

MANIPULATIVE ADVERTISEMENTS AND FREE SPEECH:
SHOULD WE REGULATE ADVERTISEMENTS AND HOW?

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OVERVIEW

Manipulative marketing is a prevalence form of influence in every free-market society. The current US legal framework works to protect marketing under the first amendment. I argue that manipulative marketing should be regulated because (a) it hinder one's ability to lead an autonomous life, and (b) as a result, marketing falls outside of first amendment protections.

CONTEXT AND IMPORTANCE OF THE PROBLEM OF MANIPULATIVE MARKETING

In their book, "Phishing for Phools", George Akerlof and Robert Shiller challenge the assumption that the free market improves the well-being of consumers. They argue that free markets do not just deliver choices and prosperity, but create irresistible incentives for businesses to manipulate consumers and prey on their emotions and ignorance. In other words, trickery and manipulation in advertising do not result from ill-will, but are an inexorable outcome of the free market. If this is true, it means that unregulated marketing will keep on finding new and efficient ways to manipulate us by exploiting our psychological weaknesses, misinformation and temporary cognitive fatigue (e.g., as when a passenger gets off from a long flight). Therefore, every free-market society must ask itself if it is willing to tolerate such manipulative influences on this grand scale. My analysis focuses on the harm of manipulative marketing on autonomy, and the arguments for and against defending the right to advertise.

THE CURRENT POLICY

US law is highly protective of commercial speech. Important commercial speech court decisions such as Citizens United, are based on two main assumptions. First, the court assumes that the harm done by the advertisement is not significant, and that the interest

of the state is not substantial. Second, the law understands marketing as a form of speech (marketing is often referred to as “commercial speech”), and is therefore protected by the first amendment.

SHOULD THE CURRENT POLICY SHOULD BE ALTERED?

The aim of my research is to tackle both assumptions. First I shall review arguments about the effects manipulative marketing. Many political thinkers rejected domination not only because the master will likely harm the slave, but also because every human being should have a sphere of discretion over his life. Those thinkers advocated the value of “autonomy”. In broad strokes, one is leading an autonomous life when one lives according to his own values, decisions and desires. “Autonomy” has often been presented as a key component in the justification of democracy: since each person has autonomy over his life, every citizen has an equal claim in the decision we make as a society of people. Of course, manipulation is not as harmful to autonomy as physical coercion, but there is a sense in which the victim of manipulation is subjected to the will of the manipulator. My argument seek to reject the common notion that all forms of marketing are consistent with the freedom of the costumers.

However, to show that manipulative marketing has deleterious effect is not enough. In the past, opponents of a certain speech often tried to establish that the interest of the state in regulation is high enough to justify violation of the first amendment. For example, ever since the 70’s, feminist groups have been trying to argue that pornography should be regulated because it humiliates women, harm their social status and their ability to play an important part of society. More often than not, this attempt has failed.

Therefore, I shall argue, drawing on Baker, that it is false to assume that advertising is a form of speech.¹ For this purpose it need to be shown that the justification of the right of free speech does not apply in the case of advertising. There are two main justifications for the right for free speech: according to the first justification – mainly advocated by John Stewart Mill – a free speech is instrumental for the truth to be revealed.

¹ In this section I draw mainly from Edwin Baker’s work on the first amendment.

According to the second justification, since the government respect people's autonomy, the government must not try to restrain a person's meaningfully expressive behavior, including speech.

To see why commercial speech should not be understood as a type of behavior that should be protected by the first amendment, we need to consider the condition of the free market in which commercial entities act. One of the defining conditions of the free market is competition. Since the market is competitive, any commercial entity must exhibit profit-maximizing behavior if it wishes to survive. Therefore, the only form of "speech" available to any commercial entity, if it wishes to survive, is the one that advances profit-maximizing behavior. Consider, for example, a candy company. Even if all individuals working for the company (board of directors, top management, marketing personnel, and other employees) believe that sugar is bad for one's health and should be avoided, the company's survival and continuance depends on the company's "commercial speech" effectively promoting the profitable sale of its products.² Since the conditions of the free market restrict any commercial entity to profit-maximizing speech, it becomes clear that "commercial speech" does not promote the acquirement of truth. This claim I argue, uncontroversial. The second justification of free speech can also be rejected in the same way: since the free-market dictates profit-maximizing speech, it is counterintuitive to view advertisement as a "meaningful expression", nor as a manifestation of one's autonomy. After regulation on marketing, the company's ability for a meaningful expression will be the same as it was before. The only difference will be the efficacy of the company's marketing techniques.

² Edwin Baker, *The First Amendment and Commercial Speech*, p.985