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Onslaught: Commercial Speech and Gender Inequality

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ONSLAUGHT: COMMERCIAL SPEECH AND GENDER INEQUALITY

Tamara R. Piety[†]

Utilizing Dove's infamous "Onslaught" viral ad, this Article explores the ways commercial speech constructs images of and attitudes toward women that interfere with full equality for women. Advertising and marketing contribute to creating a social reality in which it is taken for granted that women must spend a great deal of time on appearance and that appearance is of critical importance to life success. As is typical for much advertising, it often does this by stimulating anxiety. Such anxiety may contribute to low self-esteem, lowered ambitions and stereotype threat reactions, as well as to biased reactions on the part of others—all of which may serve as obstacles to women achieving greater equality. The barrage of images which portray women as sexual objects or commodities also sends a message in some tension with full equality for women and may similarly lead to harmful self-conceptions on the part of women, as well as leading both men and women to view women as less competent. Harms such as these are often justified on the basis of the right of the speaker to participate in public debate or in the public's right to receive advertising "information." The Dove ad itself, however,

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undermines these arguments by illustrating the problem in locating a "speaker" for commercial speech and raising questions about the nature of the "information" provided by advertising. In this Article Professor Piety argues that these questions should give us pause before accepting arguments to extend full First Amendment protection to corporate speech.

. . . so do your best to run away, but take a breath and you will pay you cannot hide

—Lyrics to “La Breeze,” soundtrack for Dove “Onslaught” campaign for real beauty video¹

[Y]ou *have* to know that for young girls there’s a cumulative effect of seeing so many women everywhere serving so many men’s interests—all the time. At some point, the message sinks in: Gals exist for the sole purpose of pleasing guys.

—Nathan McCall, *What’s Going On*²

A couple of years ago Dove posted a video called “Onslaught”³ as a part of a marketing effort it called its “Campaign for Real Beauty,”⁴ The video appears to make an argument that advertising of beauty products and the representations of women in advertising constitute an “onslaught” which generates in viewers an unhealthy fixation on appearance at the expense of other concerns and contributes to women’s anxiety about these issues,—presumably to the detriment of the development of their abilities. It is a visually powerful⁵ argument

¹ SIMIAN, *La Breeze*, on WE ARE YOUR FRIENDS (Astralwerks 2002) lyrics available at http://www.wearesimian.com/music_songbook.htm.

² NATHAN MCCALL, WHAT’S GOING ON: PERSONAL ESSAYS 41 (1997).

³ See *Onslaught* (Dove advertising campaign commercial 2007), [http://www.dove.us/features/videos/default.aspx\[cp-documentid=7049560/\]](http://www.dove.us/features/videos/default.aspx[cp-documentid=7049560/]) (last visited Aug. 29, 2009). Dove positioned the campaign for real beauty *as if* it was a political campaign to encourage change, but it was nevertheless an advertising campaign; see also Bob Garfield, ‘Onslaught’ Is a Triumph—If You Don’t Count the Hypocrisy, ADVERTISING AGE, Oct. 8, 2007, at 50 (highlighting inherent conflicts between the video’s message and its advertising role).

⁴ For a wonderfully incisive discussion of the video, as well as links to related articles, see Jon Hanson, *Hey Dove! Talk to YOUR Parent!* THE SITUATIONIST, Oct. 21, 2007, <http://thesituationist.wordpress.com/2007/10/21/hey-dove-talk-to-your-parent/>.

⁵ In my experience there is no substitute for a visual demonstration. Attempts to describe the advertising environment are inevitably drained of some of their power by being reduced to words rather than images. Why “seeing is believing” and believing is perhaps the most powerful component of “knowing”—even when the seeing is misleading—could be the subject of a separate article. See generally ROBERT A. BURTON, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN WHEN YOU ARE NOT (2008) (examining the inconsistent relationship between

that we should not dismiss or trivialize the effects commercial speech may have on us.

It is also deceptive. Although the video appears to be social commentary, it is really just advertising, advertising that is intended to sell its product by convincing the viewer that Dove “cares,” that Dove as a company (which it probably is not, but more on that later), is a responsible company and that women who also care about these issues should buy Dove products to support a responsible company.

The “Onslaught” ad is an excellent illustration of what is so problematic about commercial speech. In particular, it illustrates why extending protection for expression to nonhuman, for-profit entities which, unlike human beings, have no inherent expressive needs, is fundamentally misguided. The Dove video also serves as a useful vehicle for exposing some of the shortcomings of the current commercial speech doctrine, in that while the doctrine permits the government to regulate untruthful commercial speech, it fails to capture much that is commercial, as well as much that is misleading and arguably harmful. The advertising critiqued in the Dove video illustrates some of that harm.

In this article, which is a part of a series of articles I have written on commercial speech,⁶ I use the Dove “Onslaught” video as a

human thought and human knowledge, and arguing that “certainty” is more of a mental sensation than evidence of fact). Treating eye-witness accounts as a trump card, of course, runs the significant danger of assuming everyone is “seeing” the same thing. *See generally* Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (discussing the Supreme Court’s decision in *Scott v. Harris*, 550 U.S. 372 (2007), which suggested there was only one plausible interpretation of the events at issue, and a related empirical case study in which a group of participants shown the tape at issue in *Scott* reported differing interpretations of the same events).

⁶ *See generally* Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008) [hereinafter *Against Freedom*] (arguing that broad protection for commercial and corporate speech does not advance interests the First Amendment is meant to protect); Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 LOY. L.A. L. REV. 181 (2007) (describing why concern about competition in the marketplace of ideas suggests that commercial expression needs regulation); Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367 (2006) [hereinafter *Free Advertising*] (arguing commercial speech doctrine should include all public relations speech that functions as marketing); Tamara R. Piety, *Why the ACLU was Wrong About Nike, Inc. v. Kasky*, 41 TULSA L. REV. 715 (2006) (describing why the ACLU’s institutional goals should have aligned the organization with Kasky in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003)); Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151 (2005) (exposing a major oversight in the analysis of the *Nike* case in that most commentators failed to note Nike had been accused of an intentional tort—fraud—and thus its First Amendment defense represented an attempt to cut off fraud claims, as well as negligence claims); Tamara R. Piety, *“Merchants of Discontent”: An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV.

starting point for a discussion about how commercial speech contributes to harm to women and why, in a world in which women still do not enjoy equal pay, are grossly unrepresented in politics and business, and continue to face harassment and physical insecurity on the basis of gender, such commercial expression should not receive the *full* First Amendment protection. Although my suggestion is likely to be fairly controversial because it raises the specter of some sort of “gender police,” I want to emphasize that this argument does not compel *any particular* legislative response. Nor does it end the question of whether the benefits of advertising outweigh the harms. This article is not meant as conclusive proof that advertising harms women. Rather, I want to suggest there is evidence of harm that must be taken seriously. I do not offer suggestions about how we should address those harms should we find the evidence compelling. But treating advertising to heightened First Amendment protection, as some argue for,⁷ would certainly make it more difficult to craft solutions. Until we take a fuller account of the damage that is done by the commercial speech onslaught, we should not disarm ourselves. However, before discussing the Dove ad and its implications for commercial speech and the First Amendment, it seems necessary to make some foundational observations in the sections that follow—first, that women have not arrived at a position of full equality with respect to their position in the public sector—in work, politics, business or the professions; and second, to briefly describe the advertising environment that the Dove video seems to critique.

I. ELUSIVE GENDER EQUALITY

Despite many legal efforts—through legislation and litigation—real gender equality remains a somewhat elusive goal. Women continue to make less money than men do in the same jobs.⁸ They continue to experience disparate burdens with respect to housework and childrearing.⁹ Women are *overrepresented* in lower status jobs

377 (2001) (drawing parallels between the model of human reasoning on which advertising appears to be based and models of addiction).

⁷ See sources cited *infra* notes 53–54.

⁸ See, e.g., Hannah Fairfield, *Why is Her Paycheck Smaller?*, N.Y. TIMES, Mar. 1, 2009, at BU4 (N.Y. ed.) (discussing pay disparity within various employment fields); *Mind the Gap: Pay Discrimination Between Male and Female Scientists*, ECONOMIST, Sept. 9, 2006, at 76; Harriet Rubin, *Sexism*, CONDÉ NAST PORTFOLIO, Apr. 2008, at 93–97.

⁹ See Debra Cassens Weiss, *The Baby Effect: More Billables for Men, Fewer for Women*, ABA JOURNAL, Mar. 24, 2008, http://www.abajournal.com/news/the_baby_effect_more_billables_for_men_fewer_for_women (discussing the disparate impact of having children on number of hours billed by male and female lawyers); see also James Delingpole, *Is a Woman's*

within the same professions and job categories with men¹⁰ and are *underrepresented* in politics and in the upper echelons of management.¹¹

In addition to these facts on the ground, women are treated to a barrage of stories in the media suggesting that women who successfully pursue careers to become part of that minority of women in politics or business will pay a high price in lost opportunities for motherhood or in lost relationships because they have over-emphasized the development of their non-family talents and interests.¹² For example, just a few years ago a *Forbes* columnist advised male readers: “[W]hatever you do, don’t marry a woman with a career.”¹³ He claimed that women with careers were more likely to be dissatisfied with their marriages, neglect housework, and have affairs than were women who did not have careers.¹⁴

Place STILL in the Home? DAILY EXPRESS, (London), Nov. 17, 2003, at 13 (“[C]hild rearing and home-making are the foundation of all that is good in the world, and far too important to be put in the hands of creatures so useless as men.”). Although the author is clearly writing a humor column, the sentiments expressed by the pretended elevation of housekeeping to a status that is “too important” for men to handle could have been lifted from similar writings more than 100 years ago and, when confronted with the need to shoulder this work in addition to paid employment, it is not surprising that some women find the humor rather more elusive.

¹⁰ See sources cited *supra* note 8.

¹¹ See, e.g., Jennifer L. Lawless & Richard L. Fox, *Why Are Women Still Not Running for Public Office?*, 16 ISSUES IN GOVERNANCE STUDIES 1 (May 2008); *The Conundrum of the Glass Ceiling: Why Are Women So Persistently Absent from Top Corporate Jobs?*, ECONOMIST, July 23, 2005, at 63; *Sex Changes: Women Are Gaining Equality in Professions that Used to Be Male Preserves, but Not Complete Equality*, ECONOMIST, July 4, 2005, at 55.

¹² See generally CARYL RIVERS, *SELLING ANXIETY: HOW THE NEWS MEDIA SCARE WOMEN* (2007). Rivers’ book is a more recent entry along the lines of journalist Susan Faludi’s important work which makes some of the same observations—that as women made gains in the public sphere, there appeared to be cultural backlash to scare women into returning to the private sphere; see also SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 75–229, 257–81 (Doubleday 1992) (1991) (discussing the cultural backlashes against women on television and in the media, movies, fashion, beauty, and national politics). Note that I wrote “non-family talents and interests” rather than “career” intentionally. Although “career” should be a neutral term, as applied to women it often seems to take on the tones of some sort of optional or vanity pursuit rather than an attempt to earn a living or to earn a living and develop one’s talents. It is probably the case that most people, men and women, don’t precisely have a “career” in the sense of working for their own satisfaction and developing their talents. Most people work in order to earn a living. There is nothing supplemental about it.

¹³ Michael Noer, Editorial, *Point: Don’t Marry Career Woman*, FORBES.COM, Aug. 22, 2006, http://www.forbes.com/2006/08/23/Marriage-Careers-Divorce_cx_mn_land.html.

¹⁴ Id. At one point *Forbes* took this article off line. For a discussion of the resulting controversy see Declan McCullagh, *Forbes.com Yanks Articles Over Marrying-Career-Women Flap*, CNET NEWS BLOG, Aug. 23, 2006, http://news.cnet.com/8301-10784_3-6108978-7.html Noer seemed to assume that marriage stability (i.e., the failure to get divorced) equaled marital happiness. He apparently did not consider that economic dependency was not the same thing as marital “happiness.” But perhaps from his point of view it did not matter. He also did not equate all paid work outside the home as creating this problem. Rather, it was only that sort of work that could be characterized as relatively high status, usually requiring higher education or a professional degree, and potentially high income that threatened women’s desirability as a

And although many gains have been made in the fight for equal rights for women, it is distressing to see how much things have stayed the same. For example, there are indications that housework is still “women’s work,”¹⁵ and that the pursuit of a professional career still the man’s prerogative.¹⁶

So perhaps it is not surprising that the sexist language and imagery we saw in the 2008 election elicited so few protests. When campaigning for president, Hillary Clinton faced hecklers who cried, “Iron my shirt!”¹⁷ Vendors sold Hillary Clinton nutcrackers.¹⁸ And at one rally John McCain was asked how Republicans were going to “beat the bitch.”¹⁹ Like most observers, McCain did not seem to be offended.²⁰ Instead, he laughed. Many in the media contributed to the sexism Clinton faced on the campaign trail by commenting that Clinton reminded them of a scolding mother or, as columnist Mike Barnicle put it, “everyone’s first wife.”²¹ Others seemed to feel that claims of sexism were over-blown²² or too “old school.”²³ It is

marriage partner.

¹⁵ For example, anyone who regularly watches TV can observe that women are predominantly depicted in advertisements for household cleaning products. *See infra* note 33 and accompanying text.

¹⁶ *See, e.g.,* Fairfield, *supra* note 8.

¹⁷ *Clinton Responds to Seemingly Sexist Shouts*, USA TODAY, Jan. 7, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-01-07-clinton-iron-emotion_N.htm. It is interesting that the editors at USA Today saw fit to include the adjective “seemingly.” On the surface there is no “seemingly” about it. On the other hand, perhaps the editors were responding to the rumor that the event was staged. *See* James Joyner, *Hillary Clinton ‘Iron My Shirt’ Stunt*, OUTSIDE THE BELTWAY, Jan. 8, 2008, http://www.outsidethebeltway.com/archives/hillary_clinton_iron_my_shirt_stunt/.

¹⁸ The Clinton nutcracker is joined by a Bill Clinton corkscrew. *See* The Official Site of the Hillary Nutcracker and the New Corkscrew Bill, <http://www.hillarynutcracker.com/completelynuts.html> (last visited Sept. 25, 2009).

¹⁹ Marc Santora, *Pointed Question Puts McCain in a Tight Spot*, N.Y. TIMES, Nov. 14, 2007, at A19. It is worth noting that a woman asked this question.

²⁰ *See* Marie Cocco, Editorial, *Misogyny I Won’t Miss*, WASH. POST, May 15, 2008, at A15, (describing one of the most disheartening aspects of the response to such comments to be the silence); *see also* Kathleen Deveny, *Just Leave Your Mother Out of It*, NEWSWEEK, Mar. 17, 2008, at 32 (discussing the pervasiveness of sexist responses to Hillary Clinton’s campaign).

²¹ Cocco, *supra* note 20.

²² For some examples of those who feel the sexism claim is over blown, see some of the comments appended online to Gloria Steinem’s editorial decrying the sexism to which Clinton was exposed during the campaign. *See* Gloria Steinem, *Women Are Never Front-Runners—Readers’ Comments*, N.Y. TIMES, Jan. 8, 2008, <http://www.nytimes.com/2008/01/08/opinion/08steinem.html>.

²³ *Times* columnist Maureen Dowd suggested that charges of sexism against Clinton smacked too much of “old school” feminism. *See* Maureen Dowd, *Duel of Historical Guilts*, N.Y. TIMES, Mar. 5, 2008, at A23 (noting that many women voters felt torn between voting for Barack Obama and Hillary Clinton due to empathy towards both candidates); *see also* Kathleen Parker, *Gloria Steinem’s Last Stand*, TULSA WORLD, March 6, 2008, at A15. (“Trying to convince women under 50 that gender is a barrier to success feels not just stale, but dishonest.”). It may feel stale and dishonest, but it is clearly not. *See* sources cited *supra* notes 8–20.

difficult to imagine that if we substitute racist taunts for the sexist one that there would not have been an immediate outcry.²⁴

It may be “old school” but the figures cited above suggest that women continue to experience discrimination and to be judged by different standards than men. In particular, women are subjected to more scrutiny about their appearance.²⁵ This, too, came up in the campaign. Columnist Michael Kinsley suggested that Hillary Clinton might have had a grooming disadvantage because cultural expectations regarding women’s appearances often result in women having to spend more time than men on grooming and dressing.²⁶ Kinsley estimated that even if it was only a twenty-minute difference over the course of the campaign, that 20 minutes could add up to “an extra two weeks of campaigning or sleep for a male candidate.”²⁷

²⁴ Compare the relative quiescence of the press and public about these attacks on Clinton, to the outrage directed at the *New York Post* when it ran a cartoon that appeared to portray President Obama as a monkey by tying together the passage of the budget stimulus with the recent shooting by a police officer of a chimpanzee that had run amok and attacked and killed a woman in Connecticut. See Sam Stein, *New York Post Chimp Cartoon Compares Stimulus Author to Dead Primate*, THE HUFFINGTON POST, Feb. 18, 2009, http://www.huffingtonpost.com/2009/02/18/new-york-post-chimp-carto_n_167841.html; *Murdoch Says Sorry Over Obama Cartoon*, SKY NEWS, Feb. 24, 2009, <http://news.sky.com/skynews/Home/World-News/Rupert-Murdoch-Says-Sorry-Over-Chimp-Cartoon-Of-Obama-Seen-By-Critics-As-Racist-Towards-Obama/Article/200902415228876>. I am *not* proposing that outrage was not the appropriate reaction to that cartoon. It was. The cartoon *The Post* ran was outrageous and merited censure. What I am disturbed by was how little outrage the comments directed at Clinton seemed to engender.

²⁵ See Daphne Merkin, *The Politics of Appearance*, N.Y. TIMES STYLE MAG., Aug. 26, 2007, at 307–309 (discussing the degree of scrutiny of female candidates’ appearance, but suggesting that the difference between scrutiny of male and female candidates on the basis of their appearance is a distinction that is “fast eroding”). Of course discrimination on the basis of appearance is not just a problem for women, but to the extent that beauty is often seen as more critical for women, the general bias towards beauty may disproportionately impact women. There is some data to support that it does. See Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1040 (2009).

²⁶ See Michael Kinsley, Op-Ed., *Making Up Is Hard to Do*, WASH. POST, Mar. 26, 2008, <http://www.washingtonpost.com/wpdyn/content/article/2008/03/26/AR2008032602225.html>. In fact, women are arguably in a “Catch-22” because they must be attractive, but not *too* attractive. See Merritt Baer, *Hillary Clinton, the Halo Effect, and Women’s Catch-22*, THE SITUATIONIST, Dec. 10, 2008, <http://thesituationist.wordpress.com/2008/12/10/hillary-clinton-the-halo-effect-and-women%E2%80%99s-catch-22/> (describing some of the media criticisms of Hillary Clinton for not being “feminine” enough and the excessive coverage of Sarah Palin’s “beauty queen” background, and suggesting that viable candidates need to be somewhere in a very narrow middle); see also Nathan A. Heflick & Jamie L. Goldenberg, *Objectifying Sarah Palin: Evidence that Objectification Causes Women to be Perceived as Less Competent and Less Fully Human*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 598 (2009) (noting that subjects tended to rate Sarah Palin as more competent when they were not also asked questions regarding her appearance).

²⁷ Kinsley, *supra* note 26; see also Rhode, *supra* note 25, at 1041 (reporting some estimates on the amount of time and money American women spend on grooming).

II. MARKETING INEQUALITY

Given the long history of discrimination against women, one might think these phenomena would prompt the recognition that we have a long way to go before declaring ourselves in a post-feminist era or labeling objections to sexism “old school.”²⁸ Yet many observers in the mainstream continue to suggest that the differing positions of men and women in society are attributable to some essential, eradicable “difference” that justifies disparate treatment. For example, in what became a notorious *contretemps*, Larry Summers, the former President of Harvard College and a current member of the Obama administration, proposed that perhaps women were underrepresented in math and science because they had less aptitude for it or were opting out of the requisite long hours of study or work.²⁹

Summers may have been wrong about the reasons for the disparities between men and women’s achievements in the academy,³⁰ but his impulse to look for some essential difference(s) that would explain the disparity is fairly commonplace. However, there may be an explanation (or at least a partial one), right under our noses for why women continue to experience more difficulties in ascending to the highest levels of achievement in the public sphere, and that explanation has nothing to do with our DNA. Perhaps we need look no further than the advertising environment in which

²⁸ See Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography, and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 114 n.78 (2007) (discussing this and other observations about “third wave feminism.”).

²⁹ Summers’ claim inspired a great deal of outrage and a number of heated responses. Marcella Bombardieri, *Summers’ Remarks on Women Draw Fire*, BOSTON GLOBE, Jan. 17, 2005, at A1, available at http://www.boston.com/news/local/articles/2005/01/17/summers_remarks_on_women_draw_fire/. Ultimately, he stepped down as President of Harvard and this incident was thought by many to have contributed to the no confidence vote that preceded his resignation, as well as to Obama’s decision not to appoint him Secretary of the Treasury. David Osborne, *Summers’ ‘Sexism’ Costs Him Top Treasury Job*, INDEPENDENT (U.K.), Nov. 24, 2008, <http://www.independent.co.uk/news/world/americas/summersrsquo-Isquosexismrsquo-costs-him-top-treasury-job-1033373.html>.

³⁰ See Stanley Fish, *Clueless in Academe*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Mar. 4, 2005, at C1 (discussing the incident); see also Ellen Goodman, *Are Women Opting Out or Cut Out?*, TULSA WORLD, Aug. 2, 2008, at A15 (citing recent studies that math scores of females are equal to those of males to disprove the “opt out” theory, along with other recent studies suggest that women have not been quite as eager to pursue a “mommy track” as earlier researchers and some in the media supposed); see also Maria José Viñas, *Girls as Good as Boys at Math, Study Finds*, CHRON. HIGHER EDUC. (Wash., D.C.), July 24, 2008, <http://chronicle.com/blogPost/Girls-as-Good-as-Boys-at-Math/4118>. (discussing recent information that suggests there is no aptitude gap with respect to math, and that girls apparently have as much aptitude as boys). Instead, any disparity appears to be due to bias. See Rachana Dixit, *UVA Study: Bias Remains on Sexes, Science*, DAILY PROGRESS (Charlottesville, Va.), June 23, 2009, available at http://www2.dailyprogress.com/cdp/news/local/article/uva_study_bias_remains_on_sexes_science/41836/ (discussing the issue of stereotypes linking men to science more often than women).

women are routinely objectified and commodified to find one factor contributing to the persistence of sexism that appears to account for the lack of representation of women at the highest levels. Much advertising conveys an implicit message that women's appearance is of critical importance to their success as persons.³¹ Quite apart from the "grooming disadvantage" Kinsley suggested may exist and which this advertising environment supports and encourages, there is evidence that these representations affect how women view themselves, as well as how others view them when assessing their competence. All these factors could serve as additional obstacles to women's success. Commodification reinforces women's status as subordinate, often while ostensibly celebrating women's progress toward equality.³²

For example, advertising tells us housework is women's work and the home is the legitimate province of women (notwithstanding that men who live alone must also maintain their homes and that many men who live with women perform household cleaning chores beyond taking out the garbage). If you had any doubts about who does the housework in America, looking at the advertising

³¹ It is telling that the first sentence of Professor Crawford's article above is "[f]eminists are *ugly, boring, and shrill*, according to their critics." Crawford, *supra* note 28, at 100 (emphasis added). Note "ugly" is the first criticism. "Boring" and "shrill" of course also play to gendered stereotypes. Professor Crawford does not endorse these judgments; she merely reports on the objections others have made.

³² Here I would like to note that this article is addressed the issue of women in advertising at a very general level, and fails to capture the nuances of representation and discrimination as they play out for women of color and for lesbian women. See Scott Coltrane & Melinda Messineo, *The Perpetuation of Subtle Prejudice: Race and Gender Imagery in 1990s Television Advertising*, 42 *SEX ROLES* 363 (2000) (discussing the racial component involved in the objectification of women); see also Minjeong Kim & Angie Y. Chung, *Consuming Orientalism: Images of Asian/American Women in Multicultural Advertising*, 28 *QUALITATIVE SOC.* 67 (2005). I do not in any way intend to suggest these nuances do not exist or to minimize injuries that are distinctive for particular groups of women (or indeed men). Women (and men) of all races, however, are affected by the practices I describe here, even if sometimes in different ways or if subject to double harms. This seems, however, to be the subject of an additional article and I cannot do the subject justice here. Some observers feel the only racial problem is the lack of racial balance in much advertising. There are undoubtedly benefits from having a more racially balanced (and non-stereotyped) representation of models in the media. It may help us achieve greater equality in society at large to the extent that broadening the racial representation may increase the positive attributes associated with races other than white, but it may not do much for gender equality. Likewise, it is commonplace to observe that there is more "beefcake," such as David Beckham's recent Calvin Klein underwear ad, than there used to be, so objectification should not be equated with inequality. This argument might have more force if women did not continue to lag in wages and opportunities in all sectors. Moreover, it hardly seems to me we should rejoice in generating body anxiety and low self-esteem equally among men and women (although I think there is little evidence to date that it is anything like equal). *But cf.* HARRISON G. POPE, JR., KATHERINE A. PHILLIPS & ROBERTO OLIVARDIA, *THE ADONIS COMPLEX: THE SECRET CRISIS OF MALE BODY OBSESSION* (2000) (arguing that male body image issues are at least as prevalent today as their female counterparts). In any event, I argue that equality in objectification is a dubious goal.

environment would erase them. Ads for most household cleaning products feature a woman using the product. In fact, advertising for household cleaning products often offers a sort of pretend romance theme. For example, Swiffer, a brand of disposable mops, runs an ad comparing a woman's "relationship" with a mop and broom as akin to a romantic relationship.³³ An older example is the Mr. Clean brand featuring a brawny cartoon character who "saves" the housewife by swooping in with a faster acting or more effective cleaning product. And in advertising in general, women are portrayed as the ones doing the cooking, cleaning, and the ferrying of children to school and other appointments.

Not only does advertising offer reinforcement of stereotypical gender roles, it also deluges us with images of women as objects. Sexually suggestive photos often accompany pitches for the most mundane products.³⁴ It is commonplace to see women in bikinis in ads for beer, cars and hamburgers. And because the thriving sex industry has become more mainstream, explicitly sexual imagery also abounds in advertising to promote sexual services for strip clubs (euphemistically referred to as "gentlemen's clubs") and escort services. These ads carry a double whammy. At the first level they offer a particular representation of women and of female beauty that may be unattainable for most women. But worse, they also highlight that in these businesses, women *are* the commodity.

One columnist, Lenore Skenazy, argued that the classified ads in the back of many newspapers and magazines are essentially advertising for sex slaves because there is no way to tell whether the women engaged in these businesses are doing so willingly.³⁵ These

³³ A woman is shown shopping in a grocery store. She pauses to look at the Swiffer product. Another woman who appears to be an employee touts the product and then says "Trust me. Once you try it you'll never go back to your old mop and broom again." At this point "Baby Come Back" plays in the background as a mop and a broom appear to be peering around the corner and emerging from a pile of potatoes. See New Swiffer Commercial—Baby Come Back (Swiffer television advertisement 2008), <http://www.youtube.com/watch?v=PFbeP6YqHzg> (last visited Sept. 25, 2009). Other variations on this ad have a broom serenading a woman, a mop peering through a window as rain streams down, and a mop sending candy and flowers.

³⁴ American Apparel ads, for instance, have been very controversial for depicting what resembles child pornography. For examples of these ads see American Apparel, Advertising, <http://americanapparel.net/presscenter/ads/index.aspx> (last visited Oct. 19, 2009); see also Meghan Daum, *There is a Very Thin Line Between Ick and Porn*, TALLAHASSEE DEMOCRAT, Sept. 4, 2007. Alex Leo, blogger on The Huffington Post and author, collected her list of five of the most sexist trends in advertising. They were: bondage, rape, "sluts," "girl-on-girl action," and "money shots." See Alex Leo, *5 Sexiest Advertising Trends*, Dec. 11, 2008, <http://listicles.themagazine.com/2008/12/5-sexist-advertising-trends/>. The images on this list include some American Apparel ads.

³⁵ See Lenore Skenazy, *Classifieds: The Acceptable Way to Sell Immigrant Sex Slaves*, ADVERTISING AGE, June 25, 2007, at 21 (discussing the ambiguous language of adult classified ads in the back of magazines that make it difficult to discern the true intent of the ads); see also

ads are deceptive, she claimed, because they hide behind euphemisms like “gentlemen’s club,” “escort service,” “massage,” and “bodywork” to conceal the true nature of the businesses they promote.³⁶ Truthful ads, she writes, would force us to confront that reality. A truthful ad, she proposes, would read something like this:

For sale: Young women. Hundreds to choose from. Choose by race, age or country of origin. Have sex with them, whether they chose this job willingly or not! Don’t delay—enjoy a brothel *today!*³⁷

It may be difficult for a woman to feel that she will be taken seriously as a worker when confronted with this evidence that she is (to some) a commodity. Likewise, such ads remind men of the same thing. It may make it easier for them to take the position that women are ultimately fungible, that as commodities it is inappropriate for women to appear in a role that is not subordinate to men.

In addition, the aesthetics of pornography and the sex industry have penetrated the culture at large. The culture is awash in sexually explicit³⁸ literature, television, videos, and movies. This culture of sexually-charged advertising often valorizes (or at least normalizes) the commodification of women generally.³⁹ One beer ad takes this

Catherine Bennett, *Why Can’t We Stop the Spread of Degrading Adverts for Sex?*, OBSERVER, June 1, 2008, at 31, available at <http://www.guardian.co.uk/commentisfree/2008/jun/01/advertising.gender> (discussing the proliferation of adult advertisements in London due to England’s liberal licensing laws, and the resulting increase in adult clubs).

³⁶ See Skenazy, *supra* note 35.

³⁷ *Id.* According to Professor Crawford, sexual slavery and violence against women in pornography is part of the dark underside of the porn industry with which many of those who consider themselves “sex-positive,” or a part of the third wave of feminism, cannot come to terms. See Crawford, *supra* note 28, at 131. John Kang makes a similar argument in his excellent article “Taking Safety Seriously.” See generally John M. Kang, *Taking Safety Seriously*, 15 MICH. J. GENDER & L. 1 (2008).

³⁸ It is not merely that they are sexually explicit. It is that they typically present a picture of women’s sexuality through a lens of male (heterosexual) desire.

³⁹ See PAMELA PAUL, PORNIFIED: HOW PORNOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES 67–70 (2005) (noting the pervasive nature of pornography in American culture). On television, adult film stars like Jenna Jameson are likely to appear as if they are just another celebrity. Young women like Paris Hilton or Kim Kardashian attain celebrity status through dissemination of sex tapes. Television shows romanticize prostitution, and reality television features women as contestants who present acting as performers in adult films or strip clubs as just one of a number of occupations in the entertainment industry. See Jennifer L. Pozner, *The Unreal World: Why Women on “Reality TV” Have to be Hot, Desperate and Dumb*, MS., Fall 2004, at 50 (noting that often the image reflected by sexuality in women on “reality TV” is one in which their “desires” essentially reflect men’s fantasies). Other commentators have noted the link between pornography and mainstream advertising and suggested that the latter is a better vehicle for attacking the attitudes that are reflected in pornography. See Cheryl B. Preston, *Consuming Sexism: Pornography*

picture of woman as commodity whose function is to serve men one better by using not a real woman in its ads but a mock robot with a beer keg that springs from where her uterus would be.⁴⁰ This is environment the Dove video appears meant to critique.

III. THE DOVE AD

In the “Onslaught” video a black screen fades to a picture of a pre-teen, red-headed girl whose face fills the screen. In the background plays “La Breeze,” a song from a now-defunct European techno-dance group called Simian. A few keys are repetitively struck as a percussive beat plays with a chorus of voices singing, “Here it comes, here it comes, here it comes.” The refrain rises in volume and pitch until it builds to a visual and aural crescendo with an explosion of fast-cut pictures of women’s bodies (mostly clad in underwear or swimwear) flashing by. It is a fusillade of images, shooting right in your face.

The women are all extremely thin and large breasted.⁴¹ They embody the hyper-sexualized images of women familiar to anyone living in the United States.⁴² That barrage is followed by a second one

Suppression in the Larger Context of Commercial Images, 31 GA. L. REV. 771, 844-45 (1997) (discussing how such commercial advertising images transform “what is displayed in dark adult theaters to what is exhibited on the coffee table”).

For a recent example of the suggestion that being a sex worker can be a ticket to career success, see the case of Ashley Dupré, the call girl who was involved in the downfall of New York Governor Elliot Spitzer. See Nat Ives, *Sorry, Ashley: Your 15 Minutes Are Almost Up*, ADVERTISING AGE, Mar. 24, 2008, at 3, 25 (observing Ashley Dupré had already missed out on \$1 million by failing to capitalize quickly on her notoriety).

⁴⁰ See Bob Garfield, *A Heineken Spot That’s So Sexist It Left Even Us Feeling Infuriated*, ADVERTISING AGE, Aug. 27, 2007, at 25. The “most sexist beer commercial” would seem to offer some tough competition given this is a category that includes the Swedish Bikini Team ad. But Garfield notes that the Heineken commercial essentially animates all the worst jokes about “the perfect woman.” *Id.*

⁴¹ These two would seem to be contradictory except that, with the advent of the popularity of breast augmentation surgery, it seems our screens are filled with images of a female body type that presumably only rarely occurs in nature—a very slim woman with boyish hips but exceptionally large breasts. See, e.g., ARIEL LEVY, *FEMALE CHAUVINIST PIGS: WOMEN AND THE RISE OF RAUNCH CULTURE* 5 (2005) (“A tawdry, tarty, cartoonlike version of female sexuality has become so ubiquitous, it no longer seems particular.”); Laurie Essig, *Ordinary Ugliness: The Hidden Cost of the Credit Crunch*, THE CHRON. REV., in CHRON. OF HIGHER EDUC. (Wash., D.C.), Jan. 30, 2009, at B10, B11 (“Surgically enhanced, gravity-defying breasts, collagen-pumped lips, and a hairless pubis, like that of a child, are the most prominent physical attributes of most women in porn.”); Margaret Talbot, *Little Hotties: Barbie’s New Rivals*, NEW YORKER, Dec. 4, 2006, at 74 (Dec. 4, 2006) (describing Bratz dolls as resembling “pole dancers on their way to work at a gentlemen’s club.”).

⁴² I say “hyper-sexualized” to denote that sex-appeal, or perceived sex-appeal, to heterosexual men is conveyed by minimal clothing and conventional representations of beauty. Models are made up and positioned in sexualized poses (for example with hands on hips or covering genitals or breasts). See sources cited *infra* notes 91–100 and accompanying text.

in which a set of images (apparently sampled from real ads) with voiceovers promising women they can look “younger,” “lighter,” “firmer,” “tighter,” “thinner,” and “softer.” It is followed by scenes of women shrinking and expanding, interspersed with images of food, some graphic images of cosmetic surgery and other images that appear to be of bulimic purging. The soundtrack is eerie and compelling. The spot ends with a fade out to a group of pre-teen girls crossing the street. The original little girl brings up the rear of the group and looks into the camera as the film runs in slow motion. A fade-in to text follows, urging the viewer to “talk to your daughter before the beauty industry does.”⁴³

“Onslaught” is a compelling visual indictment of the assault on the senses, self-esteem, and psychological well-being of women that the non-stop, 24/7, 360^o⁴⁴ marketing environment represents.⁴⁵ As such, the video appears to be social commentary, albeit commentary sponsored by a for-profit corporation. Typically we assume that social commentary of this sort is entitled to the highest protection offered by the First Amendment.

In fact, the video is *not* political commentary at all, except incidentally. It is marketing. And in many respects it is an excellent example of what is so problematic about speech by for-profit entities that masquerades as commentary regarding issues of public concern. By appearing to offer social commentary it appears to support the notion that corporations are moral social actors with authentic voices. It also offers an opportunity to examine why commercial speech generally should *not* be protected by the First Amendment.⁴⁶

⁴³ See *Onslaught*, *supra* note 3.

⁴⁴ See, e.g., Shelly Lazarus, *Theory of Evolution: Criticisms Aside, Agencies Must Build on ‘360 Degree Branding’ to Succeed*, ADVERTISING AGE, Sept. 20, 1999 (Special Issue), at 58.

⁴⁵ I make no claim here that such advertising is *invariably* detrimental to women’s well-being or that it is detrimental to *all* women. Nevertheless, it is equally implausible to suppose that this onslaught is of no consequence. Rather, I argue, as the video itself suggests, that by the sheer amount of such material, it is not unreasonable to believe that it has some effect on the listeners. It is intended to affect them. It is further not unreasonable to think that the effect may be negative since so much of this type of advertising relies on a subtle or not-so-subtle message that without the advertiser’s product, some aspect of the viewer’s person will be unacceptable to others. For toiletries and cosmetics, that aspect is necessarily physical. In other words, advertising for beauty products is often dependent upon reinforcing in the listener or viewer the notion that, without the advertised product, her self-presentation will be inadequate. See also Preston, *supra* note 39, at 775 (suggesting that commercial images “influence culture”). An additional observation is that much of this advertising is arguably misleading or downright fraudulent. See Rhode, *supra* note 25, at 1041–42 (citing the weight loss industry and “cosmeceuticals” companies as having products with particularly misleading ad campaigns).

⁴⁶ There is currently no clear and stable definition of “commercial speech.” See Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1160 (2004) (describing the lack of a stable definition of

First, and most importantly, this video vividly demonstrates both the nature of the environment—an onslaught—and suggests how that onslaught is destructive. Much advertising⁴⁷ simultaneously implies that appearance is the most important aspect of a woman's being and undermines the viewer's confidence in her own appearance as a means to sell the product being advertised. Regular exposure to these kinds of messages would seem to be detrimental to a woman's self-esteem on more than one level.

Second, by representing the advertising environment as an "onslaught," the video addresses two factors reinforcing a reluctance to regulate marketing: (1) denial that marketing is effective in what it is meant to do—sell things, and (2) a tendency to trivialize marketing's secondary effects on society. The video's presentation of advertising as an onslaught is meant to break through that denial and pose the opposite question—how could all this material *fail* to have an effect? Third, once one gets past the surface of the ad itself and

"commercial" in the commercial speech doctrine). At its simplest level, "commercial speech" is a category in First Amendment doctrine and as such, is the subject of lawyers' attempts to argue that specific instances of speech are in or out of the category. But these efforts have not led to consensus on the definition of commercial speech. I have argued elsewhere that commercial speech should include any speech by a for-profit entity since, as an entity and by definition, it cannot have any purpose for speaking other than a commercial one, no matter how the speech is labeled—whether as political, public service, or marketing, because all of it ultimately is designed to service the entity's commercial purpose. *See, e.g., Piety, Against Freedom, supra* note 6, at 2593, 2645. Obviously commercial speech is more than expression by corporations since individuals, sole proprietors, partnerships and other organizations may also engage in commercial speech. It seems, however, that any expression by a fictitious, for-profit legal entity is, *by definition*, commercial speech, since the entity's *only purpose* for existence is commercial. *See* MODEL BUS. CORP. ACT § 1.40(4) (2009) ("'Corporation,' 'domestic corporation' or 'domestic business corporation' means a corporation *for profit* . . .") (emphasis added). *But see* DEL. CODE ANN. tit. 8, § 101(b) (2009) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business *or purposes* . . .") (emphasis added).

The Supreme Court has offered various definitions in different cases. Some focus on the format (advertising). *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc., 425 U.S. 748 (1976). Others say format alone is not dispositive. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); *see also* David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1080–85 (2004) (noting that the Court is unlikely to limit application of the commercial speech doctrine strictly to advertising with no cognizable issue of public concern); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1142 (2004) (warning against abstract categorizations without proper analysis of free speech values). The trend has been toward a formalistic assessment of the format in which the speech appears, limiting the application of the label "commercial speech" to that which roughly conforms to traditional advertising. *See* Vladeck, *supra* at 1059 (noting the Court has increasingly moved to an interpretation of the commercial speech doctrine that gives less deference to governmental attempts to regulate).

⁴⁷ I use the words "advertising" and "marketing" somewhat interchangeably in this article, but marketing is actually the broader practice of which advertising is a part. Advertising is the main subject of this article but other marketing practices exhibit some of the same characteristics.

examines its purpose, as well as the identity and nature of the speaker, it is clear the message is in some sense misleading. The insincerity is particularly apparent in the plea to “talk to your daughters before the beauty industry does”⁴⁸ since Dove is a part of the beauty industry. The “Onslaught” video is intended to sell Dove products by positioning the brand as one which opposes exploitive techniques. But that suggestion is misleading because the parent company, Unilever, which owns the Dove brand, is deeply implicated in the sorts of advertising criticized in the video. Furthermore, the “Onslaught” video itself illustrates how ineffective such a “talk with your daughter” would likely be because it is hard for a parent’s speech to combat the deluge of advertising messages in the culture at large. Because “onslaught” is really advertising it is appropriate to think of it as commercial speech.

IV. COMMERCIAL SPEECH

The social value of and protection for commercial speech is often justified on the grounds that commercial speech offers consumers information about products. However, the most casual review of advertising reveals that very little of what is offered in advertising is, strictly speaking, informational. Instead, what it typically offers consumers is something like classical conditioning,⁴⁹ that is, a stimulus intended to influence them at a pre-conscious level. One might not be terribly troubled by this fact except when that pre-conscious influence appears to be negative, as Dove’s video suggests they are. So protection hardly seems justified on the grounds that it provides “information.”

There was a time when advertising (or commercial speech generally) would not have been considered protected speech at all.⁵⁰ Today, however, commercial speech is a category of speech entitled

⁴⁸ See *Onslaught*, *supra* note 3.

⁴⁹ The most well-known example of classical conditioning is Pavlov’s famous dogs conditioned to salivate when a bell rang by his pairing the unconditioned stimulus (food) with a conditioned stimulus (bell). One educational text on marketing describes advertising as “operant conditioning.” See ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT* 95 (1986) (describing operant conditioning as “the kind marketers use most today”). This is probably a misuse of the term as operant conditioning involves the conditioning of a response by following up certain behavior with some sort of reward. See B. R. HERGENHAHN & MATHEW H. OLSON, *AN INTRODUCTION TO THEORIES OF LEARNING* 77 (6th ed. 2001). For the authors’ full discussion of conditioning in marketing see SETTLE & ALRECK, *supra* at 95–102.

⁵⁰ See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding a submarine owner’s arrest for purely commercial advertising under a state law that precluded the distribution of commercial handbills on public streets), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

to limited protection under an intermediate scrutiny standard.⁵¹ Under this standard truthful commercial speech is protected from governmental interference unless the government's interest is substantial and the regulation advances that interest in a manner no broader than necessary to protect the governmental interest.⁵² However, many observers have argued that commercial speech should be afforded *full* protection under the First Amendment.⁵³ The "Onslaught" ad provides just one of many examples of why this argument is misplaced because it illustrates the moral vacuum from which commercial speech issues.

By virtue of the rhetoric associated with it—defense of ideas and freedom—the First Amendment is an attractive frame for the claim that Dove is a speaker entitled its protection.⁵⁴ Superficially, a claim that speech like "Onslaught" ought to be protected is very appealing because the video looks like opinion. However, closer examination reveals an ugly truth. The appearance of political and social commentary is nothing but window dressing for an attempt to sell products. And while there is nothing wrong with selling products, advertising directed at women relies heavily on exacerbating women's insecurities, reinforcing the importance of their physical appearance, and promoting unrealistic and unhealthy role models, which in turn stands as a counterweight to its social value in stimulating purchases. It is particularly distasteful when that advertising uses a critique of advertising to further the sale of

⁵¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (identifying that the Court had adopted an intermediate level of scrutiny for restraint on commercial free speech).

⁵² *Id.* at 564.

⁵³ See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990) (stating that regulation of commercial speech would allow the government to control speech by simply deeming it commercial); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1240 (2004) (arguing all free speech should be treated the same under the First Amendment). For a defense of corporate speech rights generally, as opposed to just commercial speech, see MARTIN H. REDISH, *MONEY TALK\$: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 2* (2001) [hereinafter *MONEY TALK\$*] (arguing societal values are not harmed by the fact that expression has been paid for or is aimed to maximize profits); Bruce E. H. Johnson & Ambika K. Doran, *Amendment XXVIII?: Defending Corporate Speech Rights*, 58 S.C. L. REV. 855, 869 (2007) (arguing corporations should not be restricted, as they are composed of individuals whose free speech would be limited); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 296-97 (1998) (stating that exclusion of corporate speech from First Amendment protection would be inconsistent with American principles of equality).

⁵⁴ See Bruce E. H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, Is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243, 1245 (2004) (arguing government should not restrict public statements by businesses, as they are important to the exchange of ideas).

products that it is apparently critiquing. I am not suggesting however that distastefulness should mean that the video should be suppressed or that its misleading attributes ought to call forth any sanctions. Rather I want to underscore that the fact the video *looks* like political speech does not mean that it actually *is* or that it requires First Amendment protection.

V. ANALYZING DOVE'S STATEMENT

If Dove has a “statement” in the “Onslaught” video, it appears to be a claim that the beauty industry’s barrage of advertising, and the content of that advertising, preying as it does on insecurities, undermines women’s self-esteem and that perhaps women with low self-esteem will have greater difficulty with professional achievement and personal satisfaction.⁵⁵ This interpretation is supported by the observation that the video is part of Dove’s “Campaign for Real Beauty,” an ad campaign that became famous for using “real” women of average weight and looks as models.⁵⁶

Low self-esteem or confidence may *indeed* undermine a woman’s ability to realize her potential in all spheres of human action—educational, professional, and personal—outcomes that are in conflict with full equality for women.⁵⁷ Dove’s campaign for real beauty can be read as a statement urging parents, particularly mothers, to resist the negative messages conveyed by “the beauty industry.”

Read this way, Dove’s spot requires us to accept that advertising and marketing images are deeply implicated in, if not constitutive of, women’s self-concept, and that advertising both creates and reinforces social norms about women.⁵⁸ Given that advertising is so

⁵⁵ See Garfield, *supra* note 3, at 50.

⁵⁶ See Dove, Campaign for Real Beauty, <http://www.campaignforrealbeauty.com/dsef07/t5.aspx?id=7373> (last visited Sept. 25, 2009). There are other spots in this series worth viewing. The “campaign for real beauty” has been heralded as an advertising breakthrough, because Dove used so called “real” women—i.e., models who do not conform to industry standards of beauty—in order to supposedly combat the tyranny of the usual media image of women. See Elizabeth Olson, *Ads Are a Reminder: It’s Not Just Soap; It’s a Soapbox*, N.Y. TIMES, July 7, 2008, at C4 (describing changes in the “Campaign for Real Beauty” meant to emphasize the brand’s charitable cause, the Dove Self-Esteem Fund).

⁵⁷ One interesting study recently offers an example that might explain why chess has been largely male dominated. In this study, women playing under controlled conditions with an unknown opponent did as well as men in the study except when they believed they were playing against men. For more information on the study, see Anne Maass, Claudio D’Ettola & Mara Cadinu, *Checkmate? The Role of Gender Stereotypes in the Ultimate Intellectual Sport*, 38 EUR. J. SOC. PSYCHOL. 231 (2008), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/114262136/PDFSTART?CRETRY=1&SRETRY=0>.

⁵⁸ See generally ANTHONY J. CORTESE, PROVOCATEUR: IMAGES OF WOMEN AND MINORITIES IN ADVERTISING (2d ed. 2004) (arguing advertising subjugates women and minorities to consumption); see also JEAN KILBOURNE, DEADLY PERSUASION: WHY WOMEN

ubiquitous and that advertisers have been spending billions of dollars on advertising and research to refine the approach of advertising, Dove's proposition does not seem a stretch. Indeed, "[i]t could be argued that advertising is the most influential institution of [socialization] in modern society" and that it plays "a key role in the constructions of gender identity"⁵⁹

Is Dove right?

VI. ADVERTISING AS CULTURAL "EDUCATION"

In *Virginia Pharmacy*,⁶⁰ the case that established the commercial speech doctrine, the Supreme Court asserted that commercial speech provided consumers with information. It concluded that it was on this basis—the informational value of true speech—that commercial speech ought to be protected.⁶¹ Moreover, the Court noted, commercial speech aids persons in expressing their autonomy by assisting them in making their own choices, and thereby furthers the proper functioning of the economy.⁶² The Court reasoned as follows:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.* To this end, the free flow of commercial information is indispensable.⁶³

In so holding, the Court was echoing the judgment of many legal scholars⁶⁴ as well as marketing professionals.⁶⁵ Marketing

AND GIRLS MUST FIGHT THE ADDICTIVE POWER OF ADVERTISING *passim* (1999) (discussing how advertising influences and persuades society); SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET 89–123 (2004) (describing how new domestic habits and activities were created as a result of new products).

⁵⁹ SUT JHALLY, THE CODES OF ADVERTISING: FETISHISM AND THE POLITICAL ECONOMY OF MEANING IN THE CONSUMER SOCIETY 1 (Routledge 1990) (1987).

⁶⁰ Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc., 425 U.S. 748 (1976).

⁶¹ *Id.* at 764–65 (discussing how economic decisions in the free market are informed by advertising).

⁶² *Id.* at 765.

⁶³ *Id.* (emphasis added).

⁶⁴ See MONEY TALK\$, *supra* note 53, at 12–13 (arguing restrictions on freedom of speech

professionals often speak of “educating” the consumer. Unfortunately, marketers’ idea of “education” looks a lot more like indoctrination. “[I]t’s the marketers’ responsibility to teach consumers to accept and use their goods. Actually that’s exactly what marketers do, although usually consumers are unaware of it.”⁶⁶

Most of the speech that surrounds us every day is, apart from our personal interactions, commercially produced. That speech helps to create the norms of the culture in which we live and reinforces those aspects of the culture which are relevant in some way to commerce. If something cannot be bought or sold, if a feeling cannot be translated into a sale, that thing or that feeling is of little significance in commercial culture. Perhaps most would say there are some things which cannot be assessed in terms of their economic value—love, friendship, loyalty, and the like. However, for better or worse, there is very little that commercial culture has not found a way to successfully colonize.⁶⁷

It is also the case that the media is largely dependent upon advertising to support its editorial content.⁶⁸ Advertising and marketing is deeply embedded into the content itself everywhere—in movies and television via product placements, in billboards, in product tie-ins in restaurants and merchandise, in social networking, buzz marketing, and other stealth marketing techniques.⁶⁹ Advertising is deeply implicated in the construction, not only of our images of women, their “place” and proper occupations, but also of women’s *self*-conception. As Catharine MacKinnon has put it: “Social

would have disastrous consequences); *see also* RICHARD A. POSNER, REGULATION OF ADVERTISING BY THE FTC 3–4 (1973) (arguing that advertising is information); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1058 (1999) (arguing that a democracy-centered approach to the First Amendment is required for fair representation).

⁶⁵ *See* SETTLE & ALRECK, *supra* note 49, at 89–109 (discussing advertising as “painless injections of information”).

⁶⁶ *Id.* at 90. The authors describe four techniques for teaching consumers to want products: association, conditioning, modeling and reasoning. *Id.* at 91. It may or may not be significant that reasoning is mentioned last.

⁶⁷ *See generally* RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (2d ed. 2005) (1996). *See also* sources cited *infra* note 72.

⁶⁸ *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 7–43 (1994).

⁶⁹ *See, e.g.*, Ellen Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006) (addressing normative implications stemming from the integration of marketing into mass media); Brian Stelter, *Product Placements, Deftly Woven Into the Story Line*, N.Y. TIMES (N.Y. ed.), March 2, 2009, at B8 (discussing ways in which advertisers are integrating products into reality TV shows); *Frontline: The Merchants of Cool: A Report on the Creators & Marketers of Popular Culture for Teenagers* (PBS television broadcast Feb. 27, 2001) (examining recent various marketing practices to determine whether today’s marketers are capturing teens’ desires or driving them).

inequality is substantially created and enforced—that is, *done*—through words and images.”⁷⁰ It is part of “the situation,” the context in which life takes place and which law must interpret.⁷¹

VII. COMMON THEMES ABOUT WOMEN IN ADVERTISING

Commercial culture commodifies everything.⁷² Women were treated as property before the advent of the modern commercial culture,⁷³ but despite great strides made toward equality for women in the modern era, commercial culture has continued to reinforce the message that women’s value is primarily in relationship to men and being valued and desired by men. In the world reflected in advertising looking good is women’s most pressing concern as an artifact of the need to attract a mate, not only for reproductive purposes, but for economic support.⁷⁴ Even as the number of women in the workforce has begun to equal the number of men, and as women outpace men in college admissions, the imagery of women as sex objects has

⁷⁰ CATHARINE A. MACKINNON, ONLY WORDS 13 (1993).

⁷¹ See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 152 (2003) (“[S]ituation, like an invisible hand, moves us.”); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) (discussing the “situational character” as a new concept of human agency); see also Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087, 1096 (2008) (arguing “naïve cynicism” has slowed the progress of other “situationist insights” of social psychology).

⁷² See, e.g., BENJAMIN R. BARBER, CON\$UMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE (2007) (discussing the effects of the consumer market on individuals and society as a whole); VINCENT J. MILLER, CONSUMING RELIGION: CHRISTIAN FAITH AND PRACTICE IN A CONSUMER CULTURE (2004) (discussing ways in which consumerism has transformed religious belief and practice); RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005) (assessing commodification’s effect on the quality of social relationships).

⁷³ See, e.g., JOHN STUART MILL, THE SUBJECTION OF WOMEN *passim* (Dover Publ’ns ed., 1997) (1869). It is also important to remember that women continue to be treated as property in many other places in the world. See Kirk Semple, *Long Viewed as Chattel, Afghan Women Slowly Gain Protection*, N.Y. TIMES, Mar. 3, 2009, at A1 (describing the practice of bride prices—selling girls into marriage to partners who sometimes abuse them). Kirk Semple interviewed one Afghan woman, who stated simply: “Women are the property of men. This is tradition.” *Id.*; see also CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES (2006) (describing abuse of women—through use of rape as an instrument of terror and other human rights violations—as garnering insufficient attention of the human rights community).

⁷⁴ It is sobering to reflect that it has been a couple of hundred years since John Stuart Mill lamented that the combination of “the natural attraction between opposite sexes” and women’s economic and social dependence on men resulted in a situation in which “it would be a miracle if the object of being attractive to men had not become the polar star of feminine education and formation of character.” MILL, *supra* note 73, at 15. While there is nothing inherently wrong with wanting to be attractive to others, it becomes perverted and destructive when it becomes women’s “polar star” to the detriment of their emotional well-being and the development of their talents and full personhood.

intensified.⁷⁵ Commercial speech is shot through, not only with objectification of women, but also with examples of their commodification.

The basic premise of Dove's claim—that much advertising objectifies and undermines women—seems irrefutable. This undermining occurs in a number of ways: by portraying women as sexual objects; by portraying women as subordinate to men because women are childlike, impotent, irresponsible or unreliable; and by inundating women with marketing for beauty products that rely on the stimulation of insecurity about appearance. Reinforcing anxiety about appearance reinforces the first two messages to the extent that it encourages women to focus energy on something the culture categorizes as trivial—appearance—even as it underscores the importance of appearance to women.

A. *Women as sex objects*

Women are used in advertising and marketing as decoration for products or as “come-ons” to buyers. Women's nude or semi-clothed bodies are used as decoration for any number of products that don't seem particularly directed at heterosexual men (for example cars, which both men and women buy) and in advertisements for products in which their appearance seems somewhat incongruous (for example, a woman in a bathing suit posed next to farm equipment).

Indeed, it is apparently respectable and mainstream to use scantily clad women as a part of the marketing plan for businesses like restaurants. Hooters is, perhaps, the most well-known example of this practice, but it is not the only one. In 2007, in an exercise in marketing synergy, a restaurant opened in Manhattan called “Hawaiian Tropic Zone.” Hawaiian Tropic Zone's waitresses dressed in bikinis, and participated in a twice nightly “beauty pageant.” These features were presumably meant to attract restaurant business and promote sales of Hawaiian Tropic tanning products.⁷⁶ Elsewhere, a restaurant called the “Heart Attack Grill” which specialized in hamburgers, consistent with the theme, dressed its waitresses in “naughty nurse” uniforms of fishnet stockings, “cleavage baring tops,” and nurses' hats, with stethoscopes draped around their necks.⁷⁷

⁷⁵ See, e.g., FALUDI, *supra* note 12 (discussing the battle for gender equality, the “backlash” it has incited in the media, and the effects this backlash has on women's minds, jobs, and bodies); RIVERS, *supra* note 12 (discussing the clash in messages presented by the increased advancement of women in business and higher education, and the media's persistent message that, in order to find happiness, women must return to traditional roles of wife and mother).

⁷⁶ See Louisa Thomas, *In the Zone*, NEW YORKER, July 23, 2007, at 23–24.

⁷⁷ See Stephen Kiehl, *Restaurant's 'Naughty Nurses' Raise Pulses, Ire*, TULSA WORLD,

Moreover, a porn aesthetic (porn arguably representing the quintessential expression of women as sex objects) seems to be overtaking the culture generally.⁷⁸ This is troubling because as Robert Jensen and Gail Dines have observed, “at the core of contemporary pornography is contempt for women.”⁷⁹ Commercial culture’s appropriation of women’s images to sell products often partakes of the imagery from the sex industry.⁸⁰ Many have observed that the aesthetics of porn culture, from the pneumatic, out-sized implanted breasts and elimination of body hair, particularly pubic hair, to the offering of pole-dancing classes in the local fitness club, to outfits for teen and pre-teen girls that seem unduly sexualized—these are all aspects of the porn aesthetic that have been normalized into the culture in general so that what once seemed outré and the province the sex industry is now mainstream.⁸¹ The Bratz doll, a popular doll for little girls, is an example of this phenomenon:

Bratz dolls have large heads and skinny bodies; their almond-shaped eyes are tilted upward at the edges and adorned with thick crescents of eye-shadow, and their lips are lush and pillowy, glossed to a candy-apple sheen and rimmed with dark lip liner. They look like pole dancers on their way to work at a gentleman’s club.⁸²

The target market for these dolls is girls, ages six-to-twelve. What the Bratz line promotes is “sassy” culture. “Sassy” is apparently “the toy industry’s favored euphemism for sexy.”⁸³ The Bratz dolls’ accessories and fantasy activities appear to run along the lines of shopping, partying and reading celebrity magazines for fashion tips—aspirations that seem vanishingly narrow. One parent claimed the dolls looked like “streetwalkers.”⁸⁴ But parental disapproval is only

Nov. 18, 2006, at A8.

⁷⁸ See Gail Dines, *Dirty Business, Playboy Magazine and the Mainstreaming of Pornography*, in *PORNOGRAPHY: THE PRODUCTION AND CONSUMPTION OF INEQUALITY* 37 (Gail Dines et al. eds., 1998).

⁷⁹ Robert Jensen & Gail Dines, *The Content of Mass-Marketed Pornography*, in *PORNOGRAPHY: THE PRODUCTION AND CONSUMPTION OF INEQUALITY*, *supra* note 78, at 65, 99.

⁸⁰ See, e.g., MACKINNON, *ONLY WORDS* *supra* note 70, at 4 (describing the feelings of a woman who knows that her pictures have been taken for purposes of public distribution).

⁸¹ See PAUL, *supra* note 39, at 67–70 (noting the pervasive nature of pornography in American culture); see also LEVY, *supra* note 41, at 149–50 (describing lap dancing and girls engaging in same-sex activity to attract boys in high school).

⁸² Talbot, *supra* note 41, at 74.

⁸³ *Id.* at 76.

⁸⁴ *Id.* at 78.

an obstacle to be gotten around for marketers, and not a very difficult one either.

When grade-schoolers are playing with highly-sexualized dolls and sold T-shirts with slogans like “I’m too pretty to do math,”⁸⁵ it seems likely that that such materials *may* have an effect on whether these girls will view themselves as potential scientists, politicians, mathematicians, lawyers, doctors, CEOs, or, indeed, as workers at all.⁸⁶ Later, it may help contribute to their own and others’ assessment of the economic value on the work they do, so that they value their own work less than similarly situated men—a phenomenon called “depressed entitlement.”⁸⁷

Making women’s bodies the visible symbol of “sex” is not by any means new.⁸⁸ But the objectification of women in advertising simply represents one end of a spectrum, which finds, at its logical extension, the literal commodification of women’s bodies.⁸⁹ An advertising environment such as the one we live in normalizes and makes ubiquitous this commodification. These representations reinforce the notion that sex workers are women in control and exercising their autonomy by alienating their bodies, and that it is only repressive moralists or censors who would interfere with this. Of course, all of us who work alienate our labor. Perhaps selling sex is just another way to make a living.⁹⁰ But why selling sex or your sexuality

⁸⁵ See Posting of “Jessica” to Feministing.com, <http://feministing.com/archives/004548.html> (Nov. 3, 2005, 12:08 EST).

⁸⁶ See Whitney Arlene Crispell, *From the “Ew” Files, Depressingly Inevitable T-shirt Edition*, BITCH MAG., Spring 2007, at 20 (describing T-shirts once available from Abercrombie & Fitch and Alloy). Other shirts have slogans such as “I’m tight like spandex,” or “Who needs brains when you have these?” *Id.*

⁸⁷ John T. Jost, *An Experimental Replication of the Depressed-Entitlement Effect Among Women*, 21 PSYCHOL. WOMEN Q. 387, 388 (1997). Some have posited that it is not so much women’s depressed entitlement but men’s *enhanced* entitlement that is responsible for this phenomenon. See Brett W. Pelham & John J. Hetts, *Underworked and Overpaid: Elevated Entitlement in Men’s Self-Pay*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 93, 100 (2001). If this is the correct construction we might still wonder whether or not this elevated entitlement is a consequence of being less subject to so many negative messages tying self-worth to appearance, a social environment that reinforces that men’s identity is in some sense oppositional, that is that is in part positive because they are not women, or some combination of these and other factors.

⁸⁸ See MACKINNON, ONLY WORDS *supra* note 70.

⁸⁹ See generally Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 31 GA. L. REV. 771 (1997) (providing another argument that advertising is often a part of a spectrum of speech harmful to women of which pornography is a part).

⁹⁰ Catherine Bennett, writing for *The Observer* in the U.K., and protesting the proliferation of ads for strip clubs, lampooned this proposition when she described these ads as an “introduction to that very New Labour career option, undressing in front of drunken strangers.” Bennett, *supra* note 35, at 31. Whether being a “sex worker” is simply one more way for women to assert control over their bodies and their sexuality (and I am inclined to think it is not), sometimes these sex workers are not there voluntarily. Some of them have been forced into sexual slavery. See Skenazy, *supra* note 35, at 21 (indicating that some “sex workers” have been

represents the ultimate *expression* of that sexuality or of autonomy is rather difficult to discern. It seems far more like “alienation” in the same way we use that term in property when we refer to the right to sell property. And it is. As Levy puts it, “Raunch culture is not essentially progressive, *it is essentially commercial.*”⁹¹ Thus, the commodification of women in beer ads and the commodification of women in pornography are linked by their commercial ties.

B. Women as childlike

Much advertising also infantilizes women. One of the most influential studies of images of women in advertising was that done in 1979 by Erving Goffman. In *Gender Advertisements*,⁹² sociologist Goffman painstakingly surveyed ads in the popular culture as signs for what they might communicate about what the culture considers “structurally basic” about gender.⁹³ Although he noted that commercial advertisements were not “real life,” Goffman argued that they were in some ways a more reliably distilled version of the reality of the culture, and thus fairly authoritative “texts” for discerning a particular culture’s rituals and stereotypes. What Goffman read in the signs of advertising was that (in general) women were to men as children are to adults of both genders. His analysis became a template for later studies,⁹⁴ and many of his terms, such as “licensed withdrawal,”⁹⁵ the “head cant,”⁹⁶ and “the bashful knee bend,”⁹⁷ became something of a taxonomy for what he called “the ritualization of subordination”⁹⁸ of women in advertising.

forced into sexual slavery).

⁹¹ LEVY, *supra* note 41, at 29 (emphasis added).

⁹² ERVING GOFFMAN, *GENDER ADVERTISEMENTS* (1979).

⁹³ *Id.* at 7.

⁹⁴ See, e.g., Cheryl B. Preston, *Subordinated Stills: An Empirical Study of Sexist Print Advertising and Its Implications for Law*, 15 TEX. J. WOMEN & L. 229, 241 (2006) (relying on Goffman, noting his work was “groundbreaking,” and quoting other research identifying it as “the undisputed foundation for later work” (quoting Michelle A. Masse & Karen Rosenblum, *Male and Female Created They Them: The Depiction of Gender in the Advertising of Traditional Women’s and Men’s Magazines*, 11 WOMEN’S STUD. INT’L F. 127, 127 (1988)).

⁹⁵ GOFFMAN, *supra* note 92, at 57.

⁹⁶ *Id.* at 47.

⁹⁷ *Id.* at 45.

⁹⁸ *Id.* at 40.

VIII. ADVERTISING AND HARM TO WOMEN

The Dove spot very forcefully encapsulates what is a media barrage, aimed at women, of marketing for beauty, diet, clothing and other products and services related to appearance. Women are the principal consumers of personal grooming products.⁹⁹ Although grooming products for men are a growing business (and so we should expect to see more advertising directed at them), the bulk of this stoking of dissatisfaction is directed at women. “[B]eing raised in a culture that objectifies the female body and sexualizes women leads them to internalize this objectification. This is called self-objectification. Such self-consciousness is characterized by habitual self monitoring of one’s physical appearance.”¹⁰⁰

Dove’s spot suggests, and many studies support the conclusion, that the marketing environment affects us in this way. Advertising images both affect the culture and construct it.¹⁰¹ On its face, this

⁹⁹ See CORTESE, *supra* note 58, at 54 (noting that marketers profit through exploiting the character and appearance of women); see also NAOMI WOLFE, *THE BEAUTY MYTH passim* (1991) (arguing that there is a media barrage of marketing products directed at the appearance of women).

¹⁰⁰ CORTESE, *supra* note 58, at 55. This includes not just physical appearance, but behavior as well. See also NANCY FRIDAY, *THE POWER OF BEAUTY* 484 (1996) (A “woman must continually watch herself . . . How she appears to others, and ultimately how she appears to men, is of crucial importance for what is normally thought of as the success of her life.”) (quoting art critic John Berger).

¹⁰¹ There is far too much literature on this topic for me to do justice to it here. A few key works making this point, albeit often coming to radically different conclusions about the implications, are, in addition to GOFFMAN, *supra* note 92, the following: CORTESE, *supra* note 58, at 53 (noting that “[t]he exemplary female in advertising . . . displays youth (no lines or wrinkles), good looks, sexual seductiveness, and perfection”) (citations omitted) JHALLY, *supra* note 59, at 1 (“It could be argued that advertising is the most influential institution of [socialization] in modern society”); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 72 (1978) (“Advertising serves not so much to advertise products as to promote consumption as a way of life.”); T.J. JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* 227 (1994) (explaining how advertising merged products with emotion and thereby changed consumer culture); MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY* 11–13 (1984) (focusing his analysis on advertising’s effect on values and culture); JAMES B. TWITCHELL, *ADCULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* 4 (1996) (“Although advertising cannot create desire, it can channel it. And what is drawn down that channel, what travels with the commercial, is our culture.”). These authors come to disparate conclusions about whether to view this fact with alarm or how much control marketers have in the shaping process. But they seem to roughly agree—as well they might, given marketing’s ubiquity—that marketing speech doesn’t just reflect the culture, it constitutes it in profound ways. For more on this topic, see Symposium, *Women in Advertising*, http://www.aef.com/on_campus/symposia/2003/index.html (last visited Sept. 26, 2009) (conference sponsored by the Advertising Education Foundation and held at Northwestern University on October 18, 2003). Gloria Steinem gave the keynote address at the conference and observed (as did several other presenters) that advertising was a significant constituent of social reality. See Gloria Steinem, *Can Advertising and Activism Work Together?*, Keynote Address at the American Education Foundation Symposium: *Women in Advertising* (Oct. 18, 2003), http://www.aef.com/on_campus/symposia/2003/index.html (last

seems to be a fairly unremarkable claim because it defies credulity that such a ubiquitous influence would have no influence on its targets. Indeed, money spent by corporations on advertising and marketing could be labeled “waste” were it thought to be ineffective in stimulating sales or affecting consumer behavior. But there has long been a consensus that advertising (in general) stimulates sales.¹⁰²

Curiously though the law’s posture seems to be that marketing communications’ effects are limited to boosting sales. There does not seem to be any such parallel acknowledgment that advertising could affect viewers in any other way, such as by lowering self-esteem or increasing the risk of sexual assault. The assumption seems to be, albeit unstated, that even if marketing has some deleterious effects, the First Amendment renders us powerless to redress any negative side effects of the economic stimulation that marketing represents. Before discussing the latter claim of impotence, it is worthwhile to examine the first claim: that marketing communications affect women’s self-perception and thus undermines equality.

The argument that the advertising environment in American culture contributes to women’s low self-esteem and is constitutive of a culture that objectifies women, thereby creating subtle and not-so-subtle barriers to women’s achievement of full equality, is plausible and has some empirical support.¹⁰³ Although it would be going too far to blame the totality of women’s condition on advertising, it is not unreasonable to believe that repeated exposure to imagery like that surveyed in the “Onslaught” video can decrease self-esteem and negatively affect the perception of women in the culture. These effects may in turn lower women’s life chances.

visited Sept. 26, 2009).

¹⁰² See *FTC v. Borden Co.*, 383 U.S. 637 (1966) (discussing whether advertising expenses should be a consideration under Robinson-Patman Act in determining what constituted “like grade and quality” and charges of anticompetitive pricing); see also Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L. J.* 1165 (1948); Charles E. Mueller, *Sources of Monopoly Power: A Phenomenon Called “Product Differentiation,”* 18 *AM. U. L. REV.* 1 (1968).

¹⁰³ See, e.g., Amanda Bower, *Highly Attractive Models in Advertising and the Women Who Loathe Them: The Implications of Negative Affect for Spokesperson Effectiveness*, *J. ADVERTISING*, Fall 2001, at 51 (citing Thomas F. Cash, Diane Walker Cash, & Jonathan W. Butters, “*Mirror, Mirror on the Wall . . . ?*” *Contrast Effects and Self-Evaluations of Physical Attractiveness*, 9 *PERSONALITY & SOC. PSYCHOL. BULL.* 351 (1983) (offering empirical evidence suggests that advertising can affect female self-esteem).

A. Self-image, self-esteem and health

There is evidence that women and girls are far more preoccupied and unhappy with their appearance than are men.¹⁰⁴ Ninety percent of the consumers of plastic surgery are women.¹⁰⁵ The correlation between depression and being overweight occurs more often in women than men.¹⁰⁶ Unpopular girls are more likely to gain weight than unpopular boys.¹⁰⁷ Once overweight, women are more likely to experience negative health consequences from that weight.¹⁰⁸ Preoccupation with weight generally is harmful to women's and girls' self esteem.¹⁰⁹

Courtney Martin, author of *Perfect Girls, Starving Daughters*, writes, "Almost every girl I know lives as if how she feels about her body is representative of how she feels about everything else. *It doesn't matter how successful or in love or at peace she is in the rest of her life, if she feels overweight, she is unhappy.*"¹¹⁰ This is not a good thing. "Many young women, particularly those under twenty, do not have the emotional resources to be truly autonomous or to withstand outside pressures from peers and boyfriends, whom they desperately want to please."¹¹¹

¹⁰⁴ See, e.g., KILBOURNE, *supra* note 58, at 133 (reciting studies reporting that women scored higher than men on "self objectification" and were more preoccupied with appearance and weight); COURTNEY MARTIN, *PERFECT GIRLS, STARVING DAUGHTERS 1* (2007) (claiming that over 90% of American women feel overweight).

¹⁰⁵ See Essig, *supra* note 41, at B11 (providing evidence of an association between psychopathology and cosmetic surgery); see also Deborah Davis & Michael L. Vernon, *Sculpting the Body Beautiful: Attachment Style, Neuroticism, and the Use of Cosmetic Surgeries*, 47 *SEX ROLES* 129, 136-37 (2002) (providing additional evidence of an association between psychopathology and cosmetic surgery). Although these studies cannot prove that nonstop advertising directed at women causes anxieties that lead them to using plastic surgery because there are a range of reasons for getting cosmetic surgery, not all of which reflect psychopathology, it would be strange to conclude that we must assume that this correlation is unrelated until proven otherwise.

¹⁰⁶ See Kenneth M. Carpenter et al., *Relationships Between Obesity and DSM-IV Major Depressive Disorder, Suicide Ideation, and Suicide Attempts: Results From a General Population Study*, 90 *AM. J. PUB. HEALTH* 251, (Feb. 2000) ("Among women [but not men] increased BMI was associated with both major depression and suicide ideation.").

¹⁰⁷ Anne Harding, *Girls Who Feel Unpopular More Likely to Get Fat*, *REUTERS*, Jan. 8, 2008, <http://www.reuters.com/article/healthNews/idUSLAU87856720080108> (reporting on a study done at the Harvard School of Public Health).

¹⁰⁸ See Peter Muennig et al., *Gender and the Burden of Disease Attributable to Obesity*, 96 *AM. J. PUB. HEALTH* 1662, 1665 (2006).

¹⁰⁹ See MARTIN, *supra* note 104, at 142 ("Smart, accomplished, and thoughtful, [women] know that none of this is as instantaneously powerful as their appearances.").

¹¹⁰ MARTIN, *supra* note 104, at 30-31 (emphasis added).

¹¹¹ JOAN JACOBS BRUMBERG, *THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS* 208 (1998). This may explain the reluctance to be seen as "ugly, boring or shrill" feminists. Crawford, *supra* note 28, at 100; see also *id.* at 114 (reciting an argument by one commentator who suggests that young women take feminist achievements for granted and dismiss feminist ideals as lacking vitality in a "post-feminist" age).

Low self-esteem can undermine ambition and performance,¹¹² and it is a waste of precious time. “If the average woman spends about an hour a day contemplating her size, her calorie intake, and her exercise regime starting at the age of twelve and she lives for eight-five years, she will have lost over three years of her life.”¹¹³

B. Self-perception and stereotype threat

If women are portrayed pervasively in the media, in particular in marketing, in ways that suggest that their principal worth is decorative and as objects for men’s consumption rather than as agents, then when combined with the *actual* manifestations of discrimination, such as denials of promotions, harassing comments, media scare stories and lower visibility of women in public and professional life, it would not be surprising that women and girls might perceive themselves as subjected to a stereotype against which they must struggle if their ambitions conflict with or challenge those stereotypes. Such a perception can become part of a self-fulfilling prophecy that hampers performance. Stanford psychologist Claude Steele and others identify this phenomenon as “stereotype threat.”¹¹⁴

“Stereotype threat is a situational pressure that stigmatized individuals experience when they are in jeopardy of confirming a negative stereotype about themselves and their in-group.”¹¹⁵ For example, women taking an exam purporting to test their math skills in a room where most of the other test takers are male may underperform if primed beforehand with the stereotype that women are not

¹¹² See, e.g., Anna Fels, *Do Women Lack Ambition?*, HARV. BUS. REV., Apr. 2004, 50, 59 (lack of confidence can cause women to underestimate their chances of succeeding in their pursuit of goals); cf. Steven J. Spencer et al., *Stereotype Threat and Women’s Math Performance*, 35 J. OF EXPERIMENTAL SOC. PSYCHOL. 4 (1999) (discussing how the “stereotype threat” of women having weaker math abilities than men may disrupt women’s math performance).

¹¹³ MARTIN, *supra* note 104, at 7. Such preoccupations certainly offer an explanation, other than mere vanity, for why women might be less willing, in recessionary times, to give up spending on cosmetics and fashion. An article in my local paper made this suggestion (unclear on what evidence other than random interviews) and the author claimed “men don’t usually mind if they have to make do with old clothes for a while.” Michael Overall, *The Lipstick Effect: Money Be Darned! I Need My Beauty*, TULSA WORLD, April 9, 2009, at A1, A4. If beauty is critical to self-esteem and to social and economic success, then it is no wonder women might consider it important. Conversely, if it is less important to men (and on the fashion side it seems undeniable that men’s choices are far more limited), then it is not surprising that men might be less concerned about postponing new purchases.

¹¹⁴ See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 617 (1997).

¹¹⁵ Alexandra C. Lesko & Jennifer Henderlong Corpus, *Discounting the Difficult: How High Math-Identified Women Respond to Stereotype Threat*, 54 SEX ROLES 113, 113–114 (2006).

good at math. Stereotype threat theory posits that feeling one has to disprove a stereotype like “Girls aren’t good at math” creates additional stress for those in the stereotyped category. This stress then may become something of a self-fulfilling prophecy: it test circumstances test-takers in the category who were primed with reminders about the stereotype just prior to an exam performed worse than those in identical test circumstances who were not primed with the stereotype.¹¹⁶ The activation of the threat and the impact on performance can, in combination with “stereotype lift”—a phenomenon that is the mirror image of stereotype threat, in that persons who believe they are more talented at a particular thing than others perform better when primed with the stereotype about their superiority—can become a vicious circle.¹¹⁷

Looking at pervasive images of women as sex objects, as rightfully preoccupied with appearance, as “bad at math,”¹¹⁸ as preoccupied by the trivial and responsible for all the toilet-bowl cleaning, sweeping and dusting, surely can contribute to a belief by girls that they cannot do math, that they *should* shoulder all the housework, that they had better look good or they will lose men’s protection, love, etc. These beliefs, and a host of other pernicious stereotypes, threaten to become a self-fulfilling prophecy as girls struggle with the knowledge of both what is expected of them and what they are trying to disprove. It would also be strange if the widespread commodification of women’s bodies had *no* impact on how men viewed women’s competency and suitability for work other than in the domestic sphere or in jobs in traditionally female-dominated professions.¹¹⁹ There is evidence that it does negatively affect men’s views.

C. Perceptions of competency

In a study done more than 10 years ago, researchers at the University of Minnesota found that some male subjects, when primed with images from advertising depicting women as sexual objects, did assess women as less competent in later test conditions. These men had first completed a questionnaire intended to grade respondents on a scale of “Likelihood to Sexually Harass” and had received a high score. When they were exposed to advertising images that depicted women as sexual objects, they responded more quickly to sexist

¹¹⁶ See Steele, *supra* note 114, at 613–39.

¹¹⁷ See Jessica Cundiff, *Are Stereotypes True?*, INQUISITIVE MIND, Jan. 22, 2008, <http://www.in-mind.org/issue-5/are-stereotypes-true.html> (discussing stereotype threat and stereotype lift).

¹¹⁸ See *supra* note 85 (“too pretty to do math” T-shirts).

¹¹⁹ See *infra* Part XLC-DD–124.

versus non-sexist words in a word recognition test, engaged in more sexist behavior with female test interview subjects, and reflected lower evaluations of women's competency than did a control group of men who similarly had graded high on a Likelihood to Harass scale but who had not been "primed" by the advertising materials.¹²⁰

The testers exposed subjects to this material and, among other tasks, asked them to interview a woman purportedly applying for a job in the lab. "Compared to controls, primed subjects (1) selected more sexist and inappropriate questions to ask of the target during a job interview, (2) sat closer to her, (3) rated her as more friendly, and (4) *judged her as significantly less competent.*"¹²¹

These studies corroborate a study by Professors Heflick and Goldenberg at the University of South Florida, who found that when specifically asked to consider Sarah Palin's appearance, test subjects rated her as less competent than a group that was not specifically primed to consider her appearance.¹²² When respondents who self-identified as Democrats were excluded, the results suggested that voters who focused on Palin's appearance were *less* likely to vote for her than respondents who had not been cued to contemplate her appearance. Of course, we know that a great deal of media attention was devoted to Palin's past as a beauty contest contestant and on her present attractiveness. And much of this attention was apparently positive.¹²³ But Heflick and Goldenberg's work suggests that even the *positive* commentary ultimately undermined Palin's credibility as a candidate.

D. Increasing risk as a target for violence

A study of eighty-eight undergraduates found that men exposed to depictions of women as sex objects in advertising increased their acceptance in a subsequent evaluation of what the researchers called "rape-supportive" attitudes.¹²⁴ The researchers asked this group, evenly split between men and women, to look at ads and then to respond to a questionnaire on attitudes about gender roles. The researchers split the students into three groups: one looked at ads with depictions of women as sex objects, which meant the images were of

¹²⁰ Laurie A. Rudman & Eugene Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 493 (1995).

¹²¹ *Id.* at 511–512 (emphasis added).

¹²² See Heflick & Goldenberg, *supra* note 26.

¹²³ See Baer, *supra* note 26 (summarizing some of the campaign press coverage).

¹²⁴ Kyra Lanis & Katherine Covell, *Images of Women in Advertisements: Effects on Attitudes Related to Sexual Aggression*, 32 SEX ROLES 639 (1995).

women nude or partially nude and the depiction seemed intended to be “erotically enticing”;¹²⁵ another group looked at ads with images of women in *non*-stereotyped roles; and a third, the control group, looked at ads with no human figures.¹²⁶

This study found that the males who had viewed the ads portraying women as sex objects had high scores on the portion of the questionnaire that probed the subject’s acceptance of what the researchers called “rape acceptance myths.”¹²⁷ This study suggests that exposure to ads that portray women as sex objects increases some men’s willingness to commit or tolerate violence against women.¹²⁸

Although the study was small and subject to a number of caveats—including the objection that university undergraduate volunteers may not constitute a representative sample—its outcome is nevertheless disturbing. As the authors note, “[t]he power of advertisements to manipulate attitudes of such importance to our interpersonal and societal well being should not be underestimated. *Advertisements are more pervasive than pornography, and unlike pornography are presented in a socially acceptable framework.*”¹²⁹

IX. ADVERTISING AND DENIAL

Interestingly enough, people often resist the notion that advertising has any effect on them. Perhaps this is because it is deeply unsettling to imagine that something that so pervades the culture might be influential in toxic ways. As Jean Kilbourne, feminist author and anti-smoking activist¹³⁰ writes: “Almost everyone holds the misguided belief that advertisements don’t affect *them*, don’t shape their attitudes, don’t help define their dreams.”¹³¹ Author Courtney Martin, who has written about eating disorders and anxiety about appearance in women, proves she is one of those skeptics. Despite her deep concern about the pressure in American culture on women to be thin, Martin, in responding to Kilbourne, writes,

¹²⁵ *Id.* at 642.

¹²⁶ *Id.* at 642–43.

¹²⁷ *Id.* at 646.

¹²⁸ *Id.*

¹²⁹ *Id.* at 648 (emphasis added).

¹³⁰ Kilbourne is also an anti-smoking activist who wrote and produced the documentary *KILLING US SOFTLY* (Cambridge Documentary Films 1979), which is about the cigarette industry’s attempt to equate smoking cigarettes with liberation. See KILBOURNE, *supra* note 58, at 259 (noting that “the exploitation of women in advertising” is the subject of her film, *KILLING US SOFTLY*).

¹³¹ KILBOURNE, *supra* note 58, at 27.

Painting the mass media and advertising as the ultimate deliberate evil is too simplified and unconvincing on a personal level. I'm smart. So are my friends. We were familiar with marketing and media literacy from a young age, hip to the fact that Barbie, supermodels, and the beauty industry were dangerous to our psyches.

We need a new analysis about the ways in which pop culture and the Internet age are covertly shaping our ideas about beauty and femaleness. *Given all of our media training, how do fads and fasting celebrities still manage to weasel their ways into our brains and influence our ideas about our own bodies?* How can we still engage with pop culture in fun and ironic ways, and even reclaim it, without being brainwashed by it?¹³²

How indeed? It may be that part of the problem here is the desire to believe we are in control, even when we are not. It seems that a feeling of control is “integral to our self-concept and sense of self-esteem.”¹³³ And part of it may be an attachment to the perception that we have choices.¹³⁴ Choice certainly “has always been big in advertising . . .”¹³⁵

Alas, it seems that this need inclines human beings to see control not only where there is none, but where it is impossible—such as in a coin toss.¹³⁶ Perhaps these same tendencies are at work when consumers insist that advertising is easily ignorable, trivial material, despite its utter saturation of almost every waking moment, the vast sums spent on it, and the talented and intelligent people who have

¹³² MARTIN, *supra* note 104, at 9 (emphasis added).

¹³³ LEONARD MLODINOW, *THE DRUNKARD'S WALK: HOW RANDOMNESS RULES OUR LIVES* 185 (2008); *see also* Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285 (2005) (discussing how research on judgment and decision making uncovers biases that may contribute to making women's experiences less salient).

¹³⁴ *See, e.g.*, John Tierney, *The Advantages of Closing a Few Doors*, N.Y. TIMES, Feb. 26, 2008, at F1 (reporting on DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008), which explains that letting go of an option is so psychologically painful that people procrastinate, despite sometimes steep costs for doing so). For a philosophical discussion about the ways in which there can be such a thing as too many choices, *see* BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004) (arguing that too much choice can undermine welfare).

¹³⁵ Stuart Elliott, *For a Shoe Brand, a Choice, Not an Echo*, N.Y. TIMES, Mar. 2, 2009, <http://www.nytimes.com/2009/03/02/business/media/02adnewsletter1.html>.

¹³⁶ *See* MLODINOW, *supra* note 133, at 169–85 (explaining that people try to find patterns in life to explain the unexplainable); *see also* Ellen Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 327 (1975) (“[T]he more similar the chance situation is to a skill situation . . . the greater will be the illusion of control.”).

spent their lives' energies studying consumer behavior to make their work persuasive. All these factors might reasonably suggest that advertising does have an effect on us. The idea that because consumers are suspicious and on guard against it, advertising has no effect, is one advertising professionals themselves are aware of, but which they dismiss as manifestly untrue.

Nobody wants to admit they're in the least bit affected by advertising! They'll typically claim that they don't pay any attention to advertising, despite the fact that a glance at their pantry or closet, kitchen or garage reveals nothing but heavily advertised, name-brand consumer goods.¹³⁷

Another answer to the question Martin asks, "how does advertising manage to 'weasel' its way into our psyches," is surely attributable to the many years of effort by marketing research professionals to determine how to affect consumers' unconscious attitudes.¹³⁸ Moreover, advertising and marketing largely are conducted by segmenting markets and studying the consumers in each segment so as to customize the message based on the perceived interests, needs and attitudes of that segment.¹³⁹ Women have been extensively studied in this way.¹⁴⁰

This may be why historian Joan Jacobs Brumberg discovered that among her female students, despite being "especially savvy in their analysis of marketing strategies and . . . in their ability to

¹³⁷ SETTLE & ALRECK, *supra* note 49, at 38. This statement is very similar to what Kilbourne claims she constantly hears on the lecture circuit: "What I hear more than anything else . . . is 'I don't pay attention to ads . . . I just tune them out . . . they have no effect on me.'" KILBOURNE, *supra* note 56, at 27.

¹³⁸ See SETTLE & ALRECK, *supra* note 49, *passim*. Even a casual glance at marketing research literature reveals that the bulk of it is directed at uncovering subconscious decision-making processes, not on how to engage conscious decision-making processes. See, e.g., MAX SUTHERLAND, *ADVERTISING AND THE MIND OF THE CONSUMER: WHAT WORKS, WHAT DOESN'T AND WHY* 50–58 (1993) (describing learning by association and other unconscious or semi-conscious mental processes advertisers hope to trigger); SCHUDSON, *supra* note 101, *passim* (discussing the development of advertising relating to the consciousness level present in the business community).

¹³⁹ See TERENCE SHIMP, *ADVERTISING, PROMOTION & SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS* 49–75 (6th ed. 2003) (describing demographic, ethnographic, psychographic and geo-demographic targeting).

¹⁴⁰ It is important to note that I do not claim that every observation in this article applies with equal force to women in every racial and ethnic category. It does not. Evidence exists that white women are more often singled out than women of other races. See Coltrane & Messineo, *supra* note 32, at 371–72 (discussing a review of 1,699 ads controlled for effects of demographic, situational and audience variables, which revealed that it was commonly white women who were used to sell products). This does not mean that women of color may escape some of the negative effects of these ads, merely that race adds another dimension of harm—one this article does not address but which is no less significant.

‘deconstruct’ messages about women in any ad,” “[a]lmost all of them admitted that they did battle, *on a daily basis*, with what therapists in the eating disorders world call ‘bad body fever,’ a continuous internal commentary that constitutes a powerful form of self-punishment.”¹⁴¹

“Onslaught” further suggests that the beauty industry’s meta-message is that women’s overriding concern is (or ought to be) to preserve or enhance their appeal to heterosexual men through their appearance, and that the purchase of products and services marketed for that purpose can assist women in that goal. Although gender identity is only one part of a human being’s individuality, “[i]n modern advertising, gender is probably the social resource that is used most by advertisers. . . . Advertising seems to be obsessed with gender and sexuality.”¹⁴²

This is problematic from the standpoint of feminist efforts to promote widespread support for women as human beings with a variety of contributions to make, rather than as just objects of desire for men.¹⁴³ The notion that a woman’s primary concern ought to be her attractiveness to men is in some tension with, if not downright antithetical to, legal and social attempts to achieve equality for women. Time put into such efforts, whether or not it results in lower self-esteem, reduces time available for (arguably) more productive pursuits.

Some critics go farther and argue that many Western beauty practices¹⁴⁴ such as the plastic surgery represented in the Dove video, are evidence of misogyny, and that they reinforce subordination of women. For example, author Sheila Jeffries argues that the practices of the Western beauty industry are harmful cultural practices under

¹⁴¹ BRUMBERG, *supra* note 111, at 196.

¹⁴² JHALLY, *supra* note 59, at 135.

¹⁴³ This is not a frivolous claim. See generally MARTHA C. NUSBAUM, *SEX AND SOCIAL JUSTICE* (1999) (providing various examples of gender inequality worldwide and examining the causes of gender-based social injustice). Gaining recognition for violence against women and crimes against women as a category of human rights violations has encountered resistance. See MACKINNON, *ARE WOMEN HUMAN?* *supra* note 73, at 28–33 (framing violence against women as international human rights and humanitarian violations).

¹⁴⁴ See, e.g., Norma Desmond, *Putting My Best Face Forward*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 18, 2008, at C2 (describing an English professor’s turn to Botox and fillers in her job search). For a critique of the popularity of plastic surgery, see Jennifer Cognard-Black, *Extreme Makeover: Feminist Edition: How the Pitch for Cosmetic Surgery Co-Opts Feminism*, Ms., Summer 2007, at 47. Some research has suggested that, although it might appear that an attractive appearance is more important for women than men, it is actually men whose career changes are put at greater risk by a lack of attractiveness. See *Feet, Dollars and Inches: The Intriguing Relationship Between Height and Income*, ECONOMIST, Apr. 5, 2008, at 82 (noting that tall men on average have higher incomes); *To Those That Have, Shall be Given*, ECONOMIST, Dec. 22, 2007, at 53 (discussing the interplay between beauty and success).

United Nations conventions.¹⁴⁵ Certainly, if women find their productive energies are diverted by grooming and plastic surgery, the preoccupation with physical appearance could conceivably contribute to a failure to achieve other goals. Likewise, the pursuit of goals that are coded “trivial” or “vain” in the culture may undermine women’s status by portraying them as preoccupied by the trivial and thus lacking necessary seriousness.

X. DOVE AS POLITICAL ACTIVIST?

The Dove video does forcefully portray the nature of commercial communication to and about women. This communication is directed at them from childhood. And Dove, through the video, positions itself as against “the beauty industry” and for the empowerment of women through the rejection of a time-wasting and soul-destroying pursuit of unattainable, idealized notions of beauty. On this score, Dove’s spot is perhaps to be applauded for challenging the status quo. Indeed, *Advertising Age’s* columnist Bob Garfield called it a “triumph” for “exquisitely” combining social responsibility with brand marketing.¹⁴⁶

This all seems to combine to suggest that Dove’s message in the video is an important one, a “voice” that needs to be heard making a valuable contribution to the public discourse. However, it may pay to take another look before offering Dove unqualified congratulations. A closer examination reveals the troubling nature of the phenomenon of commercial speech. “Onslaught” is a powerful contribution to the public discourse. And it is a valuable one. But it doesn’t need First Amendment protection in order to be produced. The “Onslaught” spot is an *ad*. It is a part of an advertising campaign executed by Olgivy and Mather, one the world’s largest advertising shops. It is an example of what is known as “viral marketing”—that is, marketing that attempts to build market share through ads appearing in non-traditional media, like YouTube, in an attempt to build word-of-mouth buzz for a product or service.¹⁴⁷ It is produced to generate profits and thus it, or something like it, would be produced whether or not it received protection under the First Amendment, as

¹⁴⁵ See SHEILA JEFFREYS, BEAUTY AND MISOGYNY: HARMFUL CULTURAL PRACTICES IN THE WEST 28–34 (2005).

¹⁴⁶ Garfield, *supra* note 3, at 50.

¹⁴⁷ Word-of-mouth has become such a popular marketing strategy that it has more than one professional association devoted to it, and these groups have drawn up codes of ethics meant to address concerns about transparency in the practice, since much of it involves “stealth marketing.” Goodman, *supra* note 69, at 125 n.248 (discussing sponsorship disclosure requirements of various professional journalism associations); see also, ROB WALKER, BUYING IN 76–78 (2008) (describing what he calls “marketing”).

long as the expected return was higher than any potential liability. The only thing First Amendment protection would offer would be a shield against a governmental attempt to redress the harms to women in advertising that the Dove video so effectively conveys.

XI. IS THE DOVE AD MISLEADING?

Dove created this statement and posted it in the hopes that it would create an image for Dove as the company that “cared.” It is intended to position Dove as a brand concerned about women’s well-being, thereby stimulating purchasing behavior among that segment of the market concerned about the issues it highlighted. If this is Dove’s intended “message,” Dove is arguably not to be trusted, since it is manifestly insincere. Dove is *itself* a participant in the “beauty industry” it warns the viewer against. But of course the apparent message is not really the message at all. The message is, as dictated by the needs of the speaker, fairly straightforward: “Buy Dove products.” “Onslaught” is intended to *sell* beauty products, not to undermine their use. The purpose of the video is to promote Dove’s *own* beauty products over those of rival makers by positioning the company as one that embraces expansive notions of beauty. Any viewer familiar with Dove products (soaps, creams, lotions, etc.) would probably understand this double-barreled message.

It is not clear whether the makers of the Dove ad think viewers are unconcerned about the apparent contradiction because they have a sophisticated understanding of the message, or whether the aim of the ad is really to further stoke consumers’ insecurities, even as Dove claims to be critiquing the exploitation of these insecurities by others. However, it seems reasonable to suppose that the makers of Dove do not want women to *recover* from the anxieties the video suggests *other* advertisers prey upon any more than the makers of cigarettes want the warning labels to effectively dissuade smokers from smoking¹⁴⁸ or the makers of alcohol actually want drinkers to “drink

¹⁴⁸It seems beyond dispute that cigarette manufacturers only put warning labels on the product because they are required to do so by federal law. See 15 U.S.C. § 1333 (2006), amended by Pub. L. No. 111-31, sec. 201, § 4, 123 Stat. 1776, 1842–43 (2009) (requiring warning labels to be prominently displayed on all cigarettes manufactured, packaged, or imported to the United States). The warning labels mandated by law are not necessarily couched in the most effective form. Graphic pictures may work better than text warnings. See, e.g., *Smokers to Face Picture Warnings*, BBC NEWS, Aug. 29, 2007, <http://news.bbc.co.uk/2/hi/health/6967160.stm> (examining UK legislation requiring images depicting the health risks of smoking to be displayed on all tobacco products). Also some 160 nations have ruled that tobacco companies may not even participate in campaigns against “youth smoking” to display themselves as good corporate citizens because such campaigns merely publicize the brands. See *A Wisp of Public Spiritedness*, ECONOMIST, Nov. 29, 2008, at 63.

responsibly.”¹⁴⁹ The aim of the “Onslaught” video is to enhance Dove’s market share by distinguishing itself from brands selling similar products. It seeks to appeal to consumers who are concerned about unrealistic images, who feel excluded from the relentless focus on youth and thinness, to choose Dove. Thus, while the purpose of the video may seem to be to critique the beauty industry, instead it actually reinforces the practices it criticizes.¹⁵⁰

On the other hand, what does it mean for a company with no corporeal existence, “no soul to damn, no body to kick,”¹⁵¹ as the saying goes, to be “insincere”? Asking whether Dove is “sincere” is much like Felix Cohen’s famous question, “Where is a corporation?”¹⁵² The attempt to answer the question of Dove’s “sincerity” by treating it as if it were a natural person who could have “intentions” is to engage in law’s “transcendental nonsense.”¹⁵³

Some have argued that the way out of these difficulties is to distinguish commercial versus political speech along the lines of whether the message appears in “advertising” versus “editorial” form. This is similar to the approach taken by the Supreme Court in *First National Bank of Boston v. Bellotti*¹⁵⁴ when the majority suggested that the protection for the corporate speech in that case

¹⁴⁹ Many ads for alcoholic beverages carry an admonition to “drink responsibly.” See Gina Agostinelli & Joel W. Grube, *Alcohol Counter-Advertising and the Media: A Review of Recent Research*, 26 ALCOHOL RES. & HEALTH 15, 17–18 (2002) (noting that beer brewers sponsor counter-advertising that often increases consumer sympathy for their brand, which may, in turn, lead to increased sales or other behaviors that are seemingly incompatible with the message); see also Stuart Elliott, *A Web Awash in Liquor Ads for Moderation*, N.Y. TIMES, Mar. 9, 2009, at B7 (noting that a popular vodka brand is stepping up advertising to encourage drinking in moderation). But there is reason to be skeptical about these appeals because, according to at least one source, “[t]en percent of drinkers consume over 60% of all the alcohol sold.” KILBOURNE, *supra* note 58, at 156; see also SCHUDSON, *supra* note 101, at 26–27 (explaining the importance of the heavy user to advertisers by noting that 17% of households consume 88% of beer sold).

¹⁵⁰ Even if the makers of the video themselves perhaps harbor some subversive intents with respect to making the clip, and while no maker completely controls the reception, meaning or future use of such communications, it seems fair to say, for the reasons that are explored further herein, that attempting a counter-culture message from within the framework of the for-profit entity’s communication may doom the efforts, because the imperatives of the form are inherently contradictory to the message. Put another way, it may be impossible to convey the message “Do not allow your self-esteem to be undermined by the beauty industry” at the same time as you are attempting to position your company to be the beauty product purveyor of choice.

¹⁵¹ John C. Coffee, Jr., “No Soul to Damn, No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 389 (1980) (describing the difficulties inherent in determining appropriate punishment for corporations due to the legal fiction that is the corporate mind).

¹⁵² Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

¹⁵³ See generally *id.*

¹⁵⁴ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

stemmed from the nature of the content, not the identity of the speaker.¹⁵⁵

That approach is cosmetically appealing, but it is precisely the path that has taken us to the unlovely present, one in which the electoral process is awash in corporate influence and commercial speakers are perhaps the most powerful shapers of the culture. Looked at from the perspective of resources, the government, (and certainly the individual) may be relatively powerless to stem the tide of commercialism and address the problems commercial speech may exacerbate—problems like drug addiction, market speculation, gambling, obesity, drug safety, and perhaps many others.

However, attempts to distinguish protected from unprotected speech on the basis of format simply allow too much that is essentially commercial, and that contains false or potentially misleading material, to escape appropriate governmental scrutiny.¹⁵⁶ The Dove video itself illustrates that because the video is produced with a marketing intent but is *delivered* in a format that frames it as political speech rather than advertising. This test would also be inconclusive. And because there is no motive for producing this speech *other than* the economic welfare of the company, framing the speech as political commentary is profoundly misleading.

XII. THE CORPORATION AS SPEAKER

The legal structure of modern corporations, at least under U.S. law, makes corporate motives for speech always traceable to economic incentives.¹⁵⁷ This is because the separation of ownership and control, and the legal structure regulating the relationship of managers to the corporations they run, create a built-in tendency to

¹⁵⁵ *Id.* at 784 (finding no constitutional support for “the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material affect on its business or property”).

¹⁵⁶ I’ve addressed this issue elsewhere with respect to public relations speech. *See generally* Piety, *Free Advertising*, *supra* note 6.

¹⁵⁷ *But see* Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1411–12 (1993) (proposing that a shift is occurring as a result of constituency statutes that conceive of shareholders more as stakeholders, and therefore include groups other than shareholders within the ambit of corporate concern). Other authorities dispute this reading of constituency statutes. *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) (arguing that shareholder interests still take priority over all other constituents, and that directors are not entitled to reduce corporate profits in favor of advancing other interests).

drive corporate speech toward the maximization of firm's economic welfare over any other goals.¹⁵⁸

Messages with a broader social purpose that do not contribute to the economic welfare of the organization are more difficult to justify because managers are fiduciaries.¹⁵⁹ And even when fiduciaries go wrong, they tend to go wrong in the form of self-serving behavior—that is, taking economic rents from the organization, (perhaps through something like pumping stock price or excessive compensation), rather than engaging in social activism that is of no particular benefit to either the manager or the company.

However, Dove is not even a corporation. It is a brand. There isn't any entity "Dove." Dove is a *brand* owned by Unilever. So it is difficult to see how it can be a speaker. Protection for freedom of speech of human beings protects an essential aspect of what it means to be human. A part of being human and of self-actualization is self-expression. Neither a brand nor a corporation has a corporeal existence, a self to be actualized, or an opinion to be expressed. A brand is an asset. Owning it gives you rights to income from its employment. And although we talk about a brand's "personality," that, too, is, of course, a fiction—one that in turn is also created through the simulacra of production in commercial speech. Production of brand image is a function of commercial speech,¹⁶⁰ and is also protected by intellectual property law, which itself actually contributes to the suppression of expression, as well as to its expansion.¹⁶¹

¹⁵⁸ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001) (arguing that a universal convergence on the shareholder-oriented model of corporations is imminent). It may have been somewhat premature to declare the end of history for corporate law, as change is undoubtedly going to come as a result of the crash of 2008. In any event, a shareholder-focused mission is going to largely reflect some fictional shareholder's interest, as conceived of in corporate law, rather than actual shareholders. See Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees*, *Revisited*, 69 S. CAL. L. REV. 1021, 1056–86 (1996).

¹⁵⁹ Because the "Onslaught" video is marketing, it is a business expense. Even if its production were not a marketing expense, it could be covered as a prudent exercise in good public relations to pick an "issue" to be identified with in order to reap positive publicity for the brand. See FRASER P. SEITEL, *THE PRACTICE OF PUBLIC RELATIONS* 235–36 (8th ed. 2001) (describing "cause-related" marketing as an aspect of integrated marketing communications that may come under the umbrella of public relations).

¹⁶⁰ See NAOMI KLEIN, *NO LOGO 5* (1999) ("Think of the brand as the core meaning of the modern corporation, and of the advertisement as one vehicle used to convey that meaning to the world.").

¹⁶¹ It is worth noting that intellectual property law, itself a creature of governmental enactment, often represents a very significant restriction on freedom of expression. Indeed, it arguably acts to suppress all but commercial uses of the material under its coverage, the legal exception for fair use notwithstanding. See Margy Rochlin, *Hindu Goddess as Betty Boop? It's Personal*, N.Y. TIMES (N.Y. Ed.), Feb. 15, 2009, at AR10 (discussing a filmmaker's difficulty in getting a film distributed because of the copyright owner of some music used in the film; the

Unilever is a multinational organization that owns and markets a number of brands. Brands are themselves rather ephemeral things¹⁶²—they are vehicles for speech rather than speakers themselves. So there really is no “speaker” in the “Onslaught” video in the ordinary sense. Yes, there are persons who made the video. And they clearly had intentions, opinions, and views that were dramatized. But those persons responsible for putting it together were, ultimately, working to promote the meta-message: “Buy Dove products.” Any other communicative content is either incidental or subversive of the intent of the entity that commissioned it. The entity’s “message” is—“Buy Dove.” But because Dove is not a human being, it is not issuing that message as means of self-expression, but rather as a function of the legal purpose for which the entity was created under the law—to make a profit.

XIII. THE CONSEQUENCES OF PROFIT-DRIVEN SPEECH

The motive that marketers have to sell products both ensures that such speech will be produced, thereby decreasing the need for First Amendment protection, and renders it inherently unstable as a commitment to an idea, since it is not the *idea* that the producer is committed to, but the economic benefit. The idea is incidental and, in a real sense, is not offered for its own sake, but only instrumentally. For example, Unilever makes other grooming products, such as Axe deodorant for men. Axe is advertised to men with precisely the sort of imagery the makers of “Onslaught” criticize. Unilever also makes diet products such as Slim Fast. And many of the images in “Onslaught” look as though they might have been lifted straight from one of Slim Fast’s own ads. At the least, the visuals in “Onslaught” were surely

owners were seeking tens of thousands of dollars, more than a distributor was offering, and the filmmaker referred to this as “copyright jail”). In fact, trademarks and similar intellectual property are arguably themselves commercial speech. *See* Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737, 737 (2007) (exploring the ways trademark law and the First Amendment differ in approach to commercial speech). If so, extending full First Amendment protection to this kind of speech would seem to obliterate trademark protection, since non-owners would foreclose the government from suppressing the use of trademarks. That would turn speech into a commodity with the only role for government as policeman on behalf of owners.

¹⁶² *See, e.g.*, LUCAS CONLEY, *OBD: OBSESSIVE BRANDING DISORDER: THE BUSINESS OF ILLUSION AND THE ILLUSION OF BUSINESS* 5 (2008) (“What was once made up of products and services is now increasingly built out of nebulous intangibles.”); KLEIN, *supra* note 160, *passim* (branding is production); JAMES B. TWITCHELL, *BRANDED NATION: THE MARKETING OF MEGACHURCH, COLLEGE, INC., AND MUSEUMWORLD passim* (2004) (discussing how cultural institutions such as mega churches, universities, and museums have come to rely on branding in order to survive).

meant to mimic such advertising. So Unilever would appear to be a significant contributor to the onslaught it is critiquing. Does that make “Onslaught” misleading? Arguably it does if the intent of the video is to convey to consumers that Dove is different. Some observers quickly noted this in posted comments online.¹⁶³

To the extent that the spot suggests Dove is supporting efforts to oppose the deleterious efforts of the beauty industry, it is deceptive, because, as discussed above, Dove is a brand owned by Unilever and Unilever makes many other products that are advertised in precisely the way it criticizes, not to mention that Dove is a brand of personal care products that arguably fall within the definition of “beauty industry.” This material is produced with the intent to create word-of-mouth interest in the video, which, it is hoped, will translate into interest in Dove products and ultimately more sales for Dove.¹⁶⁴ If it does not, the message is likely to be dropped.

Indeed, by September 2007, a report in *Advertising Age* suggested that the results from the Real Beauty campaign were no longer very impressive.¹⁶⁵ And other evidence suggests that although there was some positive reaction from the public about *the message* of the ads, in general, images of ordinary women were less effective in selling products than were images using traditional models.¹⁶⁶ And in an even

¹⁶³ See, e.g., Jack Neff, *An Onslaught Against ‘Onslaught’: Dove Viral Draws Heat From Critics*, ADVERTISING AGE, Nov. 26, 2007, at 3 (discussing response of activists, newspaper op-ed writers, bloggers and videographers who found the viral video hypocritical). The company might well have thought that the inconsistency would not be picked up on since the target market are so distinct, although this too is largely an artifact of marketing because products like soap and deodorant seem as if they could well be fairly gender neutral in their intrinsic properties related to function. Some in the industry think that a product has a gender and that, although slight tweaks in message and packaging can expand the reach of a product beyond one gender or the other, in other cases a product is so gender identified that an attempt to expand it would undermine the message to the primary customers. See Rupal Parekh, *Gender-Bending Brands an Easy Way to Increase Product Reach*, ADVERTISING AGE, Mar. 2, 2009, http://adage.com/article?article_id=134979. In that case you need to make sure that if you seek to add another market, you keep it separate. See *id.*

¹⁶⁴ See Diann Daniel, *Real Beauty = Real Sales?*, CMO MAG., Feb. 3, 2006, http://web.archive.org/web/20060203060406/http://www.cmomagazine.com/read/current/real_beauty.html (noting that Dove succeeded at creating an ad that got people talking, which is “half the marketing battle”).

¹⁶⁵ See Jack Neff, *Soft Soap*, ADVERTISING AGE, Sept. 24, 2007, at 1 (noting flat performance by Unilever and quoting one consultant who observed that the Dove ads were high “concept” but that people buy products, not concepts).

¹⁶⁶ See Jack Neff, *Study: Stick to Skinny Models for Fat Profits*, ADVERTISING AGE, Aug. 4, 2008, at 4 (discussing research that found that women evaluated a brand higher if its ads used thin models as opposed to average-size models, despite the fact that the ads had a negative effect on the women’s body images). Other advertisers have reflected a position that ads using more “normal” women are simply not reflective of men’s preferences. Ken Wheaton, *Ads Say Men Don’t Like Large Women*, ADVERTISING AGE, June 25, 2007, at 21, available at http://adage.com/adages/post?article_id=118624 (discussing Brazilian ads that featured large women, which could have been empowering if the message of the ads was not that men’s

more ironic development, allegations surfaced that the women in the Dove “Real Beauty” campaign ads were not really real. Their photos had been retouched by master retoucher Pascal Dangin.¹⁶⁷ “Do you know how much retouching was on that?” he was reported to have asked.¹⁶⁸ “[I]t was great to do, a challenge, to keep everyone’s skin and faces showing the mileage but not looking unattractive.”¹⁶⁹ As one marketer put it in the wake of the retouching scandal, “Dove is cynically using ‘real women’ and exposing the process just to make money.”¹⁷⁰

XIV. WHY COUNTER-SPEECH IS NO REMEDY

“Onslaught” makes a good case that the cumulative effect of the beauty industry’s advertising speech is harmful to women and girls. But the video also serves to illustrate several ways in which the answer to that onslaught is not to be found in counter-speech. The video itself illustrates the enormous influence that advertising and other commercial and commercially-influenced speech have in the culture, particularly with respect to the construction and reinforcement of gender stereotypes. Much of this influence is constructed and operates in the unconscious.¹⁷¹ The video demonstrates more effectively than any words just how ineffective the remedy “Talk to your daughter” is likely to be.

preference for thin women will seemingly never change).

¹⁶⁷ See Jack Neff, *Dove’s ‘Real Beauty’ Pics Could Be Big Phonies*, ADVERTISING AGE, May 7, 2008, http://adage.com/article?article_id=126914.

¹⁶⁸ Lauren Collins, *Pixel Perfect: Pascal Dangin’s Virtual Reality*, NEW YORKER, May 12, 2008, at 94, 100. Dangin later claimed he was misquoted and that he had worked on the “Pro-Age,” not the “Real Beauty,” campaign, and that all he had done was “remove dust and do color correction.” Jack Neff, *Retouching Ruckus Leaves Dove Flailing*, ADVERTISING AGE, May 12, 2008, at 1 (quoting Mr. Dangin’s description of his work in the Unilever statement that addressed the controversy).

¹⁶⁹ Collins, *supra* note 168, at 100.

¹⁷⁰ Posting by Ken Wheaton to Advertising Age, http://adage.com/adages/post?article_id=119343 (July 17, 2007, 11:54 AM) Wheaton is principally trying to deflect criticism of the retouching of photos on magazine covers from the advertisers to the magazine editors. At the end, however, he runs out of steam and agrees that marketers may share the blame for the practice. See *id.* His reference to “exposing the process” of retouching refers to another viral video in the Dove campaign for real beauty series called “Evolution” which tracks the process of a model sitting for a photo shoot, her make-up, the final photo, the retouching and manipulation of the photo and to the final version as it ends up on a billboard. The tag line is “no wonder our perception of beauty is so distorted.” <http://www.youtube.com/watch?v=iYhCn0jf46U>.

¹⁷¹ See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752–53 (2001) (noting the common complaint that the legal doctrines behind current antidiscrimination law do not adequately address contemporary discrimination, which is pervasive, subtle, and often non-deliberate or unconscious).

Talking to your daughter (or for that matter your son) at the stage pictured in the video (seven or eight years old) is likely to be too little, too late. By that time children have already been the target of massive advertising efforts directed at them since before they could speak.¹⁷² At the point at which it would be possible to have a conversation with your daughter about advertising, the industry will have been playing a prominent part in shaping her understanding of the world, her fantasies, and self-conception.¹⁷³ As economist Juliet Schor observes, “Corporations have infiltrated the core activities and institutions of childhood, with virtually no resistance from government or parents.”¹⁷⁴

From babyhood, female children in Western, industrialized countries have been thoroughly socialized into much of the cultural messages about gender. Starting from infancy, many little girls are dressed in pink, in pink rooms, their clothing festooned with indicia of gender that serve no purpose except to mark them as female (think of headbands on virtually hairless babies the sole purpose of which seems to be to communicate the baby is a girl).¹⁷⁵ From a very young age female children are exposed to images of girls as princesses, mermaids, Cinderella, Sleeping Beauty, models, and beauty pageant winners.¹⁷⁶ They have received Barbies and Bratz dolls, toy kitchens,¹⁷⁷ play makeup, dress-up and a thousand other gendered aspects of dream creation in the post-industrial United States.

¹⁷² See, e.g., JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* 19 (2004) (“Kids can recognize logos by eighteen months, and before reaching their second birthday, they’re asking for products by brand name.”).

¹⁷³ See, e.g., *id. passim* (observing that children are exposed to massive amounts of advertising and are the subject of intrusive marketing research efforts that attempt to prime them as consumers before they are fully able to distinguish marketing from editorial content or intent, which stands in opposition to parental efforts at control and is to the children’s long-term detriment); Beverly A. Browne, *Gender Stereotypes in Advertising on Children’s Television in the 1990s: A Cross-National Analysis*, 27 *J. ADVERTISING* 83, 83 (1998) (“Stereotypes in advertising on children’s television programs have been a special problem because of their potential impact on gender socialization and, subsequently, children’s view of themselves and other people.”). The industry also extensively addresses teenagers. See generally ALISSA QUART, *BRANDED: THE BUYING AND SELLING OF TEENAGERS* (2003) (reporting on volume of advertising aimed at teenagers as a lucrative market, and infiltration into content and teen social networks); *Frontline: The Merchants of Cool*, *supra* note 69 (interviewing some of the marketers and media executives who have made teenagers the most sought after consumer demographic in the United States).

¹⁷⁴ *Id.* at 13.

¹⁷⁵ I am not saying these practices are necessarily bad or wrong; I am simply observing them.

¹⁷⁶ A particularly blistering critique of this practice was offered in *LITTLE MISS SUNSHINE* (Fox Searchlight Pictures 2006).

¹⁷⁷ See, e.g., Posting by “Vanessa” to *feministing.com*, <http://feministing.com/archives/004649.html> (Dec. 30, 2005, 5:04 PM) (discussing placement of “Retro Kitchen Sets” in the “girls’ rooms” section of Pottery Barn Kids stores).

It strains credulity to think that these efforts have not had a fairly prominent role in shaping those children's dreams, offering them things to want, as well as informing them of what they "should" want, what others expect of them, what society values and so forth. Set against such a powerful backdrop, sitting down for a little chat with the kids seems unlikely to do much to counter this force. The audience has been pre-primed.

Moreover, it hardly seems likely, given the ubiquity of what we might call the anti-feminist or objectivist message, that a few words offered by a parent to a pre-teen or teenager are likely to be very effective. Even if a parent's injunctions were not, to a teenage ear, coming from an inherently unreliable source when it comes to popular culture (parents do not know what is "cool" or are so "past it" that they could not possibly appreciate the importance, nay the utter necessity, of social approval and so forth), the sheer imbalance of communicative messages would doom "Talk to your daughter" as an adequate response.

So what is to be done? In the first place, that certain speech is unprotected by the First Amendment does not mean that the government must set about restraining it. Just as there may be an optimal amount of fraud—that is, an amount of fraud in the market that represents the point at which there is a decreasing marginal utility from attempts to eradicate it¹⁷⁸—so, too, may the costs of attempting to regulate misogyny in commercial advertising be disproportionately high. We might conclude that the costs of regulating such advertising are greater than the costs to women's equality in *not* regulating.

We cannot, however, assess costs we claim do not exist. The costs to women's equality are real. It is important to not deny the harm certain types of advertising causes. Thus, it seems premature to deny the *possibility* of control over commercial speech by seeing it as primarily free speech with a commercial component, rather than as commerce with a speech component. The Constitution grants the government the right to regulate commerce in the public interest.¹⁷⁹ Women's equality, health, and self-esteem are manifestly issues of public interest.

In contrast, whether we love or hate Unilever's message, Unilever is not a citizen (indeed, it is not even an American company). And it is no embattled or oppressed minority. Unilever does not need any protection to make "Onslaught." It has a powerful motive to speak—

¹⁷⁸ See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68 (1973) "[S]ome fraud can be successful because of the high, if not prohibitive, costs of discovery of the fraud."

¹⁷⁹ U. S. CONST. art. I, § 8, cl. 3.

economic interests—and ample means to do so. Handing it First Amendment protection for this sort of speech seems to offer more coverage than necessary.

For a variety of reasons, including the fact that activating fear and insecurities to sell things is a time-honored marketing technique, we can expect that the preponderance of advertising will continue to take the forms that the Dove spot criticizes. Attempts to appeal to consumers' desire to avoid embarrassment are widely believed to be effective and powerful.¹⁸⁰ "People fear embarrassment and humiliation more than just about anything else."¹⁸¹ Because of the effectiveness of capitalizing on such fears, such advertising will undoubtedly continue. The economic incentives of for-profit entity speakers ensure that these entities will be indifferent to the social goals embodied in civil rights legislation for their own sake or on moral grounds. If equality will sell products, they will promote equality. If it does not, they will not.

CONCLUSION

"Onslaught" is advertising, not an entity's self-expression. It is not political expression on behalf of Dove or Unilever, even if it looks like it. Protecting Dove's right to advertise does not appear to have much to do with advancing democracy, because a corporation is not a democratic institution, nor is it one that self-evidently ought to be entitled to a voice in a democracy. It is difficult to see Dove or Unilever as representing an oppressed minority or a dissenter for whom First Amendment protection is necessary in a democracy. So it is unclear why Dove, in this, or any other communication, ought to be granted First Amendment protection. Regulation of Dove's speech is regulation of commerce.¹⁸² And the Constitution grants to Congress the right to regulate commerce.

Some may object that freedom of advertising is necessary to stimulate the economy, and that a free market is necessary to democracy. That is demonstrably false, since many countries have free markets but not democracies.¹⁸³ Moreover, in the wake of the market crash of 2008, it could be argued that the economy was a little *over-stimulated*, and that unbridled commercial promotion may have

¹⁸⁰ See BRUMBERG, *supra* note 111, at 196 (noting that marketers assume girls today do not like their bodies and worry about things like cellulite and saddlebags).

¹⁸¹ SETTLE & ALRECK, *supra* note 49, at 116.

¹⁸² See U. S. CONST. art. I, § 8, cl. 3.

¹⁸³ This assumes, of course, that there is such a thing as a truly "free" market anywhere.

played a role in puffing up the bubble that has recently burst. Perhaps we would have been a little better off with a little less stimulation.

In any event, democracy got along fairly well before 1976 without commercial speech protection. And industry also seemed to fare well, despite the absence of First Amendment protection. As Justice Rehnquist noted in his dissent in *Virginia Pharmacy*, “[T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.”¹⁸⁴

Refusal to extend Constitutional protection does not inevitably mean the endorsement of censorship. There are many reasons—economic stimulus being only one—that widespread censorship of advertising and marketing might not be a desirable development.¹⁸⁵ For one thing, regulation is costly. For another, after careful consideration of the dangers of censorship, as well as the dangers that might result from unrestrained commercial speech, one could well conclude that the social loss is greater than the social cost. However, you cannot make this assessment until you actually *acknowledge* the social costs.

As the Supreme Court noted in *Virginia Pharmacy*, there are built-in reasons to suppose that manufacturers will continue to advertise, regardless of legal restrictions. “Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.”¹⁸⁶ Dove does not need First Amendment protection in order to produce and distribute material like “Onslaught.” Its economic incentives are sufficient. However, if we give First Amendment protection to all of the speech products of such speakers, it is hard to know how we will ever be able to protect ourselves from the patently false, not to mention the insidiously harmful. In service to the interest in selling products, sellers have historically not exercised a great deal of scrupulousness over niceties such as truth or falsity or social welfare.¹⁸⁷ Marketers’ key interest in commercial speech has been, “Does it move product?” If social responsibility moves product, the response is, “Great.” If not, that campaign is likely dead.

¹⁸⁴ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 784 (Rehnquist, J. dissenting).

¹⁸⁵ *See, e.g.*, Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, 998 (1998) (“[A] society in which the government is the only, or the leading, organized force is one that is unlikely to be able to control that government.”)

¹⁸⁶ *Va. Pharmacy*, 425 U.S. at 772, n.24.

¹⁸⁷ *See, e.g.*, LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 20–28 (2003) (describing rise of interest in consumer protection).

Whether or not we think “Onslaught” is a valuable contribution to the discussion of women’s place in society, it does not seem that refusing to give it First Amendment protection will result in videos like “Onslaught” not being produced. The producers of commercial advertising do not need the shield of Constitutional protection. But if we give it to them, we also give away any power to address some of the harms reviewed here. It may be we conclude that redressing the harms done to women in advertising are, on balance, too difficult to achieve through the regulation of advertising without many other negative consequences. However to conclude that we are powerless as a society to fight the onslaught it criticizes because of the “rights” of a fictional entity that does not feel or suffer seems just plain wrong. If that is the case we might as well surrender now.