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FREE SPEECH TO HAVE SWEATSHOPS? HOW *KASKY V. NIKE* MIGHT PROVIDE A USEFUL TOOL TO IMPROVE SWEATSHOP CONDITIONS

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Abstract: In 1998, consumer activist Marc Kasky sued Nike, claiming that Nike's statements in the media denying sweatshop conditions in its factories were false advertising. This case, culminating in a controversial California Supreme Court decision, has attracted much criticism on its implications of free speech. Little attention has been paid to how *Nike v. Kasky* might be a useful tool for anti-sweatshop advocates, who have up until now had great difficulty holding companies accountable for their sweatshop labor conditions. This Note examines the anti-sweatshop movement and its lack of effective private enforcement techniques. It then explores how the California Supreme Court in *Kasky* expanded the commercial speech doctrine. Lastly, it analyzes how *Kasky* might be used by anti-sweatshop advocates against corporations with sweatshop conditions. This Note concludes that *Kasky* is an imperfect tool but one that, when used in moderation, would not have a strong chilling effect on corporate speech.

Introduction

On Saturday, November 8, 1997, Marc Kasky picked up a copy of the *New York Times* and was struck by the front page headline, "Nike Shoe Plant in Vietnam is Called Unsafe for Workers."[1] The story detailed how a disgruntled Nike employee had leaked a damning internal audit of a Nike factory in Vietnam, uncovering numerous illegal and dangerous working conditions.[2] Massive amounts of carcinogens were discovered in the air of the factory, and employees were found to routinely work ten and a half hour days, six days a week, in violation of

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[1] Steven Greenhouse, *Nike Shoe Plant in Vietnam Is Called Unsafe for Workers,* N.Y. Times, Nov. 8, 1997, at A1; Roger Parloff, *Can We Talk?,* Fortune, Sept. 2, 2002, at 102, 108.

[2] Greenhouse, *supra* note 1, at A1, D2. The *New York Times* received the report in very circuitous fashion. *Id.* at D2. A Nike employee gave the internal audit to Dara O'Rourke, an employee of the United Nations Industrial Development Organization, who inspects factories in Vietnam. *Id.* O'Rourke gave the audit to The Transnational Resources and Action Center, who then made the report available to the *New York Times. Id.*

Vietnamese law.[3] Seventy-seven percent of the workers suffered from respiratory diseases, likely caused by the poor air quality in the factory.[4] The article contrasted the audit's findings with statements from Nike spokesperson Vada Manager, who commented that "there is a growing body of documentation that indicates that Nike workers earn superior wages and manufacture product under superior conditions."[5]

The article sparked a strong reaction within Mr. Kasky, a San Francisco consumer activist who had stopped buying Nike shoes several years earlier because of their sweatshop practices.[6] Mr. Kasky had recently been heartened when Nike released a code of conduct, which mandated certain health, safety, worker's rights and environmental standards by which all foreign Nike factories must abide.[7] The *New York Times* article revealed to Mr. Kasky that these codes were seemingly a sham.[8] It also made him feel uneasy because, as he explained later, "[it] struck me as false advertising. . . . The Nike code of conduct is marketing their products. They're marketing it to me under false grounds."[9] Kasky then contacted an old friend, lawyer Alan Caplan, to discuss bringing a claim against Nike under California's false advertising and unfair competition laws.[10]

This was the genesis of *Kasky v. Nike*, a false advertising case that sparked a controversial 2002 California Supreme Court decision con-

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[3] *Id.* at A1, D2. In the Tae Kwange Vina Factory, which makes 400,000 shoes a month and employs 9,200 workers, the audit found that

> [c]arcinogens that exceeded local legal standards by 177 times in parts of the plant and that 77 percent of the employees suffered from respiratory problems. The report also said that employees at the site . . . were forced to work 65 hours a week, far more than Vietnamese law allows, for $10 a week.

Id.

[4] *Id.*

[5] *Id.*

[6] Parloff, *supra* note 1, at 108. While by profession Kasky assisted cities by transforming unused military bases into community cultural centers, he had filed two similar false advertising lawsuits in the past. *Id.* One was against Perrier for claiming its water was spring water, another was against Pillsbury Co.'s labeling certain products as "San Francisco style" when they were actually produced in Mexico. *Id.* Kasky made no money from either lawsuit. *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* At the time Kasky filed the suit, both laws allowed claims to be filed by either a public prosecutor or a private attorney general who is defined as "any person acting for the interests of the general public." Kasky v. Nike, Inc., 45 P.3d 243, 249 (Cal. 2002). Therefore, private citizens could file such suits even though they may not have been personally injured. *Id.*

cerning the blurry line between free speech and commercial speech.[11] Kasky alleged that many of Nike's factual assertions concerning its labor practices abroad were false and misleading—assertions Nike made in a letter to the editor of the *New York Times*, a press release, a posting on Nike's website, and a letter to university presidents and athletic directors.[12] That the false advertising suit addressed statements made during a public relations campaign, and not in the traditional context of an advertisement, destined *Kasky* for controversy. Nike reframed the case as a First Amendment issue, claiming its assertions were not commercial speech and therefore could not be be challenged under the false advertising law.[13] To the chagrin of many free speech advocates and corporations, the California Supreme Court disagreed, holding that Nike's statements lose full First Amendment protection when they "concern facts material to commercial transactions—here, factual statements about how Nike makes its products."[14] In a surprising move, the U.S. Supreme Court initially agreed to hear *Kasky* on appeal, but after oral arguments issued a decision that the writ of certiorari was "improvidently granted," and declined to discuss the merits of the case.[15]

In the aftermath of the Supreme Court's nonruling, little discussion has followed regarding how the California Supreme Court's decision in *Kasky* might provide anti-sweatshop activists with an innovative way to hold corporations accountable for their labor conditions in fac-

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[11] *See* Nike, Inc. v. Kasky, 539 U.S. 654, 654 (2003); *Kasky*, 45 P.3d at 262; Rosemary Feitelberg & Joanna Ramey, *Nike Supreme Court Case Tests Free Speech*, FOOTWEAR NEWS, Feb. 10, 2003, at 12, *available at* http://lexis.com. Confusingly, the order of the names of the parties switched from *Kasky v. Nike* to *Nike v. Kasky* on appeal to the U.S. Supreme Court. *See Nike*, 539 U.S. at 654; *Kasky*, 45 P.3d at 243. For clarity's sake, this Note will consistently refer to the case as *Kasky* in the main text, since it was the California Supreme Court's decision that potentially created this new tool for activists, but citations will follow *Bluebook* protocol.

[12] *Nike*, 539 U.S. at 672; *Kasky*, 45 P.3d at 248. Specifically, Kasky claimed Nike made six misrepresentations as to its labor practices: 1) that workers who make Nike shoes are never subject to corporal punishment or sexual abuse, 2) that Nike workers were treated in accordance with applicable local government laws relating to wages and hours, 3) that Nike workers were also treated in accordance with applicable local laws relating to health and safety, 4) that Nike pays double the minimum wage in Southeast Asia, 5) workers who produce Nike products receive free meals and health care, and 6) that Nike guarantees a living wage for all workers who make Nike products. Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 857 (Cal. Ct. App. 2000).

[13] *Kasky*, 93 Cal. Rptr. 2d at 857.

[14] *Kasky*, 45 P.3d at 261.

[15] *Nike*, 539 U.S. at 655, 657.

tories overseas.[16] *Kasky* exploited the uncertainty of the commercial speech doctrine to create a novel cause of action: suing corporations based on their false statements concerning labor conditions, not based on the actual conditions themselves.[17] Although such lawsuits address only speech, they may still be very attractive to labor activists, who historically have had little success in seeking legal recourse against U.S.-based corporations for their labor practices abroad.[18] A proliferation of *Kasky*-style lawsuits, however, risks chilling corporate speech so that companies may decline to discuss labor conditions in their factories.[19] Indeed, this chilling may already be occurring, as many corporations and advertising groups declared after *Kasky* that they would refrain from publicly discussing any important public issues.[20]

This Note will examine the utility of *Kasky*-style lawsuits to challenge or change corporate labor practices both abroad and at home. Part I discusses the anti-sweatshop movement of the 1990s that functions as the context for *Kasky*. Part II examines the inadequacy of existing techniques anti-sweatshop activists use to try to hold corporations accountable for unfair labor conditions abroad and domestically. Part III explores the commercial speech doctrine, focusing on the California Supreme Court's holding in *Kasky* with regard to the doctrine, and

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[16] *See, e.g.*, Thomas C. Goldstein, Nike v. Kasky *and the Definition of Commercial Speech*, *in* 2003 Cato Sup. Ct. Rev. 63, 63 (2003). Generally, discussion has centered on critiquing the California Supreme Court's commercial speech analysis and the United States Supreme Court's strange disposal of the case. *See id.* Corporations and advertising groups have also bemoaned that the case will cause corporations to withdraw from public debate for fear of lawsuits from activist groups. *See* David M. Bigge, *Bring on the Bluewash: A Social Constructivist Argument Against Using* Nike v. Kasky *to Attack the UN Global Compact*, 14 Int'l Legal Persp. 6, 17 (2004); Theresa Howard, *Advertisers Say Ruling Leaves Them in Limbo*, USA Today, July 27, 2003, at 9B.

[17] Howard, *supra* note 16, at 9B.

[18] *See* Lena Ayoub, *Nike Just Does It—And Why the United States Shouldn't*, 11 DePaul Bus. L.J. 395, 422 (1999); Lisa G. Balthazar, *Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally Recognized Workers' Rights*, 29 Colum. Hum. Rts. L. Rev. 687, 714 (1998). *Kasky* settled three months after the Supreme Court's decision, with Nike agreeing to pay $1.5 million to the Fair Labor Association, an organization that was created by companies, international rights groups, and universities to monitor labor conditions in companies' factories abroad. Russell Mokhiber, *Nike's Come-From-Behind Win,* Multinational Monitor, Oct. 1, 2003, at 7, *available at* http://lexis.com. Although this action disappointed labor activists, the consequence was that the California Supreme Court's controversial decision became good law. *Id.*

[19] *See Nike,* 539 U.S. at 682 (Breyer, J., dissenting); *Kasky,* 45 P.3d at 271 (Brown, J., dissenting).

[20] Howard, *supra* note 16, at 9B. Indeed, Nike in the wake of the lawsuit declared it would not release its corporate responsibility report for the year of 2002 and would limit its participation in public events and media engagements in California. Mokhiber, *supra* note 18.

the implications of the U.S. Supreme Court's subsequent decision not to discuss the merits of the case. Part IV examines how the holding in *Kasky* could be used by labor activists, and compares the utility of *Kasky*-style lawsuits to other current methods. This section also addresses the potential chilling effect of such lawsuits on corporations' speech about labor conditions abroad and at home. Finally, this Note concludes that although *Kasky* is an imperfect instrument, anti-sweatshop activists could use *Kasky*-style lawsuits in moderation to effect change in corporate behavior without unduly chilling corporations' speech.

I. The Foundation: The Anti-Sweatshop Movement

Kasky can be understood best within the context of the massive anti-sweatshop movement that has snowballed in the U.S. over the last decade.[21] Composed of a loose coalition of college students, labor unions, human rights groups, churches and others, the movement began as a reaction to reports of terrible labor conditions in the factories of American corporations both abroad and at home.[22] These diverse groups have the common goal of trying to improve labor conditions and have used a variety of techniques ranging from consumer boycotts to lawsuits with limited success thus far.[23] Any discussion of the anti-sweatshop movement, however, must be grounded in a examination of the economic conditions that have sparked the reemergence of sweatshops both within the United States and abroad.

Although outsourcing has recently become a hot political topic, apparel and textile companies have been outsourcing their production facilities since the early 1970s.[24] From 1961 to 1996, the percentage of foreign-made clothes sold in the United States rose from 6% to over 60%.[25] The domestic garment industry has shifted its production from America to developing nations for three reasons: low priced imports from abroad, cheap labor, and favorable trade rules.[26] In the 1960s, low priced apparel imports from abroad flooded the United States, causing

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[21] *See* Richard Appelbaum & Peter Dreier, *The Campus Anti-Sweatshop Movement,* Am. Prospect, Sept.–Oct. 1999, at 71, 78; David Moberg, *Bringing Down Niketown,* Nation, July 7, 1999, at 15, 15–19.

[22] Moberg, *supra* note 21, at 15.

[23] *See id.* at 15–19.

[24] *See* Andrew Ross, *Introduction, in* No Sweat: Fashion, Free Trade, and the Rights of Garment Workers 9, 22 (Andrew Ross ed., 1997) [hereinafter No Sweat].

[25] Alan Howard, *Labor, History, and Sweatshops in the New Global Economy, in* No Sweat, *supra* note 24, at 151, 156–57.

[26] Ross, *supra* note 24, at 22.

a crisis in the domestic garment industry.[27] In order to remain competitive, manufacturers had three options: "automate, relocate, or evaporate."[28] As a result, many industries chose to relocate abroad because labor was considerably cheaper in developing nations, and corporations could operate there with a minimum of government regulation and scrutiny.[29] Moreover, domestic trade regulations encouraged the garment industry to do so.[30] Since 1963, a special provision in the U.S. Tariff Schedule allows pre-cut fabric to be exported for assembly as a garment and then reimported to the United States, with duties being charged only for the value added to the garment overseas.[31] Further, during the 1980s, President Reagan's free trade policies reduced or eliminated tariffs for goods coming from the Caribbean and Central America, providing another incentive for garment manufacturers to move abroad.[32]

An unintended consequence of the apparel industry relocating most of its production facilities abroad has been the revival of the sweatshop, both abroad and in the United States.[33] A "sweatshop" is generally defined as a business with grossly substandard working conditions,

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[27] *Id.*

[28] *Id.* The nature of the apparel industry precludes complete mechanization, which encourages outsourcing overseas. *Id.* Cloth is a flexible and pliant material, which makes its use in mechanical assembly lines difficult. Michael Piore, *The Economics of the Sweatshop, in* No Sweat, *supra* note 24, at 135, 138. Also, styles in the apparel industry often change rapidly by the season. *Id.* This constant change makes the investment in machinery hard to justify because this flexibility can be more easily achieved by a seamstress, a sewing machine, and patterns. *Id.* Since the seamstress can be paid less abroad, companies have an incentive to outsource manufacturing overseas. *See infra* note 29 and accompanying text.

[29] Ross, *supra* note 24, at 24; Appelbaum & Dreier, *supra* note 21, at 72–74. Whereas in the United States a manufacturer must pay $5.25 per hour to each employee, in Honduras, wages are typically 31¢ an hour, and in Haiti, 12¢. Ross, *supra* note 24, at 24. Even though most countries have minimum wage laws, prohibitions against child labor, and safety regulations, many nations are so eager for foreign investment that they do little to enforce such laws. *Id.*

[30] Ross, *supra* note 24, at 22.

[31] *Id.*

[32] *Id.* at 22–23. Many of these policies were the result of Reagan-era initiatives to fight communism in the nation's backyard. *Id.* at 22. During the 1970s, many socialist governments were taking hold across the Caribbean and Central America. *Id.* at 23. President Reagan pushed for greater free trade within the region, in the hope that this would lessen the allure of socialism by raising the standard of living. *Id.* In this spirit, Congress passed the Border Industrialization Initiative, which established free trade zones in several Central American countries, and the Caribbean Basin Initiative, which gave tariff free status to many products coming from the Caribbean. *Id.* at 22. Both policies were meant to encourage United States industries to invest abroad. Charles Kernaghan, *Paying to Lose Our Jobs, in* No Sweat, *supra* note 24, at 79, 81.

[33] Piore, *supra* note 28, at 135; Ross, *supra* note 24, at 12, 22.

where management regularly violates one or more laws governing child labor, wages and hours, or health and safety.[34] Those apparel manufacturers who relocated abroad found substandard working conditions were tolerated and, in some ways, encouraged by host governments.[35] Reports of working conditions that were grossly substandard—such as forced birth control on female workers, the suspicious deaths of union workers, routine twenty hour work days—began to trickle out of many garment factories in developing nations in the 1990s.[36] At the same time, those manufacturers who remained in the U.S. were forced to cut costs to remain competitive with the lower-priced imports.[37] Many did so by adopting illegal practices such as paying below the minimum wage, and ignoring overtime provisions and health regulations.[38]

In the early 1990s, unions, human rights groups, and consumer groups began to respond to the reports of terrible treatment in many garment factories.[39] These groups attempted to get the attention of the

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[34] Gen. Accounting Office, Data on the Tax Compliance of Sweatshops 1 (1994), *available at* http://www.unclefed.com/GAOReports/ggd94-210fs.pdf; Ross, *supra* note 24, at 10–14. No federal law or regulation defines sweatshop. Gen. Accounting Office, *supra* at 1. Historically, the term sweatshop derives from the system of subcontracting apparel work that flourished in the United States at the turn of the 20th century. Piore, *supra* note 28, at 135; Ross, *supra* note 24, at 13. In this system, instead of having garments fully assembled in one factory, the garment would be sent to several different contractors who had shops to do one specific task on the garment, such as sewing linings into coats. *See* David Von Drehle, Triangle: The Fire That Changed America 40 (2003); Ross *supra* note 24, at 13. The term sweatshop arises from the idea that these contractors literally "sweated" the profits out of the workers by forcing them to work long hours for little pay. Von Drehle, *supra* at 36. In the 1990s, the General Accounting Office created a working definition of sweatshop as "a business that violates more than one federal or state law governing wages and hours, child labor, health or safety, workers compensation, or industry registration." Gen. Accounting Office, *supra* at 1.

[35] Howard, *supra* note 25, at 157 (for an explanation of why host countries are reluctant to enforce or improve working conditions, *see infra* notes 109–12 and accompanying text).

[36] Ross, *supra* note 24, at 25–27.

[37] *See* Piore, *supra* note 28, at 135.

[38] *Id.* at 12. It is estimated that one third of New York City's shops are sweatshops, as are ninety percent of the shops in Los Angeles. *Id.* Many citizens were justifiably shocked by such reports, particularly because the United States had fought and been fairly successful in eradicating sweatshop conditions domestically during the first third of the twentieth century. Piore, *supra* note 28, at 135. The Progressive Movement first began trying to improve the conditions of sweatshops during the early twentieth century, but sweatshops were not truly obliterated until the New Deal and passage of the Fair Labor Standards Act of 1938. *Id.* at 135, 139.

[39] Kernaghan, *supra* note 32, at 44. In Europe, an anti-sweatshop movement began in the 1980s when a European department store chain retaliated against sweatshop workers organizing for better treatment in the Philippines. Maria Gillen, *The Apparel Industry Partnership's Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor's New*

mainstream media and force changes in corporate behavior, with few victories.[40] One rare success was a campaign of the National Labor Committee (NLC) in 1992.[41] The NLC became aware of abuses taking place in Central American factories, which were owned by American companies and supported by tax incentives through the Agency for International Development (USAID).[42] In an election year that focused on the economy, the NLC successfully framed the problem as one of U.S. tax dollars supporting the outsourcing of jobs to Central America.[43] "60 Minutes" aired a segment on the situation in Central American factories, prompting presidential candidate Bill Clinton to speak on the topic, and Congress to pass a law forbidding such incentives.[44]

In the mid-1990s, however, two events focused the public and media attention on the many human rights violations occurring in sweatshops abroad and at home.[45] In August 1995, federal and state agents raided a garment factory in El Monte, a suburb of Los Angeles, and found seventy-one Thai immigrants being held in involuntary servitude.[46] These workers, many of whom had been held in captivity for years behind barbed wire fences, were forced to work up to eighty-four hours a week making clothes bound for Filenes, Macy's and Nordstrom's.[47] This incident sparked outrage throughout the nation,

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Clothes?, 32 N.Y.U. J. Int'l L. & Pol. 1059, 1067 (2000). A boycott against the department store chain was organized, and after its partially successful conclusion, an organization called the Clean Clothes Campaign arose. *Id.* This group has chapters in almost a dozen European countries and focuses on empowering garment workers abroad. *Id.*

[40] *See* Kernaghan, *supra* note 32, at 44; *All Things Considered*: *Toycott* (NPR radio broadcast Dec. 17, 1996). For example, in 1991, the AFL-CIO, together with the National Consumer's League and Tibetan rights groups, initiated a "toycott" of toys made in China to protest the use of child labor and forced prison labor to produce these toys. Tom Brown, *Groups Announce Chinese 'Toycott'—Slave Labor, Child Labor Alleged in Manufacture,* Seattle Times, Nov. 25, 1991, at B4, *available at* http://lexis.com. The toycott transpired on and off for about five years without any real results. *All Things Considered, supra* (discussing that after five years the toycott had been largely unsuccessful).

[41] Kitty Krupat, *From War Zone to Free Trade Zone, in* No Sweat, *supra* note 24, at 51, 72–73. The NLC was originally formed to protest the AFL-CIO's support of U.S. policies in El Salvador and Nicaragua and had formed many contacts with labor leaders in Central America. *Id* at 64–68. During these campaigns, the NLC became aware that many United States companies were relocating their manufacturing facilities to Central America, with terrible work conditions. *Id.* at 65–66. USAID set up many incentives to encourage such relocation, including cheap loans, and tax rebates. *Id.* at 72–73.

[42] Krupat, *supra* note 41, at 72–73.

[43] *Id.*

[44] *Id.* at 73.

[45] Appelbaum & Dreier, *supra* note 21, at 74.

[46] *Id.*

[47] Ross, *supra* note 24, at 29; Appelbaum & Dreier, *supra* note 21, at 74.

and was only overshadowed by the revelation that child labor in Honduras produced Kathie Lee's clothing line at Wal-Mart.[48] On April 29, 1996, a fifteen-year-old worker from a factory that manufactured the Kathie Lee line testified at a congressional hearing as to the terrible working conditions.[49] Kathie Lee herself initially denied both knowledge and responsibility as to how her clothing line was produced, but in the face of an intense media storm, she quickly changed course.[50] She not only apologized to the worker, but also urged Wal-Mart to establish an independent monitoring system of its factories abroad, and she has since become an anti-sweatshop advocate.[51]

These stories popularized the anti-sweatshop movement, drawing diverse groups together to mobilize campaigns on the issue.[52] The Interfaith Center for Corporate Responsibility and Domini Social Investments began offering stockholder resolutions demanding a halt to labor rights abuses.[53] Unions, such as Union of Needle Trades, Industrial and Textile Workers (UNITE) and the International Textile, Garment and Leather Workers' Foundation began maior campaigns to organize sweatshop workers domestically and abroad.[54] Consumer groups such as the NLC and Human Rights Watch continued highly publicized campaigns against the GAP, Philips–Van Heusen, Disney and Star-

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[48] Ross, *supra* note 24, at 27. These revelations about Kathie Lee's clothing line were orchestrated by the National Labor Committee. Krupat, *supra* note 41, at 59–61.

[49] Krupat, *supra* note 41, at 59–60. Fifteen year old Wendy Dias testified that

> [a]t Global Fashion, there are about 100 minors like me—thirteen, fourteen years old—some even twelve. On the Kathie Lee pants, we were forced to work almost every day from 8 am to 9 pm. . . . Working all these hours, I made at most 240 lempiras, which is 31 U.S. cents. . . . The supervisors insult us and yell at us to work faster. . . . The bathroom is locked and you need permission and can use it twice a day.

Id. at 60.

[50] *Id.* at 61.

[51] *Id.* at 61–62.

[52] Moberg, *supra* note 21, at 15.

[53] *Id.*; Domini Social Investments: Spotlight on Sweatshops (1997–2005), http://www.domini.com/shareholder-advocacy/Issue-Spotlight/index.htm (last visited Jan. 13, 2006).

[54] Moberg, *supra* note 21, at 16. Organizing both abroad and at home, however, has been difficult due to the nature of the garment industry, where shops can be shut down or opened with ease. Appelbaum & Dreier, *supra* note 21, at 71. When UNITE tried to organize sweatshops that produced garments for Guess, in Los Angeles, Guess removed its business from those shops and began contracting with shops in Mexico. Moberg, *supra* note 21, at 16. Guess' move was entirely legal, as the National Labor Relations Act only protects unionized employees against the actions of employers. *See* National Labor Relations Act of 1935, 29 U.S.C. § 158 (2005). Here, Guess did not employ the workers, but was instead a customer of the independent garment shops that did employ them.

bucks.[55] Unexpectedly, college student groups also came to play a major rule in the anti-sweatshop movement.[56]

The anti-sweatshop movement benefited greatly from the support and participation of college students.[57] Student activist groups such as the United Students Against Sweatshops targeted a very narrow slice of the garment industry: the collegiate licensing industry.[58] This industry, which includes large corporations such as Nike, Champion and Fruit of the Loom, is responsible for manufacturing the sweatshirts, caps, tee-shirts and other clothing articles that bear the logo of various universities.[59] Anti-sweatshop student activists demanded that their university's clothing be manufactured in safe working conditions for fair wages and during reasonable hours.[60] The first success came in 1997 at Duke University, where student activists convinced the administration to require all licensing companies to adhere to a code of conduct forbidding child labor, requiring the minimum wage, and allowing visits by independent monitors.[61] This victory sparked student activists on 100 campuses across the country to begin their own campaigns, with varying degrees of success.[62]

Despite the anti-sweatshop movement's large coalition, the movement's achievements have been limited mostly to attracting media attention and gaining support from the public, as opposed to instituting meaningful reform.[63] This is due to the limitations of the consumer boycott—the technique of choice for most of the anti-sweatshop movement.[64] Boycotts succeed in bringing attention and embarrassment to the targeted company, and usually wring out concessions from the

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[55] Moberg, *supra* note 21, at 15.

[56] Appelbaum & Dreier, *supra* note 21, at 71–78.

[57] *Id.* The anti-sweatshop student movement is arguably the most pervasive example of student activism since the South African divestment campaign of the 1980s. *Id.* at 71.

[58] *Id.*

[59] *Id.* at 75–76.

[60] *Id.*

[61] Appelbaum & Dreier, *supra* note 21, at 71.

[62] *Id.* Student activists have used a variety of techniques to convince the administrations of the campuses to fight against sweatshops. *Id.* at 75–76. These range from 1960s-style occupations of administrative buildings, to less disruptive publicity stunts such as fashion shows discussing the conditions in which college clothes were made to presenting the college chancellor with a giant check for 16 cents—the hourly wage of factory workers in China. *Id.* at 75.

[63] Moberg, *supra* note 21, at 15–19.

[64] *Id.* at 16.

company such as promises to improve labor practices.[65] After the media storm has moved on, companies often put little effort into changing labor practices, or revert back to old ways, leaving activists to fight the same fights over again.[66] The lack of long-term enforcement mechanisms, either through governmental framework or the court systems, allows corporations to avoid genuine reform.[67] As the next section shows, anti-sweatshop activists have had limited success working within existing governmental framework, using the courts to enforce agreements, or holding companies financially accountable for unjust labor conditions.[68]

II. Legal and Governmental Barriers to Improving Sweatshop Conditions

Although the anti-sweatshop movement has attempted to improve sweatshop conditions using many different strategies, thus far most have provided limited achievements.[69] Domestically, federal and state laws that address the problems of sweatshops are not enforced effectively, and anti-sweatshop advocates have had limited success using the courts to curb sweatshop abuses for a variety of reasons.[70] Techniques to fight foreign sweatshops are even more limited, due to the com-

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[65] *Id.*; *The Shame of Sweatshops*, Consumer Rep., Aug. 1999, at 18, 19. Usually those concessions take the form of adopting codes of conduct for their factories. Moberg, *supra* note 21, at 16–18.

[66] Moberg, *supra* note 21, at 16; *The Shame of Sweatshops, supra* note 65, at 19. For example, Liz Claiborne adopted a code of conduct in the face of pressure in 1994. *Id.* In 1998, however, workers in several factories in El Salvador continued to work eighty-five hours a week, seven days a week. *Id.* These workers told the NLC that when monitors came to look at the factories, the factories were cleaned and painted. *Id.*

[67] *See* Moberg, *supra* note 21, at 18.

[68] *Id.* at 15–19.

[69] *Id.*

[70] Edna Bonacich & Richard P. Appelbaum, Behind the Label: Inequality in the Los Angeles Apparel Industry 221–61 (2000). While *Kasky* is aimed at corporations' labor abuses abroad, a discussion of barriers to curbing domestic sweatshop abuses is important for two reasons. Kasky v. Nike, Inc., 45 P.3d 243, 247–48 (Cal. 2002). First, the problems of domestic and foreign sweatshops are interrelated. *See supra* notes 39, 55 and accompanying text. It was the apparel industries' move overseas that created the resurgence of sweatshops domestically. *See supra* notes 39, 55 and accompanying text. Second, the anti-sweatshop movement has largely viewed sweatshops abroad and domestically as being two facets of the same problem. *See, e.g.,* Piore, *supra* note 28, at 135. The Apparel Industry Partnership (AIP) was created to deal with both problems, and the resulting Fair Labor Association (FLA) inspects both domestic and foreign factories. *See* Bonacich & Appelbaum, *supra* at 242–43; Fair Labor Association Public Reporting, http://www.fairlabor.org/all/transparency /reports.html (last visited Jan. 13, 2006).

plexities of international law.[71] The United States currently is under no treaty obligation to hold its corporations accountable for their labor conditions abroad, and enforcement mechanisms within host countries are weak.[72] Nor do American courts currently provide an effective venue for anti-sweatshop advocates to take U.S.-based corporations to task for their abuses abroad.[73] Private initiatives, such as corporations adopting codes of conduct, have had only limited success.[74] The following section explores these issues in greater detail.

A. *Domestic Sweatshops*

Due to the lack of effective public enforcement of labor laws, anti-sweatshop advocates have attempted to use the courts to make corporations accountable, and also to advocate for new, more effective laws.[75] Both strategies have had mixed results thus far.[76]

Strong federal labor laws address the problematic conditions of domestic sweatshops, but current enforcement efforts are not sufficient to conquer the problem.[77] The Fair Labor Standards Act of 1938 (FLSA) established within the United States a minimum wage, a forty-hour work week, overtime compensation, and a prohibition of child labor.[78] It also included the "Hot Goods" provision, which makes it a crime for any person to transport or sell an item made in a factory that violated any of the above provisions.[79] Strong governmental enforcement of the "Hot Goods" provision virtually eliminated sweatshops in the United States from the 1930s to the 1970s.[80] Afterwards, the "Hot Goods" provision fell into disuse until Clinton Administration Labor Secretary Robert Reich began enforcing it again in the early 1990s as a way to hold manufacturers, as well as shop owners, liable.[81] The Department

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[71] *See infra* notes 119–31 and accompanying text.

[72] *See infra* notes 113–18 and accompanying text.

[73] *See infra* notes 119–25 and accompanying text.

[74] *See* Gillen, *supra* note 39, at 1064.

[75] Ross, *supra* note 24, at 31; Moberg, *supra* note 21, at 15–19.

[76] Moberg, *supra* note 21, at 15–19.

[77] *Id.* at 18.

[78] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206, 207 (2005).

[79] *Id.* § 215. The Department of Labor can bring suit against such persons, with penalties including a $10,000 fine and jail time. *Id.* § 216(a). It also establishes a cause of action for employees to sue and receive double their unpaid minimum wage or unpaid overtime compensation, plus attorney's fees. *Id.* § 216(b).

[80] Moberg, *supra* note 21, at 18.

[81] Bonacich & Appelbaum, *supra* note 70, at 228. While sweatshop owners are typically the ones to violate wage and hour provisions, clothing manufacturers are usually able to escape liability by claiming that they only contract for work with these owners and are not

of Labor (DOL) has used this technique to force manufacturers to sign compliance agreements guaranteeing that they would only work with contractors who comply with the FLSA, and promising to monitor to ensure conformity.[82] Although these compliance agreements have recovered 1.3 million dollars in back wages for more than 3000 sweatshop workers in California alone, the DOL's approach has only impacted a small portion of the sweatshop industry.[83] This is due primarily to limited resources—the DOL has only 800 inspectors nation-wide and conducts only 300 investigations per year for the more than the estimated 22,000 sweatshops in the nation.[84] Thus, anti-sweatshop advocates must turn to some mechanism of private enforcement to meaningfully alleviate domestic sweatshop conditions.[85]

The anti-sweatshop movement has had greater success using the court system to hold manufacturers accountable for domestic sweatshop conditions.[86] Many activists assist sweatshop workers to initiate suits based on violations of the FLSA wage and hours provisions, hoping to set useful precedent to hold retailers accountable.[87] For example, the captive Thai workers from El Monte initiated a suit against the retailers of clothing they had manufactured, claiming that the retailers were negligent per se based on the "Hot Goods" provision.[88] When the retailers attempted to have this claim dismissed, the judge ruled the claim was viable, leaving this avenue open as a means of holding retailers and manufacturers accountable to future plaintiffs.[89]

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actually responsible for the conditions therein. *Id.* The "Hot Goods" provision, on the other hand, holds liable any person who tries to transport goods made in these forbidden conditions, whether they knew about the conditions or not. 29 U.S.C. § 216(a). As the manufacturers are typically the ones responsible for moving the garments across interstate lines, they are usually held liable. BONACICH & APPELBAUM, *supra* note 70, at 228.

[82] BONACICH & APPELBAUM, *supra* note 70, at 229–30.

[83] *Id.* at 236; Ross, *supra* note 24, at 28–29.

[84] BONACICH & APPELBAUM, *supra* note 70, at 233; Ross, *supra* note 24, at 28–29. The Bush Administration has continued many of the enforcement practices that Reich began in the 1990s, as the Department of Labor recovered $6 million in back pay for garment workers in 2002. Press Release, Dep't of Labor, Labor Department Enforcement Reaches 10-Year High (Dec. 12, 2002), http://www.dol.gov/opa/media/press/esa/ESA2002694.htm.

[85] *See* Ross, *supra* note 24, at 28–29.

[86] BONACICH & APPELBAUM, *supra* note 70, at 308–09.

[87] *See id.; see, e.g.*, Bureerong v. Uvawas, 959 F. Supp. 1231, 1236 (D.Cal. 1997).

[88] *Bureerong*, 959 F. Supp. at 1236.

[89] *Id.* at 1236–39. The defendants challenged this claim early on, and the judge allowed it to be dismissed based on insufficiency of evidence because the plaintiffs had not alleged all four elements of negligence per se under California law. *Id.* at 1236–37. The claim was dismissed without prejudice, however, because the judge decided that even though the "Hot Goods" provision did not explicitly create a private form of action, precedent allowed federal and state statutes to set the standard of care in state negligence per se

The utility of such lawsuits is limited, however, because anti-sweatshop activists often face difficulty in finding workers who are willing to sue.[90] Many sweatshop workers in the United States are illegal immigrants who fear deportation if they come forward.[91] The situation is exacerbated by the 1986 Immigrant Reform and Control Act, which created higher penalties for employers who hire illegal immigrants, thus limiting the pool of employers willing to hire illegal immigrants.[92] Therefore, immigrants are desperate for whatever work they find; a fact exploited by employers who still hire illegal immigrants.[93] These employers then can create illegal substandard working conditions because they know they are unlikely to be reported.[94] Moreover, following the Supreme Court's decision in *Hoffman Plastics Compounds v. NLRB,* few remedies may be available to illegal immigrants for certain workers' rights violations.[95] In *Hoffman Plastics,* the Supreme Court held that the National Labor Relations Board (NLRB) was not allowed to award backpay to an illegal

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actions. *Id.* at 1237. Moreover, the court found that the FLSA was intended to protect individual employees from certain injuries and therefore the "Hot Goods" provision may have been intended to do as well. *Id.* at 1237–78.

[90] *See* Farhan Haq, *Critics Link Immigration Laws to Sweatshops,* Inter Press Serv., Mar. 26, 1996, ¶ 17.

[91] *See id.* Even legal immigrants face barriers to coming forward. Kate Berry, *Garment Workers Face Another Extended Run in Sweatshop Suit,* L.A. Bus. J., Mar. 29, 2004, at 11, *available at* http://lexis.com. One worker who joined a lawsuit against Forever 21, was blacklisted from all garment factories and slapped with a defamation countersuit that was eventuallv dropped. *Id.*

[92] Haq, *supra* note 90, ¶¶ 5–6.

[93] *Id.*¶ 5.

[94] *See id.* ¶ 6.

[95] *See* 535 U.S. 137, 140 (2002). In *Hoffman Plastics,* the majority of the Supreme Court found that the National Labor Relations Board (NLRB) was not allowed to award backpay to an illegal alien even though he made out a successful National Labor Relations Act (NLRA) violation. *Id.* They reasoned that awarding backpay in this case was beyond the discretion of the NLRB, because it violated the spirit and intention of the Immigration Reform and Control Act of 1986 by encouraging future violations of immigration law. *Id.* Subsequent federal court decisions, however, have interpreted *Hoffman Plastics* very narrowly, as foreclosing an award of backpay to illegal aliens only under the NLRA. *See* Rivera v. Nibco, 364 F.3d 1057, 1066 (9th Cir. 2004); Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002). In *Rivera,* the 9th Circuit distinguished *Hoffman* from the Title VII case in front of it, reasoning that *Hoffman Plastics* limited the discretion of the NLRB, but not that of federal courts, who have the authority to interpret and weigh all laws. *Rivera,* 364 F.3d at 1068. In *Flores,* the court found that *Hoffman Plastics* only applied to backpay for work that had not yet been performed due to illegal termination, not to work that had already been performed and not adequately compensated under the FLSA. *Flores,* 233 F. Supp. 2d at 463. Moreover, many courts have limited the ability of defendants to request immigration status during discovery, believing such requests would chill the reporting of civil rights and wage violations. *See Rivera,* 364 F.3d at 1057. Thus, *Hoffman Plastic*s' impact is unclear. *See id.* at 1057, 1068; *Flores,* 233 F. Supp. 2d at 463.

alien fired for being a union supporter because of his immigration status.[96] Not only does *Hoffman Plastics* further deter lawsuits by illegal immigrants for other workplace violations, it suggests the fundamental reluctance on the part of courts to provide full labor rights to illegal immigrants.[97]

Anti-sweatshop advocates also have the option of turning to the legislative process to create state or federal laws to ease the problems they encounter in pursuing lawsuits.[98] On the state level, union advocates have had some legislative success in creating joint liability for the manufacturers and the retailers complicit in the violation of labor laws.[99] In New York, for example, unions successfully lobbied for the Joint Liability Act of 1998, which holds manufacturers liable for sweatshop conditions at contracted factories.[100] On the federal level, however, a similar bill called the Stop Sweatshops Bill, which would have held both retailers and manufacturers jointly liable for contractor sweatshop violations, was introduced in 1996 but never made it out of committee.[101] Sweatshop advocates could also turn their attention to lobbying for increased Department of Labor funding for sweatshop law enforcement, or ensuring remedies for illegal immigrants who come forward with labor law violations.[102] So far, however, the sweatshop

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[96] 535 U.S. at 140.

[97] *See id.* at 150. But again, lower courts have been more protective of immigrant rights. *See supra* note 95.

[98] Bonacich & Appelbaum, *supra* note 70, at 309.

[99] *See id.*

[100] *See* N.Y. Lab. Law § 345-a(1) (Consol. 2004); Bonacich & Appelbaum, *supra* note 70, at 309. The law sets up a damages level of 200% of the wages owed for repeating violators, and creates a misdemeanor felony for such violators, with a fine of $20,000. Bonacich & Appelbaum, *supra* note 70, at 245.

[101] Stop Sweatshops Act of 1996, H.R. 4166, 104th Cong. § 14A (1996); Bonacich & Appelbaum, *supra* note 70, at 244; Ross, *supra* note 24, at 31.

[102] *See* Hoffman Plastics Compounds v. NLRB, 535 U.S. 137, 140 (2002); Bonacich & Appelbaum, *supra* note 70, at 31, 233. Another loophole ripe for legislative change is the special status of the American territories of Saipan and American Samoa. These territories are allowed to sew a "made in the U.S.A." label onto garments and ship to the United States duty-free, but have the authority to set their own lower minimum wage and have more lax immigration policies. Jennifer Lin, *Island Sweatshops Ignore U.S. Laws,* Florida Times-Union, Feb. 28, 1998, at A1, *available at* http://lexis.com. These territories host many sweatshops, where "guest workers" live and work in deplorable conditions, and could be improved by a federal law applying federal immigration and labor laws to these islands. *Id.* While such laws have been proposed in Congress, the Republican Party in the House of Representatives has staunchly blocked these proposals. *Id.* Former House Majority Leader Dick Armey labeled such bills as counter to the "principles of the Republican Party." *Id.*

movement has done little lobbying on the federal level for such changes.[103]

B. *International Sweatshops*

Anti-sweatshop advocates face greater difficulty in holding U.S.-based corporations accountable for their actions in foreign nations, due to complexities in international law and the realities of free trade in the developing world.[104] Host countries are unlikely to enforce adequate labor conditions, despite international obligations to do so.[105] Nor do they have much incentive to compel adequate working conditions, because international governmental organizations have shied away from dealing with labor issues.[106] Compounding this problem, the United States thus far has been unwilling to apply its labor laws extra-territorially to U.S.-based corporations abroad.[107] Moreover, private enforcement mechanisms, such as corporate codes of conduct, have thus far been inadequate.[108]

Host nations of sweatshops are reluctant to strongly enforce their own labor laws primarily due to economic competition with other developing nations.[109] Developing nations are desperate for foreign investment, which could improve the economy and living conditions.[110] They compete with other developing nations to attract investment by offering incentives such as economic subsidies and minimal regulation of labor and safety.[111] Thus, despite treaties requiring these nations to enforce certain labor standards, few countries do so for fear of a competitive disadvantage with other developing nations.[112]

Nor do existing international trade or labor institutions provide a viable framework for the anti-sweatshop movement to ensure compli-

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[103] *See* Lin, *supra* note 102, at A1.

[104] *See* Ayoub, *supra* note 18, at 424.

[105] *Id.*

[106] Larry A. DiMatteo, *The DOHA Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 120 (2003).

[107] Ayoub, *supra* note 18, at 424.

[108] Gillen, *supra* note 39.

[109] Ayoub, *supra* note 18, at 422–23.

[110] *Id.*

[111] *Id.*

[112] *Id.* For example, some 142 countries have ratified the Minimum Age Convention, which sets the minimum age for employment to be 15 years old, or in some exceptional cases, 14 years old. Minimum Age Convention, June 26, 1973, ILO Doc. C138. Among the signatories is Honduras, home to the notorious Kathie Lee sweatshop scandal involving child workers as young as twelve years old. *See id.; supra* note 50 and accompanying text.

ance with labor standards.[113] The World Trade Organization (WTO), which has the power to sanction member countries for unfair trade practices, has not defined 'unfair trade practices' to include labor rights issues.[114] While the United States and the European Union have pushed for such a definition, delegates from developing countries have successfully prevented the adoption of trade sanctions to enforce labor standards.[115] Instead, the WTO has delegated jurisdiction over labor issues to the International Labor Organization (ILO), a United Nations affiliated agency that sets international labor standards through a series of international conventions.[116] Although the ILO has broad power to sanction signatory nations that violate a convention, it has rarely invoked this power, and instead has sought compliance through public pressure and threats of lessened privileges within the ILO.[117]

This failure of the international community to deal with the problem of sweatshops has led many activists to try to use the American court system to hold U.S.-based corporations accountable for labor rights abuses abroad.[118] These activists have had limited success, however, because courts are generally reluctant to apply American labor

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[113] *See* Ayoub, *supra* note 18, at 417–20.

[114] DiMatteo, *supra* note 106, at 97. Nonetheless, the WTO allows countries to pass laws that restrict imports for reasons that protect public morals and safety concerns. *Id.* at 126. Thus, it is possible that the United States could circumvent the current definition of "unfair trade practices" by passing a law requiring imported products be produced in certain labor conditions, if such a law was explicitly for the purpose of protecting safety and public morals. *See id.* Such a law might survive a WTO challenge on these grounds. *See id.*

[115] *Id.* at 121. One way to reform the WTO would be to construe the International Labor Organization convention violations as social dumping (article VI). *Id.* at 125. Social dumping is the idea that labor violations are an unfair subsidy on the cost of a country's products, putting other countries that do avoid labor violations at a competitive disadvantage. *Id.* at 125–26. The WTO currently has provisions that allow dumping to give rise to a cause of action within WTO jurisdiction. *Id.* Thus, including labor violations as dumping might provide a cause of action to bring countries with many labor violations to task. *See id.*

[116] Balthazar, *supra* note 18, at 699, 701–02; DiMatteo, *supra* note 106, at 123.

[117] Kimberly Ann Elliot & Richard B. Freeman, Can Labor Standards Improve Under Globalization? 102 (2003). The ILO has broad power to impose economic and other sanctions, although it has never actually exercised this power. *Id.* at 103. While the ILO often threatens to sanction countries to comply, it has only actually sanctioned a country once. *Id.* at 104. Complaints were brought against Burma for forced labor in 1996, and, after years of continued non-compliance, in 2000, the ILO imposed sanctions against Burma. *Id.* at 105. These sanctions called on member states to "review their relationship with the Government of Myanmar and to take appropriate measures." *Id.* Most nations took no action, however, and forced labor continues in Burma to this day. *Id.* at 106. The ILO rarely takes strong measures because most ILO member nations balk at imposing economic sanctions. *See id.*

[118] Balthazar, *supra* note 18, at 714.

laws extraterritorially.[119] The plain language of some labor laws, such as the FLSA, explicitly excludes application of the law in a "foreign country."[120] Moreover, courts will presume that a law applies only in the United States unless there is an explicit statement of Congress' intent to apply a law extraterritorially.[121] For example, in *Equal Employment Opportunity Commission v. Arabian America Oil Co.* (*Aramco*), the Supreme Court found that Title VII of the 1964 Civil Rights Act did not protect American citizens working for American corporations abroad because the language of the bill never stated its intent to apply extraterritorially.[122] Congress quickly responded by amending Title VII to define "employee" as "a citizen of the United States," which provided the necessary explicit intent.[123] Following this congressional action, Title VII became the only American labor law to apply abroad.[124] Its utility in compensating for sweatshop abuses abroad is limited, however, because it applies only to American citizens.[125]

Although Congress has passed laws that grant foreign nationals certain legal rights with regard to labor conditions internationally, labor activists have faced resistance within the U.S. court system in enforcing such laws.[126] For example, Congress amended the U.S. Generalized System of Preferences (GSP)—a trade act that allows products from developing countries duty-free access to the U.S.—to give developing countries benefits only if they were taking steps to improve labor conditions for workers.[127] When unions filed suit against the federal government for failing to enforce these provisions, however, their suit was dismissed based on lack of standing, thus limiting the availability of the GSP to protect foreign workers.[128] Similarly, labor activists have faced great difficulty in using the Alien Torts Claims Act (ATCA), which allows aliens to bring a tort claim based on a violation of a U.S. treaty

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[119] Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights*, 10 Temp. Int'l & Comp. L.J. 123, 133 (1996).

[120] 29 U.S.C. § 213(f) (2005).

[121] Gibney & Emerick, *supra* note 119, at 132.

[122] 499 U.S. 244, 246–47 (1991).

[123] *See* 42 U.S.C. § 2000e(f) (2005); Civil Rights Act of 1991, Pub. L. No. 102–166, § 109(a), 105 Stat. 1071 (1991).

[124] Gibney & Emerick, *supra* note 119, at 123–34.

[125] *See id.* at 134.

[126] *See* Balthazar, *supra* note 18, at 707–12.

[127] *Id.* at 707–08. Specifically, these rights were supposed to include freedom of association, the right to organize, a prohibition on forced labor, and acceptable minimum wages and conditions, and minimum age for employment. *Id.* at 708.

[128] *Id.* at 712.

against U.S. nationals.[129] Although the ATCA has been successfully used against foreign officials involved in human rights violations, the courts have never allowed an ATCA claim against a U.S.-based corporation for labor rights abuses, due to lack of subject matter jurisdiction, lack of standing, and lack of state action.[130]

Furthermore, the United States has no international obligation to regulate the actions of U.S.-based corporations abroad that violate international treaties.[131] The United States is not a signatory to the International Covenant on Economic, Social, and Cultural Rights (ICESC), the Convention on the Elimination of Discrimination Against Women (CEDAW) or the Convention on the Rights of the Child (CRC)—the three fundamental international treaties that address labor rights.[132] The United States also has refused to ratify ten of the eleven basic labor rights conventions of the ILO.[133] Ratification of these treaties would at least form a basis for governmental responsibility to regulate the actions of U.S.-based corporations and perhaps strengthen the possibility of a successful claim under the Alien Torts Claims Act.[134] Absent such a legal basis to take American corporations to task for labor violations abroad, labor activists have had to search for other ways to regulate corporate conduct.

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[129] 28 U.S.C. § 1350 (2005).

[130] Logan Michael Breed, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1014, 1015–23 (2002) (finding the ATCA not to be an effective vehicle to regulate the conduct of American corporations abroad).

[131] Ayoub, *supra* note 18, at 398, Balthazar, *supra* note 18, at 708.

[132] Ayoub, *supra* note 18, at 398. While these treaties lack sanctioning ability, they form the basis of obligations for signatory nations to pass laws banning child labor (CRC), establishing safe working conditions (CEDAW, ISESC) and ensuring that workers receive an adequate wage (ISESC). *Id.* at 414–16. The treaties suggest that nations must regulate the conduct of corporations based in their country as well. *Id.* Currently, however, these covenants are treated mostly as statements of purpose. Balthazar, *supra* note 18, at 698. Professor Ayoub suggests, however, that the International Covenant of Civil and Political Rights, which the U.S. has signed, creates a duty for the United States to regulate the behavior of U.S.-based corporations and their subsidiaries abroad in terms of labor conditions. *See* Ayoub, *supra* note 18, at 398–99.

[133] Balthazar, *supra* note 18, at 708. The United States has signed the Abolition of Forced Labor Convention, but has refused to ratify conventions dealing with freedom of association, equality of opportunity and treatment, and others. *Id.* at 708–09. The United States has maintained that it does not need to ratify these conventions because it has already passed domestic laws that guarantee labor rights exceeding those mandated by the conventions. *Id.* at 708. The ILO cannot enforce the standards against a country that has not signed the convention. *Id.* at 700.

[134] *See* 28 U.S.C. § 1350 (2005); Balthazar, *supra* note 18, at 698.

Increasingly, labor activists have turned to pressuring corporations to adopt codes of conduct, which are private initiatives in which corporations set standards for the labor conditions of their factories abroad.[135] Anti-sweatshop codes of conduct typically mandate that the corporation will only do business with a contractor who eschews child labor or forced labor, sets a minimum wage and maximum hour caps, and maintains some level of health and safety in the workplace.[136] Many corporations have adopted these codes, often after negative publicity generated by the anti-sweatshop movement, in an effort to show consumers that they do care about sweatshop conditions.[137] Nonetheless, these codes generally lack effective monitoring and enforcement mechanisms, and thus actually do little to improve sweatshop conditions.[138] Generally, monitoring is done by employees of the corporation, who are biased and unlikely to report factory conditions accurately.[139] If a corporation does find violations within its factories, there are no mechanisms to make these violations public, and so the corporation faces few sanctions.[140] Moreover, when a corporation does find a violation, their reaction is often to terminate their contract with the offending factory, effectively punishing the workers who reported the violations by eliminating their jobs.[141]

The Fair Labor Association (FLA), a nonprofit organization that provides a unified code of conduct and monitoring for many companies, was created to address some of the problems with individual codes of conduct.[142] The FLA grew out of the Apparel Industry Partnership (AIP), a taskforce of garment manufacturers, unions and human rights groups created by President Clinton in 1996 to investigate the sweatshop issue.[143] In 1998, the AIP taskforce created the FLA to run a moni-

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[135] Balthazar, *supra* note 18, at 718. The practice is modeled on the Sullivan Principles, a code of conduct mandating nondiscrimination policies that was adopted by twelve U.S.-based firms doing business in South Africa during the anti-apartheid movement. *Id.* at 716–17.

[136] Ayoub, *supra* note 18, at 403–04; Gillen, *supra* note 39, at 1069–70.

[137] *See* Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 Colum. J. Transnat'l L. 603, 612–13 (2000).

[138] Ayoub, *supra* note 18, at 405.

[139] *Id.* at 405–06.

[140] *Id.* at 405.

[141] Bonacich & Appelbaum, *supra* note 70, at 306. This is exactly what happened during an NLC campaign against The GAP in 1995. *Id.* After making public violations at a GAP contracted factory, GAP announced it would take its work away from that factory. *Id.*

[142] Appelbaum & Dreier, *supra* note 21, at 71–72; Moberg, *supra* note 21, at 18–19.

[143] Bonacich & Appelbaum, *supra* note 70, at 242–43; Appelbaum & Dreier, *supra* note 21, at 74. The garment industry members of the AIP generally were companies who had been the target of media campaigns exposing sweatshop practices in these factories. *See*

toring system for member companies based on a unified code of conduct, and make the results public.[144] Several corporations in the apparel industry have embraced the FLA as a way to demonstrate their commitment to the sweatshop issue to the public.[145]

Nonetheless, many in the anti-sweatshop movement doubt the legitimacy of the FLA.[146] The AIP-member unions and the Interfaith Center of Corporate Responsibility dropped out of the FLA, claiming that the code of conduct was far too lax because it denied workers a living wage and set the maximum number of working hours per week at sixty.[147] The code of conduct also allows contractors to evade this maximum number of hours in "extraordinary business circumstances," and bars child labor only below the age of fourteen.[148] The FLA's monitoring mechanism has also been criticized because companies get to choose their external monitors, who examine only five percent of the company's factories and are not required to disclose the locations of inspected factories.[149]

Similar difficulties arise in the efforts to improve sweatshops within the United States and abroad. In both arenas, public enforcement of labor laws has not been effective at eradicating the problem.[150] Domestically, the federal government has not allotted sufficient funds to fully enforce the law.[151] Internationally, host countries are reluctant to enforce their own laws, and multinational enforcement mechanisms are weak.[152] Nor has private enforcement been fully effective in either

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Appelbaum & Dreier, *supra* note 21, at 74. They were Nike, Reebok, L.L. Bean, Liz Claiborne, Patagonia, Phillips-Van Heusen, Wal-Mart's Kathie Lee brand, and Nicole Miller. *Id.* Union representatives were UNITE, the AFL-CIO, and the Retail Wholesale and Department Store Union. *Id.* Lastly, the AIP included several nonprofit groups, the National Consumer's League, Interfaith Center on Corporate Responsibility, International Labor Rights Fund, Lawyers Committee for Human Rights, Business for Social Responsibility, and the Robert Kennedy Memorial Center for Human Rights. *Id.*

144 Bonacich & Appelbaum, *supra* note 70, at 243–44. The FLA published its first round of monitoring of member companies on its website in June 2003. Aaron Bernstein, *Sweatshops: Finally, Airing the Dirty Linen*, Bus. Week, June 23, 2003, at 100.

145 Gillen, *supra* note 39, at 1070.

146 *See* Moberg, *supra* note 21, at 16–18.

147 Bonacich & Appelbaum, *supra* note 70, at 244.

148 Gillen, *supra* note 39, at 1075–76, 1083.

149 *Id.* at 1091; Bernstein, *supra* note 144. While the FLA monitors few factories and does not disclose the name of such factories, it does publicize on its website specific results of factory inspections broken down by company. *See* Fair Labor Association, *supra* note 70.

150 *See supra* notes 77–84, 118–25 and accompanying text.

151 *See supra* notes 84–85 and accompanying text.

152 *See supra* notes 109–17 and accompanying text.

arena.[153] In the United States, advocates have had some success, but their efforts are hindered due to the difficulty in finding workers to come forward.[154] Internationally, advocates have struggled to find a vehicle to enforce labor standards in American courts, and the use of codes of conduct such as the FLA have thus far been inadequate in curbing the problem.[155] Since public enforcement seems to be weak, activists need an effective method to privately enforce labor standards.[156] Thus, suits such as *Kasky,* which use speech as the grounds for a suit, may provide an alternative that activists could utilize to encourage corporations to enact meaningful changes.

III. *Kasky*'s Effect on Commercial Speech

Considering the dearth of effective techniques to reign in sweatshop abuses both abroad and at home, *Kasky* may provide an innovative cause of action for sweatshop activists to hold corporations accountable.[157] Understanding *Kasky*'s importance requires a brief overview of the commercial speech doctrine, specifically focusing on definitions of commercial speech.

A. *Commercial Speech Doctrine: Definitions*

Modern jurisprudence is clear that commercial speech is protected by the First Amendment at a lower level than other kinds of speech,[158]

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[153] *See supra* notes 86–97, 126–30, 135–49 and accompanying text.

[154] *See supra* notes 86–97 and accompanying text.

[155] *See supra* notes 118–31, 135–49 and accompanying text.

[156] *See supra* notes 86–97, 118–31, 135–49 and accompanying text.

[157] *See* Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002).

[158] Erwin Chemerinsky, Constitutional Law Principles and Policies 903 (2d ed. 2002). This lesser level of protection gives the government greater latitude to regulate commercial speech. *Id.* Until the 1970s, the Supreme Court had held that commercial speech was not protected at all by the First Amendment. *See* Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942); Chemerinsky, *supra* at 1044. In *Bigelow v. Virginia*, however, the Court reversed this long-held conclusion, finding that a state law prohibiting advertisements of abortion services was unconstitutional. 421 U.S. 809, 829 (1975); Chemerinsky, *supra* at 1045. Since then, the Court has protected commercial speech in certain settings, developing what is essentially a four part intermediate scrutiny test to determine if government regulation is constitutional. *See* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); Chemerinsky, *supra* at 1058. First, a court must determine whether the commercial speech is false or misleading, or concerning illegal activities, and thus is not protected by the First Amendment. *Cent. Hudson*, 447 U.S. at 566. If the speech is protected by the First Amendment, the court then must determine if the government's interest in restricting such speech is substantial. *Id.* If it is substantial, the court must then determine whether the law in question "directly advances" this asserted government inter-

but the Supreme Court has never given a clear or comprehensive definition of commercial speech.[159] In an early treatment of the issue, the Court considered commercial speech to be a statement that "propose[s] a commercial transaction."[160] This definition is vague and probably overly narrow, as it would exclude descriptions of products and services that the Supreme Court later found to be commercial speech.[161] In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court defined commercial speech in a different way, as an "expression related solely to the economic interests of the speaker and its audience."[162] This definition is probably overly broad, because it might implicate areas traditionally fully protected by the First Amendment, such as a newspaper or a book publishing company.[163] The Court's most clear definition of commercial speech came in *Bolger v. Young Drug Products Corp.*, where the Court defined commercial speech under a totality of circumstances test.[164] This test considers whether the speech is some sort of advertisement, whether it refers to a specific product, and whether the speaker had an economic motivation for making the speech.[165] Nonetheless, the *Bolger* test may be too narrow in terms of the word "advertisement."[166] While *Bolger* suggests that an advertisement is defined as speech occurring within a traditional print/media setting, the Court has since expanded commercial

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est. *Id.* If the law does directly advance the interest, the court must also inquire as to whether the law is "more extensive than necessary" to achieve this government interest. *Id.*

[159] CHEMERINSKY, *supra* note 158, at 1047–48.

[160] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976). In each case, the Court tends to invent a definition which best fits with the product in question. *See id.* at 749. In *Virginia State Board*, a Virginia law forbid pharmacists from advertising the price of prescription drugs. *Id.* In that case, the speech in question really did "no more than propose a commercial transaction" because it was literally an offer of a price. *See id.* at 762.

[161] CHEMERINSKY, *supra* note 158, at 1047. Subsequent cases have recognized items such as an alcohol content label on a beer bottle, statements on a business card, and statements on a financial letterhead as commercial speech, which all fall beyond the narrow purview of proposing a commercial transaction. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 481–82 (1995) (alcohol label); Ibanez v. Florida Dep't of Bus. & Prof'l Regulation Bd. of Accountancy, 512 U.S. 136, 138, 142 (1990) (business cards and letterhead).

[162] *Cent. Hudson*, 447 U.S. at 561.

[163] CHEMERINSKY, *supra* note 158, at 1048.

[164] 463 U.S. 60, 66–67 (1983).

[165] *Id.* The court found that the combination of all three factors in this case was enough to determine that it was commercial speech, while no one factor on its own was enough to support that conclusion. *Id.*

[166] CHEMERINSKY, *supra* note 158, at 1048.

speech to include some speech that occurs outside a traditional advertising format.[167]

Despite the ambiguity of the definition of commercial speech, the Supreme Court has clearly held that only truthful commercial speech is protected by the First Amendment.[168] Thus, the states and the federal government are allowed to regulate false and misleading advertising without any interference.[169] Although most false speech is protected,[170] false commercial speech differs from other kinds of false speech in fundamental ways that justifies its unprotected status.[171] The truthfulness of commercial speech can be more easily verified than other kinds of speech because commercial speech is typically objective information that the advertiser possesses.[172] Further, commercial speech is seen as less likely to be chilled than other kinds of speech because of the motive of commercial speakers.[173] And lastly, commercial speech is in-

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[167] *See, e.g.*, Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation Bd. of Accountancy, 512 U.S. 136, 142 (1990) (accepting statements on business cards and a letterhead as commercial speech); *Bolger*, 463 U.S. at 66. In *Bolger,* the speech in question was mass mailings to the public that included flyers promoting condoms and discussing the benefits of contraceptives in general. *Id.* at 62. This fits into a more traditional conception of an advertisement. *See id.* at 66.

[168] *See Bolger*, 463 U.S. at 69 (finding that "the State may deal effectively with false, deceptive, or misleading sales techniques"); Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (finding that "[f]or commercial speech to come within that provision [of the First Amendment], it at least must concern lawful activity and not be misleading"); CHEMERINSKY, *supra* note 158, at 1054. This idea is so universally accepted that it has become incorporated into the first part of the *Central Hudson* test. *See supra* note 158. Interestingly, the Court has come to this conclusion even though the Supreme Court has never directly heard a challenge to a false advertising law on First Amendment grounds. CHEMERINSKY, *supra* note 158, at 1054.

[169] *Bolger,* 463 U.S. at 69; Virginia State Bd. of Pharmacy, 425 U.S. 748, 771–72 (1976).

[170] *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 271–73 (1964) (finding First Amendment protection for false statements contained in an editorial advertisement).

[171] CHEMERINSKY, *supra* note 158, at 1054–55.

[172] *Va. State Bd.*, 425 U.S. at 772 n.24 (concluding, "[t]he truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone."); *see also id.* at 777 (Stewart, J., concurring) (concluding that, "[t]he commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression.").

[173] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (finding that "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation"); *Va. State Bd.,* 425 U.S. at 772 n.24.

tended to sell products and increase profits, so even if the false commercial speech is regulated, commercial speakers will continue to speak in order to continue selling.[174] Moreover, false commercial speech is uniquely harmful because it distorts the marketplace by misleading consumers.[175] The government has a right to protect consumers from economic harms that stem from Congress' power to regulate commercial transactions in general.[176]

One area of uncertainty within the commercial speech doctrine is what level of protection should be given to expressions that combine commercial and non-commercial speech.[177] The Court has frequently commented that a commercial speaker who "links a product to a current public debate" does not necessarily gain full protection of the First Amendment.[178] Otherwise, the Court has said, advertisers would be able to "immunize" false advertising from government oversight by linking the product to a current public debate.[179] Nonetheless, in *Riley v. National Federation of the Blind*, the Supreme Court found that commercial speech and non-commercial speech were "inextricably intertwined" in such a way that the whole expression had to be fully protected by the First Amendment.[180] Later, the Court limited this holding in *Board of Trustees, State University of New York v. Fox,* finding that commercial and noncommercial speech are "inextricably intertwined" only if a state or federal law mandates that the two kinds of speech have to be combined in the same statement.[181] Due to these varying approaches, the issue of how courts should treat statements

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[174] *Va. State Bd.,* 425 U.S. at 772 n.24.

[175] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring) (holding that false advertising laws ensure that "that consumers are not led, by incomplete or inaccurate information, to purchase products they would not purchase if they knew the truth").

[176] *44 Liquormart,* 517 U.S. at 499 (Stevens, J., concurring) (concluding that "the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions").

[177] *See, e.g.*, Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795–96 (1988).

[178] Cent. Hudson Gas and Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980).

[179] Bolger v. Young Drug Products Corp., 463 U.S. 60, 68 (1983) (reasoning "a company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions").

[180] *See Riley,* 487 U.S. at 795–96. There a North Carolina statute mandated that, prior to a solicitation, professional fundraisers must declare the percentage of money their company raised that actually went to charity. *Id.* at 786 n.2.

[181] *See* Bd. of Trs., State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989). Such a law existed in *Riley. See Riley,* 487 U.S. at 786 n.2.

that combine commercial and noncommercial speech remains ambiguous.[182]

B. Kasky v. Nike *in the California Supreme Court*

The California Supreme Court took on *Kasky* precisely because the fact pattern invoked the unclear definition of commercial speech and the difficult situation of speech that combines commercial and noncommercial elements.[183] Kasky sued Nike under California's anti-competition law and false advertising laws, alleging in his complaint that Nike made statements about its labor practices to the public of California that were false and misleading.[184] Specifically, Nike claimed that its workers abroad received on average double the local minimum wage, and worked in conditions that were in compliance with local safety laws.[185] Nike made these claims in press releases, letters to the editor, letters to university presidents and athletic directors, and newspaper advertisements, along with statements of opinion.[186] In the trial court, Nike filed demurrers to the complaint, alleging that application of California's anti-competition and false advertising laws in this case was barred by the U.S. Constitution because Nike's statements were protected under the First Amendment.[187] The trial court dismissed Kasky's claim, and the Court of Appeals affirmed, finding that Nike's statements were not commercial speech.[188]

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[182] *See Fox,* 492 U.S. at 474; *Riley,* 487 U.S. at 786 n.2.

[183] *See* Kasky v. Nike, Inc., 45 P.3d 243, 247 (Cal. 2002).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 857 (Cal. Ct. App. 2000). Nike challenged Kasky at the complaint stage, meaning no discovery or trial had been conducted. *Id.* at 858. Thus, when Nike filed a motion to have the complaint dismissed, the trial court up to the Supreme Court had to assume that Kasky's allegations within the complaint were true—i.e., that Nike had indeed misrepresented facts about labor conditions in its factories. *Id.* at 857 ("On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, appellate courts assume the truth of all facts properly pleaded by the plaintiff-appellant."). But at this point no evidence had been introduced to show that Nike had actually made false statements. *Id.*

[188] *See id.* at 857, 863. The Court of Appeals believed that Nike's statements did not convey information about their products, but instead were intended to create a "favorable corporate image." *Id.* at 860. The court found Nike's statements were not made as a product advertisement but as part of the public debate about labor practices in the context of globalization. *Id.* at 860–61. Moreover, the court believed that many of the expressions Kasky challenged did not meet two of the *Bolger* commercial speech definition factors: advertising format and reference to specific product. *Id.* at 860.

The California Supreme Court reversed, finding Nike's statements to be commercial speech in a controversial opinion that sidestepped the unclear definitions of commercial speech entirely.[189] Instead, the California Supreme Court created a new test to determine a subset of commercial speech: false commercial speech.[190] Due to the procedural stance of the case, a motion to dismiss the complaint, the California Supreme had to assume at the onset that Nike's speech was indeed false.[191] Thus, the court believed the question was not whether Nike's speech was commercial or not, but whether it was false commercial speech or false noncommercial speech.[192] Therefore, the court did not need to use the existing definitions for commercial speech.[193] Since the U.S. Supreme Court treats false commercial speech differently than commercial speech in general, the California Supreme Court believed a definition for only false commercial speech could be construed from precedent.[194] Using the rationale that false commercial speech should be unprotected, along with U.S. Supreme Court general definitions of commercial speech, the California Supreme Court created a three-part "limited-purpose" test to determine the existence of false commercial speech only.[195]

To be false commercial speech under the limited purposes test, the first two elements require that the speaker of the challenged expression must be engaged in commerce, and the intended audience must be potential buyers or customers of the speaker's goods or services.[196] The

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[189] Kasky v. Nike, Inc., 45 P.3d 243, 256, 262 (Cal. 2002).

[190] *See id.* The California Supreme Court labeled the limited-purpose test as identifying "whether particular speech may be subjected to laws aimed at prevented false advertising or other forms of commercial deception." *Id.* at 256. For brevity and clarity's sake, this Note describes the limited purpose test as identifying false commercial speech. Any speech that may constitutionally be regulated under false advertising laws must be false commercial speech. *See supra* note 168 and accompanying text. To be clear, this definition does not determine the veracity of speech. *See Kasky,* 45 P.3d at 256.

[191] *See id.* at 247. Because the Supreme Court was ruling on a motion to dismiss at the complaint stage, the California Supreme Court had to accept for the purposes of review that Kasky's allegations were true. *See supra* note 187 and accompanying text. Thus, the court had to assume Nike's speech was false. *See Kasky,* 45 P.3d at 247.

[192] *See id.* at 256. False commercial speech is unprotected by the First Amendment which false noncommercial speech is generally fully protected by the First Amendment. *See supra* note 168 and accompanying text.

[193] *Kasky,* 45 P.3d at 256. While the court does not make its reasoning clear, it seems to believe that the definition of commercial speech is broader than the definition of false commercial speech. *See id.*

[194] *See supra* notes 168–76 and accompanying text.

[195] Kasky v. Nike, Inc., 45 P.3d 243, 256-58 (Cal. 2002).

[196] *Id.* at 256.

California Supreme Court derived these two elements from U.S. Supreme Court definitions of commercial speech.[197] The court reasoned that these elements were implicit in the "commercial transaction" definition of commercial speech because it implies that commercial speech is a communication between a buyer and a seller.[198] Moreover, the court found the *Bolger* definition, which included advertising and economic motivation of the speaker, also implies that the intended audience must be consumers and the speaker must be someone engaged in commerce.[199] Advertisements typically are speeches about products or services directed at potential consumers of those goods.[200] The economic motivation factor suggests that the speaker is engaged in commerce, hoping that the speech will lead to a commercial transaction.[201]

If the first two elements are met, a challenged expression is false commercial speech if the "factual content" of the speech is commercial in nature.[202] The factual content is found to be commercial if it makes representations about the speaker's products or services for the purpose of promoting sales of that product or service.[203] The California Supreme Court based this third element in part on the *Bolger* definition.[204] The court argued that the third factor of the *Bolger* definition— referring to a specific product—has been interpreted very broadlv to include many facts about goods and services beyond just price.[205] This interpretation suggests that any factual content will be considered a "product reference."[206] The California Supreme Court also based this third element in the rationales for denying full First Amendment protection to false commercial speech.[207] The U.S. Supreme Court has said that commercial speech is both easier to verify,

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[197] *Id.* Specifically, as mentioned below, the California Supreme Court made use of the *Bolger* definition and "commercial transaction" definition. *Id.*

[198] *Id.*

[199] *Id.*

[200] Kasky v. Nike, Inc., 45 P.3d 243, 256 (Cal. 2002).

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* at 256–57.

[205] Kasky v. Nike, Inc., 45 P.3d 243, 256-57 (Cal. 2002). The Supreme has interpreted references beyond just price, to things such as the alcohol content of a beer bottle, or statements on a business card or letterhead. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 481–82 (1995); Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation Bd. of Accountancy, 512 U.S. 136, 142 (1990).

[206] *Kasky,* 45 P.3d at 256–57.

[207] *Id.* at 257.

and more hardy than other kinds of speech because it includes facts and is spoken in the pursuit of profit.[208]

The California Supreme Court then applied the test to Nike's speech, and concluded that it was false commercial speech.[209] The court held that Nike was indeed a commercial speaker as a large corporation engaged in commerce of shoes and apparel.[210] The court considered Nike's intended audience to be consumers and would-be buyers—particularly those concerned about Nike's sweatshop practices.[211] Clearly, Nike's letters to university presidents had Nike customers as an intended audience, but the court found even Nike's letters to the editors, press releases, and advertisements were arguably intended to reach consumers.[212] Lastly, and most importantly, the court held that the content of Nike's speech included facts of a commercial nature.[213] In these letters, press releases, and advertisements, Nike had made factual representations about the working conditions in which Nike products were manufactured.[214]

The California Supreme Court's limited-purpose test is problematic in that it relies on U.S. Supreme Court precedent on commercial speech but does not follow it.[215] Despite the California Supreme Court's insistence that the limited purposes test is grounded in prior cases, the court essentially conceived a brand-new test to determine a narrow slice of commercial speech, false commercial speech.[216] By doing so, the California Supreme Court has created a bifurcated system in which false commercial speech is defined under the limited-purpose test, and all other kinds commercial speech will be defined

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[208] *Id.*

[209] *Id.* at 258.

[210] *Id.*

[211] Kasky v. Nike, Inc., 45 P.3d 243, 258 (Cal. 2002).

[212] *Id.* Kasky had in fact alleged that Nike's actions were meant to increase profit in his complaint. *Id.* As proof, he offered a letter from Nike to the editor saying, "during the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions." *Id.*

[213] *Id.*

[214] *Id.* These statements of fact about labor conditions were presumably within Nike's knowledge. *Id.* If nothing else, Nike is in the best position to verify the truth of these statements, having direct contact with subcontractors managing labor conditions. *See id.* Again, Nike's purpose in making these statement was to make a profit. *Id.* If regulation of Nike's statements makes Nike attempt to verify its statements more carefully, the California Supreme Court believed that that was the very purpose of false advertising laws. *Id.*

[215] *See id.* at 256–58.

[216] *See Kasky*, 45 P.3d at 256. However, many pundits have missed this distinction—believing that the California Supreme Court has created a new definition for commercial speech as a whole. *See, e.g.,* Goldstein, *supra* note 16.

according to the U.S. Supreme Court's commercial speech definitions.[217] The California Supreme Court's reasons for creating such a divide are unclear, especially because the U.S. Supreme Court has never indicated that false commercial speech should be defined differently than other kinds of commercial speech.[218] While the U.S. Supreme Court has held that false commercial speech has no First Amendment protection and truthful commercial speech does, the Court has never suggested that this distinction should lead to separate definitions.[219] Thus, it is unclear why the California Supreme Court invented a new definition, instead of expanding interpretations of the existing commercial speech definitions to include Nike's speech.[220]

The California Supreme Court may have departed from precedent because Nike's statements did not seem to be traditional commercial speech[221] and yet clearly seemed to mislead consumers.[222] The rationales for denying First Amendment protection to false commercial speech seem to apply to Nike's statements, even if traditional definitions of commercial speech do not.[223] Nike is in the best position to verify what is happening in its own factories.[224] Nike's speech is unlikely to be stifled, as it wants to continue to sell shoes, and so has a motive to continue speaking.[225] Regulation of the veracity of Nike's comments falls within longstanding governmental practice to regulate false representations of where and how a product is made.[226] Moreover, al-

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[217] *See Kasky*, 45 P.3d at 256–57. For example, this limited purposes test definition would not be used in cases that challenge statutes that prohibit certain kinds of commercial speech—such as a law prohibiting the truthful publishing of alcoholic content on the label. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 481–82 (1995).

[218] *See* Bolger v. Young Drug Products Corp., 463 U.S. 60, 69 (1983); Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[219] *See Bolger,* 463 U.S. at 69; *Cent. Hudson,* 447 U.S. at 566.

[220] *See Kasky,* 45 P.3d at 256–58. *But see* Erwin Chemerinsky & Catherine Fisk, Nike v. Kasky *and the Modern Commercial Speech Doctrine*, 54 Case W. Res. L. Rev. 1143, 1148 (2004) (arguing that Nike's speech does fit within the *Bolger* definition).

[221] *Kasky*, 45 P.3d at 247–48. Nike's speech was not made in a traditional advertising format, and included statements of opinion and fact mixed together. *See id.*

[222] *See id.* at 258. The U.S. Supreme Court has long been concerned with protecting consumers in the marketplace. Nike, Inc. v. Kasky, 539 U.S. 654, 679 (2003) (Breyer, J., dissenting).

[223] *See Kasky,* 45 P.3d at 258.

[224] *Id.*

[225] *See id.* This rationale does not mean that Nike will continuing saying untruthful things about its labor practices abroad, but rather that Nike will likely continue speaking about its shoes and sweatshop practices in general because it needs to advertise to survive. *See id.*

[226] *Id.* at 258–59. For example, the federal government prohibits false descriptions of the origin of products, and California prohibits misrepresentations that a product was

though Nike commingled its statements of fact with opinions about workers rights, the court found this should not immunize its factual allegations about how its products are made from being commercial speech.[227] The California Supreme Court followed the U.S. Supreme Court to find that the commercial and noncommercial elements of Nike's speech were not inextricably intertwined because, following *Fox*, no law compelled Nike's speech to be combined in the same forum.[228]

Thus, the California Supreme Court's opinion relied on the principles that underlay the commercial speech doctrine, although it did not strictly follow the definitions of commercial speech.[229] That using the underlying principles could lead to a different result than existing definitions suggests that the current definitions of commercial speech are inadequate.[230] *Kasky* raises several issues that existing commercial speech doctrine has not sufficiently explained: what speech outside of traditional advertising formats can be considered commercial;[231] whether *Bolger* and other commercial speech definitions are adequate;[232] and how to analyze expressions that contain both commercial speech and non-commercial speech.[233] When Nike appealed the California Supreme Court decision, pundits on both sides of the issue looked to the Supreme Court to clarify and update its commercial speech doctrine.[234]

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made by Native Americans or blind workers. *See* 15 U.S.C. § 1125 (2005); CAL. BUS. & PROF. CODE §§ 17520, 17569 (West 2005).

[227] *See* Bolger v. Young Drug Prods. Corp., 463 U.S. 60, 68 (1983); Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980); *Kasky,* 45 P.3d at 260.

[228] *See Kasky,* 45 P.3d at 260. "No law required Nike to combine factual representation about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately." *Id.* at 267.

[229] *See id.* at 256–58.

[230] *See id.* at 268 (Brown, J., dissenting).

[231] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 481–82 (1995); Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation Bd. of Accountancy, 512 U.S. 136, 142 (1990).

[232] *See Kasky*, 45 P.3d at 256. This is implicitly what the California Supreme Court suggests by creating a new test. *See id.*

[233] *See id.* at 260, 266–67 (Chin, J., dissenting). The California Supreme Court believed that the presence of opinion on a public debate did not immunize the statements of fact, and moreover will not chill Nike's opinions because they are not the subject of the lawsuit. *Id.* at 260. Chin's dissent states that at the least Nike's opinions are inextricably entwined with the statements of fact, so that the law cannot separately analyze one without looking at the other. *Id.* at 266–67.

[234] *See* Goldstein, *supra* note 16, at 63–64.

C. *The U.S. Supreme Court's Non-Decision*

After granting certiorari to *Kasky*, hearing oral arguments and receiving thirty-one amicus briefs, the U.S. Supreme Court issued a per curiam opinion dismissing the writ of certiorari as improvidently granted.[235] This decision meant that the Court had changed its mind about hearing the case in the first place, and thus left the case's important commercial speech questions unanswered.[236] The concurrence, signed by Justices Stevens and Ginsburg, and joined in part by Justice Souter provided three procedural reasons for dismissing the writ:[237] lack of finality,[238] lack of standing,[239] and to avoid premature adjudication of the novel First Amendment questions *Kasky* raises. [240]

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[235] Nike, Inc. v. Kasky, 539 U.S. 654, 655, 667 (2003).

[236] *See id.* at 655.

[237] *Id.* at 656, 658 (Stevens, J., concurring). Justice Souter joined only as to the third reason. *Id.* at 656, 663.

[238] *See id.* at 658. By law, the Supreme Court can only review cases in which there has been a final judgement or dissent decree. *See* 28 U.S.C § 1257 (2005). The California Supreme Court's decision in *Kasky* was to reverse and remand, which is not a final decree. *Nike,* 539 U.S. at 658, 658–60 (Stevens, J., concurring). Nike had argued, however, that *Kasky* fell under an exception that allowed the Court to hear cases that are not final if state courts have finally decided a federal issue, and reversal of this issue would end the litigation. *See id.* at 658–59. Stevens found this argument to be "theoretically" true, but only if the Court could find all of Nike's comments to be absolutely protected. *Id.* at 659. Due to the nature of the case, however, such an outcome was highly unlikely—the Court could construe some of the comments to be commercial and some not, or reverse in such a way that would give Kasky the option of amending his complaint. *Id.* at 660. In such scenarios more state proceedings would follow, and new First Amendment issues might arise. *Id.* Therefore, *Kasky* was not final in such a way that fell within the exception. *Id.*

[239] *Id.* at 661–63. Justice Stevens found that neither party had the required injury needed for standing. *Id.* at 661. Kasky had no injury; indeed, Kasky had never claimed to suffer a personal injury when he initiated the suit. *Id.* Kasky had filed as a private attorney general alleging no personal injury, but instead enforcing California laws on behalf of the public of California. *Id.* There was no final judgement against Nike, so Nike had no injury in fact either. *Id.* Thus, Nike would not have been able to commence this case in federal court in the first place. *Id.* Nonetheless, the Supreme Court has adopted an exception to this rule when there is a state court judgement on a federal issue that causes injury to a party. *See* ASARCO Inc. v Kadish, 490 U.S. 605, 623–24 (1989). Nike argued that it fell into this *ASARCO* exception. *See* Reply Brief for the Petitioners at 5–6, Nike, Inc. v. Kasky, 539 U.S. 654, 655, 667 (2003) (No. 02-575). Stevens found that A*SARCO* was distinguishable in the present case because *ASARCO* involved a final declaratory judgement that a state law was illegal and so tangible legal rights were effected. *Nike,* 539 U.S. at 662 (Stevens, J., concurring). Since the judgement in *Kasky* was not final, no legal rights were effected yet and so Nike was not injured. *Id.*

[240] Nike, Inc. v. Kasky, 539 US. 654, 655, 663–64 (2003) (Stevens, J., concurring). Lastly, Stevens believed that *Kasky* was not the appropriate vehicle to explore important First Amendment issues. *Id.* at 663. *Kasky* was only at the pleading stage, lacking a factual record that would assist the Court greatly in such complicated and important commercial speech issues. *See id.* at 664–65. It is likely this last reason that convinced the Court to dis-

Although both sides claimed victory in some of the concurrence and dissent opinions' language, the real victory belonged to Marc Kasky as his lawsuit was allowed to go forward.[241]

Although the dismissal of certiorari allowed the California Supreme Court's decision on *Kasky* to stand, both the dissent and concurrence expressed disagreement with that decision.[242] Both opinions highlighted the intermingling of commercial speech and noncommercial speech with Nike's statements, an issue the California Supreme Court had quickly dismissed.[243] The dissent believed that Nike's speech had "predominant[ly]" noncommercial characteristics inextricably intertwined with commercial speech.[244] Even the concurrence defined Nike's speech as "a blending of commercial speech, noncommercial speech and debate on an issue of public importance," although the opinion did not suggest how to deal with such a "blending."[245] These opinions imply that the California Supreme Court's limited purpose test was unnecessary. The limited-purpose test was meant to find only false commercial speech, which the U.S. Supreme Court has found to merit no First Amendment protection.[246] Both the dissent and concurrence at minimum would require some First Amendment protection

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miss certiorari, as during oral argument the Justices were generally dismissive of the lack of standing and finality arguments. Transcript of Oral Argument at 31–49, Nike, Inc. v. Kasky, 539 U.S. 654, 655, 667 (2003) (No. 02-575). Moreover, Nike challenged the constitutionality of the private attorney general provisions of California's Unfair Competition Law in front of the Supreme Court although it had not raised this issue below. *See Nike,* 539 U.S. at 664 (Stevens, J., concurring).

[241] *See* Linda Greenhouse, *Nike Free Speech Case Is Unexpectedly Returned to California,* N.Y. Times, June 29, 2003, at A16. Laurence Tribe, the esteemed law professor at Harvard who argued Nike's appeal in front of the Court, commented that the concurrence's language showed that Nike's statements were not "garden variety commercial speech." *Id.* Ohio Representative Dennis Kuchinich claimed that the decision was a "victory for consumer protection and corporate accountability." *Id.*

[242] *See Nike,* 539 U.S. at 663–64 (Stevens, J., concurring); *Id.* at 676 (Breyer, J., dissenting).

[243] *Nike,* 539 U.S. at 663 (Stevens, J., concurring); *Id.* at 667 (Breyer, J., dissenting); Kaskv v. Nike, Inc., 45 P.3d 243, 260 (Cal. 2002).

[244] *Nike,* 539 U.S. at 677 (Breyer, J., dissenting). Justice Breyer suggested that while false advertising laws are important, there was no difference in determining whether speech is commercial for the purposes of false advertising or other state intrusions. *See id.* at 679. Justice Breyer focused on both the format of the speech, and whether the speech links to a public debate are central, not peripheral. *Id.* at 678. Here, Justice Breyer believed that Nike's speech was in a nontraditional advertising format and the links to a public debate are central, so Nike's speech was not "pure" commercial speech. *Id.* at 678–79.

[245] Nike, Inc. v. Kasky, 539 US. 654, 663 (2003) (Stevens, J., concurring).

[246] *See Kasky,* 45 P.3d 243, 256 (2002).

for Nike's speech due to the mixing of commercial and non-commercial speech.[247]

Nonetheless, the Court did restate its commitment to the principles of the commercial speech doctrine on which the California Supreme Court based its decision.[248] The dissent, while finding that Nike's speech was not commercial, reiterated the importance of false advertising law and the commercial speech doctrine as advancing important "public objectives."[249] The concurrence also seconded the California Supreme Court in that it does not mention the format of Nike's comments—an ad, letters to customers, etc.—as disqualifying it from being commercial speech, and instead mentioned the important governmental goal of consumer protection.[250] Thus, had the U.S. Supreme Court ruled on the issue, it likely would have provided some lesser level of protection to Nike's comments than full first Amendment protection, which would have allowed some regulation.[251]

Despite these hints that the California Supreme Court had not decided *Kasky* correctly, the U.S. Supreme Court's dismissal of certiorari led to the California Supreme Court's decision becoming final.[252] A few months after the dismissal of certiorari, Kasky and Nike settled the case.[253] The parties disclosed that Nike had agreed to donate $1.5 million to the Fair Labor Association for worker development programs abroad.[254] Thus, the California Supreme Court's decision in *Kasky* is now precedent in that state, possibly handing advocates a powerful tool in their fight against sweatshop conditions.[255]

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[247] *See Nike,* 539 U.S. at 664 (Stevens, J., concurring); *Id.* at 679 (Breyer, J., dissenting).

[248] *See Nike,* 539 U.S. at 664 (Stevens, J., concurring); *Id.* at 679 (Breyer, J., dissenting).

[249] *Id.* at 678–79 (Breyer, J., dissenting).

[250] *Id.* at 663–64 (Stevens, J., concurring). The dissent, however, believed that the format is a concern, suggesting that since Nike's statements were not in "traditional advertising or labeling contexts," it was not commercial speech. *See id.* at 677 (Breyer, J., dissenting).

[251] *See id.* at 677 (Breyer, J., dissenting).

[252] *See* Mokhiber, *supra* note 18.

[253] *Id.* The Supreme Court's dismissal of certiorari meant the California Supreme Court's orders to reverse and remand held. *See id.* However, the settlement came before discovery ever occurred in trial court. *See id.*

[254] *Id.* The FLA was not a party in Kasky's suit. *See* Kasky v. Nike, Inc., 45 P.3d 243, 243 (Cal. 2002). As far as can be determined, the donation to the FLA was made at Kasky's request, in lieu of a payment towards him directly. *See* Mokhiber, *supra* note 18. This is in keeping with Kasky's behavior in his previous lawsuits, in which he made no money. *See* Parloff, *supra* note 1, at 108.

[255] *See* Mokhiber, *supra* note 18.

IV. The Utility of *Kasky*-Style Lawsuits

Until the Supreme Court clarifies the definition of commercial speech, a *Kasky*-style lawsuit is a viable option for anti-sweatshop advocates to try to hold corporations accountable for their sweatshop conditions.[256] Such a lawsuit would involve suing a corporation based not on their sweatshop conditions, but on the falsity of a statement in a press release, letter to the editor, etc. concerning labor conditions.[257] On first glance, a *Kasky*-style lawsuit may be an effective means of private enforcement because it evades many of the barriers anti-sweatshop advocates have encountered using other techniques.[258] Nonetheless, a *Kasky*-style lawsuit must overcome two difficult issues: standing and remedies.[259] Moreover, *Kasky* risks chilling the speech of corporations, which ultimately could be disadvantageous to sweatshop activists.[260] A *Kasky*-style lawsuit gives a company two choices: improve sweatshop conditions or stop talking about sweatshop conditions at all.[261] Only a nuanced and careful campaign on the part of anti-sweatshop advocates can lead to the former alternative.[262]

A. Kasky-*style Lawsuits Compared to Other Techniques*

At least in California, *Kasky* might allow false advertising and unfair competition laws to be used in an innovative way.[263] A *Kasky*-style lawsuit would enable activists to sue corporations for making false statements

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[256] *See Kasky*, 45 P.3d at 262.

[257] *See id.* at 247–48.

[258] *See id.* at 262; *see, e.g.,* Balthazar, *supra* note 18, at 712–14.

[259] *See* Cal. Bus. & Prof. Code §§ 17203, 17204, 17206 (West 2005) (requiring personal injury to file suit as a private attorney general in California, and limiting damages to compensation for that injury).

[260] *See* Kasky v. Nike, Inc., 45 P.3d 243, 271–72 (2002) (Brown, J., dissenting). Fearing lawsuits, companies might refrain from speaking about social issues and participating in forums such as the FLA that might eventually lead to positive change. *See* Bigge, *supra* note 16, at 18.

[261] *See* Lu, *supra* note 137, at 628. The Federal Trade Commission could also legitimately take an active role in prosecuting false advertising violations in order to improve sweatshop conditions. *Id.* at 604.

[262] *See id.* at 628. Companies will likely only improve sweatshop conditions if a well-informed consumer public pressures them to do so, because otherwise companies will be tempted merely to stop talking about sweatshop issues. *Id.* If consumers make it known that their decisions are based on sweatshop conditions, companies will be more tempted to make changes. *Id.*

[263] *See Kasky,* 45 P.3d at 262. While *Kasky's* holding is only precedent in California, it certainly is persuasive authority elsewhere, which could enable activists to expand *Kasky*'s holding to other states. *See* Bigge, *supra* note 16, at 17.

about sweatshop conditions, which in itself could be leverage to pressure companies to improve these conditions.[264] Moreover, the California Supreme Court's decision found certain company "image enhancing" tools to be commercial speech even though they fell outside traditional advertising formats.[265] Nike's press releases, statements on its website, letters to the editor, letters to prominent customers and image ads were all considered commercial speech because they included factual statements about how Nike products were made.[266] Companies are more likely to make statements about sweatshop conditions in such formats, often responding to media or anti-sweatshop allegations of poor conditions, than in traditional advertising contexts.[267] Since a company's public image is seen as vital to business, this gives advocates a powerful tool to use false image-making statements against an offending company.[268]

Kasky may be more effective than other methods of private enforcement because it circumvents many of the barriers that have traditionally prevented advocates from using the court system effectively.[269] Because *Kasky* deals with speech and not actions, it avoids many of the complex international problems anti-sweatshop activists have faced in using the court system.[270] Activists have had difficulty because few labor laws apply extraterritorially, and those laws that do are difficult to enforce.[271] *Kasky,* however, is a cause of action based on domestic law

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[264] *See* Bigge, *supra* note 16, at 17. Of course, prior to *Kasky,* advocates could sue based on express claims made in traditional advertising formats. *See, e.g.,* CAL. BUS. & PROF. CODE § 17500 (stating that it is unlawful for someone in the pursuit of commerce to make untrue and misleading facts "in any newspaper or other publication, or any advertising device"). The problem was that companies often intermingle such speech with opinions, which have greater protection by the First Amendment. *See Kasky,* 45 P.3d at 260. *Kasky* holds, among other things, that this intermingling does not immunize the factual claims. *Id.*

[265] *See Kasky,* 45 P.3d at 260.

[266] *See id.* at 262.

[267] *See* Bigge, *supra* note 16, at 13. Nike's response to allegations of sweatshop conditions that sparked *Kasky* is the classic example of this. *Id.* In response to accusations in the media that Nike had been using sweatshop labor abroad, Nike began a media campaign to resurrect its image. *Id.* During this campaign, Nike made the comments that Kasky singled out as false and misleading. *Id.*

[268] *See id.* at 16. A company's image is increasingly seen as important to their bottom line. *See* Lu, *supra* note 137, at 613. Commentators have stated that when a company is found to use child labor to produce its garments, it "ranks somewhere up there with toxic dumping or unsafe products in the list of evils that can blacken the image of a successful corporation." *Id.*

[269] *See supra* notes 86–97, 126–30, 135–49 and accompanying text.

[270] *See Kasky,* 45 P.3d at 262; *supra* notes 126–30 and accompanying text.

[271] *See Kasky,* 45 P.3d at 262; *supra* notes 126–30 and accompanying text.

where labor abuses abroad are evidence of false advertising.[272] This avoids the complicated and delicate issues involved in applying a law extraterritorially.[273] Therefore, courts dealing with *Kasky*-style lawsuits may be more willing to hold corporations accountable.[274]

A *Kasky*-style lawsuit might also provide a vital follow-up to boycotts and codes of conduct.[275] Private codes of conduct, such as that enforced by the FLA, have no mechanism to punish companies that violate the codes, or even to make most of the circumstances public.[276] A *Kasky*-style lawsuit could argue that the words of the codes of conduct that companies place on their websites are a representation of fact about the product, and then sue for false advertising if there are violations of the code.[277] This would provide a much needed financial incentive for companies to comply with codes of conduct, which might lead to companies substantially improving sweatshop conditions to avoid lawsuits.[278] Similarly, if anti-sweatshop advocates are boycotting a company for its sweatshop practices abroad, and the company denies the allegations, the activists could sue with a *Kasky*-style lawsuit.[279] Further precedent-building would be necessary before activists could sue based solely on codes of conduct.[280]

Nonetheless, the problem of standing is a significant barrier to using *Kasky* as a model to enforce such codes.[281] Kasky brought suit under the California false advertising and unfair competition laws, which at the time allowed him to sue as a "private attorney general" without a per-

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[272] *See* Kasky v. Nike, Inc., 45 P.3d 243, 262 (2002); *supra* notes 126–30 and accompanying text.

[273] *See Kasky,* 45 P.3d at 262; *supra* notes 126–30 and accompanying text.

[274] *See Kasky,* 45 P.3d at 262; *supra* notes 126–30 and accompanying text.

[275] *See Kasky,* 45 P.3d at 262; *supra* notes 135–49 and accompanying text.

[276] *See supra* notes 144–52 and accompanying text. Again, the FLA does publish information about the violations found in the factories it monitors, but not the name or location of the specific factory. *See* Fair Labor Association, *supra* note 70. This makes the information impossible to check or verify. *See id.*

[277] Lu, *supra* note 137, at 619–21.

[278] *See id.* at 628.

[279] *See id.*

[280] *See* Kasky v. Nike, Inc., 45 P.3d 243, 247–48 (2002). *Kasky* certainly might lead to such a holding, but did not hold a code conduct to be commercial speech. *See id.* at 247–48, 262. As discussed below, the wording of codes of conduct make it unclear whether they are statements of fact or promises, so activists may have difficulty using codes of conduct. *See infra* note 310 and accompanying text.

[281] *See* CAL. BUS. & PROF. CODE §§ 17203, 17204, 17206 (West 2005).

sonal injury.[282] Most states, however, require some showing of injury or damages for an individual to sue based on the false advertising or unfair competition laws.[283] Following *Kasky,* the voters of California passed an initiative changing the standing requirements for the state's unfair competition and false advertising laws to require that a plaintiff have an injury in fact and have lost money or property.[284] This new standing requirement will make it more difficult for anti-sweatshop advocates to file suit in California, the only state where *Kasky* is precedent.[285] Nonetheless, in states requiring injury, many have found that nominal damages are sufficient to create an injury.[286] Many states also allow for non-economic injuries such as emotional distress to establish an injury.[287] Thus, it is possible that advocates could make out an injury if they find a plaintiff who had purchased the corporation's product, and later there were media reports that the corporation did have sweatshops.[288]

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[282] *See* CAL. BUS. & PROF. CODE § 17204 (West 2004), *amended by* CAL. BUS. & PROF. CODE § 17204 (West 2005) (stating that one "acting in the interests of itself, the members of the general public" could bring suit).

[283] *See* Bob Cohen, Annotation, *Private Right Under State Consumer Protection Act—Preconditions to Action,* 117 A.L.R.5th 155 (2004–2005). Alabama, Arizona, and now California, Connecticut, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Louisiana, Kansas, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Washington, and West Virginia all require such an injury or actual damages. *Id.* at 197–205, 208–12. Despite Justice Breyer's belief in *Kasky*'s dissent that California's private attorney general statute was unique in its lack of injury, Vermont has a similar code. *See* VT. STAT. ANN. tit. 9, § 2453(a) (2004); Cohen, *supra* at 205–06. Moreover, case law in Ohio has interpreted Ohio's Unfair Competition Law to require no injury as well. Clayton v. McCary, 426 F. Supp. 248, 262 (N.D. Ohio 1976); Cohen, *supra* at 205.

[284] *See* CAL. BUS. & PROF. CODE § 17204. This ballot, number 64, was approved by voters November 2, 2004, and went into effect the next day. CAL. PROPOSITION 64, 2004 Cal. Legisl. Serv. (West), *available at* http://vote2004.ss.ca.gov/voterguide/propositions/prop64text.pdf. The proposition is framed as a way to curb frivolous lawsuits initiated by lawyers whose "clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant . . . without any accountability to the public and without adequate court supervision." *Id.*

[285] *See* CAL. PROPOSITION 64, *supra* note 284.

[286] *See* Cohen, *supra* note 283, at 207. Minnesota, Washington and Hawaii all explicitly allow nominal damages to create injury. *See id.* For example, in *Wexler v. Brothers Entm't Group,* the Court of Appeals of Minnesota found standing based on a wrongful $11.89 telephone charge. 457 N.W.2d 218, 222 (Minn. Ct. App. 1990). Only Florida requires a "non-nominal" injury. Cohen, *supra* note 283, at 206–07. Since California's new law only took effect in November 2004, no case law has developed as to whether nominal damages would be accepted.

[287] *See* Cohen, *supra* note 283, at 212–15. Louisiana, Massachusetts, and Texas have recognized a non-economic injury to be standing in such cases. *Id.*

[288] *See* Transcript of Oral Argument at 24, 26, Nike, Inc. v. Kasky, 539 U.S. 654, 655, 667 (2003) (No. 02-575). During oral arguments of *Kasky,* Solicitor General Olson admitted

But this would be breaking new ground and require setting precedent, which may make it difficult for advocates, at least initially, to use *Kasky* in most states.[289]

The limited remedies available under false advertising and unfair competition statutes present another barrier to using *Kasky* to improve sweatshop conditions.[290] In California, for example, the remedies for an unfair business practice are an injunction to stop that practice,[291] compensation for the injury created by the unfair business practice,[292] and discretionary civil penalties.[293] The unfair business practice in *Kasky* was Nike's false and misleading statements.[294] Thus, a *Kasky*-style lawsuit could result in an injunction to stop the misleading speech about sweatshop conditions, but not to stop the actual sweatshop practices themselves.[295] It is possible, however, that damages from a *Kasky*-style lawsuit could be so punitive as to persuade the defendant company to improve sweatshop conditions to avoid future lawsuits.[296] The difficulty is that there is no court order and no guarantee that companies who are punished with a costly lawsuit will upgrade working conditions, rather than take the less costly alternative of stifling their speech.[297]

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that if someone had bought Nike shoes relying on an advertisement claiming good labor conditions, it would be sufficient to create injury in the federal system. *Id.* at 24. Olson later compared this sort of injury with a stockholder injury under federal securities law, where injury is created by buying stock after reading misleading information in the proxy statement. *Id.* at 28. Another element that might be necessary for injury in certain states is reliance—that the consumer relied on this unfair business practice or false advertising to their detriment (i.e. by purchasing the product). *See* Cohen, *supra* note 283, at 222–26. In such cases, the advocate would have to first hear the company proclaim its progress on sweatshop issues, buy the product based on this proclamation, and then hear news reports that the company's proclamation was false. *See id.*

[289] Cohen, *supra* note 283, at 197–205, 208–212. Perhaps the easiest way to remedy the standing problem is to advocate for attorneys general of the states and the Federal Trade Commission to bring such suits instead of private individuals. *See* Lu, *supra* note 137, at 617–18. The government needs to prove no injury to bring suit. *See id.*

[290] *See, e.g.,* CAL. BUS. & PROF. CODE §§ 17203, 17206 (West 2005).

[291] *Id.* § 17203.

[292] *Id.* Essentially this is to compensate for the injury, although in *Kasky* there were none. Parloff, *supra* note 1, at 108.

[293] CAL. BUS. & PROF. CODE § 17206.

[294] *See* Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002).

[295] *See id.*

[296] *See* Mokhiber, *supra* note 18. It is hard to measure how punitive such damages could be, if an individual's injury is buying a shoe. On the other hand, Kasky received a settlement of a 1.5 million dollars, showing that financially the stakes can be high. *Id.*

[297] *See* CAL. BUS. & PROF. CODE §§ 17203, 17206.

B. *The Potential Chilling Effect of Kasky-style Lawsuits*

Kasky's chilling effect on corporate speech has in practice been quite limited, although many warned to the contrary.[298] Indeed, the dissenters in the California and U.S. Supreme Court believed the chilling effect of *Kasky* would be severe.[299] Many in the business community called the decision "devastating," warning that businesses would now refrain from discussing important public issues such as cloning and FDA drug approval.[300] Nike announced in the wake of *Kasky* that it would withhold its annual Corporate Responsibility Report and would refrain from discussing social issues either with the media or at public events.[301] Rhetoric aside, however, many companies are still speaking about social issues, albeit phrasing these statements carefully to include fewer factual statements.[302] This suggests *Kasky*'s impact was less than expected, either because of corporations' profit motive or because of *Kasky*'s uncertain holding.[303] Therefore, the use of *Kasky*-style lawsuits may not chill corporate speech, at least if they are used in moderation.[304]

Many companies, including Nike, still do discuss corporate responsibility.[305] Of the eight companies that were involved in the Apparel Industry Partnership, five still have codes of conduct for labor conditions in factories posted on their website.[306] While these codes are not

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[298] *See Kasky,* 45 P.3d at 262; *supra* note 177 and accompanying text.

[299] *See* Nike, Inc. v. Kasky, 539 U.S. 654, 682 (2003) (Breyer, J., dissenting); *Kasky,* 45 P.3d at 271–72 (Brown, J., dissenting).

[300] *See* Sandy Brown, *For Corporate Speech, the Other Shoe Is Yet to Drop,* ADWEEK, June 30, 2003; Howard, *supra* note 16. Even some activists believed in the chilling effect of *Kasky,* warning that it would be better for companies to speak about the issue untruthfully, and participate in organizations like the FLA freely, than not at all. *See* Bigge, *supra* note 16, at 18.

[301] *See Nike,* 549 U.S. at 682 (Breyer, J., dissenting).

[302] *See, e.g.,* Liz Claiborne: Workers Rights, http://www.lizclaiborneinc.com/rights/default.asp (last visited Feb. 21, 2006); Nike: Workers and Factories, Code of Conduct, http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code (last visited Mar. 21, 2005); Reebok: Our Business Practices, Our Standards, http://www.reebok.com/Static/global/initiatives/rights/business (last visited Feb. 21, 2006).

[303] *See* Kasky v. Nike, Inc., 45 P.3d 243, 256, 262 (2002).

[304] *See* Lu, *supra* note 137, at 628.

[305] *See infra* note 309. Unscientifically, I looked at those companies who were members of the AIP because they were all the target of boycotts and campaigns of the anti-sweatshop movement before joining the taskforce.

[306] *See* Liz Claiborne: Workers Rights, *supra* note 302; Levi-Strauss: Global Responsibility/Global Sourcing and Operating Guidelines 2001, http://www.levistrauss.com/responsibility/conduct/guidelines.htm (last visited Feb. 21, 2006); Nike Workers and Factories, *supra* note 302; Reebok: Our Business Practices, Our Standards, *supra* note 302; Phillip Van Hausen: Corporate Responsibility: World Action, http://www.pvh.com/CorpResp_WorldAction.html

factual statements, they do represent a promise to consumers that factories will be conducted in a certain way.[307] If all or most of a corporation's factories do not meet the standard as represented in the code of conduct, this code might be misleading speech that could fall under unfair competition or false advertising laws.[308] Of the five companies that do have codes of conduct, only one, Reebok, makes factual claims about improvement of labor conditions.[309] If false, these factual claims could be grounds for a false advertising suit under *Kasky*.[310] Most companies are avoiding factual claims such as those that led to the suit against Nike.[311] Nonetheless, companies have not withdrawn from discussing social issues altogether, and by posting these codes of conduct may be exposing themselves to a lawsuit.[312] The reason why companies act this way, despite the risk, is important in analyzing whether *Kasky*-style lawsuits will chill corporate speech.[313]

Companies may be continuing to speak about social issues because of their profit motive.[314] The Supreme Court has explained that commercial speech has a "greater hardiness" than noncommercial speech because companies speak for the purpose of increasing their profit by

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(last visited Mar. 1, 2006). Notably, while two other members, Patagonia and L.L. Bean, lack codes of conduct on workers rights, they do have information about environmental practices they follow. *See* L.L. Bean: Conservation and the Environment, http://www.llbean.com/outdoorsOnline/conservationAndEnvironment/index.html?feat–ln (last visited Jan. 16, 2006); Patagonia: Take Action, http://www.patagonia.com/enviro/zgoho.Shtml?seepromo–home (last visited Jan. 16, 2006).

[307] *See, e.g.,* Reebok: Our Business Practices, Our Standards, *supra* note 302. Reebok's code, for example uses the word "shall": "[n]o factory making Reebok products shall use forced or other compulsory labor." *Id.* Using the word "shall" suggests a future promise. *See id.*

[308] *See* Lu, *supra* note 137, at 621–22. Although codes are not express claims, most false advertising or unfair competition laws discuss misleading speech. *See id.* If a statement is "likely" to deceive, then it might fall under such statutes. *See id.* This, however, is not *Kasky*'s holding, and would be an expansion of it. *See Kasky*, 45 P.3d at 262; *supra* note 280 and accompanying text.

[309] *See* Reebok: Our Business Practices, Our Improvements, http://www.reebok.com/Static/global/initiatives/rights/business/improving.html (last visited Feb. 21, 2006).

[310] *See* Kasky v. Nike, Inc., 45 P.3d 243, 262 (2002); Reebok: Our Business Practices, Our Standards, *supra* note 302.

[311] *See Kasky*, 45 P.3d at 247–48; Reebok: Our Business Practices, Our Improvements, *supra* note 309. Many companies make express claims only about their monitoring systems, which would be more difficult to challenge. *See* Nike: Workers and Factories, *supra* 302.

[312] *See supra* note 307 and accompanying text.

[313] *See Kasky*, 45 P.3d at 252–53, 262.

[314] *See Kasky,* 45 P.3d at 252–53; *supra* note 175 and accompanying text. The U.S. Supreme Court has identified the profit motive as justifying the lack of First Amendment protection for false commercial speech. *Kasky*, 45 P.3d at 252–53.

selling goods and services.[315] Even if commercial speech is regulated, corporations will continue to speak because their existence is based on how much of the product or service they can sell.[316] Thus, it is possible that companies are continuing to post codes of conduct on their websites because they believe that despite the liability, speaking on such issues is vital to selling products.[317] The anti-sweatshop movement has made it clear to companies that consumers do care about the labor conditions in which their garments are made.[318] Companies may have done a cost-benefit analysis, finding that it is advantageous to have a reputation of social responsibility, even if it opens up the potential of lawsuits.[319]

Moreover, a close reading of the holding of the California Supreme Court allows companies to continue offering their opinions on social issues, but not false factual statements.[320] The California Supreme Court held that the opinions about globalization and workers rights within Nike's statements were fully protected by the First Amendment.[321] Only the "description[s] of actual conditions and practices" of the factories that manufactured Nike's products were held to be false commercial speech.[322] Thus, *Kasky* holds that commercial speech extends only to a company's factual statements, not a company's opinion about social responsibility.[323] *Kasky* might be expanded in the future to include codes of conduct as commercial speech because promises fall within gray area between opinions and factual statements.[324] Currently, however, companies can only be held liable for false factual claims.[325]

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[315] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (finding that "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation").

[316] *See id.*

[317] *See* Lu, *supra* note 137, at 620. For example, a spokesperson from Reebok said that "consumers today hold companies accountable for the way products are made, not just the quality of the product itself." *Id.* at 624.

[318] *See id.* Polls taken by Marymount University and the National Bureau of Economic Research in the 1990s show that three-fourths of the respondents would avoid purchasing products if they knew they were produced in unsafe environments, and would pay more for an item if they knew it was produced in a safe and worker-friendly factory. Brief for Global Exchange as Amici Curiae at 2–3, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[319] *See* Lu, *supra* note 137, at 628.

[320] *See* Kasky v. Nike, Inc., 45 P.3d 243, 260 (Cal. 2002).

[321] *See id.*

[322] *See id.*

[323] *Id.* What was more revolutionary about *Kasky* was that factual statements in nontraditional advertising formats were found to be commercial speech. *See id.* at 262.

[324] *See id.* at 247, 260, 262.

[325] *See. Kasky,* 45 P.3d at 262.

Following *Kasky,* companies make few express claims that could be verified easily, but seem to have realized that their liability for opinions and promises is limited at this time.[326] Thus, it seems likely that companies will continue to speak about social issues, but will be careful not to make false factual statements.[327]

Since companies continue to speak about social issues because of the limited holding of *Kasky* and the profit motive, advocates must use *Kasky*-style lawsuits in moderation.[328] If advocates flood corporations with *Kasky*-style lawsuits, the economic calculus will change for these corporations, and they will stop speaking about social issues.[329] Anti-sweatshop activists might want to expand *Kasky*'s holding to include codes of conduct as commercial speech, but again, if they push this too far, companies will stop releasing codes of conduct.[330] To try to counteract the financial pressures of such lawsuits, activists need to maintain consumer pressure on corporations about sweatshop issues, so that companies will know it is in their best interest to keep speaking about labor.[331] Moreover, consumer pressure accompanying such lawsuits could convince corporations to actually improve sweatshop conditions.[332] Thus, anti-sweatshop activists must use *Kasky*-style lawsuits in moderation, and in conjunction with consumer pressure, to avoid chilling corporate speech.[333]

Conclusion

Kasky has created a new but flawed tool for anti-sweatshop activists to use to hold corporations accountable for their sweatshop conditions.[334] In a time when public enforcement is ineffective in improving sweatshop conditions both at home and abroad, advocates have searched for an effective private enforcement device.[335] In some ways, *Kasky* can provide such a device, because it expands commercial speech

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[326] *See* Kasky v. Nike, Inc., 45 P.3d 243, 260 (2002); *supra* note 309 and accompanying text. Thus, on its website, Nike makes ambiguous comments such as "Nike opposes child labor." *See* Nike: Workers and Factories, *supra* note 302. No one will be able to sue Nike if these kinds of statements are characterized as opinions. *See Kasky,* 45 P.3d at 260.

[327] *See Kasky,* 45 P.3d at 260; *supra* note 309 and accompanying text.

[328] *See* Lu, *supra* note 137, at 628.

[329] *See id.*

[330] *See id.*

[331] *See id.*

[332] *See id.*

[333] *See* Lu, *supra* note 137, at 628.

[334] *See* Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002).

[335] *See supra* notes 77–149 and accompanying text.

for the purpose of false advertising laws.[336] Nonetheless, significant barriers remain to using *Kasky* effectively.[337] The need for an injury to file suit will make *Kasky* difficult to utilize.[338] Moreover, the limited remedies inherent in false advertising statutes suggest that *Kasky* in itself will not lead to corporations improving sweatshop conditions.[339] There is also the danger that the Supreme Court will at some point overturn the reasoning behind *Kasky,* as they expressed disapproval of the California Supreme Court's opinion.[340] The chilling effect of *Kasky,* however, was less than expected, suggesting the *Kasky*-style lawsuits used in moderation might not chill corporate speech on social issues.[341] In conjunction with consumer pressure, a *Kasky*-style lawsuit could lead corporations to improve sweatshop conditions.[342] In sum, *Kasky* is an imperfect instrument, but one anti-sweatshop activists should explore and expand.[343]

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[336] *See Kasky,* 45 P.3d at 262.
[337] *See supra* notes 281–97 and accompanying text.
[338] *See supra* notes 281–89 and accompanying text.
[339] *See supra* notes 290–97 and accompanying text.
[340] *See supra* notes 243–51 and accompanying text.
[341] *See supra* notes 298–27 and accompanying text.
[342] *See* Lu, *supra* note 137, at 628.
[343] *See* Kasky v. Nike, Inc., 45 P.3d 243, 262 (2002).