

THE ISSUE IS ADVERTISING NOT SMOKING

Copyright © 2002 Michael J. Trevelline

Michael J. Trevelline
Attorney-at-Law
Telephone: 202-737-1139
Email: mjt@mjtlegal.com

THE ISSUE IS ADVERTISING NOT SMOKING

Table of Contents

I. Introduction	1
II. Two Opposing Views of Human Nature.....	5
.....A. An Explicit Statement of the Implicit Conventional View of Human Nature.	5
B. A Formulation of the Reasoning Behind the Traditional View of Human Nature	12
III. The Defective Current View of Human Nature Results in a Dangerous Commercial Speech Policy	18
A. Present Commercial Speech Policy Results in Less Free Speech by Skewing the Independence of the News M	
1. Dominance of Large Firms Who Censure the Media	20
2. Media Content, Both News & Entertainment, Deteriorates in Quality and Quantity.....	23
3. Democracy Based On One-Person-One-Vote, Not One-Dollar-One-Vote	29
.....	
B. Giantism Promoted, Especially Chain Stores	33
C. Forms Society Around Man's Weaknesses.....	41
IV. Toward A Teleological/Communal View	47
A. Man and His Language	48
1. Man is Inherently Social and so Inherently Susceptible to Suggestion	49
2. Nature of Language Includes Interpersonal Relations.....	52
3. Value of Information Content in Advertising.....	54
a. Value of Information Contained in Advertising Must Be Enhanced....	55
b. Value of Brand-Name Signaling Is Limited	57
c. Value of Price Advertising and Professional Service Advertising Is Limited.....	63
B. Role of Freedom and Authority	68
C. An Outline of the Needed Restrictions	74
D. Constitutional Problems with Restricting Commercial Speech.....	81
V. Conclusion	82

I. Introduction

In the last two centuries something new has arisen to dominate society -- the mass media; and, in recent decades, something has arisen to dominate the mass media -- mass advertising.¹ From whence came this influence on society? Is the growth of the mass media and of advertising simply another story of technological development: the development of electronic communication, the development of evermore efficient printing presses? This paper finds the answers have little to do with science and technology, but rather much to do with our confidence in free markets and our modern understanding of human nature. These answers are key in understanding how the various effects of this enormous phenomenon called advertising are playing out in society? The answers are of great import to First Amendment interpretation, to society, and to the continued success of our free markets. For society is a network of relating and interrelating factors, and allowing this one factor, advertising, to have such a large and growing role means it has free reign to redirect society onto a new path. Where is this path leading us?

Our confidence in free markets is so great that we have applied

¹In 1993, advertising revenues represented 2.5% of the U.S. Gross National Product. Ross D. Petty, *Advertising Law and Social Issues: The Global Perspective*, 17 Suffolk Transnat'l L. J.

the tenants of free market philosophy to free speech, resulting in the dropping of almost all restrictions on speech. In the area of political speech, Justice Oliver Wendell Holmes formulated this philosophy:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.²

In recent decades, restrictions on commercial speech have fallen as well before the philosophy of the free market. Restrictions on commercial speech of the not-too-distant past are often now seen as a quaint manifestation of a self-interested desire to protect the establishment through restrictions detrimental to the working of a free market. After all, is not the free market's efficacy dependent upon a free flow of information allowing participants to make rational decisions so that the free market, without government bureaucracy or controls, is able to coordinate innumerable factors of production, is able to establish the correct price, all the while rewarding the most industrious, the most efficient? According to

309, 309 n. 1 (1994).

²*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Homes, J.,

current understanding, then, commercial speech needs to be just as free as political speech.

The thesis of this paper takes exception to this understanding of free market principles and their application to free speech policy, in particular to commercial speech policy. A false notion of human nature informs the current understanding of freedom of speech as applied to commercial speech (advertising) resulting in a distortion of the free market, a distortion most strikingly seen in the promotion of tobacco. The rationale behind the current view of commercial speech is based on an individualistic understanding of man -- a profound and widely-held error. To understand this error, which arises from the individualism of social contract theory, we will first define the traditional understanding of man that informed commercial speech policy of the past; we will find this understanding was not the result of avarice, ignorance, and the desire to protect the status quo, but the application of a particular understanding of human nature, an understanding that sees man as inherently social, an understanding of enduring origin found in a wide array of cultures and places. Then we will see that the current view treats man as a completely independent, autonomous entity so as to allow business to seek to manipulate him; business

dissenting).

will be free to manipulate man's social nature by appeals to emotions and appeals to suggestion.

This paper will then point out the erroneous path unrestricted commercial speech has placed us on. Unrestricted commercial speech is causing great malfunctions in the free market, malfunctions seen in the current public awareness and consternation at the effectiveness of tobacco advertisements, malfunctions traceable to the individualism of social contract theory. For unrestricted commercial speech is contributing to three main malfunctions in our economy and society: (1) a decrease in free speech and increase -- surprisingly large -- in censorship, (2) an increase in economic giantism and its ill-effects, and (3) an increase in consumerism -- all directly attributable to the application of a false anthropology of man.

Finally, this paper will begin to develop an application of the traditional understanding of human nature to commercial speech policy with an eye toward enhancing the strengths of a modern free market economy. Thus, in the area of commercial speech, we can -- through the application of a valid anthropology and through an understanding of language -- develop Constitutional policy and a regulatory scheme that would enhance the free flow of information to make the free market mechanism all the more productive. In

developing a coherent understanding of human nature, we will find that the study of the philosophy of language will be the key, especially since the philosophy of language is notably absent from free speech analysis. This entire analysis is presented with the notion that basic philosophical and anthropological arguments found outside of social contract theory are not being presented in public debate, notably to the courts, including the U.S. Supreme Court, so that the power of such philosophical arguments should be all the more effective.

II. Two Opposing Views of Human Nature

A. An Explicit Statement of the Implicit Conventional View of Human Nature

How could the leaders of the bar of fifty years ago hold to the view that attorney advertising should be prohibited? Were they of little intelligence? Of little learning? Avaricious? Naive? The same restriction applied to other professions as well. How could the leaders of the professions not understand the contribution a free flow of information makes to market efficiency? Did they not understand how a free market without a bureaucracy of any kind coordinates myriads of buyers, of sellers, of producers, of middlemen, rewarding the most perceptive, the most industrious? Could they not see the value of allowing man to use his rationale

nature and initiative to make his own decisions as would seem worthy of his dignity, of his thinking ability? Their ignorance is all so obvious to us, so obvious that we give little thought to understanding what the former view was -- we are of our own age. Before attempting the most psychologically difficult task of looking at something from another's viewpoint, from the viewpoint and mentality of another time, let us state explicitly what our own mentality is. For by a close and conscious comparison of the two opposing viewpoints, we may better understand ourselves.

As children of the European Enlightenment -- and we are just that whether we consider ourselves politically liberal or conservative -- we share a quite definite view of human nature and of how human society should be formed, a view deriving largely from nineteenth-century Liberalism. One way to approach this view is to describe it in terms of its central theme of individualism. We see man as essentially self-sufficient, as not inherently apart of any community, not even the family. He may choose to belong to this or to that social organ, but only by consciously or implicitly entering into a contract. All his social relations are formed by contract and ultimately by the "social contract." In which direction, then, will this atomistic society, a society composed of a

vast amorphous mass of individuals, tend? What are the characteristics of a society based on individualism and social contract theory? Will it have a guiding political principle around which to orient society?

In fact, we have such a principle. A political corollary of basing society on the philosophical principle of individualism is to base society on the free market. Individualism places individual freedom and initiative at a premium; the free market is where that freedom and initiative are carried out. Where will man exercise his freedom of contract? With whom? We have found these answers in the free market. Without any preconceived idea of how business should be organized, the open competition of the free market almost by default provides the answer. In political discourse, the principle of orienting our affairs around the free market is becoming more and more explicit as time passes; concern for the public good is almost absent from current political discourse; individualism is the unrivaled philosophy.

Although the field is new and somewhat neglected, philosophers have begun exploring in philosophical terms the notion of orienting society around the free market. In regards to the overall direction of a free market society, our guiding principle is called in philosophical terms optimistic naturalism. In its purest form, the

idea is that a benevolent spirit of nature guides the stream of contingent events so that everything turns out for the best. Thus society revolves around the free market, the place where the benevolent spirit freely arranges events at little or no cost to society. For without any government bureaucracy or intervention, without an economic planning committee, a vast and far-flung array of information, materials, and labor is coordinated to meet the demands of society with a most subtle responsiveness.

In regards to man's role in an individualistic society, the guiding principle is called in philosophical terms optimistic humanism. Enlightenment philosophy dropped the idea of man's proclivity to sin for to sing the praises of his natural goodness. Rousseau even went so far as to say that a child raised free of the corrupting influence of traditional society would develop into a virtuous, open-minded adult.³ His rational nature and natural goodness would prove to be the dispositive factors in any situation.

In free speech policy, these two aspects of individualism -- optimistic naturalism and optimistic humanism -- mesh to produce the modern concept of freedom of speech. Man's great rational

³Many variations of this idea exist. With the coming of the 20th Century and the world wars, optimism about man's nature was brought up short. The idea still reigns (although largely as ideology), however, often under the modified view that man darker

ability, his dignity, his natural goodness placed in the context of the free market of ideas form the foundation for the current philosophy of free speech -- ideas have to make their way in the market place.⁴ Gone is any notion of forming children in virtue

side can be controlled through restrictions and education.

⁴John Stuart Mill, *On Liberty* chap. II (1858), is the most often cited basis of this reigning outlook most notably seen in the free speech opinions of Justice Oliver Wendell Holmes, especially Justice Holmes' statement that "time has upset many fighting faiths." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This principle only allows restrictions on speech where the speech would lead others to have a false belief concerning specific facts or lead others to misunderstand the value of a particular act. Followers of Mill's theory allow for restrictions on speech to prevent specific, mainly physical, harm to others. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *Phil. & Pub. Aff.* 204, 224 (1972). Mr. Scanlon offers six particular instances where speech causes what can be described as physical or financial harm or harm to reputation, thus justifying restrictions. *Id.* at 210-211.

The following language from the U.S. Supreme Court indicates it has adopted this view: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies to state attempts to deprive consumers of accurate information about their chosen products" 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996). Apparently this is a recent expansion of commercial speech Constitutional protection. Jef. I. Richards, *Politicizing Cigarette Advertising*, 45 *Cath. U. L. Rev.* 1147, 1167 (1996). The information made available by commercial speech is needed to allocate resources in a free market. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-65 (1976).

Chief Justice Rehnquist has rejected this view in a series of dissents, for example:

and truth, guarding them from past errors. Truth in fact is now an

market in which a *laissez-faire* policy would lead to optimum economic decision making under the guidance of the ‘invisible hand.’ See, e. g., Adam Smith, *Wealth of Nations* (1776). This notion was expressed by Mr. Justice Holmes in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct 17, 22, 63 L.Ed 1173 (1919), wherein he stated that ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’ See also, e. g., *Consolidated Edison v. Public Service Comm’n*, 447 U.S., at 534, 100 S.Ct at 2331; J. Mill, *On Liberty* (1858); J. Milton, *Areopagitica, A Speech for the Liberty of Unlicenced Printing* (1644).

of ideas.’ There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market. See, e. g., Baker, “Scope of the first Amendment, Freedom of Speech,” 25 *UCLA L. Rev.* 964, 967-981 (1978).

Central Hudson Gas v. Public Service Com’n of N. Y., 447 U.S. 557, 592 (1980). See *infra* note 88 and accompanying text.

Another commentator following Mill’s philosophy places the emphasis on man’s reasoning ability and dignity:

The value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish. [citing Mill, *On Liberty*] Other arguments for the moral value of free expression, for example, its relation to the discovery of truth, seem, by contrast, less powerful and often unhappily overused when they will not bear the fundamental weight they are expected to support.

David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Penn. L. Rev. 45, 62 (1974) (citations omitted).

antiquated concept for truth is relative to the individual.⁵ The way for children to learn is to give them access to all that has been said on a subject and let them choose for themselves; that man might tend toward superficial and obscene literature is inconsistent with optimistic humanism, and so any intervention to protect a member of society from himself is absurd -- it interferes with man's rational nature⁶ with his faith in competition, it is paternalistic.

One might state the objection that if our concept of freedom of speech has its origins in the European Enlightenment, something which happened centuries ago, then why has this understanding only so recently been explicitly adopted by courts and legislators? The U.S. Supreme Court has only in the past few years found freedom of speech to apply fully to commercial speech. The

⁵“At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992) (O'Connor, Kennedy, & Souter, J.J.). To restrict speech is inconsistent with the idea that beliefs are uncertain. Benjamin S. DuVal, Jr. *Free Communication of Ideas & the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 *Geo. Wash. L. Rev.* 161, 234 (1972). Since there is no certain truth, we must allow all opinions. *Id.* at 203-08.

⁶Concerning pornography, one commentator states that this argument that censorship supports virtues or character traits necessary for a democracy is circular. He finds no empirical evidence to support the notion that prudish sex morality is needed for a democratic citizenship. David A. J. Richards, *supra* note 4, at

response of this paper will be that it has taken years for the Enlightenment to play itself out, that the older view is so much more consistent with reality as to be a continuing part of the regulation of free speech in practice, although it is succumbing. The recent development of the current view is seen also in the many different, and often inconsistent, tests that the U.S. Supreme Court has applied to free speech analysis.⁷ The frequent changing of tests, the new one always more restrictive of censorship, does support the proposition that a major philosophical shift is playing itself out.⁸

**B. A Formulation of the Reasoning Behind the
Traditional View of Human Nature**

Traditional, pre-Enlightenment philosophies possess a common view of human nature, a view in opposition to the current Enlightenment-based view, a view forming society into a different image. Just as the current view of human nature can be seen as centering around one central concept -- individualism -- the traditional view can be seen as centering around the concept of the

87.

⁷DuVale, *supra* note 5, at 164-186.

⁸Much of politics has come to center around public policy. Carl Joachim Friedrich, *The Philosophy of Law in Historic Perspective* 218 & 221 (2d ed. 1965).

inherent social nature of man, sometimes referred to as the communal outlook. This is an idea pregnant with implications for the structuring of society and -- as we shall see -- for commercial speech policy. When man is seen by nature as belonging to various social groups -- the family, the local community, trade associations and work cooperatives, etc. -- his relationship with his fellows is seen as complementary in nature. Each person's strengths, training, abilities, and role in society is at the service of his neighbor and ultimately of the common good -- that concept so important to traditional societies. Thus, each individual relies on his neighbor and societal institutions to shore up his weaknesses, areas of inexperience, and lack of ability. In economics, this idea of each person having a role to play in society leads to the concept of vocation. In psychology, man's inherent social nature means he is inherently suggestible, something that will prove of great import to commercial speech policy. In political science, the deliberative element of democracy is stressed, what is sometimes referred to as classical republicanism.

The complementary nature of man is at odds with optimistic humanism. In teaching a particular topic, the traditional view would not provide the student with all views so he could decide for himself, rather it would orient the student away from the

erroneous, from the trivial, from the superficial -- toward the truth. And here we have another point in opposition, a point which will prove significant to commercial speech analysis: the traditional view is not relativistic -- it assumes that some truths are knowable, and it requires a consensus on at least the basic precepts of society. In the formation of children, society will seek to lead them, slowly and in various ways, toward virtue, toward the good. Man's proclivity to the bad means he tends to act on emotions and toward immediate gratification of the senses rather than on reason; this proclivity necessitates instilling good habits in order to master lower instincts as well as to cultivate the mind. The concepts of cultivation, formation, instilling virtue are strikingly foreign to the current view's marketplace competition orientation where the individual is "his own man" and chooses from the market place of ideas the principles on which he will base his decisions and actions.⁹

At this point, a certain similarity between the two views appears: they both have faith in man's rational nature. The current view, in a certain sense, centers on the individual's ability to reason through any decision, to weigh all the facts and data. Much of the

⁹Planned Parenthood of Southeastern Pennsylvania v. Casey, *supra* note 5.

efficiency of the marketplace depends on each individual qua buyer or seller acting in his self-interest, thus leading the market toward the most efficient outcome, toward rewarding the most efficient producers; and, in the marketplace of ideas, the optimal result depends on each person aligning himself with the most reasonable idea. The emphasis on reasoning in the current view is clearly in an individualistic context, however, since the reasoning is both self-sufficient and focused on the individual's self-interest. But whose reasoning will guide the overall direction of society? That will be left to the benevolent spirit of the marketplace, in which optimistic naturalism places so much trust.

The traditional view also emphasizes man's rational nature, but with a different understanding. Here it is something raw needing to be developed, to be nurtured, to be instructed, to be disciplined, guided, and trained all under the watchful eye of a preceptor, one knowledgeable in human wisdom. Not only is the individual's development nurtured with care, but also, with the emphasis on the complementary nature of man, society itself is shepherded with an eye to the common good; man's rational nature guides the overall direction of society. Rather than relying on the benevolent spirit of the marketplace, the republican tradition gives voice to man's rational nature in a public political forum -- each citizen has a say

in government, but subject to constitutional truths.

Applying the traditional view, the republic imposes limits on activities, limits formulated with a general principle called teleology -- the Aristotelian idea of looking to the end or purpose of a particular activity to determine its nature. A teleological analysis means that when a particular activity has an inherent purpose, it necessarily has limits since the activity is subservient to that purpose. We have already stated that the traditional view requires a core set of widely-accepted truths or principles on which to base society. Such truths would include the end or purpose of society, of economic life, of political speech, and of commercial speech. Thus the traditional view would develop a set of rational regulations for any of these activities, regulations defined with an eye toward man's social nature and all that that entails. So what is the ultimate end of society? Of political speech? Of commercial speech? The Declaration of Independence provides a ready-made articulation of the overall end of society: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness -- That to secure these Rights, Governments are instituted among Men" Thus, we can generally say that the general purpose of

economic life is to provide a stable environment for man to support himself in pursuit of happiness. We will define the purpose of political and commercial speech along these same lines in detail below in part IV.

At first blush, we may see naturalistic optimism from a teleological viewpoint as well if we define the purpose of the market thus: to produce the maximum amount of goods and services in a way that best meets the demands of the public. But naturalistic optimism does not clearly follow such a structure since the marketplace makes the decision of how economic life will be structured, rather than the teleological reasoning of man deciding how economic life will be structured.

Might not this view be the arbitrary application of one anthropology? Might not it be too vague to base free speech policy? We must place this traditional view in historic context. Classical Western philosophy, originating with classical Greek thought and coming down to us in various schools (although currently marginalized schools for the most part), contains an understanding of man's nature common to any number of societies. For example, the cultural values of Africa "include the treasure-house of oral literature, of indigenous artistic expressions, and of the social view of a human being as expressed in the formula

motho ke motho ka batho, translated as ‘a person is a person through persons.’”¹⁰

Since the common roots of the traditional view of human nature is based largely on directly perceivable, common-sense observations of man’s nature, the traditional view produces a commercial speech policy found in many societies. Since each of the two view’s of human nature derives from each school’s own fundamental assumptions, one can deductively follow those assumptions through to their logical implications about commercial speech policy, something this paper will strive to do. Many varieties, shadings, and sub-schools exist in the two views of human nature outlined here; however, it is far beyond this paper to discuss them, nor would it be helpful. To develop the implications of the various shadings of each philosophical view of human nature will be left to others and to another day.

III. The Defective Current View of Human Nature Results in a Dangerous Commercial Speech Policy

The current understanding of free markets, freedom of speech, and freedom of commercial speech is dangerous. The defects of

¹⁰John Degenaar, *The Role of Imagination in Contemporary South Africa*, 24 *Chesterton Rev.* 89, 98 (1998). Mr. Degenaar goes on to say, however, that the Eurocentric view does not contain these values.

optimistic naturalism and humanism -- upon which these understandings are based -- are causing dysfunctions in society. Since this paper is limited to commercial speech, let us now explore the dysfunctions the current view is causing in this one area. The current policy of little or no restrictions on commercial speech is causing three societal dysfunctions. Before discussing the three dysfunctions, let us outline how the three dysfunctions turn around the same philosophical error.

The root problem can be described in teleological terms. Basing itself on an individualistic anthropology, optimistic naturalism means the end or purpose of commercial speech is to support maximum production. Commercial speech mostly does this through promoting a free flow of information -- something important to a well oiled free market -- so that the individual can weigh all the facts and make a rational decision. By concentrating on a free flow of information, the current view implicitly carries the notion that any restrictions on that free flow are undesirable. By focusing the observer's eye on this mesmerizing vast flow of information and accompanying massive output of goods and services, this philosophy makes it difficult for the observer to turn his eyes back at man himself to see what effect this free flow is having on man. This materialistic philosophy assumes that a

superabundance of goods trumps any other consideration and so gives humanistic considerations scant attention. Therefore, most commentators on commercial speech are largely blind to the present policy's deleterious impact on man, on his development, on his political and social life. However, the negative consequences are so great that some commentators have pointed them out, although usually not legal commentators but rather social scientists of a definite philosophical bent. It is the function of this section then to summarize, coordinate, and present as a coherent whole the three malfunctions pointed out by these social scientists and to relate them to the underlying philosophical error.

A. Present Commercial Speech Policy Results in Less

Our modern eyes are so mesmerized and perhaps dazed by the sheer volume of noise, text, light, color, and images hurled at us each day that we hardly stop to analyze its quality, its tenor, its purpose, its effect on ourselves and on our society. Fortunately, some observers have looked into modern mass communications. What they have found is counterintuitive and at odds with commercial speech legal analysis, for there are three areas where a laissez-faire commercial speech policy has considerably restricted and -- yes the appropriate word is -- censored free speech.

1. Dominance of Large Firms Who Censure the Media

In the first place, large firms regularly censure what the news media reports, both by direct and by implicit intimidation. The fact of life is that the economic life of modern developed countries is dominated by large firms. These large firms, especially those selling to the general public, spend significant funds advertising, most notably advertising in national and regional media organs. The advertising revenues these media derive from such large firms comprises a significant part of their income. Therefore, a particular publishing or broadcasting company is quite sensitive to the wishes and concerns of its large firm advertisement accounts. This sensitivity is so acute that these publishers and broadcasters tend not to present news stories offensive to large-firm advertisers. This is not mere plausible conjecture: evidence confirms such censorship regularly occurs.¹¹ Statistical studies confirm that publishers and broadcasters seldom run news stories which present their large firm advertisers in a critical light. For example, much evidence establishes that publications carrying tobacco advertisements publish few articles on the health effects of smoking.¹² In addition, anecdotal evidence exists of specific

¹¹Ben H. Bagdikian, *The Media Monopoly* 35-37 (3d ed. 1990).

¹²Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 *Cincinnati L. Rev.* 1205,

instances of news stories being pulled at a large advertiser's request.¹³ Finally, anecdotal evidence tells of journalists never writing, pursuing or investigating stories out of consideration for the large advertiser.

In addition, some allege that television and print journalists are so conscious that large corporations are paying the bills that they favor portraying large corporations in a positive light.¹⁴ The

1219-20 (1988); Professor Baker finds that self-censorship appears widespread and that the greatest example of media silence was the decades-long dearth of reporting on the dangers of smoking. C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. Penn. L. Rev. 2097, 2143-53 (1992) Another study found:

In magazines that accept cigarette advertising I was unable to find a single article, in seven years of publication, that would have given readers any clear notion of the nature and extent of the medical and social havoc being wreaked by the cigarette-smoking habit. The records of magazines that refuse cigarette advertisements, or that do not accept advertising at all were considerably better.

R. C. Smith, *The Magazines's Smoking Habit*, in *The Commercial Connection* 256, 257 (John W. Wright ed., 1979).

¹³Bagdikian, *supra* note 11, at 35-37.

¹⁴Bagdikian, *supra* note 11, at 47-48. The thesis of Professor Baker's notable study is that "private entities in general and advertisers in particular constitute the most consistent and the most pernicious 'censors' of media content. Organized private power is today the most serious threat to a free and democratic press." Baker, *supra* note 12, at 2099. Mr. Bagdikian finds three reasons why mainstream news is "weighted in favor of corporate values:" (1) An "[o]verdependence on official sources of news" (2) A "lack of social context for facts in the news" Bagdikian, *supra* note 11, at 212. In an effort to be totally objective,

enormous resources of well-monied interests have influenced the academic community and scholarly think tanks to support positions in favor of these interests.¹⁵

Thus we begin to see flaws in naturalistic optimism's assumption that a large volume of publishing and broadcasting is a good in itself, a good that will necessarily produce a better informed populace. When we take our eyes off the sheer volume of information and look at man himself, we see a complex interrelation of factors, factors working sometimes to the good, sometimes to the bad. Laissez-faire free market advocate's implicit assumption that the benevolent spirit of the marketplace will sort everything out seems to be misplaced; at least in this instance, the spirit seems to be conspicuously absent. In this

journalists produce bland news which misses trends. *Id.* at 215. (3) A pattern of selectively pursuing certain stories and types of stories to the exclusion of others. *Id.* at 212. The sector supported by public taxes is reported in depth, especially abuses, but little coverage of the corporate private sector. *Id.* at 216.

established remunerative connections with the food and drug industries. 'Unfortunately,' the study says, 'many professors have developed extensive ties with the same industries of which they are asked to be objective analysts

Burton M. Leiser, *The Ethics of Advertising, in Ethics, Free Enterprise, and Public Policy: Original Essays on Moral Issues in Business* 173, 180 (Richard T. De George & Joseph A. Pichler eds., 1978).

instance, a laissez-faire, commercial speech legal regime produces censorship, a censorship not only producing an ill-informed public but also working in favor of one category of market participant -- the giant corporation. Again, by rejecting individualism and adopting a communal view, we will begin to see man as dependent, not independent, dependent on the media, on producers, and on regulators for receiving proper information. Seeing man as dependent will be the basis of a different commercial speech policy.

2. Media Content, Both News & Entertainment,

The news media's enormous reliance on advertising revenues slants the information presented in other ways as well, in ways more widespread, more nefarious; it even affects entertainment. In the last century, in earlier days of publishing and broadcasting, advertising did not play the same role it plays today, and, where advertising was present, its nature was often fundamentally different from that of present-day advertising. Because its role and nature were so different, it did not slant the contents of news and entertainment as it does today. Others have already ably analyzed the effects of advertising on the newspaper industry so that only a brief summary need be presented here. Professor C. Edwin Baker'

analysis is especially helpful and is relied on here.¹⁶

Advertising's role and nature were different in three ways. Each of these three changes causes a marked reduction in the information content provided by the media industry. First, advertising's role was different in that it was informational in nature similar to present-day classified advertisements and usually provided but little revenue for publications; the lion's share of revenue was from subscribers.¹⁷ Since readers provided the revenue directly, writers and reporters concentrated on meeting the needs of the readers. Now advertisers provide the bulk of revenue, and so the emphasis is on selling a reading audience to advertisers, a change affecting the very nature of the media industry.¹⁸

In the newspaper industry, this change is a major force behind the reduction in competition, the reduction in segmentation, as well as giantism in the media. The newspaper market of 100 years ago was a competitive place. Most cities had not just two competing dailies, but several, each newspaper catering to the needs of a

¹⁶Baker, *supra* note 12, at 2123-67.

¹⁷*Id.* at 2112-13.

¹⁸Historically, an advertising-driven media has tended to drive out of business publishers that depended on sales for revenue. Edward S. Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* 14 (1988).

differentiated readership along the lines of political view, social class, ethnic group, etc.¹⁹ In such an environment, the newspaperman's vocation was to keep the readership informed and to advocate their shared perspective in an entertaining, trenchant fashion.

With the ascendance of advertising revenues, the newspaper no longer has the incentive to cater to the reader's desire for differentiation.²⁰ Instead, the newspaper concentrates on selling a readership to advertisers.²¹ In a market where advertising revenues is the focus, one way a newspaper will do this is by increasing circulation. To increase circulation, it will play down stories of interest only to a particular segment of the readership; it will play down partisan reporting, lampooning and critical commentary, anything that might offend a significant number of readers, in favor of general interest, non-offensive reporting, also called "objectivism."²² An advertising-revenue driven newspaper will also work hard to develop readership of a higher income level

¹⁹Baker, *supra* note 12, at 2123.

²⁰*Id.* at 2123.

²¹*Id.* at 2123-2124.

²²*Id.* at 2128. The newspaper will also reduce the price since it has advertising revenue and since a reduced price will bring in

-- something most advertisers will pay all the more for.²³

Thus the first paper to successfully move in the direction of increasing advertising revenue through increased circulation and a concentration of wealthy readership will meet with ever-greater revenues especially as retailing is done more and more through national and regional chain stores. "The advertisement-based media receive an advertising subsidy that gives them a price-marketing quality edge, which allows them to encroach on and further weaken their advertisement-free (or advertisement-disadvantaged) rivals."²⁴ The newspaper that falls behind will be

more readers and so more advertising revenues. *Id.*

²³*Id.* at 2126-27. Mr. Dunnett reports:

Since 1900 newspapers have been a medium by which advertisers reach consumers. They particularly wish to reach the affluent and so are prepared to spend the most in newspapers read by the affluent

Peter J.S. Dunnett, *The World Newspaper Industry* 258 (1988).

²⁴Herman & Chomsky, *supra* note 18, at 14 (footnote omitted). The subsidy is so great that publishers presently sell their newsprint at one-third less than they pay for it. Bagdikian, *supra* note 11, at 134. "Newspapers, magazines, and broadcasters in 1981 collected \$33 billion a year from advertisers and only \$7 billion from their audiences. The almost 5-to-1 dependence on advertisers has insulated these media from the wishes of their audiences." *Id.* at 121. "Total gross revenue for the top 300 magazines reached \$27.08 billion; ad revenue accounted for 18.03 billion of the total . . . in 1997; circulation revenue measured \$9.05 billion . . . in 1997." *Soft Spots Appear, Revenues Up 5.9% After a Stellar '97*, *Advertising Age*, 14 June 1999 at S1.

relegated more and more to the advertisements of the dying independent retailers. In this environment of revenues being derived mostly from advertising, the smaller papers will eventually fold. Total circulation will decrease -- the lower-income reader's interests being ignored, he will not subscribe.²⁵ In general, advertising revenue has formed all branches of the media in the same direction of consolidation. Media consolidation, in turn, along with consolidation of retailers, also partly driven by the influence of advertising in the economy, has brought about media conglomeration where chains own vast numbers of media organs.²⁶

Second, advertising's dominate role in the media molds the content of news and entertainment into less socially redeeming forms. The surviving news conglomerates, both newspapers and broadcasters, focus on meeting the needs of advertisers, their great source of revenue. It is a doctrine of modern advertising theory and practice that news and entertainment must be such as to put the readership or audience in a "buying mood" meaning no emotional

²⁵Baker, *supra* note 12, at 2111 (citing a study of the demise of London's *Daily Herald*. James Curran, "Capitalism and Control of the Press, 1800-1975," in *Mass Communication and Society* 195, 218 (James Curran et al. eds. 1979)).

²⁶Bagdikian, *supra* note 11, at 4. The relationship between the phenomenon of conglomeration in retailing and of the growing importance of advertising will be discussed under Giantism, Part

or analytical reporting or entertainment.²⁷ Advertiser's demand that readers and viewers be kept in a buying mood serves to divert the flow of information and to form news reporting into the bland, uninspiring form that it presently takes. Thus television is devoid of serious drama in favor of mindless frivolity with the news being no better. Advertising has affected how we view society.

“Advertisers generally favor a view of most societal problems as non-systemic and resolvable by good faith individual initiative just as they favor viewing individual concerns as solvable by appropriate consumption.”²⁸ That such pressure (to form news content to the purposes of advertising) exists is seen in the pressure's most subversive form. When advertising first started to play a dominant role in newspapers, something known as the “reading advertisement” appeared, an advertisement written to appear as a news item. Although such a direct practice was long

III. B, below.

²⁷ “[P]rogramming is carefully noncontroversial, light, and nonpolitical in order to create a ‘buying mood.’” Bagdikian, *supra* note 11, at 133; Baker, *supra* note 12, at 2139. Light, happy programs is considered conducive to advertising so that it is difficult to sell advertising during highly rated but emotional broadcasts. *Id.* at 2153-56. The critical thinking also interferes with a buying mood. *Id.* See also, Herman & Chompsky, *supra* note 18, at 17-18.

²⁸ Baker, *supra* note 12, at 2167.

ago prohibited²⁹, advertising nevertheless still dictates the content of the media to an enormous extent.

Third and finally, advertising also dampens the flow of regional and local information.³⁰ As advertising became more important in media economics, regional and local reporting dropped dramatically. The cultivation of such a readership does not meet the needs of national distributors looking for the widest possible audience, so why bother with the expense of reporting such news? The dropping of local and regional news contributes to the development of an amorphous national culture at the expense of the local, organic culture -- a national culture, distant and impersonal.

²⁹19 U.S.C. § 1734 (1994) provides:

Editorials and other matter as "advertisements"

"advertisement" shall be fined under this title.

See also former 39 U.S.C. § 4367 (1960). In the television media, "Complaints from viewers ultimately caused the Federal Communications Commission to ban [program-length] commercials in the early 1970s. [In 1984], however, during the commission's comprehensive deregulation of the television industry, the FCC lifted the ban. There are still rules that require broadcasters to identify PLCs as ads. Jeffrey Chester and Kathryn Montgomery, *Counterfeiting the News*, *Columbia Journalism Rev.* 38, 38 (May/June 1988). 47 C.F.R. § 1212 (1996) requires radio stations to identify infomercials as such. Product placements in films is not restricted.

Thus we see that an advertising-revenue driven media provides less information to the consuming public, not more.³¹ Since the focus is no longer on serving the readers through the provision of information but on expanding revenues through sales of advertising space, the type and quality of information reported is almost an accident; it is a mere byproduct of generating advertisement revenues. Too, human nature being what it is, the lack of competition (at least among newspapers) sets the stage for lower quality reporting.

3. Democracy Based On One-Person-One-Vote, Not

Money's influence on the media through advertising revenue is the great formative influence not only on popular culture and business, but also on politics. Whether one emphasizes democratic principles of pluralism where competing interests struggle to establish their positions or whether one emphasizes a republican tradition where public deliberation and consensus building is necessary,³² with advertising-revenue driven media, the only

³⁰Bagdikian, *supra* note 11, at 201.

³¹"Systematic studies by researchers over the years make clear that despite grandiloquent rhetoric, chain papers give their communities less serious news than do independent papers." Bagdikian, *supra* note 11, at 83.

³²See, Symposium, *The Republican Civil Tradition*, 97 Yale L.

interests presented for deliberation are those not offensive to well-monied advertising interests. Many influences go to establish the overall direction of society. To form political leadership not by a particular philosophy, anthropology, vision of society, but by money is of great significance. In this section, we look at its inherent incongruity with democratic principles.

We established a government where the people hold power subject only to the confines of self-evident truths. For our democracy to work then, since the people have so much power, we must have a well-informed, politically-engaged populace, able to undertake an open and frank public hearing of many points of view. To support such a well-formed populace and to maintain the public forum for such debates, a democracy has requirements. Citizens must receive a broad education and have some degree of economic independence; independent institutions must play a large part in society in order to preserve it from being lead by narrow interests or by emotional appeals. “But education and attention to public issues are not enough [for the Madisonian system of deliberative democracy to work]. . . . *there must be public exposure to an appropriate diversity of view.* What counts as appropriate diversity is of course controversial. I suggest only that

Rev. 1493 (1988) (a discussion of the revival of republican

a broad spectrum of opinion be represented. . . .”³³

An advertising-revenue driven media undermines these requirements in two ways. First, the lack of partisan reporting means less critical analysis and so less development of the pros and cons of issues, less development of analytical skills of the readership, less participation in public debate and the political process -- thus, the present state of political apathy in the United States.³⁴ Students of journalism have explained how modern journalism’s concern with being “objective” serves often as an excuse for a lack of critical analysis; objectivism is often an excuse for not violating the “buying mood” requirement of advertisers.³⁵

Second, an advertising-revenue driven media harms democracy in a more direct way as well -- by censorship. For democracy to work, many voices must be heard, but, in fact, the only voice heard

thought, the revival’s various strains, and their critics).

³³Cass R. Sunstein, *Democracy and the Problem of Free Speech* 21 (1993) (emphasis in original). Professor Sunstein goes on to say:

views about public issues.

Id. at 22.

³⁴Baker, *supra* note 12, at 2136.

³⁵Baker, *supra* note 12, at 140.

is that with the money to pay.³⁶ It is not that all voices must be heard or that only intelligent or non-divisive voices must be heard, but the problem is the biased nature of the filter that decides what voices will be heard. This filter has only one criteria -- money. In such a system, a viewpoint is only as powerful as the money interests behind it. Besides diverse viewpoints, the media is not providing all the facts of “the unforeseen affairs of the community, the nation, and the world, information needed by the individual to prevent political powerlessness.”³⁷ One way to describe this problem is to divide freedom into political freedom and economic freedom. Both are needed for democracy. We have political freedom: we can vote for whomever we wish. But for our political

³⁶Professor Sunstein expands on this point:

The constitutional principle of one person-one vote is simply the most recent effort to concretize the traditional constitutional commitment to political equality. It follows that in the deliberative process, arguments are to count if good reasons are offered on their behalf. . . . To institutionalize the idea that the force of an argument is independent of the person who makes it, the system of deliberative democracy must incorporate this principle of political equality.

Sunstein, *supra* note 32, at 20. Professor Baker finds: “A subsidy for papers preferred by the more affluent dramatically biases our information environment -- in the direction opposite of what the democratic one-person-one-vote principle would require.” Baker, *supra* note 12, at 2127.

opinion to be carried by the media, we must ally ourselves with monied, advertising revenue generating interests. For us to decide what information we want to enter our homes, we are to a certain extent dependent on a range of large organizations, organizations having again money as their guiding principle.

B. Giantism Promoted, Especially Chain Stores

Even a listing let alone an analysis of all of the forces promoting giantism in the modern world, many and varied, is well outside the scope of this paper. (Although many such forces find their origin in the same naturalistic optimism informing the regulation of commercial speech.) Commercial speech policy's promotion of giantism is, however, within our concern. Other than to point out that giantism is bad for the democratic West for the same reasons that collectivism was bad for the communist East, this section assumes giantism is unhealthy.³⁸ In general, the phenomenon of conglomeration, organizing economic activity around larger and larger organizations, is notoriously neglected in all the social sciences but especially in economics and in law. In law, however,

³⁷Bagdikian, *supra* note 11, at 4.

³⁸*See generally* Leopold Kohr, *The Overdeveloped Nations: The Diseconomies of Scale* (1978). For a good psychological discussion of why organizations function at a lower level of maturity than individuals, see M. Scott Peck, MD, *People of the*

legislators and judges have made great changes to accommodate the realities of modern economic life. But they have done so with little or no academic guidance. Although the law and economics movement attempts to fill the breach, modern economics itself is so focused on efficiency that it contains little reflection on the wider effects of organizing society thus.

Since retailing, not manufacturing, is most affected by advertising, let us speak only of giantism in retailing. Let us briefly catalogue the modern phenomenon of giantism in retailing and giantism in the media, all accompanied by massive amounts of advertising. Retailing in the United States, whether department stores, supermarkets or restaurants, is dominated by a few dozen highly-advertised chains. For example, McDonald's restaurants is the sixteenth largest advertiser in the United States spending \$582.3 million in 1998.³⁹ The media itself has also undergone great conglomeration.⁴⁰ At the same time, a large amount of

Lie: The Hope for Healing Human Evil ch. 6 (1983).

³⁹National Register Publishing, Standard Directory of Advertisers: Volume 1 xxiii (1999) (for the period May 1997 to April 1998).

⁴⁰Mr. Bagdikian finds:

By the 1980s, the majority of all major American media -- newspapers, magazines, radio, television, books, and movies -- were controlled by fifty giant corporations.

money is being spent on advertising, \$130 billion in the United States in 1993 or approximately 2.5 percent of U.S. Gross National Product.⁴¹ A related phenomenon is that advertising is predominately national; the local press has even largely died out.⁴² In turn, the national media is dominated by megabrands.⁴³

Are these phenomenon related? Does the amount of national

These corporations were interlocked in common financial interest with other massive industries and with a few dominant international banks.

Bagdikian, *supra* note 11, at xix.

The large press has argued the opposite effect obtains: “Large chains claim that one advantage they offer the public is independence from advertiser blackmail. They are able to resist editorial pressures from large advertisers who threaten to withdraw advertising.” Dunnett, *supra* note 23, at 73. This argument does not consider the huge revenues now derived from advertising and the large chains’ dependence on these revenues, a dependence making independence unlikely.

⁴¹Petty, *supra* note 1, at 309 n.1. This is twice the per capita expenditure of Japan, the closest other nation. *Id.* *Advertising Age* reports that \$186.8 billion was spent on advertising in the United States in 1997. In addition, advertising is growing faster than the economy, by 6.2 percent in 1998 while the economy is expected to grow by 2.5 percent. Worldwide, \$298.9 billion was spent on advertising in 1997, a growth rate of 6.8 percent. *Coen: Ad Spending in ‘98 will outpace overall economy: 6.2% rise seen in U.S. expenditures*, *Advertising Age*, 15 Dec. 97 (quoting Robert Coen, an investment analyst).

⁴²Dunnett, *supra* note 23, at 26.

⁴³In 1998, the top 100 megabrands “embraced 27% of all national media spending in 1998 – \$27.5 billion of \$79.3 billion” *Top 100 MegaBrands: Megabrand, Proven Media Cornerstones*, *Advertising Age*, 12 July 99 at S2.

advertising somehow facilitate sales of homogeneous items on a national scale? Does it facilitate retailing being done largely through chains? In economic terms, the question is whether economies of scale exist in advertising so that it creates entry barriers? Or does advertising constitute a means for a new entrant to obtain a foothold in a market? Economic theory posits situations where one or the other result obtains.⁴⁴ However, “advertising can contribute to the entry barriers by influencing the extent of economies of scale when measured properly.”⁴⁵ With many products and in many markets, advertising does have economies of scale and does constitute an entry barrier; the importance of advertising revenues in the economy is a major factor behind conglomeration in retailing and in the media. The

⁴⁴Advertising constitutes an entry barrier where:

It is sometimes said that advertising has the character of a fixed cost, and therefore, if advertising is required to sell the good, it has the effect of creating economies of scale. It is also asserted that there are threshold effects in advertising, creating regions of increasing returns to scale. In addition, the technology and markets for producing and distributing advertising “messages” may exhibit declining average costs.

A. Michael Spence, *Notes on Advertising, Economies of Scale, and Entry Barriers*, 95 Q. J. Econ. 493, 493 (1980). However, under certain situations, it is not an entry barrier. *Id.* at 493.

⁴⁵ *Id.* at 494 (discussing theoretical models, not empirical

effect is first seen when homogeneous brand names begin to dominate sales. A brand name becomes an entry barrier by doing two things: it retains existing customers and attracts new ones, while a new entrant can only attract new ones.⁴⁶ Then the sales are made more and more through chain stores, who rely on the national media in turn promoting giantism in the media. In other words, “the mass advertising process helps kill off small retail businesses who cannot afford mass circulation rates in favor of large businesses, and it leads to monopoly in daily newspapers.”⁴⁷

studies).

⁴⁶Bagdikian, *supra* note 11, at 143.

⁴⁷Bagdikian, *supra* note 11, at 123. A good description of how this occurs includes a finding that advertising on national media:

have greater effective threshold levels of outlay than local media such as newspapers. . . . This is because the economies of message repetition and indivisibilities of the unit of advertising purchased make the required minimum absolute outlay on spot television larger than on newspapers and because television stations generally reach a larger minimum audience size than could be obtained through a local newspaper. . . . Large national firms, conversely, will find it optimal to take advantage of economies of national media such as network television and national magazines, easily vaulting the required minimum effective outlays.

Michael E. Porter, *Optimal Advertising: An Intra Industry Approach*, in *Issues in Advertising: The Economics of Persuasion* 91, 100 (David G. Tuerck ed., 1978) (Mr. Porter was summarizing his findings reported in Michael E. Porter, “Interbrand Choice, Media Mix and Market Performance,” 66 *Amer. Econ. Rev.* 398-

Advertising's promotion of large manufacturers at the expense of small local manufacturers is quite evident in lesser developed countries where it has a negative effect on economic development.⁴⁸

Television advertising especially promotes giantism in retailing. The cost of television advertisements is high, but it reaches many households and "at a relatively low cost. In the familiar dynamics, this in itself favors the big operator over the small, a contributing

406 (May 1976).) Retail chains and newspaper chains have developed in a similar manner:

In 1986, also, the world of consumer products was becoming increasingly homogeneous as more and more products were sold on a global basis. Large chains of department stores and supermarkets have evolved in North America and western Europe. There has been an accompanying move of advertising decision-making away from the local level, at which most newspapers operate. . . . These developments have created a bias in favor of newspaper chains for national advertisements. Chains can offer space across the chain's products.

Dunnett, *supra* note 23, at 26.

⁴⁸"[A]dvertising encourages the preferences of industrial manufactured goods over indigenous commodities." Josiane Jouet, *Advertising and Transnational Corporations in Kenya*, 15 *Dev. & Change* 435, 448 (1984). Although no research has been done on cultural effects of advertising in Kenya, Kenyans do consume many packaged food stuffs over indigenous products. *Id.* at 449. Thus, "Advertising helps to reinforce the dual economy of the country. Being largely in the hands of multinational corporations it has structural effects on the economy in that it prevents indigenous firms from competing." *Id.* at 454.

factor to the emergence of giantism in the American economy.”⁴⁹

A lawyer familiar with British charities explains the dynamics he knows quite well: Any charity can make an appeal by print media, but to do so by television requires so much money that only the established charities can do so; with their resources, these established charities may turn to the print media and mop up the money from them also.⁵⁰

By and large, then, entry barriers are raised, monopolies are strengthened, the tendency toward giantism is enforced. This is further seen in the hard-nosed realities of financial analysis. When one leaves the world of theoretical economic models to look at real world investment analysis, one cannot help but be struck by the premium investors place on well-run advertisement campaigns. Mr. Warren Buffett, one of the most respected investors in U.S. history, is said to place explicitly great value on the monopolistic power created by large-scale advertising campaigns.⁵¹ Mr.

⁴⁹Badikian, *supra* note 11, at 133.

⁵⁰John Preston Bell, *Survival of the Smallest?*, 139 New L. J. 14 (8 Dec. 89).

⁵¹Maria Crawford Scott, *The Warren Buffett Way: Investing from a Business Perspective*, AAI J. 6 (Jan. 1998) (This is a review of a book describing Mr. Warren Buffett's investment strategy. Mary Buffett and David Clark, *Buffettology: The Previously Unexplained Techniques That Have Made Warren Buffett the*

Buffett's investment strategy emphasizes consumer monopolies:

--Businesses that make products that wear out or are used up quickly and have brand-name appeal that merchants must carry to attract customers. The best example . . . is Coca-Cola. . . . Other examples include leading newspapers, drug companies with patents and brand-name prescription drugs, and popular brand-name restaurants such as McDonald's.

--Communications firms that provide services businesses must use to reach consumers. All businesses must advertise their wares to potential consumers, and many of the available media face little competition. These include worldwide advertising agencies, magazine publishers, newspapers, and telecommunications networks.⁵²

Coca Cola Corporation, considered one of the most successful retail sales oriented corporations of the century, spends an enormous amount of its revenues on advertising and is an interesting study.⁵³ The corporation's success can largely be explained in terms of the monopolistic-creating efficacy of advertising. The corporation sells a simple-to-produce product -- carbonated sugar water with a little flavoring and color added. Little if any economies of scale of any kind exists in the manufacturing end of bottled soft drinks. In every part of the world, from the most developed to the most undeveloped, bottling

World's Most Famous Investor (1998)).

⁵²Scott, *supra* note 51, at 7.

⁵³*See supra* notes 50 & 51 and accompanying text for Mr. Warren Buffett's view of Coca Cola, Inc.

plants using virtually the same simple technology produce the world's soft drinks.⁵⁴ The plants are always local and small scale because of the great shipping cost of the finished product compared to its per-weight value. Virtually the only difference between Coca Cola's product and certain competitor's is the proprietary red label. And why does soda pop in that red label demand such a premium the world over? The emotional appeal created by billions of dollars spent on advertisements.⁵⁵ Warren Buffett and the investing community at large well understand this. But what benefit accrues to society at large of such giantism in business?

C. Forms Society Around Man's Weaknesses

Unrestricted advertising, a widespread and a dominant influence on society, is forming our society in dangerous ways. Society is

⁵⁴"Independently owned bottlers . . . produced and distributed approximately 40 percent of our 1996 world wide unit case volume." Bottlers where Coco Cola Corporation had a non-controlling interest amounted to 45 percent. Coca Cola Company does produce much of the syrup used by the bottlers. It employs 26,000 and has a market value of \$131 billion. Cocoa Cola Company, 1997 Annual Report.

⁵⁵Coca Cola Company possesses a 43% share of U.S. soft-drink sales. "Advertising expenses included in selling, administrative and general expenses were \$1,437 million in 1996. . . ." "In highly developed, markets, where our primary goal is to make our products the beverages consumers prefer, we dedicate the bulk of our expenditures to marketing activities." *Id.*

composed of a great many interrelating factors or influences. One of the greatest influences on society today is advertising. Its ubiquitousness as well as the percentage of the gross domestic product it represents tell us just what a great influence it is. Now is the time for legal and economic analysis to drop the ideology of individualism and recognize this influence. Individuals act out of reason -- or they act out of emotions. However, in the current individualistic view of man, man is a self-directing entity so that emotions are assumed to play a negligible role -- man just needs access to all the information available so as to make the right decision. Thus regulations based on this anthropology leave the marketer free to appeal to emotions in marketing his wares. In fact, the marketer is forced to do so by the competitive pressures such a free market entails. And economic analysis -- based on this anthropology of individualism as well -- has difficulty identifying emotionalism as an economic factor. Only in the bottom-line world of investing is the value of emotional appeals acknowledged as we just saw with Mr. Buffett's financial analysis of the soft drink industry. Fundamentally, we have lost a sense of the dignity of man and of his vulnerability, the vulnerability of his free will, and of his dependence on his neighbor and culture to help guide him.

Common sense as well as the relevant social sciences tell us of

the falsity of this anthropology. We know that man is quite susceptible to emotional appeals; he is susceptible to flattery; language experts and psychologists tell us unequivocally that this is the case, a point which will be explored in detail in Section IV below. Because of these widespread appeals to emotions, we are making poor decisions, buying unneeded products, engaging in questionable activities -- smoking. Psychologists tell us that youth are especially vulnerable to emotional appeal, hence the enormous amount of advertising directed at youth -- cigarette advertising for example. Besides susceptibility to emotion, man cannot assimilate all facts -- he relies on his fellows, authority figures, for guidance. Thus he often takes the psychological short-cut of relying on authority figures, a great source of deception in advertising.⁵⁶ Therefore, through appeals to emotion and authority, advertisements regularly induce purchasers to make wrong decisions.

But even beyond showing the harm of advertising in any particular circumstance, the continual appeal to emotions -- even if the appeals were proved completely ineffectual -- does great harm to society by promoting self-gratification and a desire to

⁵⁶The psychology of language is discussed in great depth in Section IV.A.1. below.

consume.⁵⁷ Our personalities are being formed to see value in mere consumption and possession of goods. “[N]o one helps [the consumer] visualize the comfort of old shoes.”⁵⁸ Perhaps a force behind the large amount of consumer debt and low rate of savings is this constant promotion of consumption. The rapid changes in style stimulated by advertising “may be regarded as a device for destroying the value of goods by rendering them obsolete.”⁵⁹ Certainly, advertising is a powerful force shaping attitudes and behavior. Since advertising is highly selective in what it presents, it is not a mere reflection of our culture.

Some desires are more profitably stimulated than others, but not always to the advantage of the consumer. For example, it is more profitable to stimulate a demand for newness rather than for durability, because, if consumers prefer durable things, the frequency with which each person can be sold will diminish.⁶⁰

Therefore, all are influenced by advertising even those who have

⁵⁷“It . . . often distorts facts, promotes contested consumerist values and contested visions of social life, of women, of men, and of our needs and their solutions.” Baker, *supra* note 12, at 2101. Advertising and aggressive selling have made great contributions to the willingness of the public to consume in large amounts. Neil H. Borden, Advertising in Our Economy 266-67 (1978).

⁵⁸Sumner H. Slichter, Modern Economic Society 562 (1931).

⁵⁹*Id.* at 565.

⁶⁰*Id.*

never seen it since it shapes our culture.⁶¹ Usually in doing the job set before them in good faith, advertising men and women have become quite proficient at studying our weaknesses and of discerning even small changes in the general cultural attitude.

An advertising-revenue driven media produces a content centered on self-gratification.

⁶¹"From a long-range point of view aggressive selling and advertising have played a considerable part in the formation of mental attitudes necessary for a high level of consumption among the population of this country." Borden, *supra* note 56, at 266. "From the lack of wants of backward and primitive people, we may conclude that the extensive wants and desires of people in western countries are the result of generations of conditioning for a high standard of consumption." *Id.* at 267. Similarly, Professor Slichter finds:

. . . since men are largely what their desires make them, marketing experts are engaged in nothing less momentous than the molding of human character on a gigantic scale. Well may we ask whether it is wise to permit our valuations, our philosophy our very desires to be molded by men who are guided by no higher aim than to make a profit for themselves or for their employers.

Slichter, *supra* note 57, at 564 (citation omitted). Also, Professor Galbraith finds that advertising seems to have some effect on the wants of the worker so that wants are always beyond what he presently has, and it induces him to go into debt and so to be a reliable worker. John Kenneth Galbraith, *The New Industrial State* 281-82 (1967). Professor Pease finds that "a more abundant life [means] a life of ever-increasing material wants The social mission of advertising thus depended by necessity on a doctrine of material progress. Progress allegedly resulted from a state of discontent with things as they were and advertising bred healthy discontent." Otis Pease, *The Responsibilities of American Advertising* 21-22 (1958).

first in song and later in paint. With the advent of the printing press, they were told horizontally, sideways-out from the writers to editors and publishers and then fanlike outward to the readers in books, magazines, and newspapers.

which stories are told, as long as they can gather a particular audience together for a period of time, and then essentially rent that audience's attention to an advertiser. The only gate they keep is the bottom line.

together, and then sell their attention to a third party for money. That is his livelihood, not storytelling.

Thus the media is not free -- it can only provide content that will hold the audience's attention for the advertisers. This is no small amount of censorship. This censorship is forming our culture in a way incompatible with democracy. A public encouraged in the ways of instant gratification do not make good citizens. Society is bound to be harmed as is seen in vastly increased delinquent adolescent, unmarried teen pregnancy statistics and the like. This

⁶²James B. Twitchell, *For Shame: The Loss of Common Decency in American Culture* 63-64 (1997). For a similar view, see David Potter, *The Meaning of Commercial Television: The Historical Perspective*, in *The Commercial Connection*, *supra* note 12, at 82, 88; and Sal Randazzo, *Mythmaking on Madison Avenue: How Advertisers Apply the Power of Myth & Symbolism to Create Leadership Brands* 49 (1993) ("In contemporary, technological cultures, the advertising person has replaced the shaman."); *accord* James D. Squires, *Read All About It: The Corporate Takeover of America's Newspapers* 218 (1993) ("In the final analysis, these companies are not preparing themselves to better cover, judge and report what is going on, but rather to better

hammering away at our emotional weaknesses may well be contributing to the general increase in psychological problems in our population.

However, besides the psychological instability spawned by conditioning the public to act on the level of emotions alone, such conditioning cuts against the free market's reliance on a free flow of information and man's autonomous rational nature. Is not optimistic humanism behind the laissez-faire free market? Is not one of its precepts the idea that man should be given all the information needed to make a rational decision? How do such appeals to emotion as brand name advertising develop man's rational nature, man's ability to digest and act on all the information available in the free market? The fact is that it does not. (See section IV. A. 3. below for a fuller discussion.)

As stated in advertising doctrine, youth are particularly susceptible to emotional appeals. What effect is had by conditioning our youth to act on emotion? Such conditioning cannot but be bad for society. Again the fallacy in the argument of the proponents of advertising is seen most easily in the extreme case of tobacco advertising: most observers see the harm of allowing emotional advertising appeals to youth encouraging them

gather and report information that will be most watched or read.").

to smoke.⁶³

The argument of this paper, then, is that if smoking advertisements should be restricted then all advertisements containing emotional appeals should be restricted for the harms of emotional appeals are just as great for other products; it just takes more thinking to see.

IV. Toward A Teleological/Communal View

Above has been an attempt to outline the harm being done by a policy of unrestricted commercial speech -- arguments not new to this paper -- and to demonstrate the philosophical origins of this policy in individualism, optimistic humanism and optimistic naturalism -- the proposed contribution of this paper. But what alternative is there? What would basing commercial speech policy on an anthropology of man as inherently social mean? Would it be just another argument in favor of more interference in the free market by the welfare state? How could the market even function without a free flow of information? Would it even be a free market? Fortunately, a free market itself is just a mechanism, a mechanism subject to a regulatory scheme, a regulatory scheme that can be either ill-advised or salutary. Thus, in the area of

⁶³Smoking, however, is not theoretically the best example since it is one of the cases where the link between advertising and sales

commercial speech, we can, through the application of a valid anthropology and understanding of language, develop Constitutional policy and a regulatory scheme, which would enhance the free flow of information to make the free market mechanism all the more productive.

A. Man and His Language

First, then, let us identify an accurate anthropology of man in relation to language. After we have developed an understanding of the social nature of man and of his language, then we will construct a workable policy to govern the regulation of commercial speech. In the process, we will come to understand why the advertising industry is such a great employer of applied psychologist.⁶⁴

1. Man is Inherently Social and so Inherently

Since man is social by nature, he normally has many communications with his fellows. And he communicates in a wide variety of situations and circumstances. Also, he lives and works in communities so that he has regular ongoing dialogue with a small number of his fellows. These facts possess a great implication about the nature of language: that these

is not empirically clear.

⁶⁴Pease, *supra* note 61, at 170.

communications are so many and that man has regular and stable communications with a certain few mean that he has developed ways of shortcutting communications to make them efficient, less time and thought consuming.

The normal response to a communication is that of a laborious thought process. To begin, one tries to fit the communication into a categories of prior ones; one compares and contrasts various communications by a common-sense, inductive reasoning process. After one has settled on the significance of a communication, one brings a different type of reason to bear called judgment in order to decide how and whether to respond. It is not the place of this paper to outline the psychological, philosophical, and physiological science of the thinking process itself, but to point out that man is a rational creature; his rational nature entails an often long and laborious reasoning process. In the nature of things, then, he will possess shortcuts around this laborious process so that he can process a large number of communications as well as communicate with especially trustworthy sources in an efficient manner.

Psychologists and students of language call such shortcuts by the

name "suggestion."⁶⁵ It is the unreasoned acceptance of another person's ideas, no proof or logical argument is needed. It allows one to think other people's ideas and to act on other people's emotions. Suggestibility depends upon four factors. The first is the relationship between the parties. For our purposes, authority is the word describing the most relevant part of this factor. If the communicator is a person who enjoys considerable prestige, his status opens the receiver's mind. So we witness many medical coats on television advertisements. The second and most important factor is ignorance. When one is ignorant, one is especially prone to accept the opinions of another, thus, it is that children are so prone to suggestion, and parents protect them from their ignorance and inexperience. With adults the effect is oftentimes strengthened by our dislike for admitting a lack of knowledge or displaying it. Also, the professional, the man or woman most accustomed to rely on experts, buy the most worthless stock. As our society has become so specialized in the division of labor, this general tendency has become quite strong. Under ignorance can also be classified styles, something seen as bringing prestige. What is or what is not stylish and prestigious is

⁶⁵Raphael C. McCarthy & Daniel A. Lord, *Queen's Work Pamphlet, Who's Pushing Your Mind Around?* (1946).

much too obtuse for most to understand, thus we rely on others.

The third factor is those times when the emotions take over for the intellect, thus, the highly suggestible nature of the mob. The fourth factor is fatigue and sickness, thus, the volume of patent medicine perennially bought and sold.

The suggestible nature of man is particularly significant in modern society for two reasons. The first is the problem of information overload. As society has become more complex, the number of products and services has increased manyfold as well as the complexity of products. Thus, the amount of information a consumer must study, digest, and act on in making purchases has increased enormously. Not only has the complexity of products increased and so the amount of information, but also the information available has increased through various government regulations mandating information disclosure particularly on labels. The amount of information is such that it is humanely impossible to read and digest intelligently the information relevant for each purchase. Thus the ignorance factor is strongly present making us quite susceptible to suggestion -- to advertising. The second reason our society is so suggestible results from our society's complexity. We are specialists working for the most part in large organizations. Accustomed, then, to rely on specialists as

authority, we are disposed to rely on advertising.

2. Nature of Language Includes Interpersonal Relations

A twentieth-century philosopher has succinctly outlined the nature of language. To begin: “Human words and language accomplish a twofold purpose First, words convey reality. We speak in order to name and identify something that is real, to identify it for someone, of course -- and this points to the second aspect in question, the interpersonal character of human speech.”⁶⁶ Someone who in using words is “guided by something other than the truth . . . , from that moment on, no longer considers the other as a human person.” Socrates describes such language with the “old-fashioned term: flattery”⁶⁷ Flattery is not the telling of a lie, it can consist in the telling of the truth. “[T]he decisive element is this: having an ulterior motive What I say to him is designed to get something from him!”⁶⁸ The other person’s “dignity is ignored; I concentrate on his weaknesses and on those areas that may appeal to him -- all in order to manipulate him, to

⁶⁶Josef Pieper, Abuse of Language -- Abuse of Power 315 (Lothar Krauth trans., 1992). Any number of linguists have made similar studies of the nature of language. Pieper is used because he is so succinct.

⁶⁷*Id.* at 21.

⁶⁸*Id.* at 22.

use him for my purposes.”⁶⁹ The danger of such use of language “is not so readily recognized, for it is part of its nature to be concealed and disguised. It is, therefore, extremely difficult, at times impossible, to take a specific item . . . and identify the borderline that separates genuine communication rooted in reality from the mere manipulation of words aimed solely to impress.”⁷⁰

Thus we see that the cajoling words of advertising are inherently false, are inherently an abuse of language when they are aimed not to inform but to sell. Advertising is an assault on human dignity because their “messages make no pretense of appealing to rational deliberation and are imbued with the most manipulative techniques contemporary social science makes possible.”⁷¹ This reality of the manipulative nature of advertising points to the flaw of the pragmatist’s argument that advertising contains valuable signaling information: it signals to the consumer that the seller has put much effort into this product, and the seller’s reputation is at stake. (Signaling is addressed in depth in the next section.) Whether it contains signaling information or no, the language is manipulative, treating the hearer as a means to an end, as an object. To have the

⁶⁹*Id.* at 22-23.

⁷⁰*Id.* at 28.

media of a media-dominated society dominated by materialistic, manipulative messages means that the tenor of society itself will be set by such an outlook. Finally, in psychology, propaganda is believed capable of crossing the line from persuasion to coercion by dint of wearing down emotional response mechanisms.⁷² In view of the ubiquitousness and massive scale of modern advertising campaigns, this possibility must at least be kept in mind.

3. Value of Information Content in Advertising

a. Value of Information Contained in Advertising Must Be Enhanced

The pragmatist's response merits further consideration: Information is at a priority in a market economy. It is the mechanism by which the machinery works, a machinery producing unparalleled results in terms of production and prosperity, so that a certain gaming of the language is to be tolerated. Besides the creativity and elan of advertisements add a certain zest to our society. In essence, the pragmatist's argument points to the value

⁷¹Lowenstein, *supra* note 12, at 1222 (citation omitted).

⁷²Coercion occurs because "resistance to ceaseless stimuli implies a number of emotional reflexes which soon tire out the organism. . . . A moment comes when the abandonment of any resistance appears to be only at the cost of a greater fatigue." Yves

of the information content of advertising. “The question comes down to whether one conceives all or virtually all commercial speech as informational.”⁷³ Let us, then, focus on the information content of advertising. We have already seen in language theory that speech fulfills other purposes besides conveying information. What role does informational speech play in advertising? Is there any justification for restricting such speech?

The first thing noticeable about the information content of advertising is that it does not contain all the information a consumer needs to make a decision, often not even the essential information. “Until the government intervened and required or induced disclosure, accurate information was not available in the market as to durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of wearing apparel.”⁷⁴ This is

[b]ecause of the “public good” features of information, no single person has a sufficient incentive to pay for the benefits that he receives. The result is simple and clear:

R. Simon, *Nature and Functions of Authority* 54 n. 3 (1948).

⁷³Lowenstein, *supra* note 12, at 1226. This is because the U.S. Supreme Court has frequently said that the informational nature of commercial speech is the reason to grant First Amendment protection. *Id.*

⁷⁴Robert Pitofsky, *Advertising Regulation and the Consumer Movement*, in *Issues in Advertising: The Economics of Persuasion*, *supra* note 47, at 27, 31-32.

The market will produce too little information. Reliance on markets and “free choice” in expression will therefore have some of the same problems as reliance on markets for national defense or environmental protection. For this reason, some kind of regulatory solution, solving this problem, is justified in principle.⁷⁵

For a certain class of buyers and a certain class of products, market mechanisms that enhance information flow function properly, that is, no information overload, appeals to emotion, promotion of a consumer lifestyles, or economic censorship of the press occurs. However, advocates of unrestricted commercial speech argue that a lack of information or appeals to emotion do not render the speech necessarily harmful because advertising can convey information indirectly. This is the brand-name signaling argument.

⁷⁵Sunstein, *supra* note 32, at 70. Professor Sunstein further explained the information as a public good problem:

The production of information for one person, or a few, thus produces large external benefits for many other persons as well. But -- and this is the key point -- a free market in speech provides no adequate mechanism to ensure that these benefits will be adequately taken into account by those who produce the information, in this case the broadcasting industry.

Id. at 69. Also, outright false advertising is different than other speech in that no counter arguments will be heard as with politics, religion and economics, but only more false speech by the competitors. DuVale, *supra* note 5, at 235. Professor DuVale’s solution is to facilitate the opportunities for response. *Id.* Another problem with the idea that arguments will ultimately provide the needed information is that arguments are made to win not to seek the truth. *Id.* at 189-90.

b. Value of Brand-Name Signaling Is Limited

Let us address the brand-name signaling phenomenon.

Empirical evidence points to the good of trademarks and brand-name signaling -- heavily-advertised, brand-name products tend to be of higher quality.⁷⁶ A manufacturer with a trademark has a great incentive to maintain a high-quality product.⁷⁷ Even trademark or brand-name fungible products such as bleach and aspirin carry an implicit guarantee of higher production standards.⁷⁸ Even when the consumer unreflectively makes a

⁷⁶Gary S. Becker and Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 Q.J. Econ. 941, 944 (1993); Phillip Nelson, *Advertising and Ethics*, in *Ethics, Free Enterprise, and Public Policy: Original Essays on Moral Issues in Business*, *supra* note 15, at 187-198, 189-91. Producers tend to advertise high quality products they believe in. Michael Schudson, *Advertising, the Uneasy Persuasion: Its Dubious Impact on American Society* 18 (1984).

⁷⁷Richard A. Posner, *Economic Analysis of Law* 370 (1992). Trademarks originally functioned quite differently than today: they were explicit guarantees of high quality.

With these marks they could trace and punish those who did not live up to the standards of workmanship which were deemed essential under the guilds' monopoly grants. Thus, the craftsman's mark was likely to be a liability to its owner instead of an asset, as is usually the case with a modern mark.

Borden, *supra* note 57, at 24.

⁷⁸Posner, *supra* note 77, at 370.

purchase -- he associates the product with an appealing image, celebrity, song and so purchases it without consciously considering quality -- market efficiency is served since the consumer has been lead to the better product.⁷⁹ Since such signaled products are often of the type purchased over and over again, the manufacturer has an incentive to protect its advertising-campaign investment and not alienate the consumer with a poor product. In fact, “the advertising/sales ratios are greater for experience goods than search goods.”⁸⁰ (Experience goods are those whose quality cannot be judged except by use, e.g., tuna fish; search goods are those whose quality can be judged prior to purchase, e.g., furniture.⁸¹) It seems, then, that through brand-name signaling

⁷⁹For a good statement of this argument, see Jef I. Richards, *supra* note 4, at 1203-1209. Historically, the shift from using techniques that appeal to reason to using techniques that create vague psychological associations (now called lifestyle advertising) made arguments of the consumer movement about the truth of advertisements irrelevant. Advertising appealing not to factual assertions but to setting up associations in the mind of the audience “shifted the battle to a field where the critics were then deprived of all reasonable social weapons with which to oppose advertising, more specifically, a field where the barrier between literal truth and literal falsity was obscured and where, in consequence, it lost much of its effectiveness.” Pease, *supra* note 61, at 201-202.

⁸⁰Nelson, *supra* note 76, at 191.

⁸¹*Id.* Accord Slichter *supra* note 58, at 560 (“[I]n the somewhat limited number of cases where the consumer is able to judge the performance of goods, the current practice of marketing goods

advertising contributes to the efficiency of market forces.

However, brand-name signaling brings about efficiencies only under limited circumstances. The assumptions in this brand-name signaling argument are that the consumer buys the product because of the assurance of quality and that the quality is in fact higher or significantly higher. These assumptions are often false. Yes, the quality of advertised goods is usually higher than others, but the price increase is often much greater than the quality increase. Too, the consumer's attachment to brands is often irrational. With certain types of products in certain markets, brand-name signaling does function as its proponents describe. Thus econometric studies on these products and markets support the theory. By and large, brand-name signaling does not function as described. This is seen in the fact that large advertiser's frequently earn monopolistic rents as was discussed above under Giantism. The difficulty in economic studies is to distinguish when brand-name signaling's effects are limited to increasing product quality. To answer this, many have attempted various divisions of products, the above-mentioned experience goods-search goods distinction is only one. Mr. Warren Buffett's analysis described above offers the most practical division -- heavily-advertised, repeat-sales items earn the

under brand names probably makes for better quality.”).

greatest profits.⁸²

In economics, probably the best description was made by Thorstein Veblen in the 1920s: Some products more than others are best sold through advertising, that is, “articles of intimate personal use article of conspicuous personal use” because they bear “on the personal well-being or the personal prestige of the consumer; and the customers appear to be peculiarly open to argument and persuasion on these heads.”⁸³ This is because

⁸²I know of no microeconomic studies showing excess profits earned for highly advertised products. The addition of such costs as packaging and appearance to make a product saleable would make any calculation difficult to make. However, indirect evidence of prices being greater than quality increase is seen in the great profits that companies selling heavily-advertised products earn. The willingness of investor’s -- such as Mr. Buffett -- to pay so much for companies that advertise heavily is indirect evidence. Advertising executives are certainly aware of the value they add to such companies as seen in the following quote from a book by an advertising executive:

Why did Ford recently pay \$2 billion for Jaguar? Was Ford buying a successful, growing business? The existing inventory? The physical plant? All of these tangible assets together could not justify the price Ford paid for Jaguar. Ford was willing to pay that \$2 billion because of Jaguar’s unique, enduring brand identity and the equity the brand represents.

brands that have found their way into the consumer’s hear.

Randazzo, *supra* note 62, at 22-23.

⁸³Thorstein Veblen, *Absentee Ownership: Business Enterprise in Recent Times: The Case of America* 309 (1923). Similarly,

advertising works on “the fear of mortal disease and the fear of losing prestige.”⁸⁴ Professor Veblen’s view coincides with our analysis of suggestibility; as it turns out, then, the items most advertised, the companies Mr. Buffett is most likely to invest in, the self-same products on which we are most prone to suggestibility, are the self-same products most often sold through brand-name signaling. “National advertising consists very largely of attempts to persuade the public that certain brands have qualities which no others possess; in other words, attempts to create monopolies.”⁸⁵ Instead of persuading buyers through appeals to cognitive faculties, brand-name advertising often works by appealing to the emotive.⁸⁶ Even products initially advertised by

Professor Pease describes a certain advertising technique based on first finding a need that the consumer has and then finding a plausible link between the product and that need. The plausibility of this link can be quite fanciful and emotional with certain products: “A man seeking relief from pain, a cure for ‘bad breath,’ or freedom from some intangible and emotional frustration is apt to accept as plausible a great many assertions about aspirin, Listerine, and Camel cigarettes which would strike a man in search of a hammer or a garden rake as ridiculous.” Pease, *supra* note 61, at 172.

⁸⁴Veblen, *supra* note 83, at 310.

⁸⁵Slichter, *supra* note 58, at 357. Professor Slichter goes on to say: “Often the monopoly element in a good is based upon prestige.” *Id.* at 358.

⁸⁶A great theory of advertising was to avoid appealing to the credible nature of a claim because advertising could be developed

appeals to reason often move to appeals to emotions.

Generally, when a new brand is introduced, the advertising focuses on the brand's physical attributes and/or benefits. But as the brand matures, the advertising usually begins to include or emphasize user imagery and/or emotional/psychological benefits. Typically, this happens as a product category matures and it becomes increasingly difficult for brands to differentiate themselves solely in terms of physical, product-based attributes and/or benefits.⁸⁷

In other words, brand-name advertising functions properly in a narrow category of products where the advertisement is limited to conveying information about the product and the seller, because of repeat sales, has an incentive to maintain quality.

The willingness to so abuse language, the recourse to suggestibility, and the earning of monopolistic rents serves to undermine the information content of advertising in other ways as well.⁸⁸ In striving to persuade consumers of the unique quality of

so that "it could circumvent conscious reasoning processes by seizing directly on the reader's emotions. To arouse one's reason or to stimulate one's intellectual comprehension of the appeal was to risk the possibility of resistance to it and resentment of it." Pease *supra* note 61, at 175.

Appeals to emotion can be quite subtle as seen in the following example: "Insurance companies and other firms utilize photographs or drawings of immense buildings in their advertisements and on their stationary to suggest that they are large, long-established firms, even though they may occupy no more than a single office." Leiser, *supra* note 15, at 184.

⁸⁷Randazzo, *supra* note 62, at 209.

⁸⁸This section only addresses the direct effects of brand-name

brand-name products,

The business reduces itself to a traffic in salesmanship, running wholly on the comparative merit of the rival commodities, or rather of the rival salesmen. One result has been a substantial and progressive increase of sales-cost; very appreciably larger than an inspection of the books would show. The producers have been giving continually more attention to the saleability of their product, so that much of what appears on the books as production-cost should properly be changed to the production of saleable appearances. The distinction between workmanship and salesmanship has progressively been blurred in this way, until it will doubtless hold true now that the shop-cost of many articles produced for the market is mainly chargeable to the production of saleable appearances, ordinarily meretricious.⁸⁹

Much of such effort is the production of saleable containers.⁹⁰

advertising. The other negative effects of advertising discussed elsewhere in this paper also result from brand name advertising. Thus, one commentator recognized the argument in favor of brand-name advertising, but immediately pointed out that,

nevertheless, the primary function of the American advertising industry -- to stimulate consumption -- tended to produce effects which were unforeseeable and for which no one could in practice be held responsible. Relentlessly and unwaveringly it tended to foster a universal faith in the efficacy and growth of consumption and in the particular economic institutions on which that growth seemed to depend. The social implications of this faith have sometimes been as far-reaching as they have been uncontrollable.

Pease, *supra* note 61, at 197.

⁸⁹Veblen, *supra* note 83, at 300.

⁹⁰Professor Veblen goes on to say:

This adding of saleability to the cost of production returns to our initial comment about brand-name advertising: the increase in product quality may be far less than the increase in cost.

c. Value of Price Advertising and Professional Service Advertising Is Limited

We have yet to discuss the way advertising conveys one seemingly pure type of information -- price. Are there any circumstances where restricting the advertisement of price would be justified? To answer this question, we need only review the policy considerations we have already studied. Price consists of pure information so that any restrictions would be particularly harmful to free market mechanisms.⁹¹ The negative consequences

the business of publicity. It employs a formidable number of artists and "copy writers" as well as of itinerant spokesmen, demonstrators, interpreters. . . .

Id.

priced suppliers. This reduces the demand elasticity faced by firms and raises equilibrium prices and profit rates.

Michael Peters, *Restrictions on Price Advertising*, 92 J. Pol. Econ. 472, 472 (1984). One view is that the only justification for a ban on advertising price (in the case of alcohol) "is that it promotes temperance by increasing the cost of alcoholic beverages." Justices O'Connor, Rhenquist, Souter and Breyer concurring, 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1520-21 (O'Connor, J., concurring with Rhenquist, C.J., Souter & Breyer, J.J. 1996).

of emotional appeals are not much of a concern. Information overload is a concern, however, but only where judging the quality of the product is so difficult that the price has little meaning.

Professional services is the main instance of such a product.

Information about professional services is said to be extremely asymmetrical

since consumers cannot assess, or fully assess, the quality of the services they receive. Services are often complex and inherently judgmental (for example, medical checkups) with effects that are long delayed (title searches), or stochastically indeterminate (prescriptions for ailments). The feedback effects on which the market usually depends are impeded, if present at all.

without market recognition, or at least without full market recognition.⁹²

⁹²John E. Kwoka, Jr., *Advertising and the Price and Quality of Optometric Services*, 74 *Amer. Econ. Rev.* 211, 211 (1984). In this study, lifting an advertising ban on Optometric services resulted in smaller providers competing by increasing the one aspect of professional services easily gauged by the consumer -- amount of time spent on each customer. Larger providers spent less time per customer after permitting advertising so that the amount of time spent on average with a customer increased since most providers were small. *Id.* at 215.

At least three members of the Supreme Court seem to find merit in this argument. In a decision bearing on attorney advertising, the dissent found a need for a requirement that the information advertised is “verifiable by the ordinary consumer of legal services.” *Peel v. Attorney Reg. & Disciplinary Com’n*, 496 U.S. 91, 122 (1990) (O’Connor J., dissenting with Rehnquist, C.J. & Scalia J.). Two past members also recognized that consumers do not have the same knowledge as the attorney. *Bates v. State Bar of*

An assumption in economic social welfare maximization analysis is that price reflects the amount of consumer satisfaction. This is not always the case.⁹³

This circumstance of asymmetrical knowledge about professional services goes a long way in explaining the puzzle of why price advertising was traditionally restricted in the professions and why lawyer trade associations so often established set rates. Since the consumer had little ability to judge the quality of the service, the guarantees of quality seen in brand-name advertising were not present. The consumer would not often know whether quality was delivered. Especially in law and medicine, the result obtained often has little to do with the quality of the service

Arizona, 433 U.S. 350 (1977).

93

[T]he fact that a consumer pays a high price instead of a low one does not always mean that he gains a correspondingly greater return from his purchase. The satisfaction yielded by goods is often not connected with the price paid for them In some cases, the consumer may pay a high price simply because he is temporarily convinced by clever salesmanship that he has an intense desire for something which, on sober second thought, he finds he does not wish at all.

Slichter *supra* note 58, at 568-69. Interestingly, “The concept of social welfare derives from the classical utilitarian or Benthamite tradition.” Kenneth Dau-Schmidt, *Comments on Commercial Speech, Constitutionalism, Collective Choice*, 56 U. Cinn. L.Rev. 1383, 1389 (1988). These traditions are certainly considered part

provided. And, since price was so difficult to correlate with the actual cost to society, price competition was seen as being of doubtful value. Also, the professional inherently needs to focus on learned and practiced skill, not on efficiency.⁹⁴ His or her services are of such a personal nature that hallmarks of the professional became a sense of vocation and dedication to the client or patient. When the professional focuses on efficiency, he loses sight of the end of his work, justice in the case of the lawyer, since the end may not necessarily be remunerative. In short, his independence of judgement is compromised (quite similar to the way journalism has been compromised by advertising revenues). The free market's great ability to telescope information through pricing mechanisms is not helpful in organizing the production of professional services -- it is harmful. This is the simple but great insight of past centuries presently absent from almost all discussion of advertising in the professions.

The asymmetry of information in certain markets points to a common flaw in the understanding of competition. Free-market

of the Enlightenment tradition.

⁹⁴Lawyers advertising to obtain high volumes of cases means they will often be pressured to settle many inappropriately because they cannot litigate all of them. Also, the advertisement is deceptive because that lawyer will not handle the litigation. Often, he will broker the cases to another. New York State Bar

competition leads to greater efficiency when the competition is between suppliers, what Professor Veblen calls competition in workmanship.⁹⁵ When the suppliers work to gain an advantage against the consumer, what Veblen calls competition in public scarcity, efficiency is not maximized.

We conclude our analysis of information's role in advertising as we began by emphasizing its value. Free market mechanisms explicitly depend on a free flow of information. Informational advertising is an effective counter to the power of an oligarchy. But we also saw through our analysis of brand-name signaling that the market efficiencies had through advertising only exist where the advertising is informative in nature, either directly or by signaling a substantial increase in quality, a category of products dwarfed by the many products sold through emotional appeals with little or no increase in quality. Finally, even informational advertisements do not produce market efficiencies when the consumer cannot process the information because of information overload or because the information is highly complex or

Association Code of Professional Responsibility DR 2-103 (1997).

⁹⁵Veblen *supra* note 83, at 99. Professor Veblen distinguishes between industry and salesmanship. In the industry aspect of business, the competition is between the manufacturers and is on workmanship; in the salesmanship aspect, it is between the seller and the consumer and is on deception. *Id.* at 78.

unavailable, as seen in professional services.

B. Role of Freedom and Authority

This paper now argues that a coherent and workable philosophy of limiting commercial speech exists, is consistent with human nature and freedom, and enhances not hinders free market efficiencies. To begin with, we have already seen that extensive restrictions presently exist on speech as a result of tying the profitability of broadcasting and publishing to advertising revenues. This fact provides at least a hint that restrictions on speech will always be with us; the question is whether we will derive restrictions from an accidental source -- tying speech to advertising revenues -- or from a more purposeful source.

Since restrictions on commercial speech are imposed by someone with authority, let us begin by defining authority. Since man is social by nature, the community (state) is a natural and spontaneous part of his life. Living and working with his fellows means he must make compromises of his individual free will. These compromises result from the unitive and prudential nature of many of the community's decisions. For example, if two friends -- our hypothetical community -- decide to spend the afternoon at the park ten miles away, they may have a genuine dispute about which route to take. One may suggest the scenic route, the other, the

expressway. Neither is right, neither is wrong. Such is the nature of unitive, prudential decisions. Therefore, for the community to act as a whole in working toward the common good, someone must have authority. The friend driving the automobile will in fact have the authority over the community on this particular decision. (This paper will refer to this type of authority as unity-of-action-based authority.)

Through an unfortunate misunderstanding, this need for authority in areas of prudential decisions is rejected by advocates of unrestricted speech. Their misunderstanding arises from the other justification for authority, the substitution-of-judgment-based justification. When an individual is incompetent for whatever reason, the parent substitutes his judgment for the child's.⁹⁶ An error is the widespread belief that substitutional authority is the only justification for authority. This error, going to a fundamental philosophical assumption, is at the root of the widespread antagonism toward authority. This error explains why so many label governmental exercises of authority over competent adults as

⁹⁶For a definition of paternalism in the commercial speech context that does recognize these two bases of authority, see, Lowenstein, *supra* note 12, at 1237.

necessarily paternalistic.⁹⁷ Once again, we can see the error of individualism at work. When priority is given to self-sufficiency and self-determinism, little use is seen for unity of action. In addition, authority's tools are persuasion and coercion, whose repulsive natures render characterizations of paternalism all the more attractive. (We shall outline the application of these tools to commercial speech in the next section.)

The unitive nature of authority means that the state will impose rules on its citizens, beginning with a constitution. To carry the paternalism argument to its logical conclusion would be to do away with constitutions. Through a constitution, citizens place limits on themselves so to steel themselves against ill-considered decisions and to set forth a mode of procedure so that the citizens can work more efficiently toward the common good. In essence, a constitution is the memorial of such agreed-upon limits.⁹⁸ The

⁹⁷For example, Professor Lowenstein gives the following as a definition of paternalism which assumes the substitutional basis for authority is the only basis. It sees no place for the unity of action and man's social nature. "In the context of commercial speech, paternalism means preventing messages from reaching the consumer in order to increase the likelihood that the consumer will act in a manner the state believes is in his or her best interest." *Id.* at 1244

⁹⁸Sunstein, *supra* note 33, at 74-75.

state imposes further limits through laws.⁹⁹ But law is not the only source of limits society places on itself. Through customs, practices, values and a host of contributors, citizens – both living and dead -- come together to establish societal influences which will orient preferences and options in a definite direction. Consumption preferences is one. As we are seeing, in this area of consumption, many reasons exist to lessen the influence of emotional appeals through law so that other influences may have greater play in shaping our consumption practices.

Authority lessens our freedom as well so that freedom acts as a limit on how far authority can go. Therefore, we must discuss freedom before proceeding to discuss what type of limitations we would impose on commercial speech. An authority must impose measure and restraint to curtail certain freedoms. This means that freedom is not absolute. An understanding of freedom is essential. Our present individualistic view of freedom tends to confuse two aspects of freedom, initial freedom and terminal freedom. Everyone possesses initial freedom to an absolute degree, that is, everyone, as an autonomous entity, has the freedom to choose to

⁹⁹*Id.* at 74.

do anything he pleases.¹⁰⁰ However, terminal freedom, the actual exercise of free will of man as a social being, means man will consider the circumstances when exercising his free will; this involvement of man's rational nature is what is missing from the individualistic understanding of freedom. The prudential consideration of the circumstances by the community as it works for the common good will serve as the philosophical basis for justifying the state's imposition of restrictions on commercial speech.

In considering our modern relativistic environment, the point cannot be overemphasized that we are to use reason to arrive at objective truths and authority-imposed rules. It is not a matter of obeying a judge because he is a judge or because he is smarter or possesses more wealth. It is a matter of obeying the law that we have arrived at together through reason and the democratic process. At times, then, free speech needs to have limits when its interests are inconsistent with the promotion of objective truth. A weighing must be done. In the context of regulations aimed at promoting the efficiency of free markets, objective truth means

¹⁰⁰This division of freedom is similar to the division of liberty between negative liberty and positive liberty where negative liberty is an absent of restrictions on the individual and positive liberty is to govern oneself with a certain self-restraint. Frank Michelman,

what the public authority has decided is best for the common good after weighing the prudential considerations including the detrimental impact regulations have on freedom and autonomy. One of the purposes of society is to spread objective truths; at times, an unlimited discussion only interferes. Once again, this need for curtailment of speech is based on the social nature of man.

One additional prudential consideration cautions against certain restrictions on free speech. A problem peculiar to restrictions on speech is that they tend to restrict those with unorthodox ideas, not necessarily false ideas.¹⁰¹ In the commercial speech context, those with present market share may see that the authority imposes restrictions so that new entrants or smaller suppliers cannot be heard.

Three counter-considerations must be kept in mind. First, that authority may be abused is no argument for never exercising authority. Second, we have stated very specific ends of restrictions on commercial speech -- orient speech toward information in a form usable to the consumer and consistent with human dignity -- so that the authority would have to explain how restrictions reach these goals. The U.S. Supreme "Court's refusal to extend

Law's Republic, 8 Yale L. J. 1493, 1503 (1988).

¹⁰¹DuVale, *supra* note 5, at 234.

commercial speech protection to solicitation and trade names has rested on the possibility of consumer deception, a consideration normally ignored in analyzing political speech under the first amendment.”¹⁰² In dissents, Chief Justice Rehnquist has argued that in an elected government the free flow of ideas is important (not unlike this paper’s argument in the above section on democracy) but it is not so important in the commercial bazaar.¹⁰³ Third, orienting speech toward information means giantism will play less of a role in business including giantism’s accompanying censorship. This means the small producer will be in a better, not worse, position to make itself heard. It will not have to make itself heard above emotional appeals so helpful to giant marketers.

C. An Outline of the Needed Restrictions

We will formulate restrictions using a teleological analysis. In order to determine the purpose or end of restrictions, we must

¹⁰²Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court’s Unanswered Questions and Questionable Answers*, 134 U. Penn. L. Rev. 45, 49 (1985) (This sentence is Professor McChesney’s thesis.).

¹⁰³“The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim ‘caveat emptor.’” *Central Hudson Gas v. Public Service Com’n of N. Y.*, 447 U.S. 557, 598 (1980). *See also* the discussion at note 4 and accompanying text.

return to our study of man's nature and of the nature of language. With our purpose clearly in sight, we will use prudential reasoning to formulate coherent limits to commercial speech. With the idea of the common good in hand, let us here adumbrate these restrictions.

We have already seen that the end of all speech is twofold: to communicate information and to develop interpersonal relationships. Restrictions imposed by the state on commercial speech must be done to enhance these two purposes of speech in a free market context. Since we have chosen to center commercial activity around the free market, the communication of commercial information is especially valued -- a free flow of information is essential to an efficient market. But the flow of information in the free market is within the context of a correct anthropology of man: he is social in nature -- thus, man's susceptibility to the emotional, his susceptibility to information overload, his suggestibility. Since we have different amounts of information, tastes, inclinations, virtues, we are more or less suggestible or suggestible in different ways; equal footing does not exist for truth to prevail in the short-run as optimistic naturalism would indicate.

When considering the flow of information in a free market context, the common good is that the flow of helpful information

continues, that is, the most industrious, inventive, efficient, creative producer is rewarded with success. Society as a whole will benefit and thus the common good is served. At the same time, the consumer will be offered the lowest cost, best constructed, best designed product, all to the common good as well. Such a market provides competition-on-the-merits. As we have seen, the essential problem of unrestricted commercial speech is that competition is often not on the merits but on the consumer's psychological weaknesses, information overload and susceptibility to suggestion. Market mechanisms -- just that, machine like mechanisms -- cannot distinguish sales resulting from producing a better product and sales from taking advantage of a consumer's psychological weaknesses; however, sales through taking advantage of psychological weaknesses may be as financially rewarding as sales made on the merits of a product, and often more so. Since the common good is only served by competition-on-the-merits, sales through psychology will be restricted.

Exactly how to constitute these restrictions is a prudential decision beyond the scope of this paper (and since it is a prudential decision, there will be good faith disagreements). The task of the writers, executors, and interpreters of such regulations will be to promote the good of the information content of advertising while

filtering out the problems described above. Not to detail the best regulations but to argue for the need for such regulations and to explain their philosophical basis is the task of this paper.

Therefore, we offer no specific proposals. However, by way of summary, we will divide into ten categories the problems that advertising can cause as discussed in this paper. We, then, suggest that in view of the common good, legislative, executive, and judicial authorities – within their respective spheres – should work to address these ten problem areas of advertising.

The first four problem areas needing to be addressed are the four factors of suggestibility. (One) We are suggestible when receiving communication from authority figures. Therefore, a limit on the abuse of authority figures is needed, for example, a limit on celebrity endorsements. (Second) We are suggestible when receiving communications on subjects we are ignorant of. Therefore, authorities should prevent consumers from being taken advantage of through information overload. Thus, the mere provision of information would not be adequate. Rules would require information to be presented in standard easily digestible formats and that production standards be set.¹⁰⁴ Restrictions would

¹⁰⁴*See, Michael Trevelline, European Community Standardisation Policy: A New Means to Regulate Foodstuffs, 14*

take into account the distinction between goods whose quality can be readily determined and goods whose quality is more elusive so that advertisement of goods such as professional services would be restricted. Veblin's observation that we are susceptible to persuasion on article of intimate personal use and on article of conspicuous personal consumption because of fear of losing prestige can be seen as a category of ignorance as well.

(Third) We are suggestible when our emotions are in control.

Therefore, authorities should limit advertising during such times.

(Fourth) We are suggestible when fatigued or sick. Therefore,

Eur. Competition L. Rev. 46 (1993). A Federal Trade Commission commissioner has noted:

Consumers may need some common standard or benchmark for comparing the claims of sellers. . . . For example, in the home insulation market, the Commission found that consumers often were unable to determine what kind of insulation to use because they lacked the requisite expertise to enable them to make such judgments.

So the FTC imposed R-value standards for insulation. Mary L. Azcuenaga, *Advertising Regulation and the Free Market: Remarks of Mary L. Azcuenaga, Commissioner, Before the International Congress of Advertising and Free Market, Lima, Peru, 11 May 1995*, found at www.ftc.gov/speeches/azcuenaga/lima.htm. Similarly, "word-of-mouth advertising must be accounted one of the most effective safe-guards of the consumer" because the consumer is a good judge of certain goods and because sellers want repeat business. However, this does not apply for certain goods that the consumer cannot judge quality of even by using, for example, tires, tooth brushes, medicines, or where the consumer is too ashamed to tell of his loss. Slichter, *supra* note 58, at 571. Standards are designed to remedy the problem of these difficult-to-

authorities should limit advertising during times of fatigue and limit advertising aimed at alleviating diseases. Veblin's observations that we are susceptible to persuasion on articles of conspicuous personal consumption and when we have a fear of mortal disease are within this category.

The remaining six problems are ways in which advertising forms society in harmful ways. (Fifth) Advertising aimed at our emotions tends to promote an overvaluing of emotional well-being over logic. Therefore, authorities should prohibit many emotional appeals -- some songs, life style images, etc. -- so that competition is on the merits. (Sixth) An advertising-revenue-driven media censors the provision of news and forms news reporting into less valuable forms. Therefore, authorities should attack the problem of large advertisers censoring the news media. Perhaps a restriction on the percentage of advertising revenue from a single source would be in order. Authorities should also attack the buying mood journalistic format and the preoccupation with serving advertisers so that journalists address contentious issues, present higher culture, and report local news. The amount of revenue derived from advertising must diminish. The above proposed restrictions would work toward this outcome.

judge goods.

Advertising content would revert back to its earlier informational, classified-listing type form. If advertising revenue still dominates any significant form of media, other restrictions would be appropriate.

(Seventh) Advertising tends to promote the view that societal problems are solvable through personal action rather than through confronting systemic problems. There may well be no restriction that could specifically address this problem. A reduction in the amount of advertising through taxation should reduce advertising's influence on society and so reduce this problem. One proposal, used in some countries, is to impose a progressive tax on advertising,¹⁰⁵ another is to lower the postal rates on publications containing little or no advertising.¹⁰⁶ (Eighth) Advertising tends to promote consumerism and forms society around man's weaknesses. Again, since no specific restriction may be available for this problem, a reduction in the amount of advertising through taxation should reduce advertising's influence on society and so

¹⁰⁵Bagdikian, *supra* note 11, at 230. A problem with a tax on advertising is that it would harm the local media which relies on advertising also so that such a tax would need to be modified. Baker, *supra* note 12, at 2179. Since local advertising tends to be more informational in nature, such a tax could be modified along informational lines.

¹⁰⁶Bagdikian, *supra* note 11, at 231.

reduce this problem

(Ninth) Advertising tends toward giantism in the economic sector. Since the free market mechanisms allow great profits from stimulating sales whether the increase serves the common good or contributes nothing of substance to society, those in authority should step in and fix the breakdown in free market mechanisms by restricting activities that do not contribute to the common good but only to individual profit. Since advertising's large economy of scale stimulates the growth of chain stores and since organizing business along the lines of chain stores add little to the common good, those in authority should restrict such stimuli.

(Tenth) Advertising tends to undermine our one-person-one-vote democracy by allowing public opinion to be formed unduly by well-monied interests and by lessening the amount of public debate carried on in the media. Many of these above measures should go a long way to reestablish a deliberative democracy especially by decreasing advertising revenues, increasing competition, and increasing the number of local and regional news organs.

However, in federal politics, further restrictions may be necessary to restrict the power of monied interests from disproportionately presenting their view to the entire nation.

D. Constitutional Problems with Restricting

The above section spoke of great restrictions on commercial speech, restrictions apparently incompatible with the freedom of speech doctrine of the U.S. Constitution. However, the present understanding of freedom of speech is informed by the philosophy of the day, optimistic naturalism, a philosophy we saw to be erroneous. To interpret the Constitution through a communal philosophy would be to interpret it through an authentic view of human nature, a view consistent with how much of commercial speech was interpreted for almost the first century and one-half of the First Amendment. To speak of the philosophical underpinnings of Constitutional interpretations and the human desires, passions and emotions of particular interpretations is not to undermine the Constitution but to speak to the human concerns on which it is based. It is to go deeper than ideologies and political agendas. A substantial literature, far beyond the scope of this paper, argues the merits and problems of interpreting the Constitution with reference to philosophic sources.¹⁰⁷

V. Conclusion

Probably no other country has shown what prodigious

¹⁰⁷A review of some of this literature with an eye toward First Amendment Commercial Speech policy is to be found in Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. Cinn. L. Rev. 1317 (1988), especially pages 1323-24

accomplishments the free market is capable of as has the United States. But also no other country has allowed the free market to define society as we have done so that we can describe ourselves as a commercial democracy. Do the accomplishments of our free market mean our democracy is without flaw or weakness? Beyond critique? Two fundamental facts of our free market argue that we must stop, locate, define and possibly adjust the fundamental philosophy governing it. First is the fact we are in uncharted waters -- the dominance of the free market over society is everywhere showing signs of consolidation. Do we want a society where every store is a chain store? Second, in the regulation of commercial speech, a profound change in the philosophy of restrictions has taken place; one aspect of a growing libertarianism has come to the fore, a philosophy giving free rein to advertising, allowing advertising, of all the influences on society, to be one of the greatest.

Is not it appropriate then to examine the underlying philosophy guiding us and to ask where is it leading us? It has been the attempt of this paper to locate a fundamental anthropological error underlying the current understanding of the free market and to follow the error's effects through the regulation of commercial

and 1337-40.

speech -- not an insignificant part of our free market society. The condemnation of tobacco advertising has served to point out this error to anyone interested in looking. For man's susceptibility to suggestion, proneness to the emotional, general tendency to rely on his fellows are all inconsistent with treating him as an autonomous entity in an atomistic landscape. The very psychology of suggestibility means he functions as part of a community. It is hoped others will further develop this small tenuous attempt to apply an understanding of man's social nature to legal analysis.

THE ISSUE IS ADVERTISING NOT SMOKING

<< Table of Contents will generate here >>

THE ISSUE IS ADVERTISING NOT SMOKING