

RESPONSE

Digital Marketing, Consumer Protection, and the First Amendment: A Brief Reply to Professor Ryan Calo

*David C. Vladeck**

ABSTRACT

Professor Ryan Calo's meticulous critique of the potential for digital marketing to manipulate consumer choice is intended to be a wake-up call to regulators, policymakers, and consumers about the dangers lurking in a digital world. His arguments are powerful and persuasive. We all need to take heed.

This Response takes issue with only three of Professor Calo's arguments, none of which go to the heart of his thesis. First, although I agree with Professor Calo's description of the power of digital marketing, there are factors that may mitigate some of the risks he sees looming. Second, Professor Calo may underestimate the ability of regulators, using existing authorities, to respond to some of the worst abuses he forecasts. And finally, although I am sympathetic to Professor Calo's policy prescriptions, I fear that some of the speech restraints he considers may founder on the shoals of the First Amendment.

TABLE OF CONTENTS

INTRODUCTION	156
I. DIGITAL MARKETING IN PERSPECTIVE.....	158

* Professor of Law, Georgetown University Law Center. From June 2009 through January 2013, Professor Vladeck served as the Director of the Federal Trade Commission's Bureau of Consumer Protection. The author wishes to thank Gwendelynn Bills, Online Articles Editor of *The George Washington Law Review*, for her top-notch editorial assistance.

II. REGULATORS ARE AWARE OF, AND SHARE, PROFESSOR CALO'S CONCERNS	162
III. DIGITAL MARKETING MANIPULATION AND THE FIRST AMENDMENT.....	164
CONCLUSION.....	170

INTRODUCTION

Professor Ryan Calo is one of the brightest stars in the constellation of rising privacy scholars. His views count. For that reason, his detailed, trenchant, and downright disturbing account of the potential for marketers to unleash highly personalized and psychologically tailored digital marketing designed to overwhelm a consumer's defenses demands attention.¹ And that is what he wants. Professor Calo is the Paul Revere of digital-marketing manipulation. His article is intended to sound the alarm and prompt regulators to start thinking right now about how to address the risks of digital marketing. And his argument is a powerful one. Reduced to its core, his argument is that marketing companies will soon deploy platoons of psychologists, anthropologists, behavioral economists, and marketing experts to use vast quantities of consumer-specific information to make fine-tuned, personalized marketing pitches at exactly the moment the consumer is least able to resist. Making matters worse, Professor Calo contends that the existing consumer protection laws may not be up to the task of reining in these practices.

Professor Calo recognizes that each time the advertising industry comes up with "new" techniques of persuasion, other scholars have sounded similar alarms, but their fears did not materialize. For that reason, much of Professor Calo's article is an extended answer to skeptics who do not share his concerns about digital marketing. He makes a convincing case that consumers are, or soon will be, imperiled by digital marketing that poses risks that are different in kind and degree than the risks posed by other selling tools. He wants us to worry, and even without the persuasive power of digital manipulation, his argument succeeds.

As a former regulator, there is much in Professor Calo's argument that persuades me that his warning is not a false alarm. There is no question that, as Professor Calo contends, the power of digital marketing is growing, and that the ability of marketers to leverage the power of "big data" to prepare highly personalized profiles on consumers is already a reality.²

¹ See Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014).

² See, e.g., Brooks Bell, *How Data Will Drive Business Strategy in 2014*, FORBES

Nor is there any question that the increasing use of manipulative digital marketing techniques has important and troubling policy implications. By laying bare and grappling with these issues, Professor Calo has performed an important service.

There is much to commend Professor Calo's article, and there are only three minor points on which our views diverge. First, although I agree that digital marketing provides new, novel, and disquieting opportunities for manipulation, Professor Calo's argument does not adequately take into account factors that may mitigate some of the risks he sees on the horizon. Second, Professor Calo appears not to appreciate that regulators share his concerns. As a result, his article overlooks some of the ways regulators are already responding to the risks that manipulative digital advertising poses to consumers. And third, I have serious doubts that Professor Calo's First Amendment analysis adequately addresses the Supreme Court's current commercial speech jurisprudence. Constructing an argument based on *Ohralik v. Ohio State Bar Association*,³ without addressing later cases dealing with in-person solicitation, especially *Edenfield v. Fane*,⁴ seems problematic. After all, Professor Calo's argument depends on the claim that digital marketing is a much more powerful tool than conventional advertising for manipulating consumers, and therefore it should be treated as potentially coercive speech subject to government restraint. Under prevailing First Amendment doctrine, the line between especially persuasive speech, which is entitled to robust First Amendment protection, and coercive speech, which may be regulated or suppressed, is hardly a bright one. The factors the Court considers in determining when speech crosses the line cut decidedly against Professor Calo's claim. For these reasons, to the extent that there are abuses with digital marketing, the responses will likely have to come in forms other than speech restraints.

I. DIGITAL MARKETING IN PERSPECTIVE

Although I agree with much of Professor Calo's evaluation of the risks of digital marketing, it is important to put his critique in context. There are three points that temper the urgency of his appeal.

TECHONOMY (Jan. 23, 2014, 12:33 PM), <http://www.forbes.com/sites/teconomy/2014/01/23/how-data-will-drive-business-strategy-in-2014/>; Andrew Cherwenka, *Expert Marketing Predictions: Is 2014 the Year of Personalization?*, HUFFINGTON POST BUSINESS (Mar. 08, 2014, 5:59 AM), http://www.huffingtonpost.com/andrew-cherwenka/expert-marketing-predicti_b_4542837.html.

³ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

⁴ *Edenfield v. Fane*, 507 U.S. 761 (1993).

First, reading Professor Calo's article uncritically, one would likely reach two conclusions: most people (a) spend a good deal of time surfing the internet or reading ad-sponsored content and are subject to a barrage of highly targeted digital marketing, a barrage that intensifies when the person's defenses are down, and (b) spend a good deal of money online. That may be true in Seattle, Professor Calo's home base, and that may be true for certain demographic groups, like some teens. But it is not true for most of America. To be sure, many Americans spend hours each day staring at computer screens, using word processing programs, sending emails, or on work-related software. But most Americans still spend comparatively small amounts of time on sites supported by advertising.⁵ For that reason, exposure to the type of manipulative digital marketing that Professor Calo worries about is far from pervasive. Americans still spend more time watching television than they do interacting with digital media.⁶ Americans still spend most of their money offline; internet sales, while growing, represent a trivial portion of retail sales in the United States.⁷ And advertisers—including those selling what Professor Calo calls "demerit goods" (goods like alcohol and junk food)—still concentrate their advertising dollars on conventional media; digital marketing occupies a small, albeit growing, portion of marketing budgets.⁸

⁵ One study determined that the average American spends less than three hours per day on internet activities, other than email, that contain online advertising such as social networks, online video, and blogs. See *Social, Digital Video Drive Further Growth in Time Spent Online*, EMARKETER (May 8, 2013), <http://www.emarketer.com/Article/Social-Digital-Video-Drive-Further-Growth-Time-Spent-Online/1009872>.

⁶ See News Release, Bureau of Labor Statistics, American Time Use Survey—2013 Results 2 (June 18, 2014), available at <http://www.bls.gov/news.release/pdf/atus.pdf> (reporting, based on 2013 data, that "[w]atching TV was the leisure activity that occupied the most time (2.8 hours per day), accounting for more than half of leisure time, on average, for those age 15 and over"). Other sources suggest that Americans spend even more time watching television. See Statistic Brain Research Inst., *Television Watching Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/television-watching-statistics/> (last visited Oct. 9, 2014) (estimating that the average American spends over five hours a day watching television); see also Cotton Delo, *U.S. Adults Now Spending More Time on Digital Devices Than Watching TV*, ADVERTISINGAGE (Aug. 1, 2013), <http://adage.com/article/digital/americans-spend-time-digital-devices-tv/243414/> (digital marketing company estimates that Americans now spend more time engaged with digital technology than watching television, but acknowledges substantial double counting).

⁷ According to the most recent statistics available from the Department of Commerce, in 2012 "e-commerce" represented just over five percent of retail sales in the United States. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2012 E-STATS 2 (2014), available at http://www.census.gov/econ/estats/2012_e-stats_report.pdf.

⁸ See FTC, SELF-REGULATION IN THE ALCOHOL INDUSTRY: REPORT OF THE FEDERAL TRADE COMMISSION 8 tbl.2 (2014), available at <http://www.ftc.gov/system/files/documents/>

Second, as Professor Calo points out, highly personal information is the coin of the realm for digital advertisers. Ubiquitous data collection is key. The digital marketing dystopia that Professor Calo warns of depends on the steady flow of personal information into analytic companies; that information is the raw material the companies need to tailor manipulative marketing strategies. But data collection of the scope required to support highly personalized marketing is not inevitable. Since 2010, the FTC has pushed for a “Do Not Track” option to provide consumers significant control over the collection of personal data.⁹ Although efforts to negotiate a Do Not Track regime fell apart, the FTC’s effort has nonetheless borne fruit. All of the major browsers (Microsoft’s Internet Explorer, Mozilla’s Firefox, and Apple’s Safari) offer Do Not Track options that permit anonymous browsing, and in 2012 Microsoft issued its Internet Explorer 10, which by default is set to Do Not Track.¹⁰ To be sure, advertisers have resisted compliance.¹¹ But that resistance is starting to weaken. Twitter, with over 270 million active users, recently announced that it intends to honor Do Not Track signals.¹² And Mozilla and Apple are considering

reports/self-regulation-alcohol-industry-report-federal-trade-commission/140320alcohol-report.pdf (reporting that digital marketing amounted to slightly less than eight percent of the alcohol industry’s advertising expenditures in 2011 while traditional media—television, radio, magazine, and newspaper advertising—amounted to about one-third of the industry’s expenditures). The most recent statistics about marketing “junk foods” to children, based on 2009 data, show that digital advertising amounted for only about seven percent of industry’s expenditures, although the portion of expenditures in digital media was on the rise. FTC, A REVIEW OF FOOD MARKETING TO CHILDREN AND ADOLESCENTS: FOLLOW-UP REPORT 10 fig.II.5 (2012) [hereinafter FTC’S FOLLOW-UP REPORT ON FOOD MARKETING], available at <http://www.ftc.gov/sites/default/files/documents/reports/review-food-marketing-children-and-adolescents-follow-report/121221foodmarketingreport.pdf>.

⁹ FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS, PRELIMINARY FTC STAFF REPORT 63 (2010).

¹⁰ See, e.g., Craig Buckler, *Microsoft IE10 and Its “Do Not Track” Default Settings*, SITEPOINT (Oct. 19, 2012), <http://www.sitepoint.com/ie10-do-not-track/>; *Do Not Track FAQ*, MOZILLA, <https://www.mozilla.org/en-US/dnt/> (last visited Oct. 9, 2014); *Safari 6 (OS X Mountain Lion): Ask Websites Not to Track You*, APPLE, <http://support.apple.com/kb/PH11952> (last visited Oct. 9, 2014).

¹¹ See, e.g., Elise Ackerman, *Google and Facebook Ignore “Do Not Track” Requests, Claim They Confuse Consumers*, FORBES (Feb. 27, 2013, 7:58 PM), <http://www.forbes.com/sites/eliseackerman/2013/02/27/big-internet-companies-struggle-over-proper-response-to-consumers-do-not-track-requests/>; Elizabeth Dwoskin, *Yahoo Won’t Honor ‘Do Not Track’ Requests from Users*, WALL ST. J. DIGITS (May 2, 2014, 8:22 PM), <http://blogs.wsj.com/digits/2014/05/02/yahoo-wont-honor-do-not-track-requests-from-users/>.

¹² Simon Davies, *Three Healthy Indications That Online Privacy May Have Turned a Corner*, THE PRIVACY SURGEON (July 11, 2013), <http://www.privacysurgeon.org/blog/>

setting their browsers to a default Do Not Track setting.¹³ The advertising industry now projects that up to half of browser activity will soon be sending out Do Not Track signals, a development which has prompted the industry to reconsider its position.¹⁴ Although it is too early to declare victory for Do Not Track, it is also too late to deny that consumers are increasingly demanding control over tracking and that the market is responding—a response that may undercut the ability of digital marketers to engage in manipulation.¹⁵

Third, existing laws give regulators tools to combat at least some of the most serious abuses Professor Calo identifies. For Professor Calo, the key to manipulation is the identification of consumers who exhibit a

incision/three-healthy-indicators-that-online-privacy-may-have-turned-a-corner/; Kevin Weil, *Experimenting with New Ways to Tailor Ads*, TWITTER BLOG (July 3, 2013, 3:04 PM), <https://blog.twitter.com/2013/experimenting-with-new-ways-to-tailor-ads> (announcing that “Twitter will not receive browser-related information from our ad partners for tailoring ads if users have DNT enabled in their browser”).

¹³ Jim Edwards, *Death of the Cookie: How the Web’s All-Seeing Tracking Device Could Meet Its End*, BUS. INSIDER (May 1, 2013, 8:02 AM), <http://www.businessinsider.com/death-of-cookies-2013-4?op=1>.

¹⁴ Jim Edwards, *Ad Business May Capitulate on Use of Tracking Cookies: ‘That Is No Longer Tenable,’* SFGATE (July 9, 2013, 7:46 AM), <http://www.sfgate.com/technology/businessinsider/article/Ad-Business-May-Capitulate-On-Use-Of-Tracking-4654597.php>.

¹⁵ See Davies, *supra* note 12; Mark Little, “*Little Data*”: *Big Data’s New Battleground*, OVUM (Jan. 29, 2013), <http://www.ovum.com/little-data-big-datas-new-battleground/> (tech consulting service reporting that its “Consumer Insights survey has discovered that an average of 66% of the Internet population across 11 countries would select a ‘do not track’ . . . feature if it was easily available”). Unless advertisers stop indiscriminately placing tracking devices on people’s computers, they are likely to soon confront another legal challenge. Their business model depends on the unconsented-to collection of personal information for commercial gain. A few early cases suggested that the unauthorized placement of tracking cookies might not constitute a “trespass to chattels” because there was no proof that the cookie harmed the computer. But Do Not Track changes the valence of that argument. Consider a real property analogy: if one owns property, it is not necessarily a trespass for someone to come on that property without permission, but if the property owner posts “No Trespassing” signs, anyone who comes on the land without permission is trespassing. See generally Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73 (2003) (discussing the application of common law trespass doctrine to cyberspace); see also *Ortberg v. United States*, 81 A.3d 303, 309–10 (D.C. 2013) (applying DC law to find that defendant should have known entry was against the will of the lawful occupant and thus unlawful). Using a browser to emit a Do Not Track signal is the digital equivalent of posting “No Trespassing” signs. It declares that, absent the owner’s permission, no tracking device may be placed on the computer. To the extent that the advertising industry defies that signal, at some point it likely will face challenges based on common law property claims. See Laura Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels*, 17 BERKELEY TECH. L.J. (ANNUAL REVIEW) 421, 428–35 (2002).

particular cognitive bias or vulnerability. He raises the possibility that psychologists and behavioral economists will be able to identify and compile lists of consumers especially vulnerable to certain appeals. These “sucker lists” will then be sold to the highest bidder. All of that rings true and is deeply troubling. But there is nothing new about “sucker lists,” and marketers hardly need sophisticated technology to identify people with easy-to-exploit vulnerabilities, especially consumers in dire financial straits looking for credit or moneymaking opportunities, or consumers searching for easy and effective weight loss products. Regulators have long gone after entities that create sucker lists, like rogue credit reporting agencies and lead generators, and the marketers and their affiliates that use them for marketing purposes.¹⁶ Professor Calo is right to be concerned about the harms that manipulative digital marketing can cause, but at this point, many of his concerns are still forecasts, and existing regulatory tools can address at least some of the abuses.

II. REGULATORS ARE AWARE OF, AND SHARE, PROFESSOR CALO’S CONCERNS

Chalk it up to hypersensitivity, but Professor Calo’s article can be read to suggest that regulators are not on top of the developments in the digital marketing strategies and are ill-prepared to respond. Not so. The FTC has long recognized the potential to use digital marketing to deceptively or unfairly manipulate consumers. For instance, in 2010, the agency sent compulsory process orders to forty-eight large food marketing companies to probe the various techniques they use to sell their products to children and teenagers. The agency directed they provide information on:

- i. Research on the effectiveness of new media (*e.g.*, company-sponsored Internet sites, other Internet and digital

¹⁶ See, *e.g.*, Press Release, FTC, Consumer Reporting Agency to Pay \$1.8 Million for Fair Credit Reporting Act Violations (June 27, 2011), *available at* <http://www.ftc.gov/news-events/press-releases/2011/06/consumer-reporting-agency-pay-18-million-fair-credit-reporting>; Press Release, FTC, FTC Settlements Require Equifax to Forfeit Money Made by Allegedly Improperly Selling Information About Millions of Consumers Who Were Late on Their Mortgages (Oct. 10, 2012), *available at* <http://www.ftc.gov/news-events/press-releases/2012/10/ftc-settlements-require-equifax-forfeit-money-made-allegedly>; Press Release, FTC, Internet Marketers of Acai Berry Weight-Loss Pills and “Colon Cleansers” to Pay \$1.5 Million to Settle FTC Charges of Deceptive Advertising and Unfair Billing (Jan. 9, 2012), *available at* <http://www.ftc.gov/news-events/press-releases/2012/01/internet-marketers-acai-berry-weight-loss-pills-colon-cleansers>; Press Release, FTC, Payday Loan Lead Generators Settle FTC Charges (June 24, 2008), *available at* <http://www.ftc.gov/news-events/press-releases/2008/06/payday-loan-lead-generators-settle-ftc-charges>.

advertising, and word-of-mouth and viral marketing) in increasing interest in or consumption of any food product among individuals under the age of 18;

ii. Research on the use of behavioral targeting (*i.e.*, the use of information about an individual's online activities to select which advertisements to display to that individual) and other similar marketing practices to increase interest in or consumption of any food product among individuals under the age of 18; and

iii. Scientific and market research exploring neurological, psychological, or other factors that may contribute to food advertising appeal among youth.¹⁷

The information obtained from these inquiries was incorporated into the agency's *Follow-Up Report on Food Marketing*, released in December 2012.¹⁸

The agency has also made it a priority to bring enforcement actions against companies that lure consumers in through the exploitation of cognitive biases. For instance, in *FTC v. Commerce Planet, Inc.*,¹⁹ a massive negative option case involving injury to nearly a half-million consumers, the company's website offered consumers a free "Online Auction Starter Kit" that would teach purchasers how to sell products on online auction sites such as eBay.²⁰ The kit, consumers were told, would give them an easily managed online business bringing in a steady income.

¹⁷ FTC'S FOLLOW-UP REPORT ON FOOD MARKETING, *supra* note 8, at app. B-15; *see also id.* at app. D. Note that the agency had a concern that Professor Calo does not address, but likely strengthens his argument. Increasingly, marketers are using technologies such as functional magnetic resonance imaging (fMRI) to measure changes in activity in parts of the brain; that information can give insights into the factors that are likely to persuade particular consumers. *See, e.g.*, David Aaker, *Will Neural Marketing Become a Game-Changer?*, PROPHET (Sept. 11, 2013), <https://www.prophet.com/blog/aakeronbrands/157-will-neural-marketing-become-a-game-changer>; *see also* Press Release, FTC, FTC Native Advertising Workshop on December 4, 2013 Will Explore the Blurring of Digital Ads with Digital Content (Sept. 16, 2013), *available at* <http://www.ftc.gov/news-events/press-releases/2013/09/ftc-native-advertising-workshop-december-4-2013-will-explore> (announcing workshop to explore research about "how consumers notice and understand paid messages that are integrated into, or presented as, news, entertainment, or regular content" and what research shows about "the ways that consumers seek out, receive, and view content online influences their capacity to notice and understand these messages as paid content").

¹⁸ *See* FTC'S FOLLOW-UP REPORT ON FOOD MARKETING, *supra* note 8, at app. D (detailing all of the food marketing companies' digital-marketing efforts).

¹⁹ *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048 (C.D. Cal. 2012).

²⁰ *Id.* at 1054.

Although the offer was “free,” consumers had to provide credit card information for nominal shipping and handling costs.²¹ Most consumers, however, unwittingly signed up for the company’s \$60 per month “OnlineSupplier” program and had a hard time canceling their enrollment or getting a refund.²² The company’s defense was that its website contained all of the requisite disclosures and disclaimers; the FTC countered that the website was carefully constructed to ensnare consumers by obscuring the disclosures and disclaimers.²³ The case was all about manipulation and exploitation, not outright falsehoods. At trial, the FTC’s key witness was an expert in “human computer interaction” (“HCI”), which the court described as “an interdisciplinary study that encompasses both qualitative and quantitative methods and draws upon such fields as computer science, cognitive psychology, and social psychology, among others.”²⁴ The court relied heavily on the expert’s testimony in its opinion holding for the FTC, and the FTC routinely consults HCI experts in enforcement matters.²⁵ To the extent that Professor Calo is worried that regulators are not closely following developments in digital marketing, that concern is misplaced.

III. DIGITAL MARKETING MANIPULATION AND THE FIRST AMENDMENT

The one point on which my views and Professor Calo’s views significantly diverge is over the First Amendment implications of digital

²¹ *Id.*

²² *Id.* at 1054–55.

²³ *Id.* at 1065.

²⁴ *Id.* at 1068.

²⁵ *Id.* at 1068–72, 1093. Professor Calo makes the puzzling claim that the FTC filed its first negative option case based on deceptive and unfair website content in 2011, when it brought suit against Jesse Willms. Calo, *supra* note 1, at 1002 & n.30. That claim is incorrect. *FTC v. Willms*, No. 2:11-cv-00828-MJP (W.D. Wash. Mar. 6, 2012), was preceded by many other, similar negative option cases, including many brought during my tenure at the FTC, such as *Commerce Planet*, which was filed in 2009. See Complaint for Permanent Injunction and Other Equitable Relief at 4–6, *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048 (C.D. Cal. 2012) (No. 8:09-cv-01324-CJC(RNBx)), available at <http://www.ftc.gov/sites/default/files/documents/cases/2009/11/091119complanetcmt.pdf>. The agency’s massive case against Jeremy Johnson and I Works, Inc. was filed in 2010. See Complaint, *FTC v. Johnson*, No. 2:10-cv-02203-RLH-GWF (D. Nev. 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/12/101222iworkscmt.pdf>; see also Natasha Singer, *A Local Hero Accused*, N.Y. TIMES, June 16, 2013, at BU1. Additionally, a negative option case involving free trials for health and beauty products was filed in 2010. See Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Cent. Coast Nutraceuticals, Inc.*, No. 1:10-cv-04931 (N.D. Ill. Aug. 5, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/08/100816centralcoastcmt.pdf>.

marketing. Although I am sympathetic to Professor Calo's argument, under prevailing First Amendment jurisprudence, speech restraints aimed at restricting or banning "manipulative" digital marketing practices are likely in for rough sledding.²⁶ Here is the problem: in order to escape rigorous First Amendment review, Professor Calo argues that the techniques employed in manipulative marketing are similar to those that can be used to coerce consumers in face-to-face encounters. Then, relying on *Ohralik*, he claims that the Court has recognized that in some contexts in-person solicitation poses risks so great that the State may forbid or strictly regulate these encounters. In other words, manipulative digital marketing may cross the line from permissible persuasion to impermissible coercion, and thus can be regulated or suppressed. But one person's coercion is another's persuasion.²⁷ And speech may not be regulated or suppressed simply because it is thought to be too persuasive. The line between persuasion and coercion is hardly clear, and the Court's cases do not make the argument for coercion here an easy one.

To begin with, *Ohralik* is a fact-bound case that was all about

²⁶ In the interest of full disclosure, I spent more than twenty-five years with Public Citizen Litigation Group, which litigated many of the early commercial speech cases, including *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993), which I argued. See generally Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189 (2004) (Professor Morrison, now Lerner Family Associate Dean for Public Interest and Public Service Law at George Washington University Law School, directed the Litigation Group and was in many ways the architect of the early commercial speech doctrine). I have argued elsewhere that the Court has transformed the commercial speech doctrine from an intermediate standard of review, under which governmental judgments were given some deference, into a far more demanding standard, where government restraints on speech are struck down even when they further substantial consumer protection goals. David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1072 (2004).

²⁷ Consider a simple illustration based on Professor Calo's donut example. See Calo, *supra* note 1, at 996. Suppose a company has determined, based on browsing history and geolocation information, that a person loves donuts (and who doesn't?). Is it "manipulation" to send that person a text message with a discount coupon each time the person is near a donut shop? I think not. Is the case for manipulation stronger if, based on the sophisticated psychological profiling Professor Calo describes, the message is delivered at precisely the moment that person is most easily persuaded to buy donuts? Maybe so, but maybe not. And that is the point. The line between persuasion and coercion is hardly a bright one. Nowhere does Professor Calo suggest a solution to this line-drawing problem, no doubt because the line between permissible marketing and over-the-top marketing will be hard to draw and intensely fact-bound, making the First Amendment issue particularly problematic.

coercion. Mr. Ohralik was a classic “ambulance chasing” lawyer.²⁸ Ohralik learned from an acquaintance that two young women had been injured in an automobile accident.²⁹ He then contacted the parents of one of the women, and learned that Carol, their eighteen-year-old daughter, was hospitalized.³⁰ Ohralik approached Carol in her hospital room, where she was in traction and in pain, and offered to represent her.³¹ Later on, he again visited Carol at the hospital, where she signed a contingency fee agreement.³² In the meantime, Ohralik approached Carol’s eighteen-year-old passenger, Wanda Lou—who also had been injured—at her home on the day she was released from the hospital; Wanda Lou agreed orally to a contingency fee arrangement.³³ Ohralik did not disclose to Wanda Lou the conflict between her, the passenger, and Carol, the driver.³⁴ Ohralik also recorded his conversations with the young women and their parents without their permission and used the tape recording as evidence of a contract with Wanda Lou when she refused to pay him a fee.³⁵

Faced with these facts, the Court upheld the discipline imposed on Ohralik.³⁶ The Court pointed to a number of factors that, in its view, made in-person solicitation by lawyers fraught with special peril. For one thing, the Court thought that the “potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.”³⁷ Adding to the Court’s concern was the nature of the interaction: “[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.”³⁸ Moreover, “in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession.”³⁹ And the Court was especially troubled that Ohralik solicited “young accident victims at a time when they were especially incapable of making informed

²⁸ See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449–54.

²⁹ *Id.* at 449.

³⁰ *Id.*

³¹ *Id.* at 450.

³² *Id.*

³³ *Id.* at 451.

³⁴ *See id.*

³⁵ *See id.* at 450–52.

³⁶ *Id.* at 467–68.

³⁷ *Id.* at 465.

³⁸ *Id.* at 457.

³⁹ *Id.* at 466.

judgments.”⁴⁰

Most of the concerns identified by the Court are absent from online solicitation. It may be that digital marketers could be seen as “professionals trained in the art of persuasion,” but online solicitations have few of the hallmarks of in-person solicitation, which “may exert pressure” and “demand an immediate response.” The key difference is that a person solicited on the internet can simply push a button and make the solicitation disappear, just as someone who receives unwanted mail can send it on a short trip from the mailbox to the trash can. The ease with which a person receiving an over-the-top solicitation can exit from the site or delete the offending solicitation makes it more likely that the Court will draw an analogy not to in-person solicitation as Professor Calo contends, but to direct-mail solicitations, which the Court has found to pose few of the risks present in *Ohralik*. As the Court put it, “[u]nlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter . . . can readily . . . put [it] in a drawer to be considered later, ignored, or discarded.”⁴¹

Indeed, as anyone who has undergone the rite-of-passage of an in-person solicitation by a used car dealer or insurance salesman knows, no matter how sophisticated digital manipulation becomes, it cannot hold a candle to the power of in-person solicitation.⁴² To be sure, digital marketers may try to create the impression that the consumer must act immediately (e.g., “Act now! Only one left at this price!”), but they do so at their peril.⁴³ Unlike in-person solicitations that cannot effectively be overseen after the fact, digital solicitations leave a perfect evidentiary trail, which law enforcement agencies use every day to build cases against entities that engage in deceptive or unfair practices. Moreover, given the strong anti-paternalism strain that runs through the Supreme Court’s

⁴⁰ *Id.* at 467.

⁴¹ *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 475–76 (1988).

⁴² I am not persuaded by Professor Calo’s suggestion that internet solicitation may become more coercive than in-person solicitation because it will be systematized as well as personalized. Calo, *supra* note 1, at 1021–24. Skilled salespeople can adapt in ways that far outstrip the capacity of existing algorithms to evolve and respond. Recall Woody Allen’s famous line in *Take the Money and Run*, which invoked everyone’s nightmare: “Virgil complains, and he is severely tortured. For several days, he is locked in a sweat-box with an insurance salesman.” Trevor Gilks, *Take the Money and Run*, EVERY WOODY ALLEN MOVIE (last visited Oct. 9, 2014), <http://www.everywoodyallenmovie.com/post/take-the-money-and-run/>.

⁴³ These kinds of marketing practices have long been condemned by the FTC as deceptive. *See, e.g.*, *FTC v. Colgate-Palmolive*, 380 U.S. 374, 387 (1965); *FTC v. Standard Educ. Soc’y*, 302 U.S. 112, 115–17 (1937).

commercial speech cases, the Court is almost certain to reject the suggestion that most consumers are as vulnerable to manipulation as were the youthful accident victims in *Ohralik*.⁴⁴

Even assuming that *Ohralik*'s analysis is relevant, *Ohralik* was not the Court's last word on in-person solicitation. In *Ohralik*'s companion case, *In re Primus*,⁴⁵ the Court struck down a disciplinary sanction imposed against an ACLU lawyer for directly soliciting clients for a civil rights case.⁴⁶ In so ruling, the Court underscored that in-person solicitation was entitled to substantial First Amendment protection because of its high communicative value and that *Ohralik* should not be read to hold that all in-person solicitation by lawyers could be prohibited by broad, prophylactic bans.⁴⁷

Perhaps more importantly, fifteen years later the Court revisited *Ohralik* and concluded that in-person solicitation was not inherently coercive and did not justify categorical restraints. In *Edenfield*, the Court struck down Florida's ban on in-person solicitation by certified public accountants seeking to solicit business clients.⁴⁸ In distinguishing *Ohralik*, the Court said that the "holding was narrow and depended upon certain unique features of in-person solicitation by lawyers that were present in the circumstances of that case."⁴⁹ The Court held that restraints on direct solicitation bear a heavy burden of justification precisely because information is so effectively communicated in face-to-face encounters. The government's "burden is not satisfied by mere speculation or conjecture," but rather it "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."⁵⁰ Thus, instead of providing a clear path to regulate digital marketing manipulation, the Court's in-person solicitation jurisprudence—if

⁴⁴ For example, in *Virginia State Board of Pharmacy* the Court said:

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

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

⁴⁵ *In re Primus*, 436 U.S. 412 (1978).

⁴⁶ *Id.* at 414–18, 439.

⁴⁷ *Id.* at 436–39.

⁴⁸ *Edenfield v. Fane*, 507 U.S. 761, 763 (1993).

⁴⁹ *Id.* at 774 (internal quotation marks omitted).

⁵⁰ *Id.* at 770–71.

applicable—places significant burdens on government to justify any restraint.

Fortunately, it may be that regulators will be able to avoid using speech restraints to address digital-marketing abuses because there are a number of nonspeech restraining tools to identify and punish offenders. For example, the FTC's deception and unfairness authority give it the power to police much of the misconduct that Professor Calo fears, as do other statutes the agency enforces, especially the Fair Credit Reporting Act.⁵¹ Under state unfair and deceptive practice acts, state attorneys general have roughly the same powers as the FTC.⁵² And there are additional, nonspeech regulatory tools that could be deployed if needed.

One is a “cooling off” rule, similar to the FTC's rule regarding door-to-door sales.⁵³ If, as Professor Calo forecasts, digital marketing leads to manipulation that cannot be policed effectively under current law, Congress or the FTC could enact a rule giving consumers a short period within which to rescind purchases they were unfairly pressured into making. Another possible set of tools, also mentioned by Professor Calo, are mandatory disclosures—sort of digital “Miranda warnings”—to make consumers aware that they are receiving personalized marketing messages based on browsing history and profiling.⁵⁴ That sort of notice might place consumers on guard. And a third option is public shaming—publicizing companies that cross the line from marketing into outright manipulation. Consumers would likely be outraged to learn that companies are manipulating them by identifying and exploiting their weaknesses. Professor Calo's donut example focuses on a consumer with a weakness for donuts and points out that, by using sophisticated analytic techniques, a company might be able to pinpoint the moment the consumer's will to resist is at its weakest point, and send a text message at that precise moment, including directions to the nearest donut shop. My point is that, if that hypothetical comes to pass, and if consumers can identify consumer-facing companies engaged in manipulation based on consumer vulnerability, shaming might be a powerful weapon to persuade consumers

⁵¹ Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (2012).

⁵² CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 5–6 (2009), available at https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.

⁵³ 16 C.F.R. § 429 (2014).

⁵⁴ Mandatory disclosure regimes, imposed to safeguard consumers from deception, are evaluated under a less rigorous standard than speech restraints. See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650–53 (1985).

to take their business elsewhere.

CONCLUSION

Ryan Calo has done a great service by laying bare the risks posed by increasingly sophisticated digital marketing. He has successfully debunked the argument that the risks it poses are nothing new. And he has responsibly sounded an alarm to prompt regulators into action.

My disagreements with Professor Calo do not go to the core of his argument. Instead, they are gentle caveats—that the risks today may be less pronounced than he theorizes, that regulators may be more alert to the risk posed by digital marketing than he gives them credit for, and that, because of the Supreme Court's commercial speech jurisprudence, regulators may have to exhaust nonspeech tools to combat digital marketing manipulation before they may consider employing speech restraints.

Notwithstanding these few caveats, Professor Calo's insights about digital marketing manipulation are a warning to us all. Sophisticated, data-driven insights into our preferences and weakness may soon be available for exploitation by companies dedicated to delivering personalized selling messages to us at our weakest moments. How the law responds to this form of digital marketing manipulation is an important question, and Professor Calo's article insists that regulators, policymakers, and consumers take notice now. We would all be wise to heed Professor Calo's advice.