27 C.F.R. § 4.64(i) (1992).

<sup>96</sup> Black, *supra* note 11 and accompanying text.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Redrafted Newsletter, *Alcohol and Heart Disease - Behind the French Paradox*, attachment to letter from John Hinman, Attorney, American Wine Alliance for Research and Education, to Tom Skora, Chief, Market Compliance Branch, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (Jan. 19, 1993) (on file with San Joaquin College of Law, Law Review Office).

to provide them with 'adequate information' [to make an informed choice]."<sup>101</sup> The BATF's objective of banning deception in advertising health claims is unconvincing because the government warning, now on labels<sup>102</sup> and soon expected to be in advertising,<sup>103</sup> is itself deceptive and misleading due to material omissions of potential positive benefits. Consumer interest in health information and the value of complete disclosure for making knowledgeable personal decisions must at all times be balanced against the government's understandable goal of curbing the ravages of alcohol abuse and other health problems.

### *B. Promoting Health Claims Can Withstand Prongs Three and Four*

The federal government's substantial interest in combatting alcohol abuse and its concomitant hazards comports with *Central Hudson's* second prong. Alcoholism threatens the public health, safety, and welfare. The disease strains family life, creates great expense for employers, and causes serious motor vehicle accidents.<sup>104</sup> It may cause brain damage or other birth defects in infants whose mothers drink during pregnancy.<sup>105</sup> The more complex inquiries are the third and fourth prong issues of whether the governmental interest is directly advanced by proscribing health claims and whether the restriction meets *Fox's* criterion of being "narrowly tailored" to the governmental aim. It is unlikely that forbidding the wine industry from reporting on the French Paradox will directly advance the government's interest in reducing alcoholism.

Experts debate whether the purpose of advertising is to shift consumer loyalty from one brand to another or to bring new consumers into the market.<sup>106</sup> It has been judicially noted that advertising does not affect consumption.<sup>107</sup> It is more likely that alcohol use is influenced by

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<sup>101</sup> *Center for Science in the Public Interest v. Department of the Treasury*, 797 F.2d 995 (D.C. Cir. 1986).

<sup>102</sup> 27 U.S.C.S. § 215(a) (Law Co-op. 1992).

<sup>103</sup> S.674, 103rd Cong., 1st Sess. (1993).

<sup>104</sup> See e.g., Jayne Hurley & Stephen Schmidt, *A Drink A Day?*, NUTRITION ACTION HEALTH LETTER (Center for Science in the Public Interest, Washington, D.C.), November 1992, at 1, 5; *Moderate Drinking*, *supra* note 64; Karen L. Sterchi, *Restrictions on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 NOTRE DAME L.R. 779, 791 (1985).

<sup>105</sup> *Moderate Drinking*, *supra* note 64, at 2.

<sup>106</sup> Sterchi, *supra* note 104, at 792.

<sup>107</sup> *Oklahoma Broadcasters Association v. Crisp*, 636 F. Supp. 978, 992 (W.D. Okla. 1985).

such cultural and social factors as family, friends, and peers.<sup>108</sup> Abuse is associated with a genetic predisposition, and addiction is both a psychological and physical disorder characterized by denial.<sup>109</sup> The scientific community has not reached consensus in determining whether alcohol advertising causes excessive consumption.<sup>110</sup> Without sufficient empirical data, one can only speculate whether advertising health benefits would increase wine consumption so significantly as to directly advance the government's interest. It is more likely that those who would drink wine out of concern for good health would be alerted to the need for moderation due to the U-shaped curve and would not be apt to become abusers. If the government's objective is to reduce alcoholism, the prohibition of messages emphasizing moderation does not directly advance this goal. Given the *Edenfield* court's admonition that the government must demonstrate the restriction will alleviate the harm to a material degree,<sup>111</sup> the FAA Act is not likely to pass muster under prong three of the *Central Hudson* test.

Assuming, arguendo, that the BATF's prohibition on therapeutic claims does directly advance the government's asserted interest, the fourth prong of the *Central Hudson* test requires analysis of whether the restriction is narrowly tailored to serve the government's purpose. In *Fox*, Justice Scalia explained the fit does not have to be perfect but it must be proportionate, and the government must justify the reasonableness of the restrictions.<sup>112</sup> The BATF has yet to meet that burden. Should litigation ensue, the onus is on the government to present evidence that a broad ban on health claims establishes a reasonable fit with the government's struggle against the detrimental effects of alcoholism.

A more reasonable fit would be the establishment of specific guidelines for health claims. The Wine Institute has created voluntary adver-

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<sup>108</sup> Sterchi, *supra* note 104, at 793 (citing Jessor and Jessor, *Adolescent Development and the Onset of Drinking: A Longitudinal Study*, 36 J. STUD. ALCOHOL 27 (1975); Margulies, Kesslet & Kandel, *A Longitudinal Study of Onset of Drinking Among High School Students*, 38 J. STUD. ALCOHOL 897 (1977)). See also, Matthew O. Howard & Dennis Donovan, *The Definition of Alcoholism*, 269 JAMA 586-587 (1993).

<sup>109</sup> *Depression, Substance Abuse Linked Genetically, NIMH Study Indicates* (Dept. of Health & Human Services, Washington, D.C.), Mar.-Apr. 1993, 108 PUBLIC HEALTH REP. 261; Howard & Donovan, *supra* note 108; Robert M. Morse & Daniel K. Flavin, *The Definition of Alcoholism*, 268 JAMA 1012-1014 (1992).

<sup>110</sup> Sterchi, *supra*, note 106, at 792.

<sup>111</sup> *Edenfield v. Fane*, 113 S. Ct. 1792, 1800, 1803 (1993).

<sup>112</sup> *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

tising standards<sup>113</sup> which apply to direct mail, point-of-sale, outdoor displays, and radio, television, and print media. These guidelines forbid depiction of excessive or immature drinkers, daring behavior, use of heroes or sports celebrities to appeal to the young, or sexually provocative poses. The *Central Hudson* Court suggested advertisements could be prescreened.<sup>114</sup> The BATF provides voluntary prescreening services. If the BATF were to incorporate the Wine Institute's or similar guidelines into its policy and add the NIAAA standards of moderate consumption, it would assist in putting forth balanced information to the public which would enable people to make lawful choices affecting their lives.

A total ban on health claims is an extreme and questionable method of curbing alcoholism. As long as more narrowly tailored measures are readily available, a broad ban on therapeutic claims is unjustified. If the Court adheres to its teachings in *Virginia Pharmacy*, as affirmed in *Cincinnati v. Discovery Network* and *Edenfield v. Fane*, it will not approve the sweeping prohibition.

#### 1. Leeward Winery Attempts to Test the Health Claim Ban

California's Leeward Winery cited studies in its Spring 1992 customer newsletter which concluded that wine in moderation can be healthful. Leeward believed The French Paradox, seen by millions of viewers of the "60 Minutes" broadcast, represented an opportunity to present scientific evidence of health benefits while stressing moderation in drinking as a counter-attack against alcohol abuse.<sup>115</sup>

The BATF, empowered to withdraw winery permits for violation of the FAA Act, warned Leeward that its newsletter references to The French Paradox violated federal advertising regulations. In response to the winery's promotion, the BATF wrote a cease-and-desist letter ordering Leeward to withdraw its advertisement from the market and

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<sup>113</sup> CODE OF ADVERTISING STANDARDS, Wine Institute, The Industry Association of California Winegrowers (1987). The guidelines specifically encourage depiction of mature persons engaging in socially responsible behavior.

<sup>114</sup> *Central Hudson Gas and Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557, 571 n.13 (1980).

<sup>115</sup> Donna K. H. Walters, *To Your Health; Vintner Fights Ruling Against Advertising Benefits of Wine*, L.A. TIMES, Apr. 18, 1992, at D1. Others in the industry followed suit. Winemakers and industry organizations launched their promotional tools. The Wine Institute, a California educational and lobbying organization distributed video tapes of "The French Paradox" to members and others. The California Association of Winegrape Growers passed out bumper stickers displaying the slogan, "A gift for your heart . . . Enjoy a glass of red wine."

threatened "possible action" against Leeward's permit to sell wine.<sup>116</sup> Interested in testing the law, Leeward asked the BATF for a formal citation to enable it to rebut the BATF determination before an administrative law judge. Once administrative remedies were exhausted, Leeward's intention was to be heard by a United States District Court on whether its First Amendment right to commercial speech protection had been violated.<sup>117</sup>

The BATF retreated from its threat of legal action, recategorizing it as a warning. Leeward complied with the BATF's directive but continues to make submissions to the BATF for approval of truthful information in a newsletter format.<sup>118</sup> Leeward contends it is adversely impacted by unconstitutional content regulation which prohibits it from reporting on the medical studies in advertisements and newsletters. The BATF's response is that it is protecting the public from distorted accounts of medical evidence.<sup>119</sup>

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<sup>116</sup> Letter from Thomas J. Skora, Chief, Market Compliance Branch, Department of the Treasury Bureau of Alcohol, Tobacco, and Firearms, to Leeward Winery (Mar. 30, 1992) (on file with San Joaquin College of Law, Law Review Office).

<sup>117</sup> Letter from John Hinman, Leeward Attorney, Hinman & Carmichael, to Harry J. Alder, Regional Director, Compliance, Bureau of Alcohol, Tobacco, and Firearms (April 17, 1992) (on file with San Joaquin College of Law, Law Review Office). This letter noted the newsletter had already been distributed and could not effectively be withdrawn. Leeward agreed to destroy all remaining copies pending eventual hearing.

<sup>118</sup> Memorandum from John A. Hinman, Wine Industry Attorney, Hinman & Carmichael, to California Wineries and Wine Trade Associations (Jan. 19, 1993) (on file with San Joaquin College of Law, Law Review Office). This memorandum contains, as attachments, a letter to BATF seeking permission to disseminate information on the risks and benefits of moderate drinking and a redrafted newsletter statement entitled "Alcohol and Health Disease - Behind the French Paradox."

<sup>119</sup> John E. Morris, *This Agency Keeps a Tight Cork on Wine Labels; But Industry Complains: We Can't Tell the Truth About Our Products*, LEGAL TIMES, June 3, 1992, at P4.

The BATF did not limit its rejection to Leeward. It also prevented the New York based Food and Wine Institute from running advertisements proclaiming that French wine is beneficial to health. In December 1992, it investigated the appearance of red, heart-shaped buttons which asked "Have You Had Your Glass of Red Wine Today?" The buttons, deemed inappropriate for distribution, were on sale in retail wine stores and through The Wine Trader, a wine industry magazine.

Large vintners, like Robert Mondavi, declined to market their products through health claim assertions because of greater exposure to product liability lawsuits. The Robert Mondavi Winery is not, however, without its own dispute with the BATF. Mondavi fought to retain a wine label that stated "Wine in moderation is an integral part of our culture, heritage, and the gracious way of life." The label described wine as "a temperate, civilized, sacred, romantic mealtime beverage recommended in the bible." After several rounds of meetings, the BATF approved a modified version of the label

## 2. The Beringer Neckhanger Fracas

In October 1992, almost one year after "60 Minutes" ran its French Paradox segment, Beringer Winery<sup>120</sup> sought and received the BATF's approval to attach informational "neckhangers" to its bottles.<sup>121</sup> Beringer had worked with the BATF to develop and present a balanced statement about moderate wine consumption, including health benefits and attendant risks.<sup>122</sup> The BATF-approved statement, a six-paragraph excerpt from the "60 Minutes" segment, was a landmark development in wine promotion as it marked the first government acknowledgement of a link between drinking wine and lowering the risk of heart disease.<sup>123</sup> The BATF's approval was not intended as a blanket permit to all wineries to change their labels or add neckhangers. Each winery's individual submission would be evaluated on a case by case basis.<sup>124</sup>

The BATF's decision to permit the neckhanger drew vociferous protest from consumer, religious, medical, and anti-alcohol groups, most notably the Center for Science in the Public Interest (CSPI), who condemned the approval as encouragement of drinking.<sup>125</sup> The BATF defended its approval,<sup>126</sup> saying the neckhanger contained excerpts of the "60 Minutes" broadcast which cited a study of 44,000 persons between ages forty and seventy-five who drank moderately each day and had a twenty-five to forty percent less chance of acquiring heart disease.<sup>127</sup>

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from which the reference to the Bible and the word "sacred" were deleted. The amended label included a narrower statement that wine is part of the Mondavi family's culture and heritage. The wine industry viewed the BATF's permission, notwithstanding Mondavi's concession, as a major victory.

<sup>120</sup> Beringer Winery is owned by Wine World Estates, a subsidiary of Nestlé Corporation.

<sup>121</sup> A "neckhanger" is a cardboard card containing promotional material which is tied around the neck of a wine bottle.

<sup>122</sup> Joyce Price, *Labeling Wine as Health Food Draws Protests*, WASH. TIMES, Nov. 1, 1992, at A3. See also Carole Sugarman, *Mixed Messages: Is It Bottoms Up! Or Just Say No?; Vintners Get Go-Ahead to Add Pros to the Cons of Drinking*, WASH. POST, Nov. 4, 1992, at E1; Lawrence M. Fisher, *A Votre Sante, from Bureau of Alcohol*, N.Y. TIMES, Oct. 24, 1992, § 1, at 35.

<sup>123</sup> Carole Sugarman, *Tags Will Tout Red's Health Benefits; Some Find the News Hard to Swallow*, ATLANTA J. AND CONST., Nov. 12, 1992, at W18.

<sup>124</sup> Lawrence M. Fisher, *A Votre Sante From Bureau of Alcohol*, N.Y. TIMES, Oct. 24, 1992, § 1, at 35.

<sup>125</sup> Price, *supra* note 122.

<sup>126</sup> Price, *supra* note 122.

<sup>127</sup> *60 Minutes* (CBS television broadcast, Nov. 17, 1991). The study was under the auspices of the Harvard School of Public Health which evaluated 44,000 Americans

The BATF maintained these statements were legal because the therapeutic claims did not exceed the strength of the supporting evidence<sup>128</sup> and the government health warning, appearing on all wine bottles, acts as a deterrent and balances the health claim.<sup>129</sup>

The CSPI disagreed on the basis that the prominence of the neckhanger overpowered the small warning located on the back of the bottle. The CSPI decried the lack of public debate over such an important consumer issue and suggested the BATF's decision warranted strong consideration of a jurisdictional change in the enforcing agency from the BATF to the FDA.<sup>130</sup> The wine industry opposes change, saying it prefers to "play with a devil it knows, rather than a devil it doesn't."<sup>131</sup>

Shortly after the BATF approval, a suit was filed against Beringer Vineyards and its parent, Nestlé Corporation, based on California consumer fraud law which encompasses false or misleading advertising claims.<sup>132</sup> The complainant asserted the neckhanger was misleading because its definition of moderate alcohol use as two drinks did not specify the actual amount of wine per glass, nor did it consider an individual's personal characteristics, such as gender, body weight, age, or ethnicity, each of which may affect a person's reaction to alcohol.<sup>133</sup> The complaint further alleged the neckhanger failed to discuss known risks of alcohol, such as breast cancer, cirrhosis of the liver, and automobile accidents.<sup>134</sup>

The suit was filed at the same time that a campaign was mounted to overturn the BATF's decision.<sup>135</sup> Lobbyists called on government agen-

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between 40 and 75 years old who drank up to 2 alcoholic drinks each day.

<sup>128</sup> Price, *supra* note 122.

<sup>129</sup> Price, *supra* note 122.

<sup>130</sup> Price, *supra* note 122. The CSPI argued that the FDA would impose greater control on labels of alcoholic beverages if alcohol was treated as a drug.

<sup>131</sup> Telephone Interview with Wendell Lee, Legal Counsel, Wine Institute (May 18, 1993).

<sup>132</sup> *Reese v. Beringer Vineyards*, filed Oct. 23, 1992, in Alameda County Superior Court, alleged Beringer violated Cal. Bus. & Prof. Code § 17500 for making and disseminating statements which it knew were untrue and misleading for the purpose of inducing the public to buy its wine. These statements implied the BATF's approval of same. The statements were misleading because "alcohol consumption is a threat to the public health . . . [It] can and often does kill."

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Active organizations included CSPI, National Council on Alcoholism and Drug Dependence, National Parent Teachers Association, Christian Life Commission, and American Academy of Family Physicians.

cies to increase restrictions on the wine industry's ability to make health claims.<sup>136</sup> As a result, the United States Surgeon General expressed concern that the neckhanger was self-serving and did not promote the most accurate health information to consumers.<sup>137</sup> She was troubled by the definition of "moderate" because it failed to consider individual differences in the general population<sup>138</sup> and opined there is inconclusive proof that moderate wine drinking lowers the risk of coronary disease more than other alcoholic beverages.<sup>139</sup>

The NIAAA joined the Surgeon General's condemnation of the neckhangers, informing the BATF that the Beringer message was "scientifically inaccurate" and in conflict with existing health policy.<sup>140</sup> The NIAAA voiced concern that heart disease is still a major cause of death in France and expressed disbelief that moderate wine drinkers are at lower risk for coronary heart disease. After a year of simmering controversy over the red wine and health claim issue, Beringer voluntarily curtailed its plans for using the neckhangers and has not revived its efforts to distribute them.<sup>141</sup>

### 3. An Interagency Approach

As evidence of the substantial government interest in regulating promotion of alcohol, the FTC and the FDA reviewed the neckhangers,<sup>142</sup> despite their lack of jurisdiction over alcohol labeling and advertising regulation. The FDA and the FTC are the regulatory agencies for food labeling and advertising, respectively. Just as the BATF was granting

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<sup>136</sup> Price, *supra* note 122.

<sup>137</sup> Amy B. Goen, *Neckhangers May Be Albatross for Wine Industry; Novello Concerned*, FOOD & DRINK DAILY, Nov. 5, 1992, available in LEXIS, Nexis Library, NWLTRS File.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Amy B. Goen, *FTC, FDA to Investigate Wine Neckhangers; NIAAA Concerned*, FOOD & DRINK DAILY Nov. 9, 1992, available in LEXIS, Nexis Library, NWLTRS File. The scientific inaccuracies identified by NIAAA included (1) language stating that moderate drinkers suffer from 25% to 60% fewer heart attacks, when studies show the percentage to be from 25% to 45%, (2) the implication that all individuals who drink and are not alcohol abusers could benefit from drinking wine, and (3) the definitions supplied for moderate drinkers are not applicable to the elderly. The NIAAA also pointed out that the neckhanger does not state that minors should not drink and that pregnant or nursing women should consult with their physicians.

<sup>141</sup> Donna K.H. Walters, *Medicinal Claims for Wine are Recorded; Marketing: Beringer Backs Down in Face of Public and Government Outcry*, L.A. TIMES, Nov. 11, 1992, at D1.

<sup>142</sup> *Id.*

label approval to Beringer, the FDA was in the process of implementing a uniform food labeling and nutritional information law<sup>143</sup> as part of the Federal Food, Drug and Cosmetic Act<sup>144</sup> to standardize package displays of nutritional content of food and to clamp down on use of the term "healthy" or "healthful." Unless requested, the FDA does not have authority to get directly involved with products which contain less than seven percent alcohol.<sup>145</sup>

In developing a strategy to deal with the wine industry's desire to advertise studies proclaiming health benefits from drinking red wine, the BATF requested comments from the other agencies.<sup>146</sup> The BATF received advice from public health officials regarding formulation of policies pertaining to dissemination of health claims related to consumption of alcoholic beverages.<sup>147</sup> Because the BATF utilizes the scientific and public health expertise of the FDA and other federal agencies, interagency intervention to prevent health claims occurred at cabinet level by the Secretary of Health and Human Services.<sup>148</sup> As a result, the BATF decided to consult routinely with the FDA before

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<sup>143</sup> Nutritional Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. 2353 (1990).

<sup>144</sup> 21 U.S.C.S. §§ 301-394 (Law Co-op. 1989).

<sup>145</sup> Memorandum of Meeting of Nov. 5, 1992 between FDA and Wine World Estates to discuss proposed neckhanger (on file with San Joaquin College of Law, Law Review Office).

<sup>146</sup> Letter from Thomas J. Skora, Chief, Marketing Compliance Branch, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, to John A. Hinman, Esq., Hinman & Carmichael (Dec. 30, 1992) (on file with San Joaquin College of Law, Law Review Office).

<sup>147</sup> Letter from Enoch Gordis, M.D., Director, National Institute on Alcohol Abuse and Alcoholism, to Thomas J. Skora, Chief, Market Compliance Branch, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (Oct. 30, 1992) (on file with San Joaquin College of Law, Law Review Office). The BATF consulted with the NIAAA, an arm of the Department of Health and Human Services regarding pre-clearance of a proposed 663 word health statement entitled "Wine and Heart Disease - Behind the 'French Paradox,'" which had been submitted to the BATF by John A. Hinman, Esq., who represents many wineries wishing to send the statement in a newsletter to their customers.

<sup>148</sup> Letter from Louis W. Sullivan, M.D., Secretary of Health and Human Services, to Nicholas F. Brady, Secretary of Treasury (Nov. 30, 1992) (on file with San Joaquin College of Law, Law Review Office) voicing concern about the public health ramifications of allowing a claim for a health benefit on an alcoholic product without considering potential detrimental effects such as risk of stroke, motor vehicle crashes, interactions with medications, and cancer. Secretary Sullivan was disquieted by the prospect of BATF adopting a less stringent standard than that which FDA applies to health claims for foods with the consequence that federal rules would be inconsistent and possibly confusing or misleading to consumers.

approving any health claim on alcoholic beverage labels and with the FTC in evaluating health claims made in advertising materials.<sup>149</sup> The BATF believes this interagency approach to regulation of health claims will ensure uniformity and consistency and asserts all future label and promotion disputes will be scrutinized by FDA.<sup>150</sup>

#### 4. Economic Impact of The French Paradox on The Wine Industry

Prior to 1986, the United States was on the verge of becoming one of the world's important wine-consuming nations. Since then, the American wine industry has had a series of setbacks. It soon became clear that the United States was not like Italy or France where wine is an integral part of the culture. Domestic consumption has declined due, in

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<sup>149</sup> *Id.* BATF, in a draft agency circular, *Health Claims in Labeling and Advertising of Alcoholic Beverages* (Feb. 1993), announced the interagency approach between itself, FDA, and FTC:

[T]he Bureau has consistently utilized the scientific and public health expertise of FDA in approving ingredients in alcoholic beverages, requiring label disclosure of certain substances, and in identifying adulterated alcoholic beverages which are deemed mislabeled. In light of the expanding universe of medical evidence dealing with moderate consumption and in an effort to continue to draw upon the expertise of FDA, ATF believes it is useful to consult with FDA when ATF is evaluating health benefit claims concerning moderate consumption of alcoholic beverages . . . .

. . . FDA has advised ATF of its position that specific health claims recommending the use of alcoholic beverages to combat a particular adverse condition may place the particular alcoholic beverage in the category of a drug and require FDA clearance . . . .

FTC regulates advertising of . . . alcoholic beverages. FTC has advised ATF that its primary concern with advertising is that it not be false, deceptive, or misleading.

. . . ATF does not believe it is in the public interest for ATF to consider approving a health claim in the labeling and advertising of alcoholic beverages without coordinating such consideration with all other agencies which have relevant expertise . . . .

. . . [B]efore approving any health claim on alcoholic beverage labels or related material, ATF will consult with FDA . . . .

With respect to advertising . . . ATF will coordinate with the FTC to ensure that ATF is not approving material that would place the advertiser in violation of the FTC's requirements.

<sup>150</sup> Alan Liddle, *S.F. Panel Debates French Paradox; Health Claims for Alcoholic Beverages*, NATION'S RESTAURANT NEWS NEWSPAPER, Mar. 8, 1993, at 56, available in LEXIS, Nexis Library, CURRENT File. The FDA is unlikely to support any health claims for alcohol products and may consider the products to be new drugs which have to pass a drug-clearing procedure to be the subject of valid health claims.

part, to a heightened awareness of the negative implications of drinking.<sup>151</sup> Both economic and natural forces have also adversely impacted the wine industry. In 1986, a six-year drought began which detrimentally affected Napa, Sonoma, and Mendocino counties, the heart of California's wine country. Coincidentally, the parasite phylloxera, which destroyed large parts of the world's vineyards in the nineteenth century, destroyed thousands of acres in California. Uprooting and replacing vineyards is estimated to cost in the millions of dollars.<sup>152</sup> In 1991, wine sellers were faced with a sizable federal excise tax increase, war in the Persian Gulf, and lingering recession.<sup>153</sup> The cumulative effect of these factors caused banks to become reluctant to lend wineries money. Against this troubled backdrop, wine sales suffered their greatest decrease in a decade.<sup>154</sup>

In the fourth quarter of 1991, publicity on the potential benefits of red wine halted the backward slide. Thirty million viewers watched the "60 Minutes" segment on The French Paradox.<sup>155</sup> Following the program, more medical studies correlating moderate consumption of wine and good health were reported in the press. These reports created a marketing momentum. Consumers began purchasing all types of red wines.<sup>156</sup> The skyrocketing demand, coupled with a scarcity of common red grapes in the San Joaquin Valley of California, increased market prices by approximately fifty percent in 1992.<sup>157</sup>

Supermarket purchases in the United States of domestic red wine during 1992 soared by forty-four percent over the previous year in the four weeks following the television report.<sup>158</sup> Red varietal sales in-

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<sup>151</sup> Prial, *supra* note 1.

<sup>152</sup> Prial, *supra* note 1. Robert Mondavi Winery, a Napa Valley giant, expects to spend \$20 million to replant destroyed vineyards.

<sup>153</sup> *The 49th Annual Statistical Survey; U.S. Wine Market Off 8.6% in '91*, WINES & VINES, July, 1992, at 17.

<sup>154</sup> Prial, *supra* note 1. The market was off by 8.6%, with the first half being particularly sluggish. Table wine sales dropped 2.5% from their 1990 level. Table wines, at 316.6 million gallons, represented 68.1% of the entire United States wine market in 1991. In 1990, that level was 324.7 million gallons.

<sup>155</sup> *Sales of Red Wine Surge Following "60 Minutes" Report*, Wine Inst. News Release (Wine Inst., San Francisco, CA), Jan. 17, 1992.

<sup>156</sup> Jon A. Fredrikson, 1992: "Hot" Year for Table Wine, WINES & VINES, Apr. 1993, at 21. California table wine shipments rose by 20 million gallons from an annual rate of 278 million gallons to 298 million gallons twelve months later.

<sup>157</sup> Carrie Dolan, *Wineries and Government Clash Over Ads that Toast Health Benefits of Drinking*, WALL ST. J., Oct. 19, 1992, at B1.

<sup>158</sup> Morris, *supra* note 10.

creased by fifty-three percent.<sup>159</sup> The average percent change in super-market sales volume of Cabernet Sauvignon for four four-week periods following the telecast increased forty-five percent,<sup>160</sup> whereas the four four-week periods preceding the telecast posted only a modest average gain of five percent.<sup>161</sup> All California wine sales, except coolers, increased eleven percent in the first six months of 1992 over the corresponding period in 1991.<sup>162</sup> Most of the growth was in red wines which tripled in sales after the television report.<sup>163</sup> The grape industry has also been positively affected. Because the volume of red wine grapes available for generic products decreased over the last few years, grapes were in great demand but short supply after the airing of "The French Paradox".<sup>164</sup>

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<sup>159</sup> Morris, *supra* note 10.

<sup>160</sup> Walters, *supra* note 115, citing a Gomberg-Fredrikson report which tracks wine sales at supermarkets. Six months after the "60 Minutes" telecast, sales were still up 25% over the previous year.

<sup>161</sup> *Sales of Red Wine Surge Following "60 Minutes" Report*, *supra* note 150. Figures were derived from scanning data from 2,400 supermarkets around the country.

<sup>162</sup> *California Wine Sales Up for First Six Months*, WINES & VINES, Oct. 1992, at 14. Four giant commercial wineries, known as the "Big Four", achieved tremendous growth during that period as did other large superpremium wineries. For example, the Wine Group grew 39%, Delicato 35%, Gallo 13% (excluding coolers), and Heublein 10%. Among the superpremium wineries, Kendall-Jackson grew 40%, the Wine Alliance 45%, C. Mondavi 20%, Wente 44%, Buena Vista 38%, R.H. Phillips 33%, Rodney Strong 37%, Louis Martini 53%, Rutherford Hill 33%, McDowell Valley 39%, Guenoc 29%. All domestic and imported table wines grew by 12% in supermarkets during the first half of 1992. Cabernet Sauvignon sales rose 48%, Merlot soared 94%, and red Zinfandel jumped 33%.

By the end of 1992, California red wine sales grew approximately 36%. The volume of California red wine sold increased from 39 million gallons in 1991 to 53 million gallons in 1992. Even imports posted a gain of almost 16%, the first gain in 8 years. The strong market for red wines benefitted imports, as shipments into the United States increased 42%. See *Economic Report; 1992 Wine Market Posts Gains*, WINE INST. NEWS, Mar. 1993, at 3.

Overall, table wine shipments in 1992 were worth \$3.2 billion, 10% over the previous year and the largest increase in a decade. See Prial, *supra* note 1. For the fiscal year ending June 30, 1992, revenue was \$154 million, up 23% from \$125 million the year before. Premium wine sales grew 16% in 1992. Sutter Home Winery increased production by 14%, or 5.2 million cases over 1991. See Clifford Carlsen, *Sutter Tops List of Bay's Biggest Wine Producers*, S.F. BUS. TIMES, Mar. 26, 1993, at 15.

<sup>163</sup> Carlsen, *supra* note 162.

<sup>164</sup> *Economic Report; Varieties Huge Share of '92 Crush*, WINE INST. NEWS, May/June 1993, at 3. Among red wine grapes, the crush volume of Merlot more than quadrupled between 1988 and 1992, from 8,000 tons to 37,000 tons.

California grape growers in Stanislaus County reported that unexpectedly strong demand, generated by the favorable publicity about moderate drinking and health bene-

Industry experts directly relate the increased sales of red wines to the publicity generated by the "60 Minutes" telecast.<sup>165</sup> The impact of the television program on consumers yielded phenomenal results in 1992, creating gigantic increases in wine purchases.<sup>166</sup> The statistics demonstrate that presentation of health information to the public is a consequential impetus to an ailing industry which cannot be understated. The degree of consumer response further illustrates the public's enormous appetite for health data and its desire to exercise self-determination over personal lifestyle and product choices.

The fourth prong of the *Central Hudson-Fox* test requires the government's restriction to be narrowly tailored to its objective and the cost to the advertiser carefully calculated. In essence, the Court must formulate a cost-benefit ratio. When calculation of the cost of banning health claims is completed, the fourth prong of *Central Hudson* and *Fox* must fail. The price of suppression is too high.

#### V. VAGUENESS AND OVERBREADTH: COLLATERAL INFIRMITIES OF THE FAA ACT

The constitutional doctrines of vagueness and overbreadth provide the wine industry and the consumer with additional First Amendment weapons to attack federal regulation of therapeutic claims. Although the overbreadth doctrine is generally considered inapplicable to commercial speech,<sup>167</sup> the Court has left the door ajar when fully protected speech is jeopardized.<sup>168</sup> Generally, vagueness and overbreadth provide artificial means of conferring standing where it does not otherwise exist.<sup>169</sup> This *jus tertii* standing permits hypothetical attacks on vague or overbroad laws to prevent the chilling of protected speech.

Justice Scalia, in *obiter dictum*, mused that it is absurd to confer standing on a third party who is not actually impacted by a vague or

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fits, resulted in very early grape buying in March and April of 1992. Prices offered to growers ranged from 15% to 30% more than in 1991 for various white grapes and from 25 to an astronomical 80% increase for red varieties. See *The Nation's Vineyards in 1992*, WINES & VINES, Feb. 1993, at 18.

<sup>165</sup> Gavin Power, *Wineries Enjoying Better Times*, S.F. CHRON., May 21, 1993, at D1.

<sup>166</sup> *Fredrikson Sees '93 Market Down 2% from 1992*, WINES & VINES, Jan. 1993, at 14.

<sup>167</sup> *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 462 n.20 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-81 (1977).

<sup>168</sup> *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 481-84 (1989).

<sup>169</sup> LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1023 (2d ed. 1988).

overbroad statute but to deny it to a party asserting actual injury from the law.<sup>170</sup> *Fox* entertains the notion that the commercial speech litigants before the Court had standing to attack vague or overbroad laws as they applied specifically to themselves. The Court saw no reason why the doctrines could not be invoked where the plaintiff's challenge to certain applications of the statute would fail unless they were invoked.<sup>171</sup> The implication of *Fox* seems to be an invitation for a lesser facial attack on legislative enactments which impact commercial speech as well as fully protected speech.<sup>172</sup> The interesting doctrinal question posed is whether *Fox* will spawn a subspecies of the standard vagueness and overbreadth doctrines.

A. *The FAA Act is Vague for Failure to Set Forth Standards to Define False and Misleading Statements*

A statute is deemed void for vagueness if the conduct which it proscribes is so unclearly defined that "men of common intelligence must necessarily guess at its meaning."<sup>173</sup> The prohibition against vagueness was born from the due process requirement of fair notice of the forbidden conduct.<sup>174</sup> When a statute is indefinite, enforcement may become arbitrary and discriminatory due to the lack of explicit legislative standards.<sup>175</sup>

The FAA Act fails to give definition or examples of language or claims which must be avoided. Sections 205(e) and (f) describe unlawful practices for labeling and advertising. Labeling, bottling, and packaging must be

in conformity with such regulations, to be prescribed by the Secretary of the Treasury . . . (1) as will prohibit deception of the consumer with respect to such products . . . and as will prohibit, *irrespective of falsity*, such statements relating to age, manufacturing processes, analyses, guarantees, *and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer*; . . . (4) as will prohibit statements on the label that are . . . *false, misleading, obscene, or indecent* . . . .<sup>176</sup>

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<sup>170</sup> Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 481-84 (1989).

<sup>171</sup> *Id.* at 483.

<sup>172</sup> "[W]hile the overbreadth doctrine was born as an expansion of the law of standing, it would produce absurd results to limit its application strictly to that context." *Id.* at 484.

<sup>173</sup> Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

<sup>174</sup> Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972).

<sup>175</sup> TRIBE, *supra* note 169.

<sup>176</sup> 27 U.S.C.S. § 205(e) (Law. Co-op. 1992) (emphasis added).

Advertisements are subject to similar provisions as labels. In addition, they are subject to a further ban on statements inconsistent with the product label itself.<sup>177</sup>

The BATF regulation uses substantially the same language in its label and advertisement requirements.<sup>178</sup> The regulation permits additional information to be printed on labels which is "truthful, accurate, and specific, and . . . [not] misleading,"<sup>179</sup> but bars advertisements from containing "any statement, design, representation, pictorial representation, or device representing that the use of wine has curative or therapeutic effects *if such statement is untrue in any particular or tends to create a misleading impression.*"<sup>180</sup>

The Supreme Court considers misleading advertising to be that which encourages fraud, overreaching, or confusion.<sup>181</sup> This definition has not been included in either the FAA Act or the BATF regulation. Based on the standard set by the FTC, which generally requires one or two scientifically conducted studies, there is plenty of medical evidence to support health claims attributable to moderate consumption of wine. There is no accusation by the government that the wine industry has overreached or plans to do so. Their newsletters and promotional materials are not fraudulent. Yet, the BATF's actual practice is to find misleading all material containing claims. When Leeward Winery mailed its newsletter to 2,000 customers, it had not been put on notice that it breached specific standards of the Secretary. The fact is there are no published standards. The public has not been provided with the criteria which the Secretary of the Treasury uses to determine whether scientific and irrelevant matters are misleading. One can only guess what constitutes an "irrelevant matter" or what circumstances make scientific matter misleading. "Words inevitably contain germs of uncertainty" making it imperative that they be "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."<sup>182</sup> Such arbitrary application of the law dictates that sections 205(e) and (f) be

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<sup>177</sup> Advertising is defined as the publishing or dissemination by radio broadcast, newspaper, periodical, sign, or other printed or graphic matter of alcoholic beverages which is made to induce sales in interstate or foreign commerce. 27 U.S.C.S. § 205(f) (Law. Co-op. 1992).

<sup>178</sup> 27 C.F.R. §§ 4.39, 4.64 (1992).

<sup>179</sup> 27 C.F.R. § 4.38(f) (1992).

<sup>180</sup> 27 C.F.R. § 4.64(i) (1992) (emphasis added).

<sup>181</sup> *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 462 (1978).

<sup>182</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 578-79 (1973)).

struck down for vagueness and illegal restraint on speech.

*B. Overbreadth: A Facial Invalidation of the FAA Act*

A statute is overbroad and void on its face if it reaches beyond its allowable area of control and "sweeps within its ambit" constitutionally protected speech or conduct.<sup>183</sup> The overbreadth doctrine is an exception to the requirement that a plaintiff must have standing to litigate for another.<sup>184</sup> The rationale is to prevent substantial deterrence of free speech.<sup>185</sup> The overbreadth doctrine developed "not primarily for the benefit of the litigant, but for the benefit of society - to prevent the statute from chilling the First Amendment rights of other parties not before the court."<sup>186</sup> The Court recognized that the doctrine might, at times, cause injury to individuals because it allows unprotected speech to be uttered. But the Court believed this to be a small price compared to that imposed by stifling free speech through overly inclusive legislation.<sup>187</sup>

While overbreadth analysis is not applicable to commercial speech because commercial speech is considered hardier and less likely to be chilled than fully protected speech,<sup>188</sup> a statute may be attacked if the overbreadth applies to non-commercial speech as well.<sup>189</sup> The FAA Act, as interpreted by BATF, reaches newsletters, press releases, speeches, seminars, and assorted promotional material disseminated by trade associations whose membership is composed of participating wineries. Information about wine and health that is promulgated by these organizations is generic, referring to types of wine or wine in general rather than specific brands. The purpose is to create awareness of wine's beneficial effects in order to stimulate consumer demand. The

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<sup>183</sup> *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

<sup>184</sup> *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

<sup>185</sup> *TRIBE*, *supra* note 159.

<sup>186</sup> *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984).

<sup>187</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973): "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."

<sup>188</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 (1976): "[C]ommercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."

<sup>189</sup> *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 481 (1989).

speech does not "propose a commercial transaction"<sup>190</sup> in the sense that it is not an invitation to purchase a particular brand produced by a commercial winery. While the trade association is paid by its membership, it has no direct economic relationship with the end customer.

Justice Scalia pointed out in *Fox* that speech for a profit does not necessarily consist of speech that proposes a commercial transaction.<sup>191</sup> When a trade association is prohibited from making scientifically substantiated representations that the use of wine has curative or therapeutic effects, under the guise that such statements constitute advertising, the non-commercial application of the statute infringes upon the group or representative's right of protected speech. Therefore, overbreadth may be invoked by wineries or consumers, as third parties, because "a statute that infringes protected speech" may be challenged by a person "even if the statute constitutionally might be applied to him."<sup>192</sup>

No bright line delineates protected and unprotected speech. It is not readily apparent that a court can easily segregate the constitutional and unconstitutional applications of the law. It is difficult to ascertain what industry representatives may say with impunity. Wine associations may hold seminars, write health articles for periodicals, meet at conventions, and provide grants for public radio or television programming. These activities fall into the realm of constitutionally protected speech. Where the content of the speech or conduct alludes to health benefits and medical studies, or quotes doctors, scientists, or "60 Minutes," the speaker is at risk of conviction for a misdemeanor. For the organizations to "forego protected activity rather than run afoul of the statute's proscriptions" is to be intimidated by an overbroad statute that "hangs over their heads like a Sword of Damocles . . ."<sup>193</sup> Even if one were to concede that the government's health claim policy is appropriate in its commercial speech application, the same cannot be said for its non-commercial application. On this basis, the regulation must be invalidated. The probable effect of the BATF's prohibition on substantiated therapeutic claims would be to steer the public away from a more accurate understanding of the relationship between alcohol and health.<sup>194</sup>

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<sup>190</sup> *Virginia Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 385 (1973)).

<sup>191</sup> *Fox*, 492 U.S. at 469: "Some of our most valid forms of fully protected speech are uttered for a profit."

<sup>192</sup> *Id.* at 482-483 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)).

<sup>193</sup> *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

<sup>194</sup> See John E. Calfee, *Proposed Alcohol Ad Warnings are Contrary to Free Speech Values and Consumer Interests*, WASH. LEGAL FOUND., Legal Opinion Letter, May 14, 1993, available in LEXIS, Nexis Library, LGLNEWS File (discussing the

## CONCLUSION

Free speech is the hallmark of a nation that cherishes civil liberties. Even in the robust arena of commercial speech, to which a lesser protection is afforded, we must be vigilant about suppression of truthful information. The evils of alcoholism are well-recognized, as is the government's substantial interest in its eradication. This must be accomplished by attacking the root causes of addiction and educating the public of the dangers of excess. To suppress truthful speech is to clash with the very precept of the First Amendment. Curtailing health claims is more extensive than reasonably necessary to further the government's goal of combatting alcohol abuse. A broad gap separates speech which is "potentially misleading" from speech which is "inherently misleading" and a "no-speech" policy is unnecessarily harsh where a "case-by-case" analysis will suffice.

Individuals perceive a deprivation of power when they are restricted from making fundamental decisions about their lives. Government must recognize that matters such as health are vital to the average citizen and respect the rights of the individual. To exclude an advertiser's communications from protection merely because of its financial interest in the outcome is to violate the basic tenets of commercial speech doctrine. Economic motivation alone does not render commercial commentary misleading, deceptive, untrue, or lacking in value. That an industry is motivated by fiscal revitalization does not necessarily devalue its message to consumers. Sixty years ago this nation learned that prohibiting the manufacture and sale of alcoholic beverages did not alleviate the affliction of alcoholism. We must now realize that prohibiting substantiated medical claims will be no more successful. The people's right of self-determination through free-flowing ideas must remain unfettered.

JOAN JACOBS LEVIE