



Consumerism, Conformity, and Uncritical Thinking in America

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Introduction

America is on a perilous course. The outlines of a pending crisis are slowly starting to emerge. But the present crisis is different from those that have come before it. Its imminence is not foretold by riots, protests, or upheavals. Nightly news reports are devoid of references to it. Our perception of the crisis is clouded by a proclivity for self-adulation and self-congratulation. And yet there is a crisis, nonetheless. Like a cancer it spreads slowly through society. It is quiet and insidious. Imperceptibly it erodes our most cherished values. It is a crisis of rampant consumerism, stultifying conformity, and vanishing critical thinking.

This paper aims to address this hidden crisis. In Part I, a more detailed description of the situation is provided. In Parts II, III, and IV, three distinct but complementary proposals are offered in response. Finally, in the last section, some concluding thoughts are put forth regarding the future of American government.

Part I

A. The Crisis: Consumerism, Conformity, and Uncritical Thinking

1. Consumeristic Society

One recent study found that by age 16 the typical American will have seen almost six million ads.¹ This translates into more than one ad per waking minute.² Such unrelenting commercial bombardment is exerting a powerful effect on American culture. We are becoming advertising slogan experts. “Eat your Wheaties”; “Just do it”; “You deserve a break today at McDonald’s” – these are phrases we all know.

But mere familiarity with advertising slogans is not a major problem in itself. Rather, the problem arises when advertising convinces us that consumption is the answer to life’s challenges. We act as if all problems can be solved by watching late-night television infomercials. To get in shape, we purchase an exercise video called *Tae-Bo*. To lead a healthy lifestyle, we heed the mystical teachings of self-anointed guru Deepak Chopra. To learn the future, we turn to the *Psychic Friends Network*. Indeed, television advertising is a veritable minefield of lies and unfulfilled promises. But we do not learn from our empty purchases. Instead, we consume again and again, each time inventing a more imaginative excuse for why the previous purchase failed to solve our problems.

The explosive growth of infomercials is one sign that the culture of consumption is triumphing. In the mid-1980s, approximately 10,000 to 20,000 infomercials aired per week.³ Now an average of 250,000 infomercials

¹Douglas Martin, *What’s in a Name: The Allure of Labels*, N.Y. Times, Jan. 9, 2000, at Week in Review.

²Id.

³Evelyn Theiss, *Few Will Admit to TV Shopping, But the Sales are Skyrocketing*, Grand Rapids Press, Feb. 3, 1999, at D5.

can be seen every week.⁴ Presently, infomercials and home shopping networks together constitute a \$94 billion annual industry in the United States.⁵ By contrast, in 1999, the total amount spent on medical research in the United States was about \$42 billion.⁶ The fact that infomercials and home shopping networks generated more than twice this figure suggests that consumerism is spinning out of control.

The need to consume is sometimes overpowering. Americans now average six hours per week shopping, as opposed to only forty minutes playing with their children.⁷ We now have more shopping malls in America than high schools.⁸ Prescription drugs are freely dispensed to suppress the urge to rush to the mall for a shopping spree.⁹ Such compulsive forays are in part the byproduct of corporate conditioning teaching us to seek salvation in the material. Not infrequently the purpose of the shopping excursion is not to acquire a particular product but to seek fleeting refuge from one's frustrations. With each purchase comes a temporary diversion, a brief reprieve from the reality of an otherwise uneventful life.

The act of buying takes precedence over that which is bought. And given the absence of a shopping list, the tendency is to overbuy. We "shop until we drop" – the average American spent 30 percent more in 1995 than in 1979, despite the stagnant incomes during that period.¹⁰ We "spend to save" – the American savings rate is now down to two percent – only a quarter of what it was in the 1950s, when we earned less than half as much in real dollars.¹¹ And as soon as we finish shopping, we rush home to watch *Who Wants to Be a*

⁴Id.

⁵Id.

⁶The \$42 billion is broken down as follows: private industry spent about \$24 billion (See E.M. Kolass, *The Cost of Research, Generic Firms Get a Free Ride*, Washington Times, Dec. 6, 1999, at A17); and the United States government spent about \$18 billion (See *Examining the Budget for 2001*, Portland Oregonian, Feb. 8, 2000, at A6.)

⁷John De Graf, *The Overspent American/ Luxury Fever*, Amicus Journal, July 1, 1999 (book review).

⁸Id.

⁹*Obsessive Shoppers Can Be Helped By a Pill, Study Says*, Chicago Tribune, Aug. 11, 1995, at 7.

¹⁰Janet T. Knoedler, *The Overspent American: Upscaling, Downshifting, and the New Consumer*, Journal of Economic Issues, Sept. 1, 1999 (book review).

¹¹John De Graf, *The Overspent American/ Luxury Fever*, Amicus Journal, July 1, 1999 (book review).

Millionaire,¹² now the highest-rated show in prime-time television.¹³ As we watch, we imagine if we were to win a million dollars. How many more acquisitions could we stockpile on our next trip to the mall?¹⁴

2. Conformist Society

Gone is Ralph Waldo Emerson's vision of democracy. Democracy as freedom. Freedom to invent oneself. Freedom to create oneself. Freedom to be an individual, to be different, to discover one's own values. Slowly eroded in part by the awesome powers of corporate advertising, the Emersonian dream has faded quietly from our conscience. In its place has come the culture of consumption and its close companion, the culture of conformity.

We all watch the same television shows. Thursday night is dubbed *Must-See TV*. No one dares miss it for fear that there will be nothing to talk about with friends and acquaintances. During these vacuous conversations, all real-life events can and should be related to a particular episode of *Seinfeld*. The fictional characters on *Friends* promote horizontally-striped sweaters as high fashion. Suddenly, we all must wear a similar sweater to fit in with the crowd. To go with the sweater, we don a hat with the word *NIKE* emblazoned across the front, thereby providing free advertising for a sneaker company.

No one seems to mind the mass production of American cookie-cutter culture. Sprite tells us that "image

¹²Many have commented that the difference between the new wave of game shows and their predecessors is the ridiculously easy, anti-intellectual questions featured on the current shows. For instance, during a recent episode of *Who Wants to Be a Millionaire*, one of the questions was something to the effect of: "What is the third word in this sequence – 'duck, duck, _____'" Then the contestant was presented four choices, one of which was obviously "goose."

¹³Larry Bonko, *Game Show's Appeal Lies In Its Every Day Winners*, Virginia-Pilot and the Ledger-Star, Jan. 29, 2000, at E1.

¹⁴Also consider the following: average household debt is now approximately equal to average household income, and 18 percent of disposable income goes to servicing household debt. See Janet T. Knoedler, *The Overspent American: Upscaling, Downshifting, and the New Consumer*, Journal of Economic Issues, Sept. 1, 1999 (book review). Moreover, in each of the past three years, more Americans have declared personal bankruptcy than have graduated from college. See John De Graf, *The Overspent American/ Luxury Fever*, Amicus Journal, July 1, 1999 (book review).

is everything.” But we are not encouraged to create our own image, our own identity. Our only task is to aspire towards the corporate image that has been created for us. And happily, we obey. The ultimate insult is provided by the Coors Brewing Company, whose ads tells us to “Be Original.” The message is clear – being original means drinking Coors beer. But no one is insulted. We innocently consume the kidnapper’s candy with little thought as to the price to be paid.

To be sure, we have not entirely abandoned our quest for individuality. But now it is a different type of individuality we chase. Now we spend our time in pursuit of “self-help” while searching for our “true selves.”¹⁵ But the term “self-help” is misleading. It implies solving problems for oneself, being an original. But in the New Age, “self-help” means purchasing products to solve problems. To be an individual, we do what someone else tells us. This is a very different type of individualism than Emerson had imagined.

Moreover, our celebrated ideals of freedom and individuality are increasingly being corrupted by self-serving corporate “rights” rhetoric. It turns out the First Amendment is a knife that cuts both ways. We take great pride in our First Amendment freedom. Yet often the “freedom” of which powerful corporate interests speak is merely freedom for themselves, but a shackle for many others. Take the Washington Redskins, for instance. Under the banner of freedom of speech, the Redskins dogmatically persist in using their racist trademark.¹⁶ Never mind that racism is the ultimate enemy of freedom and individuality. The “freedom” of the Washington Redskins to increase profits reigns supreme; the freedom of Native Americans to avoid disparagement and mocking caricature is ignored.¹⁷

As First Amendment scholar Jack Balkin has argued:

¹⁵A recent article states that self-improvement (not including diets) constitutes a \$2.48 billion industry. See Charles Wesley Orton, *Help yourself – The Self Help Category Takes Off with Renewed Vigor as Consumers Make Millennial Resolutions*, Response TV, Feb. 1, 2000.

¹⁶See Jendi Reiter, *Trademark Law as Censor*, National Law Journal, Oct. 4, 1999, at A24.

¹⁷The rights of Native Americans could be better protected if a “positive liberterian” framework for individual freedom were used. Indeed, the passage of “hate speech” laws is often justified as being necessary to promote the First Amendment rights of its victims under such a “positive liberty” conception. See Fallon, Richard H. *Two Senses of Autonomy*, 46 Stan. L. Rev. 875 (1994).

[T]he paradigmatic example of free speech in our society is not the speaker on the soapbox, or the reasoned exchange of views on the television talk show or in the legislative chamber; rather . . . it is the endless bombardment of our minds with commercials about shampoo and deodorant, telling us how awful our bodies are and how we have to change them or decorate them in some way in order to become worthwhile people, dictating for us what we really want and do not want. It is the repeated urge to cultural conformity as explained to us through the latest fashion statements on *Dallas*, *Dynasty*, or even MTV. In short, the paradigmatic example of free speech in this country is the parroting of values created for us by those groups and persons who have sufficient money and clout to monopolize our attentions and ultimately our very imaginations.¹⁸

But our John Wayne sense of individuality demands this be allowed. We do not want the government clamping down on “freedom.” We are a country of “rugged individualists.” We love free markets. We proudly echo the sentiments of Friederick von Hayek. We are vigilant to avoid “the road to serfdom.” Even if “Redskins” is a racist term, we should just deal with it. And even if advertisements do lie, we can handle it. Only the weak are fooled, or so we tell ourselves. Yet the evidence suggests otherwise.

3. Uncritical Society

Critical thinking is on the decline in America. Perhaps our unregulated, freedom-at-all-costs culture is catching up with us. The successful parade of “infomercials” is one line of evidence. But there are other signs of our propensity for uncritical thought. For example, only five percent of the American public is scientifically literate, defined as having a general understanding of how the scientific method works and how to weigh and assess evidence.¹⁹ Arguably one of the greatest achievements of humanity, the scientific method and the disciplined thinking it demands, is ignored by most Americans.

A 1996 U.S. Gallup poll²⁰ reveals the uncritical tendencies of many Americans:

¹⁹Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark*, (New York: Ballantine Books, 1996), p. 6.

²⁰U.S. Gallup Poll, Sep. 3, 1996.

Belief	Percentage
US is covering up its knowledge of UFOs	71%
UFOs have visited the earth	45%
Extra Sensory Perception	48%
Devil	42%
Telepathy	35%
Haunted Houses	33%
Ghosts	30%
Psychic Powers	27%
Astrology	25%
Witches	19%

A 1999 Gallup Poll²¹ about Halloween illustrates a pattern of decline in critical thinking:

Belief	1979	1996	1999
Ghosts	11%	30%	33%
Witches	11%	19%	22%

The trend towards uncritical thinking is also suggested by the fact that belief in ghosts is much higher among younger Americans than among older Americans. In fact, over half – 54 percent – of those 18 to 29 say they believe in ghosts, compared to only eight percent of seniors 65 and older.²²

A recent Yankelovich Partners poll lends further support to the notion that belief in the paranormal is on the rise.²³ The poll compared belief in 1997 in paranormal phenomena with belief levels measured in 1976.

The question was: which if any of the following do you believe in at least to some degree?

²¹See <<http://www.gallup.com/poll/releases/pr991029.asp>>

²²Id.

²³Published in USA Today “Snapshot” titled *Belief in the Beyond*, April 20, 1997.

Belief	1976	1997
Spiritualism ²⁴	12%	52%
Faith Healing	10%	45%
Astrology	17%	37%
UFOs	24%	30%
Reincarnation	9%	25%
Fortune Telling	4%	14%

Popular television programming feeds and perpetuates the insatiable appetite for the paranormal. Top-rated programs often present vivid recreations of paranormal events with little or no balance.²⁵ Examples include *Unsolved Mysteries*, *Alien Autopsy: Fact or Fiction*, *The X-Files*, *Sightings*, *Psi-Factor*, and *Sabrina, the Teenage Witch*.²⁶ Even worse, science is often portrayed in a negative light. Scientists are portrayed as evil, mad, and dangerous (think Dr. Frankenstein); science itself is depicted as useless at solving problems (think Dr. Strangelove).²⁷ Popular talk shows such as *Oprah* and *Larry King Live* reinforce the cult of uncritical thinking, frequently providing forums for spiritualists and psychics.²⁸

No wonder Americans so readily buy the bag of goods that is sold to them. Why plan for the uncertainties of the future when you can consult a psychic? Why attempt to get in shape when you can buy “exercise in a bottle?”²⁹ Fantasy and fairy tales are extremely marketable. And so we are fed them over and over – in advertising, on television, and in the movies. The result is a vulnerable and weak-minded culture of consumption, always searching for quick fixes and easy answers. Instead of confronting the most difficult and unpalatable truths about ourselves and the world around us, we console ourselves with empty consumption and wishful thinking. The belief in mystical forces beyond our control provides an opportunity to evade

²⁴Spiritualism is a belief that the dead survive as spirits which can communicate with the living.

²⁵Nisbet, Matt, *Floating in a fantasy world: GenXers have been raised in an era of unprecedented scientific achievements, yet many are rejecting science and embracing the paranormal*, Buffalo News, Aug 9, 1999, at H1.

²⁶Id.

²⁷Id.

²⁸Id.

²⁹See Sally Squires, *Shell Game; Some ‘Miracle’ Supplements Made Mostly From the Outer Shells of Shrimp and Crabs Promise to Make You Trim, But the Claims Are Largely Unfounded*, Washington Post, March 28, 2000, at Z12.

responsibility and absolves us from accepting our own mistakes. And it is a vicious cycle – advertising helps create and perpetuate a society void of critical thought; the lack of any such critical thought allows for the continued dominance of the advertising machinery.

In short, in the name of freedom, we have created a three-pronged monster: a culture of consumption, conformity, and uncritical thinking. In so doing we have reduced ourselves to a Pokémon society characterized by fads and ritualistic behavior propagated and disseminated by Madison Avenue. Individual development has been sacrificed at the altar of mindless consumption. The relentless bombardment of advertising has distracted, undermined and, ultimately, crippled our capacity for critical engagement, leaving us all more or less undifferentiated, each seeking salvation in the accumulation of material products.

B. Two Challenges to the Thesis

1. The Challenge of Relativism

Relativists might object on the grounds that consumption and conformity are merely value preferences and are therefore not amenable to objective determinations. Essentially, the relativist argument is that one cannot claim that consumerism is inherently bad if it makes people happy. Similarly, relativists argue, one should not insist that people value individuality if they prefer instead to conform. There is, after all, no independently verifiable method to decide which values are “best,” and consequently such determinations should be left to individuals to decide on their own.

In this way, post-modernist relativism poses an interesting challenge to the validity of all knowledge and moral judgments. Yet ultimately relativism is unsatisfying as applied to questions of democratic governance

because it provides little guidance to inform our decisions. If it is impossible for any value to be inherently better than another, then how are we to proceed? For instance, should we not frown upon cultures that encourage vaginal mutilation and other practices to incapacitate women? Is today's society no better than the one that accepted slavery in America? Is societal progress ever possible if there is no way to say what counts as "better?" What do relativists propose we do?

The fashion of post-modernist relativism is intellectual bubble gum – it may allow for an impressive flex of scholarly muscle, but it is essentially useless in the real world.³⁰ Policy determinations ultimately must be made. Absolute certainty is not available to us; we must therefore deal in probabilities. The task, then, in our post-modernist moment, is to choose the best values, even while acknowledging that our choices are at best contingent, and certainly subject to rigorous debate and constant revision. This paper proposes certain values; the reader may choose to agree or disagree with those chosen. But to argue that one value cannot be inherently better than another, and that therefore we should just "let the market decide," is not an attractive option.

2. The Challenge of Free Market Gospel

Unfortunately, much legal scholarship is currently dominated by precisely this notion that we should in fact just "let the market decide." The "rational actor" model assumes that individuals always make economic choices to maximize their welfare; therefore, the reasoning goes, there is little need for government interference. The Federal Trade Commission (hereinafter "FTC") has averred its general belief in this model in a

³⁰Nisbet, Matt, *Floating in a fantasy world: GenXers have been raised in an era of unprecedented scientific achievements, yet many are rejecting science and embracing the paranormal*, Buffalo News, Aug 9, 1999, at H1.

recent Policy Statement: “We rely on consumer choice – the ability of individual consumers to make their own private purchasing decisions without regulatory intervention – to govern the market.”³¹

Yet the FTC does not apply this reasoning to consumers it deems “vulnerable.” For instance, to the extent that Joe Camel advertising entices children or adolescents to begin smoking, this market correction concept does not apply.³² The reason is that children are not old enough to be considered “rational actors.”³³

However, this paper argues that not only children, but society as a whole, should not always be expected to behave as “rational actors.” To understand why, one must grasp the basic assumptions of the rational actor model.³⁴ Classical economic theory is premised on the assumption of “perfect competition;” that is a situation in which no producer can influence the market, and all producers compete in terms of quality and price (not advertising) for buyers who pay the producer what they think the goods are worth.³⁵ This model assumes that buyers have perfect knowledge of product quality and price, and that they actively seek out the best goods to maximize their economic welfare.³⁶ Yet the perfect competition model is very different from the current conditions of the American market.³⁷

For one, the traditional model is premised on the assumption that consumers seek *objective* information before making a purchase.³⁸ However, since any type information must be paid for (in time, money and effort), consumers will only seek out information up to the point at which perceived marginal benefits exceed

³¹Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, 4 Trade Reg. Rep. (CCH) 13,203, at 20,907 (June 23, 1988).

³²John Harrington, Up in Smoke: *The FTC's Refusal to Apply 'Unfairness Doctrine' to Camel Cigarette Advertising*, Fed Comm L. J., vol 47, no 3. <<http://www.law.indiana.edu/fclj/pubs/v47/no3/harring.html#II>>.

³³Id.

³⁴See John Sinclair, *Images Incorporated*, (New York: Croom Helm, 1987), p 20-21.

³⁵Id.

³⁶Id.

³⁷Id.

³⁸Id.

perceived marginal costs.³⁹ Thus, although consumers are free to seek information from more objective sources, such as Consumer Reports or reliable friends, typically such an exercise involves too much time and effort, especially for smaller purchases. Consequently, consumers tend to rely on advertising as a primary source of information. But the goal of advertising is not to provide objective information, but rather to persuade. This distinction between information and persuasion represents the first major departure from the classical model.⁴⁰

A second inversion of the model is related to the way in which consumers acquire information.⁴¹ The traditional model assumes that purchasers actively seek out information.⁴² In practice, however, instead of consumers seeking out information, the information seeks out consumers.⁴³ Most advertising is diffused by advertisers subsidizing the mass media.⁴⁴ The result is that advertising is forced on the consumers of the medium.⁴⁵ Thus, the principle of consumer sovereignty is inverted – the second departure from the model.⁴⁶ For these reasons, a policy favoring advertising regulation does not imply a belief that adults behave as children, or as other vulnerable individuals incapable of rational choice. Rather, such a policy acknowledges that adults live in a world in which the traditional model does not fully apply – often the information they receive is biased (the first departure) and is forced upon them whether they want it or not (the second departure).

Free-marketers also put extraordinary faith in the tendency of markets to be self-correcting in arguing for less regulation. The theory is that if an advertising claim is not delivered, the consumer will not buy the product

³⁹Id.

⁴⁰Id.

⁴¹Id.

⁴²Id.

⁴³Id.

⁴⁴Id.

⁴⁵Id.

⁴⁶Id.

again. In other words, consumers will eventually learn to distinguish between information and persuasion. Therefore, advertising regulation is unnecessary.

There are several problems with this argument.⁴⁷ First, the product must be repurchased on a frequent basis for the theory to be valid.⁴⁸ The argument has little relevance for one-shot purchases such as cars.⁴⁹ Second, the consumer must recall the advertising claim when the product fails to live up to that claim.⁵⁰ This may be especially relevant when the claim involves how long the product will last.⁵¹ Third, the consumer must be able to recognize if a product fails to provide what it claims.⁵² For a product that promises long-term benefits, there will be no way for the consumer to judge immediately whether the product is delivering.⁵³ For example, a consumer will not be able to verify in the short-term whether a mouthwash that promises to fight gum disease is delivering since any benefits would not be immediately evident. Fourth, even if a consumer is not satisfied with a purchase, the consumer will only alter purchase patterns if he perceives there are better options available.⁵⁴ If alternative products are also advertised in a misleading manner, the consumer will not be confident that the alternatives will be any better.⁵⁵

Lastly, though it is sometimes argued that the presence of competitors should render the market efficient, as Robert Pitofsky, the current FTC Commissioner has pointed out: “in the scores of proceedings in which the FTC successfully challenged the truth of major advertising themes, there was not a single instance in which rivals used their own access to channels of consumer information to expose deceptions.”⁵⁶

⁴⁷See Joshua L. Wiener, *Empirical Insights for the FTC: Comments on the Bloom and Smith et al. Papers*, in *Marketing and Advertising Regulation*. (Notre Dame: University of Notre Dame Press, 1990).

⁴⁸Id.

⁴⁹Id.

⁵⁰Id.

⁵¹Id.

⁵²Id.

⁵³Id.

⁵⁴Id.

⁵⁵Id.

⁵⁶Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 667 (1977).

In sum, there is little reason to believe that markets are automatically self-correcting, and this is true even if consumers behave as “rationally” as can be expected. As a final note, one might ask: if the model of perfectly self-correcting markets really held, why should the government regulate any advertising at all? The fact that the government does regulate advertising indicates that self-correction theory has its limitations.

C. Declining Critical Thinking: A Problem That Relativism and Free Market Gospel Cannot Address

To be sure, despite the previous arguments, the staunch relativist/free marketer could nonetheless dream up numerous reasons why rising consumerism and conformity are not problematic. After all, Emerson has his critics, and economics is a discipline in which nearly any position is debatable. Yet, such an individual would be hard-pressed to apply these two intellectual fashions to argue that a decline in critical thinking is acceptable.⁵⁷

The logic of the relativist/free marketer makes no provision for a discernible and substantive public interest that is distinct from private individual consumption. The relativist says the public interest is not discernible because no value is inherently better than the next; the free marketer tends to focus only on individual liberty, not the public interest. To address the free marketer, this paper argues that the common interest does not necessarily find expression in market behavior. Indeed, sometimes the interests of individuals and society at large may point in different directions.

Critical thinking is an example of the previous argument. In other words, assuming that each individual

⁵⁷One response to the relativist argument is provided by Edmund Way Teale, who proclaimed in his 1950 book *Circle of Seasons*, that: “It is morally as bad to care whether a thing is true or not, so long as it makes you feel good, as it is not to care how you got your money as long as you have got it.”

can be better off by not engaging in critical thought (i.e. they are “happier” if they do not think critically), collectively, society suffers because it is worse off without critical thinkers. This seems to suggest that the neoliberal vision of each pursuing one’s own self-interest may not, in this case, be best for society. And yet, this argument that society is “worse off” is only valid if we accept that one value may be better than the next – i.e., a rejection of relativism. To the author, it seems obvious that a society endowed with critical thinking is better than one that is not. It does not seem plausible to suggest that critical thinking is merely a value preference, no better or worse than any other.

Yet at least one scholar has proposed that the decline in critical thinking is not as troubling as might be imagined. Making a “lesser of two evils” argument, Roger Koppl proposes that blind consumerism is not such a bad thing because it distracts us from other things that are far worse:

The urge to salvation runs deep in the human psyche. . . . [T]he urge for faith and commitment can be dangerous. The real dangers come when you have a lot of people with the same faith trying to do something about it. . . . The dangerous faiths are the ones that are earthly, widely held, and collective: Marxism, nationalism, supremacist racial doctrines, that sort of thing. These secular religions act as a lens to focus all the energies of many believers on one object. But if they are, as I think they must be, idolatrous faiths, then the lens must be focused on the wrong object. . . . The diversions created by stupid advertising focus different people’s messianic impulses in different directions and on relatively unimportant things. That is the good they do. We seek redemption for our suffering through the new popularity we may enjoy if our teeth are baking-soda clean and our breath is minty fresh. We seek salvation in the new Mercedes Benz rag-top automobile. When these products disappoint us, we may turn to Soloflex exercise machines and 1-900 party lines. The wise among us may know that earthly salvation cannot be had. But the rest of us are off to the shopping mall for Macy’s big one-day sale. And that’s fine. For if we were not tempted in this way by pimping advertisements, we might end up acting on the same foolish dream of redemption to the detriment of ourselves and our fellow humanity. But for the lure of consumerism we might seek redemption through ethnic cleansing or a holy war against infidels.⁵⁸

Koppl’s cynicism is remarkable. Surely he is right to suggest that America is better off than places such as Kosovo, East Timor or Chechnya, where the comforts of late capitalism and mass consumption have not yet spread. Consumerism is of course better than hatred and ethnic cleansing. But is that all we should aspire

to? Koppl would have us believe that social progress can never be worth pursuing. For Koppl, any form of deeper commitment is automatically dismissed as “idolatrous faith.”

But Koppl’s view is misguided – while he is right to suggest that consumerism may be beneficial in that it diverts us from dogmatic thinking, Koppl fails to consider the harm that comes from obliterating *all* thinking. One wonders what Koppl would make of the civil rights movement, the struggle for women’s liberation, or any other form of progressive critical thinking for that matter. At worst, Koppl appears to be claiming that society is not capable of any further evolution. We should all stop thinking and accept the proposition that America has already reached its ideal state. At best, Koppl seems to envisage a Platonic world in which a few enlightened philosopher-kings guide the nation towards moderate change, while the masses waste their time chasing the American dream of commodity fetishism.

But our aspirations should be much greater. The promise of democracy is that the power should rest with the *demos*. We must strive for a society in which all people matter. We must envision an America in which it is unacceptable to distract the political impulses of the masses by encouraging excessive consumption and the worship of the “bitch goddess of success.”⁵⁹ We have yet to attain the Enlightenment ideal of the sanctity and supremacy of the individual. To achieve this more ideal society, we must reject the notion that consumerism and free markets will solve all our problems. We must be willing to expose the empty mythology on which we sustain ourselves – the Horatio Alger stories, the denial of class hierarchies, and the unflinching belief in an American exceptionalism. We must challenge the unquestioned assumption of the necessity of economic growth at the behest of corporate priorities.

In short, we must halt the impulse towards self-congratulation and self-glorification, and instead allow for the idea that government intervention is necessary for change. The successful political movements of the 1960s were only made possible by government intervention, in the form of judicial, legislative, and executive action.

⁵⁹As William James famously put it.

Analogous measures are needed today. Some of the higher ideals to strive for today are the promotion of science and critical thinking, along with the continued pursuit of equality, justice, and a sense of compassion, to name a few. But we will not achieve them on our own. We must be willing to raise our sights and goals, and ask how these ideals might be realized. And when we do this, we see that the current course will never get us there. Corporate America has no clear motivation to increase critical thinking or anything else, for that matter, which does not benefit shareholders. On the contrary, it has every incentive to promote a dumbed-down society in which it is free to manipulate facts, increase profits, and maintain the status quo. For this reason, it is imperative that government acts to reverse these trends. In order to live up to the promise of democracy, government must intervene to empower every American to become an autonomous critical thinker, independent of the corporate machinery.

But even those who would reject this admittedly idealistic vision, and would instead opt for a society guided by enlightened elites, must realize that even this less ambitious goal may not be feasible if current trends persist. Ordinary citizens must still have enough capacity for critical thought to at least elect the right leaders. This may no longer be possible due to the rapidly declining interest in politics in America. The Vanishing Voter Project, a Harvard-based organization, was born of this concern that Americans no longer care about politics.⁶⁰ Perhaps the requirements of critical engagement and serious contemplation are too much to ask of today's sound-bite society.

To the extent that Americans are interested, we tend to vote for all-style, no-substance celebrities. Like other commodities in today's market-driven culture, flashy celebrities "sell." Ex-wrestler Jesse Ventura is the governor of Minnesota. Celebrities such as Donald Trump and Warren Beatty have seriously pondered a run for the presidency. Even candidates that appear more serious, such as Bill Bradley, carry with them the benefits of celebrity status. John McCain has the ultimate prisoner-of-war story to sell us. The other option,

⁶⁰See *Voters Uncertain as Primaries Near*, Associated Press, Jan. 6, 2000. <<http://www.nytimes.com/aponline/p/AP-Vanishing-Voters.html>>

it appears, is to elect the modern-day “heir to the throne” – George W. Bush – who has already displayed a shocking ignorance of current world events.⁶¹ Al Gore, as the heir apparent waiting in the wings, nicely fits the pattern. It is conceivable that the next presidential election will feature two conflicting claims to the throne; one based on birthright and the other on position i.e., loyal service to the reigning monarch.

Where are the modern-day political leaders who can transform the nation? Is there no room in today’s politics for the thinking candidate? Celebrity-driven politics may be the first sign of disaster. On the other hand, transforming the nation into a hereditary monarchy is not a better option. We must ask whether these disturbing political trends are linked to the decline in the capacity for critical thought.

Science and technology pose more problems.⁶² As scientific progress hurtles forward, Americans will be forced to make increasingly difficult choices. Complicated issues, such as long-term environmental safety, require complex analysis and rigorous thought. To separate the issues that pose serious threats from those that do not, an appreciation of science and critical thinking is necessary. The decisionmakers of tomorrow must be fluent in science to make the right choices and avoid doing simply what political pressure dictates. If the current trend persists, we risk making disastrous choices.

The ultimate problem is that we may be setting the stage for a terrible fall when the economy sputters. In effect, our consumption-obsessed society may be a “house of cards” that can collapse at any moment. While things may seem fine in these prosperous times, all bets are off if the stock market were to crash again. A country lacking in widespread critical thought may not have the capacity to overcome crisis and catastrophe. Franklin Delano Roosevelt’s New Deal was ultimately a successful response to economic collapse. Yet without visionary leaders at the helm, one wonders what may have become of America in those turbulent times. Economic catastrophes around the world historically have led to propaganda-driven

⁶¹Bush was asked to name the leaders of four current world “hot spots” – Chechnya, Taiwan, India, and Paksitan – but could only give a partial response to one. *See Bush Fails Pop Quiz on Leaders*, The Globe and Mail, Nov 5, 1999.

⁶²See Nisbet, Matt, *Floating in a fantasy world: GenXers have been raised in an era of unprecedented scientific achievements, yet many are rejecting science and embracing the paranormal*, Buffalo News, Aug 9, 1999, at H1.

scapegoating and ultimately genocide. Lacking the critical thinking to discover rational solutions without resorting to hatred, we stand to repeat the mistakes that have been made throughout history. Thus, perhaps Koppl is wrong to suggest the consumerism provides automatic immunity from ugly “messianic impulses.” In contrast to critical thinking skills, consumerism perpetuates itself only as long as the strong economy persists. The next time the gravy train of economic prosperity is derailed, our intellectual flabbiness may be exposed.

For these reasons, no matter how much confidence one professes in the efficiency of markets or in the tenets of relativism (which refuses to “judge” consumerism and conformity), a decline in critical thinking poses serious problems that neither of these belief systems can adequately address. The free market approach fails to distinguish between the public interest and each individual’s private interest. The relativist approach is lacking, in this case, because certain values, such as critical thinking, are so important that they are not amenable to relativist sophistry and other forms of post-modernist equivocation. Flatly, a decline in critical thinking is a major problem – there are no two ways about it. Thus, no matter what can be said in defense of a consumeristic and conformist society, a decrease in the capacity for critical thought should command our attention, staunch relativists and free-marketers included.

The first thing we must do is come to grips with the idea that corporations are becoming increasingly effective at shaping our culture and values. We must then recognize the legitimate role of the state in counteracting this increasingly powerful corporate influence. This requires a rejection of absolute moral relativism as well as a repudiation of the notion that free markets always yield desirable outcomes. Our task is to commit to values, not profits. Ultimately, we must have the courage to affirm that one value may in fact be superior to the next. Only then can we begin to reform and remake society; only then may we begin the quest to reclaim ourselves and the individuality we have surrendered.

D. Recent Developments are Exacerbating the Crisis

1. A Wave of Mergers

The recent trend toward consolidation of corporate power in the entertainment, news, and information fields is exacerbating the problem. Massive firms, already inherently positioned to shape culture and values, are in effect further locking up the marketplace of ideas by merging into even more gigantic behemoths. The pending Viacom-CBS merger will create a new Viacom with revenues ahead of the Walt Disney Company, which owns networks like ABC and ESPN, and the NBC unit of General Electric Company.⁶³ Even more troubling is the imminent \$166 billion Time Warner – America Online union, which would be the biggest corporate merger ever.⁶⁴ Time Warner, the world’s largest media and entertainment company, already holds an impressive list of media properties including CNN, HBO, TNT, Time, People, Fortune and Sports Illustrated magazines, and the Warner Brothers movie, television and music studios.⁶⁵ AOL, the biggest name in the new media world, owns America Online and all of its attendant features including AOL Instant Messenger, as well as Netscape and CompuServe.⁶⁶ The potential for Time Warner to leverage its cultural consensus into the online world should make us extremely wary.

The point is well-made by an op-ed cartoon entitled “A merger for the masses.”⁶⁷ In this cartoon, the two characters are portrayed as cheerfully and mindlessly discussing how the new merger will be “great” for consumers.⁶⁸ The smiling woman proclaims: “Just imagine the benefits to consumers such as ourselves!

AOL will be able to link to the Time cover story hyping the latest Warner Brothers movies. . . . The world

⁶³Stuart Elliot, *A Combined Viacom-CBS Would Cast an Awfully Large Shadow Across a Wide Range of Ad Media*, N.Y. Times, Sept. 8, 1999, at C8.

⁶⁴*AOL and Time Warner to Merge in \$166 Billion Stock Deal*, N.Y. Times, Jan. 10, 2000, at A1.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷Tom Tomorrow, *A Merger for the Masses*, N.Y. Times, Jan. 11, 2000, at “Op-Art” section, Online edition.

⁶⁸*Id.*

is one step closer to a *single source* for all news, information and entertainment!”⁶⁹ Her equally vacuous husband enthusiastically chimes in: “I’ve always found all those company names *terribly* confusing!”⁷⁰ ⁷¹

Of course, the cartoon is satirical. But the point is well-taken. The long-term consequences of this merger may be disastrous unless we awaken from our self-satisfied state of oblivion. AOL now has a clear incentive to favor its partners’ sites by providing easy linkage to them, which is often what is used to “surf” from one site to the next. Consumers wishing to access less well-visited sites must be able to find the internet addresses of these sites. However, the vast majority of the internet is not catalogued by search engines, such as Yahoo and Alta Vista. Therefore, in the future, the popular sites are likely to attract even more visitors, while the less popular sites are likely to become even more marginalized.

2. Customized Marketing

The internet also gives the behemoths the power to customize ads to the particular interests of individuals. Mass marketing and mass media will ultimately be displaced by individualized marketing and media. The latter are far less expensive and infinitely more effective than the former. Through the simple act of tracking the web sites that one visits, a small cadre of media giants have ushered in a new era of advertising characterized by an efficiency that was unimaginable only a few years ago. The click of a mouse provides others a powerful arsenal of information to tempt us to consume from an alluring menu fashioned to suit our idiosyncratic tastes. Charles Sykes, writing in the Wall Street Journal, has noted:

⁶⁹Id.

⁷⁰Id.

⁷¹Just when you thought things could not get any worse – Time Warner has announced plans to merge with music industry giant EMI records. See *EMI and Time Warner Plan to Form Global Music Group*, N.Y. Times, Jan. 23, 2000, at A1.

[M]arketers are deploying technologies designed to allow advertisers to target individual consumers by watching and learning about their habits and tastes. A recent survey found that 86 of the top 100 ecommerce sites plant ‘cookies’ – identifying markers – on users’ computer drives, sometimes without their knowledge. The cookies enable Web sites to build a ‘psychographic profile,’ which in turn can be used to serve up advertising ‘banners’ that are matched with the customer’s interests. But there is a thin line between marketing and stalking. One doesn’t have to be paranoid to be troubled by the Big Brother of all of this.⁷²

Other sites actually have live operators on hand, secretly observing every move the consumer makes.⁷³ At an opportune moment, the live operator is trained to butt in and make purchasing suggestions.⁷⁴

One must ask whether this sort of corporate behavior crosses the line. In a sense, we are allowing the individual to go one-on-one with a modern day Goliath better armed than his biblical counterpart. Who is going to protect David?

In other words, contrary to the popular mythology, the internet is hardly becoming a forum for isolated voices of reasoned dissent. In fact, recent developments evince the opposite trend – the internet is rapidly becoming another vehicle through which massive companies exert greater influence over the shaping of culture, preferences, and values.⁷⁵

3. The Future of Advertising

There is nothing to suggest that advertising will ever slow down. With each passing day, advertising becomes increasingly omnipresent in our lives. It used to be that we flipped channels to avoid commercials. Now we

⁷³Michel, Marriot, *It’s Not Big Brother, It’s Customer Service*, N.Y. Times, Jan.27, 2000, online edition.

⁷⁴Id.

⁷⁵As further evidence of the internet’s symbiotic relationship with pop culture, a recent poll conducted by Yahoo found that, of all musical groups, the Backstreet Boys was the subject of most internet searches in 1999. Predictably, ‘N Sync and 98 Degrees also made the top 10 list.

gleefully watch them with fascination and admiration.⁷⁶ And even when we think we are watching regular programming, we are still unable to escape the grasp of corporate advertising. The new strategy is to use product placements in movies and television shows – a powerful way to target unsuspecting audiences.⁷⁷ Messages are also being digitally implanted into the background of live sporting events.⁷⁸ And now we hear that CBS has been strategically implanting *CBS News* virtual images during some of its on-scene news reports.⁷⁹

Is there any relief in sight? A recent Wall Street Journal article speculates that things will only get worse.⁸⁰ According to the author of the article, soon we should expect car makers to set up exhibits showcasing new-car models in popular dog-walking spots, and mobile “tasting vans” at bus stops and outside of schools where parents drop off children.⁸¹ And also look for “ambient advertising” – marketing that is not restricted to its medium, such as a billboard that speaks to you as you walk by, or a computer that sprays the smell of doughnuts when you click on an ad.⁸² The author of the article concludes that in the future we will have to go on vacations from advertising in “designated market-free zones” to “cleanse us from brand assault.”⁸³

E. The Side Effects of Materialism are Starting to Manifest

The side effects of our materialistic culture are starting to manifest. The distractions of constant consumption

⁷⁶An interesting phenomenon that reflects our obsession with commercials is that many viewers watch the Super Bowl primarily for the ads.

⁷⁷Jonathan Kaufman, *The Omnipresent Persuaders*, Wall Street Journal, Jan. 1, 2000, at R26.

⁷⁸*Id.*

⁷⁹Alex Kuczyinsky, *On CBS News, Some of What You See Isn't There*, N. Y. Times, Jan. 12, 2000, at A1.

⁸⁰Jonathan Kaufman, *The Omnipresent Persuaders*, Wall Street Journal, Jan. 1, 2000, at R26.

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

are eroding traditional social values. Commitment to causes larger than oneself is becoming increasingly rare. Concerns over the growing wealth inequalities are increasingly going unspoken. Little attention is being paid to the recent finding that 30 million Americans worry about where they will get their next meals.⁸⁴ We do not seem troubled by the fact that one in six American children lives in poverty.⁸⁵ Charitable giving to the poor and homeless has fallen.⁸⁶ To the extent that we still do have compassion, it is seemingly only brought out by isolated made-for-TV-style tragedies, such as those of JonBenet Ramsey and Elián González. Indeed, it seems that traditional social values, not amenable to quick “bottom line” calculations, are being replaced by one value – greed. Moral worth is becoming equated with net worth. In the process, questions relating to democracy, equality, and compassion are becoming the first casualties of our advertising-driven culture of consumption.

F. Three Institutions of Power: The Church, State, and Corporations

The idea that corporations are exerting an overly powerful effect on society is repeated frequently throughout this paper. One might thus get the impression that the paper vilifies corporations and seeks to blame them for all societal ills. The charge is not quite true. In fact, corporations have had a partner in the co-opting of the American mind – that is, the mind itself. In essence, this paper contends that uncritical thinking is inherent in the human condition. Humans are easily led to believe all sorts of ridiculous things. Today corporations are at the helm directing the propaganda campaign. But corporations have not always been

⁸⁴ *Report: Times Not Booming for Everyone*, USA Today, Jan. 19, 2000, Online edition.

⁸⁵ *Id.*

⁸⁶ Peter T. Kilborn, *As Affluence Rises, Donations to Poor and Needy Fall Off*, Milwaukee Journal Sentinel, Dec. 12, 1999, at 8.

in this position – indeed, it is only in recent years that corporate power has become more influential than other traditional sources of authority.

At the risk of gross oversimplification, Western history can be viewed as a power struggle among three institutions – church, state, and corporations – each attempting to provide individuals with a coherent world view and thereby capture their sympathies and devotion. For thousands of years, religious teachings unquestionably reigned supreme. It was not until the last few centuries in which massive revolutions of thought occurred in Europe (the Glorious Revolution, the French Revolution, etc.) that state power came to challenge the authority of the church. In some nations, specifically the communist and totalitarian ones, state power actually suppressed religious authority. On the other hand, in other nations, state power reinforced the teachings of the church. In recent years, however, the transformation from an industrial economy to an information society has allowed corporate power to eclipse both church and state power in terms of cultural influence in the United States.⁸⁷

Given that it is now corporations that largely shape the thoughts and desires of individuals, this paper argues that, in order to restore the sanctity of the individual, greater authority must be given to the state.⁸⁸ But the state must not seek to replace corporate control with its own form of state propaganda. The goal must be to empower Americans to think for themselves. As noted above, corporations do not have any incentive to see this happen.⁸⁹ The state, however, does have a compelling interest in having a critical, thoughtful, and engaged citizenry. To this end, the enhancement of state power is both necessary and justified.

G. A Matter of Misplaced Distrust

⁸⁷Obviously, these statements are intended to be quite general. For example, for many individuals religious authority will always be predominant.

⁸⁸Of course, campaign finance reform is also needed to help separate private and state power. But such a discussion is beyond the scope of this paper.

⁸⁹See Part I C. *supra*.

To be certain, the claim is not being made that Americans are unaware of the dangers of not thinking for themselves. In fact most Americans are very cognizant of notions of “mind control” and other perceived threats to autonomy. But the institution that we have traditionally most feared is the state. Religious authority has been largely kept at bay by the principle of separation of church and state. To the extent that one wishes to disregard religious teachings, one is free to do so in the United States. But state power has always made us nervous, and perhaps with good reason. The rise of communist dictatorships and totalitarian regimes abroad has conditioned us to be wary of the abuses brought on by unchecked state power. Books such as Aldous Huxley’s *Brave New World* and George Orwell’s *1984* have reinforced the point and increased our sensitivities to perceived threats of state thought control. Justice Brandeis, in a well-known dissenting opinion, articulated these concerns:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.⁹⁰

Brandeis’s sentiments echo Emerson, placing strong emphasis on individuality, independent development, and freedom from intrusion into one’s thoughts. Yet, written in 1928, the only imaginable threat to autonomy was the government. However, these days the main threat is no longer government, but private corporations. What has happened is that, in our haste to preserve our freedom, we have gone too far. We have feared government power so much that we have become dogmatic in our insistence that government be relatively impotent against private industry. Our vigilance has worked – as Bill Clinton put it in his 1996 State of the Union address, the “era of big government is over.” This type of statement wins political points these days. Today it is almost inconceivable that a successful presidential candidate would declare the opposite – that government is the way to solve problems. As Ronald Reagan put it: “Government is not the solution to our

problem. Government is the problem.”⁹¹

But the de-emphasis of government power has *not* resulted in a society of free and independent individuals. What has instead transpired is that corporations have rushed in to fill the void no longer occupied by state or religious authorities. Granted enormous advantages in the form of limited liability, unlimited life, tax benefits, and a generally pro-business regulatory environment, corporations have accumulated massive amounts of wealth and spent much of their abundance on massive advertising campaigns. Terrified by the notion that our “freedom” might be deprived, we insist that government stand idly by as corporations bombard us with relentless advertising campaigns, full of puffery, exaggeration, and other half-truths. No matter how hard we try, it is almost impossible for us to fully resist the corporate agenda. And so the reins have been handed over – whereas religious dogma and state propaganda were yesterday’s primary hazards, today corporations pose the greatest threat to our intellectual autonomy.

H. Overview of the Proposals

The program proposed herein consists of three recommended policy initiatives. First, the government should scrutinize “puffery” or exaggeration in advertising more carefully, circumscribing to a greater degree the claims that advertisers are permitted to make. Though relatively modest in scope, the goal would be to eliminate a certain amount of lying and dishonesty that pervades advertising. A restriction on puffery would reduce the advantage that corporations enjoy in the marketplace, and thus help to counter the larger societal trends of consumerism, conformity, and uncritical thinking. However, a puffery regulation by itself would only do so much. Therefore, such a measure should be thought of primarily as a first line of defense, a

⁹¹Ronald Reagan made this statement in his first inaugural address.

starting point for bolder and more imaginative efforts.

The second proposal is that the government should use counter-advertising campaigns more frequently. In certain instances, it is not enough for government to merely regulate puffery because such action does not ensure that consumers get the information they need. Therefore, in these cases, the government has an affirmative duty to provide consumers with unbiased and reliable information. In this way, government counter-advertising would attempt to balance the “marketplace of ideas,” and thereby help consumers make more informed decisions. Equipped with a more even outlook on certain issues, consumers would be less likely to fall into the traps of consumerism, conformity, and uncritical thinking.

The final and most ambitious proposal is that the government should directly seek to increase critical thinking. Several methods are proposed to accomplish this goal. The need for such a policy is motivated by the idea, informed by the discipline of evolutionary psychology, that human beings are inherently uncritical thinkers. Therefore, given the potentially innate basis for uncritical thinking, the government must go beyond the two measures proposed above and explicitly attempt to address the human predisposition to be uncritical.

Part II

A. What is Puffery?

The first type of reform this paper advocates is a change in the FTC's lenient treatment of an advertising technique called "puffery," in which advertisers unrealistically exaggerate or "puff" the virtues of the product being sold. Presently, companies are allowed to get away with a great deal of puffery. Some examples of puffery include:

Snapple, made from the best stuff on earth. (in reference to iced tea)

Feel your best. Feel your Ginsana. (in reference to an herbal product)

It really works! (in reference to a psychic phone service)

In the first example, there is an implicit claim that the ingredients of Snapple beverages are better or healthier than those of its competitors. In the second instance, it is implied that taking Ginsana herbal supplements will improve health, even though such a claim has never been proven to the point that would satisfy the requirements that the Food and Drug Administration (hereinafter "FDA") would impose if it had jurisdiction over herbal products. In the final instance, the implication is that psychics can predict the future, despite the fact that the law simultaneously requires that the advertiser disclose that the service is "for entertainment purposes only."

Claims such as these, which the advertiser has little or no reason to believe are true, are treated by the law

as being completely legal. The theory is that every consumer expects puffery to exist, and that no reasonable consumer would actually be misled by it.⁹² In other words, puffery is legal because it does not work. Of course, this begs the question – if puffery does not work, why do so many advertisements contain so much of it? Advertisers strenuously contend that consumers do not believe puffery. However, if consumers are not influenced by puffery, what function does puffery serve? It seems most likely that if the advertising profession as a whole has consistently committed itself to the use of puffery, it can only be from the knowledge that puffery really does work.⁹³ Thus, the following irony presents: puffery is used because it works, but legalized because it does not work.⁹⁴

B. How Does Puffery Work?

In the author's estimation, puffery is the primary method through which advertisers contribute to the American tendency to rely on consumption to solve problems, real or imagined. It is a way in which advertisers create and exploit needs and vulnerabilities. In the above examples, the ads target the American preoccupation with "wellness," as well as the uncontrollable need to know what the future has in store. But the products and services the ads promote to satisfy these obsessions – iced tea, unproven supplements, and psychic phone consultations – are unlikely to be of much benefit. Thus, puffery is the ultimate advertising tool – advertisers use it to say something very suggestive, though imprecise, when otherwise the law would not allow them to say anything at all. Puffery grants advertisers an exemption from the rule of truth in advertising. It gives advertisers a free pass to lie and deceive the American public, as long as they do so in

⁹²See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 12-26.

⁹³*Id.*

⁹⁴*Id.*

a vague and roundabout fashion.

Given license to distort facts, advertisers manipulate reality and shape preferences. The power to puff is the power to create values. But the values are formed in the advertiser's image. They are consumption-reinforcing. The message is: the more you buy of our product, the better off you will be. You need to consume to improve yourself. Harold Lasswell's *Who Gets What, When, How* is replaced with what can I get and how soon? From very early in childhood we are indoctrinated with corporate America's message. Even once safe havens have been penetrated. Children at school are exposed to commercials on Channel One.⁹⁵ Public television in the name of survival has gone to bed with its corporate sponsors.⁹⁶ No matter what counter-strategies individuals may adopt, it is nearly impossible to avoid the ideological inculcation of the values of corporate America. The upshot is a consumption-obsessed society characterized by dulling consensus, superstitious thinking, and compulsive shopping sprees. Each Christmas there is a new gadget that every kid in America "must" have: *Pokémon*, *Tickle Me Elmo*, *Teenage Ninja Mutant Turtles*, and *Beanie Babies* are recent examples. Nor are adults immune. Now we are told that if we engage in the latest adult fad – online trading – we can buy our own island or even country.⁹⁷ And the puffery continues. Buy this, do that, think this, this product will make your life worth living again. And so the never-ending urge for earthly salvation continues.

C. Contingency of Current State of Law

⁹⁵In one of the most bizarre events in the history of school discipline, a youngster recently was suspended from school for wearing a jacket with a Pepsi logo on a day on which the school had clothed all the students in Coke jackets to compete for Coke favors. See Rhonda H. Karparkin, *Toward a fair and just marketplace for all customers: The responsibilities of marketing professionals*, *Journal of Public Policy & Marketing*, April 1, 1999.

⁹⁶See John Hazleton, *Public service TV – the end of an era?*, Broadcast, Jan. 14, 2000, at 21.

⁹⁷Chris Reidy, *Ad campaign starts for Fidelity's Powerstreet online trading brand*, Knight-Ridder Tribune Business News – The Boston Globe, Sept. 11, 1999, Online edition.

The truthfulness exemption granted puffery is an historical contingency, largely attributable to chance.⁹⁸ The puffery exemption stems from the long tradition in the Anglo-American law of *caveat emptor* or “let the buyer beware.”⁹⁹ However, there is little reason to view the *caveat emptor* rule as being particularly natural, logical, or inevitable. In fact, the story of how *caveat emptor* crept into the law is a largely a story of accident and historical circumstance.¹⁰⁰

Throughout the Middle Ages in England, laws governing trade were administered mostly by the Church and various guild and merchant groups.¹⁰¹ The general rule was that merchants were fully responsible for all of their claims, and courts were set up to discipline merchants who were deceitful.¹⁰² In such fashion, a rule of absolute honesty in the marketplace became the norm. However, at the same time, there was also a fringe group of nomadic traders, here today and gone tomorrow, from whom no redress could be had if defects of their goods were discovered only after they left.¹⁰³ It is with regard to these wandering merchants that a folk custom of *caveat emptor* emerged.¹⁰⁴

How could it be that a mere folk convention that contradicted the law eventually came to supplant that law? It happened because the king and his courts wanted to do everything possible to encourage the growth of trade.¹⁰⁵ Thus, in nationalizing the marketplace, they disregarded the established rules of lawful markets and instead chose a precedent from the lawless markets of fly-by-night traders.¹⁰⁶ In this way, *caveat emptor* gained official recognition in English law. Yet there was nothing inherently natural about the rule of *caveat*

⁹⁸See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 27-46.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.*

emptor. It was merely a contingent adaptation to particular circumstances, no more innately preferable than the norm of absolute honesty that had preceded it.

Ivan L. Preston has detailed how one accident after the next served to expand *caveat emptor* and give it a force it could not have otherwise had.¹⁰⁷ Consider, for example, the famous 1603 bezar-stone case, known as *Chandelor v. Lopus*.¹⁰⁸ The case involved a buyer who purchased a bezar-stone, a folk remedy that was to be applied to whichever part of the body was diseased.¹⁰⁹ Lopus apparently tried the remedy without success, and concluded that it was not a bezar-stone.¹¹⁰ Lopus brought suit for misrepresentation.¹¹¹ The court held that Chandelor had not *warranted* it to be a bezar-stone, but merely *said* it was such.¹¹² The court declared that “the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action.”¹¹³

The holding that a statement of fact has no legal status as such was an astonishing decision.¹¹⁴ The precedent was eventually relied upon to justify an increasingly sellerist bias in the law.¹¹⁵ However, commentators have claimed that the interpretation of, and later reliance upon, the decision was merely an historical accident.¹¹⁶ The real story, it has been argued, is that the court recognized that the bezar-stone was a placebo, and as such, its status was mostly a matter of subjective interpretation.¹¹⁷ Therefore, the court was merely trying to protect Chandelor, and not trying to establish a new precedent for commercial dealing.¹¹⁸

Preston describes countless other examples of how accidental circumstances shaped the law and gave it a

¹⁰⁷See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 27-67.

¹⁰⁸Cro. Jac. 4, 79 Eng. Rep. 3 (1603).

¹⁰⁹See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 35-40.

¹¹⁰Id.

¹¹¹Id.

¹¹²Id.

¹¹³Id.

¹¹⁴Id.

¹¹⁵Id.

¹¹⁶Id.

¹¹⁷Id.

¹¹⁸Id.

sellerist bent. He notes:

I will be identifying other accidental happenings in this book, enough to suggest that the law of the marketplace developed as it did almost entirely by chance. I interpret these accidents as significant, because a principal purpose of this look at history is to determine whether sellerism is as strongly rooted in law as advertisers tend to believe, or whether it has a relatively weak foundation that would tend to justify the efforts of those who would replace it with consumerism. The many accidents contributing to the development of sellerism of course encourage the latter belief.¹¹⁹

Over the years, the harsh sellerism in the law has been softened considerably. In the last century, the bezarstone case has been overturned, and it is now much easier for the law to recognize a warranty, and in some cases, an implied warranty.¹²⁰ Similarly, the standard of proof necessary to find fraudulent misrepresentation has been lowered.¹²¹

Perhaps the most significant development for consumers has been the creation of the Federal Trade Commission in 1914. The establishment of the FTC has aided consumers in many ways.¹²² Before the FTC was created, consumer protection was largely restricted to court suits instituted by individual citizens.¹²³ Predictably, such suits were rarely brought.¹²⁴ For one, individual citizens did not often have the time, energy, and money to bring an action.¹²⁵ Also, the common law of misrepresentation made it very hard to establish a misrepresentation as illegal.¹²⁶ With the creation of the FTC, however, an advertisement itself could be challenged without having to prove reliance and damages.¹²⁷ Indeed, the FTC has at times been very aggressive in attacking false advertising. The apex of the FTC was undoubtedly in the 1960s and 1970s when Ralph Nader and his raiders brought the cause of consumer rights to the forefront of the American consciousness. In short, the FTC has done a great deal to clean up the market, thus moving away from the

¹²⁰See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 47-61.

¹²¹See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 62-67.

¹²²See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 90-112.

¹²³Id.

¹²⁴Id.

¹²⁵Id.

¹²⁶Id.

¹²⁷Id.

harsh rule of *caveat emptor*.

But, unfortunately, vestiges of *caveat emptor* can still be seen in the FTC's current policy on puffery. In its influential 1983 Policy Statement on Deception, the FTC specifically addressed the issue of puffery:

The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously. The term 'puffing' refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign them benefits they do not possess.¹²⁸

Judging from the language of the Policy Statement, as well as the actions taken by the FTC since 1983, it seems pretty clear that puffery is here to stay. Thus, although much progress has been made, the accidents and historical contingencies of the last five hundred years continue to exert a powerful effect, biasing us toward sellerism and limiting our ability to imagine alternatives.

D. Specific Proposal

The FTC should rethink its lenient treatment of puffery. The proposal is not that the FTC should ban all puffery outright.¹²⁹ Instead, the FTC should take the politically more expedient middle ground and only eliminate puffery that has been shown to deceive. Of course, the FTC is already supposed to prohibit puffery that deceives. The problem is that the FTC does not believe that *any* puffery deceives.

The FTC should be open to the possibility that puffery is sometimes believed by consumers. Appropriate

¹²⁹Why not? First, such a proposal would be more radical and therefore less politically expedient. Second, there are seemingly so many instances of puffery in which it is inconceivable that very many people would be deceived. For instance, "You got the right one, baby" (Pepsi ad) or "Coke is it!" In such an instance in which mass deception is unlikely, the governmental intrusion should be regarded as too great, especially considering the burden such a ban places on creativity and wit. Of course, if there is any uncertainty, it is advisable to test consumers to see if they do in fact believe the puff.

FTC action would include conducting studies to determine if a substantial number of consumers are deceived in particular cases.¹³⁰ Presently, FTC staff members typically view an ad and make their own judgments to determine whether the claims constitute puffery.¹³¹ Once labeled puffery, the claims are granted an automatic exemption. The current system is basically the “I know it when I see it” approach in that no consumer data is gathered. Yet the FTC’s mission is to protect consumers. If the proposed empirical approach were instead adopted, the FTC would be in a better position to make informed judgments about how *consumers* react to puffery. If deception is found, the advertisement would be discontinued; if not, the ad would be permitted to continue running. In this way, the FTC would rely on the perceptions of consumers, rather than its own “best guess.” Such a policy would go along way to ridding the market of deceptive puffery.

E. Why Regulate Puffery?

1. Puffery Works

There are a number of reasons why the FTC should crack down on puffery. Most importantly, puffery works. As argued above, the very fact that sophisticated advertisers, with all of their experience and expertise, choose to employ puffery is highly supportive of the proposition that puffery affects consumer behavior.¹³² In addition, there is a considerable body of empirical evidence that suggests that consumers believe puffery, and that it is not necessarily automatically dismissed by consumers, as the FTC would have us believe.

¹³⁰One question is what should count as a “substantial number” of consumers? In other words, what percent of consumers must be fooled before the FTC acts? This is a difficult policy question that is beyond the scope of this paper. The important point, however, is that presently there are probably many puffing advertisements that are believed by upwards of 30% or 40% of the viewers. Ads such as these would clearly qualify as being deceptive. These ads would be a good place to start.

¹³¹This observation stems from the author’s having worked at the FTC in the summer of 1999. Also see Ivan L. Preston, *Puffery and Other ‘Loophole’ Claims: How the Law’s ‘Don’t Ask, Don’t Tell’ Policy Condone Fraudulent Falsity in Advertising*, 18 J.L. & Com. 49 (1998).

¹³²See Part II A. *supra*

Preston describes nine different studies that have been done on puffery in recent years.¹³³ Taken together, the studies demonstrate that consumers very often interpret puffs as being implied statements of fact, and also that consumers believe a remarkably large amount of the puffery. In one study, 47% of consumers judged a puff to be “completely true.”¹³⁴ In another study, subjects believed explicit puffing claims 40% of the time.¹³⁵

(a) A Private Lawsuit Illustrates the Effectiveness of Puffery

A recent private lawsuit lends further credence to the deceptive nature of puffery. In August of 1998, Pizza Hut sued Papa John’s on the grounds that Papa John’s slogan “Better Ingredients, Better Pizza” implied that the ingredients used by Papa John’s were fresh and those used by competitors were not.¹³⁶ On January 2, 2000, a federal judge found that the slogan was deceptive and ordered Papa John’s to stop using the slogan, despite its puffery defense.¹³⁷

A close examination of the Papa John’s case reveals how effective puffery can be.¹³⁸ For years, the pizza market was divided among three major players – Pizza Hut, Domino’s, and Little Caesar’s.¹³⁹ Then suddenly Papa John’s burst on the scene with an effective marketing campaign emphasizing product quality. In one memorable ad, the competitor is depicted as making pizza from an unpalatable glob of tomato paste under a rusty tap.¹⁴⁰ Another ad showed the Pizza Hut founder telling his employees at a fictional meeting that he

¹³³See Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), pp. 180-84.

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Papa John’s Ordered to Pay Pizza Hut*, N.Y. Times, Jan. 5, 2000, Online edition.

¹³⁷*Id.*

¹³⁸See David Goetz, *Pizza War’s Legacy Uncertain*, The Courier Journal, Jan. 9, 2000, at 01E.

¹³⁹*Id.*

¹⁴⁰*Id.*

had found a better pizza.¹⁴¹ And then, at the end of each spot, was the “Better Ingredients, Better Pizza” slogan.¹⁴²

Largely due its strategic use of puffery in advertising, Papa John’s rapidly went from being an unknown entity to a major player that was cutting into Pizza Hut’s profits.¹⁴³ Yet, as the outcome of the lawsuit indicates, the ad campaign was not based on any substantive information that Papa John’s was actually using better ingredients. It was all hype – but devastatingly effective. One wonders how many ad campaigns the FTC could challenge on the same grounds, if only it were so inclined. It is also worth pondering how many other companies (that do not have Pizza Hut’s resources to bring a lawsuit) are losing profits, and how many other consumers are being deceived, all under the theory that puffery does not deceive.

2. Puffery Harms Even Sophisticated Consumers

Even sophisticated consumers who are not deceived by puffery are nonetheless harmed by it. Though they might not let puffery influence their purchasing decisions, these consumers are still negatively affected because puffery prevents them from getting useful information from the advertiser.¹⁴⁴ Recall the earlier argument that consumers are most likely to view the advertiser as the best source of information about a product, given the costs of seeking outside information.¹⁴⁵ Thus, because of puffery, sophisticated consumers go without useful information, such as the real differences between the advertised product and competing products, and instead must listen to empty puffery, which they likely find transparent, if not annoying.

¹⁴¹Id.

¹⁴²Id.

¹⁴³Id.

¹⁴⁴See Ivan L. Preston, *The Tangled Web They Weave*, (Madison: University of Wisconsin Press, 1994), p.197.

¹⁴⁵See Part I B. 2. *supra*

3. Tolerance of Puffery Breeds Cynicism

In addition to the deprivation of useful information, increased cynicism among sophisticated consumers is an additional side effect of the law's tolerance of puffery. The distrust generated by puffery fuels the fires of cynicism and pessimism already epidemic in our society. The indirect sanctioning of these legalized falsehoods by government inaction may lead citizens to generalize their skepticism to government itself. The end result is a jaded citizenry mired in indifference, paralyzed by doubt, and clouded by a tarnished sense of truth.¹⁴⁶

4. Consumers May Not Know That Puffery Can be Legal

Another reason to crack down on puffery is that there is already a law against deceptiveness that may give rise to a reliance interest in some consumers. In other words, because consumers are aware that there is *some* law against deceptiveness, they may naively assume that the law permits no lying whatsoever.¹⁴⁷ In effect, some consumers might form the faulty belief that "they couldn't say it if it wasn't true."¹⁴⁸ In this way, the existence of an underenforced prohibition against deception actually makes matters worse because it lulls consumers into a false sense of security.

¹⁴⁶Recent studies indicate that 45 percent of Americans no longer believe lying is wrong. See Bernice Kanner, *What Became of Our Capacity for Veracity?*, Dallas Morning News, June 14, 1996, at 7C.

¹⁴⁷See Ivan L. Preston, *The Tangled Web They Weave*, (Madison: University of Wisconsin Press, 1994), p.178.

¹⁴⁸*Id.*

5. Tolerance of Puffery is an Historical Contingency

An additional reason for removing puffery's immunity is that the law's currently permissive stance toward puffery, as described above,¹⁴⁹ developed largely through accidents and misinterpretation of earlier precedent. There is no reason to believe that puffery is a natural or necessary condition of selling. In the Middle Ages, such deception would have been forbidden. Later times brought a need for new policies. *Caveat emptor* developed at a particular point in time to encourage more trade. However, conditions in the United States in 2000 are not the same as they were in England in the 16th and 17th Centuries. There is nothing to suggest that, if puffery were regulated more closely, trade in the United States would grind to a screeching halt. The sellers in today's economy are rarely merchants acting on their own. Instead, today's sellers are more often huge national and transnational corporations, wielding incredible amounts of economic power. Such corporations already typically employ huge advertising and public relations firms to promote their products in the best possible light. There is no reason to allow them to use puffery to further augment their advantage over the individual consumer.¹⁵⁰

6. Tolerance of Puffery Results from Disparity in Ability to Influence Political Process

Another argument for heightened scrutiny stems from the tendency of administrative agencies to favor

¹⁴⁹See Part II C. *supra*

¹⁵⁰If, by chance, a restriction on puffery were at some point implemented and wound up hurting producers, our reaction should be nothing short of raucous applause. Such an occurrence would merely signify that profits that had been previously wrongfully extracted from gullible consumers were at last being returned to the consumers – an equitable redistribution. American corporations should be profitable without resorting to puffery. To the extent that they need to use puffery to sustain themselves, they should be eliminated from the marketplace.

small, highly-interested parties over large, diffuse interests.¹⁵¹ Organized advertisers press the puffery defense vigorously, while scattered consumer groups make no similar demands.¹⁵² As a result, the law tends to equate the needs of society more strongly with the needs of sellers, while the voices of consumers go unheard.¹⁵³ Cracking down on puffery might help restore the balance.

7. Other Agencies Are Less Tolerant of Puffery

The FTC's reluctance to attack puffery is especially puzzling given that other federal regulatory agencies do not seem to share its view. For instance, the FDA recently cracked down on puffery by forcing drug manufacturer Glaxo Wellcome to alter an advertisement for its flu medication Relenza.¹⁵⁴ The original ad depicted a formerly flu-stricken woman ushering the flu, played by actor Wayne Knight, out of her body.¹⁵⁵ The FDA required that Glaxo Wellcome change the ad so that the flu is not ushered out of her body because such a depiction exaggerated the effectiveness of the drug, which only claims to reduce flu symptoms from seven days to six.¹⁵⁶ There is a great irony that the FTC, the agency charged with primary jurisdiction over false advertising, does not seem to share in the urgency to get deceptive puffery out of the market.

8. The Law Should Not Tolerate Regulatable Lying

¹⁵¹See Ivan L. Preston, *The Tangled Web They Weave*, (Madison: University of Wisconsin Press, 1994), p. 178.

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴See Sheryl Gay Stolberg, *F.D.A. Forces Drug Maker to Keep the Flu in Ad for a Remedy*, N.Y. Times, Jan. 14, 2000, at A17.

¹⁵⁵*Id.*

¹⁵⁶*Id.*

A final justification for FTC action is that puffery, no matter how you dress it up, more or less boils down to legalized lying. Why should the law approve of lying? In almost all other regulatable contexts, lying is against the law. Why should it be different for economic dealing? What benefits come from allowing puffery? For certain, advertisers would still find a way to advertise their wares, even if they were not permitted to puff. The only difference would be that advertising would be more truthful. It is hard to imagine why such a change would not be desirable.

F. Anticipated Criticisms

1. “Puffery Does Not Really Work”

The most obvious criticism is that, despite what has been claimed herein, puffery does not really fool anyone. The first response to this skeptical position is to review the arguments presented thus far. The most compelling argument, it will be recalled, is that if puffery did not affect consumers, companies would not use it.¹⁵⁷ Moreover, if one is seriously committed to the notion that puffery does not affect consumers at all, and that consumers can never be manipulated – one must also be willing to argue that individuals possess absolute free will, and in effect are “uncaused causes.” Philosophers have grappled with the question of free will for ages. However, the idea that individuals possess absolute free will, and are completely uninfluenced by what is around them, is indefensible. Our thoughts and actions are undeniably influenced by what we hear, see, and read. If we were truly free agents, there would be no need to prohibit any form of speech. However, there are several types of speech that are not granted any First Amendment protection – solicitation

¹⁵⁷See Part II E. 1. *supra*.

of crimes, offers of bribes, and “fighting words” are some examples. If we truly believed that individuals could not be provoked to commit crimes, accept bribes, or incite riots, there would be no need for these First Amendment exceptions to exist. Thus, it must be admitted that, at least to a certain degree, consumers are affected by puffery.

2. “Puffery Only Works on Those Who ‘Deserve’ It”

The other version of the skeptical position is that, while puffery may have some effect on everyone, it only really works on the people who “deserve” it, i.e. the gullible and the naive. The argument is that only ignorant people would actually believe puffery or allow it to influence their purchasing decisions. In one of the studies mentioned above, however, the researchers noted that their subjects on average were more well-educated than the general population.¹⁵⁸ Thus, puffery’s effectiveness is not automatically limited to the ignorant, unthinking, and unsophisticated.

But even if puffery were in fact only effective on the less educated members of society, would that be a reason to allow puffery? It has been documented that psychic hotlines appeal disproportionately to African-American women, statistically one of the most powerless groups in society.¹⁵⁹ Indeed, the celebrities touting the virtues of these hotlines on infomercials are often African-American women, such as Dionne Warwick and LaToya Jackson.¹⁶⁰ Is it somehow better or more acceptable that puffery is disproportionately deceiving indigent African-American women in this instance? If anything, it seems precisely the opposite should be

¹⁵⁸Ivan L. Preston, *The Great American Blowup*, (Madison: The University of Wisconsin Press, 1996), p. 182.

¹⁵⁹See *Seers Peer Into Wallets: TV Prophets are Only Seeking Profits*, Boston Herald, Feb. 23, 1993, at 39.

¹⁶⁰*Id.*

true. If it is the case that puffery is most effective at exploiting the most powerless elements of society, this would certainly be no justification for the FTC to give puffery its blessing with a grant of blanket immunity.

3. “Puffery and Advertising Cannot Create Needs That Are Not Already Present”

Another potential criticism is that, even if advertising and puffery affect behavior to some extent, they do not create needs – rather they merely bring previously dormant or unnoticed needs into the consumer’s awareness. Such reasoning, often put forth by advertisers and their apologists, reveals itself as nothing more than self-serving sophistry. First, on a philosophical level, how can one have a “need” of which one is not even aware? What is the essence of the concept “need” if it does not imply awareness of its very existence? As economist John Kenneth Galbraith once stated: “It is not necessary to advertise food to hungry people, fuel to cold people, or houses to the homeless.”¹⁶¹

Addressing the argument more directly, it is of course true that any particular product must be marketed so that it appeals to some basic component of the human psyche, such as the desire to love or be loved, to be comfortable, or to be healthy. This is not a very constraining set of innate human desires – nearly any product can be tied into one of them. But this does not mean that the consumer had a pre-existing need for the product itself. For instance, imagine a major advertising campaign touting the benefits of being an expert at differential calculus. “If you become a calculus wizard, you will be the coolest kid in school!” Now, even more improbably, suppose that such a campaign succeeded. We would hardly say that the children had an innate desire to be good at differential calculus. For the same reason, one cannot argue that children

¹⁶¹ Julia Vitullo-Martin and J. Robert Moskin, *The Executive Book of Quotations*, (New York: Oxford University Press, 1994), p. 5.

have an innate desire to own Nike sneakers. In both cases, the innate desire is to be well-liked; whether advertising ties this need to calculus or sneakers is arbitrary.¹⁶²

Moreover, even assuming *arguendo* that all needs are pre-existing, the fact remains that advertisers select which of these needs to exploit. Only those needs that can be readily translated into profitable commercial products are developed by advertisers. Consider Michael Schudson's argument:

As marketers read people's preferences for particular products, they take everything else in society as settled – the legitimacy of a market economy, the good sense of devoting the nation's wealth to things that can be commercialized in the short-run, the justice of focusing of commercial development on the needs of the consumers with the majority dollars rather than on the majority of consumers, and the rightness of leaving the task of identifying needs and desires in private hands not responsible to public oversight. In short, the consumers the marketers listen to are not persons, not citizens, but thin voices choosing from among a set of predetermined options. The 'people' the marketers are concerned with are only those people or those parts of people that fit into the image of the consumer the marketer has created.¹⁶³

Thus, no matter if one is convinced that advertisers create new needs or merely develop needs that were already there, the result is the same – advertisers are a powerful force in deciding which values, needs, and preferences become outwardly expressed.

4. "Tighter Regulation of Puffery Would be Too Costly"

Another potential criticism is that the implementation of the proposal would be costly due to a dramatic increase in the amount of litigation. Granted, in the short term, it should be expected that there might be more litigation as the FTC and industry seek to define the boundaries of the new puffery standard. However,

¹⁶²The idea that needs can be created from the outside is also resonant with some recent research on hypnosis. In one study, a researcher suggested that subjects "regress" to a past life. By the end of the experiment, roughly half of the subjects came to believe that they had indeed lived a past life. Are we to assume that the "need" to believe they had lived a past life was already within the subjects and was merely brought into awareness by the experimenter's suggestion? See Daniel Schacter, *Searching for Memory: The Brain, the Mind, and the Past*, (New York: Basic Books, 1996).

after some time, the new “line in the sand” would be drawn. After that point, there is no reason to expect that there would be any more or less litigation than at present.

5. “Puffery is Protected by the First Amendment”

A final criticism stems from the advertising industry’s complaint that puffery should be protected by the First Amendment. This approach has little merit. The commercial speech doctrine permits any degree of regulation of content that is deceptive.¹⁶⁴ This paper only calls for regulation of puffery that is shown to be deceptive; thus, no First Amendment problem arises. Moreover, in *Central Hudson*, the Supreme Court said that “[t]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”¹⁶⁵ Thus, any advertising seeking First Amendment protection faces an affirmative requirement – it must actually be informative rather than merely not factually inaccurate.¹⁶⁶ Therefore, deceptive puffery is not protected by the First Amendment.

To sum up, the main point of the proceeding discussion is that puffery provides corporations with a powerful, but highly questionable, tool to influence public opinion. In essence, the FTC’s tolerance of puffery gives corporations the legal right to lie. The FTC should take immediate action to remove this blanket immunity and restore some semblance of balance to the marketplace. However, while such a measure is necessary, it

¹⁶⁴See *Bolger v. Youngs Drug*, 463 U.S. 60, 66-68 (1983).

¹⁶⁵*Central Hudson Gas Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). This case was revised in part in *SUNY v. Foc*, 492 U.S. 469 (1989).

¹⁶⁶See Ivan L. Preston, *Puffery and Other ‘Loophole’ Claims: How the Law’s ‘Don’t Ask, Don’t Tell’ Policy Condones Fraudulent Falsity in Advertising*, 18 J.L. & Com. 49 (1998).

is by no means sufficient to live up to the larger goal of a fairer society with a more balanced marketplace and a greater chance for individuals to resist the corporate pressure towards consumption, conformity, and uncritical thinking.

Part III

A. Beyond Puffery Regulation: The Case for Government Counter-advertising

To achieve the ambitious goals of this paper, more imaginative measures are needed. This paper proposes that more extensive usage of government counter-advertising would be the next step towards achieving these lofty objectives. In short, ridding the market of deceptive puffery stops corporations from lying. However, given the extensive advertising budgets of many firms, we still must be wary of the culture-shaping power of corporations. Thus, regulating advertising is not enough; the government must do something more – it must affirmatively provide consumers with the information they need to make informed decisions. In other words, to balance the marketplace, government must be willing to take on corporations at their own game – advertising. Well-produced government counter-advertising is the way in which the government can balance the marketplace and give individuals a greater ability to create themselves on their own terms.

B. A Brief History of Government Counter-advertising

Government counter-advertising is not a new idea. Between 1967 and 1970, the federal government used a national counter-advertising campaign to counter the effects of cigarette advertising and educate the

American public about the risks of tobacco use.¹⁶⁷ The Federal Communications Commission (hereinafter “FCC”) required licensees that broadcast cigarette commercials to provide free media time for anti-smoking public service announcements under the Fairness Doctrine.¹⁶⁸ The Fairness Doctrine, which was repealed by the FCC in 1988, obligated broadcasters to “encourage and implement the broadcast of all sides of controversial public issues over their facilities over and beyond their obligations to make available on demand opportunities for the expression of opposing views.”¹⁶⁹ The counter-advertising campaign ended in January 1971, as a result of a federal law that banned cigarette advertising on television and radio.¹⁷⁰

Despite the demise of the Fairness Doctrine, government counter-advertising campaigns persist. Presently the government is conducting a \$2 billion, five-year advertising campaign against illegal drugs.¹⁷¹ Mothers Against Drunk Driving, as well as some other groups, attempted to get some of this funding for an advertising campaign against underage drinking.¹⁷² The attempt ultimately failed in a close vote in the full Senate and House Appropriations committee, undoubtedly in large part due to the alcohol industry’s considerable influence in Congress.¹⁷³ Nonetheless, there is still a large amount of government advertising, sponsored in part by the Department of Transportation, urging Americans to avoid underage consumption and drinking and driving.¹⁷⁴ Some have suggested that it is only a matter of time before the government launches an all-out attack on underage drinking.¹⁷⁵ Another recent target is the gun industry – on January 18, 2000,

¹⁶⁷See K. Michael Cumming and Hillary Clarke, *The Use of Counter-advertising as a Tobacco Use Deterrent and Analysis of Pending Legislation*, Health Science Analysis Project, Policy Analysis No. 8. <http://scarcnet.org/hsap/counter.htm#_Toc416665785>

¹⁶⁸Id.

¹⁶⁹Id.

¹⁷⁰Id.

¹⁷¹David Byrd, *Last Call for Alcohol?*, National Journal, Dec. 18, 1999.

¹⁷²Id.

¹⁷³Id.

¹⁷⁴See Chuck Blanchard, *Anti-Drug Ad Campaign is Right on Target for Now*, Arizona Republic, June 15, 1999, at EV6.

¹⁷⁵Id.

President Clinton proposed \$10 million for a gun safety advertising campaign.¹⁷⁶

C. Effectiveness of Counter-advertising

The counter-advertising campaign against smoking is generally considered to have been a remarkable success. Between 1967 and 1970, cigarette consumption in the United States dropped at a much faster rate than during the period immediately before or after the campaign.¹⁷⁷ While it is impossible to rule out the effects of other influences, several studies have concluded that the anti-smoking campaign was responsible for much of the reduction.¹⁷⁸ Moreover, state counter-advertising in California, Massachusetts, and Florida also seem to be effective at reducing smoking.¹⁷⁹ Florida's \$26 million "Truth" campaign against cigarette smoking experienced remarkable success.¹⁸⁰ After the campaign's first year, smoking dropped 10 percent among teens, and 19 percent among middle-school students.¹⁸¹ Anti-smoking campaigns in Norway, Greece, Austria, and Australia lend further credence to the notion that mass media programming can affect perceptions about smoking and influence consumption habits.¹⁸² Lastly, although the U.S. government's anti-drug campaign has only just gotten under way, early reports indicate that so far it is working better than expected.¹⁸³

¹⁷⁶Ann Scales, *Full agenda gives Clinton a taste of the Hub*, Boston Globe, Jan. 19, 2000, at A1.

¹⁷⁷See K. Michael Cumming and Hillary Clarke, *The Use of Counter-advertising as a Tobacco Use Deterrent and Analysis of Pending Legislation*, Health Science Analysis Project, Policy Analysis No. 8. <http://scarcnet.org/hsap/counter.htm#_Toc416665785>

¹⁷⁸Id.

¹⁷⁹Id.

¹⁸⁰David Byrd, *Last Call for Alcohol?*, National Journal, Dec. 18, 1999.

¹⁸¹Id.

¹⁸²K. Michael Cumming and Hillary Clarke, *The Use of Counter-advertising as a Tobacco Use Deterrent and Analysis of Pending Legislation*, Health Science Analysis Project, Policy Analysis No. 8. <http://scarcnet.org/hsap/counter.htm#_Toc416665785>

¹⁸³David Byrd, *Last Call for Alcohol?*, National Journal, Dec. 18, 1999.

D. Tobacco, Drugs, Alcohol, and Guns ... What's Next?

It is encouraging to see that the United States government has made continued use of counter-advertising to promote the public interest. However, the subjects selected so far – tobacco, drugs, alcohol, and guns – are predictable candidates because most Americans are aware of the societal harm that these products cause. As a result, it is relatively easy to generate support for these types of counter-advertising campaigns. This is especially the case with illegal drugs, given that no businesses are legally profiting from their sale.

The point of this proposal, however, is that the government must do more. In the name of fairness, individuality, and critical thinking, the government must extend counter-advertising to new areas, and use it to tackle new issues. What should the next targets be? In an ideal world, there are many potential subjects that should be addressed through counter-advertising. In any instance in which corporations seem to be dominating the conversation, to the detriment of consumers, a counter-advertising campaign is appropriate. For starters, however, it is first necessary to pick one area in which the corporate domination of the discussion is particularly drastic. Such an instance must be marked by such profound one-sidedness that dissenting voices are being effectively drowned out, and consumers are not receiving the appropriate information. In short, it must be an example in which individuals fail to make rational consumption decisions because of an “antitrust” violation of the marketplace of ideas.

E. Next Target of Counter-advertising: Herbal and Other Dietary Supplements

The entire field of unregulated herbal and dietary supplements should be the next target of government

counter-advertising. It is a prime example of the type of one-sided discussion that necessitates government intervention. It seems that almost everything one hears about herbal supplements is unequivocally positive. The New Age is upon us. Everything that is “natural” is thought to be beneficial. Appealing to our egos, the New Age spinsters are convincing. Taking herbal products allows us to “take control of our own health.”¹⁸⁴ The established medical profession is made out to be the enemy. “Don’t listen to doctors – doctors are arrogant and self-important.”¹⁸⁵ Of course, no one mentions the arrogance implicit in believing that one knows more about medical issues than the entire medical profession. Nor does anyone point out the self-importance inherent in insisting that one can understand health issues by disregarding scientific evidence.

And so a disturbing trend is starting to emerge – individuals are becoming increasingly overzealous in their quest to manage their own health. As a consequence, notions of truth, evidence, and skepticism are falling by the wayside. Dr. Andrew Weil, one of the leading proponents of the pro-supplement movement, proudly proclaims: I disagree with [the] argument that all of medical practice has to be evidence-based.¹⁸⁶ What then would Dr. Weil prefer medical practice be based on, if not evidence? Indeed, it seems the discussion has become so one-sided, and we have become so blinded, that we are effectively allowing supplement manufacturers and their allies to pooh-pooh the conventions of science and get away with virtually anything.

¹⁸⁴This claim is made on <<http://www.telusplanet.net/public/herbrem1/index.htm>>, a website claiming that herbs are capable of curing most forms of cancer. A “money back guarantee” is even offered.

¹⁸⁵This claim is made on <<http://www.cascadian.com/CRC/Directory/HealthNutrition.html>>, a website promoting “Chondriana” and “Life Crystals” as a “gift to humanity.” The author of the site also adds: “In fact, I assert that modern medicine is not based on competent, science at all, but on protecting an increasingly obsolete system of research, diagnosis, treatment and profit for the industries positioned to gain at the expense of the nieve and disempowered.”

¹⁸⁶Jane Erikson, *‘Integrative medicine’ up for debate: Weil, harsh critic will meet tonight*, Arizona Daily Star, April 9, 1999, at 1B.

1. A Recent Trip to the Corner Drug Store...

The author recently visited a mainstream drug store and was shocked by how much it had changed since the last visit. This time the store had a large section, located within the actual pharmacy, devoted entirely to herbals and supplements. Hanging right next to the herbs was a pamphlet listing the “benefits” of the products. The pamphlet was provided by a company called “Nature’s Resource” with the trademark “Conceived in Nature. Rooted in Science.” But the claims made for the products are hardly “rooted in science.” Consider the product called “Eyebright Herb.” Under the “Benefits” heading, the product is described as follows:

Eyebright, a small annual herb native to Europe and Asia has been used since the middle ages for its beneficial properties. Eyebright herb has been used for centuries by people seeking to support their eye health.

Rather than being “rooted in science,” the claims are in fact antithetical to science. The claim that the herb has been used “since the middle ages” and “for centuries” is somehow supposed to provide evidence of the herb’s efficacy. But of course it does not. Witch doctors have also been used “since the middle ages.” “For centuries” people thought the earth was flat. Where are the double-blind studies? Where is the peer-reviewed paper to support the safety and efficacy of this product? The purported “benefits” are equally unscientific. We are told Eyebright herb has “beneficial properties” and “supports eye health.” What does this mean? Should the product be taken to treat glaucoma? Cataracts? To improve vision? Or, as the name seems to imply, to make our eyes brighter? Should everyone take Eyebright herb or just those with some sort of deficiency? How do we know if we have this deficiency?

Other ads are even more opaque. Consider the “Benefits” description of “Cat’s Claw Bark Extract”:

In the heart of the Amazonian rain forest, the exotic Cat’s Claw vine is an ancient and treasured herb. Scientists and herbal authorities became interested in Cat’s Claw when ethnobotanists reported the widespread use of this unique plant. Nature’s Resource™ Cat’s Claw is standardized to contain 3% oxinole alkaloids.

Although we are told that Cat’s Claw is “exotic” and “ancient and treasured,” we learn nothing about how this product is to be used. Apparently “scientists and herbal authorities” are interested in the herb; for what reason we are not told. We are simply left guessing what the product can do for us.

The FDA’s primary response has been to require that the following disclaimer be attached to any claims: “This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.”¹⁸⁷ However, one wonders whether this vague warning effectively informs consumers about the relative benefits and costs of herbal products. For example, consumers might interpret the warning to mean that the FDA does not think the product is dangerous enough to merit close scrutiny. This would give consumers a false sense of security.

Another issue is that if the product is not intended to treat any disease, what then is its purpose? Do most consumers actually walk into a store and suddenly decide that they need a product to “support eye health” even though there is nothing wrong with their eyes? It seems more likely that consumers will only seek out an herb if they perceive there to be a problem in the first place. Thus, the claim that an herb “supports eye health” is nothing more than a disease claim dressed in vague language. The only difference between this type of claim and a traditional disease claim is that in this instance we leave more up to the consumer’s

¹⁸⁷See Ann Palmer, *Herbs May Not Be What You Think*, Inside MS, March 22, 1999.

imagination, thereby increasing the number of potential ailments that the consumer may think can benefit from the herbal treatment. By being vague, but suggestive, supplement manufacturers are able to deceive consumers into believing that the product is effective for any number of conditions. The manufacturer is not permitted to say exactly how or why the product works, but nonetheless is able to imply that it will work. And this, for all intents and purposes, is essentially a disease claim.

2. Congress Is Contributing to the Problem

Why do we tolerate this outright deception? How have things become so one-sided that Americans do not protest but instead eagerly line up to purchase products that are not supported by science? One factor is that this sort of thinking has been encouraged by acts of Congress. Congress has fueled the pro-supplement frenzy by effectively curbing the FDA's ability to regulate herbal products.¹⁸⁸ The first blow was the Proxmire Amendment in 1976 to the Food, Drug, and Cosmetic Act, which prohibited the FDA from ridding the marketplace of useless dietary supplement ingredients as long as the products are not inherently dangerous.¹⁸⁹ The bill was passed largely as a result of the health-food industry misleading many of its customers into believing that the FDA intended to greatly restrict the sale of supplement products.¹⁹⁰ More than a million protest messages flooded Congress as a result.¹⁹¹

Then came the Dietary Supplement Health and Education Act in 1994 (hereinafter "DSHEA"), following another massive lobbying campaign by the health-food industry.¹⁹² The DSHEA defines dietary supplements

¹⁸⁸See Steven Barrett, *Pro-Quackery Legislation* < <http://www.quackwatch.com>.>

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²*Id.*

to include herbs as well as any substances purported to supplement the diet by increasing dietary intake.”¹⁹³ The Act prevents the FDA from removing worthless ingredients from the marketplace provided that there is no specific disease claim being made.¹⁹⁴ It also permits sellers to use misleading third-party literature to promote the sale of their products.¹⁹⁵ The result is that the FDA’s power to protect consumers against unsubstantiated claims has been greatly weakened.¹⁹⁶ Since its passage, even hormones such as DHEA and melatonin are being hawked as supplements.¹⁹⁷

The next blow may come if the Access to Medical Treatment Act is passed.¹⁹⁸ The proposed legislation would encourage health care practitioners to use any medical treatment, even those drugs and devices that have not been approved by the FDA, as long as patients are warned of the risks.¹⁹⁹ By encouraging doctors to prescribe unproven therapies, the law would further strengthen the position of herbs and other dietary supplements.²⁰⁰ The legislation would also constrain the FDA’s ability to remove a product from the marketplace, absent finding a dietary supplement “presents a significant and unreasonable risk of illness or injury.”²⁰¹

In summary, Congress has acted more or less at the behest of a powerful supplement lobby,²⁰² and has thereby aided and abetted the industry in their one-sided domination of the discussion of herbs and dietary supplements.²⁰³ There is no equally powerful and well-organized consumer lobby to oppose such efforts. As

¹⁹³Id.

¹⁹⁴Id.

¹⁹⁵Id.

¹⁹⁶Id.

¹⁹⁷Id.

¹⁹⁸See Fred Schulte and Jenni Bergal, *Two Sides of Medicine Clash in Political Ring*, Sun-Sentinel, Dec. 15, 1999, at 28A.

¹⁹⁹See Steven Barrett, *Pro-Quackery Legislation* < <http://www.quackwatch.com> >

²⁰⁰Id.

²⁰¹Id.

²⁰²A Washington Post article describes the DHSEA as having been “fiercely pushed by the industry through an acquiescent Congress. . . .” See Guy Gugliotta, *Health concerns grow over herbal aids*, Washington Post, March 19, 2000, at A01.

²⁰³It is worth pointing out, once more, that the failure to separate money and politics is a great obstacle to the notion that the government should more aggressively reel in the private sector. For this reason, agencies such as the FDA and FTC, which are less vulnerable to the corrupting influence of money, are more likely to favor aggressive reform. However, such attempts at reform will likely be frustrated without Congressional support, given the considerable control Congress exercises over these agencies.

a consequence, Congress has repeatedly strengthened supplement manufacturers in their quest to promote unproven products as viable alternatives to standard medical treatment. With each pro-supplement measure it passes, Congress gives untested supplements the explicit endorsement of government. Congress chants the word “freedom” as its mantra and thus waves its talismanic wand transforming what is essentially unproven snake oil into useful medicinal products. In the name of “freedom,” science, evidence, and critical thinking are ignored.

The fact that the FDA, the agency with the most expertise on the matter, has consistently opposed such measures is not highlighted or perceived by the vast majority of the American public. For example, few are aware that in recent testimony, FDA Commissioner Jane E. Henney, M.D., pointed out:

Products that contain substances similar to those found in prescription drugs are marketed for children as dietary supplements. Likewise, products with ingredients that simulate illicit street drugs are marketed as dietary supplements to adolescents via the Internet and shops specializing in drug paraphernalia.²⁰⁴

Another FDA official recently noted:

It’s the manufacturers’ ball game. They can do anything they want. By congressional authority we can’t do much about what we find in dietary supplements.²⁰⁵

Prosy Abarquez-Delacruz, regional administrator for the California Health Services Department’s Food and Drug Branch, described the DHSEA as “the Food Fraud Facilitation Act” and added that since the Act was passed, the supplement industry is “the John Wayne industry, like the wild, wild West.”²⁰⁶ But the point of view of the FDA and other government agencies does not come across to the public. Americans, seeing that herbs and supplements are everywhere, naively assume that “the government” would not allow unsafe or ineffective products to be sold to the public.²⁰⁷

²⁰⁶Guy Gugliotta, *Health concerns grow over herbal aids*, Washington Post, March 19, 2000, at A01.

²⁰⁷Id.

3. The Role of the Internet

The internet further slants the discussion in favor of herbs and supplements. Typing the words “herbal supplement” into an internet search engine links the user to thousands of commercial sites making all sorts of outrageous claims about the efficacy of these products. Perhaps only one in a hundred sites has anything mildly critical to say about supplements. It is clear that the “marketplace of ideas” theory is not working. The government must do something to achieve balance, but the FDA and FTC simply do not have the resources to go after each of these sites individually. Another problem is that many sites cannot be traced to any particular person or company. The issue is further complicated by the fact that many of the sites are foreign, raising jurisdiction issues even if the agencies wanted to act.

4. Books, Newsletters, and Store Clerks

But one need not go online to be barraged by absurd claims for unproven supplements and herbs. The supplement industry is organized to ensure that the public learns of medicinal uses that are not allowed to be stated on product labels. This is done mainly by promoting the ingredients of the products through books, magazines, newsletters, booklets, lectures, and oral claims made by retailers. Store clerks are often specifically instructed by store management to testify to the benefits of the products by discussing their own positive experiences using them.²⁰⁸ Thus, wherever we turn, the effectiveness and usefulness of untested herbal products is reaffirmed.

²⁰⁸A friend who formerly worked as a clerk in a health food store relayed this point.

5. The Big Companies Are Now on the Bandwagon

Perhaps the most important factor in the creation of the herbal supplement craze, and the most pressing argument for the necessity of government counter-advertising, is that mainstream pharmaceutical companies have recently joined the fray. In late 1998, Warner-Lambert Co. (Quanterra), Bayer Co. (One-A-Day), and American Home Products (Centrum) all launched new herbal supplement lines.²⁰⁹ In addition, mainstream drug stores – not just “health food” stores – are now selling herbal products.²¹⁰ So now there are mainstream drug companies selling herbal products in traditional drug stores. The reputations of these companies and stores provide instant legitimacy for herbs with those who otherwise may have resisted the craze. After all, we trust these companies. We have grown up with them. Now they are telling us that herbs are good for us. So we tend to believe them. Most Americans also believe that Congress would not support a measure to facilitate the manufacture and distribution of snake oil. So why would we suspect that these trustworthy companies and Congress have failed us?

But indeed they have. Congress, prodded by representatives from Utah and New Mexico, not coincidentally two states with many supplement manufacturers,²¹¹ has disregarded science, stripped the FDA of its power, and has generally sold out to the economic interests of corporate America, all under the guise of “health freedom.” The pharmaceutical companies, seeing the potential for enormous profits, have also discarded science in their rush to jump on the supplement bandwagon.

²⁰⁹See Edward R. Silverman, *Unproven Herbal Aids Supplement Bottom Line*, Star-Ledger, April 18, 1999.

²¹⁰See Part III E. 1. *supra*.

²¹¹See *Andro is a symptom of a bigger problem*, State Journal-Register, Sept. 4, 1998, at 8.

6. Corporate Advertising: Making the Problem Even Worse

Advertising campaigns are further distorting our perceptions of reality and convincing us that herbs are safe and effective. Now that the big companies are on board, supplement advertising pervades the airways. Even more troubling is that some of the ads make explicit appeals to science. For instance, in ads featuring Hector Elizondo, an actor who incidentally plays a doctor on television, Warner-Lambert claims its Quanterra ginkgo supplement provides “mental sharpness.”²¹² “If it’s not clinically proven, it is not Quanterra,” the ads proclaim.²¹³ But the studies Warner-Lambert cites to support the “mental sharpness” claim used subjects with dementia or some impairment, which means the results do not apply to healthy people.²¹⁴

American Home Products also appeals to science in its ads: “Look for Centrum herbals. The only herbals backed by Centrum science.”²¹⁵ But American Home Products does not offer any specific studies as proof.²¹⁶ When a consumer watchdog group asked about some of its claims regarding the herb ginseng, its herbal supplier referenced two studies claiming ginseng can boost energy.²¹⁷ Yet these two studies, which were not done on the supplier’s specific ginseng, were deemed inadequate by independent experts because they failed to include placebos, a standard in medical research.²¹⁸ Bayer does not make any explicit reference to science to support its claims for One-A-Day herbs, but nonetheless the claims are strong: “Help your body help itself with One-A-Day Specialized Blends. . . just what you need to feel your best.”²¹⁹

²¹²See Edward R. Silverman, *Unproven Herbal Aids Supplement Bottom Line*, Star-Ledger, April 18, 1999.

²¹³See *Drug Makers Stake Claim in Herbals*, Chain Drug Review, Feb. 1, 1999.

²¹⁴See Edward R. Silverman, *Unproven Herbal Aids Supplement Bottom Line*, Star-Ledger, April 18, 1999.

²¹⁵The author has personally viewed this commercial many times.

²¹⁶See Edward R. Silverman, *Unproven Herbal Aids Supplement Bottom Line*, Star-Ledger, April 18, 1999.

²¹⁷*Id.*

²¹⁸*Id.*

²¹⁹See *Drug Makers Stake Claim in Herbals*, Chain Drug Review, Feb. 1, 1999.

7. Advertising Strategy: The Use of Celebrities

The drug companies have also been recruiting famous celebrities to reinforce the message that herbs and supplements are good for us. As noted, Hector Elizondo works for Warner-Lambert. Bayer promotes its One-A-Day line with television star Annie Potts.²²⁰ Pharmaton, which is part of the Boehringer Ingelheim worldwide group of companies, uses basketball star Scottie Pippen to promote Ginsana, its particular brand of ginseng.²²¹ If Hector Elizondo, Annie Potts, and Scottie Pippen say that the usage of herbs is what makes them so successful, who are we to disbelieve? Stuck in a culture of celebrity worship, it is hard for Americans to resist the temptation to believe what we are told by celebrities.

Besides, why would we *want* to remain skeptical when what they say is so appealing? Take one herb to make your hair look nicer. Another will clear up your skin. Still another will help with memory and concentration. How about the sex drive? We've got one for that too. Got another problem? Surely there is an herb that can help. The will to believe is overwhelming. Herbs provide the ultimate quick-fix. They work like drugs, but are cheaper and have no side effects because they are "natural." Why ruin all the fun by demanding that we actually have proof?

8. The Exploding Use of Herbal and Dietary Supplements

And so the conversation has become totally unbalanced. The false promise that herbs can solve all of our problems – reinforced by Congress, the internet, books, magazines, pamphlets, store clerks, and now finally mainstream stores and pharmaceutical companies, backed by strong advertising campaigns relying on

²²⁰Id.

²²¹See Liza Featherstone, *Chill Pill*, *Us*, March 1, 1999, at 45.

celebrities and appeals to “science,” – is ultimately too much for most of us to resist. The impulse to ingest unproven and unregulated herbal remedies has been spreading like wildfire throughout society. One study published in the Journal of the American Medical Association found that the use of herbs had increased by almost 400% between 1990 and 1997.²²² In 1997, 30 percent of all American households purchased herbal supplements, according to Nutrition Business Journal.²²³ In the first half of 1998, sales of herbal supplements grew by between 50% and 60%.²²⁴ One can only imagine how much sales have since increased, now that the large drug companies have gotten involved. One 1998 study conducted by a market research firm found that about 64 percent of 43,000 households in a nationwide survey had used at least one herbal supplement.²²⁵ Put simply, there is no foreseeable end in sight to the explosion in the use of herbs and supplements. And all of this without any significant demand by the American public for scientific corroboration. In summary, the present conversation is one of utter domination by pro-supplement interests. Americans, seemingly discounting the need for scientific thinking, are ingesting large doses of unregulated, untested, and unproven substances. Consider some of the harms that are resulting.

9. Harms Associated with Supplement Usage

a) Direct Harm

The usage of unregulated supplements is causing an unacceptable number of deaths and other adverse reac-

²²²Chapin Clark, *Herb Mentality: Herbal supplements have gone mainstream, forcing retailers to make these products a priority in their whole-health plans*, Supermarket News, Jan. 18, 1999.

²²³Edward R. Silverman, *Unproven Herbal Aids Supplement Bottom Line*, Star-Ledger, April 18, 1999.

²²⁴*Drug Makers Stake Claim in Herbals*, Chain Drug Review, Feb. 1, 1999.

²²⁵Lisa Liddane, *Fixing the Fine Print: New Labels on Herbs, Vitamins are Designed to Give Consumers Clues to Use and Effectiveness, But Some Think More is Needed*, Colorado Springs Gazette Telegraph, June 1, 1999 6/1/99 Colo. Springs Gazette Telegraph, at LIFE1.

tions in the United States. For instance, between 1983 and October 10, 1998, the FDA's Special Nutritional Adverse Events Monitoring System reported 2,621 adverse events and 184 deaths related to the usage of dietary supplements.²²⁶ These figures drastically underestimate the extent of the problem. For example, the American Association of Poison Control Centers reported 6,194 adverse reactions to supplements in 1998 alone, including 1,369 cases requiring treatment in a health care facility.²²⁷ These figures do not include reports relating to ephedra and its derivatives, which account for the biggest percentage of the FDA's cases.²²⁸ Moreover, young children are being disproportionately harmed by supplement usage. Sixty-four percent of the Association's reports involve children under the age of 6, a trend also noted by many poison control centers.²²⁹

One of the most dangerous supplements on the market is ephedra, also known as ma huang, which is promoted as a "natural" way to increase human metabolism. The FDA attributes 39 deaths and 685 possible adverse reactions to products containing ephedra.²³⁰ The Texas Department of Health reported 418 adverse events from 1993 to 1995 from two companies selling ephedra whose telephone complaint records were subpoenaed.²³¹ In 1999, a San Francisco lawyer deposed a company executive who said the firm had received "roughly 3,500 complaints" about its ephedrine product, none of which had been reported to the FDA.²³² A further problem is that the lack of regulation means that there are no federal standards of quality control. California investigators in 1998 found that nearly one-third of 260 imported Asian herbals were either spiked with drugs not listed on the label or contained lead, arsenic or mercury.²³³ In February 2000, California officials discovered five Chinese herbals that contained potent diabetes drugs.²³⁴ The March 1999 issue

²²⁶Guy Gugliotta, *Health concerns grow over herbal aids*, Washington Post, March 19, 2000, at A01.

²²⁷Id.

²²⁸Id.

²²⁹Id.

²³⁰Id.

²³¹Id.

²³²Id.

²³³Id.

²³⁴Id.

of Consumer Reports compared the contents of popular herbals and repeatedly found wildly inconsistent dosages.²³⁵ For instance, the active ingredient in individual samples of ginkgo biloba from the same national brand ranged from 7% to 13%.²³⁶ Thus, the lack of regulation means that consumers have no way of knowing exactly what they are getting when they purchase unregulated herbal products.

Still another problem arises when consumers mix herbal products with prescription medications. The usage of herbs is often not reported to doctors,²³⁷ which leaves the door open for harmful drug-herb interactions. For example, it was recently found that St. John's wort, a popular herbal remedy for depression, can interfere with drugs used to treat HIV-infected people and heart-transplant patients.²³⁸

b) Economic Harm

The amount of money spent on dietary supplements is projected to be \$15.7 billion in 2000.²³⁹ It is wasteful on both the societal and individual level for that much money to be spent on products that are unproven.²⁴⁰ On the societal level, limited resources are being wasted when funds are allocated to follow leads based on data that are inadequate or fabricated.²⁴¹ When misinformation based upon wishful thinking becomes widespread, the mass media tend to exacerbate the problem by spreading the message.²⁴² This in turn can influence decision-making by patients, judges, policymakers, and legislators.²⁴³ All of this money could be

²³⁵ Ann Palmer, *Herbs May Not Be What You Think*, Inside MS, March 22, 1999.

²³⁶ Id.

²³⁷ Recent surveys have found that 70 percent of those who take alternative remedies do not tell their doctors. See *Surgery, Under the Influence of Herbs*, N.Y. Times, April 4, 2000, Online edition.

²³⁸ *Concerns grow for herbal remedy*, Cincinnati Post, Feb. 14, 2000, at 1C.

²³⁹ Guy Gugliotta, *Health concerns grow over herbal aids*, Washington Post, March 19, 2000, at A01.

²⁴⁰ See William T. Jarvis, *How Quackery Harms* <<http://www.quackwatch.com>>

²⁴¹ Id.

²⁴² Id.

²⁴³ Id.

better spent on either proven medical treatments, or on sound research to determine which supplements work and which do not. On the individual level, much money is spent by desperate individuals willing to spend their last dime because of their condition.²⁴⁴ The financial impact on individuals and families can be catastrophic if they make the mistake of heroically leaving no stone unturned in their quest for a remedy in hopeless cases.²⁴⁵

c) Indirect Harm

Using supplements may cause harm if such usage causes the consumer to forego standard medical treatment. Some supplement users attempt to “complement” standard medical treatment with herbs; others, however, are “true believers” who use supplements in lieu of traditional medicine. It is this latter group that stands to be harmed the most. Sometimes a readily treatable medical condition may unnecessarily cause severe illness or even death because an individual chooses to rely exclusively on herbs. It is difficult to quantify how many needless deaths are caused by the exclusive reliance on herbs, but there is evidence to suggest it does happen.²⁴⁶

10. The FDA: A Weak Response by a Paralyzed Agency

As noted, the FDA’s hands have been substantially tied by Congress on the matter of herb and supplement

²⁴⁴Id.

²⁴⁵Id.

²⁴⁶Id.

usage.²⁴⁷ When questioned about the dangers these products posed to consumers, Joseph Levitt, head of the FDA's Center for Food Safety and Applied Nutrition, placed the responsibility on the consumers: "For now, the safeguard is that consumers get to choose whether they do the homework to decide if the product is proper for them. Consumers have some responsibility to take the initiative."²⁴⁸

There are two problems with this response. First, consumers may not have the means to conduct effective research. As discussed, the quality of information most consumers receive about herbs has a profoundly pro-supplement bias. Where should consumers look for information? Television? Friends? The internet? Most consumers do not have access to medical journals; thus it is unrealistic to place the burden of independent research on consumers.

Second, even if consumers could obtain the proper information, most are not equipped to know how to interpret data and make appropriate judgments. As Robert Tenery, chair of the American Medical Association's Council on Ethical and Judicial Affairs, stated: "Consumers are at a disadvantage. They don't have the background to know what's an appropriate review of a product. Unless we give consumers more basic knowledge to make judgments, they're not going to be able to make a proper decision."²⁴⁹ In other words, a citizenry lacking scientific critical thinking skills will make poor decisions even if they have access to certain information.

11. If Herbs and Supplements Are So Bad, Why Not Ban Them?

²⁴⁷See Part III E. 2. *supra*.

²⁴⁸Edward R. Silverman, *Unproven Herbal Aids Supplement Bottom Line*, Star-Ledger, April 18, 1999.

²⁴⁹*Id.*

The case has been made that supplements are causing great harm to society. Why then should we not ban them? There are two responses. First, an outright ban would truly be an attack on American freedom. This paper agrees with the notion that consumers should have the freedom to choose for themselves. The point of this paper is not to take away that choice, but rather to make the exercise of that choice more meaningful by providing consumers the necessary information to make an intelligent decision. Only if consumers possess a reasonably balanced view of an issue, do they actually have true freedom of choice.²⁵⁰ A ban would not advance this goal.

Second, an outright ban would only be appropriate if there were absolutely no reason to believe that herbs and supplements can be effective. But such a position is unmerited. German studies and more recently some studies conducted in the United States have suggested that certain herbs may have potential.²⁵¹ Since many effective pharmaceutical drugs are derived from plants, it seems logical that some herbs should also contain similarly effective active compounds. Therefore, it would be unwise for the government to ban these products. The idea should not be to ban them, but rather to study them scientifically.²⁵² Only then can we determine which herbs work and bring these herbs into the scientific mainstream.

12. Why Not Just Crack Down on the Advertising?

One response to the problem might be to crack down on the advertising of herbs and supplements. The

²⁵⁰One might speculate that a counter-advertising campaign would also precipitate an increasing concern for safety and efficacy within the industry itself. Increasing consumer awareness of the problem would likely cause supplement manufacturers to respond to the heightened concern by making safety and efficacy more of a priority.

²⁵¹See Denise Grady, *Scientists say herbs need more regulation*, N.Y. Times, March 7, 2000, Online edition.

²⁵²It is encouraging to see that this is starting to happen. Currently there is a \$2.5 million federally financed study to test alternative therapies, including herbs and dietary supplements. See Sheryl Gay Stolberg, *Alternative Care Gains a Foothold*, N.Y. Times, Jan. 31, 2000, Online edition.

FTC could challenge specific claims and thus try to remove the deception from the marketplace. However, such a response would be insufficient because, as discussed previously,²⁵³ it would not provide any positive information for consumers that would enable them to make more well-informed decisions. In other words, while it is desirable to remove puffing claims from the marketplace, such a measure would nonetheless be inadequate because it would not encourage any debate, discussion, or criticism. In short, it would not expose consumers to the other side of the story.

Everything else in society that is protected by the First Amendment – friends, books, salespersons, Dr. Weil – would still tilt the balance in favor of herbs and supplements. Moreover, challenging specific advertising campaigns would be inefficient because attacking problems on a case-by-case basis involves huge costs in terms of time, money, and staffing. A final problem is that many advertising campaigns come and go in a shorter period of time than it would take for the FTC to resolve a particular lawsuit. For these reasons, only a full-fledged government counter-advertising campaign will provide the broad overarching response that is needed to balance the marketplace.

14. How to Proceed

Accordingly, the best approach is to balance the discussion about herbs through government counter-advertising. To be effective, such counter-advertising must satisfy three conditions. First, it must be seen frequently and it must be seen by many. The occasional public service announcement in the wee hours of the morning simply will not suffice. Second, it must well-produced. The shoddy public service announcements used today are not an effective option. Government ads, to compete in the market, must offer the same level

²⁵³See Part III A. *supra*.

of skill, production, and wit as corporate ads. Third, it must make generous use of well-known celebrities. Putting a government bureaucrat on television to say that supplements are bad will not do. If Scottie Pippen is hawking ginseng for the supplement industry, the government must find another NBA player to argue the other side of the story.

15. The Problem of Funding

Corporations can shell out millions of dollars, but the government must operate on a tighter budget. How, then, can the government finance a counter-advertising campaign? Ideally, the government could gain free access to television time, as it did in the case of cigarettes, if the Fairness Doctrine were reinstated. Failing that, another option is to provide federal funding and require that networks match each federal dollar with one dollar of free advertising. This is how the drug counter-advertising campaign is presently being financed.²⁵⁴ A third option is to pay for the airtime with a tax on supplements. Two bills pending in Congress for an anti-smoking campaign propose to generate funds in a similar fashion, by raising money through a tax on cigarettes.²⁵⁵ A fourth possibility is that government could mandate that the corporations themselves disclose the relevant information. Obviously, such disclosure would need to go beyond the current statement that the FDA requires. The problem, however, is that the more companies are required to disclose, the greater is the problem of constitutionally impermissible “compelled speech.”^{256 257}

²⁵⁴See Marc Lacey and Bill Carter, In Deal with TV Networks, U.S. Drug Office is Reviewing Scripts, N.Y. Times, Jan. 14, 2000, Online edition.

²⁵⁵K. Michael Cumming and Hillary Clarke, *The Use of Counter-advertising as a Tobacco Use Deterrent and Analysis of Pending Legislation*, Health Science Analysis Project, Policy Analysis No. 8. <http://scarcnet.org/hsap/counter.htm#_Toc416665785>

²⁵⁶Id.

²⁵⁷A more thorough discussion of the pros and cons of each is beyond the scope of this paper. The main point, however, is that such counter-advertising campaigns could be funded if the government truly wanted to act.

16. Tom Gugliotta and Other Celebrities

A separate problem is how can the government compensate celebrities for their efforts in the counter-advertising program? The answer is that the government must find celebrities who agree ideologically with the cause and are willing to work for free. Admittedly, it might seem an outlandish notion at first. But if supplements are indeed causing great harm to society, it should be expected that celebrities have also been negatively affected.

Perhaps there is already a good candidate out there. On December 17, 1999, NBA all-star power forward Tom Gugliotta suddenly collapsed, had a life-threatening seizure, and stopped breathing.²⁵⁸ The Phoenix Suns' team doctors believe the cause to be Gugliotta's use of an unregulated dietary supplement derived from a substance known as gamma-hydroxybutyrate (hereinafter "GHB"), which a friend had given him to help him sleep better. It so happens that the FDA had issued warnings about this particular supplement.²⁵⁹ But clearly the warnings were not enough. Gugliotta had not heard such a warning. Nor had most Americans. Prior to the incident, GHB was widely viewed as merely another "healthy" supplement that could be used to promote sleep. Widely available in gyms, magazines, health food stores, and the internet, few suspected there could be anything wrong with GHB.

But what happened to Gugliotta precisely illustrates the point of this section: most of the information we receive about herbs and dietary supplements is uncritically positive. The marketplace of information is utterly out of balance. And so we fall for the trap of thinking that because herbs are "natural," they must be safe. Yet, in 1999 alone, three Florida poison centers recorded 549 incidents and two deaths involving

²⁵⁸Bob Baum, *Suns' Gugliotta Hopes Seizure is a Lesson to Others*, Salt Lake Tribune, Dec. 31, 1999, at C1.

²⁵⁹*Id.*

GHB.²⁶⁰ In 1997-98, Texas health officials logged GHB-induced 86 hospital visits.²⁶¹

How does Gugliotta feel about the matter now? When asked about the incident, Gugliotta said, “What burns me is I took something that I really didn’t know too much about. That’s just not right to do, and it nearly cost me my life.” It was, he said, “very stupid when you look back on it, but something I think 95 percent of people would do.”²⁶² It appears as though Gugliotta recognizes that he made a mistake to ingest a substance about which he had little information, other than his friend’s recommendation. It also seems that he agrees that Americans could benefit from a dose of skepticism with regard to herbal supplements. Perhaps Gugliotta would be willing to become a volunteer spokesman for the government’s cause.²⁶³

Already the incident has prompted a major response. The Council for Responsible Nutrition, a trade association for the supplement industry, has offered to meet with NBA players to educate them on the dangers of misusing supplements.²⁶⁴ Several players, who formerly used ginseng and other supplements, have vowed to never use them again.²⁶⁵ The Utah Jazz team trainer Mike Shimensky now sends any supplement brought into his locker room to a medical lab for analysis.²⁶⁶ The latest response is that Congressman J.D. Hayworth (R-Arizona) has announced his strong support for legislation that would allow the Drug Enforcement Administration (hereinafter “DEA”) to control the substance marketed as a dietary supplement that almost killed Gugliotta.²⁶⁷

²⁶⁰Guy Gugliotta, *Health concerns grow over herbal aids*, Washington Post, March 19, 2000, at A01.

²⁶¹Id.

²⁶²Bob Baum, *Suns’ Gugliotta Hopes Seizure is a Lesson to Others*, Salt Lake Tribune, Dec. 31, 1999, at C1.

²⁶³Another candidate is New York Mets pitcher Bill Pulsipher. Pulsipher recently collapsed and was later found unconscious by his wife. Doctors are attributing the incident to Pulsipher’s usage of a “fat-burning” dietary supplement in combination with the prescription drug Prozac. Pulsipher was later found to have “heart irregularities” which team doctors speculate may have been caused by the supplement. Pulsipher has since stopped using the supplement. See Marty Noble, *Spring Training/In Hampton’s Case, No Pain=Gain*, N.Y. Newsday, March 4, 2000, at A36.

²⁶⁴David Sabino, *Inside the NBA*, Sports Illustrated, Jan. 17, 2000, at 70.

²⁶⁵Id.

²⁶⁶Id.

²⁶⁷*Hayworth Backs DEA Control of Supplement that Almost Killed Suns’ Tom Gugliotta*, Government Press Release by Federal Document Clearing House, Jan 31, 2000.

But why does it take an incident like this to prompt such a response? Congressman Hayworth's effort is commendable, but will DEA's control over the substance actually educate consumers about GHB and other potentially dangerous substances? Are we not just setting ourselves up for another incident with a different product? As Gugliotta has suggested, consumers need accurate information. They do not have the luxury of sending all of their supplements to the lab for analysis, nor should this be necessary. Consumers should be given all of the information they need in order to make an intelligent decision. Therefore, the government must step in and conduct a counter-advertising campaign to provide such information.

F. Anticipated Criticisms¹. “What About the Marketplace of Ideas?”

Counter-advertising implies government intervention in the market. A critic may wonder on what grounds such intervention in the free market is justified. In essence, the issue turns on one's conception of the continued validity of Justice Holmes' well-known “marketplace of ideas” theory. In his famous dissent in *Abrams v. United States*, Holmes argued that “[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁶⁸

While such a notion is intuitively appealing and is often invoked, this paper proposes that the marketplace of ideas paradigm no longer makes sense in today's world, given the rise of enormously powerful corporations and a highly concentrated mass media. Put simply, it is illogical to assume that in today's economic environment the ideas that get accepted are necessarily the “best” ideas. Rather, the ideas and values that often prevail are those which corporate America advances using its vast resources and control of the mass media. Large corporations pour dollar upon dollar into influential “think tanks” that spit back out a preferred ideology –

²⁶⁸*Abrams v. United States*, 250 U.S. 616, 630 (1919).

namely, that the unfettered market is the solution to our problems. The *laissez faire* ideologues have thus realized a cultural hegemony and have effectively foreclosed the possibility of debate, discussion, or dispute. For every Ralph Nader, there are a thousand large corporations poised to reach into their wallets to counter his efforts.

Thus the market is not truly free – in effect, there is an “antitrust” violation in the marketplace of ideas. To achieve balance, the government must intervene. As Michael Schudson has argued, “[t]he effectiveness of advertising depends on the amount and product information available to consumers. . . . advertising will be more successful the more impoverished the consumer’s information environment.”²⁶⁹ The government’s task, then, is to enrich this impoverished information environment in which most consumers reside. The more information consumers receive, the better equipped they will be to view corporate advertising in its proper place. Only then can we have a society in which the “marketplace of ideas” works. Only then will the ability of different speakers to influence society be determined by the merits of their arguments, rather than the size of their wallets.

Other scholars have analyzed the situation similarly, and have also concluded that the “marketplace of ideas” rhetoric cannot be relied upon. Yale Law professor Owen Fiss argues that because modern society is “characterized by grossly unequal distributions of power and a limited capacity of people to learn all that they must to function effectively as citizens,”²⁷⁰ the state “is allowed, encouraged, and sometimes required to enact measures or issue decrees that enrich public debate.”²⁷¹ Fiss explains:

²⁶⁹Michael Schudson, *Advertising, The Uneasy Persuasion: Its Dubious Impact on American Society*, (New York: Basic Books, 1984), pp. 90-91.

²⁷⁰Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 785

²⁷¹*Id.* at 786.

The market might be splendid for some purposes but not for others. It might be an effective institution for producing cheap and varied consumer goods and for providing essential services (including entertainment) but not for producing the kind of debate that constantly renews the capacity of a people for self-determination. The state is to act as the much-needed countervailing power, to counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy. The purpose of the state is not to supplant the market (as it would under a socialist theory), nor to perfect the market (as it would under a theory of market failure), but rather to supplement it. The state is to act as the corrective for the market. The state must put on the agenda issues that are systematically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled.²⁷²

In summary, the state has an affirmative duty to balance the discussion about herbs and dietary supplements because, as the evidence in this case demonstrates, it is foolish think that the “marketplace of ideas” functions perfectly on its own.

2. “Government Counter-advertising Violates the Spirit of *Buckley v. Valeo*”

At first blush, such frank government balancing of speech might seem to encounter some resistance from the well-known campaign finance case, *Buckley v. Valeo*.²⁷³ The *Buckley* opinion came out against a First Amendment “governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”²⁷⁴ However, the equalization at issue in *Buckley* was whether the government could limit the ability of one side (the wealthy) to speak. Yet this paper does not propose what would be its analogy in the commercial world – a limitation on the amount of corporate advertising. The proposal instead aims to achieve balance by helping present the other side of the issues though counter-advertising. Thus, the *Buckley* analogy is inapposite; despite its hostility to the concept of balancing speech, its ire is aimed not at balancing through presenting both sides, but rather at balancing through the restriction of one side.

²⁷³*Buckley v. Valeo*, 421 U.S. 1 (1976).

²⁷⁴*Id.* at 48.

In actuality, a counter-advertising program would fit nicely with some of the goals espoused by *Buckley*, which held that the purpose of the First Amendment is “to secure the widest possible dissemination of information from diverse and antagonistic sources.”²⁷⁵ Other influential Supreme Court cases hit on the same theme. “More speech and a better informed citizenry are among the central goals of the First Amendment.”²⁷⁶ The First Amendment preserves “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²⁷⁷ Or perhaps even more pertinent to the matter: “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”²⁷⁸ Thus, a program of counter-advertising serves these purposes – it would promote more speech, more debate, and ultimately give citizens a more balanced view of certain issues and allow them to resist the tendency towards stultifying consensus.

3. “Governmental Intervention Means Less Freedom”

Because Americans often regard government intervention as an anathema to freedom, perhaps a more philosophical justification is needed. Austrian philosopher Karl Popper’s model of the “open society” is particularly relevant. Popper’s conception of an open society was premised on the insight that absolute truth is beyond the grasp of humanity.²⁷⁹ He argued that because no one individual or group may have a monopoly

²⁷⁵Id. at 48.

²⁷⁶Rubin v. Coors Brewing Co. 514 U.S. 476, 497 (1995) (Stevens concurrence).

²⁷⁷New York Times v. Sullivan 376 U.S. 254, 270 (1964).

²⁷⁸Red Lion v. FCC 395 U.S. 367, 389 (1969).

²⁷⁹See Karl R. Popper, *The Open Society and Its Enemies*, (London: Routledge & Kegan Paul, 1945).

on truth, society must be constructed to accommodate criticism and opposition, so that each individual is free to develop as an autonomous critical thinker.²⁸⁰ Popper's main concern was the totalitarian ideologies of his day – communism, fascism, and Nazism. He argued that all were deeply flawed in that they all claimed to be in possession of ultimate truth.²⁸¹ Such a claim was then wrongly used to justify state repression of individual autonomy.²⁸²

Financier/philanthropist George Soros has attempted to apply Popper's insights to modern conditions. Soros generally agrees with Popper's analysis, but argues that today there is a new enemy to freedom – our unqualified faith in *laissez-faire* capitalism. In his book *The Crisis of Global Capitalism*, Soros discusses at length the distinction between individualized private interests and the public interest.²⁸³ Ultimately, Soros emphatically concludes that our dominant *laissez faire* ideology – “market fundamentalism” as he calls it – is a tremendous threat to liberty: “The central contention of this book is that market fundamentalism is today a greater threat to open society than any totalitarian ideology.”²⁸⁴ Soros would like to see a return to the ideals of the Enlightenment, in which the “rule of reason, the supremacy of science, and the universal brotherhood of man”²⁸⁵ become the dominant themes, rather than a world in which “monetary values have usurped the role of intrinsic values and markets have come to dominate areas of society where they do not properly belong.”²⁸⁶ Clearly, Soros's ideas resonate with those of this paper.²⁸⁷ Soros's point is that an unfettered market allows certain voices to dominate and thereby militates against the realization of an open

²⁸⁰Id.

²⁸¹Id.

²⁸²Id.

²⁸³George Soros, *The Crisis of Global Capitalism*, (New York: PublicAffairs, 1998).

²⁸⁴Id. at xxii.

²⁸⁵Id. at 88.

²⁸⁶Id. at 206-7.

²⁸⁷Yet there are differences between Soros's project and the program proposed herein. First, Soros's main concern is global capitalism; this paper deals primarily with domestic policy. Second, to the extent that Soros explicitly addresses domestic issues, he seems to focus on wealthy, high-minded individuals such as himself effecting change through scholarships, grants, and endowments. His focus on private, rather than governmental, domestic reform efforts is somewhat incongruous, given his emphasis on creating international governing bodies with real power to solve problems. In this respect, Soros and this paper part ways. While the efforts of philanthropic individuals can be helpful, this paper argues that the only way to reel in the culture-shaping power of the private sector is through an increase in governmental power and independence.

society. This paper agrees with Soros's thesis in general, and argues specifically that government intervention through counter-advertising should be a primary strategy for achieving this open society.

The purpose of the preceding discussion has been to show that herbs and dietary supplements are an example in which government counter-advertising is particularly necessary. It is of course likely that there are other instances in which the discussion has become similarly unbalanced or distorted. To the extent feasible, the United States government should undertake counter-advertising campaigns in these instances as well.

Part IV

A.

Thus far the case has been made for tighter regulation of puffery and government counter-advertising. But the question must be asked: to what extent will such measures reduce the propensity for consumerism, conformity, and uncritical thinking? It seems they will help somewhat. A regulation of puffery will limit the impact of corporate advertising to a certain degree. Government counter-advertising will be helpful in attacking certain issues in which the discussion has become particularly unbalanced.

But such measures certainly will not solve the deeper problem referenced earlier, that consumers are inherently predisposed to such tendencies. As historian Daniel J. Boorstin has argued, “[t]he deeper problems connected with advertising come less from the unscrupulousness of our ‘deceivers’ than from our pleasure in being deceived, less from the desire to seduce than from the desire to be seduced.”²⁸⁸ Thus, to really get to the heart of the matter, we must not only discuss external influences on behavior, but also internal ones. That is, in order to comprehend why individuals have historically been conformist and uncritical, and today consumerist, we must turn our attention to fundamental questions of human nature. For if it is indeed the case that the human mind is inherently given to such tendencies, any attempt at reform must take this into account. Otherwise, we will in effect be “spinning our wheels” – we may get rid of some puffery here or there, we may do some occasional counter-advertising, but the underlying problem will remain. Therefore, a

²⁸⁸Daniel J. Boorstin, quoted in Rhodas Thomas Tripp, *The International Thesaurus of Quotations*, (New York: Thomas Y. Crowell Company, 1970), p. 18.

complete program that aims to restore the autonomy of the individual thinker must also consider the innate tendencies of the human brain.

B. Evolutionary Psychology

The discipline of evolutionary psychology provides a rich explanatory framework. The basic premise of evolutionary psychology is that the human mind cannot be fully understood unless one accounts for the forces of evolution that shaped its development. The approach holds that the behaviors that most favored survival and reproduction during the evolutionary period are the ones that today have become widespread throughout humanity due to the process of natural selection. In essence, the evolutionary perspective suggests that in order to understand why we act as we do, we must take into account how we evolved.

Yet critics often hurl the charge of reductionism at evolutionary psychology. The criticism is that by discussing biology, we reduce humans to mere pre-ordained manifestations of their genes. The criticism misses the mark. The evolutionary perspective attempts to explain behavior in a more all-encompassing fashion, taking into account not only external stimuli, but also the innate brain structure of the actor. By attempting to understand how natural selection has shaped the machinery of the brain, the approach offers the potential to gain a deeper understanding of the human condition. Clearly this is not reductionism; on the other hand, to ignore this genetic aspect of behavior may in fact be a form of reductionism.

The same holds for this paper. It would have been grossly inadequate if this paper had only included a discussion of puffery and counter-advertising. It would have been the equivalent of treating each consumer as a “black box.” Each individual would have been regarded as a rational actor who, once equipped with the appropriate information, would automatically make the right decision. Such an approach is inadequate because the human brain does not function in this perfectly rational fashion. The human brain did not evolve only

rational decision-making capabilities, but also a predisposition towards conformity and uncritical thinking.

In his pioneering book, *On Human Nature*, Harvard professor Edward O. Wilson uses the evolutionary approach to address many aspects of the human psyche.²⁸⁹ One area that Wilson discusses is critical thinking and conformity. Wilson argues that “the readiness to be indoctrinated [is] a neurologically based learning rule that evolved through selection of clans competing against one another.”²⁹⁰ This susceptibility to indoctrination translates into a genetic predisposition towards conformity as a survival strategy. Such a predisposition was probably adaptive at both the societal and individual levels. Wilson explains how conformity may have conferred survival benefits at the societal level:

When conformity becomes too weak, groups suffer decline and perhaps even extinction. In this hypothetical version, it is still possible for selfish, individualistic members to gain the upper hand and to multiply at the expense of others. But the rising influence of their deviant predispositions accelerates the vulnerability of society and hastens its decline. Societies with higher frequencies of such individuals, and hence of the genes that predispose to them, will give way to those less weakened in “genetic resolve,” and the overall frequency of conforming individuals in the population as a whole will rise. The genetic capacity for blind conformity spreads at the expense of the genetic incapacity.²⁹¹

The idea is that conformity by individuals leads to a cohesive society that allows for the sharing of information and values. Such a society is better able to coordinate group efforts, such as wars against rival clans, and is thus more likely to perpetuate itself. In contrast, a society that allows individuals to work out their own rules of behavior will likely disintegrate into chaos because of its inability to mobilize cooperative efforts.

Wilson then explains how the predisposition to conformity may have conferred evolutionary advantages on

²⁸⁹Edward O. Wilson, *On Human Nature*, (Cambridge: Harvard University Press, 1978).

²⁹⁰Id. at 184

the individual level:

The ability of individuals to conform permits them to enjoy the benefits of membership with a minimum of energy expenditure and risk, and their behavior is sustained over long periods of time as the social norm. Although the rivals of the conformists in the society may gain a momentary advantage through selfishness and irreverence, it is lost in the long run through ostracism and repression.²⁹²

A similar evolutionary theme can be discerned in the writings of Friedrich Nietzsche. In *Beyond Good and Evil*, Nietzsche proclaims:

In every age, for as long as there have been humans, there have also been human herds (family groups, congregations, tribes, peoples, nations, churches) and always a great many followers in proportion to the small number of commanders. Considering, then, that *obedience has been bred* and practiced best and longest among humans, we can surely assume that *everyone on average is born with a need to obey*, as a kind of formal conscience that decrees: ‘Thou shalt do certain things without question, refrain from certain things without question’, in short ‘thou shalt’ . . . Human development has been so strangely restricted. . . *because the herd instinct of obedience is inherited best*. . . [G]reat powers of reason are felt as a danger; everything that raises an individual above the herd and causes his neighbor to fear him is henceforth called evil; a proper, modest, *conforming*, equalizing mentality, what is average on the scale of human desires gains a moral name and respect.²⁹³ (Emphasis mine)

In a later passage, Nietzsche declares:

The more similar, the more common people: these have always been and continue to be at an advantage, *while those who are more select, subtle, rare, harder to understand are readily left alone, come to harm in their isolation, and rarely procreate*. We have to call upon enormous counterforces in order to thwart this natural, all-too-natural continuation of the same thing, the further development of humans who are similar, ordinary, average, herd-like – common.²⁹⁴ (Emphasis mine)

Wilson concludes, and undoubtedly Nietzsche would agree,²⁹⁵ that such readiness for indoctrination and predisposition to conformity explain the prominence of religious belief throughout history. Wilson states:

²⁹⁵Nietzsche frequently used the term “religious instinct.”

A kind of cultural Darwinism operates during the competition among sects in the evolution of more advanced religions. Those that gain adherents grow; those that cannot disappear. Consequently religions are like other human institutions in that they evolve in directions that enhance the welfare of the practitioners.²⁹⁶

The highest form of religious practice, when examined more closely, can be seen to confer biological advantage. Above all they congeal identity. In the midst of the chaotic and potentially disorienting experiences each person undergoes daily, religion classifies him, provides him with unquestioned membership in a group claiming great powers, and by this means gives him a driving purpose in life compatible with his self-interest. His strength is the strength of the group. . . . The mind is predisposed – one can speculate that the learning rules are physiologically programmed – to participate in a few processes of sacralization which in combination generate the institutions of organized religion.²⁹⁷

Other scholars have reached similar conclusions. Philosophy professor Paul Kurtz argues:

Yet I submit that there is another factor present, which explains the persistence of religiosity, and this is an evolutionary explanation; that is, belief in the transcendental had adaptive value, and those tribes or clans that believed in unseen myths and forces to whom they propitiated by ritual and prayer had a tendency to survive and to pass on this genetic predisposition to their offspring. Thus religiosity is a heritable factor within the naked human ape.²⁹⁸

Kurtz notes that empirical support can be found for the existence of a religious predisposition in the famous Minnesota twins study, one of the most extensive studies to date.²⁹⁹ The Minnesota study attempted to determine the relative influence of nature and nurture on a number of variables, including religiosity.³⁰⁰ Studying 53 pairs of identical twins and 31 pairs of fraternal twins reared apart, examining five different measures of religiosity, the researchers found that the correlations between identical twins were typically double those for fraternal twins: “genetic factors account for approximately 50 percent of the observed variance on our measures.”³⁰¹ In other words, about one-half of the differences among people in their religious attitudes, interests, and values is accounted for by their genes. On the basis of these and other studies, evolutionary psychologists conclude there is a relatively strong genetic predisposition to religiosity.³⁰²

²⁹⁹See Michael Shermer, *Who do people believe in God: An empirical study on a deep question*, *Humanist*, Nov. 1, 1999.

³⁰⁰Id.

³⁰¹Id.

³⁰²Shermer’s article details many of these studies.

But as noted, religious indoctrination is not the only form of propagandizing to which we may be genetically predisposed. Indeed, governments throughout history have also exploited the same weakness towards conformity and uncritical thinking. For instance, many have spoken of Marxism and Communism as being secular religions. Consider the following statement by Grigori Pyatakov, one of Lenin's closest disciples:

A real Communist, that is, a man raised in the Party and who has absorbed its spirit becomes himself in a way a miracle man. For such a Party a true Bolshevik will readily cast out from his mind ideas in which he has believed for years. A true Bolshevik has submerged his personality in the collectivity, the 'Party,' to such an extent that he can make the necessary effort to break away from his own opinions and convictions, and can honestly agree with the Party – that is the test of a true Bolshevik.³⁰³

One of the contentions of this paper is that there is a great parallel among religious indoctrination, state propaganda, and the corporate influence that exists today. In other words, the same human propensity for uncritical thought and conformity that has historically been exploited by religions and governments is today being capitalized upon by corporations to promote consumerism. The challenge we face, however, is to translate this insight of evolutionary psychology into practical solutions for the betterment of society.

C.

The proposal advanced here is that the direct promotion of critical thinking by schools is perhaps our only hope for breaking this endless cycle of domination and thereby fully liberating ourselves. Of course, this is by no means an original concept. In fact, the advocacy of critical thinking can be traced all the way back

to Socrates.³⁰⁴ Socrates insisted upon the questioning of all beliefs and assumptions.³⁰⁵ He argued that we must distinguish those beliefs that are reasonable from those which – however appealing they may be to our naïve egocentrism, however comforting they may be, however much we may wish them to be true – lack adequate evidence to warrant our belief.³⁰⁶ If we learned this valuable skill, Socrates argued, our thinking would become vastly improved.

Descartes was also a proponent of critical thinking.³⁰⁷ In his seminal work, *Rules For the Direction of the Mind*, Descartes argued for the need for systematic training of the mind to cultivate the skill of critical thinking.³⁰⁸ Descartes’ method of critical thought was based on a principle of systematic doubt.³⁰⁹ Every aspect of thinking, Descartes maintained, should be questioned, scrutinized, and tested rigorously.³¹⁰ ³¹¹

It is important to see that one draws the same conclusion from reading Socrates and Descartes as one does from studying evolutionary psychology. The implication in all three instances is that the untrained human mind is invariably subject to frequent lapses in logical reasoning.³¹² As a consequence, instruction in the practice of critical thinking is a necessary strategy to overcome this innate tendency. It therefore follows that schools should seek to promote critical thinking.

Unfortunately, the traditional American educational model does not facilitate such critical thinking. The traditional framework of education presents the conclusion but rarely presents the evidence that supports the conclusion. As a result, even the brightest students tend to accept what is taught as “truth.” While students may successfully acquire factual information in this way, it is hard to see how such uncritical acceptance of

³⁰⁴See *A Brief History of the Idea of Critical Thinking* <<http://www.criticalthinking.org>>

³⁰⁵Id.

³⁰⁶Id.

³⁰⁷Id.

³⁰⁸Id.

³⁰⁹Id.

³¹⁰Id.

³¹¹In more recent times, Yale legal theorist Bruce Ackerman has proposed that the state should fund “liberal schools” to promote critical thinking to overcome the biases and limitations of parental instruction. See Bruce Ackerman, *Social Justice in the Liberal State*, (New Haven: Yale University Press, 1980), pp. 150-58.

³¹²Of course, given that both Socrates and Descartes preceded Darwin, it hardly seems plausible to suggest that Socrates and Descartes believed that this tendency was a product of human evolution.

authority can help students develop the requisite skills to become independent thinkers. Thus, in at least this sense, American schools are failures. As social critic William Graham Sumner stated:

Schools make persons all on one pattern, orthodoxy. School education, unless it is regulated by the best knowledge and good sense, will produce men and women who are all of one pattern, as if turned in a lathe. An orthodoxy is produced in regard to all the great doctrines of life. It consists of the most worn and commonplace opinions. . . The popular opinions always contain broad fallacies, half-truths, and glib generalizations. . . .³¹³

Sumner argued that teaching critical thinking should be the central purpose of education:

Criticism is the examination and test of propositions of any kind which are offered for acceptance, in order to find out whether they correspond to reality or not. The critical faculty is a product of education and training. It is a mental habit and power. It is a prime condition of human welfare that men and women should be trained in. It is our only guarantee against delusion, deception, superstition, and misapprehension of ourselves and our earthly circumstances. Education is good just so far as it produces well-developed critical faculty. . . . A teacher of any subject. . . who holds everything open to unlimited verification and revision is cultivating that method as a habit in the pupils. Men educated in it cannot be stampeded. . . . They are slow to believe. They can hold things as possible or probable in all degrees, without certainty and without pain. They can weight for evidence and weigh evidence. They can resist appeals to their dearest prejudices. . . . Education in the critical faculty is the only education of which it can be truly said that it makes good citizens.³¹⁴

Although these words were written nearly one hundred years ago, their relevance remains undiminished today. In fact, given the rise of today's increasingly powerful corporations, it is perhaps even more urgent now than ever before that we heed Sumner's recommendation.

D. Specific Proposal: Teach Critical Thinking in Schools

The federal government should take a more active role in the promotion of critical thinking. Specifically, the United States Department of Education should develop model curricula to assist local school boards in the creation and implementation of critical thinking programs at the elementary, intermediate, and high school levels. In elementary schools, students would be taught critical thinking similar to the way in which they are currently taught other skills such as reading comprehension. Teachers would present students with complex written passages and oral presentations. The teachers would then train students to identify and differentiate between the facts, opinions, and claims in each passage.³¹⁵ In this way, students would become familiar with the basic structure of logical arguments, and would learn how to analyze critically each part of an argument. The mastery of these skills would be tested each year by state-wide examinations.

More advanced courses would then build upon concepts already learned at the lower levels. For instance, at the intermediate and high school levels, courses in critical thinking could integrate more sophisticated concepts, such as how the need to apply critical scrutiny varies depending upon the financial incentives of the speaker. Upper-level courses could also focus on the necessity of applying critical thinking to corporate advertising. In this fashion, students would gain a basic understanding of critical thinking, as well an ability to scrutinize corporate advertising, by the time they graduate from high school.

E. Critical Thinking Curricula Would be Reinforced by a Government Television Campaign

The critical thinking skills learned in school would be reinforced by a government-sponsored television campaign. Professional athletes and celebrities would be recruited to deliver the message that the lessons learned

³¹⁵A case can be made that teachers, too, may require some instruction in critical thinking if the program is to be successful.

in school should be applied to real-life situations. Inspired by the endorsement of critical thinking by their heroes, students would be more motivated to master the skills they are taught in school.³¹⁶

Another possibility is to use science popularizers, instead of celebrities, to promote critical thinking. The advantage of this approach is that direct emphasis could be placed on science and critical thinking, without risking the possibility that the critical thinking message might be overshadowed or obscured by the presence of celebrities. The disadvantage, however, is that young students will likely be more interested in listening to celebrities than scientists. For this reason, perhaps both celebrities and scientists should be used.

F. Additional Proposals

1.

The government should fund critical thinking organizations such as The Center for Critical Thinking, Committee for Scientific Investigation of Claims of the Paranormal, and various other skeptics societies. With the additional funding, these organizations would have a greater ability to promote their message to the public. The net result would be that more individuals would become interested in science and critical thinking.

2. Encourage Positive Presentations of Science in the Media

³¹⁶This of course is vulnerable to the objection that critical thinkers should learn not to trust celebrities. There is undoubtedly a certain irony in proposing that celebrities should teach us to be critical thinkers. However, celebrity public service announcements are different from corporate advertising using celebrities. Students will be able to grasp this distinction. Thus, on balance, it seems worth it to use celebrities, given the tremendous ability of celebrities to influence public opinion.

The government should also encourage positive portrayals of science in the media.³¹⁷ Television programs such as *L.A. Law* and *ER* have reportedly raised interest in law and medicine, respectively.³¹⁸ One can imagine how a similarly successful show about scientists might have the same effect for science and critical thinking.³¹⁹ For example, Carl Sagan has proposed a series called *Solved Mysteries*,³²⁰ which would attempt to illustrate how critical thinking has been successfully used in the past to solve difficult problems.³²¹

G. Anticipated Criticisms

1. “The Critical Thinking Project Will Not Succeed”

The critical thinking project may not succeed because many individuals may not be particularly interested in becoming critical thinkers. That is, they may hear the government’s critical thinking message but choose not to follow it. If this is in fact what happens, there is nothing more that the government can or should do. The goal of the proposal is to give citizens a meaningful choice in their consumption decisions. The hope and expectation is that many will adopt the critical mindset, but it must be admitted that some will not.

If consumers are presented with the scientific mentality, but ultimately reject it, there is nothing more the

³¹⁷Note that the White House has been engaging in an analogous program with respect to illegal drug usage. For the past two years, the White House Office of National Drug Control Policy has reviewed the scripts of popular television shows before airing to encourage the networks to portray illegal drug use in a negative light. The government was criticized, however, for not making the project well-known to the American public. (See Marc Lacey and Bill Carter, *In Deal with TV Networks, U.S. Drug Office is Reviewing Scripts*, N.Y. Times, Jan. 14, 2000, Online edition). Therefore, if the proposed pro-science media project were instituted, the government would have to be open about what it was attempting to accomplish.

³¹⁸With respect to *L.A. Law*, See Roger Highfield, *Bragg urges BBC to make soap opera based on science*, Daily Telegraph, Aug. 21, 1998, at 9. With respect to *ER*, See Jason R. Rich, *Medical Field Offers Positive Prognosis for Jobs*, Boston Herald, April 19, 1998, at 81.

³¹⁹See Roger Highfield, *Bragg urges BBC to make soap opera based on science*, Daily Telegraph, Aug. 21, 1998, at 9.

³²⁰An obvious play on the sensationalist television program known as *Unsolved Mysteries*.

³²¹Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark*, (New York: Ballantine Books, 1996), p. 377.

government should do. The important point is that the *choice* to reject scientific thinking will have been an informed decision.

Consumer sovereignty and individual freedom are the highest values. The critical thinking proposal is motivated by the concern that many consumers do not actually enjoy these freedoms because they have not been given a real opportunity to become independent thinkers. However, once this concern has been satisfied, government has no business telling people how they must think or act. In other words, the success of the program should not be defined by the extent to which citizens actually change their behavior, but rather to the extent to which government has given citizens a legitimate opportunity to become independent thinkers.

This warning against government compulsion is not mere rhetoric. Rather, it is born of the observation that different people have different temperaments and distinct talents. For example, some individuals may develop their own capabilities best, not by becoming scientists, but by becoming poets. Others may maximize their potential by becoming great musicians. Therefore, for the sake of individual fulfillment, it is important that government not compel citizens to think in any one particular way. Moreover, on the societal level, there can be little doubt that society as a whole benefits from having individuals develop their unique abilities and talents. For example, imagine how much worse off we would all be if Shakespeare had been forced by the government to become a scientist. Thus, the goal is not to encourage citizens to adopt critical thinking exclusively, and at all costs and in all situations, but merely to expose individuals to the benefits of this way of thinking.

In this fashion, the current proposal differs substantially from other idealistic attempts at social reform. Marxist and other utopian impulses are all premised on the necessity of transforming human life by making people, conceived of as matter to be perfected, conform to some single overriding idea. Such ideologies promise to guide us at long last to the One True Way. They all fail to recognize, however, that human

beings are fundamentally distinct in many respects – different things make different people tick.

By the same token, this does not mean that the state must therefore abstain from *any* attempt at social engineering. To reiterate a theme of this paper, the choice between individual freedom and state interference is a false dichotomy. In the absence of state intervention, the predominance of corporate values persists. In other words, by failing to act, the state indirectly sanctions the loss of personal autonomy by its citizens by allowing the corporate mentality – consumerism, conformity, and uncritical thinking – to go unchallenged. Therefore, it is the affirmative role of the state to intervene. But such intervention must not amount to a new form of state propaganda. It instead must equip individuals with the tools of critical thinking so that they may have the true freedom to think for themselves.

2. “We Should be Suspicious Whenever Government Uses a Controversial Scientific Theory to Justify a New Policy”

Given that the program proposed herein is largely motivated by evolutionary theory, it is likely that some will object on the grounds that the government should not place so much reliance on a controversial scientific theory. This objection merits close examination. Indeed, it is true that throughout history governments have manipulated scientific theories as a pretense for enlarging their own power. For instance, the eugenics programs of the 1920s were based on the “scientific” notion that sterilizing certain individuals was good for the advancement of society. The atrocities of the Nazis were also based on propaganda labeled “scientific.” As a final example, Marxism was premised on the false idea that the scientific certainty of the natural sciences is available in the realm of political science.

Given this rather ugly history, the immediate reaction is to be skeptical of any attempt to justify a new policy by using a somewhat controversial scientific theory. The knee-jerk reflex is to argue that the governmental application of scientific theories to the realm of policymaking should be greatly constrained. To a certain extent, this intuition is understandable. After all, it is true that scientific knowledge has limits. For instance, science cannot “prove” that one race is superior to the next. Nor can it demonstrate the opposite – that all people are inherently equal. Science cannot prove or disprove the existence of God. Nor can science determine whether organ selling is morally justified – science cannot provide an independent basis for the validation of ethical principles.

Thus science can neither replace religion nor render moral reasoning outdated. What science is good at is dealing with testable claims about the physical world. For this reason, the argument goes, we must be careful not to overextend science to areas in which it is not well-suited. An influential proponent of this position is Harvard professor Stephen Jay Gould. Gould believes that science and religion/morality constitute “non-overlapping magisteria,”³²² and that we should be nervous any time science is applied in a broad manner for fear that science might be overstepping its bounds.

In this case, however, there is little reason for such a concern. The proposed government program would merely promote the idea that everyone should appreciate science and critical thinking. By using several different strategies, the plan would be to “hit consumers over the head” with the need to adopt critical thinking. This hardly seems an objectionable idea – it should not raise a red flag when government encourages its citizens to be critical thinkers. Thus, the protestation that such reliance on evolutionary theory would represent an overextension of science is unmerited.

³²²See Stephen Jay Gould, *Rocks of Ages: Science and Religion in the Fullness of Life*, (New York: Ballantine Publishing Group, 1999).

3. “The Program Raises ‘Slippery Slope’ Concerns”

Gould might nonetheless argue that although the critical thinking program is not objectionable in its own right, such reliance on evolutionary theory for the purpose of policymaking still raises “slippery slope” concerns. In other words, Gould might argue that the tacit approval of evolutionary psychology in this case would be dangerous because it would pave the way for other more unacceptable applications of evolutionary psychology. After all, evolutionary psychology is not purely factual in the way that, say, measuring the amount of energy released by a certain physical process is. For this reason, Gould might maintain that experimental scientific theories, such as evolutionary psychology, should never play a role in the making of public policy.

The problem with this view is that it shortchanges the potential for science to bring about useful societal progress. It embraces a very limited role for science in society. It encourages the belief that science is only competent at generating a few specific types of information, and that the application of scientific findings should be strictly limited to their immediate context. Science is seen as cold and calculating, relevant only for highly fact-specific inquiries. Science is a fact-checker; it has little to say about the big questions. Expansive scientific theories, such as evolutionary psychology, are immediately dismissed because of the belief that science must steer clear of any grand theorizing.

But it would be foolish prescribe such a limited and compromised role for science. Science must be permitted to do more than merely make narrow factual assertions. Science is not simply one way of knowing the world, on a par with other forms of knowledge. It is in fact much more than that. Science is the crowning glory and greatest achievement of the human intellectual endeavor. It is the only means we have of obtaining reliable, accurate, and objective knowledge about the world around us. Scientific achievements have given us longer and healthier lives, incredible technological advances, and the ability to travel and communicate in

ways unimaginable only decades ago. Scientific thinking has elevated humanity from an age of superstitious fear of nature to a point where humans can more or less control and understand their environment. Though it is true that science can never allow us to “know truth” in an absolute sense, the predictions of scientific theories are, nevertheless, very often sufficiently close to certainty that we are willing to bet our life on them, such as when we board an airplane.³²³

To be sure, the claim is not being made that evolutionary theory is as thoroughly well-settled as is gravitational theory. Nonetheless, one would be hard-pressed to find a biologist who would dispute that there is a strong evolutionary basis of human behavior. Therefore, it would be foolish for us to insist that policymakers continue to act as if they were ignorant of this consideration.

The essential point is that it is time we stop paralyzing ourselves with an overly apprehensive fear of science. The tangible benefits from the pursuit of science have simply been too remarkable to justify such a limited role for science in the making of public policy. Simply put, science and critical thinking are humanity’s best tools in the quest for knowledge and freedom. Therefore, government should actively encourage the spread of scientific thinking throughout society.

H. Scientific Thinking Itself is the Safeguard

But Gould’s challenge remains: no matter how wonderful science may potentially be, how can we be certain that encouraging a greater role for science in policymaking will ultimately not lead to its misapplication? Indeed, the risk is always present that science may be misappropriated. But such concerns do not suggest that government should not rely upon scientific theories, but rather that government must be all the more

³²³See Vivian J. Stenger, *Postmodern attacks on science and reality* <<http://www.quackwatch.com>>

certain to promote the skill of critical thinking in its citizenry.

Science is not as much a body of knowledge as it is a rigorous way of thinking and acquiring knowledge. The scientific way of thinking requires persistence, discipline, and humility. Unlike religious doctrine, it insists that all propositions and theories are tentative. It is marked by an affinity for questioning, debate, and conflict. Every claim must stand up to endless challenges and harsh scrutiny. Openness, diversity, and discussion are required. No theory or idea is considered “sacred.” In the end, some claims stand the test of time, while others do not. As Carl Sagan put it: “[s]cience gropes and staggers toward improved understanding. . . . One of the reasons for its success is that science has a built-in error correcting machinery at its very heart.”³²⁴

The point is that if done properly, science can never become dogmatic because such thinking is antithetical to the scientific way. Therefore, because of this built-in safety mechanism of the scientific process, we should not be fearful of applying the theories of science to policymaking. However, we must always be certain that the spirit of scientific skepticism remains strong. As Wilson cautioned in the preface to his book:

I wish to say the following to others who are prone to read this book uncritically as a tested product of science: I might easily be wrong – in any particular conclusion, in the grander hopes for the role of natural sciences, and in the trusted gamble on scientific materialism. This qualification does not represent false modesty but instead is an attempt to maintain strength. The uncompromising application of evolutionary theory to all aspects of human existence will come to nothing if the scientific spirit itself falters, if ideas are not constructed so as to be submitted to objective testing and hence made mortal. The social sciences are too young and weak, and evolutionary theory itself still too imperfect, for the propositions reviewed here to be carved in stone.³²⁵

It is thus clear that Wilson recognized the vital role that critical thinking must play if we are to benefit from a greater consideration of scientific theories in the making of public policy.

³²⁴Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark*, (New York: Ballantine Books, 1996), p. 20, 27.

I. On the Need to Aggressively Democratize Scientific Thinking

But we cannot just snap our fingers and assume that the entire country will magically heed Wilson's words and become critical in its application of evolutionary psychology or other scientific theories. Wilson's book was primarily intended for other scientists, students, and intellectuals – hardly the great majority of Americans. So while his warning was appropriate, it was perhaps not addressed to those who could benefit most from it. It will do us little good if the scientific attitude is restricted only to scientists and intellectuals scattered in laboratories and universities across the country. Therefore, government must teach everyone – consumers, legislators, judges, and others – to adopt this mode of thought. In other words, only if we are all reasonably critical thinkers, can we feel secure in a greater application of scientific knowledge in the public domain. For this reason, the promotion of critical thinking by government should be a top priority. This democratization of the scientific way of thinking is the best answer to Gould's concern about the overextension of scientific theory. And thus the question becomes: why not aspire to this more noble goal of universal autonomy rather than playing Gould's perilous game of negotiating a limited role for science out of transparent fear of mass manipulation?

J. The Democratization of Scientific Thinking Would Strengthen Democracy Itself

The popularization of scientific thinking would strengthen democracy itself. Science and democracy reinforce each other because they are founded on the same principles. John Dewey is often credited with noticing this close relationship. Dewey argued that the democratization of science would be necessary to realize the full

potential of democracy. Individuals who think like scientists make for better citizens in a democracy. Carl Sagan, the great science popularizer, agreed with the position:

The values of science and the values of democracy are concordant, in many cases indistinguishable. Science and democracy began – in their civilized incarnations – in the same time and place, Greece in the seventh and sixth centuries B.C. Science confers power on anyone who takes the trouble to learn it (although too many have been systematically prevented from doing so). Science thrives on, indeed requires, the free exchange of ideas; its values are antithetical to secrecy. Science holds no special vantage points or privileged positions. Both science and democracy encourage unconventional opinions and vigorous debate. Both demand adequate reason, coherent argument, rigorous standards of evidence and honesty. Science is a way to call the bluff of those who only pretend to knowledge. It is a bulwark against mysticism, against superstition, against religion misapplied to where it has no business being. If we're true to its values, it can tell us when we're being lied to. It provides a mid-course correction to our mistakes. The more widespread its language, rules, and methods, the better chance we have of preserving what Thomas Jefferson and his colleagues had in mind.

Furthermore, the democratization of scientific thinking would serve as an antidote to the previously discussed vanishing interest in politics.³²⁶ The growth of critical thinking in the citizenry would serve to counter Seymour Martin Lipset's rather perverse yet influential view of declining political participation in the post World War II period. While his contemporaries expressed concern about the decline of voting and its implications for democracy, Lipset contended otherwise:

[I]ncreased participation might threaten the workings of democracy since non-voting [is] largely located among the ignorant part of the electorate. And subsequent studies indicate that non voters differ from voters in having authoritarian attitudes, cynical ideas about democracy and political parties, intolerant sentiments on deviant opinions and ethnic minorities, and in preferring strong leaders in government.³²⁷

Lipset paints a disturbing picture of the “ignorant part of the electorate.” His analysis stands as dramatic testimony to the need for the promotion of critical thinking. What is even more troubling, however, is Lipset's apparent acceptance of the idea that declining voter participation can be beneficial for democracy. Lipset's brand of elitism has much in common with Gould's fear of science for the masses, and Koppl's praise

³²⁶See Part I C.

for advertisements that “focus different people’s messianic impulses in different directions and on relatively unimportant things.” Gould, Koppl, and Lipset all share the idea that the masses cannot be trusted. Gould is afraid of them thinking wrongly about science; Koppl is happy to see them “rush off to the shopping mall”; whereas Lipset is relieved when they stay away from voting booths. But rather than hoping to distract the masses, thus ensuring they will not think about science or cast votes, is it not more desirable to envisage a society in which all citizens can be entrusted, in fact expected, to participate responsibly, actively, and most important, critically? The democratization of science and the scientific attitude is our best hope to achieve this end.

K. The Application of Scientific Techniques Would Strengthen Democracy: A Proposal for Greater Experimentalism in Government

Not only did Dewey and the pragmatists call for the democratization of science, but they also believed that democracy could be enriched by the application of scientific techniques and methods. Karl Popper’s vision of the “open society” was also premised on the notion that scientific principles should be applied to decisions of democratic governance. One scientific idea of particular relevance is the need for experimentalism.

As applied to governmental matters, experimentalism represents the idea that we should never become wed to any particular course of action. We must always be willing to revise and rethink in light of any new evidence. The only matters on which we can agree *a priori* are certain general principles. The general principle advocated in this paper is the need to counter the trend towards consumerism, conformity, and uncritical thinking.

But no individual can say for certain how this goal is best realized. With this in mind, we must become

experimental in our approach, relentlessly testing various ideas until success is achieved. In the beginning of this section, a number of proposals are put forth to accelerate the spread of science and critical thinking. Of course, this list of ideas is by no means exhaustive. Undoubtedly, there are many more ideas to be contemplated and considered. Because it is not at all obvious which is the best strategy to increase critical thinking, experimentalism is the most prudent approach.

The essential point, however, is that we must ultimately find *some* way to increase critical thinking in America if we are to achieve the lofty goals of this paper. Puffery regulation and government counter-advertising will be helpful, but will not be adequate by themselves without a concomitant increase in critical thinking. To summarize, then, the program to increase critical thinking would have two important benefits. First, it is the most direct and potentially most effective strategy to counter the consumerism, conformity, and uncritical thinking described throughout this paper. Second, increased critical thinking would allow us to confidently promote a greater role for science in the making of public policy.

Some Concluding Thoughts

Stepping back and reflecting on the ideas presented in the preceding pages, there emerges a certain tension that flows through this paper. More specifically, the paper contains strong currents of both pessimism and optimism. The pessimistic view is evident throughout, as there has been a deliberate effort to focus on several disconcerting tendencies – consumerism, conformity, and uncritical thinking – while downplaying more positive considerations. The aim has been to question the prototypically American propensity for self-flattery and self-congratulation, and thereby allow for the contemplation of meaningful change. The goal has been to provoke, rather than to pontificate on the necessity and desirability of the current conditions.

The paper is also pessimistic in the sense that it recognizes that the project is dependent upon innovative governmental intervention on a sustained basis. The prospects for such action at present and in the foreseeable future are not encouraging. Following a half century of Big Government, we now live in an era in which devotees of an unfettered free market reign, and intervention by Washington by its very nature is an anathema. Furthermore, it would seem that the trinity of problems discussed – consumerism, conformity, and vanishing critical thinking – do not contain the seeds of their own solution. On the contrary, they seem to reinforce each other in an endless loop.

At the same time, transcending this gloom and negativity is a buoyant optimism and idealism. A central tenet of the paper is that notions of progress and betterment are real concepts, authentic ideals to which we can aspire. The paper argues that, despite the seductive appeal of moral relativism, it is in fact possible to deem one set of values better than the next. We are therefore justified in our longings for a better America.

The paper proposes that such an America would be one in which each individual is an independent thinker, at last freed from the tyranny of oppressive powers. The ultimate aim is that the age-old quest for individual freedom and personal autonomy, flirted with throughout history but never fully realized, will have at last been brought to fruition for all Americans.

Admittedly, the goals espoused by this paper are not easily attained. Therefore, it is perhaps easy to dismiss this paper as another misguided attempt to achieve that which is unattainable. But one should not argue that a reform program is not worthwhile simply because it cannot bring about perfection. The gap between the actual and the ideal will always be present. Society is not capable of ultimate perfection. It is, however, capable of progress. But to aspire to progress, we must first have a comprehensive vision of what might be. What is needed is a target to strive and yearn for. A grand compass to navigate beyond the immediate waters. It is precisely because an ideal is only potentially attainable that it satisfies a need and desire for a supraexistent vision that transcends notions of practicality.³²⁸

This paper represents a first effort at such an undertaking. It proposes that we aspire to the ideals of an open society in which each individual is free to invent oneself apart from the pressures of authoritarian institutions of power. It is, however, likely that many readers will criticize the ideas of this paper. Such a response would suggest that the paper has succeeded in stimulating debate and discussion, which ultimately can be the only proper purpose of a paper in the social sciences. It would be contrary to the ideals of an open society if one individual could prepare a precise blueprint for how to structure democratic relationships. Democracy is a shared discourse. Therefore, the proposals should be viewed primarily as jumping off points for further contemplation. The recommendations are intended to spur thought; they are not necessarily exact prescriptions for action.

More than anything else, this paper should be viewed as a proposal to begin the discussion. It asks that we

³²⁸See James Buchanan, *Time for a revival . . . saving the soul of classical liberalism*, Wall Street Journal, Dec. 31, 1999, at R29.

be unafraid to speak in bold terms about the issues that should be of great import to us all. It challenges us to avoid the trap of paralyzing realism which admits of no potential for change. It asks that we reimagine the boundaries of the possible, not in the light of the actual, but rather in terms of an ideal. Let us then begin the conversation, and thus commence a new attitude of openness and experimentalism in American government.