7-1-1991


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Abstract
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Keywords
Advertising

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ADVERTISING, TASTE CONSTRUCTION, AND THE SEARCH FOR ENLIGHTENED POLICY: A CRITIQUE

By Iain Ramsay*

This essay is a critique of current legal and public policy discourse concerning the power of advertising to affect consumer tastes and preferences. Two models are critiqued: advertising as information and advertising as preference manipulation. These models are then contrasted with approaches drawn from cultural studies which, drawing on interpretive, rather than empirical, knowledge, suggest an alternative understanding of the role of advertising in a society dominated by "institutions of normalization" rather than by law. As a reflective critique, the essay does not conclude with any blueprint for reform but argues for greater study of the contradictory strands in consumer culture and of the extent to which consumption practices may become sites for social transformation.

I. INTRODUCTION

C'est le sens qui fait vendre.1

Who decides what counts as knowledge about advertising, and who knows what needs to be decided about the role of

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advertising in contemporary society? The familiar questions of power and knowledge are central themes in this essay. Like many people in our society, I believe that advertising does have an effect on me. Although I am not certain exactly how this works, I am not completely happy about these effects. I worry that we are prisoners of a false necessity: that a contingent phenomenon of commercial propaganda has become regarded as a natural form so that it is difficult to imagine a world without it. I am sceptical of claims that the full relationship of advertising to cultural and social formations can be understood by studies which attempt to empirically measure its short term impact. How advertising relates

2 "[T]he right to decide what is true is not independent of the right to decide what is just." See J-P. Lyotard, The Post Modern Condition: A Report on Knowledge, trans. G. Bennington & B. Massumi (Minneapolis: University of Minnesota, 1984) at 8.

3 The recent work of Roberto Unger is dominated by a concern that politics and social theory should not be constrained by false necessity. See False Necessity: Anti-Necessitarian Social Theory in the Service of Social Democracy (Cambridge: Cambridge University Press, 1987).

4 See R. Barthes, Mythologies (London: Jonathan Cape, 1972) at 11.

5 Patricia Williams voices similar sentiments in "Commercial Rights and Constitutional Wrongs" (1990) 49 Md. L. Rev. 293. Stephen Fox commences a popular history of advertising by stating that "practically everyone dislikes it ... Nobody believes it, or admits to believing it. It usually appeals to the less agreeable aspects of human nature: greed, vanity, insecurity, competitiveness, materialism ... But there it is, one of the dominant forces in twentieth century America. Among the pillars of our popular culture, advertising stands with TV, sports, movies, pop music, and the print media as unavoidable features of modern life." See The Mirror Makers (New York: Morrow, 1984) at 7.

6 See G. Murdock & N. Janus, Mass Communications and the Advertising Industry (Paris: UNESCO, 1985) at 58 discussing empirical work: "Advertising's full impact on cultural production and social consumption cannot be properly grasped within the framework they have established. A more comprehensive approach requires us to work on the macro as well as the micro level of analysis, to examine structural constraints as well as intentional actions, and to develop the analysis of political economy and cultural formations as well as the psychology and sociology of everyday behavior."

David Riesman, in the 1961 preface to his work The Lonely Crowd, indicates that "it is obviously impossible neatly to separate the media from their wider cultural context, just as it is impossible to separate the messages of advertising in the media from the 'messages' carried by the goods themselves ... We still believe that the long-run impact of the media on the style of perception, the understanding (or, more often, the misunderstanding) of life, the sense of what it means to be an American boy or girl, man or woman, or old folk, is immense -- more important than the often overestimated power of the media to push one marginally differentiated product or candidate over another." See The Lonely Crowd (New Haven: Yale University Press, 1961) at xlii.
to patterns of consumption and how we constitute and reproduce ourselves as consumers are important political issues on which a society should have a democratic dialogue. But how does one engage in a "good" democratic dialogue when one senses that advertising may be shaping the dialogue? These are puzzles which do not seem to have obvious answers to me. Yet, I feel the dichotomies within which existing public policy debates are structured to be tired and unhelpful. They do not clarify the issues or liberate me from my iron cage. Nor does policy discourse seem able to connect advertising to other locations of education and socialisation in consumption found in contemporary capitalist societies.

In this article, I want to address these themes of knowledge and power by interrogating a set of arguments which are routinely marshalled against the regulation of advertising practices in the area of taste construction and transfer. I include, within this topic, the general issue of the commodification of taste and specific issues such as advocacy or image advertising. Several arguments are made against regulation of advertising practices in this area. First, there is the claim that regulation is a paternalistic interference with individual preferences. This is usually coupled with the claim that

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7 This point is made by Magder who summarizes Leiss, Kline, & Jhally, infra, note 65 as arguing that "the pervasiveness of advertising in modern consumer societies only enhances the undemocratic structure of the market place; open, collective discussion over non-commercial relations between people and objects is non-existent or marginalized." See T. Magder, "Taking Culture Seriously: A Political Economy of Communications" in W. Clement & G. Williams, eds, The New Canadian Political Economy (Kingston: McGill-Queen’s University Press, 1989) 278 at 287-88.


9 Advocacy advertising, where companies do not attempt to sell directly their product, but stress the generally beneficial role which the company or free enterprise plays in the community, has grown significantly over the past two decades. It was partly a response to the perceived "legitimacy gap" facing large corporations in the late 60s and early 70s. Joyce Nelson, in Sultans of Sleaze (Toronto: Between The Lines, 1989), describes how these campaigns are part of a broader "communications strategy" in which public relations plays a central role in helping to ensure that public expectations meet corporate goals or change the symbolism (but not the substance) of corporate performance to meet public goals. See also S.P. Sethi, Advocacy Advertising and the Large Corporation (Lexington, Mass.: Lexington Books, 1977).
proponents of regulation are both elitist and anti-democratic: they are denigrators of popular taste and mass consumer culture and their vantage point is that of the intellectual outsider condemning popular culture.\(^\text{10}\) A variation of this position is to admit the possibility of advertising's power to shape values, but to claim that regulation in this area involves difficult and controversial value judgments which the agency/court is ill-suited institutionally to make.\(^\text{11}\) This argument is often used in conjunction with one which points to critics' inability to provide objective measures of harm suffered (for example, in terms of welfare losses or psychological harm) or criteria for identifying unacceptable claims.\(^\text{12}\) On this view,

\(^{10}\) See section IV, infra at 33. A comprehensive analysis of deceptive advertising in the Harvard Law Review makes the sweeping statement that "intellectuals since Aristotle have had a special dislike for the materialism of the marketplace." See "Developments in the Law – Deceptive Advertising" (1966-67) 80 Harv. L. Rev. 1005 at 1013. Milton Friedman states that the "real objection of most critics of advertising is not that advertising manipulates tastes but that the public at large has meretricious tastes – that is, tastes that do not agree with the critics." See Free to Choose (New York: Penguin Books, 1980) at 266. In response to Galbraith's argument, see infra, note 46, that production creates wants, Hayek argues that very few wants are innate and that many preferences are learnt. This does not mean, however, that because individuals do not have independently determined desires for culture or literature that artistic production creates the wants. See F. Hayek, "The Non Sequitur of the Dependence Effect" (1960) 27 Southern Econ. J. 346.

A variation of Friedman's criticism is to argue that consumerist concerns about advertising reflect the values of the "liberal upper middle class." See R.K. Winter, "Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism" (1972-73) 82 Yale L.J. 890 at 902. See also his following comments: "When Mr. Nader criticises the food industry for taking steps to 'sharpen and meet superficially consumer tastes at the cost of other critical consumer needs' one may fairly ask whose judgment it is that a taste is superficial and whose judgment it is that a 'need' is 'critical'." See The Consumer Advocate Versus The Consumer (Washington: American Enterprise Institute, 1973) at 7. See also G. Stigler, "Private Vice and Public Virtue" (1961) 4 J. Law & Econ. 1.

A further strategy is to characterize the critic as a romantic reactionary to modern technology and social organization who harkens back to some golden age. Thus, Held asks whether the Frankfurt School is merely a "perennial spiritualistic reaction – romantic, in the last instance – against technique and modern social organisation." See D. Held, Introduction to Critical Theory: Horkheimer to Habermas (Berkeley: University of California Press, 1980) at 40. In this vein, Harold Mendelsohn's review of Neil Postman's critique of commercialization of the media, Amusing Ourselves to Death (New York: Penguin Books, 1985), argues that Postman's view of the past "is strictly Norman Rockwell throughout. His view of the past embraces a blueberry-pie, old oaken table, mythic America." See (1987) 16 Contemp. Soc. at 555.

\(^{11}\) See below, section IV at 607.

\(^{12}\) See infra, note 20.
the presumption should be against "intervention" with preferences in
the market until there are solid data to justify regulation. Meanwhile,
although there are insufficient data to justify government regulation,
a common response has been to rely on the lighter touch of industry self-regulation which is paradoxically
justified in terms of specialist expertise.\textsuperscript{13}

These arguments are part of a mainstream public policy
discourse dominated by what might loosely be described as liberal
individualism in which the central issues are those of individual
freedom versus paternalism and private markets versus public
regulation.\textsuperscript{14} They are also dependent on economic and social
science knowledge which claims to provide the truth about
advertising. By truth, I do not mean a set of truths about
advertising, but rather an authoritative discourse which claims to
identify the relevant issues, procedures, and approaches for
understanding the power and effects of advertising.\textsuperscript{15} I shall argue
that both the arguments and assumptions of this dominant public
policy discourse are unconvincing, at least insofar as they apply to
setting an agenda, structuring arguments concerning the power of

\textsuperscript{13} See, generally, J.J. Boddewyn, \textit{Advertising Self Regulation and Outside Participation: A

\textsuperscript{14} I realize that there are several varieties of liberalism and that some liberals would
disagree with the above characterization. However, it does seem to me that my description
constitutes that form of liberalism which has dominated legal and public policy discourse in
this area. See below, section IV at 605. For example, Richard Craswell, in developing a
normative theory of deceptive advertising, is concerned to ensure that his theory is compatible
with liberal theories of individualism and freedom. He notes that "most liberal political
theories posit that individuals should be allowed to reach their own decisions, free from state
intervention restricting the decisionmaking process." See R. Craswell, "Interpreting Deceptive
Advertising" (1985) 65 B.U.L. Rev. 657 at 664. David Cohen also adopts this liberal
approach, noting both that "consumer protection policies can conveniently be placed on a
continuum reflecting the level of intervention in the market by government" and the liberal
economists' aversion to "the paternalistic implications of standard setting." See D. Cohen,
"Can It Really Be Unconstitutional to Regulate Product Safety Information?" (1990) 17 Can.
Bus. L.J. 55 at 60-61. I discuss these issues at greater length in I. Ramsay, \textit{Consumer

\textsuperscript{15} I rely here on the approach outlined by Foucault, who argues that "there is a battle
'for truth,' or at least 'around truth' -- it being understood once again that by truth I do not
mean 'the ensemble of truths which are to be discovered and accepted,' but rather 'the
ensemble of rules according to which the true and the false are separated and specific effects
of power attached to the true.'" See M. Foucault, \textit{Power/Knowledge: Selected Interviews and
advertising, and furthering dialogue on the nature of advertising in society.\textsuperscript{16}

In Part II, I examine two approaches to advertising regulation: advertising as information and as preference manipulation. These approaches take us to the limits of current public policy discourse, illustrating the distinctions between conservative and more progressive viewpoints. A central point here is that, even on its own terms, the conservative view of advertising as information does not provide a coherent limit on regulation of advertising. In Part III, I develop my critique by exploring the relationship of cultural theory to advertising control. This approach locates advertising within the study of the production of meaning in society and the relationship of these meanings to powerful interests. It suggests a different perspective on the construction of preferences, the supposed distinction between elite and mass culture, and what counts as knowledge about the social world. Taken together, the insights of cultural studies could have significant implications for the substantive and institutional issues surrounding the regulation of advertising. However, they have rarely surfaced in law and public policy argument. In Part IV, therefore, I investigate law's truth about advertising, particularly concerning the topic of advertising and taste construction. I note the "pull of the policy audience"\textsuperscript{17} and the consequent marginalization of work drawn from cultural studies. The recent decisions under the \textit{Canadian Charter of Rights and Freedoms}\textsuperscript{18} concerning commercial speech provide an opportunity for deconstructing law's truth.

Since this essay is critique rather than prescription, I do not conclude with any blueprint for reform. I do suggest, however, that any critical theory of advertising must be linked to the politics of social relations in a consumer society and to a detailed understanding of the politics of everyday consumption. At the same time, I implicitly raise the question of the importance of law as a site of

\textsuperscript{16} See, generally, sections III and IV, below at 591 and 605.

\textsuperscript{17} S. Silbey & A. Sarat, "The Pull of the Policy Audience" (1988) 10 Law & Pol'y 97.

social struggle over the meaning of consumption and consumer relationships in contemporary society.

II. THE LIMITS OF PUBLIC POLICY

A. Information Theory: Technocracy and Market Failure

We cannot walk before we toddle,
Though we may toddle far too long,
If we embrace a lovely Model
That is consistent, clear, and wrong.19

The dominant approach to regulation locates the control of advertising within the economic paradigm of welfare economics. Government regulation is a response to failures in markets for information. The emphasis is on harnessing market incentives through instruments such as mandatory disclosures which "consumers could then use to protect their interests in advance of injury."20 In the words of Pitofsky’s influential article, "[P]rotection of consumers against advertising fraud should not be a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process."21 This approach draws on a branch of law and economics scholarship, the main premise of which is that advertising is a much more significant source of market information than had been thought22 by earlier generations of

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21 Ibid. at 674. Pitofsky rejected the inclusion of psychological exploitation within the development of unfairness regulation because it would be impossible to develop coherent standards of exploitation. He notes at 684 that "charges that an ad, though not deceptive, tends to take advantage of a vulnerable group will usually raise controversial questions of excessive government paternalism."

22 The following articles by P. Nelson were important, developing from the earlier speculations of George Stigler contained in "The Economics of Information" (1961) 69 J. Pol. Econ. 213: "Information and Consumer Behavior" (1970) J. Pol. Econ. 311 and "Advertising as Information" (1974) 82 J. Pol. Econ. 729. These were assimilated into the legal literature
economists.\textsuperscript{23} The critical bite of this literature lies in its challenge to the conventional wisdom that deception is \textit{per se} bad. It is argued that, in many cases, rules which prevent deception of some consumers would filter out information which might be useful to other consumers.\textsuperscript{24} Justifications for regulation must be found in the entire information environment of a particular market.

The information approach appears to promise several benefits for policy makers. Reliance on the supposedly weak value judgments embedded in the norm of consumer sovereignty in welfare economics\textsuperscript{25} appears to foreclose the necessity of making difficult and controversial value judgments concerning the impact of advertising. "Intervention" in the market is necessary merely to make a central social institution work more effectively. It does not involve a challenge to the market mechanism, nor does it seem to paternalistically overrule consumer preferences or favour one particular social group. Both consumers and producers could therefore benefit.\textsuperscript{26} Economic models and empirical data would

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\textsuperscript{23} Thus, R.H. Coase, writing in 1977, claimed that advertising is "clearly part of the market for ideas. Intellectuals have not, in general, welcomed this other occupant of their domain. And the feeling of antipathy has been shared by economists, who, until comparatively recently, have tended to deplore rather than to analyze the effects of advertising. In recent years advertising has been studied more rigorously, and this has been accompanied by, or perhaps we should say has resulted in, a more sympathetic attitude to advertising." See "Advertising and Free Speech" (1977) 6 J. Leg. Stud. 1 at 8-9.

\textsuperscript{24} This is not the same issue as the well worn discussion of whether the law should protect the reasonable or gullible consumer. See, for example, Beales, Craswell & Salop, \textit{supra}, note 22 at 495-501; R. Reich, "Preventing Deception in Commercial Speech" (1979) 54 N.Y.U.L. Rev. 775 and Craswell, \textit{supra}, note 14.

\textsuperscript{25} On this topic, see, for example, C. Rowley, "Social Sciences and Law: The Relevance of Economic Theories" (1981) 1 Oxford J. Leg. Stud. 391 at 399-403.

\textsuperscript{26} Beales, Craswell & Salop, \textit{supra}, note 22 at 513-14, in discussing the advantages of information remedies over product standards, argue that "information remedies allow consumers to protect themselves according to personal preferences rather than place on regulators the difficult task of compromising diverse preferences with a common standard ... [They] place the burden of enforcement of quality on informed consumers in conjunction with marketplace forces."
transform policy making into a relatively hard-headed evaluation of welfare losses from information failures.

There are, however, several problems with this approach. First, it has not proved a simple task to identify with empirical precision those market situations where intervention is justified. This is indeed a major conclusion of a leading article on intervention in consumer markets which indicates the difficulties of establishing clear rules in this area.\textsuperscript{27} It is always possible that private markets for information or other information substitutes might arise to compensate for potential failures. Thus, Posner and Pitofsky could diverge significantly in their assessment of the need for government regulation of misleading advertising,\textsuperscript{28} notwithstanding that both authors adopt a market failure approach and the deeper assumption of a private economic realm into which government "intervenes."\textsuperscript{29} Robert Reich suggests a possible technical solution to these difficulties, arguing that the policy issue should be conceived as an attempt to balance a "free flow" against a "clean flow" of information.\textsuperscript{30} This balancing should be done with the objective of making the market work more effectively. In Reich's view, there will be an optimal amount of market information at the point

\textsuperscript{27} Beales, Craswell, and Salop conclude at 532 by noting that "it is extremely difficult to develop many hard-and-fast rules and that the proper policy to be followed will depend heavily on the facts of each case."

\textsuperscript{28} See R. Posner, "The Federal Trade Commission" (1969-70) 37 U. Chi. L. Rev. 47. Posner rejects the need for a federal administrative agency to regulate misleading advertising. Commenting on the information failure argument for public regulation, he notes that "competitors are not the only source of product information to the consumer in a free market. It is relatively rare for a consumer to deal with only one firm, one source of information, in making a purchase. Consumers consult physicians, appraisers, securities brokers, home improvement contractors, newspaper and magazine columnists, interior decorators, travel agents, and a host of others whose business it is to advise consumers on choosing among competing products and whose livelihood depends on no small extent on the honesty and accuracy of their advice ... These 'information brokers' do not exist primarily to prevent deception, but they have that effect." Compare Pitofsky, supra, note 20 at 667-69.

\textsuperscript{29} See Pitofsky, supra, note 20 at 667: "Where there are instances of consumer abuse or exploitation as a result of false, misleading or irrelevant advertising, it does not necessarily follow that these need be remedies by governmental intrusion into the marketplace."

\textsuperscript{30} See Reich, supra, note 24.
represented by the most efficient allocation between seller and consumer of the costs of searching for a product.\textsuperscript{31}

Achieving this optimal point is obviously an issue which can only be definitively solved in the context of a case by case analysis and on the basis of detailed empirical information. In order to avoid the difficulties of such case by case fact finding, Reich argues for the use of presumptions, a standard legal technique. Thus, on the basis of the economics of information, he suggests a number of possible presumptions; for example, that it is presumptively inefficient to restrain price advertising, but not door to door sales. Information standards would be presumptively efficient, since words such as "natural" are difficult for consumers to verify, and unless there is a standard, the costs of comparison shopping are increased substantially. Presumptions aside, there is, as Stephen Breyer notes, much room for disagreement within this approach as to whether regulation is justified.\textsuperscript{32} These disagreements may ultimately turn on whether one starts with preferences in favour of markets or regulation.

Second, the normative basis of this approach remains to correct preferences in order to achieve more rational consumer decision-making. It is assumed that, but for the misleading information, consumers would have revealed different preferences which they would have preferred to those based on misleading information.\textsuperscript{33} Regulation is, therefore, "an aid to free decision-making rather than an interference."\textsuperscript{34} Such a counterfactual argument might, however, be extended to a wide variety of potential beliefs induced by advertising which leads to "irrational" consumer decision-making. An attempted distinction between these situations is that false factual beliefs are more easily established and do not require controversial value judgments about the worth of preferences

\textsuperscript{31} Ibid. at 792-97.
\textsuperscript{32} S. Breyer, Regulation and Its Reform (Cambridge: Harvard University Press, 1982) at 28.
\textsuperscript{33} Or as the Harvard Law Review puts it, "leading customers to purchase products that do not match their wants." See "Developments in the Law - Deceptive Advertising," supra, note 10 at 1010.
\textsuperscript{34} Craswell, supra, note 14 at 664.
or the difficulties of separating rational from irrational preferences.\textsuperscript{35} There is, moreover, widespread agreement that false factual beliefs are undesirable.

Yet, the basic point remains. There is in principle no distinction between correcting preferences based on misleading information and correcting preferences based on other undesirable influences on preference formation. Refusing to look behind consumers' revealed preferences reflects both a value judgment which is hardly non-controversial and a particular view of the political process as merely following preferences. Take, for example, the argument that it is unnecessary to police price claims which state that they are "lowest prices ever" or an "all-time low price."\textsuperscript{36} This argument is based on the hypothesis that many individuals will be sceptical about such claims and that, since these prices are in any event likely to be low, the many consumers who take advantage of this offer will benefit. This argument depends on many factual assumptions, not the least of which is that we (policy-makers) can identify who will benefit and that this group would not have preferred to purchase a different product. Moreover, we assume that consumers faced with an array of these types of claims are acting rationally, rather than fighting for control over their choices.\textsuperscript{37} Perhaps it is easy for policy-makers to make this type of judgment because these assumptions about consumer behavior are, for them, intuitively plausible and are ones which they feel would appeal to many other individuals. Perhaps, but that is not the same as a rigorous, scientific statement about consumer behaviour. Within this

\textsuperscript{35} "While there are accepted procedures for determining the truth about the number of calories in a soft drink, or about the effect of calories on weight loss, there is no similarly accepted method of determining whether wanting to imitate a television model is good or bad. \textit{De gustibus non est disputandum} ... there is no equally widely-shared definition of a rational decisionmaking process. The distinction between rational and irrational is much harder to define than the distinction between true or false." \textit{Ibid.} at 666-67.

\textsuperscript{36} See Pitofsky, \textit{supra}, note 20 at 687.

approach, there is a curious confusion of analytic modelling, armchair empiricism, and normative assumptions.\textsuperscript{38}

Finally, a further assumption is that the control of advertising will be located in a body whose role and legitimacy emerge from following existing preferences, rather than attempting to change them. For this reason, the approach of information theory appears to be an attractive basis for carving out a regulatory mandate. But this is also a controversial and possibly naïve view of the role of political institutions, such as courts, and the political process generally.\textsuperscript{39}

The information approach begins to seem less hard-headed in the light of these comments. Moreover, from both a theoretical and policy viewpoint, its neglect of issues of advertising and preference formation seem curious. The argument that neo-classical economics has no theory of taste formation is, as noted, hardly a sufficient reason for ignoring this topic. Advertising and preference formation would appear to provide an ideal opportunity for theory development. From a policy viewpoint, the growth of advertising is associated with economic models of oligopoly. Yet, the information school continues to work within the neo-classical model.

As a form of discourse, however, it remains attractive to many academics and bureaucrats, perhaps because it appears to legitimate outcomes in non-ideological terms and the pretensions to power of "a particular subset of the ruling class — the liberal and conservative policy analysts."\textsuperscript{40}

\textsuperscript{38} Unger captures this issue neatly: "The chief instrument of the law and economics school is the equivocal use of the market concept. These analysts give free rein to the very mistake that the increasing formalization of microeconomics was largely meant to avoid: the identification of the abstract market idea or the abstract circumstance of maximizing choice with a particular social and institutional complex. As a result, an analytic apparatus intended, when rigorous, to be entirely free of restrictive assumptions about the workings of society and entirely subsidiary to an empirical or normative theory that needs independent justification gets mistaken for a particular empirical and normative vision." See R. Unger, "The Critical Legal Studies Movement" (1982-83) 96 Harv. L. Rev. 563 at 574.

\textsuperscript{39} See below, section II at 588-90.

\textsuperscript{40} See D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power" (1981-82) 41 Md. L. Rev. 563 at 604: "Efficiency analysis, like many another mode of professional discourse, is an obscure mix of the normative and the merely descriptive; it requires training to master; it provides a basis for an internal hierarchy of the profession that crosscuts political
B. Preference Manipulation

Economists have long recognised that advertising may change tastes as well as provide information.\(^4^1\) The relatively thin theory of consumer behavior evident in the neo-classical economic model of consumer sovereignty — that people choose what they prefer — has never completely dominated the literature. The conception of preferences as socially conditioned goes back at least to Veblen.\(^4^2\) In the 1920s, Chamberlin stressed the importance of selling costs in his theory of monopolistic competition. He argued that advertising might manipulate preferences through taste transfer,\(^4^3\) a concept which seems particularly applicable to the current operations of multinational corporations in the nations of the South.\(^4^4\) The dominant market structure of oligopoly, where firms cannot sell all their products at the market price and where price competition may be counterproductive, creates enormous incentives for image

\(^{}\)\(^1^\) See Coase, supra, note 23.


\(^{}\)\(^3^\) "Advertising affects demands ... by altering the wants themselves. The distinction between this and altering the channel through which existing wants are satisfied ... seems to be clear analytically ... selling methods which play upon the buyer's susceptibilities, which use against him laws of psychology with which he is unfamiliar and therefore against which he cannot defend himself, which frighten or flatter or disarm him — all of these have nothing to do with his knowledge. They are not informative; they are manipulative. They create a new scheme of wants by rearranging his motives. As a result, demand for the advertised product is increased, that for other products is correspondingly diminished." See E. Chamberlin, The Theory of Monopolistic Competition, 6th ed. (Cambridge, Mass.: Harvard University Press, 1950) at 119-20.

\(^{}\)\(^4^\) Concrete examples of this are provided in S. Langdon, Multinational Corporations and Development in Kenya (New York: St. Martin's Press, 1970). Chandra Muzaffar comments that "a massive transfer of tastes and fads from the capitalist centres to their peripheries has been taking place in the last twenty years." See C. Muzaffar, "Changing Lifestyles Today for Tomorrow: The Spiritual Basis" in E. Wheelwright, ed., Consumers, Transnational Corporations and Development (Sydney: University of Sydney, 1986) 1 at 5. See also J. Sinclair, Images Incorporated: Advertising As Industry and Ideology (London: Croom Helm, 1987) c. 7.
Galbraith's concept of the "dependence effect," where producers use advertising to create wants rather than respond to consumer needs, is probably the best known modern statement of the preference manipulation thesis in relation to those consumer markets dominated by large corporations operating in oligopolistic markets.

Most economic analysis in this area has concentrated on the potential impact of product differentiation and image advertising on creating monopoly power and consequently elevated prices. Although there is evidence in some consumer markets of a statistically significant relation between intensive image differentiation and monopoly profits, the issue remains contested. It is difficult to measure these relationships, particularly given the quality variable. Arguments that consumers are being taken advantage of may always be met by the counter-argument that consumers may be willing to pay more for the assurance of brand quality or the status of the "right" beer. Beyond egregious cases, such as household bleach which is supplied in a standardized solution, the economic study of this area is hampered by the

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45 See, for example, W. Baumol, A. Blinder & A. Scarth, Economics: Principles and Policy (Toronto: Harcourt Brace Jovanovich, 1988) at 485-86. E. Herman argues that "the long-established norm of market structure and behavior has been that of oligopoly, that is, the constrained rivalry of a few interdependent sellers who compete mainly by means of product differentiation." See E. Herman, Corporate Control, Corporate Power (Cambridge: Cambridge University Press, 1982) at 1. See also the general discussion in F. Scherer, Industrial Market Structure and Economic Performance, 2d ed. (Boston: Houghton Mifflin, 1980) at 386-405.

46 "The even more direct link between production and wants is provided by the institutions of modern advertising and salesmanship. These cannot be reconciled with the notion of independently determined desires, for their central function is to create desires - to bring into being wants that previously did not exist." See J.K. Galbraith, The Affluent Society, 4th ed. (New York: New American Library, 1984) at 129. In his later work, Economics and the Public Purpose (New York: New American Library, 1975), Galbraith modified his thesis as restricted to those areas of the economy dominated by large bureaucratic organisations operating in oligopolistic conditions.

47 See the general discussion in Scherer, supra, note 45 at 390-98. The main study relied on to show a significant relation between image advertising and monopoly power is by Comanor and Wilson. See W. Comanor & T. Wilson, "The Effect of Advertising on Competition: A Survey" (1979) 17 J. Econ. Literature 453. Their research was challenged by L. Telser in "Some Aspects of the Economics of Advertising" (1960) 41 J. Bus. 166. Scherer seems to admit that the difference in viewpoint is ideological. See Scherer, supra, note 45 at 393.
difficulties of holding many variables constant (especially quality) and the lack of any clear norms as to the optimal level of product differentiation. It is very difficult for economists to make scientific statements about how much variety and differentiation there should be in the consumer marketplace.

Preference manipulation and taste transfer also require economists to recognize the interdependence of utilities: an individual's welfare may depend on the consumption decisions of their peers. Economists encounter difficulties in making a clear statement of the social welfare issues in situations where advertising exploits this interdependency. Perhaps the best known example is the frequent model changes in U.S. automobiles in the 1950s. Was this a positive contribution to social welfare? Scherer comments that clearly, new car buyers pay more than if model changes were effected less often. Equally clearly, they freely elect to do so, for they have the option of holding on to their present auto longer or buying last year's model or an import restyled less frequently. By the stern criterion of consumer sovereignty, styling rivalry would seem to emerge with only minor scars. Still this is not completely convincing. The interdependence of consumer preferences complicates matters. Smith may buy a new model only because he fears that if he does not and neighbour Jones does, his utility will be reduced. Jones perceives the situation symmetrically, and both end up buying new models, though neither might if they could find some way to enforce mutual (and more widespread) buying restraint.

The pervasiveness of advertising's exploitation of interdependent utilities — the "anxious housewife," the newcomer in town, the person who cannot make friends, the halitosis scare, the importance of achieving the standard package of goods and services which usually exceeds significantly the statistical average — underlines the importance of thinking seriously about the possibility of the political

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48 For a useful discussion of this issue, see B. Dunlop, D. McQueen & M. Trebilcock, Canadian Competition Policy (Aurora, Ont.: Canada Law Book, 1987) at 92-102.

49 Scherer argues that buying a product to keep up with trendsetters "can destroy utility along with creating it. To be sure, by responding to the stimulus and buying an advertised product, consumers may feel they are gaining something worthwhile. But it is not clear they have done any more than return to the satisfaction level they would have maintained without the persuasive assault on their preference structures." See supra, note 45 at 381.

process enforcing Scherer's "mutual buying restraint." It is as if consumers are caught in a classic prisoner's dilemma, where some mechanism for mutual cooperation might satisfy individual desires which are hampered by problems of collective coordination.\(^5\)

Although many economists might agree with Scherer, they seem to be frozen in indecision when faced with suggesting policy prescriptions. They point to the potential futility of regulating this type of advertising, the difficulties of selecting the appropriate target, and the fear that government is unlikely to outperform the market in determining the optimal level of product differentiation.\(^5\)

It is as if the scientific rhetoric of economics runs out at the end of every discussion of product differentiation and preference manipulation, so that we are left with the adage that the issue of the social costs of these advertising practices involves moral judgments over which reasonable persons may disagree.\(^5\) A public policy discourse and institutional framework that stresses the importance of expert judgment as a basis for decision making is unlikely, therefore, to focus for an extended period on this topic. Any agency which does is likely to disappear in clouds of conflicting social science data.\(^5\)

The economic work on advertising and product differentiation suggests the need for further probing of the sources of consumer preferences. Recent progressive-liberal work\(^5\) has challenged both the thin theory of consumer sovereignty in the economic literature and the conception of politics as following private preferences. The challenge draws on psychological and

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\(^{51}\) See, generally, Sunstein, infra, note 55.

\(^{52}\) See Scherer, supra, note 45 at 404.

\(^{53}\) Ibid. at 380.

\(^{54}\) This is, perhaps, what happened to the U.S. Federal Trade Commission in some of its celebrated cases in the early 1970s, such as the ITT Wonderbread litigation, infra, note 126. See D. Rice, Consumer Transactions (Boston: Little, Brown, 1975) at 750-60.

\(^{55}\) I am thinking particularly of articles such as C. Sunstein, "Legal Interference with Private Preferences" (1986) 53 U. Chi. L. Rev. 1129 and his text After the Rights Revolution: Reconceiving the Regulatory State (Cambridge, Mass.: Harvard University Press, 1990). These works provide a useful source of references in psychology, economics, and political theory which furnishes the basis for critiquing the thin theory of private preferences in neo-classical economics.
economic work on the limits of consumer rationality and a conception of politics as the opportunity for the moulding and transformation of preferences: an opportunity for the "public and rational discussion about the common good."\(^{56}\) Citizens may wish, like Ulysses, to foreclose or restrict future choices which as consumers they might succumb to.\(^ {57}\)

Existing preferences are, within this conception, a function of current legal rules and social conditions and are, therefore, shifting and not static. They are social constructions. There is, therefore, no such thing as social or legal institutions simply "following" preferences. To do so is to make a conscious choice of endorsing a particular set of preferences.\(^ {58}\) Recognition of these arguments reduces objections to public measures which attempt to change preferences in order to achieve greater social welfare or individual autonomy.

The main bite of this progressive critique is the attempt to change the terms of debate over government regulation, problematizing simple conceptions of paternalism and consumer sovereignty and arguing that many regulatory programmes which appear to interfere with consumer preferences, in fact, promote values of autonomy and social welfare and reflect democratic desires.

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\(^{56}\) "Much more important ... is the idea that the central concern of politics should be the transformation of preferences rather than their aggregation. On this view the core of the political process is the public and rational discussion about the common good, not the isolated act of voting according to private preferences ... [politics involves] purging the private, selfish or idiosyncratic preferences in open and public debate." See J. Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press, 1983) at 35. Owen Fiss has articulated a similar model as a normative basis for adjudication. See O. Fiss, "The Forms of Justice" (1979) 93 Harv. L. Rev. 1.

\(^{57}\) See J. Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1979). Examples might include door to door sales, seat belts, the use of hazardous products, and controls on lifestyle advertising. Public broadcasting might be justified as dealing with the situation where the short term costs of appreciating this type of broadcasting are high, but the long term benefits are higher.

\(^{58}\) Neatly put by Bernard Williams in his critique of utilitarianism: "To engage in those processes which utilitarianism regards as just 'following' is ... itself doing something: it is choosing to endorse those preferences, or some set of them, which lie on the surface, as determined by such things as what people at a given moment regard as possible – something which in its turn is affected by the activities of government." See J. Smart & B. Williams, *Utilitarianism For and Against* (Cambridge: Cambridge University Press, 1979) at 147-48.
It also reiterates the point made by Realist writers, such as Hale,\(^59\) and Dawson,\(^60\) that the market is not a natural prepolitical institution and that the particular form of market relations reflects a political compromise backed up by state force. Issues of consumer protection, such as control of advertising, may be viewed, therefore, as establishing and changing ground rules, rather than as "intervention" in a private sphere or paternalistically overruling individual preferences.

This modified preference formation approach also leads to some reflections on structure and agency in modern life. We seem, within this approach, to be multiple selves\(^61\) depending on the institutional context. The social constructionism of sociology challenges the agency of liberal philosophy. Indeed, liberal progressives, such as Sunstein, fear that acceptance of this "social construction of preferences" approach may lead to the rejection of autonomy and to the acceptance of relativism and tyranny. To counter this possibility, Sunstein argues for a normative presumption in favour of private choices.\(^62\) Without addressing this argument at this point, the limitation of this work is that it has failed thus far to examine carefully these issues of structure and agency within the context of the structural forces which have historically shaped the modern consumer society. It is this issue to which I now turn.

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\(^{60}\) "The system of 'free' contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality. As welcome fiction is slowly displaced by sober fact, the regime of 'freedom' can be visualized as merely another system, more elaborate and more highly organized, for the exercise of economic pressure." See J. Dawson, "Economic Duress and the Fair Exchange in French and German Law" (1937) 11 Tul. L. Rev. 345.


\(^{62}\) I do have difficulties with this position. Accepting that preferences are socially constructed implies no normative position as to which preferences should be respected. The move from relativism to tyranny is also difficult to comprehend. It seems similar to the implausible argument, in another context, that rejection of the possibility of universal values based on human nature would lead to tyranny.
CULTURAL THEORY: FROM POLICY CRITIC TO SOCIAL CRITIC

Culture is only true when implicitly critical, and the mind which forgets this revenges itself in the critics it breeds.

A central concern of cultural studies is with the social production of meaning in society and the connection of these

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65 Unfortunately, "cultural studies" is not an immediately recognisable discipline. John Fiske, in Television Culture (London: Methuen, 1987) at 1, notes that it derives from "particular inflections of Marxism, semiotics, post-structuralism, and ethnography." It is obviously a vast area and I can do no more than scratch the surface in this section. There is a large body of literature from a variety of disciplines which examines the significance of the development of the consumer society as a cultural form. See, for example, the material cited in W. Leiss, S. Kline & S. Jhally, Social Communication in Advertising (Toronto: Methuen, 1986); G. McCracken, Culture and Consumption (Bloomington: Indiana University Press, 1988). See also the special issue on consumer culture in (1983) 1:3 Theory, Culture and Society.


meanings with powerful interests. The focus here is, therefore, not the behavioral social scientists’ concern with, for example, how advertising causes certain effects in individuals or power as measured through quantitative analysis of market performance. Rather, it is how advertising and the media may work to "prefer certain meanings of the world, to circulate some meanings rather than others and to serve some social interests better than others." The focus is on how advertising and the media may be more or less effective in producing and reproducing particular ideologies in society at large, rather than the issue of its impact on particular individuals or groups. From this perspective, the study of power is the ability to shape perceptions, so that the existing order becomes a part of commonsense, that is, a normalisation of contingent social arrangements.

This type of inquiry draws on a different form of knowledge than that of the scientific tradition. Our knowledge of the social world is not solely scientific, but also interpretive. Within this approach, rhetoric is not separate from reality, since reality is only available "through the discourses we have available to make sense of it." If our knowledge of social reality is partly constituted through linguistic and cultural codes, then understanding how dominant conceptions of reality are reproduced and others marginalised or rejected may help in understanding how we constitute ourselves as subjects, an enlightening and potentially emancipatory exercise. Cultural studies has moved the debate on ideology from the issue of false consciousness and the obscuring of the real relations of capitalist society to the more general issue of cultural leadership in society.

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66 See Television Culture, ibid. at 20.

67 Steven Lukes describes this type of power as the ability to shape perceptions "in such a way that [individuals] accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural or unchangeable." See S. Lukes, Power: A Radical View (New York: MacMillan, 1974) at 24.

68 Television Culture, supra, note 65 at 42. A useful account of this approach, contrasting it with empirical and behaviouristic approaches, is S. Hall, "The Rediscovery of Ideology: Return of the Repressed in Media Studies" in M. Gurevitch et al, eds, Culture, Society and the Media (London: Methuen, 1982) 56.
An initial conception of advertising as an instrument of social control is a theme both in historical studies of consumer culture and the work of the Frankfurt School. At the risk of oversimplification, the Frankfurt School underlined several tendencies in the economic and cultural development of modern capitalism. Within the system of production in monopoly capitalism, the culture of consumption was an important aspect of social integration and control. The constitution of individuals as consumers, rather than as workers or conservers, was important both for the defusion of potential class antagonisms and for sustaining the system of production. Later writers charted with greater precision the historical transitions in this development and the importance of advertising to these changes.

The totalizing tendencies of the Frankfurt School's vision were coupled with a pessimistic vision of growing corporate authoritarianism, the deterioration of culture as a critical force, increasing political passivity, and the deterioration of public life. The following quotation from Marcuse summarises these concerns:

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69 See Ewen, supra, note 65.


Ewen, supra, note 65, Leiss, supra, note 65, and the work of Christopher Lasch are clearly influenced by the Frankfurt School. The theme of social integration and control is also visible in the earlier structural work of Baudrillard who argues that:

'In the first half of the twentieth century, the indoctrination into systematic and organized consumption is the equivalent and the extension, in the twentieth century, of the great indoctrination of rural populations into industrial labor, which occurred throughout the nineteenth century ... Consumer needs and satisfactions are productive forces which are now constrained and rationalized like all others."

See Jean Baudrillard: Selected Writings, supra, note 65 at 50.

71 See, for example, Ewen, supra, note 65 and R. Williams, Dream Worlds: Mass Consumption in Late Nineteenth Century France (Berkeley: University of California Press, 1982).

72 See, in particular, Horkheimer & Adorno, supra, note 70.
[D]omination – in the guise of affluence and liberty – extends to all spheres of private and public existence, integrates all authentic opposition, absorbs all alternatives. Its supreme promise is an ever-more-comfortable life for an ever-growing number of people who, in a strict sense, cannot imagine a qualitatively different universe of discourse and action, for the capacity to contain and manipulate subversive imagination and effort is an integral part of the given society.73

The work of the Frankfurt School is important in drawing attention to the role of ideology and culture in sustaining domination. Ideological analysis and critique might, therefore, be as important as studies of changing modes of production and the expansion of markets. In addition, it suggested that the arena of consumption might become an important site for political struggle. The discipline of consumption might lead to potential revolt, as in the case of the discipline of the workplace. These issues were, however, never developed in the work of Marcuse and Adorno. Their intellectual stance was that of an outsider contrasting an ideal society with the debased state of our own, but providing little positive guidance on how to get from here to there.74 Specifically, there was little discussion of how dominant ideology reproduced itself. Moreover, consumers seemed homogenous and passive in the face of the onslaughts of the culture industry. There seemed to be little role for resistance to the powers of production. Consumption was a seductive form of captivity.75 They problematised, however, the development of a critical theory of society which would

73 Marcuse, supra, note 70 at 18 & 23. The influence of Marcuse may be seen in Lasch's comment that "mass consumption [is] part of a larger pattern of dependence, disorientation, and loss of control ... The social arrangements that support a system of mass production and mass consumption tend to discourage initiative and self-reliance and to promote dependence, passivity, and a spectatorial state of mind both at work and at play." See C. Lasch, The Minimal Self (New York: W.W. Norton, 1984) at 27. In Canada, Harold Innis feared that the new mass media would result in the destruction of creative thought. In his view, "[T]he masses are inert, even non-existent ... at worst the illiterate consumers to whom the new media must pander." Quoted in Magder, supra, note 7 at 281.

74 In Stanley Fish's terms, "critique in its positive aspect looks very much like a project without content." See "Critical Self Consciousness, Or Can We Know What We're Doing" in S. Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (London: Duke University Press, 1989) 436 at 446.

75 See The Culture of Consumption, supra, note 65 at x.
simultaneously provide understanding of the oppressive features of society and stimulation to transformation and liberation.\textsuperscript{76}

Focus on the central role of cultural leadership originated with the work of Gramsci. In 1929, in a prescient article titled "Americanism and Fordism," Gramsci argued that an important aspect of the new Fordist system of rationalized mass production would be the creation of a new consciousness among individuals, reflecting "the necessity of elaborating a new type of man."\textsuperscript{77} The creation of a consumer culture and associated patterns of consumption were a necessary part of this new system of production. This would not be achieved mechanically through brute force or the power of business to mould opinion through advertising. It also required the intellectual and moral leadership of the professional and managerial classes and of professors and \textit{literati} who helped to shape the bounds of conventional wisdom. Moreover, this cultural change was a messy business: there are often many contradictory strands, aspects from older cultures, and potentially revolutionary slivers.\textsuperscript{78} The hegemony of this dominant new culture is never final.

This approach underlines the struggle at the cultural level of whose vision of social reality would be made to stick and the idea that cultural dominance or hegemony was achieved by "winning the active consent"\textsuperscript{79} of those classes subordinated within the culture. In the work of Althusser, a systematic development of this concept of hegemony may be found.\textsuperscript{80} Althusser argues that the modern capitalist society is composed of a large number of ideological state apparatuses, including the educational, communications, cultural, legal, and political. These institutions, existing in the "public" and

\footnotesize{76 Some of the problems of critical theory are explored by Stanley Fish, \textit{supra}, note 74.}

\footnotesize{77 \textit{Supra}, note 65 at 279.}


\footnotesize{79 See Hall, \textit{supra}, note 68 at 85.}

"private" sectors, all contribute in different ways to the reproduction of capitalist relations of exploitation. They achieve this by recruiting, transforming, and constituting individuals into appropriate ideological subjects. We automatically recognize ourselves as consumers or sexual subjects within these ideologies. By continuing to constitute ourselves in this ideological manner, we reproduce dominant ideology.

Judith Williamson’s studies of advertising draw on Althusser; they are an imaginative application of the role of advertising as part of an ideological apparatus and the role of the individual subject in producing and reproducing meaning. Her focus is on the process of meaning: how the form of advertising works. Thus, advertisements generally work by transferring meaning (signs) from existing ideological systems to a product. For example, a picture of Catherine Deneuve beside Chanel No 5 perfume invites an individual to see the product in terms of glamour and beauty, thus substituting the product for both Catherine Deneuve and what she signifies. Distinctions in social mythologies are used to create distinctions between products.81

A central point is that knowledge of these connections is not intrinsic to the ad. We actively construct that meaning through our reading of the advertisement. An important aspect of the construction of the advertising text is the attempt to position the reader/subject to read it from a particular viewpoint. This is reflected in the idea that advertisements leave a space for us to fill up as subjects. That space in which we constitute ourselves as subjects of the ads is, it is argued, that of the dominant ideology: "we are consumers, that we have certain values, that we will freely buy things, consume, on the basis of these values."82 In this respect, advertisements are not simply selling products, they are providing us with a structure in which we construct ourselves. Thus, "in providing us with a structure in which we, and those goods, are interchangeable, they are selling us ourselves."83

81 See Decoding Advertisements, supra, note 65 at 27.
82 Ibid. at 42.
83 Ibid. at 13.
We actively reproduce dominant ideology. In Williamson's view, this process does the ideological work of obscuring the real structure of society and the nature of social relations. Identifying ourselves with what we consume creates "the false assumption that workers 'with two cars and a colour TV' are not part of the working class."\textsuperscript{84} Although Williamson believes that advertisements appropriate real needs and desires in people, which if they were not diverted "could radically change society,\textsuperscript{85}" and that they give us a false sense of ourselves, advertising is in her view almost completely uncontrollable. Whatever restrictions are put on verbal content or false claims, there is little prospect of controlling the use of images and symbols. Thus, it can absorb any criticism by incorporating critical symbols, such as feminism or even revolutionary slogans, transferring them devoid of their critical content to the product.

Williamson seems, therefore, to reach a result not dissimilar to that of the Frankfurt School, neglecting Gramsci's comments on the potential class struggles around the ideological construction of the individual as consumer.\textsuperscript{86} The media and advertising contribute to the containment of subversive and oppositional tendencies in society. There seems little role for agency in this structuralist vision.

Later work in cultural studies challenges this approach, suggesting a greater power for the reader/audience in the "struggle for meaning." Cultural meanings are a site for a continuing struggle between producers and consumers. Fiske,\textsuperscript{87} drawing on a wide variety of studies, critiques the power of television to construct a particular reading by audiences. For example, he points to Morley\textsuperscript{88} who showed how different groups and individuals in decoding TV messages did not adopt the preferred meaning of a TV text, but developed negotiated or oppositional readings. This involves, therefore, a rejection of a simple transmitter/receiver theory of

\textsuperscript{84} Ibid.

\textsuperscript{85} Ibid. at 15.

\textsuperscript{86} This point is made by Fiske in Television Culture, supra, note 65 at 40.

\textsuperscript{87} Ibid.

communication and the passive image of the consumer in early theories of consumer exploitation. Individuals and groups may subvert the text to their own end. For example, Hodge and Tripp found that children used the programme Prisoner: Cell Block H as a metaphor for their experience at school. It therefore became a focus for articulating and understanding their sense of powerlessness. Children were not passive receptors but rather "engaged in a constant active struggle to make sense out of their own social experience." Other studies indicate the complexities of the way in which television interacts with the politics of the family, social position, and oral cultures. These studies do not deny the structural conditions of class, gender, and race which might affect interpretation of the text. They do, however, challenge both the idea that these factors mechanically produce meanings in the particular subject and the homogenous mass consumption image of the populace implicit in some earlier work.

Other work undermines the elite/mass culture dichotomy implicit in earlier theory. Bourdieu shows the connection between culture and class, that is, the role of "cultural capital" in identifying

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89 Fiske, in Television Culture, supra, note 65 at 65, points out how Morley's ethnographic work can be linked to the semiotic studies of Umberto Eco. Eco's theory of "aberrant coding" posits that "whenever there are significant social differences between the encoders and decoders of a text, the decoding will necessarily be 'aberrant.'" Fiske cites U. Eco, "Towards A Semiotic Inquiry into the TV Message" in J. Corner & J. Hawthorn, eds, Communication Studies: An Introductory Reader (London: Edward Arnold, 1980) 131.


91 Television Culture, supra, note 65 at 68.

92 Ibid., c. 5.

93 A good critique of the "homogenous mass consumption" image is provided by J. Root in Open the Box (London: Comedia, 1986). The need for television to appeal to a wide group of individuals in society with differing interests requires a certain openness of text which allows for differences of readings. Thus, the series Dallas, perhaps the symbol of "mass American culture," is read very differently by differing groups. See I. Ang, Watching Dallas: Soap Opera and Melodramatic Imagination (London: Methuen, 1985) and E. Katz & T. Liebes, "Mutual Aid in the Decoding of Dallas: Preliminary Notes from a Cross-Cultural Study" in P. Drummond & R. Paterson, eds, Television in Transition: Papers From The First International Television Studies Conference (London: British Film Institute, 1986) 187, cited in Television Culture, supra, note 65 at 79.
Thus, we might assume that the ability to appreciate certain forms of music or to acquire culture is attributable to natural taste. Culture is equally available to all, but only a few have "taste," appreciate the opera, and so on. If, however, we reject the notion of objective truth in art and culture and accept that conceptions of culture are historically contingent, then it becomes a small step to viewing culture as helping to solidify economic class positions. The denigration of popular and working class culture may be part of a process of cultural reproduction which helps to reproduce social and economic inequalities. Schooling plays an important role in this process and critical educational theory has shown the regulative role of language and children's texts in promoting class distinctions and silencing alternative voices.

The cumulative impact of these differing strands is that we should take the popular economy seriously, both as a source of meaning and a site for struggle. The people are not "cultural dopes" incapable of discrimination and at the mercy of the barons of industry.

The recent work in cultural studies has, therefore, a humane and almost upbeat tone, promising the possibility of the empowered subject/consumer and the spinning of oppositional discourse out of the cloth of capitalism. This work is, however, vague on the

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94 Bourdieu notes that "a class is defined as much by its being-perceived as by its being, by its consumption — which need not be conspicuous in order to be symbolic — as much as by its position in the relations of production (even if it is true that the latter governs the former)." See Bourdieu, supra, note 65 at 483.


96 Television Culture, supra, note 65 at 309, 313.

97 For example, the punk movement in England constructed an oppositional identity out of the popular economy. Similarly, Hebdige has shown how the products of the American cultural industries were used by working class youths in England in the 1950s to develop an identity in opposition to the anodyne characterization of popular culture on the B.B.C. and the traditional romantic cloth cap image of the working class. See D. Hebdige, Hiding in the Light (London: Comedia, 1989).

J. Myers, in Understains (London: Comedia, 1986), discusses how the left wing Greater London Council (G.L.C.) in the U.K. used advertising in its anti-abolition campaign against the Thatcher government. According to an advertising industry study, the G.L.C.
extent to which subordinate groups have significantly changed their position through such cultural resistance, its general role in bringing about social change, and its relationship to changes in the conditions of social existence. "The people" is a rather vague description which almost seems to reintroduce the elite/mass culture distinction and obscure issues of class, gender, and race.

Undoubtedly, control of the discursive production of meanings is an important form of social and cultural power. The experience of the feminist movement is often appealed to as an example of the importance of the struggle over meaning. There remains the problem, however, of relating these cultural movements to changes in material conditions. Critics have scoffed at "left-wing academics ... picking out strands of subversion in every piece of pop culture from Street Style to Soap Opera." As Williamson pointedly remarks:

Wearing a Lacoste sweatshirt doesn't make anyone middle class any more than wearing legwarmers makes you a feminist. The idea that ideologies - including campaign was one of the most "significant campaigns in British advertising history." It set the agenda for media coverage and shifted public opinion, creating a climate in which the legislation was overturned. "The widely acknowledged effectiveness of the campaign has undoubtedly given further impetus to the fast-growing corporate advertising sector" and "has actually extended perceptions of the power and influence of advertising itself - in particular in its ability to influence other media." See D. Robb, "The GLC's Anti 'Paving Bill' Campaign: Advancing the Science of Political Issue Advertising" in C. Channon, ed., Twenty Advertising Case Histories (London: Cassell Educational, 1989) 120 at 128-29.

This approach is related to the current search in critical legal work for "transformative spins," taking elements of the dominant legal culture and using them for a group's own oppositional or subversive interest. It is similar to Foucault's "resistive power," where pleasure is achieved through "exercising a power that questions, monitors, watches, spies, searches out, palpates, brings to light; and on the other hand, the pleasure that kindles at having to evade this power, flee from it, foil it or travesty it." See M. Foucault, The History of Sexuality, vol. 1, trans. R. Hurley (New York: Random House, 1978) at 45. Fiske refers to this process as "excorporation," that process by which the powerless steal elements of the dominant culture and use them in their own, often oppositional or subversive, interests." See Television Culture, supra, note 65 at 315. The implication in this context is that consumption may be a liberating and subversive activity. For examples of attempts to develop oppositional discourse in the field of consumption, see P. Graham, "Criticalness, Pragmatics, and Everyday Life: Consumer Literacy as Critical Practice" in J. Forester, ed., Critical Theory and Public Life (Cambridge, Mass.: M.I.T. Press, 1985) 147 and M. de Certeau, The Invention of Everyday Life, trans. S.F. Rendall (Berkeley: University of California Press, 1984).

Moreover, bell hooks argues that "the politics of style" results in potentially radical movements being turned into a commodity, into "fashionable speech as in 'black women writers are in right now.'" This potential for commodification and co-optation is always a danger for any radical challenge to dominant understandings.

These comments remind us of the difficulty of separating economy from culture, as reflected in the phrase the "culture industry." Nowhere is this connection more close than in the U.S.A. which dominates the international media and advertising world. Networks sell audiences to advertisers, rather than attempt to respond to consumer preferences over a period of time. They neglect material of interest to the elderly, youth, and the poor.

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101 The phrase used by Adorno and Horkheimer, supra, note 70.

102 Nine of the largest ten advertising firms in the world are North American. See A. Giddens, Sociology (Cambridge: Polity Press, 1989) at 544; B. Bagdikian, The Media Monopoly, 3d ed. (Boston: Beacon Press, 1990) at ix-xii; M. Raboy, Missed Opportunities: The Story of Canada's Broadcasting Policy (Montreal: McGill-Queen's University Press, 1990) c. 7. Vipond notes that, in 1987, of the 6.8 billion spent on media advertising in Canada, approximately 50 per cent was spent on the mass media. She notes that "advertising is the mainstay of our mass media." See M. Vipond, The Mass Media in Canada (Toronto: Lorimer, 1989) at 89. Magder notes that "advertising not only impinges on the production practices of media institutions, it is itself an important cultural form." See Magder, supra, note 7 at 287.


Advertisers, who are entitled to preview programmes for suitability, disassociate themselves from controversial programming and the net effect is safe conventional programming.\(^{105}\) Those few shows which attempt to raise social issues generally convert them into personal problems to be addressed at the family or individual level and often contain facile endings. A recent study of broadcasting in the U.S.A. notes that these processes operate in a society so committed to the First Amendment values of free press and expression and concludes, ironically, that "a society which safeguards the sanctity of communication from possible invasion by certain political interests should generate no indignation over equivalent inroads from a different source."\(^{106}\) Finally, there is the increasing concentration of ownership in Canada and the U.S.A. within interlocking corporate groups, the social consequences of which are rarely discussed in the media.\(^{107}\)

There is little work on the development of oppositional discourse out of advertising campaigns. They may be a site for struggle and cultural resistance, as demonstrated by graffiti campaigns in London and in U.S. cities against sexist advertising and attempted exploitation of minority groups.\(^{108}\) The message of cultural studies is perhaps that these struggles over meaning are potentially important. Students of post-industrial society argue that the increasing extension of the logic of capitalist relations beyond the world of work into a multitude of social relations has resulted in the increasing politicization of these relations. The social relationships around consumption are, therefore, increasingly sites for political contests over control of living conditions (as in urban

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\(^{105}\) During the 1970s, 30 major ad agencies formed a cooperative company known as A.I.S. which previews every prime time programme and episode for compatibility with the advertisers "programme content sensitivities." Blumler, \textit{ibid.} at 123.

\(^{106}\) \textit{Ibid.} at 125-26.

\(^{107}\) See Bagdakian and Raboy, \textit{supra}, note 102.

\(^{108}\) See, generally, Myers, \textit{supra}, note 97.
Consumption is a contested terrain: a contradictory discourse of potential liberation and subordination.\(^{109}\)

In summary, there are several insights that may be drawn from cultural studies. First, we should interrogate closely our

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\(109\) Bowles and Gintis argue that, in modern society, "politics is not simply about the manner in which power adjudicates competing claims for resources. It is also a contest over who we are to become, a contest in which identity, interests and solidarity are as much the outcome as the starting point of political activity." See S. Bowles & H. Gintis, *Democracy and Capitalism: Property, Community and the Contradictions of Modern Social Thought* (New York: Basic Books, 1986) at 8.

\(110\) A useful example of this struggle over consumption is the movement which achieved the banning of children's advertising in Quebec. See G. Larose, *L'Abolition de la publicité aux enfants* (M.S.C. Thesis, Université de Montréal, 1973).

For an exploration of these contradictions from a historical perspective, see M. Nava, "Consumerism and Its Contradictions" (1987) 1 Cultural Studies 204. The left has traditionally paid little attention to consumption as a site of struggle. However, the growth of "new social movements" and the search for an alternative to the right wing politics of the market have led to debates over consumption as a terrain of political struggle and personal liberation and the role of cultural as well as economic struggle. See E. Laclau & C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, trans. W. Moore & P. Cammack (London: Verso, 1985) at 159. See, for example, S. Hall & M. Jacques, eds, *New Times: The Changing Face of Politics in the 1990s* (London: Lawrence & Wishart, 1989); F. Jameson, "Postmodernism and Consumer Society" in A. Kaplan, ed., *Postmodernism and Its Discontents* (London: Verso, 1988) 13; A. Sivandan, "All that Melts into Air is Solid: The Hokum of New Times" (1989-90) 31:3 Race and Class l. See also Kellner, *supra*, note 70, c. 6.

These issues concerning consumption may be related to earlier works heralding a post-industrial society where individuals are not merely subordinated to capital in the workplace, but through processes of integration are subordinated in a multitude of other social relations: culture, free time, education, and sex. See A. Touraine, *The Post-Industrial Society*, trans. L.F.X. Mayhew (New York: Random House, 1971). For an interesting study of the increasing commodification and control of leisure, see J. Seabrook, *The Leisure Society* (Oxford: Basil Blackwell, 1988). In England, there has been traditionally a distrust by the left of commodified consumption and pleasure. This can be seen in the work of R. Hoggart, *The Uses Of Literacy* (Fair Lawn: Essential Books, 1957), where he fears that the consumer society will break down the working class community. George Orwell, in his essay "Pleasure Resorts" in S. Orwell & I. Angus, eds, *The Collected Essays, Journalism and Letters of George Orwell*, vol. 4 (New York: Harcourt, 1968) 78, saw consumer culture as a debasing force. The communist party campaigned against horror comics in the early 1950s, partly on the basis that they imported U.S. "Coca Cola" values into British traditions. See *Hiding in the Light, supra*, note 97, c. 3.

In the U.S.A., Harris and Milkis argue that the ideology of consumption was problematized in the 30s and the late 60s. See R. Harris & S. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies* (New York: Oxford University Press, 1989) c. 5. See also the discussion in *The Lonely Crowd, supra*, note 6 and the perceptive work by Robert Lynd, "Democracy's Third Estate: The Consumer" (1936) 51 Pol. Sci. Q. 481.
assumptions about the media, advertising, and their power over the consumer. We should be sceptical of arguments which suggest that the media transmits messages to us so that over a period of time we become saturated with whatever ideology is being peddled. Consumers are not "cultural dopes." Second, it suggests a different way of thinking about issues concerning advertising than is currently provided by the dichotomy of free choice versus paternalism and the conception of power in the discourse of contemporary public policy. This involves the rejection of the idea of the individual as a pre-existing unified identity who acts upon the external world. We are socially situated subjects who are partly a product of social relations and who can only act through existing linguistic and cultural codes. Anthony Giddens's concept of structuration is helpful here in thinking about questions of structure and agency. He argues that the image of a constraining structure on individual action does not capture the way in which social life is continually constituted and reproduced through individual behavior. Structure is both medium and outcome. This does not involve a rejection of agency for structure or the ability to reflect critically on structural issues, but it suggests that the debate over advertising is not one of free choice versus paternalism, but rather what kind of society we should be and what influences and mouldings we should be exposed to. A problematic is identifying those situations which may be conducive to social action which transforms, rather than merely reproduces, structure. Third, the interrelation of language, culture, and power is central in thinking about the role of advertising and the media. This may not be adequately captured by empirical methods or concentration on the power of advertising in the short term.

111 This exploitation approach often relies on the rhetorical effect of numbers. For example, Postman argues that "[a]n American who has reached the age of 40 will have seen well over one million television commercials in his or her lifetime, and has close to another million to go before the first Social Security check arrives. We may safely assume, therefore, that the television commercial has profoundly influenced American habits of thought." See supra, note 10 at 126.

Attention to the significance of advertising in the cultural economy is therefore as important as its role in the financial economy. Finally, we should not see advertising in isolation from other cultural phenomena. At the very least, we should connect the different ways in which discourse about advertising connects through what Althusser describes as differing ideological state apparatuses, such as law, education, and the media.

IV. LEGAL AND PUBLIC POLICY DISCOURSE AND ADVERTISING: THE PULL OF THE POLICY AUDIENCE

Governments, in western capitalist economies, generally focus on regulating the economic rather than cultural aspects of advertising. They rarely proceed beyond deception and information failure as bases for regulating the content of advertising messages. Public policy primarily attempts to provide the conditions for rational choice in the market through enhancing information and the education of consumers. Liberation for the consumer will be achieved by being armed against the insinuations of modern advertising. The cultural issues surrounding advertisements have not been discussed at great length in policy documents. Arguments that advertising is unfair, that it results in psychological exploitation or inappropriate social values, have infrequently resulted in significant legal regulation. Any regulation that has been

113 Silbey & Sarat, supra, note 17.

114 In Canada, this is the thrust of the relevant sections of the Competition Act, R.S.C. 1985, c.34, the relevant sections of the Food and Drugs Act, R.S.C. 1985, c. F-27, the Textile Labelling Act, R.S.C. 1985, c. T-10, and the Consumer Packaging and Labelling Act, R.S.C. 1985, c. 38. See House of Commons, Report of the Standing Committee on Consumer and Corporate Affairs On The Subject of Misleading Advertising (Ottawa: The Committee, 1988).

115 It is fair perhaps to add the caveat that, in Canada, there has been a continuing undercurrent of concern on this issue. The debate has been framed around issues of national cultural identity being pitted against American commercialism. See, for example, the 1974 CRTC hearings on the CBC, Radio Frequencies Are Public Property (1974), Decisions, CRTC 74-70. The issue of sex role stereotyping has, of course, been a continuing topic in broadcasting policy making. The debate has not, however, generally been underpinned by much theoretical reflection on the cultural issues around advertising.
attempted has generally been through self-regulatory approaches,\textsuperscript{116} although the rationale for this particular style of regulation is often unconvincing. In addition, sophisticated arguments concerning the cultural impact of advertising have rarely made their way into public policy discourse.

The preference manipulation approach did, however, influence some judicial, academic, and policy texts of the late '60s and early '70s.\textsuperscript{117} Consumers were conceived as relatively passive victims of the manipulative power of producers, with little comparative advantage in protecting their interests.\textsuperscript{118} The moral discourse of exploitation is reflected in the Ontario Law Reform Commission's rejection of the puffing defence as "based on a misconception of the importance of modern advertising techniques in influencing the consumer's buying decisions."\textsuperscript{119} Arguments for the extension of producer liability to the ultimate consumer also seem connected to assumptions about the power of manufacturers' advertising to affect consumer purchasing decisions. Priest argues

\textsuperscript{116} In Canada, for example, see the discussion in J.J. Boddewyn, "Outside Participation in Canadian Advertising Self-Regulation" (1984) 1 Can. J. Admin. Sci. 215. In the UK, see Ramsay, supra, note 14 at 388.


\textsuperscript{118} Thus, Haines J. commented in Ranger, supra, note 117 at 405: "By newspaper, radio and television every home has become the display window of the manufacturer, and the stand of every pitchman. By extraordinary skill the printed and spoken word together with the accompanying art form and drama have become an alluring and attractive means of representation of quality and confidence."

that similar sentiments dominated thinking about producers' use of standard form warranty provisions to limit liability to consumers.\textsuperscript{120}

If legal academics at this time recognized the broader questions of the social and ethical issues raised by the techniques of modern advertising in moulding consumer preferences,\textsuperscript{121} there was a remarkable similarity to economists in their response to the issues of preference manipulation. In their view, it was necessary to transform the moral issue of exploitation into the social science discourse of measuring the effects of advertising. Posed in this manner, the issue of the regulation of image appeals was fraught with difficulties given the absence of detailed empirical research on the impact of these claims, the lack of a social consensus on what constituted manipulation, and the fear that such regulation would be "tainted by an undesirable degree of paternalism."\textsuperscript{122} To the extent that unfair advertising came within the regulatory umbrella, it should only be in those situations where there was a measurable economic loss to consumers (for example, in artificial product differentiation) or a clearly demonstrated emotional exploitation. A major policy document concluded by noting that "the case for regulating advertising on purely social grounds is a shaky one, for it rests on individual preconceptions of desirable social and aesthetic values."\textsuperscript{123}

In this policy scenario, the conception of advertising's power focuses on the ability of advertising to measurably affect consumers' observable behaviour in the short term. Their work seems based on a distinction between the domain of policy, where questions are amenable to scientific analysis, and the world of politics, value judgments, and irrational polemic. An important policy role is, therefore, to submit the rhetoric of popular works, such as The Hidden Persuaders,\textsuperscript{124} to empirical analysis. The "speculation and


\textsuperscript{121} See "Consumer Protection in the Affluent Society," supra, note 117.

\textsuperscript{122} Study on Consumer Misleading and Unfair Trade Practices, supra, note 117 at 25.

\textsuperscript{123} Ibid. at 30.

\textsuperscript{124} Supra, note 65.
dogma" of such texts would be tested "by detailed empirical
research".\textsuperscript{125} positivist social science would transcend the ideological
battlefield, separating rhetoric from reality, and resulting in
enlightened policy. This approach towards difficult issues of
advertising regulation was institutionalized in the U.S.A. in the early
1970s, when market surveys and psychological evidence were
important aspects of such landmark cases as \textit{ITT Continental Baking
Co. v. Federal Trade Commission}.\textsuperscript{126} Reading these cases is an
exercise in reading competing social science evidence. The more
difficult the case, the more the battlefield became the expert
evidence from social science studies. Policy documents and
academic writing continue to advocate the use of greater social
science expertise in advertising regulation.\textsuperscript{127}

The recent importation of the doctrine of commercial
speech by the Supreme Court of Canada requires the law to
construct its vision of the role of advertising in society. It is a view
which endorses the consumption of commodities in the market as
an important aspect of human flourishing. In the \textit{Ford} decision,
commercial expression is granted constitutional protection by the
Court on two grounds: (1) the broad interpretation given to the
expression formula; and (2) "over and above its intrinsic value as
expression," the role commercial expression plays "in enabling
individuals to make informed economic choices, an important aspect
of individual self-fulfilment and personal autonomy."\textsuperscript{128}

On this view, advertising is closely linked to both economic
and political values; that is, the efficient functioning of the consumer
market and individual autonomy. Commercial advertising "involves
more than economics."\textsuperscript{129} The position adopted by the Court seems
close to a classic liberal vision of individual economic activity as an

\textsuperscript{125} Ibid. at 29.

\textsuperscript{126} 83 F.T.C. 856 (1973), \textit{modified and enforced}, 532 F. 2d 207 (2d Cir. 1976).

\textsuperscript{127} See, for example, House of Commons, \textit{supra}, note 114; V. Black, "A Brief Word

\textit{Ford} cited to D.L.R.] at 618.

\textsuperscript{129} \textit{Royal College of Dental Surgeons of Ontario v. Rocket}, (1990) 71 D.L.R. (4th) 68 at
74 (S.C.C.), McLachlin J.
area central to an individual's self-definition; consequently, it is most in need of protection against encroachment by the collectivity.\textsuperscript{130} It is the liberatory vision of consumerism. This transformation of a particular ideology of market/state relations into a constitutional right is troubling to many commentators who argue that it is not the role of a liberal state to endorse in this manner a particular form of social relations.\textsuperscript{131}

The incoherence of the reasoning of the Court is illustrated most clearly in its conceptualization of the values at stake in determining the extent to which commercial speech and the consumer will be protected. In the view of the Court, this issue "reveals the tension between two values: the value of the free circulation of commercial information and the value of consumer protection against harmful commercial speech."\textsuperscript{132} Here is the implied contrast between the "free" natural state of the private market and the public intervention to prevent harm. The rationale for regulation is to improve the quality of market information. But this rationale appears to present a paradox, since both constitutional protection of commercial speech and government "intervention" are based on considerations of consumer information. In the former case, the argument is based not solely on economic welfare but on a consumer's right to receive information.\textsuperscript{133} The content of this

\textsuperscript{130} See P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117 at 131. For a classic statement of this position in modern times, see M. Friedman, \textit{Capitalism and Freedom} (Chicago: Chicago University Press, 1962). This approach is made forcefully by Cory J.A. in the Ontario Court of Appeal decision in \textit{Rocket v. Royal College of Dental Surgeons}, infra, note 133.

\textsuperscript{131} The accusation of "Lochnering," imposing a particular vision of market state relations, was made by Rehnquist J. in his dissent in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council}, 425 U.S. 748 at 784 (1976): "While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession." See discussion in A.C. Hutchinson, "Money Talk: Against Constitutionalizing (Commerical) Speech" [1990] 1 Can. Bus. L.J. 1.

\textsuperscript{132} \textit{Ford}, supra, note 128 at 612.

\textsuperscript{133} See, for example, the decision of Cory J.A. in the Ontario Court of Appeal decision in \textit{Rocket v. Royal College of Dental Surgeons of Ontario} (1980), 49 D.L.R. (4th) 641 at 664: "The consumer has a right to as much helpful information about the products offered as he or she can get ... The right of the consumer to receive information is important in today's
right, whether or not understood in a Hohfeldian sense, is equated
with the level of information that would be provided in a "free
market." This is a terrain where, speaking metaphorically, the river
of information flows freely. But all consumers may not be aware of
the eddies and rapids, so there is a need to intervene, perhaps to
the frustration of those more knowledgeable or willing to take risks.

But this metaphorical contrast between a free and a
controlled flow is deeply misleading. There is no natural level of
market information which can be determined apart from difficult
normative questions about the ground rules of market exchange.
Requirements of truth in lending, the common law rules on
misrepresentation and mistake, implied warranties, occupational
licensing, weights and measures standards, and the duty to warn in
negligence are all addressed to issues of information regulation.
None is obviously a natural requirement of a free market. The very
existence of advertising points to a failure in the perfect information
assumption of the market model. So which measures should be
characterized as interventions rather than ground rules? Which
should be accorded constitutional protection on the basis of the
listener's rights to information? If consumption is a potentially
important area of self-fulfilment, then should we recognize a
constitutional right to complete information from sellers, so that
individuals may decide whether or not to consume?¹³⁴

The argument from welfare is likely to be as inconclusive as
the rights argument. Reflection suggests that the issues here are
not primarily economic or distributive, but rather are about what
sort of society we should be. Even the literature on preference
manipulation indicates that consumption in modern societies is not
a solitary event. If the Court did intend that its protection of
advertising should endorse and facilitate the purchase of
commodities as a form of human flourishing, then perhaps it should
have reflected on how it knew that this particular market form
facilitates human flourishing.

A Critique

It is instructive to contrast this case with the celebrated and influential U.S. case of *Charles of the Ritz Distributors Corporation v. Federal Trade Commission*.\(^{135}\) This 1944 landmark case is often taken to stand for the proposition that protection against misleading advertising will be extended to protect the credulous as well as the reasonable consumer. From 1934 to 1939, Charles of the Ritz had marketed a cream known as "Rejuvenescence," representing that it gave the skin a "wonderfully rejuvenating" bloom. Over $1,000,000 in sales of the cream were made during this period. The Commission charged the company with making false representations, since no cosmetic could overcome the skin's aging process. The Circuit Court rejected the company's defence that no straight thinking person could believe that its cream could actually rejuvenate. This standard interpretation of protection for the gullible consumer is reflected in Clark J.'s comment that

> while the wise and the worldly may well realize the falsity of any representations that the present product can roll back the years, there remains 'that vast multitude' of others who like Ponce de Leon, still seek a perpetual fountain of youth ... the average woman, conditioned by talk in the magazines and over the radio of 'vitamins, hormones, and God knows what,' might take 'rejuvenescence' to mean that this 'is one of the modern miracles'.\(^{136}\)

There are at least two stories here. Clark J.'s judgment may reflect a heavily gendered paternalism: the dark side of paternalism. We protect women consumers because they are unable to protect themselves against the power of business. Their rationality has been undermined and they are no longer capable of making fully autonomous decisions. If only they had better education or more information, things might have turned out differently. Just as we protect children against the consequences of their actions, as in *Irwin Toy*,\(^{137}\) so we protect women in the type of situation in *Charles of The Ritz*. Yet, this construction of the consumer as incapable, as prisoner to consumption addictions, is from another perspective highly patronising and deeply counter to dominant ideology in Western society. It is, therefore, simple for conservative

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\(^{135}\) 143 F. 2d. 676 (1944) [hereinafter *Charles of the Ritz*].

\(^{136}\) Ibid. at 680.

forces to exploit this sentiment and characterize consumer protection as the paternalism of an elite group attempting to impose its views on the populace. Who, after all, really believes that a skin cream could "roll back the years"? Moreover, in the liberal construction of consumer protection, there lurks the fear that, if we accept that people are not "idiots," that they know what they are doing when they sign the form or read the ad, then the game is up for consumer protection.

Duncan Kennedy counters this position by arguing that this form of paternalistic protection should be broadly extended because we are all "idiots" subject to the false consciousness of modern capitalism. It is not the other — the old woman, the poor or naive individual — who is the victim of consumer fraud, it is ourselves. The bright lines of capacity and incapacity must be replaced by a continuum which reflects the fact that "human beings have limited capacities to understand, to reason and to predict." The issue in cases like Charles of the Ritz is not about questions of economic market power, but rather the cultural question of false consciousness.

But there is little comfort in the camaraderie of idiots. A second way of reading Clark J.'s comments is, therefore, to see him recognizing the cultural and structural dimensions of advertising and the consumer subject as socially situated. The market place here is dominated by a culture industry which makes it difficult for individuals to think critically. The culture of science and progress has been turned into a commodity, such that Charles of the Ritz is able to sell illusions of youth, personal attractiveness, and control over one's body as a means of achieving control over one's life.

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138 See Kennedy, supra, note 40 at 632 quoting R. Clark "The Soundness of Financial Intermediaries" (1976-77) 86 Yale L.J. 1 at 19: "Human finitude and normative error are the major sorts of personal imperfections: human beings have limited capacities to understand, to reason, and to predict, and they do not always know or choose the risks that under some moral theory they ought to prefer."

139 Ibid.

140 Control of the body is an important topic in discussions of the development of the consumer society. Zygmunt Bauman, drawing on the work of Foucault sees a connection between consumer health fads, jogging and so on and the need for reproduction of more disciplined workers and consumers. See "Industrialism, Consumerism and Power" (1983) 1:3 Theory, Culture and Society 32.
We should recognize more fully the different cultural story about consumers in the above account. Within this story, consumers are not dopes or idiots. We do develop strategies for dealing with powerful institutions, but we do so within a larger set of material and ideological structures and codes that are not of our choosing. Given the importance of these social structures and cultural institutions, such as advertising, in constituting our subjectivity and the role of everyday practices in reproducing dominant culture, they should be the focus for political debate. At the least, scholars might probe the way in which regulation of advertising is related to the ability of individuals to think reflectively about the everyday acts by which we reproduce the consumer culture.

In Canada, law's truth knows little of this cultural approach. The dominant discourse in relation to consumer protection reflects approaches rooted in philosophical and methodological individualism, in particular, economics and positivistic social science. The general area of cultural studies has had little input into the policy process.

It is at this point that the relationship of knowledge to power may be made more explicit. Much of the work on advertising in law and public policy is dominated by "the pull of the policy audience."\(^1\)\(^{41}\) This has several consequences. The academic, as expert policy adviser, attains authority by speaking in a discourse that appears to be relatively apolitical. By avoiding discussions about ends or attempting to draw on weak value judgments, policy analysis attempts to separate technical policy issues from the bigger questions of politics. The language of positivistic social science provides the appearance of detached authoritative advice. Bureaucrats, whose claim to power also may rest on the concept of detached, neutral, and dispassionate advice, will be attracted by this approach. These two groups of academics and administrators are linked by a common class pretension to power based on the apolitical scientific knowledge necessary to manage a complex economy. In English Canada, the domination of neo-classical economics in the Canadian policy process has resulted in academics playing the role of policy critic rather than social critic.\(^1\)\(^{42}\) There

\(^{141}\) See Silbey & Sarat, \textit{supra}, note 17.

\(^{142}\) See Brooks & Gagnon, \textit{supra}, note 63 at 126.
was also the general influence during the 1960s and 1970s of positivistic and behavioral approaches to social science and to the role of law in society. Work described as cultural studies could be downplayed as "dogma and speculation," only to be taken seriously if formulated as hypotheses which could be falsified by empirical data. Power was only meaningful as a concept if it could be translated into a measurable impact.\textsuperscript{143}

In the conception of the audience as policy maker, the bottom line of many studies was what, in instrumental terms, the state might do to address issues of advertising regulation. Social change was associated with enlightened policy making by the state through a variety of policy instruments. Since it was often not clear from cultural studies what, if anything, could be done about advertising in terms of policy making, rather than political action, little enthusiasm was shown for these analyses and their practitioners could be described as ideologues and polemicists.

V. CONCLUSION

It's like a revival, with public testimonies. There's so much thought going into what people do with their votes in this election. It's as if politics has become an aspect of life as fraught as, say, shopping — absorbing time, full of hard, obscure, silly, weighty choices.\textsuperscript{144}

Thinking critically about advertising leads quickly into reflection on issues of economic and cultural power in modern societies. Advertising is a central aspect of the consumer marketplace, financing media communication and representing a significant economic and cultural industry. The mixture of economy and culture in the phrase the "culture industry" reminds us of the difficulty of separating these two spheres. The economic structure of the international media industry, dominated by the U.S., and the economic imperatives of securing audiences for advertisers place

\textsuperscript{143} This was, of course, the approach of law and economics to such issues as inequality of bargaining power in contract law. For a good example of this strategy, see Priest, supra, note 120.

\textsuperscript{144} R. Salutin, \textit{Waiting for Democracy: A Citizen's Journal} (Markham, Ont.: Viking, 1989) at 203.
significant barriers to the development of oppositional discourse. \(^{145}\)

In addition, the literature on post-industrial society points to the increasing penetration of the logic of commodity capitalism into all aspects of social life, including the so-called private arena of leisure, culture, and sexual relations.

It is also quite clear, however, from the development of new social movements organised around consumption that the consumer society has not led to the end of ideology and that advertising may be a site for social struggle. A common aspect of consumer culture, reflected in advertising, is the appeal to images of cultural democratization and equality, images which may act as catalysts for the rejection of inequalities in social and economic relations. Advertising may be an opportunity for social struggle and for highlighting inequalities and oppressive social and economic relations associated with consumption. But it is important to maintain a focus on the wider relationships around consumption and to be aware of advertising's power to commodify any new, more progressive, image. The ability of advertising to adjust to new images of women, substituting the successful lawyer for the happy homemaker, is an obvious example of cooptive commodification which should not conceal the continuing class, gender, and race inequalities in social relations.

We also need to problematize the role of law and the central state in the regulation of advertising. It must be asked to what extent policies in this area have acted in tandem with other forces in the normalization of a particular vision of consumer relations. Since at least the end of the Second World War, the central state in North America and Western Europe has tended to identify its consumer policies with market consumerism. It was an approach, which during this period, meshed well with broader state economic objectives of dismantling wartime controls and promoting full employment and competitive markets. Vigorous policing of misleading advertising claims is consistent with these objectives. Consumer policy as an instrument of social integration and control is illustrated in the work of many a ministry of consumer affairs,

\(^{145}\) For a useful discussion of the potential for oppositional discourse, see L. Benn, "White Noise: The Long, Sad Story of TV Criticism" in The Village Voice Literary Supplement (December 1990) at 14.
some consumer advocacy organizations, and consumer education programmes in school. These attempt to both substitute expert knowledge for local knowledge and to communicate the "proper" norms of market behavior, extending administrative control over consumer action. It has never been completely successful in subordinating individuals to this mode of living. Although consumerism, as reflected in consumer reports and mainstream consumer organizations, has never challenged seriously the assumptions of this discourse, there has always been a part of consumerism which has seen consumption as an important terrain for political struggle against the domination by an oppressive form of life. Feminism, the ecological movement, and the social movements concerned with the control of urban space are three examples of attempts to develop counter discourses.

We clearly need further study of those moments, such as the late 60s and early 70s, when critiques of advertising were associated with movements for social transformation. My speculation is, however, that the use of social science evidence and expert agencies to address these questions of taste construction and transfer contributed ultimately to the subsequent regulatory cul de sac. Lacking popular political legitimacy, agencies were required ultimately to stake their claim for regulation on scientific knowledge, transforming the politics of advertising into technical questions. But the constitution of the consumer market is a central political question raising questions whose resolution is likely to have a large patterning effect on economic and social relations and which are ill-suited to decisions by experts. The regulation of advertising is also closely related to work from a variety of perspectives which searches for a better form of democratic politics. Indeed, it is the treatment of politics, as a commodified market form harnessing the skills of marketing and advertising, which has prompted much of this work. It is imperative to foster greater public discussion of the impact of the economics of the media and its ownership. A

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146 See sources cited supra, note 97.

147 See the discussion in Critical Theory and Public Life, supra, note 97 and Hutchinson, supra, note 131 at 31-34.

148 See Raboy & Bagdakian, supra, note 102.
modest policy might be to take liberal rhetoric seriously and require licensees to reserve time for counter advertising for any product claims which raise controversial issues of public importance.\footnote{149} 

I have suggested how a study of the role of advertising in taste construction and transfer undermines the traditional distinction between the private and public realm and the construction of regulation as intervention in the prepolitical private sphere of the market. We should take seriously the arguments of writers, such as Giddens, that, in our continuing acts of routine consumption, we are helping to reproduce the social institutions that we played no part in bringing into existence.\footnote{150} At the least, this suggests a greater focus on the politics of the everyday world of consumption and their connection to the broader institutions of contemporary society. As Tomlinson suggests, "[T]he relation between our everyday pleasures and the politics of the age is a binding concern."\footnote{151} Any attempt to develop a critical theory of the consumer society must take these issues seriously.

\footnote{149} Nelson, \textit{supra}, note 9 at 134 makes the comment that "as environmental issues increasingly becomes 'matters of public concern' ... virtually every product ad on mainstream radio and TV should be followed by a counter-ad pointing out the product's health and environmental dangers in order to achieve 'balance'." For a useful discussion of the fairness doctrine in the context of regulation of advertising, see S. Breyer \& R. Stewart, eds, \textit{Administrative Law and Regulatory Policy}, 2d ed. (Toronto: Little Brown, 1985) at 985-1001. See the interesting proposals in Raboy, \textit{supra}, note 102 at 342-57.

