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Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?

Scot Silvergate

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Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?

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[The] technique of subliminal projection could not fail to arouse the most intense interest among the world's mass entertainees. For the new technique was aimed directly at them, and its purpose was to manipulate their minds without their being aware of what was being done to them.¹

I. INTRODUCTION

Today, because of advances in technology, people are being subjected to subliminal messages during many of their daily activities.² Television,³ movies,⁴ magazines,⁵ and even department stores,⁶ expose the public to messages below the threshold of conscious perception. Studies indicate that similar messages in the form of weak stimuli can influence behavior even though they are not perceptible to the

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1. A. HUXLEY, *BRAVE NEW WORLD REVISITED* 78-79 (1965).
 2. See *infra* notes 84-103 and accompanying text.
 3. See *infra* note 71 and accompanying text.
 4. See *infra* notes 80-83 and accompanying text.
 5. See *infra* notes 96-103 and accompanying text.
 6. See *infra* notes 91 & 93 and accompanying text.

receiver.⁷ Three main methods of subliminal stimulation have shown strong behavioral effects:⁸ visual messages that are flashed before a viewer so quickly or so dimly that they are not noticed (subvisual); vocal messages that are either played at sound levels too low to be consciously perceived or at tonal frequencies too high to be consciously understood (subaudible); and images hidden inside photographs and drawings (embedding).

The potential for manipulating behavior is at odds with revered concepts of personal autonomy and free will because the viewer does not have the opportunity to consciously evaluate the messages. Courts, therefore, are being called upon to decide whether subliminal communication is protected under the first amendment. The task is difficult, however, because subliminal communications do not fit into established first amendment doctrines.⁹ The authors of the first amendment scarcely could have conceived of the constitutional issues that would arise with the advent of the telephone, motion pictures, television, satellite communications, and other innovations of modern society.¹⁰

The prospect of subliminal communication as a means of public manipulation first arose in 1957 when James Vicary, an advertising executive with a psychology background, announced that he had developed a technique that subjected consumers to an "irresistible" advertising message that was dimly displayed during a movie.¹¹ Vicary claimed that although audiences were unaware of the messages projected onto the screen during the showing of the movie, these projected messages accounted for dramatically increased sales of Coca-Cola and popcorn.¹² Legislators and the public were outraged at the possible implications of subliminal communication.¹³ While these

7. Moore, *Subliminal Advertising: What You See Is What You Get*, 46 J. MARKETING 38, 40 (1982).

8. *Id.* at 39.

9. "The various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison." Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring).

10. See Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459 (1989) (Energizing ways of communications, some more efficient than others, are leading many to reconsider what is within first amendment protection.).

11. Moore, *Subliminal Delusion*, PSYCHOLOGY TODAY, July 1985, at 10.

12. See *infra* notes 78-83 and accompanying text.

13. W. KEY, *SUBLIMINAL SEDUCTION* 21 (1973). An example of the outrage could be found in the *Saturday Review* which stated:

The subconscious mind is the most delicate part of the most delicate apparatus in the entire universe. It is not to be smudged, sullied or twisted in

claims were not supported by other evidence,¹⁴ Congress introduced bills in 1958 and 1959¹⁵ to restrict this type of subliminal communication. Although no bill relating to subliminal communication ever made it out of committee,¹⁶ advances in electronic communication have led to a resurgence in the movement to restrict subliminal speech.¹⁷

Advocates of subliminal communication contend that it is a form of speech protected by the first amendment.¹⁸ This contention is based on the belief that subliminal communication, like other forms of speech, is "a valued liberty both as a means and as an ends."¹⁹ The advocates maintain that the ability to express oneself as one sees fit furthers "individual liberty, autonomy and self development."²⁰ Accordingly, it is reasoned, for individuals to realize their full potential, they must control their own destinies by being able to make life-affecting choices that help them attain the goals they have set.²¹ Thus, being able to express oneself the way one chooses is an important element of self development.

Contrarily, others believe that subliminal perception is the antithesis of freedom.²² They contend that subliminally implanted messages violate the free will, personal autonomy, and the innermost privacy of individuals' minds and thoughts. They reason that if either

order to boost the sales of popcorn or anything else. Nothing is more difficult in the modern world than to protect the privacy of the human soul.

Smudging the Subconscious, SATURDAY REV., Oct. 5, 1957, at 40.

14. Moore, *supra* note 11, at 10.

15. H.R. 10802, 85th Cong., 2d Sess. (1958); H.R. 11363, 85th Cong. 2d Sess. (1958); H.R. 1998, 86th Cong., 1st Sess. (1959).

16. Bliss, *Subliminal Projection: History and Analysis*, 5 COMM./ENT. L.J. 419, 426 (1983).

17. See, e.g., *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 26); Gurnick, *Subliminal Advertising: Threat to Consumer Autonomy?*, BEVERLY HILLS B.J. 56 (1987); Reed & Whitman, *A Constitutional and Policy-Related Evaluation of Prohibiting the Use of Certain Nonverbal Techniques in Legal Advertising*, B.Y.U. L. REV. 265 (1988); Note, *Judicial Recognition and Control of New Media Techniques: In Search of the "Subliminal Tort,"* 14 J. MARSHALL L. REV. 733 (1981) [hereinafter Note, *Judicial Recognition*]; Note, *The Subconscious Taken Captive: A Social, Ethical, and Legal Analysis of Subliminal Communication Technology*, 54 S. CAL. L. REV. 1077 (1981) [hereinafter Note, *Subconscious Taken Captive*].

18. Defendant's Motion for Summary Judgment at 28, *Vance v. Judas Priest* (D. Nev. 1989) (No. 86-5844/86-3939). "Subliminal lyrics are no different from nonsubliminal lyrics. They are a form of speech or expression. . . . The First Amendment applies to all kinds of speech. Subliminal lyrics are therefore presumptively entitled to its protection." *Id.*

19. *Whitney v. California*, 274 U.S. 357, 375 (1926) (Brandeis, J., concurring).

20. G. GUNTHER, CONSTITUTIONAL LAW 979 (9th ed. 1985).

21. Reddish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

22. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 25-26).

the form or expression of subliminal speech is unduly intrusive, it may be limited.²³ However, established first amendment doctrine does not lend itself towards dealing with subliminal communication.

When the question arises as to whether a new kind of expression falls within the protection of the first amendment, it must be assessed by standards suited to it and be evaluated according to the problems it presents.²⁴ While the right of free speech has never been held to be absolute, the guarantees of the first amendment are perhaps more cherished and expansive than those of any other constitutional right.²⁵ Nevertheless, the United States Supreme Court has devised "several intermediate categories of less-than-complete constitutional protection for certain kinds of expression."²⁶ These categories include commercial speech, obscene and offensive speech, child pornography, and defamation. Given the special position that the first amendment occupies in constitutional jurisprudence, if a new kind of expression does not fall within one of these narrowly established exceptions,²⁷ great caution should be used before devising a new category of speech that is not protected under the first amendment.

Restrictions upon subliminal communication may be hard to square with the established rationale for not giving certain types of speech the full protection of the first amendment. First, subliminal transmission is arguably present in most expression, even if not intentional. For example, subliminal expression can be found in paintings, overt speech, body language, innuendo, and music.²⁸ Further, ges-

23. Note, *Subconscious Taken Captive*, *supra* note 17, at 1131.

24. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

25. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) ("Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.").

26. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-18, at 930 (2d ed. 1988) (footnotes omitted).

27. There are four classes of speech which may be limited. They are: (1) obscene speech, *Miller v. California*, 413 U.S. 15 (1973); (2) libel, slander, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy and the like, *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961); (3) speech or writing used as an integral part of conduct in violation of a valid criminal statute, *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); and (4) speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1000, 249 Cal. Rptr. 187, 192 (Ct. App. 1988) (same).

28. Examples of embedding can be found in works of several artists including Picasso, Titian, and Rembrandt. W. KEY, *supra* note 13, at 114; see, e.g., W. KEY, *THE CLAM PLATE ORGY: AND OTHER SUBLIMINAL TECHNIQUES FOR MANIPULATING YOUR BEHAVIOR* 58-61 (1980) [hereinafter W. KEY, *CLAM PLATE*]. Subliminal lyrics in music can be found in compositions by The Beatles, The Who, and Simon and Garfunkel. W. KEY, *MEDIA SEXPLOITATION* 116-45 (1976). Probably the best example of subliminal lyrics in music can be found in the song "Strawberry Fields" on the Beatles' "Magical Mystery Tour" album. W. KEY, *supra* note 13, at 119. While debatable, it is claimed that the words "I buried Paul" can be heard at the end of "Strawberry Fields." *Id.*

tures, body posture, eye control, setting, and tonal inflection all modify the meaning of speech.²⁹ The pervasiveness of subliminal communications within everyday speech may make it virtually impossible to distinguish, before trial, allowable forms of subliminal transmission from those forms disallowed. The bright line protection of the first amendment could become hazy if subliminal communication were treated differently than supraliminal speech³⁰—speech within the realm of conscious perception—because all speech is comprised of both supraliminal³¹ and subliminal parts.³² Any distinction that relied upon the affect on the listener would chill free discourse because the effect could not be pre-determined. Second, the subliminal phenomenon is difficult to identify and the “effects are not quantifiable.”³³ This lack of objective data makes it hard to justify a new limitation on the first amendment.³⁴ The difficulty in defining subliminal communication, compounded with the difficulty in determining which types should be restricted, would cause statutes limiting subliminal communications to be very specific and narrow. Otherwise, Congress runs the risk of drafting statutes that are either over-inclusive or vague³⁵ and, thus, unconstitutional. Third, subliminal communication does have value,³⁶ unlike the specific forms of expression that the Court has determined to be unprotected, such as obscene speech.³⁷ Specifically, subliminal elements can add tone and feeling to a message. Finally, while speech can be restricted either because of form or content, restricting subliminal communication poses greater difficulties because subliminal communication does not fall neatly within either category. Clearly, the content of subliminal messages, if overt, would be protected speech unless they also fall within one of the other proscribed categories of speech. However, if subliminal speech is restricted simply because of its form, subliminal transmissions would be restricted based on effects which may not be capable of being proven. Thus, the balancing necessary to conclude that a form

29. Reed & Whitman, *supra* note 17, at 268.

30. Kiesel, *Subliminal Seduction*, 70 A.B.A. J., July 1984, at 27.

31. Note, *Judicial Recognition*, *supra* note 17, at 742. All sensory input is registered in both a conscious and subconscious manner. *Id.* Additionally, with the exception of taste (for which tests have not yet been carried out), all sensory modalities have a subliminal fringe (i.e., pain, tactile, auditory, visual, olfactory, and thermal). N. DIXON, PRECONSCIOUS PROCESSING 263-64 (1981).

32. Note, *Judicial Recognition*, *supra* note 17, at 742.

33. Gurnick, *supra* note 17.

34. See *infra* note 58 and accompanying text.

35. R. ROTUNDA, HANDBOOK ON CONSTITUTIONAL LAW 722 (1978).

36. See *infra* notes 89-95 and accompanying text.

37. *Miller v. California*, 413 U.S. 15 (1972) (“[T]his much has been categorically settled by this court, that obscene material is unprotected by [the first] amendment.”).

of speech is intrusive would be a difficult, if not an impossible, undertaking.³⁸ Perhaps because of these difficulties, subliminal communications have largely been left alone.³⁹

Although the legislatures have not yet acted, at least one district court has restricted subliminal communications by finding that such communications are not entitled to first amendment protection.⁴⁰ In *Vance v. Judas Priest*,⁴¹ the parents of James Vance and Raymond Belknap sued the "heavy metal" rock band "Judas Priest," alleging that subliminal lyrics⁴² on the album *Stained Class* caused Belknap's

38. "Where government aims at the noncommunicative impact of an act, the correct result in any particular case thus reflects some 'balancing' of the competing interests." L. TRIBE, *supra* note 26, § 12-2, at 791.

39. Defendant's Motion for Summary Judgment at 37, *Vance v. Judas Priest* (D. Nev. 1989) (No. 86-5844/86-3939).

40. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 26).

41. *Id.*

42. Defendant's Motion for Summary Judgment at 3-4, *Vance v. Judas Priest* (D. Nev. 1989) (No. 86-5844/86-3939). The lyrics of "Better By You, Better Than Me" are as follows, with the subliminal lyrics in parentheses:

You can find a way to ease my passion
 You listen to the blood flow in my veins
 You hear the teaching of the wind
 Tell her what I'm like within
 I can't find the words; my mind is dim
 It's better by you, better than me
 Guess you'll have to tell her how I tried
 To speak about some hell so long inside
 Tell her now I've got to go, out in the streets
 And down the shore
 Tell her the world's not much for living for
 It's better by you, better than me
 Everybody, everybody knows,
 Everybody, everybody knows.
 Better by you, better than me (DO IT)
 You can tell her what I want it to be (DO IT)
 You can say what I only can see (DO IT)
 It's better by you, better than me
 Guess I'll have to change my way of living
 Don't want to really know the way I feel
 Guess I'll learn to fight and kill
 Tell her not to wait until
 They find my blood upon her windowsill
 It's better by you, better than me
 Everybody, everybody knows,
 Everybody, everybody knows.
 Better by you, better than me (DO IT)
 You can tell her what I want it to be (DO IT)

suicide and Vance's attempted suicide.⁴³ In holding that subliminal speech is not protected by the first amendment, the Nevada district court held that "subliminal messages are inconsistent with any of the theories offered to justify freedom of speech."⁴⁴ This restrictive holding poses a serious threat to artistic freedoms that are fundamental to the first amendment because many art forms, either accidentally or purposely, incorporate subliminal techniques for a variety of reasons. Entertainment, motion pictures, radio broadcasts, television, and musical and dramatic works, in addition to political or ideological speech, fall within the first amendment's guarantee of freedom of expression.⁴⁵ As artistic expression is presumptively protected by the

You can say what I only can see (DO IT)

It's better by you, better than me (DO IT)

Id. In addition to the subliminal lyrics in the song "Better By You, Better Than Me," the plaintiffs also claimed that there were backwards masked lyrics: lyrics that have meaning when played forwards and backwards. *Id.* at 4-5. The plaintiffs also claimed that the subconscious is able to decipher the "backwards" lyrics. The backwards masked lyrics that are alleged to be in the song "White Heat, Red Hot" are: "Fuck the lord; fuck (suck) all of you," when the lyrics "deliver us/from all the fuss" are played backwards. *Id.* On the song "Stained Class," plaintiffs claimed that "sing my evil spirit" can be heard when "faithless continuum/into the abyss" is played backwards. *Id.*

43. *Id.* On December 23, 1985, Belknap, 18, and Vance, 20, went to a playground at a local church with a sawed-off 12-gauge shotgun. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 4). During the day, both Belknap and Vance had consumed beer and smoked marijuana. *Id.* at 9. At the playground, Belknap placed the end of the shotgun under his chin and pulled the trigger. *Id.* at 2. Minutes later, Vance did the same. *Id.* While Belknap was successful in killing himself, however, Vance survived the initial blast. *Id.* at 4. After numerous operations, Vance remained horribly disfigured. *Id.* Vance died on November 20, 1988, of heart failure. *Id.*

44. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 22). The court explained its decision as follows:

Several major theories have been advanced to justify the protection given to free speech. They are: (1) the marketplace of ideas; (2) representative democracy and self-government; and (3) individual self-fulfillment and self-realization. . . .

The court concludes that the use of audio subliminal communications does not advance any of these theories cited to justify free speech. Each of these theories entails some measure of discussion, the free flow of ideas, and open and robust debate among the participants. Under the marketplace theory, the free exchange of ideas ultimately permits truth to prevail; under the self-government theory, discussion and debate over political issues furthers our democratic system of government; and under the self-fulfillment or self-realization theory, an individual's ability to freely express himself to others enhances his personal autonomy and development.

Audio subliminal communications are the antithesis of these theories. They do not convey ideas or information to be processed by the listener so that he or she can make an individual determination about its value. They do not enable an individual to further his personal autonomy. Instead, they are intended to influence and manipulate the behavior of the listener without his knowledge.

Id. at 22-25.

45. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1980); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

first amendment, courts must find sufficient justification to exclude subliminal presentation.⁴⁶ When courts deal with this troublesome issue, they must remember that "undifferentiated fear . . . is not enough to overcome the right of freedom of expression."⁴⁷ The main concern behind freedom of speech is the guarantee that each person be given the full opportunity "for expression in *all* of its varied forms to convey a desired message."⁴⁸

This Comment argues that the first amendment protects both supraliminal and subliminal artistic expression. Section II defines subliminal perception and illustrates how subliminal perception techniques are commonly used. Section III discusses the narrowly defined classes of speech that are not protected under the first amendment. Section IV analyzes the exceptions to free speech, argues that subliminal communications do not fall within any of the unprotected classes, and explains why subliminal speech should receive the same protection as supraliminal speech. The final Section of this Comment concludes that subliminal artistic perception should be protected by the first amendment for three reasons. First, subliminal perception advances the purposes of the first amendment. Second, subliminal communications are not new and comprise many aspects of supraliminal communication making distinctions between acceptable and unacceptable subliminal communications difficult to discern. Finally, the actual affects of subliminal perception are too uncertain to conclude that a recipient's right to personal autonomy and privacy outweighs the right to engage in subliminal communications.

II. SUBLIMINAL PERCEPTION: NOW YOU DON'T SEE IT, NOW YOU DO

Subliminal perception, defined as sensory input into the human nervous system that circumvents conscious awareness,⁴⁹ is not a new phenomenon.⁵⁰ The existence of the human subconscious has been explored and documented by composers, artists, poets, philosophers, and scientists.⁵¹ The first recorded mention of unconscious perception is attributed to Democritus (400 B.C.) who wrote that "much is perceptible which is not perceived by us."⁵² Aristotle, Montaigne, Leibiniz, and Freud have all alluded to and explored the subcon-

46. See generally *Young v. American Mini Theatres, Inc.*, 427 U.S. 73 (1976).

47. *Tinker v. Des Moines School*, 393 U.S. 503, 508 (1969).

48. *Young*, 427 U.S. at 77.

49. W. KEY, *supra* note 13, at 11.

50. *Id.*

51. *Id.*

52. *Id.* at 19.

scious.⁵³ Subliminal communication is an attempt to speak directly to the subconscious. Today, however, subliminal perception connotes concepts of manipulation and brainwashing.⁵⁴ This Section will attempt to define subliminal perception, describe subliminal techniques, and explore some of their recent applications.

A. *Subliminal Stimuli*

To many, seeing is believing. But, subliminal messages, by definition, are not consciously "seen" or "heard." Because one does not perceive being subjected to subliminal stimuli, it is easy to assume that subliminal affects are nonexistent.⁵⁵ The causal impact that subliminal messages have on subsequent behavior may not be consciously appreciated.⁵⁶ Also, when coupled with the idea that subliminal perception threatens individual autonomy and freedom of will, the social value of subliminal communication is even easier to discount.⁵⁷ People like to believe that they are in full control of their destinies. However, while the magnitude of the affects of subliminal perception are debated,⁵⁸ it

53. *Id.* at 19-20.

54. *Id.* at 18.

55. N. DIXON, *supra* note 31, at 182. William Key suggests that in America an intellectual fad exists whereby nothing is "significant unless it can be consciously quantified." W. KEY, *supra* note 13, at 11.

56. "Though seemingly ingrained in human nature, the conviction that personal behavior is coherently and consciously chosen is largely illusory. In addition to conscious decision-making, a variety of non-conscious influences also shape behavior." Reed & Whitman, *supra* note 17, at 272.

57. W. KEY, *supra* note 13, at 11. It is actually this threat that makes subliminal phenomena so much more distasteful than other forms of perception.

58. Compare N. DIXON, *supra* note 31, at 182 (Dixon discusses the positive effects of subliminal perception and its relationship with the brain, the mind, and behavior.); Adams, 'Mommy and I Are One' Beaming Messages to Inner Space, *PSYCHOLOGY TODAY*, May 1982, at 24 (There is evidence which suggests that subliminal messages can affect behavior.); Weinstein, Drozdenko & Weinstein, *Effects of Subliminal Cues in Print Advertising upon Brain Response, Purchase Intention, and Simulated Purchase*, in 3 *ADVERTISING AND CONSUMER PSYCHOLOGY* 3 (J. Olson & K. Sentis ed. 1986) (Subliminally embedded messages can be influential in enhancing advertisements.) with Bevan, *Subliminal Stimulation: A Pervasive Problem for Psychology*, 61 *PSYCHOLOGICAL BULL.* 81, 92 (1964) (Subliminal effects are so slight that they should not be considered seriously as a technique to affect consumer sales.); Moore, *supra* note 7, at 41 (The supposed influence of subliminal suggestions is contradicted by much research evidence and is incompatible with theories of perception and motivation.); Moore, *supra* note 11, at 10 (The claim that subliminal messages can effectively change overt human behavior is not supported by any scientific documentation.).

Dr. Lloyd Silverman, a professor of psychology at New York University, claims that his experiments and his subliminal psychodynamic activation method have demonstrated that the subliminal presentation of emotionally charged messages can trigger unconscious thought and alter future behavior. Adams, *supra*. *Contra* Balay & Shevrin, *The Subliminal Psychodynamic Activation Method, a Critical Review*, *AMERICAN PSYCHOLOGIST*, March 1988, at 161, 171 (Balay and Shevrin criticize Dr. Silverman's research regarding psychodynamic activation and

is generally accepted that subliminal stimuli can influence at least certain types of behavior.⁵⁹

The parameters of subliminal perception have been outlined as follows:

- (1) The eliciting of contingent responses by stimulation below the absolute awareness threshold, where this threshold is defined as the lowest level of stimulus energy at which the subject *ever* reports hearing or seeing anything of stimulus.
- (2) The retrospective reporting by the subject that he neither saw nor heard anything of stimulus.
- (3) The occurrence of contingent responses, without reported awareness of the stimulus, that differ qualitatively from those elicited by the same stimulus when presented *above* the awareness of threshold.⁶⁰

"Subliminal" literally means "below threshold."⁶¹ When a message is presented below one's conscious awareness, the information is said to be presented subliminally.⁶² By appealing to unconscious desires, a subliminally implanted message, theoretically, can influence subsequent behavior.⁶³ Unlike supraliminal communications, the recipient cannot consciously evaluate and discount the received message. As a result, "people may be affected by external

disagree with Dr. Silverman's conclusion that psychodynamic activation effects have been definitively established.).

While subliminal effects have been documented in laboratory experiments, scientists are beginning to conclude that subliminal messages can affect individuals in everyday life. *See generally* Bargh & Pietromonaco, *Automatic Information Processing and Social Perception: The Influence of Trait Information Presented Outside of Conscious Awareness on Impression Formation*, 43 J. PERSONALITY AND SOC. PSYCHOLOGY 437 (1982) ("It was concluded that social stimuli of which people are not consciously aware can influence conscious judgment."); Bornstein, Leone & Galley, *The Generalizability of Subliminal Mere Exposure Effects: Influence of Stimuli Perceived Without Awareness on Social Behavior*, 53 J. PERSONALITY AND SOC. PSYCHOLOGY 1070 (1987) (The article describes "three experiments investigating the extent to which subliminal mere exposure effects are obtainable not only with simple stimuli but also with complex human stimuli in social situations.").

59. *See generally* N. DIXON, *supra* note 31, at 182; W. KEY, *supra* note 13, at 11; Adams, *supra* note 58; Weinstein, Drozdenko & Weinstein, *supra* note 58. Dr. Silverman has reported that schizophrenic patients were helped when exposed to the message "mommy and I are one" or "daddy and I are one." Adams, *supra* note 58, at 28. Subliminal exposure may also affect people who are depressed or who stutter. *Id.* at 30.

60. Note, *Subconscious Taken Captive*, *supra* note 17, at 1081 (quoting N. DIXON, *SUBLIMINAL PERCEPTION—THE NATURE OF A CONTROVERSY* 18 (1971)).

61. Moore, *supra* note 11, at 10.

62. By presenting a message subconsciously, it is hoped that the message will appeal to an unconscious desire or need. Eight hidden human needs have been documented: emotional security, reassurance of worth, ego gratification, creative outlets, love objects, sense of power, sense of roots, and immortality. Bliss, *supra* note 16, at 419 n.1 (citing V. PACKARD, *THE HIDDEN PERSUADERS* (1957)).

63. *See generally* N. DIXON, *supra* note 31, at 182; Adams, *supra* note 58, at 24.

stimulus of which they remain totally unaware."⁶⁴

B. *Modes of Subliminal Communication*

Essentially, there are "two systems," which can operate independently from one another:⁶⁵ the conscious and the subconscious. The conscious is responsible for mediating between external stimuli and overt responses while the subconscious is responsible for phenomenal representation.⁶⁶ Each of our senses has "a subliminal fringe" that can be excited without conscious awareness of the excitation. Subliminal communications take place within this fringe area.

Currently, the most commonly used and criticized methods of subliminal communication are subaudible and subvisual. Subvisual techniques include embedding,⁶⁷ which involves quickly flashing pictures or messages between frames in movies and television programs,⁶⁸ and dimly projecting the desired message onto the movie or television screen too faintly to be noticed.⁶⁹ Subvisual subliminal transmission has found many applications. For example, subvisual subliminal perception has been used to heighten tension in movies,⁷⁰ to sell products,⁷¹ to reduce aggressive impulses in schizophrenics,⁷² and even to try to apprehend a mass murderer.⁷³

In the early 1900's, Dr. O. Poetzle, a contemporary of Sigmund Freud, made one of the first significant discoveries relating to subliminal perception.⁷⁴ Poetzle hypothesized that dream content was comprised of subliminally perceived stimuli.⁷⁵ His studies illustrated that when subjects were exposed to subliminal stimuli without their

64. N. DIXON, *supra* note 31, at 9.

65. *Id.* at 10. To prove that the two systems operate independently, Dixon offers the fact that people dream, experience imagery, and hallucinate "without their contents of consciousness owing anything to concurrent external stimulation or . . . activity." *Id.*

66. *Id.*

67. See generally W. KEY, *supra* note 13, at 20.

68. See *infra* notes 71 & 73 and accompanying text.

69. See *infra* notes 80 & 81 and accompanying text.

70. Bliss, *supra* note 16, at 423. In "The Exorcist," the face of Father Karras appears in the film as a death mask. *Id.* Additionally, a complete fox hunt is inter-cut throughout the film that flashes by so fast that it is imperceptible to the conscious eye. *Id.*

71. *Id.* at 425. To help sell a game called "Husker-Du," the words "Get It" were flashed upon the television screen during a sixty second commercial. *Id.*

72. Adams, *supra* note 58, at 26.

73. Bliss, *supra* note 16, at 424 (citing Wash. Post, May 12, 1978, at A13, col. 1). The message "Contact the Chief" was inserted into a news broadcast of a murder story. *Id.* The police thought that the murderer might be interested in watching the news and hearing an account of his deeds. *Id.* This attempt, however, failed. *Id.*

74. W. KEY, *supra* note 13, at 20.

75. W. KEY, MEDIA SEXPLOITATION, *supra* note 28, at 99.

knowledge,⁷⁶ the subliminal messages would appear in the subject's dreams days, and sometimes weeks, after the initial exposure.⁷⁷

During the late 1950's, market researcher James Vicary, employing Poetzle's theories, developed the tachistoscope.⁷⁸ The tachistoscope was essentially a film projector equipped with a high speed shutter that could flash messages at speeds up to 1/3000 of a second.⁷⁹ Perhaps the best known experiment using the tachistoscope involved Vicary's Subliminal Projection Company.⁸⁰ During the viewing of the movie "Picnic," the tachistoscope flashed the messages "Hungry? Eat Popcorn" and "Drink Coca-Cola" onto the screen.⁸¹ Reportedly, during the six-week test involving 45,699 patrons, popcorn sales increased 57.7% and Coca-Cola sales rose 18.1%.⁸² These results have not been substantiated or duplicated.⁸³ The tachistoscope technique has since been incorporated into movies and commercials.⁸⁴ This technique involves splicing several frames of film containing a subliminal message in between the frames of the movie being shown.⁸⁵ When the film is shown at normal speeds, the interspliced scenes appear so fast that the viewing audience is not consciously aware of their existence.

Subvisual subliminal messages also can be transmitted by lowering the light intensity of an ordinary projector so that the message is too dim to be perceived by the conscious eye.⁸⁶ This method may be more effective than the brief flashing of messages by the tachistoscope because a message can be transmitted continuously rather than intermittently.⁸⁷

Subaudible subliminal communication is the second prominent way that subliminal messages are transmitted. These transmissions are broadcast at either a tonal frequency outside the range of conscious human perception or at volumes reduced so that the subject cannot consciously hear the message.⁸⁸ Subaudible communications also have been incorporated in commercial and artistic productions.

76. For a discussion of the Poetzle effect, see N. DIXON, *supra* note 31, at 91-98.

77. W. KEY, *MEDIA SEXPLOITATION*, *supra* note 28, at 99.

78. W. KEY, *supra* note 13, at 21.

79. CHRISTIANITY TODAY, Jan. 31, 1975, at 9.

80. Note, *Subconscious Taken Captive*, *supra* note 17, at 1080.

81. Bliss, *supra* note 16, at 422.

82. W. KEY, *supra* note 13, at 22-23.

83. Adams, *supra* note 58, at 30.

84. W. KEY, *MEDIA SEXPLOITATION*, *supra* note 28, at 102.

85. *Id.* at 101.

86. W. KEY, *supra* note 13, at 23.

87. *Id.*

88. Bliss, *supra* note 16, at 421. The "silent dog whistle" is an example of a sound imperceptible to human consciousness. W. KEY, *supra* note 13, at 27. Human beings can hear

For example, this technique has been employed artistically in movies⁸⁹ and songs⁹⁰ either to increase tension or evoke emotion. Additionally, subaudible messages have been used to sell products,⁹¹ to increase the vigilance of military personnel,⁹² to reduce theft,⁹³ to reduce the rate of error on the factory assembly line,⁹⁴ and to help motivate people to do everything from losing weight to quitting smoking.⁹⁵

Another technique commonly used to convey subliminal messages is "embedding."⁹⁶ Embedding involves hiding images in advertisements,⁹⁷ photographs, or paintings⁹⁸ that relate to human need,⁹⁹ or insecurities.¹⁰⁰ Theoretically, by appealing to a need or insecurity, a strong emotional response will be evoked.¹⁰¹ In advertis-

the whistle, but not consciously. *Id.* "Data transmitted at these high tonal frequencies register in the unconscious." *Id.*

89. Bliss, *supra* note 16, at 424. To heighten tension in the film "The Exorcist," director William Friedkin used subliminal sounds of an angry swarm of bees, the sound of terrified pigs being slaughtered, and the sound of orgasmic vocalization. *Id.* (citing W. KEY, MEDIA SEXPLOITATION, *supra* note 28, at 111).

90. For a discussion on subliminal lyrics in music, see W. KEY, MEDIA SEXPLOITATION, *supra* note 28, at 116-44. *E.g.*, Vance v. Judas Priest, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 10) (referring to lyrics in the song "Better by You, Better Than Me" on an album by the heavy metal rock group Judas Priest entitled "Stained Class"); McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (Ct. App. 1988) (referring to subliminal lyrics in the song "Suicide Solution" on the heavy metal rock album by John 'Ozzy' Osbourne entitled "Blizzard of Oz").

91. Shelly Palmer, a copywriter and singer, admits to having altered the soundwaves of voice and music tracks in advertisements for Seagram's mixers, Balley's Casino, and Matilda Bay wine coolers. Kalish, *Creative Concepts*, MARKETING & MEDIA DECISIONS, May 1988, at 32. Interestingly, Palmer can evade FCC rules prohibiting certain sounds (i.e. casino noises) by broadcasting the outlawed sounds subliminally. *Id.* at 31.

92. Note, *Judicial Recognition*, *supra* note 17, at 733, 741 (citing HUMAN ENGINEERING LABORATORIES, ABERDEEN PROVING GROUND, MARYLAND, U.S. ARMY, WORK PERFORMANCE WITH MUSIC: INSTRUMENTATION AND FREQUENCY RESPONSE 20-21 (1968) (Technical Memorandum 9-68, AMCMS Code 5026.11.81900)).

93. One department store reported a savings of \$600,000 by reducing theft 37% during a nine month period. *Behavior: Secret Voices*, TIME, Sept. 10, 1979, at 71.

94. Note, *Judicial Recognition*, *supra* note 17, at 742.

95. Kiesel, *supra* note 30, at 27. Potentials Unlimited of Grand Rapids, Michigan, markets self-help subliminal audio and visual cassettes. *Id.*

96. Technically, this method is not subliminal because the "embeds" can be seen in a conscious state. Moore, *supra* note 11, at 10. See generally W. KEY, CLAM PLATE, *supra* note 28, at 7; W. KEY, MEDIA SEXPLOITATION, *supra* note 28, at 102; W. KEY, *supra* note 13, at 23.

97. One technique involves hiding certain taboo words in the advertisement. W. KEY, MEDIA SEXPLOITATION, *supra* note 28, at 9.

98. *Id.* For example, the word "seks," which is the seventeenth century Dutch word for "sex," can be found in at least one Rembrandt painting. *Id.* at 10.

99. See *supra* note 62 and accompanying text.

100. Bliss, *supra* note 16, at 420.

101. *Id.*

ing, the advertiser hopes that the unsuspecting subject will unconsciously associate the product with the subject's need or insecurity, thereby causing the subject to choose the advertised product.¹⁰² The needs triggering the strongest emotional responses are those needs associated with sex and death.¹⁰³

III. FREEDOM OF SPEECH: BACKGROUND

A. *Justification of Free Speech*

The development of free speech in the American colonies followed a pattern similar to the development of free speech in England.¹⁰⁴ The colonies initially evinced no intent to liberalize free communication within their own communities.¹⁰⁵ Only powerful individuals, such as members of the clergy, were able to speak without fear of being punished.¹⁰⁶ The text of the main body of the Constitution does not include an express provision upholding a general theory of free speech.¹⁰⁷ Only with the adoption of the Bill of Rights in 1791, was freedom of speech protected.¹⁰⁸ Nonetheless, although the general public was given the right of free speech, certain types of speech were vigorously suppressed.¹⁰⁹ Even today, the boundaries of first amendment protection remain unclear.¹¹⁰ What is certain, however, is that the first amendment occupies a preferred position among the hierarchy of constitutional rights.¹¹¹ Justice Cardozo characterized speech as a "fundamental liberty," asserting that nearly every other freedom is made possible by free speech.¹¹² Three main theories have been advanced as judicial and philosophical justifications for the spe-

102. *Id.*

103. *Id.*

104. T. TEDFORD, *FREEDOM OF SPEECH IN THE UNITED STATES* 31 (1985).

105. R. ROTUNDA, *supra* note 35, at 714.

106. T. TEDFORD, *supra* note 104, at 31.

107. R. ROTUNDA, *supra* note 35, at 715.

108. The first amendment of the Constitution reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

109. T. TEDFORD, *supra* note 104, at 31. Although private libel and obscenity were not significant concerns in colonial times, blasphemy and sedition were suppressed. *Id.*

110. *Id.* at 45.

111. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 18).

112. G. GUNTHER, *supra* note 20, at 976 (quoting *Palko v. Connecticut*, 302 U.S. 319 (1937)).

cial protection of speech:¹¹³ the marketplace of ideas, self government, and self-development.¹¹⁴

No doubt, the most prominent theory supporting the right of free speech is the "marketplace of ideas."¹¹⁵ The origins of this theory can be traced back at least to the writings of John Milton in *Areopagitica*.¹¹⁶ Milton envisioned truth grappling with falsehoods "in a free and open encounter."¹¹⁷ Two centuries later, John Stuart Mill reaffirmed the ideas of Milton in his classic essay, *On Liberty*.¹¹⁸ Mill argued that suppression of opinions was wrong whether the opinion was true or false.¹¹⁹ Mill contended that "if the opinion was true, then society would be denied the truth,"¹²⁰ but, even if the opinion

113. *Id.*

114. Other authors and commentators have recognized additional (or different) theories justifying freedom of expression. Professor Emerson, probably the leading modern theorist of free speech, has recognized four separate values served by the first amendment's protection of expression: (1) "assuring individual self-fulfillment;" (2) "advancing knowledge and discovering truth;" (3) "providing for participation in decision making by all members of society;" and (4) "achieving a more adaptable and hence a more stable community . . . [thus] maintaining the precarious balance between healthy cleavage and necessary consensus." Reddish, *supra* note 21, at 591 (citations omitted).

Martin Reddish feels that "the constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization.'" *Id.* at 593. Reddish contends that other justifications of free expression are "subvalues" of self-realization. *Id.* at 594.

Professor Blasi, on the other hand, sees the "checking value" of the first amendment as its primary function. See Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521 (1977) (first amendment checks official abuse of power in government).

115. L. TRIBE, *supra* note 26, § 12-1, at 785; see *infra* notes 122-27 and accompanying text.

116. T. TEDFORD, *supra* note 104, at 18. Milton gave four reasons in *Areopagitica* to oppose censorship:

(1) It is a tool developed and used by those held in low regard (such as the opponents of the Reformation); (2) it weakens character (since the study of various points of view helps to build character); (3) it does not work (the ideas being censored become known despite efforts to suppress them); and (4) it discourages learning and the search for truth.

Id. (quoting Milton, *Areopagitica* (1644)). The oft quoted lines from *Areopagitica* are:

"And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to mis-doubt her strength. Let her and Falsehood grapple; who ever know Truth put to the worse in a free and open encounter?"

Id. (quoting *Areopagitica*).

117. L. TRIBE, *supra* note 26, § 12-1, at 785.

118. Mill reaffirmed the ideas of John Milton. Mill gave three reasons why freedom of speech was justified: (1) The censored opinion may be true and the accepted opinion may in error; (2) even truth needs to be challenged and tested, else it becomes a "dead dogma"; and (3) there is probably some degree of truth in all opinions. T. TEDFORD, *supra* note 104, at 18. The most famous lines from *On Liberty* are: "if all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." *Id.* (citing Mill, *On Liberty*).

119. G. GUNTHER, *supra* note 20, at 978.

120. *Id.*

"is false, society is denied the fuller understanding of truth which comes from its conflict with error; and when the received opinion is part truth and part error, society can know the whole truth only by allowing the airing of competing views."¹²¹

The free market theory was first enunciated in American case-law by Justice Holmes in *Abrams v. United States*,¹²² one of his much celebrated dissents. In *Abrams*, Holmes stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹²³ Under his theory, the law should be used to expand communications in the "marketplace" and insure that it remains open.¹²⁴ As long as it is open¹²⁵ to the widest range of information, individuals, and not the censoring authorities, will be the best judges of their own interests.¹²⁶ If ideas are to be encouraged, neither the government nor private individuals should be allowed to censor ideas. Thus, under this theory, subliminal transmission should not be disallowed because at least some individuals would be restricted from entering the "marketplace." On the other hand, it is arguable that subliminal communications do not contribute to the exchange of ideas in dialogue—the purpose of an open marketplace—because they are not consciously perceived.¹²⁷

The second rationale for the protection of free speech is that the ability to speak without restraint is "essential to intelligent self-government in a democratic society."¹²⁸ This theory supports absolute

121. *Id.*

122. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

123. *Id.*

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id. Subsequent cases have affirmed this theory. *Cf. Red Lion v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

124. T. TEDFORD, *supra* note 104, at 434.

125. It has been suggested by a number of commentators that the "marketplace" metaphor does not fit the realities of modern society. G. GUNTHER, *supra* note 20, at 979 n.13. Jerome A. Barron believes that the open marketplace was just a romantic illusion and if it ever existed, it surely does not exist today. T. TEDFORD, *supra* note 104, at 416. Further, the "market" is a closed system with the channels of communication largely in the hands of private individuals. *Id.*; see Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

126. T. TEDFORD, *supra* note 104, at 434.

127. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 25).

128. L. TRIBE, *supra* note 26, § 12-1, at 786.

protection of the first amendment to "public discussion of issues of civic importance,"¹²⁹ but offers only minimal protection to other areas of speech.¹³⁰ Critics of this theory have responded by pointing out that there is no proof that the framers intended to fully protect some forms of speech and not others.¹³¹ Further, such a distinction is unworkable as the boundary between public and private speech is not distinct and often overlaps.¹³² This theory is seen by some as expandable to encompass novels, plays, poems, works of art, and commercial information if they add to the "sophistication and wisdom of the electorate."¹³³ Arguably, the potential expansiveness of this theory could include subliminal communication which at times is coexistent with supraliminal communication.¹³⁴

Perhaps the strongest argument for finding that subliminal speech is protected under the first amendment lies in the rationale that free speech adds to and protects the "values of individual liberty, autonomy and self-development."¹³⁵ Subliminal transmissions, quite possibly, may be the only practical way for individuals to communicate certain ideas, feelings, and emotions.¹³⁶ By allowing an individual to freely choose the way to convey an idea, the "individual develops his powers and abilities to make decisions regarding his destiny," thus enabling the individual to define and express the

129. *Id.*; see A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); cf. *Stromberg v. California*, 283 U.S. 259 (1931).

130. L. TRIBE, *supra* note 26, § 12-1, at 786.

131. T. TEDFORD, *supra* note 104, at 429; see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976) ("But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.").

132. T. TEDFORD, *supra* note 104, at 429. For example:

[T]he issue of the censorship of certain controversial novels, such as *Strange Fruit* (which deals with the matter of race relations), is considered by many to be a matter of private speech that can be censored under due process of law; yet *Strange Fruit*, as well as many other novels that might be mentioned, also discusses important social issues. Similarly, publications about birth control are concerned with both private and public matters. Where does one draw the line?

Id. Using an example found in Chafee, *Book Review*, 62 HARV. L. REV. 891, 899 (1949).

133. L. TRIBE, *supra* note 26, § 12-1, at 787.

134. See *supra* note 29 and accompanying text; see also *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.").

135. G. GUNTHER, *supra* note 20, at 979. This theme is also seen in Justice Brandeis' concurrence in *Whitney v. California*, 274 U.S. 357, 372-80 (1926) (Brandeis, J., concurring).

136. For example, subliminal communication may be the only way artists, singers, or movie directors can communicate certain feelings. See *supra* note 70 and accompanying text.

"self."¹³⁷

B. First Amendment Claims

The United States Supreme Court has allowed the government to abridge speech in two ways.¹³⁸ First, speech can be regulated because of the ideas or information conveyed.¹³⁹ These types of restrictions try to limit specific messages or viewpoints¹⁴⁰ or try to prevent the effects caused by exposure to certain ideas or information.¹⁴¹ The second way speech is restricted is not by aiming at the ideas or information conveyed but by limiting certain types of activities¹⁴² or by enforcing rules which discourage communication.¹⁴³ The first type of restrictions are content-based while the second type are content-neutral.¹⁴⁴

Content-based restrictions strike at the heart of the first amendment.¹⁴⁵ Regulations that are content-based will survive constitutional scrutiny if the speech that is restricted poses a "clear and present danger" or otherwise falls into one of the narrowly drawn classes of speech excepted from the first amendment.¹⁴⁶ If the regulation is content-neutral, the Court will balance the values of freedom of expression against the competing governmental interests that the regulation is thought to promote.¹⁴⁷ These regulations will pass constitutional muster if the regulation serves a valid governmental interest and does not unduly restrict the flow of information.¹⁴⁸

Subliminal transmission is a unique mode of communication that does not fit neatly into any category of restricted speech. The content of many subliminal messages would be constitutionally protected if the messages were presented overtly. Thus, a restriction on sublimi-

137. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 24); *see also* Reddish, *supra* note 21, at 591-95.

138. L. TRIBE, *supra* note 26, § 12-2, at 789.

139. *Id.*

140. *Id.*; *see, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

141. L. TRIBE, *supra* note 26, § 12-2, at 789; *see, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

142. L. TRIBE, *supra* note 26, § 12-2, at 789; *see, e.g.*, *Kovacs v. Cooper*, 336 U.S. 77 (1949).

143. L. TRIBE, *supra* note 26, § 12-2, at 790; *see, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

144. *See* G. STONE, *CONSTITUTIONAL LAW* 939, 1169 (1986).

145. L. TRIBE, *supra* note 26, § 12-2, at 790. "For if the constitution means anything, it means that ordinarily at least, 'the government has no power to restrict expression because of its messages, its ideas, its subject matter or its content.'" *Id.* (quoting *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)).

146. L. TRIBE, *supra* note 26, § 12-2, at 791-92.

147. *Id.* at 791.

148. *Id.*

nal messages would not be content-based. However, the pervasiveness of subliminal communication in many forms of speech would prevent restrictions from being based solely on form. The balance that would be required to determine which speech would be prohibited must involve the weighing of the right of the speaker to communicate freely against the privacy and personal autonomy rights of the recipient of subliminal messages. This balancing can become a slippery slope, "reliant on the sympathetic administration of the law."¹⁴⁹

C. Commercial Speech

The incorporation of psychological theories in advertising has long been controversial.¹⁵⁰ While commercial advertisements are entitled to qualified first amendment protection,¹⁵¹ advertisers must nevertheless comply with numerous governmental regulations whether or not psychological methods are used in commercial speech.

1. THE MEDIUM IS THE SUBLIMINAL MESSAGE

As early as the seventeenth century, merchants utilized the power of emotions to sell products.¹⁵² In the 1950's and early 1960's, Madison Avenue discovered "motivation research"¹⁵³ and began experimenting with Freudian-psychological techniques in advertising.¹⁵⁴ Today, advertisements go far beyond communicating the price

149. *Id.* at 794 ("The balancing approach is . . . a slippery slope; once an issue is seen as a matter of degree, first amendment protections become especially reliant on the sympathetic administration of the law."). Additionally, it may be hard, if not impossible, to accurately determine the "true" effect, if any, that the subliminal communication has on the recipient. See *supra* note 112 and accompanying text.

150. See generally V. PACKARD, *supra* note 62.

151. See *infra* notes 170-77 and accompanying text; see also Gurnick, *supra* note 17, at 59.

152. Reed & Coalson, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733, 735-36 (1977).

153. Motivation research has been described as follows:

Motivation research is the type of research that seeks to learn what motivates people in making choices. It employs techniques designed to reach the unconscious or subconscious mind because preferences generally are determined by factors of which the individual is not conscious. . . . Actually in the buying situation the consumer generally acts emotionally and compulsively, unconsciously reacting to the images and designs which in the subconscious are associated with the product.

V. PACKARD, *supra* note 62, at 7-8 (quoting Louis Cheskin, Market Researcher).

Subliminal techniques have been used for decades. This caused Marshall McLuhan to comment "that 1984 really happened around 1930, but we didn't notice." W. KEY, *MEDIA SEXPLOITATION*, *supra* note 28, at 74. McLuhan was referring to the "general effect of subliminal media upon western society." *Id.*

154. Reed & Coalson, *supra* note 152, at 743.

and/or the physical attributes of the advertised product.¹⁵⁵ Clever advertising executives appeal to a consumer's emotional or psychological needs and seem to promise, either explicitly or implicitly, that their product will fill these needs.¹⁵⁶ By grouping potential consumers according to their "psychographic" profiles,¹⁵⁷ advertisers can aim a product toward an emotional need of a particular segment of the population to achieve maximum advertising effectiveness.¹⁵⁸ Sophisticated advertising techniques employ emotional symbols that consumers associate with products in order to enhance sales.¹⁵⁹ Advertisers use a myriad of nonverbal techniques, such as music, graphics, and drama, to tap into consumers' emotions.¹⁶⁰ The concentration seems to be on process rather than on substance.¹⁶¹

Advertisers teach consumers, through classical nonverbal conditioning techniques, to associate emotional symbols with advertised

155. *Id.* at 734.

156. *Id.* Abraham Maslow's theory of the "hierarchy of needs" describes human needs as primary and secondary. The primary needs include safety, food, and shelter; the secondary needs encompass belongingness, love, self-esteem, status, and self-actualization. *Id.* at 740; see also A. MASLOW, *MOTIVATION AND PERSONALITY* 80-92 (1954).

Aldous Huxley succinctly stated the method of using subliminal techniques to encourage sales:

Find some common desire, some widespread unconscious fear or anxiety; think out some way to relate this wish or fear to the product you have to sell; then build a bridge of verbal or pictorial symbols over which your customer can pass from fact to compensatory dream, and from the dream to the illusion that your product, when purchased, will make the dream come true.

A. HUXLEY, *supra* note 1, at 51.

Vance Packard identified eight hidden needs that, if effectively related to a product, would cause consumers to purchase the product in order to satisfy a hidden need. The eight hidden needs Packard identified are: emotional security, reassurance of worth, ego gratification, creativity, love objects, power, a sense of roots, and immortality. V. PACKARD, *supra* note 62, at 72-83.

157. Reed & Coalson, *supra* note 152, at 743. "In the late 1960's the word *psychographics* began appearing . . . [It referred] to the techniques involved with a sophisticated relationship between psychology and marketing research. . . [I]t became possible to categorize consumers by statistical regressions into psychological groupings." *Id.* (emphasis in original).

158. *Id.* at 744.

"[P]eople don't seem to be reasonable . . . But people do act with purpose. Their behavior makes sense if you think about it in terms of its goals, of people's needs and their motives. That seems to be the secret of understanding or manipulating people." V. PACKARD, *supra* note 62, at 19.

159. Reed & Coalson, *supra* note 152, at 739.

160. Reed & Whitman, *supra* note 17, at 276-78.

161. M. McLuhan & Q. Fiore, *THE MEDIUM IS THE MESSAGE* 10 (1967). Media influences almost every aspect of our lives. "All media work us over completely. They are so pervasive in their personal, political, economic, aesthetic, psychological, moral, ethical, and social consequences that they leave no part of us untouched, unaffected, unaltered. The medium is the message." *Id.* at 26.

products.¹⁶² Through conditioned responses, advertisers try to alter consumers' feelings about products.¹⁶³ By changing the consumers' feelings, it is hoped that, eventually, the emotional conditioning will change the way consumers think about products.¹⁶⁴ "[T]he resulting belief-change occurs not because of a rational, reasoned process but due to an affective, conditioned one."¹⁶⁵ By using nonverbal techniques, advertisers communicate that their product will give "emotional satisfactions, which are extrinsic to the products and services yet which motivate" sales.¹⁶⁶ Inducement of "consumer preferences apart from any intrinsic product or service characteristics"¹⁶⁷ has led to charges that emotionally laden nonverbal advertising is deceptive and should be restricted.¹⁶⁸

2. RESTRICTIONS ON ADVERTISING

Prior to the mid-1970's, commercial advertising, or speech whose primary purpose was commercial, was thought not to be protected by the first amendment.¹⁶⁹ However, in 1976, when *Virginia State Board*

162. Reed & Coalson, *supra* note 152, at 745-51.

The classical conditioning paradigm states briefly that where one stimulus, called the "unconditioned stimulus," which evokes a certain "response," is paired repetitively with an unrelated second stimulus, called the "conditioned stimulus," the "conditioned stimulus" alone will, after a time, evoke the "response" previously elicited only by the "unconditioned stimulus." Thus, Pavlov, who formulated this paradigm, was able to teach a dog to salivate (response) upon hearing a buzzer (conditioned stimulus) by repetitively associating the buzzer's sound with the presentation of food (unconditioned stimulus).

Id. at 745 n.54 (citing Stolurow, *Conditioning*, in *HANDBOOK OF GENERAL PSYCHOLOGY* 283-84 (B. Wolman ed. 1973)).

163. *Id.* at 746.

164. *Id.* By appealing to one's emotions, advertisers try to change the way a person subconsciously *feels* about a product. This is believed to be more effective than appealing to one's powers of logic or reason to attempt to change what a person consciously *thinks* or *believes* about a product. *Id.*

165. *Id.*

166. Reed & Whitman, *supra* note 17, at 285.

167. *Id.* at 286.

168. *See id.*; *see also* Reed & Coalson, *supra* note 152, at 733.

169. G. GUNTHER, *supra* note 20, at 1128-29; *see, e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (sustaining a ban on handbill advertisements). In *Chrestensen*, the Court established the commercial speech doctrine:

This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in the public thoroughfares. We are equally clear that the Constitution imposes no such restraint on governments as respects purely commercial advertising.

of *Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁷⁰ was decided, the law began to shift in favor of protecting commercial speech.¹⁷¹ In *Virginia State Board of Pharmacy*, a group of consumers, concerned about the high price of prescription drugs, challenged a Virginia statute that prohibited pharmacists from advertising prescription drug prices.¹⁷² In striking down the state statute, the United States Supreme Court held that commercial speech was protected by the first amendment.¹⁷³ The Court, however, qualified its holding by adding that speech that "no more than propose[s] a commercial purpose" is distinguishable from other varieties of speech and, thus, is entitled to a lesser degree of protection.¹⁷⁴

Three years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁷⁵ the Court established a four-part test to determine whether regulations restricting commercial speech are valid under the first amendment.¹⁷⁶ In fashioning its test, the Court stressed that first amendment protection of commercial speech is "based on the informational function of advertising."¹⁷⁷ Consequently, any advertising which misinforms or is deceptive may be suppressed.¹⁷⁸ Citing the *Virginia Board of Pharmacy* and *Central*

Id. at 54. The *Chrestensen* case has been severely criticized and has even caused Justice Douglas to refer to the decision as "casual, almost offhand." G. GUNTHER, *supra* note 20, at 1128.

170. 425 U.S. 748 (1976).

171. Reed & Whitman, *supra* note 17, at 292.

172. *Virginia Pharmacy Bd. v. Virginia Consumer Counsel*, 425 U.S. 748, 749-50 (1976).

173. *Id.* at 770.

174. *Id.* at 771-72 n.24. In qualifying the protection of commercial speech, the Court said:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between speech that does "no more than propose a commercial transaction," and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. . . . Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Id.

175. 447 U.S. 557 (1980).

176. *Id.* at 566. The four-part analysis the Court devised was: 1) the Court must "determine whether the expression [is] protected by the First Amendment" (for commercial speech, at a minimum, it must not mislead and it must concern a lawful activity); 2) the Court must determine whether the "asserted governmental interest is substantial;" 3) if the answers to the previous questions are positive, the Court must then determine if the asserted governmental interest is directly advanced by the regulation; and 4) whether the regulation is more extensive than necessary to serve the asserted interest. *Id.*

177. *Id.* at 563.

178. *Id.*

Hudson line of cases, some commentators have suggested that because nonverbal communicative techniques—presumably including subliminal techniques—either mislead or deceive the public, the government and the FTC may constitutionally “protect consumers from ‘unfair’ emotionally conditioning commercial messages.”¹⁷⁹

Although persuasive arguments exist for the prohibition of subliminal advertising, it does not follow that all subliminal communications, including those used in artistic expressions, should be prohibited. Subliminal advertising is distinguishable from subliminal artistic expression in several respects.¹⁸⁰ First, commercial speech, such as advertising, historically has been subject to substantial governmental regulation,¹⁸¹ while artistic expression generally has been accorded great deference.¹⁸² Currently, for example, there are FTC and NAB regulations that restrict subliminal broadcasting on television¹⁸³ while, with respect to artistic expression, network censors have become more lenient with what they will permit to be aired. Second, the constitutional values of individual liberty, autonomy, and self-development are heightened when the profit motive is diminished. If artistic uses of subliminal expression were disallowed, artistic freedom would be reduced. Contrarily, the profit incentive acts as a countervailing force to restrictions on commercial advertising. If a certain form of advertising is disallowed, other forms will quickly fill the void so that sales will not be adversely affected. Thus, eliminating subliminal advertising would have little, if any, effect on the overall volume of commercial advertising.¹⁸⁴

The same countervailing force, however, does not apply in artistic expression. Whereas advertisers use subliminal techniques to trig-

179. Reed & Coalson, *supra* note 152, at 782. See generally Reed & Whitman, *supra* note 17.

180. Along this line, one commentator wrote:

To consider legal implications of subliminal advertising, commercial and subliminal expression must be distinguished from that which lies outside these categories. Commercial speech is easily distinguished from other expression. The former “is confined to the promotion of specific goods or services.” It does “no more than promote a commercial transaction.” Commercial speech is characterized by the advertiser’s purely economic interests. Non-commercial speech involves “exposition of ideas . . . truth, science, morality and arts.”

Gurnick, *supra* note 17, at 60-61 (footnotes and citations omitted).

181. J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 767 (1978).

182. See *Young v. American Mini Theatres*, 427 U.S. 73 (1976).

183. See *infra* notes 195-207 and accompanying text.

184. “[C]ommercial speech may be more durable than other kinds” of speech. Therefore, “there is little likelihood of it . . . being chilled by proper regulation.” *Virginia Pharmacy Bd. v. Virginia Consumer Counsel*, 425 U.S. 748, 772 n.24 (1976).

ger feelings in consumers that they hope impel them to purchase products, artists employ subliminal techniques to trigger feelings and emotions that are ends in themselves.¹⁸⁵ While it might be true that there is no such thing as "pure" commercial speech,¹⁸⁶ it is obvious that because increased sales is its primary goal, commercial speech has primarily a pecuniary motivation. Viewed from this perspective, one could fairly conclude that subliminal advertising is more deceptive and manipulative than art forms embodying subliminal techniques because subliminal advertising uses one's emotions as tools to achieve another objective: sales. Thus, while it might be unclear whether subliminal advertising is entitled to the "qualified, but nonetheless substantial protection accorded to commercial speech,"¹⁸⁷ it is clear that subliminal *artistic* expression deserves greater protection than commercial speech in general.

D. *The Regulation of Subliminal Speech*

Both the Congress and the state legislatures have considered passing laws regulating subliminal communications. To date, no law restricting subliminal transmissions has ever been passed by Congress. The only restrictions that exist are to be found in rules of regulatory agencies and in policy statements issued by television networks and their supervisory affiliates.

1. STATE AND FEDERAL REGULATIONS

Federal attempts to regulate subliminal communications have been unsuccessful. For example, in 1958, Representatives Jim Wright and Craig Hosmer introduced bills that would penalize the unlawful use of subliminal advertising on television.¹⁸⁸ Hearings were never held on the bill.¹⁸⁹ A year later, Wright reintroduced the bill. Once

185. See Reed & Whitman, *supra* note 17, at 276. "A primary purpose of music is to trigger emotion. Listeners often 'consume' musical emotion purely for private enjoyment." *Id.* Further, artistic expression may be ideally suited for subliminal techniques. One author stated that:

In many of these realms communicators aim to evoke emotional response from those who attend their work. Art, for example, does not necessarily call for cognitive or articulable reaction. Subliminal techniques are consistent with such forms of expression. The techniques constitute a valuable tool among communicators' choice of methods with which to express themselves and affect audiences.

Gurnick, *supra* note 17, at 59-60.

186. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 181, at 772.

187. *Bolger v. Young Drug Prod. Corp.*, 463 U.S. 60, 68 (1983).

188. Bliss, *supra* note 16, at 426.

189. *Id.*

again, it died in committee.¹⁹⁰

State legislatures have also attempted to pass bills restricting subliminal transmissions. For example, in 1984, the California Assembly, considered a bill restricting the transmission of subliminal messages.¹⁹¹ This bill, unlike the federal bills, was not only aimed at advertisers, but also restricted any "person who knowingly communicates to members of the public any subliminally embedded communication" without making known the existence of such communication.¹⁹² Because the bill was never acted on by the Senate Judiciary Committee, it too died in committee.¹⁹³ Thus far, *no* regulation, either state or federal, has ever been passed that restricts subliminally transmitted messages.¹⁹⁴

2. THE POSITION OF THE FTC, THE FCC, AND THE NAB

As early as 1957, the Federal Communications Commission (FCC) addressed the issue of subliminal transmissions.¹⁹⁵ It indicated that subliminal broadcasting "is inconsistent with . . . the public interest."¹⁹⁶ Under Section 303 of the Communication Act,¹⁹⁷ the FCC may have the ability to control certain subliminal messages.¹⁹⁸ But, this statutory authority is limited to enforcement against broadcast-

190. *Id.*

191. Gurnick, *supra* note 17, at 70.

192. *Id.* Gurnick, the bill's author, expressed some skepticism as to whether the California Bill was the best way to deal with subliminal advertising. *Id.* He wrote:

To the extent that the proposal dealt with other realms of communication it might or might not be appropriate. For the realm of advertising there is a better method of regulating subliminal communication. The Federal Trade Commission or State counterparts offer expertise in studying subliminal techniques, consistency in regulating them, and flexibility in remedying abuses.

Id.

193. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 16).

194. Defendant's Motion for Summary Judgment at 37, *Vance v. Judas Priest* (D. Nev. 1989) (No. 86-5844/86-3939). It may be impossible to draft a statute containing a first amendment exception for subliminal communications that would pass constitutional muster. *Id.*

195. *FCC Public Notice*, FCC 57-1289 (Nov. 27, 1957). For a discussion of the FCC notice, see Bliss, *supra* note 16, at 429-32.

196. *FCC Public Notice*, FCC 74-78 (Jan. 24, 1974) ("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 broadcasts employing such techniques are contrary to the public interest. Whether effective or not such broadcasts are intended to be deceptive.").

197. 47 U.S.C. § 303 (1988).

198. Bliss, *supra* note 16, at 429; see also Richards & Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 GA. L. REV. 77, 83-94 (1981) (discussing the FCC restrictions on advertisers).

ers¹⁹⁹ and sanctions may be imposed only if the broadcaster has knowledge of the subliminal message.²⁰⁰ The FCC cannot take action against the advertiser; that responsibility rests with the Federal Trade Commission (FTC).²⁰¹ However, the FTC is similarly limited in its authority. It may act against an advertiser only if the subliminal message constitutes unfair competition or a deceptive practice²⁰² as those terms have been defined by the FTC and the courts, mainly through case law.²⁰³

Perhaps the strongest restrictions on subliminal transmissions have been established by the National Association of Broadcasters (NAB). The NAB is the broadcast industry's self-regulating body and has never favored broadcasting subliminal messages.²⁰⁴ Starting in 1958, the NAB Television Code expressly rejected the use of any transmission of information made below the threshold of conscious perception.²⁰⁵ All the major networks have followed the NAB's lead and refuse to transmit subliminal messages.²⁰⁶ Finally, to insure that

199. Bliss, *supra* note 16, at 430. Enforcement against broadcasters is difficult. *Id.* First, 47 U.S.C. § 317 "applies only to messages received from undisclosed sources." *Id.* Thus, without proper disclosure, broadcasters are prohibited from inserting subliminal ads of one advertiser into ads of other advertisers, or into news or entertainment broadcasts. *Id.* However, broadcasters are not prohibited from running overt ads containing the same subliminal message. *Id.* Second, Section 317 does not prohibit the inclusion of subliminal ads in unsponsored or public service announcements. *Id.* Finally, the FCC is without statutory authority to enforce sanctions against advertising agencies and program producers. *Id.* at 431.

200. *Id.* at 430-31.

201. *Id.* at 432; see also Richards & Zakia, *supra* note 198, at 83-86.

202. Bliss, *supra* note 16, at 432. "[U]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." *Id.* (quoting Federal Trade Commission Act § 5, 15 U.S.C.A. § 45(a)(1) (West Supp. 1980); see also *Scientific Mfg. v. FTC*, 24 F.2d 640, 644 (3d Cir. 1941) (holding that the FTC could prevent unfair or deceptive acts or practices).

203. Richards & Zakia, *supra* note 198, at 88 (citing cases which define deception: *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963) (defining misrepresentation of fact); *Blockenstette v. FTC*, 134 F.2d 369 (10th Cir. 1943) (deceptive advertising may occur if advertisement is susceptible to misreading); *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950) (deception occurs when evidence is taken out of context so as to distort the truth)). For an analysis of unfairness, see Reed & Coalson, *supra* note 152, at 762-64.

204. Bliss, *supra* note 16, at 434.

205. *Id.* at 435. The NAB's last statement on its policy with respect to subliminal communication stated: "*Subliminal Perception*. Any technique whereby an attempt is made to convey information to viewer by transmitting messages below the threshold of normal awareness is not permitted." *Id.* (quoting NAB, *THE TELEVISION CODE, Program Standards*, ch. 4, ¶ 12 (20th ed. June 1978)).

206. *Id.* 436-37. In 1957, ABC announced:

Until such time as full and complete information concerning the effect of this technique is available for careful consideration, the ABC Television Network and its owned and operated stations, in keeping with the policy that all commercial announcements should be clearly identified as such, will not broadcast messages utilizing the technique of subliminal perception.

no subliminal messages can be found in advertisements for alcohol, the Bureau of Alcohol, Tobacco and Firearms has adopted a regulation prohibiting such advertising²⁰⁷ on the basis that it constitutes a deceptive advertising practice.²⁰⁸

The main goal behind most of the mentioned regulations is to curb subliminal communications only with respect to advertising.²⁰⁹ But, advertising is just one of many areas in which subliminal techniques may be employed. For example, subliminal messages occur in art, music, and movies to evoke emotional responses from those attending the artists' work.²¹⁰ Interestingly, even advocates of removing subliminal messages from advertising admit that subliminal techniques can be a valuable tool for communicators to use to "express themselves and [to] affect [their] audiences."²¹¹

IV. ARTISTIC SUBLIMINAL EXPRESSION FINDS PROTECTION UNDER THE FIRST AMENDMENT

An analysis of whether a particular form of expression, conduct, or speech is protected by the first amendment must begin with the threshold question of whether the suspect activity can be defined as "speech." Speech, "as an irreducible minimum . . . must constitute a communication."²¹² Communication, in turn, requires that there be a communicator and a recipient.²¹³ Subliminal communication would certainly fit within this simplistic definition of speech because there is a communicator attempting to communicate a message, albeit a subliminal message, to a potential listener.

Next, the question of whether subliminal communication, in the form of artistic expression, constitutes speech should be answered in the affirmative. "[F]reedom of speech is not limited to political

Id. (quoting 6 NARTB, TELEVISION CODE SUBSCRIBER BULLETIN, No. 8, at 1 (Dec. 1975)).

207. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 17). The regulation states:

(h) Deceptive advertising techniques. Subliminal or similar techniques are prohibited. "Subliminal or similar techniques," as used in this part, refers to any device or technique that is used to convey, or attempts to convey, a message to a person by means of images or sounds of a very brief nature that cannot be perceived at a normal level of awareness.

Id. (quoting 27 C.F.R. § 5.65(h) (1988)).

208. *Id.*

209. See generally Bliss, *supra* note 16.

210. Gurnick, *supra* note 17, at 56, 58-59.

211. *Id.*

212. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973).

213. *Id.*

expression or comment on public affairs."²¹⁴ "Speech," for first amendment purposes, is defined by "the idea of cognitive content, of mental effect, of a communication designed to appeal to the intellectual process. This . . . [includes] the artistic and the emotive as well as the propositional. . . . [It is] essentially . . . a mental stimulus."²¹⁵ By adding a subliminal element to artistic expression, the emotive content of the expression is enhanced. The United States Supreme Court has held that "[i]n this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."²¹⁶ Thus, if his medium of expression includes subliminal communication, that expression should be included within the ambit of constitutional protection.

Further, art forms cannot be dissected into speech components that are allowable and those that are not.²¹⁷ Often, it is precisely the nonverbal element that helps to define and distinguish the specific forms of art and artistic expression.²¹⁸ This is because humans cannot convey ideas.²¹⁹ "People can convey only signs, sounds, and symbols that represent . . . idea[s] to them."²²⁰ Because artistic expressions are not as constrained or as clear as the spoken or written word—exemplified by the fact that a particular piece of art work can, and often does, have different meanings for different people—the artist should be allowed the greatest latitude to use whatever means is necessary fully to express himself. A central concern of the first amendment is that there "be a free flow from creator to audience of whatever message . . . might [be] convey[ed]."²²¹ Moreover, "the free speech guarantee is that there be full opportunity for expression in all its varied forms to convey a desired message."²²² As the Court recognized in *Cohen v. California*,²²³ "linguistic expression serves a dual

214. *Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 493, 178 Cal. Rptr. 888, 892 (Ct. App. 1981) (citing *Time v. Hill*, 385 U.S. 374, 388 (1967)).

215. Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922-23 (1979).

216. *Young v. American Mini Theatres, Inc.*, 427 U.S. 73, 77 (1976) (quoting Douglas J., concurring in *Superior Films v. Department of Educ.*, 346 U.S. 587, 589 (1954)).

217. *Southeastern Promotions v. City of Atlanta*, 334 F. Supp. 634, 639 (1971).

218. *Id.*

219. Cleveland, *Semiotics: Determining What the Advertising Message Means to the Audience*, in 3 ADVERTISING AND CONSUMER PSYCHOLOGY 227 (J. Olson & K. Sentis eds. 1986).

220. *Id.*

221. *Young v. American Mini Theatres, Inc.*, 427 U.S. 73, 77 (1976).

222. *Id.* at 76.

223. 403 U.S. 15 (1971). In *Cohen*, the defendant wore a jacket bearing the words "Fuck the Draft" in the Los Angeles County Courthouse. *Id.* at 16. The Court reversed a conviction that Cohen maliciously and willfully disturbed the peace by offensive conduct. *Id.* at 16, 26.

communicative function: it conveys not only ideas capable of relatively precise detached explication, but otherwise inexpressible emotions as well."²²⁴ Thus,

[E]ven if a communication is substantially devoid of all cognitive content, its emotive content is surely protectable. It would be shocking to conclude that symphonic compositions or nonrepresentational art could be the subject of governmental censorship. Both are fully within the ambit of the first amendment notwithstanding their lack of both verbal and cognitive content.²²⁵

Although several cases tangentially have discussed subliminal communication, none have dealt squarely with the issue of whether subliminal speech is to be accorded first amendment protection.²²⁶ As the following two cases will illustrate, however, first amendment principles require that subliminal speech be protected under the first amendment unless it falls into one of the pre-existing categories of speech that may be limited.

For example, in *Zamora v. Columbia Broadcasting System*,²²⁷ a Florida federal district court refused to place liability on television broadcasters where a susceptible minor viewed violence and then acted unlawfully. In *Zamora*, the plaintiff alleged that he had become "involuntarily addicted to and completely subliminally intoxicated" by viewing extensive broadcasts of violence by the three major television networks, ABC, CBS, and NBC.²²⁸ *Zamora* claimed that the networks breached their duty to him by failing to use ordinary care in preventing impermissible stimulation, incitement, and instigation to duplicate the violent acts he witnessed on television.²²⁹ The district court correctly dismissed the case for failing to state a claim.²³⁰

In reaching its decision, the *Zamora* court noted that the broadcasts of violence did not fit into any of the established categories of

224. *Id.* at 26.

225. Nimmer, *supra* note 212, at 35.

226. See *Playboy Enter., Inc. v. Chuckleberry Pub., Inc.* 687 F.2d 563, 570-71 (2d Cir. 1982) (holding that adoption of the name "Playmen" in a magazine subtitle subliminally infringed upon the "Playboy" mark); *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968) (In analyzing the FCC's authority to regulate cigarette commercials, Judge Bazelon noted that "it is difficult to calculate the subliminal impact of [the] pervasive propaganda [of commercials], which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word."); *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 200 (S.D. Fla. 1979) (court refused to hold television networks liable for minor's violent acts although defendant claimed that he had become subliminally intoxicated by the extensive violence he viewed on television).

227. *Zamora*, 480 F. Supp. at 204.

228. *Id.* at 200.

229. *Id.*

230. *Id.* at 201.

speech that may be limited,²³¹ such as speech that was obscene, profane, libelous, or insulting. The court refused to recognize a new duty standard that would allow recovery when a susceptible person views violent acts and subsequently behaves unlawfully.²³² The court also noted that the aberrant acts of a few sensitive or insensitive individuals should not inhibit broadcasters' rights to disseminate.²³³

Next, in *McCollum v. Columbia Broadcasting Systems*,²³⁴ a case factually similar to *Vance v. Judas Priest*, a California appellate court refused to hold record producers liable for a listener's suicide because there was no evidence that subliminal music lyrics were intended to or did bring about the suicide.²³⁵ In *McCollum*, plaintiff's son committed suicide after listening to albums by John 'Ozzy' Osbourne containing songs suggesting that suicide was an acceptable alternative to life.²³⁶ *McCollum* sued alleging that the music was the proximate cause of his son's suicide.²³⁷ While the album arguably contained subliminal lyrics advocating suicide,²³⁸ the question of whether subliminal communication was protected by the first amendment was not placed directly before the court. The court stated that although the lyrics were not immediately intelligible, they were "perceptible [enough] to be heard and understood when the listener concentrate[d] on the music and lyrics."²³⁹ In holding that Osbourne was not liable,

231. *Id.* at 204. The court also stated that "any action, legislative or otherwise which has as its purpose placing limitations upon freedom of expression must be viewed with suspicion." *Id.* at 203.

232. *Id.* at 206. The court stated that "the imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise by this Court." *Id.* In addition, the court recognized that it lacked both the legal and institutional capacity to identify depictions of violence, let alone the ability to define standards for media dissemination of items containing violence. *Id.* at 203. If such a standard was adopted, a broadcaster might be liable for acts committed by viewers after watching such broadcasts as *Julius Caesar*, *Hamlet*, *Grimm's Fairy Tales*, *All Quiet on the Western Front*, *The Holocaust*, and *John Wayne* movies. *Id.* at 206.

[T]he imposition of the duty claimed would discriminate among television productions on the basis of content and not on the basis of any of the first amendment limitations referred to above. The works of creative artists and entertainers must be protected. The First Amendment casts a "heavy burden" on those who seek to censor.

Id. (citations omitted).

233. *Id.* at 205.

234. 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (Ct. App. 1988).

235. *Id.* at 1000, 249 Cal. Rptr. at 193.

236. *Id.* at 995, 249 Cal. Rptr. at 190.

237. *Id.* at 994, 249 Cal. Rptr. at 189.

238. The song "Suicide Solution" contains masked lyrics which are sung at one and one-half times the normal rate of speed. *Id.* at 997, 249 Cal. Rptr. at 190-91.

239. *Id.* The lyrics are as follows:

"Ah know people
You really know where its at
You got it

the court stated that "[m]erely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct incitement to commit violence."²⁴⁰

These two cases illustrate several first amendment principles. First, courts are hesitant to recognize new categories of restricted speech. As the *Zamora* court pointed out, "any action, legislative or otherwise which has as its purpose placing limitations upon freedom of expression must be viewed with suspicion."²⁴¹ Second, aberrant behavior by a small group of individuals in reaction to certain types of expression does not necessarily require that barriers be enacted prohibiting the particular form of speech.²⁴² Third, to justify suppression of speech, there must be reasonable grounds to believe that the danger to be prevented is imminent.²⁴³ Fourth, prohibition of free speech is an "inappropriate means for averting a relatively trivial harm to society."²⁴⁴ Finally, in our system, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right of free expression."²⁴⁵ Thus, if the subliminal message does not fall into one of the pre-existing categories of restricted speech, a court should be hesitant to invent a new category. Instead, it should apply the general rule that a governmental body may not restrict either the form or content of individual expression.²⁴⁶

A. *Regulating Speech*

1. CONTENT REGULATION

Certain forms of speech, or speech in certain contexts, fall

Why try, why try
Get the gun and try it
Shoot, shoot, shoot" (this line was repeated for about ten seconds).

Id.

240. *Id.* at 1001, 249 Cal. Rptr. at 194.

241. *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 203 (S.D. Fla. 1979).

242. "There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." *Id.* at 205 (quoting *Cohen v. California*, 403 U.S. 15, 23 (1971)).

243. See *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1000-03, 249 Cal. Rptr. 187, 193-95 (Ct. App. 1988) (holding that the incitement standard established in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), had not been met); see *infra* notes 255-58 and accompanying text.

244. *Whitney v. California*, 274 U.S. 357, 377 (1926) (Brandeis & Holmes, J.J., concurring) ("Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.").

245. *Zamora*, 480 F. Supp. at 204 (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969)).

246. *Cohen*, 403 U.S. at 24.

outside the scope of constitutional protection.²⁴⁷ Consequently, if a subliminal communication should fall into one of the relatively few unprotected categories of speech, it too would not receive first amendment protection.²⁴⁸ Subliminal speech, however, unlike obscenity, does not naturally lend itself to categorizations.

More fundamentally, the question is whether subliminal messages could ever pose a "clear and present danger" by inciting imminent lawless action. If so, then subliminal speech might be forbidden.²⁴⁹ In *Judas Priest*, the plaintiffs alleged that the subliminal message contained in musical lyrics posed a clear and present danger because it caused the suicide of Belknap and the attempted suicide of Vance.²⁵⁰ Had the message on the *Judas Priest* album been overt it would likely be protected speech unless, of course, it fell into an unprotected category.²⁵¹ The plaintiffs, however, questioned whether the same message, presented subliminally, would still be protected if it met the standard established in *Brandenburg v. Ohio*.²⁵² *Brandenburg* prohibits speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."²⁵³ Presumably, plaintiffs' argument in *Judas Priest* is that the message is not protected by the first amendment because it unconsciously incited the decedents to commit suicide.

247. See *supra* note 27 and accompanying text.

248. *Id.*

249. See generally *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (Constitutional guarantees of free speech do not permit a state to restrict activities unless those activities are "directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

250. Defendant's Motion for Summary Judgment at 2, *Vance v. Judas Priest* (D. Nev. 1989) (No. 86-5844/86-3939).

251. *Vance v. Judas Priest*, No. 86-5844/86-3939 (D. Nev. 1989) (Order Denying Summary Judgment at 19); see *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 998, 249 Cal. Rptr. 187, 191 (Ct. App. 1988) (lyrics are protected speech); see also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1018 (5th Cir. 1987) (holding that publisher was not liable for death of adolescent who hanged himself after he read an article in the magazine entitled "Orgasm of Death" discussing the practice of autoerotic asphyxia: "masturbating while 'hanging' oneself in order to temporarily cut off blood supply to the brain at the moment of orgasm"); *Yakubowicz v. Paramount Pictures Corp.*, 404 Mass. 624, 626-27, 536 N.E.2d 1067, 1068-69 (1989) (holding that motion picture producer and distributor was not liable for the death of a minor who was killed by a group of teenagers after they viewed a violent movie about gangs). For related discussions on the liability of television and movie producers, see Note, *Media Liability for Injuries that Result from Television Broadcasts to Immature Audiences*, 22 SAN DIEGO L. REV. 377 (1985); and Note, *Tort Liability for Nonlibelous Statements: First Amendment Considerations*, 93 YALE L.J. 744 (1984).

252. 395 U.S. 444, 447 (1969) (per curiam) (reversing a Ku Klux Klan leader's conviction under Ohio's criminal syndicalism statute for advocating violence as a means of accomplishing change).

253. *Id.*

In *McCollum*, a similar case involving both overt and subliminal lyrics suggesting that suicide is an acceptable and desirable alternative to life, the California appellate court set forth the necessary showing to go forward under the incitement standard. It explained that "the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test."²⁵⁴ On the facts presented, the *McCollum* court held that there was no command²⁵⁵ to immediately commit suicide and there was no intent by the singer that the decedent kill himself.²⁵⁶ The court also noted the difficulty in applying the incitement standard to musical lyrics and poetry because such expressions are figurative and no rational person could believe that the lyrics or poetry are literal commands for immediate action.²⁵⁷ Similarly, because subliminal lyrics may at best, through repeated exposure, modify some future behavior, they could not meet the immediate action qualification set forth in *Brandenburg*. Based on the tests expounded in *Brandenburg* and *McCollum*, the restrictive holding in *Judas Priest* that subliminal speech could be prohibited was incorrect and poses a serious threat to freedom of expression.

In summary, subliminal speech cannot be regulated because of content alone. Subliminal communications do not inherently fall within one of the groups of speech traditionally found to be outside the protection of the first amendment. Consequently, the existing paradigms dealing with such speech cannot be applied to subliminal speech. Further, the clear and present danger test would not be applicable to subliminal communications because they do not meet the immediate action qualification in *Brandenburg*. Thus, based on the

254. *McCollum*, 202 Cal. App. 3d at 1000, 249 Cal. Rptr. at 193 (citation omitted).

255. *Id.*

256. *Id.*

257. The *McCollum* court stated:

This is particularly true when the artist's performance of such musical lyrics and poetry was physically and temporarily remote from the listener who only subsequently hears such performances by means of an electronic recording. The circumstances and conditions under which the listener might receive such performance are infinitely variable and totally beyond both the control and the anticipation of the performing artists and the producers and distributors of the recording.

Id. at 1002 n.10, 249 Cal. Rptr. at 194 n.10. Similarly, one could argue that subliminal messages that are either recorded visually or audibly could not be viewed as a command for immediate action because of intervening events and the length of time between recording a subliminal message, receiving it, and acting upon it.

existing tests, it is unclear how a subliminal message could ever pose a clear and present danger, let alone an immediate one.

2. REGULATION OF THE FORM OF SPEECH

In addition to regulating the content of certain types of speech, regulatory statutes which are "not intended to control the content of speech but [which] incidentally limit . . . its unfettered exercise,"²⁵⁸ have been constitutionally justified if the regulation serves a compelling state interest and is narrowly tailored to accomplish a proper state purpose.²⁵⁹ To pass constitutional muster, the governmental interest must outweigh the constitutional interest against which it is balanced.²⁶⁰ As subliminal speech does not generally fall into one of the specific categories of regulatable speech, governmental regulations that indirectly limit speech pose a greater threat to subliminal speech because these regulations are based on malleable concepts like notions of privacy and individual autonomy.

For example, in *Kovacs v. Cooper*,²⁶¹ the United States Supreme Court upheld a city ordinance that prohibited persons using loudspeakers or sound amplification devices from broadcasting on public streets.²⁶² The Court balanced the constitutional right to disseminate ideas against the right of individuals to be free from distracting noises within their homes.²⁶³ The Court upheld the statute concluding that the "unwilling listener . . . is helpless to escape this interference with his privacy."²⁶⁴ But, the right to privacy has its limitations. For instance, in *Public Utilities Commission v. Pollak*,²⁶⁵ the Court held that it was constitutionally permissible for a street railway vehicle to play radio programs through its loudspeakers.²⁶⁶ In so holding, however, the Court explained that the right to privacy one enjoys in his own home is substantially limited by the rights of others when he travels on public thoroughfares or rides on public transportation.²⁶⁷

258. *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1960).

259. *See generally id.*

260. *Id.*

261. 336 U.S. 77 (1949).

262. *Id.* at 89.

263. *Id.* at 87.

264. *Id.* at 86-87.

265. 343 U.S. 451 (1952).

266. *Id.*

267. *Id.* at 464. "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance." *Id.* Interestingly, when reviewing the facts of the case, the Commission found that in the opinion of the bus operators, "the music on the vehicles had a tendency to keep the passengers in a better mood, and that it simplified transit operations." *Id.* at 459 (citation omitted). Perhaps this was due to subliminal effects of the music.

When determining the extent to which privacy may be invaded, the Court considers to what degree the individual is a captive audience.²⁶⁸ In *Cohen v. California*,²⁶⁹ the defendant was convicted of maliciously and willfully disturbing the peace for wearing a jacket with the words "Fuck the Draft" on it to protest the Vietnam War and the draft.²⁷⁰ On appeal, the Court stated that:

[W]e are often "captives" outside the sanctuary of the home and subject to objectionable speech. The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.²⁷¹

The Court overturned Cohen's conviction, reasoning that unsuspecting viewers could avoid further bombardment by "simply averting their eyes."²⁷² In *Erzonznik v. City of Jacksonville*,²⁷³ the Court expanded on this point:

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." Much that we encounter offends our aesthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.²⁷⁴

Commentators have argued that subliminal communications present a high degree of captivity because the recipient is unaware of the subliminal transmission. Thus, he does not have the choice of averting his eyes or shutting his ears.²⁷⁵ One could argue, however, that subliminal message captive audience cases are distinguishable from unwilling captive audience cases based on the element of pleasure. While the recipient of the subliminal message may not consciously know that he is being exposed to a subliminal message, his continued exposure results from his attraction to it. For example, a person may enjoy viewing a piece of art work even though he is unable to describe exactly what it is about the art work that he likes. Similarly, people view movies or listen to music because they find it

268. Note, *Subconscious Taken Captive*, *supra* note 17, at 1125-33.

269. 403 U.S. 15, 24 (1971); see *supra* notes 261-68 and accompanying text.

270. *Cohen*, 403 U.S. at 16.

271. *Id.* at 21 (citation omitted).

272. *Id.*

273. 422 U.S. 205 (1975).

274. *Id.* at 210 (citation omitted).

275. Note, *Subconscious Taken Captive*, *supra* note 17, at 1131.

somehow pleasurable. Additionally, because people bring many of these items into their homes voluntarily, the element of captivity is lessened if not removed.

Still, one commentator who believes that subliminal communication poses a high degree of captivity in and of itself, suggests that the Court find this type of expression intrusive and that it require full disclosure of all such transmissions.²⁷⁶ If this were the case, non-disclosure would trigger a new form of invasion of privacy action.²⁷⁷ The resulting litigation would not only diminish one's first amendment right of expression, but would also be unfair. This is because not all subliminal communication is manipulative or effective at controlling future human behavior.²⁷⁸ Thus, any new cause of action would have to be narrowly tailored so that only those persons exposed to messages that were effective in manipulating or modifying behavior could sue.²⁷⁹ This refinement could be analogized to the tort concept of false imprisonment where no cause of action lies unless the plaintiff knows he is being held against his will.²⁸⁰

276. *Id.* at 1131, 1138.

277. Although it does not approve of subliminal communications, the American Civil Liberties Union (ACLU) opposed a California Bill requiring users of subliminal speech to notify the public. The ACLU argued that the Bill would provide a private cause of action for invasion of privacy against subliminal communicators. Kiesel, *supra* note 30, at 27.

278. See *supra* note 58 and accompanying text.

279. One author suggests that "naturally occurring subliminal stimuli are not objectionable as an infringement on the capacity of autonomy any more than other phenomena (such as the weather) that evoke particular reaction and behavior." Gurnick, *supra* note 17, at 58 n.25. This is because "natural subliminal stimuli lack the intent in their creation and movement from source to recipient. Regulation[s] . . . can only apply to messages *designed* to affect behavior of an unknowing recipient." *Id.* at 52-56.

It appears, however, that the line between what naturally occurs and what occurs intentionally is hazy. For example, a women wearing a wedding band in a commercial or a commercial taking place in a snow storm may subconsciously evoke a certain feeling or mood which may appeal to a consumer's emotional need (perhaps the need for security, sex, or love with respect to the wedding band and the need for shelter with respect to the snow storm). See W. KEY, *supra* note 13, at 92-94, for an analysis on why an advertiser would have a women model wear a wedding band in a commercial. While it can be said that the advertiser purposely had the model wear the wedding band or the commercial take place in a snow storm, it can also be said that the feelings subconsciously prompted occurred as naturally as if the same subconscious feelings were triggered by actually seeing a women wearing a wedding band or being caught in a an actual snow storm.

280. RESTATEMENT (SECOND) OF TORTS § 35 (1965).

§ 35 False Imprisonment

(1) An actor is subject to liability to another for false imprisonment if

- (a) he acts intending to confine the other or third person within boundaries fixed by the actor, and
- (b) his act directly or indirectly results in such confinement of the other,

and

- (c) the other is *conscious* of the confinement or harmed by it.

Id. (emphasis added).

The courts have not yet considered the effects that subliminal messages may have on personal autonomy. Yet, if subliminal messages can encourage a desired type of behavior, the question of whether one's personal autonomy has been intolerably violated could become the central issue and determine whether restrictions or disclosure requirements are mandated.

B. *Personal Autonomy*

At the heart of the subliminal speech debate lie the sensitive issues of personal autonomy and invasion of privacy. The mere mention of subliminal communication to most people will conjure up images of 1984, *A Clockwork Orange*, or *A Brave New World*²⁸¹ and the possibility of a nation of automatons controlled by some evil genius. Protection of subliminal speech seems to conflict with the value that society places on privacy,²⁸² specifically, the sanctity accorded to one's own mind, thoughts, and free will. Currently, however, there is no consensus on the effectiveness, if any, of subliminal messages.²⁸³ Teachers, therapists, and parents could all testify as to how difficult it is to alter one's behavior even when the individual is motivated to change.²⁸⁴

One widely accepted view of the effectiveness of subliminal speech is that while they cannot change people's attitudes, subliminal messages may trigger a prior attitude or predisposition.²⁸⁵ Assuming this is true, does it necessarily follow that one loses his autonomy if he pursues an activity that has been subliminally suggested to him?

The general argument against subliminal communication is that it is immoral because it violates individual autonomy.²⁸⁶ A counter-argument is that "it is hard to find anything very sinister about a

281. W. KEY, *MEDIA SEXPLOITATION*, *supra* note 28, at 115.

282. Gurnick, *supra* note 17.

The value . . . of the institutions of civil life lies in their operation as giving reality to the capacities of will and reason . . . enabling them to be really exercised. In their general effect . . . they render it possible for a man to be freely determined by the idea of a possible satisfaction of himself, instead of being driven this way and that by external forces . . . and they enable him to realize his reason, i.e., his idea of self-perfection, by acting as a member of a social organization in which each contributes to the better being of all.

Id. at 56 (quoting Green, *Principles of Political Obligation* (1880), quoted in 12 BEHAVIORAL SCIENCE 465 (1967)).

283. See *supra* note 58 and accompanying text.

284. Moore, *supra* note 11, at 10.

285. Note, *Subconscious Taken Captive*, *supra* note 17, at 1089 (quoting Lander, *In Through the Out Door*, OMNI, Feb. 1981, at 45).

286. Crisp, *Persuasive Advertising, Autonomy, and the Creation of Desire*, 6 J. BUS. ETHICS 413 (1987).

science whose principal conclusion is that you get along with people by giving them what they want."²⁸⁷ Thus, by appealing to our subliminal desires—which are real desires just like our conscious desires—new desires are not created. On the contrary, old desires are satisfied.²⁸⁸

At least, theoretically, when we unknowingly purchase a product or act in a certain way that has been subliminally suggested, we subconsciously believe we are satisfying a subliminal desire. This of course assumes that the subliminal message touches off a subconscious desire bypassing the 'pesky' calculating and reasoning ego when the time comes to act.²⁸⁹ Further, if we continue to do the subliminally prescribed activity, we do so supposedly because the subliminal desire has been fulfilled. However, the more likely scenario is that we continue doing the activity because it pleases our conscious, rational desires, now that our reasoning ego gets into the act.²⁹⁰ Alternatively, if our subconscious desire is not fulfilled—or consciously the product or activity is displeasing—we will cease doing whatever has been subliminally suggested. In a sense, this is like a self-regulating market (or political structure). Either we get what we want or we move on (or vote the person out of power).

From this standpoint, it appears that the risk of violating one's personal autonomy is incurred only if one initially acts because a subliminally implanted message has aroused a subliminal desire. However, it is arguable whether one's autonomy is actually violated when this occurs because the desire is original and not manufactured. Fur-

287. Arrington, *Advertising and Behavior Control*, 1 J. BUS. ETHICS 3, 5 (1982) (quoting V. PACKARD, *supra* note 62, at 256).

288. *Id.* at 11.

289. *Id.* Instead of trying to remove subliminal communications so that people will not unknowingly be influenced to make "wrong" choices, a better technique to insure that people make "correct" choices is by encouraging education, religion, and societal and familial values. In a similar vein, Justice Brandeis stated: "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." *Whitney v. California*, 274 U.S. 357, 378 (1926) (Brandeis & Holmes, J.J., concurring).

290. It should be kept in mind, however, that subliminal stimuli must compete with stronger, supraliminal stimuli. This, in turn, diminishes the effectiveness of the subliminal stimulus.

Because subliminal stimuli are constrained by definition to be weak—to be otherwise would make for a supraliminal stimulus—subliminal stimuli are at a general disadvantage relative to competing supraliminal stimuli. Indeed, even stimuli normally perceived to be supraliminal may be filtered out of conscious awareness if competing stimuli are of greater importance. Thus, for subliminal stimuli to be effective, they must first successfully compete with all the supraliminal stimuli that demand attention.

Weinstein, Drozdenko & Weinstein, *supra* note 58, at 3 (citations omitted).

ther, "most of us have a benevolent subconscious which does not overwhelm our ego and its reason for action."²⁹¹ Thus, because our subconscious is kept in check by our reasoning ego, we are able to "respond to subliminal [transmissions] without risking our autonomy."²⁹²

V. CONCLUSION

As technology advances, it is inevitable that new forms of communication, some not yet considered, will be developed and cause clashes between claims of privacy and free speech. Subliminal communication is but one small example. While subliminal perception is not a new idea, technology has progressed so that the sphere of people who are exposed to such communications has been greatly increased. It appears, however, that, at least for now, a restriction on subliminal speech would be a knee-jerk reaction to undifferentiated fears. The scientific evidence regarding the effectiveness of subliminal suggestion is unclear at best. Further, because of the prevalence of intentional, inadvertent, or naturally occurring subliminal communications, regulations would be difficult, if not impossible, to fashion. Also, at least with respect to artistic expression, subliminal techniques have been employed for generations and are protected under the first amendment. If a painter could be held liable for subliminally embedding the word "DEATH" in his painting or a musician could be found responsible for the suicide death of a fan, all art forms would potentially be chilled. Artists would fear being prosecuted for some message that someone found in the work. Finally, it should not be assumed that humans, as thinking, rational beings, need paternalistic protection of laws restricting subliminal transmissions. It is hard to believe that subliminal suggestion can summarily wipe out a person's normative values that have been instilled by society and cause that person to pursue activities that he or she would not normally do. I, for one, think people deserve more credit.

SCOT SILVERGLATE

291. Arrington, *supra* note 287, at 10.

292. *Id.*