Advertisements, Stereotypes, and Freedom of Expression

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I. Introduction

One of the most troublesome phenomena in democratic societies is the continuing discrimination against minorities and women. This phenomenon is puzzling because it stands in sharp contradiction to the fundamental stances of most of the citizens of those societies, stances that are in favor of equality. How can this discrepancy be explained? The answer to this question is found in the results of many studies in the field of social cognition, which show that despite the fact that people have internalized the value of equality on the cognitive level, on the subconscious level they continue to rely on stereotypical assumptions about the place of minorities and women and are prejudiced with regard to those groups. These prejudices, it is reasonable to assume, lead to the discriminating behavior.

The law tends to deal with the phenomenon of discrimination in a post hoc fashion; namely, it grants remedies to whoever can prove that he or she was discriminated against. Currently, American courts generally require the plaintiff to prove that the defendant acted with discriminatory intent. However, in light of the findings that people are not aware of the fact that they are acting on the basis of stereotypical assumptions, insistence on showing intent to discriminate means that in many cases, people who have been discriminated against have no legal remedy. It is our contention that rather than a post-hoc approach with complex proof of intent and motive, it would be more appropriate to try and focus on the factors that influence the formation of the stereotypical attitudes, even before they lead to discriminatory behavior. People are exposed to stereotypes as part of their socialization process, the process by which social norms are transferred from one generation to the next. Socialization begins with the family and then continues in the school, but it is also conducted ceaselessly by the media. In this article, we argue for legislation that places restrictions on the transferal of stereotypical messages in advertisements. These messages shape the attitudes of people and are likely to lead to discrimination against minorities and women, to injury to the self-image of members of these groups, and to
other harms. It is our contention that by means of such legislation it will be possible to reduce the influence of stereotypes on people’s attitudes and behavior.

We focus on stereotypical messages that appear in advertisements and not on stereotypical messages that are transmitted in other contexts. In our opinion, there is no room for placing restrictions on stereotypical messages that are transmitted directly, that is, by way of presentation of claims for the audience’s scrutiny. Thus the publication of an article that claims that a woman’s place is in the home should not be restricted. In the spirit of Justice Brandeis, the correct way of dealing with a problematic opinion is not to restrict that opinion, but, rather, to sound opposing opinions. However, stereotypical messages that are found in advertisements are not transmitted by way of presentation of claims. The political connotations in advertisements (for example, that women perform domestic jobs) arise as a byproduct of the attempt to sell. Meanings are transmitted covertly and indirectly, and accordingly, they are not subjected to the audience’s scrutiny in the sense that they are not absorbed by the audience in a cognitive and conscious manner.

Regarding works of art, there are many instances in which political messages are transmitted in such works in an indirect manner. Nonetheless, in the context of advertisements, it can be assumed that the only motive behind the “political” messages is economic in nature, namely, the desire to sell. This assumption is not valid insofar as works of art are concerned. Although the contents of works of art might be influenced by the desire to sell, we cannot assume that this is the only motivation. Therefore, the process of tracing the motive behind the message is complex and holds the potential for error. Accordingly, there is the danger that restricting stereotypical messages in works of art will, in fact, constitute restricting the expression of a view. In contrast, in the context of advertisements, we can assume with a high degree of probability that the motive behind the message is the attempt to reap profit. Thus, restrictions on stereotypes in advertisements constitute a restriction of the commercial interest, not of the expression of a person’s credo. In addition, if the State is vested with the authority to intervene in the contents of works of art, there is concern that this authority will be exploited to restrict views that the ruling regime does not support.
Another reason for our focus on stereotypical messages that are transmitted in
advertisements relates to the fact that advertisers tend to present each advertisement a
number of times, with the intention that the frequent repetition will cause people to
buy the advertised product. The advertisement is, therefore, a sort of “brainwashing”
that attempts to transmit messages subconsciously to the viewers, with the byproduct
being that the stereotypical meanings are also transmitted to the viewers. Our focus on
stereotyping in advertising also stems from the great extent of the exposure to
advertisements\textsuperscript{vi} and from the fact that advertisements are particularly flooded with
stereotypical messages. It is reasonable to assume that the exposure to advertisements
plays a greater role in the formation of sexist prejudices than does the exposure to
pornography, since most people are exposed to the former far more than to the latter.

Stereotypical messages are not the only messages that are transmitted in an indirect,
repetitious, and intensive fashion in advertisements. Advertisements transmit in this
way also messages about desirable lifestyles and the superiority of the consumer
culture. In this article, we have chosen to focus on the \textit{stereotypical} messages that
appear in advertisements since, in our opinion, they are more problematic than the
other messages in advertisements. First, the stereotypical messages inflict greater
harms, particularly in terms of the increase in incidence of discrimination. Second,
whereas broad consensus exists amongst citizens of democratic states with regard to
the objection to classifying people on the basis of stereotypical assumptions, it is not
possible to assume a similar consensus against the consumer culture. As we will show
below, this difference has bearing in terms of the legitimacy of our proposed statutory
restrictions on stereotyping in advertisements.

The article will be divided into two main parts. The first part will describe the way in
which advertisements function and how they transfer stereotypical messages. In
addition, we will describe the harms that exposure to stereotype messages in
advertisements is likely to cause. The second part will be devoted to contending with
the claim that restricting stereotypical messages in advertisements inappropriately
violates the freedom of expression of advertisers, and particularly that of the viewers.
We will attempt to show that not only would our proposed restrictions not violate
freedom of expression, they would in fact contribute to the realization of the
objectives that underlie the principle of freedom of expression. The stereotypical
messages are absorbed by people through a non-cognitive process. These messages are covert, emotional, and repetitious. Accordingly, they have no actual value in terms of the objectives of freedom of expression. In addition, the restrictions we propose have strong legitimacy since they are based on the general recognition by the majority of citizens in democratic states of the importance of equality.

II. Advertisements and Stereotypes

In order to understand the problems related to stereotypical messages that are transmitted in advertisements, it is first necessary to understand the general way in which advertisements function.

An unsophisticated understanding of advertisements would perceive them as no more than a tool for transferring information regarding consumer products. A completely different picture arises, however, from the academic research conducted in this field. Transmission of information about products is only a small part of modern advertising. Since the 1920s, manufacturers and advertisers have come to understand that advertisements must do more than simply convey information concerning the product (Ewen, 1976). They realized that advertisements must try to alter attitudes regarding appropriate lifestyles and emphasize product consumption as an essential element of happiness and success. Advertisements try to promote a materialistic value system, under which personal happiness and success are defined as high consumption and the possession of as many products as possible (Leiss, 1985).

Direct appeal to logic and use of rational argument are not tactics employed by advertisers in attempting to alter consumers’ value systems. Indeed, such a direct strategy would likely arouse antagonism amongst many consumers. Rather, the attempt to alter consumer values is indirect in nature. The semiotic analysis of advertisements seems to explain best the invisible ways in which advertisements change values. Under the semiotic approach, advertisements create associations between products and meanings.
In her well-known semiotic analysis of advertisements, Williamson (1978) analyzed an advertisement in which a bottle of Chanel perfume was placed next to the French actress Catherine Deneuve. In the cultural context of this advertisement, Deneuve symbolizes for many French elegance or “chic”. Despite the fact that in the advertisement nothing was claimed to this effect, placing the perfume bottle next to the actress created a connection between this specific brand of perfume and elegance. It is important to note that there is of course no natural connection between the quality of elegance and this brand of perfume. Had the advertiser placed the Chanel bottle next to Clint Eastwood, who symbolizes masculinity, people would begin to believe, after continued and repeated exposure to this connection, that this is a man’s cologne.

Semiotic analysis also points to the fact that information on the product and logical argument play no part in the attempt to redefine viewers’ value systems and personalities. This is manifested in the scarcity of text to be found in modern advertisements. Instead of text, today’s advertisements make extensive use of visual imagery. Under semiotic theory, visual imagery is a picture that represents and suggests a particular meaning, idea, or conception. Visual imagery is, by its very nature, non-discursive. The use of a series of images in succession often elicits associational free-play. Such imagery encourages leaps of imagination in the viewer’s mind from one meaning to another, without much attention to whether there is any logical connection between them.

How do advertisements succeed in creating an association between things devoid of any logical connection? How do they succeed in establishing the completely baseless connection between a certain scent and French elegance? The advertiser is well aware of the lack of any logical connection between scents and personality traits. He therefore makes use of a medium that is not logical in nature—visual imagery, which, as noted, encourages associational free-play. Furthermore, by focusing on the weaknesses and anxieties of viewers (MacBride, 1980), advertisers enhance the willingness of viewers to see a link between logically unconnected things. Advertisers identify people’s needs for safety, health, sexual accomplishment, adventure, etc. Advertisements then promise to assist in satisfying these needs: they promise to make us more attractive, popular, significant, and happier; cured of all sorts of medical ailments and afflictions; and so on. Hence, an advertisement’s success in establishing
a convincing connection between women's attractiveness and a certain scent is related also to the insecurity suffered by many women with regard to their personal appearance.

Stereotypical images, like all images in advertisements, convey meanings. These images ascribe characteristics to social groups or sectors of society. These characteristics may include traits, physical attributes, societal roles, or specific behavior. Most often, advertisements ascribe characteristics to gender and racial groups. For example, a woman shown washing dishes in an advertisement is likely to create an association in the minds of viewers between what it means to be a woman and the activity of washing dishes, whereas a woman who is portrayed as “sexy” is likely to create an association between the meaning of being a woman and sexual availability. An advertisement in which the manager is Caucasian and the blue-collar worker is Hispanic creates an association between Hispanic identity and low socio-economic status. As we will show below, gender and racial stereotypes create serious harms (most likely, more severe harms than those brought about by other types of stereotypes).

Studies consistently report that women are typically portrayed in advertisements either as housewives or as sexy and beautiful (Coltraine, 2000; Cortese, 1999; Lazier, 1993). The “housewife” type of woman is characterized as submissive, dependent, nurturing, tidy, gentle, and unconfident, and she is likely to be shown at home. The "sexy" type of woman is characterized as young, thin, smiling, acquiescent, provocative, and sexually available. The latter stereotype, which emerged in the 1980s, represents what Naomi Wolf (1991) calls the “Beauty Myth,” that is, the notion that women are and should be beautiful and sexually available for men. In contrast, advertisements tend to portray men outside the home and in occupational roles, and they are generally shown as knowledgeable, independent, powerful, successful, and tough.

Studies show that racial and ethnic minorities are underrepresented in advertisements. In the United States, Latinos and Asian-Americans are significantly underrepresented in television commercials (Coltraine, 2000, 382). Although on the whole, African-Americans are not underrepresented in advertisements, they are significantly
underrepresented in romantic scenes and family settings (Coltraine, 2000, 384). In addition, when minorities do appear in advertisements, they are stereotyped. For example, it has been consistently reported that African-American men are routinely shown as aggressive. In general, non-Caucasians tend to be shown in advertisements in the background, associated with fast-food, beer, and automobiles and as subservient to Caucasian authority figures (Wilks & Valencia, 1989; Humphrey & Schuman, 1984).

Two types of stereotypical images may be distinguished in advertisements: transformative images and conservative images. The function of transformative images is to reshape viewers’ value systems and personalities. For example, as noted, in the 1980’s the image of the beautiful and sexy woman began to appear with great frequency in advertisements. As Naomi Wolf (1991) explains, advertisers are interested in persuading women to accept this definition of being a woman, since they hope that in the attempt to become more attractive women will increase their purchases of cosmetic products.

The second type of stereotypical images, conservative images, reflects accepted social meanings of belonging to gender or racial groups. These images serve the advertiser in achieving one or both of the following two objectives. The first objective is to focus her message on people she believes will buy her product (consumer targeting). For example, she will use men to advertise work tools and women to advertise laundry detergent. The advertiser’s second objective is to create an atmosphere that encourages buying, i.e., to foster a buying mood (Baker, 1994, 62-66). To achieve this, the advertiser tries to avoid imagery that may make viewers uneasy. Thus, she will use images that reflect accepted social meanings. In the majority of cases, the stereotype images are of the conservative type. They are not aimed at altering viewers’ attitudes or redefining their values. Instead, they seem to reflect the prevailing social perceptions regarding the meaning of belonging to a certain group.

Stereotypes in advertisements are problematic in two respects: first, in terms of the role they play in forming prejudices amongst those exposed to them; second, in terms of the damage that is caused due to the existence of prejudices of this type. With regard to the former role of stereotypical messages, the use of transformative images
represents an attempt on the part of the advertiser to change the attitudes and values of those exposed to the advertisements. This is not conducted by way of presenting claims that are to be subjected to rational scrutiny, since, as explained above, any attempt to directly change the values and attitudes of the viewer will arouse antagonism, and consequently, transformative messages are indirect. The objective is to change the viewer without his or her being conscious of this, by appealing to emotions and exploiting human weaknesses and anxieties. Advertisements that make use of beautiful, well-groomed, and thin models subconsciously influence the women who are exposed to them to the point of their believing that they must look like these models. The success of such advertisements in changing the attitudes of women derives from the fact that they play on the widespread human anxiety regarding external appearance and from the fact that the products being advertised guarantee to make the viewers beautiful.

Conservative stereotypical images are also problematic in terms of the role they play in forming prejudices. Aside from the fact that these images indirectly transmit stereotypes, studies show that advertisements lag behind the social changes that have occurred in reality. Thus, despite the fact that over the past several decades, a growing number of women have been performing functions traditionally considered masculine and more African-Americans are holding positions that in the past were perceived as “White,” these changes are not reflected fully in contemporary advertisements. To a large extent, advertisements preserve the allocation of roles that was acceptable several decades ago. The explanation for this phenomenon is probably that the advertiser tries to create a “buying” atmosphere, one that will make the audience feel at ease. Thus, he seeks to avoid creating any emotional tension in the viewers, which would likely arise from exposure to a presentation of minorities and women in non-traditional roles. Were the stereotypes to reflect the prevailing social reality, it would be more difficult to find fault with the advertisers for presenting the existing division of roles in society. However, when the stereotype images lag behind the increase in equality that has occurred over the last decades, they are playing a regressive role and are preventing people from internalizing the changes that have transpired in reality.
Yet the most significant problem in regard to the role that stereotypes in advertisements play in shaping prejudices is that these messages are transmitted in a way that prevents people from internalizing their belief in equality. In liberal democracies there is broad consensus regarding the importance of equality, and the overwhelming majority of citizens oppose generalizations on the basis of race or gender. However, stereotyping in advertising serves to wear away at this widespread commitment in principle to equality. This is connected to the fact that there are two levels at which people relate to the phenomena they encounter: the conscious-cognitive level and the sub-conscious emotional level; and there is often incongruity between the two.

Studies in social psychology on the relationship between stereotypes and people's beliefs are revealing in this context (Devine, 1989; Banaji & Hardin, 1996; Blair & Banaji, 1996). In these studies, when subjects were asked for a quick response, even those who had unequivocally liberal egalitarian views expressed prejudices and stereotypical assumptions. In contrast, when these same subjects were given a reasonable amount of time to respond, their reactions did not reflect such stereotyping or prejudices. These findings are commonly explained by the fact that when an immediate response is required, people with egalitarian beliefs do not have sufficient time to neutralize the influence of their early exposure to stereotype norms. Individuals have a deep-rooted acquaintance with stereotype norms, originating in the early socialization processes. Clearly, therefore, both strong personal commitment and a favorable environment are necessary to free oneself from the hold of such norms. Throwing off the chains of a stereotype norm is similar in many ways to ridding oneself of an unwanted habit: one must make a decision to change the habit, remember this resolution, and then act in accordance therewith consistently and repeatedly (Devine, 1989, 15).

The effect of advertisements is to prevent such a process from occurring. They bring their audiences into repeated contact with stereotypes. They thus prevent people from internalizing at the emotional level their cognitive commitment to changing the stereotypical allocation of roles. By targeting the emotional level—the subconscious—advertisements create a conditioned reflexive response in audiences. As was explained earlier, most of the time, advertisements are non-cognitive. An
advertisement is not a set of claims that present a logical argument, but, rather, a swift series of visual images that does not leave the observer sufficient time to process and assess cognitively what she is being exposed to. Because of the rapid pace at which the stereotype images in advertisements are shown, the viewer does not have enough time to analyze critically the stereotypes she is seeing. Thus, not only do advertisements make no contribution to the elimination of the adverse practice of stereotyping, they also have a distinctly regressive effect: they interfere with a person’s ability to internalize at the emotional level what she understands at the cognitive level. They cause the individual to forget the new “habit” that she wishes to adopt. They endow the norm that she seeks to change with a repetitive resonance, something that greatly intensifies its force.

Our discussion assumes that exposure to stereotypical messages in advertisements shapes the stereotypical attitudes of people toward women and minorities. This assumption is supported by a number of findings. First, watching television in general influences the attitudes and behaviors of the viewers, something that has found expression in many studies that show the influence of violent television programs on the audience. Second, there is a connection between exposure to television and stereotypical attitudes. For example, one study found that people who watch a lot of television have a greater tendency to believe that women are less capable than men and hold more stereotypical views with regard to which professions are better suited to women (Gerber, 1993). In another study it was revealed that following the introduction of the television into a community where it had previously been unknown, the attitudes of children in that community became more stereotypical and similar to the attitudes of children in other communities (Kimball, 1986). Third, with regard specifically to advertisements studies show that exposure to stereotypical advertisements influences the attitudes and behavior of those exposed to them. Thus a recently published study (Davis, 2002a) revealed that women who were exposed to stereotypical advertisements prior to a math exam scored lower on the exam than women who were exposed to neutral advertisements. The study also found that exposure to stereotypical advertisements caused women to prefer professions that are considered more “feminine” (for example, professions that require high verbal ability) to professions that are considered more masculine (the exact sciences).
The second aspect of the problematic nature of stereotypical messages relates to the harms that ensue from the existence of prejudices. There are several such harms. First, the reinforcement of stereotypical attitudes by advertisements most probably leads to discrimination against the stereotyped groups. For example, a woman might be denied a position for which she has the required skills because of the stereotypical opinions of the employer; a contractor might refuse to sell an apartment to an African-American only because the contractor is afraid that people with stereotypical opinions will not want to purchase adjacent apartments. These are unequivocal and significant injuries to substantive interests of these individuals. Beyond this, it is clear that discriminatory treatment of a person violates her dignity and causes her emotional distress.

Second, men who are exposed to the image of the beautiful and sensuous woman might develop a tendency to treat women as sex objects. One study (Mohr, 1996) showed that men who were exposed to pornographic materials thereafter tended to focus on the physical traits of women. Moreover, from cases brought before the courts it arises that exposure to pornographic materials at the workplace often leads to sexual harassment.\textsuperscript{xv} The treatment of women as sex objects in advertisements is more implied and oblique than in pornography; however, as Dworkin (1991) claims, since the exposure to advertisements is far wider than the exposure to pornography, it would not be unreasonable to assume that the influence of advertisements on the perception of women as sex objects is greater than that of pornography.

Third, even those who belong to the stereotyped groups are not impervious to the process of internalizing those messages. Indeed, studies show that the stereotypical perceptions of women and minorities are prevalent also among those same vulnerable groups (Nosek, 2002). The internalization of such perceptions amongst women, for example, has negative ramifications, for the image of the sensuous and beautiful woman is absorbed by many women and they are slaves to that image. One study (Lasn, 1999, note 65) showed that nine out of ten women are dissatisfied with their bodies and feel ashamed of themselves. Anorexia nervosa has reached epidemic proportions throughout the Western world. In the United States alone, approximately eight million people are reported as suffering from eating disorders, about 90% of which are women.\textsuperscript{xvi} PT Fredrickson (1998) claims that in modern Western culture,
Fourth, stereotypes in advertisements are problematic because they silence the voices of women and minorities, thereby constituting a violation of their freedom of expression. With regard to pornography and hate speech, it has been claimed that internalization of messages that are derogatory to women or minorities has the effect of their speech not being taken seriously and therefore of their being silenced in a certain sense. Similarly, it can be argued that stereotypical messages in advertisements also lead to derogatory treatment of the speech of women and minorities, thereby effectively silencing their voices. In addition, women and minorities are likely to refrain from stating their opinions for fear of derogatory treatment of their speech. To the extent that derogatory treatment of the speech of women and minority groups stems from stereotypical messages in advertisements, these messages in a certain sense silence them.

III. Freedom of Expression

We have seen that the stereotypical messages are problematic both from the perspective of the role they play in shaping prejudices amongst those that are exposed to them and from the perspective of the harms that result from the existence of such prejudices. Therefore, it is our contention that the law should prohibit the transmission of racial and gender stereotypes in advertisements. Most liberal democracies refrain from statutorily prohibiting the transmission of stereotypical messages in advertisements, instead leaving the matter to self-regulation by the media by means of codes of ethics. The overwhelming presence of stereotypes in advertisements, even today, is indicative of the fact that we cannot rely on ethical codes to prevent the severe harms described above, and it appears that a statutory regulation is preferable.
A regulation of this sort raises many questions with regard to the application of the law, for instance: How would stereotypes be defined? Which authority would be responsible for enforcing the law? What type of sanction would be appropriate in instances of violation of the law? And so forth. In this article, we do not address these questions; rather, we focus on one central claim that is likely to be brought against our proposal, namely, that any prohibition on stereotypical messages in advertisements would constitute an unjustified violation of freedom of expression. Objections to our proposal could be raised on the ground that it constitutes a violation of both the advertiser’s freedom of expression as well as the viewing public’s freedom of information. Below, we examine first the claims that could be raised by advertisers and then turn to the arguments that could be raised by viewers against our proposal for legislation limiting stereotyping in advertisements.

The first claim against our proposal is that it would limit the advertiser’s freedom of expression. Our response to this claim is that the legislation we propose would not limit the advertiser’s freedom of expression, but, rather, his general freedom of action. The real purpose of the commercial advertisement is not to express the advertiser’s ideology or values (Baker, 1994, 194-210). The advertiser’s aim is to encourage acts of sale. From this perspective, prohibiting stereotyping in advertisements would be no different from prohibiting racial discrimination in the sale of products and services. Economic liberty, rather than the freedom to express one’s beliefs, would be limited. Some might argue that this claim does not have general validity, since there may be cases in which the advertiser does express in the advertisement his ideology or beliefs. For example, the manager of an electric car factory may convey in an advertisement the message that the cars are environment-friendly and genuinely believe this message. In our opinion, restricting such advertising would not be a violation of the advertiser’s freedom of expression since he would not be prevented from transmitting his views in other forums, for example, in a newspaper article or a letter to the editor.

It is worthwhile to note that in other contexts as well, the motive behind transmitting messages may be economic in nature. For example, it can be assumed that at times, the contents of works of art are influenced by the goal of making a financial profit. In light of this, is there justification for limiting the transmitting of stereotypical messages in works of art when it seems clear that the motive is economic? In our
opinion, restrictions of this type are not desirable. In the context of advertisements, it can be assumed with a high degree of likelihood that the motive behind the message is the desire to profit. With regard to works of art, however, the economic motive is not the only motive, and therefore, the process of tracking the motive behind the message is complex and holds many possibilities for error. In addition, there is concern that the state would exploit such restrictions to limit artists’ possibilities for expressing their credos by means of artistic creation.

The second claim that is likely to be raised against our proposal is that restrictions on the advertiser’s freedom of expression will prevent the public from receiving all the information that it needs to reach optimal decisions in economic matters. Indeed, the right to information is a central consideration in granting people the freedom to express themselves in the economic sphere. As Redish (1971, 443-443) explains,

> When the individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information, weigh it mentally in light of the goals of the personal satisfaction he has set for himself, counter-balance his conclusions with the possible price differentials, and in so doing exercise his abilities to reason and think.

We have two responses to this claim. First, commercial speech should be accorded more narrow protection than that accorded speech related to public matters. Commercial speech is an offer to make a commercial transaction.\textsuperscript{xix} It does not contribute to political discourse or, at best, its contribution is marginal (Jackson & Calvin, 1979). The principal value of freedom of expression is linked to the fact that it enables optimal public discourse in a democratic state.\textsuperscript{xx} Thus, most liberal democracies accord commercial speech more narrow protection than that accorded to political speech.\textsuperscript{xxi} In light of the lesser value of commercial speech, there is room to consider limiting it when this is necessary for realizing important social interests. The prevention of racial and gender discrimination is certainly a legitimate social interest in a liberal democracy.

Second, advertisements are hardly informative. Even in those cases where it is possible to extract indirectly some information from the stereotypes in
advertisements, it is still difficult to see how such information could be relevant to the act of purchasing products. For example, it is difficult to see how a stereotype that links belonging to a certain racial group with working in blue-collar professions could contribute to optimal decision-making regarding which product to purchase. Thus the restrictions that we propose will not harm the one thing that justifies protecting commercial speech, namely, access to information that will assist in making optimal economic decisions with regard to the advertised product. Moreover, in cases in which the stereotype in the advertisement is a generalization that does not reflect reality, the prejudice that it is likely to form amongst those exposed to the advertisement is likely to lead them to make non-optimal economic decisions in other contexts. For example, they might choose not to hire an African-American despite his having better skills than a Caucasian applicant.

But the claim that poses the real challenge to our proposal is the following: imposing legal prohibitions on stereotyping in advertisements constitutes an attempt to promote a view that favors racial and gender equality. Such prohibitions are in essence a silencing of the opposing view—the non-egalitarian view. Thus, under this claim, our proposal is problematic because it is moralistic and paternalistic. It is moralistic because it represents an attempt by the state to confer a moral view; it is paternalistic because it represents a state of mind that does not believe in the ability of those exposed to advertisements to choose the right view from between the two views (G. Dworkin, 1971). Our proposal therefore would constitute a severe violation of the autonomy of the viewers of advertisements. Instead of allowing them to be exposed to all views regarding equality and to choose for themselves which one to believe, we would be shielding them from one of those views. The American courts would classify such intervention by the state in freedom of expression as a “viewpoint discrimination” limitation. Limitations of this sort arise when the state promotes one view while discriminating against a competing view. There is a strong presumption against the constitutionality of this type of restriction of expression (Sunstein, 1993, 13), based on the rationale presented by Easterbrook in the American Booksellers case (1985, note 5), according to which such restrictions are in fact an attempt by the state to implement thought control. As noted earlier, commercial speech is of low value from the perspective of the interests involved in freedom of expression. Nonetheless, the American courts prohibit viewpoint discrimination, without addressing the value
of the given speech, and forbids this type of restriction even of speech that usually is not protected. For example, despite the fact that pornography is of low value in terms of its contribution to public discourse, the courts prohibit restrictions on it that fall into the category of viewpoint discrimination (American Booksellers, 1985). Similarly, despite the fact that “fighting words” are defined as unprotected speech, the courts prohibit such restrictions on them as well (R.A.V. v. St. Paul, 1992).

The criticism of our proposal is basically that the suggested regulation would violate the autonomy of the viewing audience. In order to contend with this criticism, we will first clarify the meaning of autonomy. From the etymological perspective, autonomy is the state in which a person is self-ruling. There are two principal approaches with regard to the conditions for self-rule, both of which are related to Isaiah Berlin’s (1979) well-known distinction between negative liberty and positive liberty. Autonomy in the sense of negative liberty means a lack of restrictions by others on the individual’s actions. Under the approach that understands autonomy as a positive liberty, a person is not necessarily autonomous just because others refrain from intervening in her actions and she realizes her preferences. For there is still the question of by what or due to what process she formed those preferences. Autonomy (in the sense of positive liberty requires that the individual is the source of his or her preferences. This does not mean that people must have the ability to determine their preferences ex nihilo, for virtually no one has such ability. Our preferences and values are formed within the cultural environment in which we live and that influences us. But the idea of autonomy mandates that people scrutinize critically the preferences and values to which they are exposed in their cultural environments and that they do not accept them without first thus considering them.

There are two possible types of cases in which a process of critical thought does not transpire. One is when the person is subject to the influences of external factors that do not pass through his or her filter of rationality. Such influences occur when the messages are covert, when they are repeated over and over again to the point of “brainwashing”, when they appeal to the emotions while exploiting people’s anxieties and weaknesses. In addition, when the messages are fallacious, it is clear that the preferences and values that people form in reliance on these messages will not be right. The second type of case is when a person acts in accordance only with his or her
impulses, without first considering them critically. A relevant distinction in this context is that between first order preferences and second order preferences. Impulsive preferences are first order preferences, and their objects are things that exist in reality. However, people’s ability to reflect allows them to have also second order preferences, the objects of which are the first order preferences. For example, a person can have a first order preference to smoke cigarettes, but, at the same time, a second order preference not to have a preference to smoke (Frankfurt, 1988, 12). Animals are not autonomous because they have only first order preferences. They are automatic; they are governed by their nature and impulses. The ability of humans to reflect on their first order preferences, following which they shape their second order preferences and then act in accordance therewith, is what makes human beings creatures with a capacity for self-rule.

How are these two senses of autonomy related to the question of freedom of expression? Under autonomy in the sense of negative liberty, any limitation imposed by the state on freedom of expression is by definition a violation of the autonomy of the audience, since autonomy is freedom from any limitations at the hands of others. Under autonomy in the sense of positive liberty, the negative liberty to hear all forms of expression apparently guarantees positive liberty: when the state restricts certain forms of expression, a person cannot hear all opinions, and accordingly, in some sense, this means that not she, but a foreign entity—the state—is the source of her views and preferences (Scanlon, 1972, 1979).

Of crucial importance, however, is the insight that not every restriction on freedom of expression necessarily detracts from an individual’s positive liberty. Indeed, there may be cases in which the absence of restriction on freedom of expression in fact confines positive liberty. One such case is false advertising, where a person may prefer product A to product B because of the deceitful advertising of product A. In such a case, the preference of the consumer is determined by the advertiser who deceived her; that preference is not her own. Hence, if the state were to prohibit false advertising, thereby constricting the negative liberty of advertisers and the audience, this might contribute to the audience’s positive liberty. Another example of this is the prohibition on transmitting subliminal messages. Although such a prohibition constitutes a restriction of the audience’s negative liberty to receive messages of this
type, it contributes to the audience’s positive liberty because the audience internalizes such messages without passing them through the filter of rationality.

Thus, the positive liberty sense of autonomy is preferable to its negative liberty sense. This is so because the assumption underlying the negative liberty sense of autonomy is largely unrealistic. That sense of autonomy is founded on the simplistic assumption that the lack of interference by society is the necessary and sufficient condition for the realization of the potential that exists in every mature and sane person to shape his or her own values and preferences. However, as demonstrated by the examples of fallacious and subliminal messages, it is not realistic to assume that a person is self-ruling in every instance in which the state refrains from restricting the transmission of messages.

At this juncture, we will show why the criticism that our proposal violates the autonomy of advertisements’ audiences is unfounded. Our claim is that stereotypical messages in advertisements belong to that category of cases in which the state’s intervention is necessary to ensure the autonomy (in the sense of positive freedom) of the audience. We will therefore seek to show, first, that the audience internalizes stereotypical messages without passing them through the filter of rationality and, second, that these messages prevent people from realizing their second order preferences that are in favor of equality and opposed to stereotypes. We will demonstrate this through an examination of the two types of stereotypes existing in advertisements: transformative stereotypes and conservative stereotypes.

As noted above, transformative stereotypes represent an attempt by the advertiser to change the attitudes and values of those exposed to the advertisements. The advertiser’s motive is economic in nature; for example, the advertisers of the beauty industry’s products are interested in women internalizing the image of the beautiful and “sexy” woman since this will increase sales. As noted, any direct attempt to change the values and stances of viewers will arouse antagonism. Thus, advertisers cannot present direct arguments that will be subject to the test of reason, and thus the transformative messages are indirect. The objective is to change the viewer in a way that he or she is not aware of. To this end, the advertiser makes extensive use of visual imagery. Such imagery is, by its very nature, non-discursive. The use of a series of
images in succession often elicits associational free-play. Such imagery encourages leaps of imagination in the viewer’s mind from one meaning to another, without much attention to whether there is any logical connection between those meanings.

In addition, transformative messages focus on the weaknesses and anxieties of the viewers in a manipulative fashion. Someone who is sick and in pain is likely to be persuaded to pay a great deal of money for “folk” medicine that clearly will not help him at all. He would be acting based on his emotions only and not on a rational consideration of the data. Anyone selling such medicine relies on the person’s pain causing him to choose in an irrational manner, an approach that violates the sick person’s autonomy. Similarly, advertisers plug into the natural anxiety people feel with regard to their appearance. Advertisers seeking to sell cosmetic products exploit this anxiety and do their utmost to exacerbate it as much as possible. By means of advertisements with beautiful, groomed, thin models, advertisers intensify the anxiety, and therefore, the process that ends in women believing that they must look like these models is emotional, not critical, in nature.

Thus the injury caused by transformative stereotypes to the audience’s autonomy is manifested in the fact that the advertiser causes a change in the audience’s attitudes without the audience giving critical consideration to the matter. Whereas lying behind the transformative messages is the intention of the advertiser to shape new attitudes for the viewers, conservative stereotypes (stereotypes that present women and minorities according to the traditional division of roles) allegedly represent attitudes that are already held by the viewers. In light of the fact that in using conservative stereotypes the advertiser is not attempting to change attitudes, how is their use injuring the audience’s autonomy?

In order to understand how the conservative stereotypes reduce the audience's autonomy, let us recall the distinction between first order preferences and second order preferences. Many people in democratic societies seem to suffer from a sort of mental split. On the one hand, they regard themselves as committed to the ideal of equality. Yet, on the other hand, they have stereotypical attitudes that are the result of their education and other environmental influences, attitudes which they have difficulty discarding. In other words, many people concurrently have first order
preferences that are prejudicial and second order preferences that favor equality. They in fact would prefer not to have prejudicial preferences, and in this they are comparable to people who would prefer not to have a desire to smoke. As we clarified earlier, in order for people to realize their second order preferences favoring equality, they must undergo a process that is similar to that of abandoning a bad habit: they must make the decision to change the habit, remember this decision, and then act in accordance therewith consistently and repeatedly. However, advertisements prevent this process from transpiring, by placing the viewers in constant contact with the stereotypes from which they seek to free themselves. Thus, advertisements impair the viewer’s ability to reflect on his first order preferences and to act in accordance with his second order preference favoring equality. This regressive effect on the viewer’s ability to realize his preference for equality is intensified by the fact, mentioned above, that advertisements lag behind the changes in reality. They present the traditional division of roles, despite the fact that in the past few decades more and more African-Americans and women have entered into roles that in the past were considered “White” or “masculine”, respectively.

To a certain extent, all stereotypical messages in advertisements, be they transformative or conservative, cause injury to the audience’s autonomy if only for the reason that they are indirect. From the vantage point of the viewer, the advertiser’s goal is to convince him or her to purchase a product or service. The viewer does not notice the fact that different value-oriented messages reverberate from the advertisements as well, including messages regarding the meaning of belonging to certain groups. This is similar to the way in which “stances” with regard to women can be deduced from pornographic movies. Both the objective and effect of pornography are to create sexual arousal (Schauer, 1979). However, it is possible also to extricate from pornography an ideology according to which the role of women is to fulfill the sexual needs of men. In our opinion, in all of these cases, it is difficult to consider these indirect messages a clear case of the expression of a view that is deserving of full protection in the name of freedom of expression. Were we to regard the messages that can be extracted from advertisements as some sort of expression of a view, the very reason for which we protect free speech would be undermined. Indeed, we protect freedom of expression so that people will be able to hear the full range of information and views and to scrutinize them in order to decide whether or
not to accept them. From this perspective, indirect messages are of minimal value. In order to conduct a critical examination of messages, a person must be aware of them, which is not the case when the messages are indirect. It seems, too, that this lack of awareness on the part of the audience aids in the internalization of the hidden messages in advertisements. As Schudson (1984, 224-229) claims, advertisements have difficulty influencing people to buy the advertised products because people anticipate the attempt to convince them to buy those products. In contrast, advertisements succeed in causing the audience to internalize consumerist values because people are not aware of the transmission of value-oriented messages in advertisements and therefore are not critical on this level.

But the fact that, from the perspective of the underlying objectives of freedom of expression, the value of indirect messages is low and the fact that internalization of indirect messages causes injury to autonomy, are insufficient grounds for limiting the transmission of such messages. We encounter indirect messages on a regular basis in our meeting with reality. In fact, we can deduce from every behavior certain messages that we might internalize without any critical consideration. For example, a person accepts his friend’s invitation to dinner. If, after the meal, the guest is witness to the fact that the task of doing the dishes is performed by the host’s wife, it is possible that the guest will absorb, in an uncritical manner, the underlying message that women are supposed to perform this kind of work. However, the degree of injury to autonomy by indirect messages in the context of advertisements is far greater in comparison to indirect messages that are transmitted in other contexts. This is due to two central characteristics of the commercial advertisement. First, advertisers tend to present advertisements a great number of times with the intention that the frequent repetition will cause people to buy the advertised products. The advertisement is therefore a type of “brainwashing” that attempts to transmit the advertising message to people in a non-conscious manner. Second, the messages that are transmitted in the advertisements are ubiquitous. If we compare the sexist messages that indirectly emerge from pornography with those that arise from stereotypical advertisements, it will not be groundless to assume that advertisements play a far greater role in shaping sexist prejudices than does the exposure to pornography, since pornography does not have the same degree of repetitiveness as do advertisements and the exposure to pornography is far less.
We have shown that stereotypes in advertisements cause injury to the autonomy of the viewers. But from this injury one cannot necessarily deduce that the appropriate way to ensure autonomy is by means of our proposed solution, that is, a legislative prohibition of stereotyping in advertisements. Instead of preventing exposure to stereotypical advertisements, perhaps we can teach people how to deal with such advertisements in a rational way. For example, schoolchildren could be given lessons on how such advertisements convey hidden stereotypical messages. This approach recalls the claim that the more appropriate way to contend with exposure to problematic opinions is not to restrict the expression of those opinions, but to explain why they are problematic (Whitney v. California, 1927, 377). However, it is important to reemphasize that we do not propose imposing limitations on stereotypes in advertisements because of their contents, but, rather, because they operate in conditions of reduced rationality. As noted, we do not advocate prohibiting a newspaper article that claims a woman’s place is in the kitchen; indeed, we believe that the best way to contend with such a stance is to publish an article that refutes this claim. But it seems doubtful that educating the public to increase the awareness of hidden stereotypical messages in advertisements would be effective in dealing with the problem. As noted, the process by which a person absorbs materials that are transmitted by advertisements involves a state of reduced rationality. Increased awareness of the stereotypical nature of advertisements cannot, therefore, succeed in eliminating the effects of such stereotypes on attitudes.

The matter of stereotypes in advertisements is one of those cases in which only state intervention will enable people to protect themselves against irrational influences. This kind of intervention is not an expression of a general lack of faith in human rationality. Rather, it is the result of the recognition of the fact that people’s rationality is not perfect. Thus, in the context of advertisements, the indirectness and repetitiveness of the messages lead people to internalize them, despite the fact that we can assume that were the messages presented in a direct and cognitive fashion, people would scrutinize them critically.

Were we to ask people whether they would favor a law protecting them against irrational influences, it can be assumed that they would respond affirmatively, despite
the fact that such a law would likely impose limitations on them. For example, we can assume that people would agree to a law that requires them to wear a seatbelt while driving. At first glance, such a law might be understood as paternalistic since it supposedly restricts the liberty of people in order to protect their interests, thereby expressing a lack of faith in their ability to perceive these interests by themselves. However, while it seems that in this case, people know where their interest lies—they know that wearing a seatbelt saves lives—they also know that sometimes they are liable to act impulsively and against what rationality dictates. For example, at the end of a tiring day at work, people tend to succumb to the impulse of comfort and not use a seatbelt. In terms of the distinction between first order preferences and second order preferences, this impulse expresses a preference of the first order, whereas a person’s comprehension of the importance of using a seatbelt expresses a second order preference.

A person’s awareness of the fact that in certain situations he has reduced rationality and therefore might act in an irrational way would lead him, it is reasonable to assume, to the conclusion that it is worthwhile for him to set limitations on his ability to act irrationally in the future. He would want a law that imposes a fine on him for failing to use a seatbelt, since that law will ensure that he puts on his seatbelt even after a tiring day. He would want, in other words, a law that helps him to overcome his first order preference and to realize his second order preference. Similarly, it is reasonable to assume that a person may be interested in a law that invalidates contracts he makes when intoxicated. Such limitations may be characterized as self-paternalistic rather than paternalistic: they are limitations a person would impose on her own liberty in situations in which her rationality is impaired. Our proposed limitations on stereotypes also fall within the scope of self-paternalism. It is reasonable to assume that people would approve of such limitations. Recognizing that they cannot critically assess the stereotypical messages in advertisements, they would want a law that prevents them from internalizing racist or sexist attitudes, a law that helps them realize their second order preference for equality. xxvii If it is realistic to assume that people would favor such a law, then this assumption will constitute a source of legitimacy for the law. A law derives legitimacy from the fact that there is good reason to believe that people would accept it. xxviii
It is worthwhile to note that the legislation that we propose does not raise certain fears with regard to the abuse of power of the State. In the context of pornography, for example, the concern was raised that the state would make use of the claim that it is acting to ensure the autonomy of women in order to justify placing limitations on pornography when the real motive behind its actions is a puritan objection to pornography (Strossen, 1993). It would seem that a similar concern should not arise in the context of our proposal. However, one might still suspect that the State would try to suppress certain images that do not square with the "proper" view of women and minorities held by the powerful elites. We shall address this problem shortly. A second concern that arises with regard to state exploitation is that the state will claim that it is acting to ensure values that are legitimate to advance, when the real motive behind the legislation is the desire to serve the interests of elite groups close to the government. This concern too does not arise with regard to our proposal, since the purpose of the suggested legislation is the protection of disadvantaged groups.

It is important to recall again the criticism that our proposal constitutes viewpoint discrimination, which enables the state to advance the egalitarian view while discriminating against the non-egalitarian view. At the foundation of this criticism lies the concern that the proposed arrangement will enable the state to implement thought control by means of preventing the voicing of the non-egalitarian view. However, it would be mistaken to thus understand our proposal. The purpose of the legislation would not be to silence the non-egalitarian view, but, rather, to prevent the harms that would be caused by the transmission of stereotypical messages in a non-cognitive manner. It would be reasonable to suspect that behind our proposal lies the motive of viewpoint discrimination were the account of the harms brought by us minimal. As Sunstein (1986, 615) argued, “if the harm invoked is minimal or if it is implausible to think that the regulation will remedy the harm, it is more likely that the regulation is in fact based on viewpoint discrimination”. However, the harms that we outlined in the previous section—including discrimination, sexual harassment, injury to the self-images and achievements of minorities, and the silencing of these groups—are grave and point to the likelihood of our proposal being motivated by viewpoint discrimination as being low. Indeed, our proposal seeks to prevent these harms, not silence the non-egalitarian viewpoint.
The problematics of stereotypical messages in advertisements, which are connected to the fact that people internalize these messages without passing them through the filter of rationality, emerge also with regard to other types of messages in advertisements, such as messages regarding the desirability of consumerism. This notwithstanding, it is our contention that stereotypical messages are more problematic, for two reasons. First, equality is a value to which there is wide commitment in democratic societies, and stereotypes in advertisements undermine this commitment. However, it is difficult to point to a similarly wide commitment to anti-consumerism in these societies, and thus, limiting anti-consumerist messages enjoys much less legitimacy. Second, we have shown that stereotypical messages in advertisements cause the severest of harms. In contrast, the harm that results from consumerist messages is far less tangible.

Notes

i See, Devine, 1989; Banaji & Hardin, 1996; Blair & Banaji, 1996 and the discussion below at p. 9.

ii This is the application of studies in the field of cognitive psychology to the area of prohibition of discrimination. See Lawrence (1987); Oppenheimer (1993); Krieger (1995); Wax (1999); and Blasi (2002).

iii By the term “advertisement”, we refer to commercial advertisements, that is, messages that are intended to persuade people to buy a product.


v This point will be clarified below, see infra discussion at p. 20.

vi Studies show that the average American is exposed to hundreds of advertisements a day on television, in newspapers, in the street, in school—in sum, almost everywhere. See Petty (1992, ix) and MacChesney (1998, 20). Kellner (1991, 66) estimates that the average American views approximately 20,000 advertisements a year on television.

vii Postman (1986) claims that television as a visual medium encourages free associations and is non-discursive, as opposed to the typographic culture of print journalism. This is one application of McLuhan’s claim “The medium is the message,” namely, that the medium used necessarily has an impact on the contents. See McLuhan and Fiore (1967).

viii Although there is no single definition of stereotypes, most social scientists agree on the above-noted definition. See, e.g., Yueh-Ting Lee et al. (1995, 30-31).

ix Sometimes advertisements show a career woman, who is presented as intelligent, confident, ambitious, hard working, dominant, and well-dressed. However, the typical woman in advertisements is not the career woman, but either the housewife or else the sexy woman.

x Erving Goffman’s groundbreaking research of gender advertisements (1976) is enlightening on this point. Goffman’s working assumption was that advertisements are sites at which social norms may be exposed. More specifically, he believes that we can find in advertisements the stereotype norms that define the roles of men and women and the meanings of these roles. These norms define, amongst other things, the ways in which men and women should each dress and behave in different situations.

It is important to note that advertisements touch on the meanings of belonging to a given social group in another way as well. As Turow (1997) notes, from the 1980s, advertisers began to create a connection between products and different lifestyles. This new marketing approach stressed the differences between different social groups and
encouraged advertisers to divide the consumer public into as many different groups as possible. Turow claims that this division exacerbated the lack of trust between social groups and it is responsible to a great extent for the increase in racial tension in the United States in the 1980’s and 1990’s. It should be emphasized that despite the fact that this marketing tactic is, indeed, likely to increase instability in society, it does not necessarily involve the use of negative stereotypes against weak groups. Thus, we do not include in our proposal prohibiting advertisements that make use of this marketing technique.

Different surveys have shown a significant increase over the last decades in the positive stances of Caucasians with regard to the prohibition on discrimination against African-Americans. For example, the percentage of those opposing segregation in the education system between “Whites” and “Blacks” rose from 32% in 1942 to 96% in 1995; the percentage of those supporting equal opportunity for African-Americans in the work force rose from 45% in 1944 to 97% in 1972; and the percentage of those opposing legislation that prohibits interracial marriages rose from 38% in 1963 to 87% in 1998. See Schuman, 1997, 104-107.

The American Psychological Association concluded in 1993 that "there is absolutely no doubt that those who are heavy viewers of this [television] violence demonstrate increased acceptance of aggressive attitudes and increased aggressive behavior". See Wartella et al. (1998).

It is possible that this study does not provide overwhelming proof of the effect of stereotypical messages in the media on the attitudes of viewers. It may be the case that there is no causal connection between the variables and that there is, in fact, a third variable, such as the socio-economic status of the viewers, that is responsible for this outcome.

Such claims were brought by feminist and critical-race theorists. See, e.g., MacKinnon (1993); Langton (1993); Lawrence (1990).

Only in Norway does the law explicitly prohibit the transmission of gender stereotype images. Section 1 of the Marketing Control Act provides that: “The advertiser and anybody who creates advertising shall ensure that the advertisement does not conflict with the inherent equality between the sexes and that it does not exploit the body of one sex nor imply any offensive or derogatory judgment of female or male.” See Maxeiner & Schotthofer (1999, 381); Ramsay (1996, 118-133).

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., (1976, 762). We should note, for the sake of precision, that there are commercial expressions that do not constitute an offer for a business deal, for example, the publication of the financial reports of public corporations.

This issue is discussed by economists, with some of them contending that a sophisticated market is likely to cause such employers to be driven out. See, e.g., Becker (1971); Friedman (1962); Epstein (1992); and Posner (1987, 1989). In contrast, other economists claim that there is a need for legislation to promote economic efficiency. See, e.g., McAdams (1995), and Donohue (1986, 1992).

This is the Hobbesian approach that is applied in Nozick’s theory (1974). On subliminal speech and the regulation thereof, see Pearson (1995).
In Rawls (1971), for example, the legitimacy of social-political arrangements is connected to the fact that these are arrangements that people would choose in what he calls “the original position.”

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