

# FIRST AMENDMENT DIALOGUE AND SUBLIMINAL MESSAGES

*Many studies have now shown the effectiveness of subliminal psychodynamic activation. . . . It is now evident that a subliminal stimulus can bring about behavior change as a result of activating psychodynamic processes. This raises anew anxieties that were stimulated in the 1960's of a 1984-type society in which our behavior is being secretly influenced by external forces. It also raises anew a criticism that has been made of the experimental method—that the people participating are treated as inanimate objects. . . . I am convinced that both of these concerns have some justification, though it is difficult to say at this point exactly what is warranted and what is an exaggeration based upon remnants of childhood fantasies to which we are all vulnerable. I hope this question will be easier to answer as more results accumulate on what can and cannot be brought about by subliminal stimulation. In light of the considerations referred to above as well as more general ethical considerations, it is important for all of us utilizing subliminal psychodynamic activation to bend over backwards to protect subjects.<sup>1</sup>*

## I

### INTRODUCTION

Subliminal persuasion is ubiquitous. In times past, subliminals<sup>2</sup> were confined to somewhat grotesque and ludicrous advertising. Today, subconscious behavior control is less of an art and more of a science. Clinically, subliminal behavior modification has proven effective.<sup>3</sup> Culturally, the evidence is mounting that visual and auditory pseudo-hypnotic messages can incite sickness and violence with glints and whispers more insidious than messages that meet the eye or greet the ear.<sup>4</sup> The use of subliminal persuasion is increasing in department stores and in the workplace.<sup>5</sup> We are instructed not only in what to buy but also in how to feel and to behave. The proposed regulation of subliminals has been opposed by advertising industry critics.<sup>6</sup> This Note will explore the dilemma of regulating what we cannot see, hear or defend ourselves from.

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1. Silverman, *Ethical Considerations in the Use of Subliminal Psychodynamic Activation* (unpublished paper available from Research Center for Mental Health, New York University).

2. Subliminals are messages directed at or below the audience's threshold of conscious awareness.

3. See *infra* text accompanying notes 22-26.

4. See *infra* text accompanying notes 76-116.

5. See *infra* text accompanying notes 29-35.

6. See *infra* text accompanying notes 157-206.

## II

## A HISTORY OF ATTEMPTS AT SUBLIMINAL PERSUASION

“DRINK COCA-COLA. HUNGRY? EAT POPCORN.” In 1956, Subliminal Projection Co., Inc. painted Kim Novak’s face with these messages in the movie *Picnic*. The ad flashed every five seconds for one three-thousandth of a second.<sup>7</sup> That same year, the BBC broadcast a subliminal “four word news item . . . and asked viewers to try to identify it.”<sup>8</sup> The next year, Bangor, Maine’s WTWO-TV asked, “IF YOU HAVE SEEN THIS MESSAGE, WRITE WTWO.” They asked every eleven seconds at one eightieth of a second on alternate days for two weeks.<sup>9</sup> CBS-TV, Canada, joined the game the year after that, broadcasting subliminals at between one-fifth and one-half second 352 times in one half hour.<sup>10</sup>

The plot thickened, in 1958, on WTTV, Bloomington, Indiana. Two Indiana University faculty members superimposed a low-contrast beam<sup>11</sup> over the nightly television movie. Viewers were surreptitiously directed to “WATCH FRANK EDWARDS.” Obedient fans were then treated to yet another subliminal message promoting a commercial product.<sup>12</sup>

Radio stations, preceding the Beatles and their subliminal imitators, began the exploitation of audio subliminals during the late 1950’s with “phantom spots” and threshold level “added recall devices.” These were both prerecorded and later multi-tracked over regular promotional spots and music. Sometimes, subliminals were even inserted into “empty” programming pauses. Presumably, listeners in Chicago, Minneapolis, San Francisco, Longview and other cities were unable to distinguish subliminal-filled silence from pure silence.<sup>13</sup>

In 1962, CBS scaled a new pinnacle of embarrassment when an announcer advised the national audience that subliminals were inserted in the regular program credits. There were numerous complaints from viewers and

7. *Public Hearing Concerning Labelling and Advertising Regulations under the Federal Alcohol Administration Act*, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Vol. 1, 15 (Sept. 9, 1981) (statement of Charles F. Adams, American Association of Advertising Agencies) (on file at N.Y.U. Review of Law & Social Change) [hereinafter cited as *BATF Hearing*]. Mr. Adams stated: “According to Vicary (of Subliminal Projection Co., Inc.) it increased popcorn sales by 57 percent in theaters in which it was used, and Coke sales by 18 percent. This would lead us to believe that it is easier to make people hungry than thirsty.” See also Jones, *Subliminal Advertising in American Broadcast Media 10-11* (Yale Legis. Serv. 1978) (on file at N.Y.U. Review of Law & Social Change).

8. FCC INFORMATION BULLETIN, *Subliminal Projection* 9 (Feb. 1971). See *BATF Hearing*, *supra* note 7, at 16. According to Mr. Adams, “[o]f 430 replies, 150 claimed to have perceived [the message] but only 20 got it right.”

9. FCC INFORMATION BULLETIN, *Subliminal Projection* 1 (Feb. 1971).

10. Jones, *supra* note 7, at 11.

11. See *infra* text accompanying notes 31-35.

12. De Fleur & Petranoff, *A Televised Test of Subliminal Persuasion*, 23 PUB. OPINION Q. 168, 171, 174 (1959). See also Jones, *supra* note 7, at 11.

13. FCC INFORMATION BULLETIN, *supra* note 8, at 9.

one more arresting complaint from the FCC. The network later declared that the announcement was a hoax. The name of the program? "To Tell the Truth."<sup>14</sup>

Subliminals leaped the threshold of awareness by appearing in national newspaper headlines during Christmas of 1973. Both the FCC and the FTC received complaints that several television stations were beaming tachistoscopic<sup>15</sup> commands into the subconscious of viewers.<sup>16</sup> This was no hoax. A subliminal message thoughtfully adapted to a child's vocabulary was superimposed on an ad for a toy called "Husker-Du." The message was, "GET IT." The Premium Corporation of America "claimed that it was inserted by an exuberant but misguided young man from the production house in Minneapolis."<sup>17</sup>

Since *Picnic*, subliminals in movies have evolved both as promotional and artistic devices. For example, in 1972, Inflight Motion Pictures, Inc. reportedly announced the beginning of subliminal advertising on regularly scheduled airlines.<sup>18</sup> It is in horror films, however, that subliminals have thus far found their niche. For example, few people remember the subliminal message "BLOOD" in *My World Dies Screaming*.<sup>19</sup> Warner Brothers has acknowledged using subliminal deathmasks in the old priest's dream sequence in the more memorable *The Exorcist*.<sup>20</sup> Allegedly, shortly after seeing the subliminal deathmask in *The Exorcist*, a young Indianapolis man fainted and broke his jaw. He is suing Warner Brothers for \$350,000 because "the subliminal image constitutes an intentional defect in the movie . . . that . . . can harm the viewer."<sup>21</sup>

On a more positive note, subliminals are in vogue in weight control clinics. In one experiment, the reassuring message "MOMMY AND I ARE ONE" curbed more nervous snacking than the neutral message "PEOPLE ARE WALKING."<sup>22</sup> Subliminals are also used to weed out Danish, Norwe-

14. *Citizen Comment Requesting that the Bureau Recognize Its Jurisdiction over Subliminal Messages in Alcohol Advertisements and Commence Rulemaking to Appropriately Revise the Advertising Regulations Under the Federal Alcohol Administration Act: Hearings Pursuant to Notice 313 Before the Bureau of Alcohol, Tobacco and Firearms, Treasury 17* (submitted March 23, 1979 by Action on Deceptive Subliminals (ADS)) [hereinafter cited as *ADS*].

15. Jones, *supra* note 7, at 3.

16. FCC PUBLIC NOTICE, *Broadcast of Information by Means of "Subliminal Perception" Techniques*, FCC 74-78, 2 (Jan. 24, 1974), 39 Fed. Reg. 3714 (1974).

17. *BATF Hearing*, *supra* note 7, at 16. According to Mr. Adams, "They voluntarily removed the commercial from the air, and history records that the marketplace was not kind to 'Husker-Du.'"

18. Jones, *supra* note 7, at 12.

19. *BATF Hearing*, *supra* note 7, at 15.

20. Lander, *In Through the Out Door*, *OMNI MAGAZINE* 45, 47 (Feb. 1981).

21. *Id.* at 107.

22. *Id.* at 48. See also Silverman, *Psychoanalytic Theory: The Reports of My Death Are Greatly Exaggerated*, 31 *AM. PSYCHOLOGIST* 621-37 (1976) (discussing psychoanalytic theory, subliminal research and behaviorism).

gian, and Swedish Air Force jet cadets,<sup>23</sup> to desensitize agoraphobics (who react less stressfully to vistas they cannot see),<sup>24</sup> to bolster the egos of math and law students,<sup>25</sup> and to treat repetitive compulsive behavior, depression, and stuttering.<sup>26</sup> One Los Angeles television station flashed "DRIVE SAFELY" during the news in an apparently vain attempt to lower the accident rate.<sup>27</sup> More audacious but equally unsuccessful was a Wichita, Kansas station that urged a murderer to "CONTACT THE CHIEF."<sup>28</sup>

Today, subliminals have entered a "brave new world." They infest print advertising to the saturation point.<sup>29</sup> One Madison Avenue source, who requested anonymity, shuddered at the suggestion that home audiences might freeze and enhance television images captured on Sony Betamax.<sup>30</sup>

Hal Becker, Ph.D., president of Behavioral Engineering Corporation, markets "Dr. Becker's Black Boxes," as patents 3060795 and 3278676 are informally known.<sup>31</sup> For just \$4,800 a year, Dr. Becker's electronic Black Box mixes subliminal messages in Muzak to discourage shoplifting in grocery and department stores: "I AM HONEST. I WILL NOT STEAL."<sup>32</sup> Salespeople in at least one New York realty office are inspired by "MY

23. Lander, *supra* note 20, at 45, 48 (cadets with a lower threshold perceived military targets more readily and were quicker to evade opponents).

24. *Id.* at 46, 48. See also McGinnies, *Emotionality and Perceptual Defense*, 56 *PSYCHOLOGY REV.* 244, 249 (1949) (perceptual defenses may be circumvented by subthreshold introduction of the elements of phobias).

25. Lander, *supra* note 20, at 46, 48.

26. Silverman, *Psychoanalytic Theory*, 31 *AMERICAN PSYCHOLOGIST* 629-30 (1976); Becker, Corrigan, Elder, Tallant & Goldstein, *Subliminal Communication: Biological Engineering Considerations*, DIGEST OF THE 6TH INTERNATIONAL CONFERENCE ON MEDICAL ELECTRONICS AND BIOLOGICAL ENGINEERING, TOKYO 452 (1965); Becker & Glanzer, *Subliminal Communication: Advances in Audiovisual Engineering Applications for Behavior Therapy and Education*, PROCEEDINGS OF THE 1978 INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS REGION 3 CONFERENCE, ATLANTA (April 10-12, 1978); Becker, Glanzer & Dunbar, Human Engineering Solutions for Weight Control Problems (paper submitted for presentation to the 1978 International Conference on Cybernetics and Society, Tokyo (Nov. 3-5, 1978) and Kyoto (Nov. 7, 1978)). For an extensive bibliography of the scientific background of subliminal communication, see *ADS*, *supra* note 14, app. B.

27. *BATF Hearing*, *supra* note 7, at 15, 16.

28. *Id.* at 16; Lander, *supra* note 20, at 47.

29. See generally *Media Images of Alcohol: The Effects of Advertising and Other Media on Alcohol Abuse, 1976: Hearings Before the Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare, 94th Cong. 2d Sess.* 173-86 (1976) (statement of Wilson B. Key, head of Mediaprobe, a citizens' action group concerned with subliminals) [hereinafter cited as *Senate Hearings*]. See also W. KEY, *MEDIA SEXPLOITATION* (1976) [hereinafter cited as *MEDIA SEXPLOITATION*]; W. KEY, *SUBLIMINAL SEDUCTION* (1972) [hereinafter cited as *SUBLIMINAL SEDUCTION*]; W. KEY, *THE CLAM-PLATE ORGY AND OTHER SUBLIMINAL TECHNIQUES FOR MANIPULATING YOUR BEHAVIOR* (1981) [hereinafter cited as *CLAM-PLATE ORGY*].

30. Conversation between the author and a source who wishes to remain anonymous (Nov. 18, 1981). (These fears are somewhat antiquated. Video recorders will freeze old-style tachistoscopic "quick cuts" but cannot detect today's low-contrast beams).

31. Jones, *supra* note 7, at 31 n.25.

32. Lander, *supra* note 20, at 45.

TIME IS VALUABLE . . . DOLLARS NOW . . . REWARD IS COMING . . . I FEEL GOOD."<sup>33</sup>

Dr. Becker reports sales of subliminals are booming, so to speak. "Someday there will be audio conditioning in the same way we now have air conditioning," according to Dr. Becker.<sup>34</sup> Prospective clients include a professional football team in search of the perfect halftime pep talk.<sup>35</sup>

More disturbing is the use of subliminals in the political arena. According to Dr. Wilson B. Key, subliminal embedding techniques<sup>36</sup> "have been used in every political campaign of any magnitude in the United States and Canada for at least twenty-five years—if not much, much longer. SEX embeds can even be designed into campaign buttons."<sup>37</sup> SEX "embeds," quite literally, involve etching the letters S-E-X or S-X into the natural lines on the hands and faces in promotional portraits.<sup>38</sup> Dr. Key reported the use of SEX "embeds" in one campaign:

In a recent U.S. congressional election campaign in Virginia's 10th District, SEX "embeds" were discovered in the campaign literature of all candidates except one who could not afford to hire an advertising agency. . . . A formal complaint was initiated by one candidate with the Virginia Election Commission, charging the use of subliminal techniques in the candidate's literature. The commission refused to accept the complaint. . . .<sup>39</sup>

Jadish Sheth, president of the American Psychological Association's Division on Consumer Psychology is more reassuring: "Applying subliminal messages to the political arena . . . will bring more people to the polls. But it won't change their votes."<sup>40</sup> A very similar assurance was given to interested congressmen, the FCC, and news media representatives by Subliminal Projection Co., Inc. at a demonstration on January 13, 1958. Representatives of Subliminal Projection Co., Inc. boasted that although subliminal advertising "would not make a Republican switch to a Democrat, it could be used to get out the vote."<sup>41</sup>

These claims are less comforting in view of the often crucial impact of voter turnout in determining many elections. Subliminals would also seem implicated in the impact of "charisma" in media-dominated election campaigns.

33. *Id.* at 46.

34. *Id.*

35. *Id.*

36. See *infra* text accompanying notes 43-49.

37. MEDIA SEXPLOITATION, *supra* note 29, at 8.

38. See *id.* at 8-9.

39. *Id.* at 8.

40. Quoted in Lander, *supra* note 20, at 48.

41. Quoted in Jones, *supra* note 7, at 14.

## III

## HOW SUBLIMINALS WORK

The mechanics of subliminal persuasion follow advances in media technology. Several fundamental techniques have been identified,<sup>42</sup> and further refinement of subliminal conditioning technology must be anticipated.

Subliminals in print and photography are usually photoengraved, particularly in newspaper, magazine, and billboard advertising.<sup>43</sup> Often, specially commissioned paintings of products, primarily liquors, incorporate subliminal elements directly.<sup>44</sup> These elements may be elusive designs of light and shadow, sometimes incorporating Gestalt figure-ground dichotomy, or cunningly hidden images of sex or death, the major themes of subliminal persuasion.<sup>45</sup> Sex images include the sex organs, either alone or in extreme close-ups of all humanly known sexual behavior.<sup>46</sup> Frequently, the letters S-E-X or familiar Anglo-Saxon four-letter words are spelled out in a painting which at first glance appears to be an innocent photograph.<sup>47</sup> Death images include skulls, other macabre objects, and the words DEATH, DETH, and CANCER.<sup>48</sup> All of these print devices, which may also be found in still frames of motion pictures, are called, colloquially, "embeds."<sup>49</sup>

As with all other subliminal techniques, there has been vigorous debate over their detectability. Detectability has obvious implications in drafting enforceable laws. As recently as 1976, Dr. Key cautioned senators that embeds were virtually undetectable.<sup>50</sup> Today, however, modern technology can render subliminal embeds visible to the naked eye.<sup>51</sup>

In film, the oldest technique, the tachistoscope, has been supplanted by low contrast superimposition.<sup>52</sup> The tachistoscope merely inserts subliminal

42. See MEDIA SEXPLOITATION, *supra* note 29, at 9.

43. *Senate Hearings*, *supra* note 29, at 174-75.

44. ADS, *supra* note 14, app. A; *Senate Hearings*, *supra* note 29; MEDIA SEXPLOITATION, *supra* note 29; SUBLIMINAL SEDUCTION, *supra* note 29; CLAM-PLATE ORGY, *supra* note 29. All five sources are replete with examples. No expert analysis or description is as compelling as a personal viewing.

45. See, e.g., ADS, *supra* note 14, app. A; *Senate Hearings*, *supra* note 29, at 174; MEDIA SEXPLOITATION, *supra* note 29; SUBLIMINAL SEDUCTION, *supra* note 29; CLAM-PLATE ORGY, *supra* note 29.

46. See, e.g., ADS, *supra* note 14, app. A; *Senate Hearings*, *supra* note 29.

47. See MEDIA SEXPLOITATION, *supra* note 29, at 9.

48. See *id.* at 9, 172; *Senate Hearings*, *supra* note 29, at 173-78.

49. E.g., Jones, *supra* note 7, at 4.

50. *Senate Hearings*, *supra* note 29, at 179-81.

51. Jones, *supra* note 7, at 30 n.8. Basically, detection of embeds involves computer enhancement similar to techniques developed to improve resolution of aerial reconnaissance as well as Mariner and Voyager photographs. A less costly technique involves a Linen Tester, a device that blows up engravings to test for airbrushing. See *Senate Hearings*, *supra* note 29, at 185.

52. See ADS, *supra* note 14, at 7; Jones, *supra* note 7, at 3; *Senate Hearings*, *supra* note 29, at 181.

frames in film for one three-thousandth of a second. In contrast, a low intensity beam can superimpose words or images over normal film.<sup>53</sup> This is not a double exposure; in effect, two films play together. The principal advantage of the low intensity technique was stated bluntly in a report prepared for Senator Wendell Anderson:

It should also be noted that the advertising industry long ago recognized that tachistoscopes were far cruder than low-contrast techniques, since tachistoscopic "fast cuts" are detectable by oscilloscope or slow playback, while low-contrast subliminals cannot be isolated.<sup>54</sup>

Audio subliminals are introduced in commercial records through multi-tracking.<sup>55</sup> As described above, they are also hidden in Muzak or even in a seemingly empty program pause.<sup>56</sup> In contrast to visual subliminals, audio subliminals are relatively easy to detect, given apparatus to amplify and, in some cases, to retard the signal.

After the signal goes out, very peculiar events take place to establish the subliminal beachhead. As will be detailed later, some subliminal advertising is directed at the threshold of consciousness and shares certain mechanisms with traditional advertising.<sup>57</sup> Traditional advertising usually consists of a rational overlay on an emotional association which is produced by psychological conditioning.<sup>58</sup> For example, products are associated with fundamental drives by shortening commercial time while increasing commercial frequency. This is classical conditioning. According to one critic:

Current examples of this associational technique which can be verified by switching on any TV channel are: "*Kentucky-Fried Chicken . . . a barrel of fun, goodbye ho-hums,*" "*Pet Milk makes you happy,*" "*Ultra-Brite gives your mouth sex appeal,*" "*Pick-a-Pack of Juicy Fruit Gum—What a happy feeling,*" "*You're nice Mom, and so's Aurora,*" "*When you've got your health, you've got just about everything: Geritol every day,*" so on *ad infinitum*.<sup>59</sup>

The rational marketplace, in which advertising is protected for its informational value to the consumer and for the prevention of waste, begins to deteriorate under the irrational onslaught of emotional advertising.<sup>60</sup>

53. Jones, *supra* note 7, at 3.

54. *Id.*

55. See *supra* text accompanying note 13.

56. *Id.*

57. See *infra* text accompanying notes 60-61.

58. See Note, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733, 745 (1977).

59. Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171, 175 (1975) (emphasis in original).

60. ADS, *supra* note 14, at 8-10.

Another critic posed the public policy issue this way: "Is it really in the public interest for citizens to be taught day by day, year after year, by the most powerful electronic media known to our civilization that human happiness, joy, and sexual satisfaction flow from the purchase of soft drinks, soap powders, and toothpastes?"<sup>61</sup> The common associational technique, however troublesome, remains partially over and partially under the threshold of human consciousness. The message is consciously perceived, but the conditioning works on a subconscious level. Subliminal persuaders have gone beyond the point of being problematic insofar as the rational marketplace is concerned.<sup>62</sup> Most subliminals operate on a level totally disconnected with the conscious message or perception of the advertisement.<sup>63</sup> The rational marketplace, a policy bulwark of the first amendment, is intentionally undermined.

Subliminal messages tag people in three ways: directly, indirectly, and through preexisting mental associations. Direct subliminals are messages aimed at and received by their intended primary audience; trained market researchers target their audience according to maximum audience vulnerability.<sup>64</sup> For example, young people are more vulnerable to electronic media than print media.<sup>65</sup> Subliminals aimed at youth are therefore carried on radio and television, with additional specificity mustered according to age, sex, region, class, ethnicity and prior spending habits. Direct subliminals can be so narrowly focused that they are perfectly visible or audible to the nontarget audience. For example, sexual embeds designed to heighten male fears of latent homosexuality may be readily perceptible to females not threatened by embeds of male sex organs.<sup>66</sup>

Some direct subliminals evade conscious perception by an ingenious twist. The key to bypassing the conscious level lies in manipulation of the threshold of consciousness itself. That is why subliminals focus on sex and death.<sup>67</sup> Both subjects are innately disturbing enough to raise an audience's

61. See Note, *supra* note 58, at 771.

62. See *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414, 428 (S.D.N.Y. 1980), *aff'd on rehearing*, 511 F. Supp. 486 (S.D.N.Y. 1981). The public interest is defeated by wasteful impulse buying. Subliminal confusion coerces consumers into compulsive buying, subverting the price-quality proportion that theoretically coordinates the free market. See generally Duggan, *Fairness in Advertising: In Pursuit of the Hidden Persuaders*, 11 MELB. U.L. REV. 50 (1977).

63. *Ortho Pharmaceutical Corp. v. American Cyanamid Co.*, 361 F. Supp. 1032, 1044 (D.N.J. 1973); Duggan, *supra* note 62, at 51; Jones, *supra* note 7, at 9-10.

64. See *supra* text accompanying notes 22-33. See Note, *Psychological Advertising: A New Area of FTC Regulation*, 1972 Wis. L.R. 1097, 1097-110 (discussing maximizing audience psychological vulnerability by sophisticated research tools). See generally V. PACKARD, *HIDDEN PERSUADERS* (1957) (the first widely disseminated discussion of motivated advertising techniques).

65. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585-86 (D.D.C. 1971). See generally M. McLuhan, *UNDERSTANDING MEDIA* (1964).

66. *MEDIA SEXPLOITATION*, *supra* note 29, at 16-35. *Senate Hearings*, *supra* note 29, at 184-85.

67. *ADS*, *supra* note 14, at 7, app. B6; see Jones, *supra* note 7, at 7.



psychological perceptual defenses. The viewer's threshold of conscious perception rises so that more of the advertisement is blocked or consciously unrecognized. Ironically, while the conscious personality is protected, this mechanism of threshold elevation channels additional advertising content subliminally.<sup>68</sup> Consequently, less message content remains subject to conscious analysis or discrimination and the emotive force of the advertisement remains relatively undiminished.<sup>69</sup>

Indirect subliminals have previously gone unrecognized. Indirect subliminals are messages that eventually reach a secondary audience. For example, direct subliminals broadcast to teenagers will also be received by adults. These adults may not be motivated to buy merchandise designed for young people. Nevertheless, the broadcast themes of sex and death remain embedded in the adults' subconscious.

Subliminals so permeate our culture that they tend to "leak out" into a diffuse and imperceptible babble to which no particular audience pays attention. Subliminals become background noise. This is the effect that troubled Judge Bazelon in *Banzhaf v. FCC*,<sup>70</sup> which upheld the FCC's authority to require countervailing antismoking messages on stations broadcasting cigarette ads:

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.<sup>71</sup>

Victims of indirect subliminals may be at equal risk with victims of direct subliminals and consumers who ignore ads. None of the members of these groups can defend themselves through conscious criticism from the emotive effect of subliminals.<sup>72</sup> One critic of indirect subliminals noted that their effectiveness is inversely proportional to the importance people attach to them.<sup>73</sup> Therefore, I suggest indirect subliminal advertising actually consists of a torrent of direct subliminals replete with their original potency and force.

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68. Jones, *supra* note 7, at 6-7.

69. *ADS*, *supra* note 14, app. B5; Reed, *supra* note 59, at 179.

70. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

71. *Id.* at 1100-01 (emphasis in original).

72. Note *supra* note 58, at 750.

73. *Id.* at 774.

The third class of subliminals is Lanham Act subliminals.<sup>74</sup> Briefly, Lanham Act infringement subliminals involve the conversion of psychologi-

74. Section 43(a) of the Lanham Act provides useful precedent for tort liability for subliminal persuasion. The Lanham Trade-Mark Act, § 43(a), 15 U.S.C. § 1125(a), provides in pertinent part:

Any person who shall . . . use in connection with goods . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods . . . to enter into commerce, . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

The Lanham Act proscribes trademark infringement where an advertiser uses product confusion to capitalize on the mental associations and symbolism instilled in an audience by a previous advertiser. See *Ortho Pharmaceutical Corp. v. American Cyanamid Co.*, 361 F. Supp. 1032, 1044 (D.N.J. 1973).

Lanham Act subliminals are fundamentally similar to direct and indirect subliminals. In all three categories, advertisers aim for our subconscious minds in order to influence us below the threshold of conscious discernment and analysis. Lanham Act subliminal persuasion differs from direct and indirect subliminal persuasion only by the subliminal projection mechanism. In direct and indirect subliminals, the whole message is transmitted at once. In Lanham Act subliminals, the advertiser triggers subconscious messages already in place.

The term "subliminal" is ubiquitous in Lanham Act cases. In general, it is used synonymously with "unconscious associations." Judicial use and refinement of the term "subliminal," however, portrays a clear apprehension of the range of legal and psychological problems inherent in direct and indirect as well as Lanham Act subliminals.

Some courts have equated "subliminal" with "subconscious" level activity. *Id.*; *Londontown Manufacturing Co. v. Cable Raincoat Co.*, 371 F. Supp. 1114, 1118 (S.D.N.Y. 1974). In *Londontown*, the court held that the "London Fog" trademark was infringed by the "Smog" trademark and stated:

The relation between raincoat and weather is an association of ideas in the mind of the consumer.

A manufacturer cannot preempt all weather as his exclusive mark, but by using an element in a fanciful sense he can appropriate an approximate synonym in popular use. If consumers come to think of a wire fence as a reminder of a *cyclone*, then a competitor may not remind them of his wire fence as a *tornado* . . . . The reason is that advertising and trademarks rely on impressions. The consumer does not memorize the mark. He has a feeling about it from past exposure. That feeling may be vague, subliminal it is said, but it comes to consciousness when the article is seen with the trademark affixed. The ultimate test is, of course, whether the public is likely to be confused by the similarity of the marks . . . .

371 F. Supp. at 1118 (citations omitted).

Four years later, in *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978), the Second Circuit held that subliminals may be independently effective components of the total message. The court ruled that Anacin could not play on subliminal pain associations with the term "inflammation" in claiming pain relief superiority in comparison to Tylenol. *Id.* at 167-68. Anacin had deceptively advertised that it was a superior "pain" reliever, without the requisite evidence, by the subterfuge of using "inflammation" to suggest "pain." *Id.* at 164-70.

The Lanham Act was designed to prevent product confusion. Confusion per se is the harm legislated against, and no actual sale need result from the confusion—the mere likelihood of confusion is prohibited. Moreover, the Act was broadened by amendment to

cal associations produced by one advertiser to another advertiser's use. For example, Goodrich Rubber may be confused with Goodyear Rubber, especially after dire warnings in Goodrich ads not to mistake the identity of the Goodyear blimp. Goodrich's ads are not actually Lanham Act infringements because they expressly disclaim any association between Goodrich and the blimp. Subconsciously, however, the consumer comes to associate both corporations with the blimp. Perhaps the conscious distinction will be retained; perhaps subconscious confusion will ultimately result. In either case, both companies gain promotional associational mileage in nonrigid airships. As one court has stated: "[A]dvertising and trademarks rely on impressions. The consumer does not memorize the mark. He has a feeling about it from past exposure. That feeling may be vague, *subliminal* it is said, *but it comes to consciousness when the article is seen with the trademark affixed.*"<sup>75</sup>

prohibit confusion in general in addition to confusion of product origin or brand. *Ortho Pharmaceutical Corp.*, 361 F. Supp. at 1042.

Lanham Act subliminals stimulate impulse buying. See *Playboy Enterprises, Inc. v. Chuckleberry Publishing*, 511 F. Supp. 486, 492 (S.D.N.Y. 1981). Accordingly, the level of consumer sophistication and the degree of care exercised in purchasing are legally irrelevant. *Grottrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons*, 365 F. Supp. 707, 717 (S.D.N.Y. 1973), *aff'd*, 523 F.2d 1331 (2d Cir. 1975); *Ortho Pharmaceutical Corp.*, 361 F. Supp. at 1043. In these cases, doctors and purchasers of grand pianos were presumed unable to employ conscious discrimination to counteract subliminals. The situation is no better when subliminal elements are combined with superthreshold elements. *Senate Hearings, supra* note 9, at 184; see *infra* text accompanying notes 143-48. Misleading subliminals can create a false general impression even when the supraliminal facts are all true. In fact, subliminals are effective even when the audience perceives the conscious elements and finds them hard to believe. *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d at 168 n.17, 172.

For these reasons, deception under the Lanham Act is defined as the likelihood or high probability of confusion, *Playboy Enterprises*, 511 F. Supp. at 491, rather than whether or not the ad is true or false, *American Home Products Corp.*, 577 F.2d at 165. Moreover, the court examines the total message for deception and may find an infringement even where the conscious portion of the message, taken alone, is truthful. For subconscious or nonlinguistic elements of ads, a "reasonably implied" standard has evolved. *Id.* Evidence of actual confusion at the time of sale is not necessary under the Lanham Act. *Ortho Pharmaceutical Corp.*, 361 F. Supp. at 1043; *Playboy Enterprises*, 486 F. Supp. at 429; *Steinway & Sons*, 365 F. Supp. at 715. Of course, actual confusion is of great probative value if it can be demonstrated. *Steinway & Sons*, 365 F. Supp. at 715.

The Lanham Act does require proof of intent to create confusion. *Playboy Enterprises*, 511 F. Supp. at 491, 494. Essentially proof of intent can be circumstantial, *Ortho Pharmaceutical Corp.*, 361 F. Supp. at 1040, 1042, 1043, particularly when the plaintiff attempts to show subconscious influences. One type of circumstantial evidence traditionally acceptable in a Lanham Act case is the consumer survey, which is admissible as a hearsay exception or "not hearsay" under the Federal Rules of Evidence. *American Home Products Corp.*, 577 F.2d at 166; *Steinway & Sons*, 523 F.2d at 1341. Ultimately, the true standard of confusion is the general public reaction. *American Home Products Corp.*, 577 F.2d at 163; *Londontown*, 371 F. Supp. at 1118.

75. *Londontown*, 371 F. Supp. at 1118 (emphasis added) (Cable had confused the public's appreciation of London Fog raingear with Smog raingear).

## IV

## SICKNESS AND VIOLENCE

Courts have frequently distinguished broadcast subliminals as an independent medium because of their adverse impact on health and behavior.<sup>76</sup> Strict scrutiny of broadcast subliminals developed in the late sixties and seventies as the regulation of cigarette advertising became progressively more stringent. In *Banzhaf*, the United States Court of Appeals for the District of Columbia Circuit ruled that the impact of distinctly subliminal broadcast cigarette advertising on health outweighed first amendment considerations.<sup>77</sup> This was a judicial ratification of a similar assessment set forth by Congress in the Federal Cigarette Labeling and Advertising Act.<sup>78</sup>

Subsequently, the United States District Court, District of Columbia, in *Capital Broadcasting Co. v. Mitchell*,<sup>79</sup> upheld the ban on broadcast cigarette advertising imposed by the Public Health Cigarette Smoking Act of 1969. This decision, affirmed by the Supreme Court, took *Banzhaf* one step further by distinguishing broadcasting as a subliminal medium and consigning the free speech rights of advertisers and broadcasters to subservient status for the sake of the public health.<sup>80</sup>

These decisions did not foresee the potential scope of the subliminal problem. The courts failed to recognize that print media subliminals as embeds might be functionally equivalent to broadcast subliminals. Furthermore, these cases only addressed the specific health threat posed by subliminals in the cigarette advertising context without recognizing the intrinsic health threatening quality of subliminals themselves.<sup>81</sup> However, the fact remains that every court which has considered the issue, including the Supreme Court, has distinguished subliminal advertising as a unique medium relatively unprotected by the first amendment when the public health is threatened.<sup>82</sup>

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76. See *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 582-85 (D.D.C. 1971).

77. 405 F.2d at 1082.

78. See *id.* at 1087-91.

79. 333 F. Supp. 582.

80. *Id.* at 583-85.

81. See *ADS*, *supra* note 14, at 22-26. Subliminal reinforcement in particular areas such as alcohol and tobacco use, multiplies the danger of already recognized health hazards. See generally *BATF Hearing*, *supra* note 7.

82. See also Kozyris, *Advertising Intrusion: Assault on the Senses, Trespass on the Mind—A Remedy through Separation*, 36 OHIO ST. L.J. 299, 314-23 (1975); Note, *Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529, 564-65 (1979); *ADS*, *supra* note 14, at 28-29; Jones, *supra* note 7, at 27. An analogous line of "soundtruck cases," discussed in Kozyris, at 318, demonstrates that unusually intrusive advertising that impinges on health may be prohibited despite the first amendment.

The courts and the legislature need not await definitive scientific evidence of the intrinsic health threat of subliminals before banning them.<sup>83</sup> Moreover, there is a substantial body of scientific literature that documents the adverse impact of subliminals on health.<sup>84</sup>

There are several health problems to be considered. Even in healthy individuals, the receipt of competing or contradictory messages both below and above the threshold of consciousness may result in cognitive dissonance,<sup>85</sup> a state of psychological discord caused by simultaneously entertaining contradictory beliefs. Heightened cognitive dissonance disrupts an individual's tranquility and peace of mind. It is thought to lead to a plethora of future health problems, both physical and mental. Tranquility and peace of mind are themselves legitimate state health concerns, even when their disruption has no physical manifestations.<sup>86</sup>

At a deeper level, we have seen how subliminals usurp the natural function of association formation.<sup>87</sup> Subliminal associations occur on a subconscious level. There is no advertiser-provided analog to the ego function of conscious oversight of association formation. According to psychoanalytic theory, the ego ordinarily "defuses" the raw impact of stimuli by subjecting it to conscious evaluation.<sup>88</sup> Occasionally, stimuli are so disturbing that the ego represses them by keeping them subconscious. However, subliminals cannot be "defused" by the ego. They remain subconscious and are thus analogs to repressed stimuli.<sup>89</sup> Where the absence of conscious oversight over subliminal stimuli leads to psychopathology, artificially induced neurosis results.<sup>90</sup>

Not surprisingly, some people are more susceptible than others to damage from subliminal messages. First, the susceptibility of individuals to subliminals in general differs. Second, subliminals may be directed at a particular audience and other audiences may be unaffected by them. Third, some people may have had particular life experiences which may be triggered by the stimuli, although most people are unaffected by them.<sup>91</sup> Professor Lloyd Silverman of New York University's Department of Mental

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83. Kozyris, *supra* note 82, at 322 n.100, 346.

84. *ADS*, *supra* note 14, at app. B.

85. See *infra* text accompanying notes 141-48. See also A. PIAGET, *THEORY OF COGNITIVE DISSONANCE* (1964).

86. Kozyris, *supra* note 82, at 322-23.

87. See *supra* text accompanying notes 67-75.

88. S. FREUD, *THE EGO AND THE ID* (1934).

89. *Senate Hearings*, *supra* note 29, at 184-85.

90. See C. BRENNER, *AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS* 177 (1974) (libidinal stimuli which escape from repression give rise to neurotic symptoms); *ADS*, *supra* note 8, at B6 (the subliminal aspect of experimentally induced libidinal or aggressive impulses can create or intensify psychopathology), B4 (conscious awareness of the aggressive or libidinal stimulus destroys its pathogenic quality).

91. Jones, *supra* note 7, at 6-8, 30 nn.13-14, 32 n.34.

Health has warned that even "neutral" subliminal messages may have disastrous effects. He cited the case of a patient in a controlled therapeutic setting who nevertheless reacted violently to the innocuous message "PEOPLE ARE WALKING." Apparently, her sadistic father had punished his children by telling them to "go out walking in the snow."<sup>92</sup>

The overwhelming majority of subliminal messages, however, are not neutral. We have seen how advertisers inundate us with themes of sex and death.<sup>93</sup> Subliminal stimuli, applied to influence behavior, worsen potential pathology.<sup>94</sup> No one can truly ascertain the effect of a continuous barrage of perhaps thousands of daily subconscious messages of sex and death on any individual. Worse still, there is reason to believe that all of these subliminal messages are retained by the brain throughout life.<sup>95</sup> Most people, never clinically ill, nevertheless store over a lifetime millions of subliminals in place of normal associations. Eventually, all of these subliminals must "clog" the normal associative process to an indeterminate extent.<sup>96</sup> Subliminal incitement to violence might thus be viewed as a manifestation of subliminally induced psychopathology. Subliminal incitement might also be viewed as a sound justification for the regulation of subliminals distinct from their adverse impact on health.<sup>97</sup>

In the Lanham Act cases,<sup>98</sup> subliminal ads are legally presumed to create irresistible impulse buying despite consumer sophistication and possible conscious resistance.<sup>99</sup> However, impulse buying is a far cry from subliminal reduction of consumers to berserk erratic killing machines. Subliminals and irresistible impulses are thus far judicially related in only one tort and one criminal case. In *Stevens v. Parke, Davis & Company*,<sup>100</sup> the Supreme Court of California considered a wrongful death action, and held that subliminal advertising was in part responsible for a physician's improper prescription of a dangerous drug despite the manufacturer's express

92. Lander, *supra* note 20, at 48, 107.

93. See Jones, *supra* note 7, at 6-7. See also ADS, *supra* note 14, at 7, app. B. See generally Senate Hearings, *supra* note 29; MEDIA SEXPLOITATION, *supra* note 29; SUBLIMINAL SEDUCTION, *supra* note 29; CLAM-PLATE ORGY, *supra* note 29.

94. ADS, *supra* note 14, at 6, app. B4-6.

95. Senate Hearings, *supra* note 29, at 180; ADS, *supra* note 14, at app. B7.

96. See *infra* text accompanying notes 112-15.

97. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). (Unfortunately, subliminals do not fit within the parameters of the *Brandenburg* test because their effect is incremental. Occasionally, however, effects may be immediate, violent and unforeseeable. Lander, *supra* note 20, at 48.)

98. See *supra* note 74.

99. *Playboy Enterprises*, 486 F. Supp. at 428-29. *Steinway & Sons*, 365 F. Supp. at 717, 523 F.2d at 1339-42 (mere fact of consumer sophistication or discrimination not enough to overcome confusion between products with similar trademarks).

100. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

warning. Cautious physicians could be subliminally induced to administer the wrong drug:

The record reveals in abundant detail that Parke, Davis made every effort, employing both direct and subliminal advertising, to allay the fears of the medical profession which were raised by knowledge of the drug's dangers. It cannot be said, therefore, that Dr. Beland's prescription of the drug despite his awareness of its dangers was anything other than the foreseeable consequence—indeed, the desired result—of Parke, Davis' overpromotion. . . .<sup>101</sup>

While *Stevens* shows that a jury may credit a subliminal irresistible impulse in a civil case, *Zamora v. Florida*<sup>102</sup> shows that juries may be more reluctant to credit subliminal irresistible impulses as a criminal defense in a murder trial. In *Zamora*, the defense was "involuntary subliminal television intoxication."<sup>103</sup> The teenage defendant in the case was convicted. Perhaps this verdict was reached because Florida does not recognize irresistible impulses<sup>104</sup> in general or diminished capacity<sup>105</sup> as a murder defense. Either of these defenses is more compatible with subliminal effects than the strict M'Naghten rule<sup>106</sup> the jury applied.<sup>107</sup> Moreover, the trial judge refused to allow testimony on subliminal persuasion by psychiatrists. The court also prohibited questioning potential jurors on their views of the effects of television violence or even on their own viewing habits.<sup>108</sup> The appeals court labored to point out that "television was not on trial."<sup>109</sup>

101. 9 Cal. 3d at 69, 507 P.2d at 664, 107 Cal. Rptr. at 56.

102. 361 So. 2d 776 (Fla. Dist. Ct. App. 1978), *cert. denied*, 372 So. 2d 472 (Fla. 1979).

103. *Id.* at 779.

104. The irresistible impulse defense applies where the felon is driven to homicide by psychological forces beyond control regardless of whether the defendant knows right from wrong. The irresistible impulse defense is incorporated in the Model Penal Code: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he *lacks substantial capacity* either to appreciate the criminality [wrongfulness] of his conduct or *to conform his conduct to the requirements of law.*" MODEL PENAL CODE § 4.01(1) (1981) (emphasis added).

105. The diminished capacity defense appears in the Model Penal Code under the rubric "mental disease or defect." Basically, it provides either a complete defense or a reduction of a murder charge to manslaughter where, for example, mental retardation qualifies a felon's understanding of the criminality of his or her actions, although technically, under a strict interpretation of the M'Naghten rule, the suspect may be aware, however dimly, that his or her activities are wrongful. MODEL PENAL CODE § 4.01 (1981).

106. The M'Naghten rule holds that knowledge of the criminality of a felon's actions sufficiently provides for *mens rea* so long as the defendant could tell right from wrong at the time the crime was committed. M'Naghten's Case, 8 Eng. Rep. 718 (1843).

107. 361 So. 2d at 779.

108. *Id.* at 779-80.

109. *Id.* at 784.

It is noteworthy that Zamora was characterized as a sociopath.<sup>110</sup> By definition, a sociopath represses his emotions and would be more vulnerable to subliminal stimulation than a normal individual. This is because a sociopath's threshold is very high—a flattened, apperceptive affect—allowing less leeway for conscious perception and detoxification of messages that would be at threshold level normally. Thus, although Zamora was not found to be subliminally intoxicated, and the defense of subliminal intoxication was apparently given short shrift by the court, people with profiles similar to Zamora's are apt to be unusually vulnerable to subliminal impulses.

Arguably, subliminal influences affect all of us at one level or another. Obviously, any stimulus that damages individuals is culturally significant to the extent that it pervades the general population. Subliminal stimulation of the sexual and aggressive drives is omnipresent. While no single cause can account for the increasingly violent character of our society, pervasive subliminal stimulation should be added to the list of unhealthy cultural determinants.

Subliminals interfere with autonomy, a traditional bastion of first amendment protection.<sup>111</sup> Our autonomy is invaded as subliminals replace our norms and subjectivity of meaning<sup>112</sup> with a mechanical substitute for the associative process. Similarly, subliminals are antithetical to the first amendment policy of promoting knowledge, truth, and self-fulfillment.<sup>113</sup>

Subliminal stimulation, in the wrong hands, is evil, not merely unethical. Even some advertisers have encouraged an effective ban before the market forces them to compete in the subliminal advertising arms race.<sup>114</sup> Subliminal behavior control may be employed on a mass scale to mold minds. Like genetic manipulation, operant conditioning, pharmacological behavior modification, and direct electronic control of the nervous system, subliminals present a fundamental challenge to free will in a free society.<sup>115</sup>

Today, there are no precise figures on the potential for subliminal devices. Perhaps the most compelling testimony for the effectiveness of current rudimentary techniques remains the advertising industry's adoption of and substantial expenditures for subliminal persuasion.<sup>116</sup>

110. *Id.* at 780.

111. See generally Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 157-61 (1980).

112. *Id.* at 169-72.

113. *ADS*, *supra* note 14, at 28; see *infra* text accompanying notes 127-39. See generally Chevigny, *supra* note 111.

114. *ADS*, *supra* note 14, at 10, 11.

115. *Senate Hearings*, *supra* note 29, at 180.

116. *ADS*, *supra* note 14, at 3, 4; *Senate Hearings*, *supra* note 29, at 174; see also *ADS*, *supra* note 14, at 5 nn.5-6, 6 nn.8-13, app. B1 nn.1 & 3, app. B2 nn.5-7, app. B3 n.11; Note, *supra* note 58, at 753; Jones, *supra* note 7, at 6, 28-29 (scientific evidence of the effect of subliminals on behavior).



## V

NO FREE SPEECH WITHOUT SPEECH:  
THE LINGUISTIC APPROACH

Subliminal persuasion, at least in advertisements, would rarely meet the Supreme Court's *Brandenburg*<sup>117</sup> test: speech may be prohibited under the free speech clause of the United States Constitution only if it incites imminent violence. However, the *Brandenburg* test is ill-suited for the subtle buildup of subliminal influence within the individual and the equally subtle creation of a cultural universe of sex and violence within which the individual may be compelled to act.<sup>118</sup>

Nevertheless, the *Brandenburg* test may not be an obstacle to regulation of subliminal stimuli under the first amendment; subliminals simply do not fall under the first amendment at all. The free speech clause is variously interpreted to promote dialogue, truth, the free market of ideas, democracy, and individual autonomy or eudaemonism. Subliminal devices contribute nothing to any of these ideals. Thus far, I have at least briefly touched on all of them except dialogue and truth. If subliminals contribute nothing to either, then subliminals are not, philosophically speaking, "speech" at all.

Even in the most basic terms, speech entails communication. Generally, there is a dialogue. The gray areas of free speech protection encompass billboards, public sound trucks, demagoguery, repression, deceptive advertising, the power of the press, copyright, espionage, libel and slander, religious choice, ideology and so forth. Even these so-called gray areas, however, all presume that information is both conveyed and understood.

Equating speech with dialogue and understanding is in accord with modern epistemology, which is described in terms of linguistic analysis.<sup>119</sup> The underlying presumption of all linguistic schools is simply that language is the tool of understanding while understanding is quite literally inconceivable without language. Normally, the universe outside the self is perceived with varying accuracy and precision by one individual and refined by mutual description through dialogue with a second individual. External objects themselves, other than their subjective impressions, remain unknowable. That is why agreement on the nature of external objects, between individuals, is so important.<sup>120</sup>

Usually, such agreements about the nature of familiar objects are tacit.<sup>121</sup> Otherwise, conventional dialogue would be impossible. Such a spec-

117. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Subliminal ads, which are not neutral in content, would seem to have a greater potential to trigger such violent reactions.

118. Note, *Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529, 556-60 (1979).

119. See generally Chevigny, *supra* note 111, at 172-76.

120. *Id.* at 176.

121. See L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (D. Pears & B. McGuinness trans. 1961). Of course, students should not hesitate to read the original German. On the

tacle would actually be humorous: A might say, "B, why are you sitting on your head?" B might well reply, "I'm not sitting on your head," or even, "What?" A would be forced to physically point to B's head to make B understand that A was speaking of B's head. Perhaps A must conceptually explain how the head is not the natural seat of the body. In any event, it is unlikely that B will ever understand A's wild gesticulations unaided by vocal explanations. However, A cannot very well explain what he is talking about unless A and B share some concept of "head." Nevertheless, beneath our tacit conventions, in the quiet babble of the unravelling fringes of our thought, like a black hole in space, lies a semantic abyss.

Subliminals, which remain unconscious, simply do not surface in normal conversation. People do not talk about signals they have never seen, and subliminals remain undefined and ultimately meaningless as a consequence. On one level, subliminals are never the topic of conversation. On the next level, subliminals are not capable of being expressed in words or language. Consequently, subliminals are simply absent in people's conversations.

The best argument that subliminals are speech is the internal dialogue argument, which is an epistemological argument. The infant first imperfectly perceives all external objects and, perhaps, all internal feelings. These external or internal sense impressions are embodied as concepts and refined by comparison with other concepts and sense impressions.<sup>122</sup> Gradually, the sense impression becomes meaningful as it is continually mentally re-evaluated. This is the internal dialogue.<sup>123</sup> Subliminals arguably become part of the interior dialogue as they interplay with our previous associations.

However, the most private interior dialogue is peppered with the associations of others. The normal development of individual association processes probably requires this contact with other people. Therefore, it is doubtful that subliminals are evaluated solely by internal dialogue.

In any event, the subliminal can never be translated to the external dialogue that takes place between people. Subliminals remain undefined and meaningless as they cannot be described in language. There are no external references with which to point to explain subliminals since they are subconscious. There may be internal references, in the sense of wraithlike Jungian

other hand, after this famous volume, Wittgenstein broke with the logical positivists and held that language can never accurately describe anything. In fact, according to Wittgenstein, at best language is merely a "silent pointing at" an objective object. If this is true, even reading the original German would be futile, as many scholars have learned.

122. See A. AYER, *LANGUAGE, TRUTH AND LOGIC* (2d ed. 1946).

123. Chevigny, *supra* note 111, at 173. Because copying the unknowable is impossible, language is not a copy of the external world. Language makes sense only in terms of its own internal integrity, which is reinforced by reliable repetition of linguistic constructs and personal experience. The internal integrity of language consists of the interrelationships between words as well as the definitions of words themselves. This process occurs equally in speaking and thinking. Therefore, the term "internal dialogue" is functionally and philosophically grounded in conventional linguistic analysis.

archetypes, but these are not normally refined enough to be tradeworthy concepts of discourse. They are never linguistically clear or verifiable enough to be meaningful in conversation.

Even orthodox Freudian bromides, such as "the train going into the tunnel" are only meaningful "words" because of conventions in sexual symbolism. Prior to its elevation to consciousness, the symbol remains unsymbolic. Linguistic analysis, in other words, will only elevate the subliminal to the category of speech after conscious articulation and comprehension by another individual. Without a prior linguistic convention or agreement concerning the subliminal, this cannot occur.

Still, subliminal speech might occur if there really is an *a priori* Jungian language of symbols. In that case, subliminals seem meaningful either as symbols of internal or external dialogue. In this sense, advertisers using subliminals merely broadcast a subconscious language, which is a form of speech. In that case, however, the meaning of the message is the Jungian symbolism, not the subliminal mode of transmission. Subliminals are distinguished from the meaningful portion of the message by their essentially mechanical or "carrier-wave" nature.

Arguably, this is not the case where the "medium is the message."<sup>124</sup> However, that kind of subliminal message cannot be meaningfully raised to the level of dialogue. By separating the meaningful from the meaningless portions of the message, the meaningless portion of the message remains meaningless. According to Professor Paul Chevigny:

[S]logans, formulas for which no reply is permitted, are not really part of language. They have no meaning because they have no context, and cannot be put in context without the social dimension of language, without interplay between the slogan and a responsive reader or speaker. We cannot want to forbid dialogue about anything spoken or written in a human language, unless we want to eliminate the search for the purpose and understanding of what is said.<sup>125</sup>

According to Professor Laurence Tribe:

The notion that some expression may be regulated consistent with the first amendment without meeting any separate compelling-interest test starts with the already familiar proposition that expression has special value only in the context of "dialogue": communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs. Starting with this proposition, *it is reasonable to distinguish be-*

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124. See M. McLuhan, *supra* note 67.

125. Chevigny, *supra* note 111, at 177.

*tween contexts in which talk leaves room for reply and those in which talk triggers action or causes harm without the time or opportunity for response. It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved. . . .*<sup>126</sup>

Practical experience with subliminals indicates they do not even enter into the internal dialogue. Subliminals' effectiveness in motivating behavior is dependent upon their remaining below threshold, subconscious, and beyond meaningful interpretation. Subliminals which entered the subconscious dialogue, supposing there is one, would be defused. The subconscious dialogue would add to or detract from the subliminal in eventual adjustment to a new equilibrium. Subliminals, which cannot enter dialogue, never become "speech" where "speech" consists of dialogue. Speech, not subliminals, is protected by the first amendment.

The reason that the free speech clause protects dialogue is that dialogues are the process by which the excesses of false or inflammatory concepts are corrected.<sup>127</sup> Justice Brandeis, with the concurrence of Justice Holmes, argued that dialogue is essential "to expose through discussion" contested points of view.<sup>128</sup> In their view, the degree of discussion is directly proportional to the degree of appropriate first amendment protection.

Subliminals, which cannot enter dialogue, counter truth-seeking in two ways. First, as a corollary to the dialogue argument, they are meaningless signals which can neither be true nor false in themselves. Second, though nonsense words, subliminals may replace normal associations and dilute more sensible concepts otherwise available for truth-seeking dialogue. The interjection of nonsense words in speech is itself productive of inaccuracies.<sup>129</sup> They may further blur the boundary between what is informative and what is not.<sup>130</sup> Arguably, the meaning of speech is often independent of literal truth and falsity.<sup>131</sup> However, it does not follow that the meaning of speech is independent of relative truth and falsity. Moreover, figurative truth and falsity are themselves conceptual objects of subliminal corruption.

126. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* sec. 12-18, at 605 (1978) (emphasis added).

127. Chevigny, *supra* note 111, at 175; Note, *supra* note 118, at 569-70.

128. *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

129. See generally L. WITTGENSTEIN, *supra* note 121. The concept of nonsense words was developed in the course of logical positivism. Nonsense words are words that cannot be independently verified by objective reality through the senses. Their only function is therefore semantic rather than informational. Their "meaning" derives from grammatical convention only.

130. See Duggan, *supra* note 62, at 56.

131. See Chevigny, *supra* note 111, at 165, 178; Note, *supra* note 58, at 753.

## VI

## COMMERCIAL SPEECH IS NO EXCUSE

Even if subliminals may be categorized as speech, they remain outside the pale of the most shadowy and attenuated precedents of first amendment protection. Previously, we examined the chief characteristic of subliminals: their mechanical behavior modification aspect. Few people would suggest that a program of national behavior modification, however fragmented into diverse special interests, warrants commercial free speech protection. Practically, it is impossible to distinguish the behavior control element of subliminals from their commercial speech aspect. However, even if they were distinguishable, the Supreme Court under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>132</sup> would probably reduce any first amendment protection to a virtual nullity.

In *Central Hudson Gas*, the Court struck down a prohibition of advertising promoting the use of electricity which the Court of Appeals of New York had upheld as a permissible means to promote the state interests in energy conservation and fair utility rate structures.<sup>133</sup>

*Central Hudson Gas* clarified murky commercial speech precedents by articulating a four part test for analyzing the scope of first amendment protection and providing a succinct policy analysis. Under the test, the Court first sought to determine "whether the expression is protected by the First Amendment."<sup>134</sup> It concluded that "[f]or commercial speech to come within [the first amendment], it at least must concern lawful activity and not be misleading."<sup>135</sup> Subliminals are by their nature deceptive and may thus be regulated under current commercial speech doctrine.<sup>136</sup>

The only rationale expressed in *Central Hudson Gas* for extending first amendment protection to commercial speech in general is the theory that advertising creates a rational marketplace by educating consumers and thus promoting classical competition by keeping product quality up and prices down:

Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. . . . "[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the

132. 447 U.S. 557 (1980).

133. *Consolidated Edison Co. v. Public Service Comm'n of New York*, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979).

134. *Central Hudson Gas*, 447 U.S. at 566.

135. *Id.*

136. *See infra* text accompanying notes 192-204.

channels of communication, rather than to close them [sic] . . . .” Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.<sup>137</sup>

Subliminal advertising, however, is the ultimate weapon of the irrational marketplace.<sup>138</sup> As such, it is a technological refinement on general emotive advertising.<sup>139</sup> Impulse buying is the *raison d'être* of subliminal assault. Indeed, there is no other reason for subliminal advertising except the subconscious creation of economically wasteful consumer desires and the confusion of product identification.<sup>140</sup>

## VII

### CURRENT REGULATION: THE ORWELLIAN BEAST AT LARGE

The truth or falsity of individual subliminals is irrelevant; these categories properly apply only to speech which can be linguistically analyzed. Accordingly, the prevalent standard of advertising regulation, conscious deception, while useful, is inadequate for subliminals.<sup>141</sup> Similarly, regulation based on perception is not keyed to emotionally conditioned advertising, which regards perception rather than belief.<sup>142</sup>

Moreover, subliminal messages do not reverberate in a vacuum but interact with conscious linguistic messages in various ways. Through such interaction, the concepts of truth and falsity are further eviscerated by elevated levels of interference and concomitant confusion.

We can simplify the possible types of mixed subliminal and conscious messages into six categories. In category one, there is a conscious message but no subliminal message. In category two, there is a subliminal message but no conscious message. This occurs in both therapeutic and behavior modification settings.<sup>143</sup> In categories two through six, there is potential interference between prior and subsequent conscious messages.

In category three, there are complementary, parallel conscious and subliminal messages which reinforce each other. However, complete reinforcement is merely a theoretical ideal, not a reality. It follows that even complementary messages disturb the purity of the conscious message. The

137. *Central Hudson Gas*, 447 U.S. at 561-62.

138. See Duggan, *supra* note 62, at 54.

139. See generally Reed, *supra* note 59.

140. See *supra* note 74 for examples of confusion of product identification.

141. See *infra* text accompanying notes 191-206. See also Chevigny, *supra* note 111, at 167 n.74.

142. See Note, *supra* note 58, at 760-61.

143. Lander, *supra* note 20, at 47, 107.

degree of interference, if significant, shifts the whole arrangement into category four.

In category four, there are uncomplementary and mutually interfering conscious and subliminal messages. Obviously, this arrangement has the greatest potential for confusing the clarity of the conscious message. Anxiety produced by interfering messages is commonly exacerbated by advertisers' choice of innately disturbing sex and death themes for the subliminal message.<sup>144</sup> This double-dose of anxiety raises individual threshold barriers to render the audience more vulnerable to manipulation.<sup>145</sup> This is the arrangement most commonly found in cigarette and alcohol advertising.<sup>146</sup>

In category five, conscious and subliminal messages are directed at the conscious mind. This can occur when subliminal messages are sent at about the threshold level and the individual threshold lowers as the result, for example, of relaxation.<sup>147</sup> This may also occur when subliminal messages float into consciousness subsequent to transmission through normal mechanisms such as dreaming. In this category, memory distortion may be a problem.

In category six, conscious and subliminal messages are directed at the subconscious. This occurs when the conscious message produces a subconscious effect while the subliminal has direct impact.

In categories two, five, and six, there are, in addition, potential category three and four problems. In categories two through six, there are always problems of the distortion of meaning and the confusion of truth.

What is not susceptible to regulation if on a conscious level may be regulated at the unconscious level.<sup>148</sup> Since the consciously deceptive standard provides inadequate protection, except for clinical use, subliminals as a medium of expression must be prohibited entirely. Messages aimed at threshold level should be treated as subliminal messages. Subliminal messages in discord with concurrent supraliminal messages should be singled out for special punitive damages because they are especially destructive.

Regulatory precedent provides that special audience sensitivity or vulnerability to a particular medium deserves extra protection. Children are currently afforded special protection by the National Association of Broadcasters<sup>149</sup> and the Federal Trade Commission<sup>150</sup> precisely because their cog-

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144. See *ADS supra* note 14, at 7, app. B6; Jones, *supra* note 7, at 6-7.

145. See *supra* text accompanying notes 69-71.

146. *BATF Hearing, supra* note 7; *Senate Hearings, supra* note 29, at 78.

147. *MEDIA SEXPLOITATION, supra* note 29, at 1-15; *Senate Hearings, supra* note 29, at 184-85.

148. See Duggan, *supra* note 62, at 50-51.

149. See NATIONAL ASSOCIATION OF BROADCASTERS, *THE TELEVISION CODE*, Art. II (22d ed. July 1981); *THE RADIO CODE*, Art. G (23d ed. July 1981).

150. Kozyris, *supra* note 82, at 338-39 n.161-68. See also Hinds, *F.T.C. Head May End Reviews of Ads*, *N.Y. Times*, March 19, 1982, at D4, col. 1.

nitive discrimination is weak; they cannot consciously analyze and defuse the persuasive effects of broadcast commercials. Subliminals, of course, operate on the general audience in the same fashion: even adult audiences cannot consciously analyze and defuse subliminal broadcasting.

International regulation of subliminal advertising provides for total prohibition of subliminals. Foreign countries and international bodies that bar subliminals include the United Nations, the Council of Europe, Belgium, Canada, and England.<sup>151</sup>

Because of the international influence of the United States advertising industry, an effective ban on subliminals is impossible without the cooperation of the United States.<sup>152</sup> In the United States, however, political pressure from special interests<sup>153</sup> and a startling gap in the protection afforded by section 5 of the Federal Trade Commission Act<sup>154</sup> have led to virtual abdication of regulatory responsibility.

Currently, the American people must rely on industry self-regulation, which affords even less protection than a standard of *caveat emptor* because consumer education in this area is useless. Even an alert audience keyed to search for subliminals will be unable to detect direct subliminals and unlikely to detect indirect subliminals.<sup>155</sup> Furthermore, consumers cannot escape ubiquitous subliminal stimuli without utterly divorcing themselves from their surrounding culture. Subliminals are the ultimate extension of the concept of the captive audience.<sup>156</sup>

The story of self-regulation is a brief one: it begins and ends with the National Association of Radio and Television Broadcasters. On November 6, 1957, the NARTB issued a "Memo on Subliminal Advertising" which anticipated public concern and the necessity of devising an industry policy to deal with it.<sup>157</sup> In May, 1958, NARTB television and radio codes were revised specifically to ban subliminals, but no enforcement mechanism was supplied. Unfortunately, the NARTB has never looked for subliminals.<sup>158</sup> No other industry, legislative or administrative authority is looking for subliminals either. During the incidents of the late fifties, two bills were introduced in the House banning subliminals and providing penalties for their use. Both bills died in committee.<sup>159</sup>

151. Jones, *supra* note 7, at 20-23; *ADS*, *supra* note 8, at 19-21; *Senate Hearings*, *supra* note 29, at 183.

152. See *CLAM-PLATE ORGY*, *supra* note 29, at 148.

153. See *infra* text accompanying notes 160-175.

154. See *infra* text accompanying note 205.

155. See *supra* text accompanying notes 64-69.

156. See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (soundtracks); *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (mailing lists).

157. Jones, *supra* note 7, at 13-14.

158. See *CLAM-PLATE ORGY*, *supra* note 29, at 135.

159. Jones, *supra* note 7, at 14.



The contemporary politics of subliminal advertising were aired at recent Bureau of Alcohol, Tobacco and Firearms hearings. Along with ten other proposed regulations, the BATF proposed to ban subliminal advertisements for alcoholic beverages.<sup>160</sup> The controversy over subliminals soon eclipsed the other BATF suggestions. Thirteen brewers and advertising industry representatives submitted written comments.<sup>161</sup> Eight industry speakers presented oral arguments at the hearing.<sup>162</sup> The industry response can be sorted into three categories.

In the first category was the response of the minority who endorsed the rule, however enthusiastically. This category included The Wine Institute,<sup>163</sup> Jos. Schlitz Brewing Co.,<sup>164</sup> United Vintners, Inc.,<sup>165</sup> and the Distilled Spirits Council of the United States.<sup>166</sup> In the second category was the response of the majority who argued that since subliminals did not exist, or were prohibited by the FCC, FTC or self-regulation, a simple ban on subliminal advertising was an onerous and unnecessary regulatory burden. This category included the Olympia Brewing Co.,<sup>167</sup> the Adolph Coors Co.,<sup>168</sup> The Association of American Vintners,<sup>169</sup> The American Association of Advertising Agencies, Inc., and Joseph E. Seagram & Sons, Inc.<sup>170</sup>

By far the most interesting theory in support of this second response was argued at the hearing by Charles F. Adams, Executive Vice President of The American Association of Advertising Agencies, Inc. Mr. Adams admit-

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160. Notice of Proposed Rulemaking, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, 45 Fed. Reg. 83530 (1980).

161. Comments from organizations received by the Bureau of Alcohol, Tobacco and Firearms regarding Notice of Proposed Rulemaking No. 362 (1980) [hereinafter cited as Comments] (on file at N.Y.U. Rev. of L. & Soc. Change).

162. *BATF Hearing, supra* note 7.

163. Wine Institute, Statement Regarding Proposed Amendments to 27 Code of Federal Regulations Relative to Wine Labeling and Advertising, 3 (March 16, 1981), in Comments, *supra* note 161.

164. Schlitz Brewing Co., Comments on Notice No. 362 Advertising and Labeling Regulations under the Federal Alcohol Administration Act, 3 (March 18, 1981), in Comments, *supra* note 161.

165. Letter of United Vintners Inc. to Bureau of Alcohol, Tobacco and Firearms (March 19, 1981), in Comments, *supra* note 161.

166. *BATF Hearing, supra* note 7, at 129-57.

167. *Id.* at Exhibit No. 2, Letter from R. Corbins Houchins, Associate General Counsel, Olympia Brewing Company, to Bureau of Alcohol, Tobacco and Firearms (August 5, 1981).

168. *Id.* at Exhibit 8, Testimony Regarding Proposed Labeling & Advertising Regulations for Malt Beverages (Submission date unknown).

169. *Id.* at Exhibit 11, Testimony of the Association of American Vintners (Submission date unknown); Comments of the Association of American Vintners Regarding Notice No. 362—Labeling and Advertising Regulations under the Federal Alcohol Administration Act 2, 3 (March 18, 1981), in Comments, *supra* note 161.

170. Comments on Notice No. 362 Advertising and Labeling Regulations Under the Federal Alcohol Administration Act 3 (March 18, 1981), in Comments, *supra* note 161.

ted that no one in the advertising industry looked for subliminals. He reasoned that subliminals could not exist because their existence would logically require a gargantuan conspiracy among advertisers, clients, and the broadcast media. In fact, Mr. Adams's logic seems unassailable:

Charles Adams:

Well, it might be difficult [to detect subliminals], but I think that with all the watchguards that we have on advertising, if subliminal advertising were being used, I have no doubt that it would be perceived. After all, subliminal advertising is only so subliminal, and I hate to talk about [it] really as if it does exist. We are confident that it does not.

I think that it would be—I would have to ask a technician about this, but I think that it would be detected by the station, by the television station, by the people, or the technicians who were putting the commercials on the air. Most commercials now, of course are videotaped so it wouldn't be something as simple as, you know, putting a frame in a motion picture frame—something like that.

It would have to be put on tape. That would require the collusion of the advertisers, the advertising agency, the production house, the people programming it on the air.

I mean just—I think it's just impossible for that many people to be involved and plot to put a subliminal commercial on the air and not have it known.

. . .

[Question]:

But to your knowledge is there anyone reviewing commercials with that in mind?

Adams:

With that in mind, no, there is not. Not that I know of. But again, *I think the reason for that is that it doesn't pay to do it because of our confidence that it does not exist.*<sup>171</sup>

Just such a massive coverup was charged in a paper prepared for Senator Wendell Anderson:

If subliminal techniques are being used to a considerable extent, numerous production personnel will have been involved at the agency and production house levels. It is unlikely that these parties would choose to perjure themselves if subpoenaed to testify personally before an investigative committee. On the other hand, no incentive has yet been given to induce them to "blow the whistle"

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171. *BATF Hearing*, *supra* note 7, at 28-31 (emphasis added).

on what may be a widespread practice. For these reasons, it is imperative that any enquiry into subliminal usage obtain personal testimony from advertising personnel who have been implicated in the past, or who may be in a position to have actual knowledge of undisclosed instances of subliminal advertising. As a purely investigative measure, it might also be fruitful to solicit agency response to an ostensible advertiser's request for a subliminal ad package.<sup>172</sup>

The third and last type of response to the BATF Notice of Proposed Rulemaking was the most disturbing. Howard H. Bell, President of the American Advertising Federation, submitted the following written remarks: "The current administration has made it very clear that new government regulations shall not be issued unless they are clearly necessary. In our view the issuance of this regulatory provision clearly countervenes that policy."<sup>173</sup> In fact, shortly after this advice was offered, the BATF was advised by the Reagan administration that it would be disbanded and its law enforcement functions absorbed by the Department of Justice.<sup>174</sup> The hearing material discussed in this Note was already consigned to bulk storage when I retrieved it. Of course, the Reagan administration plan to dismember the BATF had nothing to do with subliminal advertising. Nevertheless, the existence of the plan suggests that the BATF was vulnerable to political pressure against new regulations.<sup>175</sup>

The Federal Communication Commission's regulatory role in this area seems to be couched in earnest indifference. When Representative William L. Dawson of Illinois wrote to the FCC in 1957, he urged an immediate moratorium on all subliminal advertising.<sup>176</sup> The FCC replied that a warning to broadcasters was inappropriate. Instead, the agency suggested in a public notice<sup>177</sup> that licensees might proceed with "caution" in their use of subliminals. Yet the FCC was not unaware of the nature of subliminals; subliminal producers had provided the FCC with a private demonstration.<sup>178</sup> Nor was

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172. *Jones, supra* note 7, at 28-29.

173. In re Notice No. 362—Proposed Regulations Concerning the Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages, 3, 4 (Comments of Howard H. Bell & Jonah Gitlitz) (March 19, 1981), in Comments, *supra* note 161.

174. Gailey, *White House Planning to Kill Firearms Enforcement Unit*, N.Y. Times, Sept. 19, 1981, at A1, col. 1. As of the publication date of this Note, it appears that the BATF will not be disbanded after all. Further, on September 20, 1982, Roger L. Bowling, of the Research and Regulations Branch, BATF, reported that no decision had been made concerning the regulation of subliminal advertising. Final regulations are due in the spring of 1983. Telephone interview with Roger L. Bowling, Research and Regulations Branch, BATF (Sept. 20, 1982).

175. See Gailey, *supra* note 174.

176. *Jones, supra* note 7, at 13.

177. FCC Public Notice, Use of Subliminal Perception in Advertising by Television Stations, FCC 57-1289 (1957).

178. See *supra* text accompanying note 41.

the FCC unaware of its regulatory authority to proscribe subliminals; in 1957, the FCC informed Senator Charles Potter of numerous bases of authority under the Communications Act of 1934.<sup>179</sup> These include the general authority to regulate broadcasting in the public interest under section 303(a) of the Act, which specifically provides for FCC purview over all types of broadcasting apparatus.<sup>180</sup> In the Information Bulletin on Subliminal Projection of February, 1971, the FCC went so far as to allow subliminals employed in the entertainment portions of programming.<sup>181</sup> The agency stated that section 317 of the Communications Act,<sup>182</sup> which prohibits unidentified sponsorship, applied only to commercials and not to entire television shows.

Not until 1974 did the FCC finally condemn the use of subliminals, and then only in response to public furor over the Husker-Du incident.<sup>183</sup> On January 24, 1974, in a public notice entitled "Broadcast of Information by Means of 'Subliminal Perception' Techniques," the agency stated:

We believe that use of subliminal perception is inconsistent with the obligations of a licensee, and therefore we take this occasion to make clear that broadcasters employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive.

In closing, we note that the Federal Trade Commission also received a complaint about the pre-Christmas announcements, and that it is making inquiry into the matter in light of the laws that it administers.<sup>184</sup>

This public notice, which lacks the authority of a rule or regulation, was reiterated in an information bulletin issued in November, 1977.<sup>185</sup> Since then, the FCC has demonstrated no further interest in regulating subliminals.

The reference to the FTC in the public notice was, in fact, an early intimation of future FCC policy: pass on complaints to the FTC. Dr. Wilson B. Key has repeatedly offered to prove the current magnitude of subliminal persuasion to the FCC. On each occasion, he alleges, his offer was rejected and he was referred to the FTC.<sup>186</sup> On one occasion, he was

179. *Jones, supra* note 7, at 13.

180. Communications Act of 1934, codified as amended at 47 U.S.C. §§ 153(b), 303 (1976) [hereinafter cited as Communications Act]. *See also* § 153(b) which broadly defines "radio communication."

181. *See Jones, supra* note 7, at 13.

182. 47 U.S.C. § 317 (1976).

183. *See supra* text accompanying notes 15-17.

184. *See supra* note 16.

185. FCC Information Bulletin, Subliminal Projection 2 (Nov. 1977).

186. CLAM-PLATE ORGY, *supra* note 29, at 139 (on September 15, 1981, the author was also referred by the FCC to the FTC and was informed that the FCC routinely referred such inquiries).

even advised that the FCC could not investigate subliminal advertising because of section 326 of the Communications Act,<sup>187</sup> which prohibits the agency from censorship.<sup>188</sup> Dr. Key writes:

I began to appreciate how so many FCC commissioners and staff members qualified for high-paying broadcast industry jobs after they left the government. The FCC is on record as prohibiting subliminal techniques in broadcasting, but unfortunately cannot enter into an investigation because that would conflict with freedom of broadcasting—a position presumably backed up by the First Amendment. They then pass the buck to the FTC.<sup>189</sup>

Dr. Key's futile attempts to present proof to the FCC are in counterpoint to my own telephone call to the FCC on September 15, 1981, which elicited the following agency comment: "Periodically questions on subliminal advertising come up *but no one has been caught doing it yet*. No decisions are available and no court cases are pending."<sup>190</sup>

When, in turn, I telephoned the FTC,<sup>191</sup> I was referred back to the FCC policy statement. A staff attorney for the FTC Division of Advertising Practices did inform me that, while the FTC has no specific regulations or policy concerning subliminals, sections 5<sup>192</sup> and 12<sup>193</sup> of the Federal Trade Commission Act forbid unfair and deceptive practices. However, he said that proof was required that subliminal techniques were intentionally used and had a significant impact on commerce.<sup>194</sup>

The FTC spokesperson said that FTC policy was to be receptive to complaints from rival advertisers. However, he said no such complaints had been received since the FCC policy statement of 1974.<sup>195</sup> Howard H. Bell,

187. 47 U.S.C. § 326 (1976).

188. CLAM-PLATE ORGY, *supra* note 29, at 139.

189. *Id.*

190. Telephone interview with Mr. Hubbel, FCC Compliance Officer (September 15, 1981) (emphasis added). (Author's notes on the interview are on file at the office of the N.Y.U. Review of Law & Social Change).

191. Telephone interview with FTC staff attorney David Steinman (September 15, 1981). (Author's notes on interview are on file at N.Y.U. Rev. of L. & Soc. Change).

192. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), provides in pertinent part:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

193. Section 12 of the Federal Trade Commission Act, 15 U.S.C. § 52 (1976), provides in pertinent part:

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . .

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

194. *See id.* at § 5.

195. *See supra* note 191.

President of the American Advertising Federation confirmed, at the BATF hearing, that no complaints had been forwarded from industry groups to the FTC.<sup>196</sup>

FTC reticence to act on its own or in response to consumer complaints flies in the face of the Wheeler-Lea Amendment<sup>197</sup> which made consumer protection an FTC priority in the case of unfair or deceptive advertising.<sup>198</sup> Section 5(a) of the FTC Act<sup>199</sup> was intentionally left general enough by Congress to cover any new deceptive practices which might arise.<sup>200</sup>

James C. Miller, III, Chairman of the FTC for the Reagan administration, has suggested stripping the FTC of its jurisdiction over "unfair" advertising on the grounds that power over deceptive advertising is sufficient for the public interest.<sup>201</sup> In fact, all court decisions in favor of the FTC and in prohibition of unfair or deceptive advertising have been won on grounds of deception rather than unfairness. Mr. Miller, however, would go even further and restrict the definition of "deceptive" to facts rather than opinions because, ostensibly, the current FTC standard-making powers are too broad.<sup>202</sup> Consumer advocates have voiced determined opposition to these proposals.

While the FTC has thus refused to adopt any regulatory standards, subliminals are odious enough to fall within any conceivable definition of "deceptive"—except, of course, that they may not be "facts" under the new FTC policy proposed by Mr. Miller. New FTC regulation prohibiting subliminals would also be particularly welcome in view of the currently loose FTC evidentiary standards: proof of deception is not required, only the reasonable likelihood that vulnerable and susceptible consumers—not reasonable consumers—could be adversely affected.<sup>203</sup> Mr. Miller, however, would tighten evidentiary standards since they are tied to the "unfairness" branch of FTC enforcement powers.<sup>204</sup> This is not to suggest that Mr. Miller favors subliminal advertising. His proposed reforms, however, would make subliminal advertising more difficult to stop.

In fairness to the FTC, agency critics have failed to recognize the implications of a loophole in the FTC Act that, for practical reasons,

196. *BATF Hearing*, *supra* note 7, at 77, 87.

197. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (amending 15 U.S.C. § 45 (1934)).

198. Note, *supra* note 58, at 759; Jones, *supra* note 7, at 18.

199. 15 U.S.C. § 45(a) (1976).

200. H.R. REP. No. 1142, 63rd Cong., 2d Sess. 19 (1914).

201. Hinds, *supra* note 150.

202. *Id.*

203. *Charles of the Ritz Distributors Corporation v. Federal Trade Commission*, 143 F.2d 676, 679-80 (2d Cir. 1944); *Federal Trade Commission v. Standard Education Society*, 301 U.S. 112, 116 (1937).

204. Hinds, *supra* note 150. See also Duggan, *supra* note 62, at 61; Reed, *supra* note 59, at 182.

effectively blocks agency action. This elephantine gap is section 14(b),<sup>205</sup> codified under the rubric of penalties for false advertising:

No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section . . . unless he has refused . . . to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency . . . who caused him to disseminate such advertisement. No advertising agency shall be liable under this section . . . unless it has refused . . . to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller . . . who caused it to cause the dissemination of such advertisement.<sup>206</sup>

Prohibition should be industry-wide. This section of the Act must be revised to insure liability for the advertising agency, broadcast or print medium, as well as the sponsor, through the revision of the FTC Act. Currently, sponsors can plead ignorance to evade section 5 of the Act by pointing their fingers at advertising agencies and broadcasters, as they did in the Husker-Du incident.

## VIII CONCLUSION

The linguistic argument maintains both that subliminals are not speech and that they inhibit truth-seeking dialogue, the essence of the free speech clause of the first amendment. Subliminal advertising may, therefore, be regulated where it is artificially constructed for psychological manipulation.<sup>207</sup> We should not disturb the roots of the personality, in our ignorance, by artificial subliminal pollution. Rendering the invisible world visible is always somewhat frightening. In this instance, we have done so only to find ourselves beset with thousands of nefarious commercial messages and human engineering commands. We have never found a subliminal that says, "IGNORE THIS MESSAGE." On the other hand, "WATCH THIS SPACE" may well be out there, provided we continue to look.<sup>208</sup>

HARRY SCHILLER

205. FTC Act § 14(b), 15 U.S.C. § 54 (1980).

206. *Id.*

207. On the other hand, naturally occurring subliminals, which, for example, appear in artists' landscapes, obviously cannot, and should not, be legislated against. They appear to play a part in normal character formation.

208. Subliminals may also result from messages too big to perceive. For example, the milky way may spell out a message unknown to us. Perhaps one such message is NO TRESPASSING! See K. VONNEGUT, *SIRENS OF TITAN* (1970).

