
Lifestyle Advertising and Classical Freedom of Expression Doctrine

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Classical freedom of expression doctrine rests on a simple view of language as an instrument used by an individual to express to others his/her pre-linguistic ideas and feelings. In classical doctrine there is a distinction between expression, appealing to reason, and manipulation, distorting the natural reason of the individual and undermining the effort to discover truth. It is this distinction which defines the scope of freedom of expression. In recent years classical theory and doctrine have undergone a number of changes which reflect evolving views of language and meaning. There is now a greater recognition that language actually gives form to human thought and feeling. There has been a shift in the justification of the freedom from the discovery of truth to self-expression and self-development and the scope of the freedom has been extended beyond the spoken and written word to include different forms of "symbolic speech." Yet in spite of these changes, the courts continue to hold on to the simple lines and categories of classical doctrine and to the individualist and rationalist perspectives of classical theory. They have been unwilling to carefully examine the scope of the freedom and they continue to believe that there is a clear distinction between rational and manipulative expression. The inadequacy of this revised version of classical doctrine becomes very clear when it is applied to lifestyle advertising and other uses of visual imagery. If the courts are to come to grips with lifestyle advertising they must recognize that different uses of visual imagery contribute in different ways to the realization of human agency. They must be prepared to draw a difficult line between different uses of visual imagery, denying constitutional protection to uses such as lifestyle advertising which seek to affect consumer behaviour while discouraging realization of this effect.

La conception classique de la liberté d'expression se base sur une notion simple de la langue qui ne serait qu'un instrument permettant à l'individu d'exprimer ses idées et ses émotions. Cette conception fait une distinction entre l'expression qui fait appel à la raison et l'expression manipulatrice qui dénature les raisons d'agir de l'individu et fait obstacle à la poursuite de la vérité. C'est cette distinction qui définit les limites de la liberté d'expression. Les développements en linguistique et en sémantique au cours des dernières années ont influencé la doctrine classique qui reconnaît maintenant le rôle de la langue dans l'expression de la pensée et des sentiments humains. La justification de la liberté d'expression, traditionnellement ancrée dans la découverte de la vérité, s'est ainsi déplacée vers l'expression et le développement personnels ; la liberté ne se limite plus au discours oral ou écrit mais réussit à englober des manifestations symboliques sous diverses formes. Malgré ces changements théoriques, les catégories de la conception classique traditionnelle, associées aux perspectives individualiste et rationaliste, retiennent toujours la faveur des tribunaux qui refusent de se soumettre à une évaluation précise des limites de la liberté d'expression. En dépit d'une reconnaissance de l'évolution théorique, l'approche judiciaire semble incapable de se défaire des fossiles classiques. Il en résulte que les tribunaux seront incapables de trancher les débats sur la publicité prônant un mode de vie (« lifestyle advertising ») s'ils ne tiennent pas compte des effets multiples et variés qu'ont les images et les symboles visuels sur le processus décisionnel des personnes. Ils seront forcés de contraster les divers types d'images et leur utilisation afin de déterminer les limites des garanties constitutionnelles de la liberté d'expression afin de refuser de protéger le « lifestyle advertising » qui décourage un processus actif de prise de décision.

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Introduction

A. *An Example of the Problem*

The cigarette companies were delighted by two recent decisions of the Supreme Court of Canada. In holding that commercial expression, and more particularly, advertising, is protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms*,¹ the Supreme Court in *Ford v. A.G. Quebec*² and *Irwin Toy v. A.G. Quebec*³ has strengthened the companies' constitutional attack on the federal government's ban on cigarette advertising.⁴

The cigarette companies now feel that their case is won or, at least, half won. If advertising is protected expression under s. 2(b), then it is up to the federal government to justify the ban on cigarette advertising under the terms of s. 1, by showing that the ban is "reasonable" and "demonstrably justified in a free and democratic society."

The federal government's argument under s. 1 of the *Charter* is that cigarette advertising encourages smoking and that smoking is a harmful activity. In making its case under s. 1, the government has brought forward a host of studies which show the harmful consequences of cigarette smoking. Generally speaking, the cigarette companies have not tried to deny this powerful evidence of the harm of smoking — harm to the individual smoker and harm to the community through health care and other costs. However, the companies have tried to deny the government's claim that cigarette advertising leads people to smoke. They have maintained that their advertising does not encourage new smokers; it simply encourages brand switching or reinforces brand loyalty among those who already smoke.

The companies' position does not sound very convincing. Any suggestion that smoking is not harmful to health flies in the face of an overwhelming body of medical evidence. And with regard to the claim that advertising does not encourage individuals to start smoking, could it really be the case that cigarette advertising influences the behaviour of those who are already smokers but not the behaviour of non-smokers? Could it really be that cigarette advertising reinforces brand loyalty but not loyalty to cigarette smoking generally? It seems counter-intuitive that cigarette advertising does not encourage people to start smoking or to continue smoking.⁵ The companies would not be spending signif-

¹Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

²[1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to S.C.R.].

³[1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.].

⁴*Tobacco Products Control Act*, S.C. 1988, c. 20, s. 4.

⁵It seems fairly obvious that a significant amount of cigarette advertising is aimed at non-smokers.

icant amounts of money on advertising campaigns nor would they be challenging the ban in the courts and invoking their fundamental freedom to express themselves, unless they believed that their advertising was significant in its effect on consumers.

The cigarette companies are better off conceding, or at least shifting the focus of debate from the influence of their advertising, and, taking the higher ground of individual liberty, arguing that individuals must be free to make their own choices on the basis of available information. The "information market" includes cigarette advertising but it also includes facts and figures about the harm of smoking. If people decide to smoke or to continue smoking, it is in spite of this information about the health consequences of smoking. Is it not wrong for the state to interfere with an individual's decision-making by limiting what she/he can hear and see? Is not the proper solution more speech by government or other interested parties concerning the harm that smoking causes? The federal government might be within its constitutional power to prohibit smoking but surely until it does so, it cannot prohibit communication which encourages the legal activity of smoking.

This argument by the cigarette companies would draw strength from the reasons given in *Ford* for protecting commercial expression under s. 2(b) of the *Charter*. According to the Court in that case, commercial expression is worthy of protection because it provides information which allows individuals to make intelligent and informed economic choices, "an important aspect of individual self-fulfilment and personal autonomy."⁶ The protection of commercial expression involves a recognition of the importance of individual choice, freely made and based upon available information.

Indeed, the value of informed and intelligent choice is thought to lie at the root of freedom of expression. The classical view of freedom of expression is that the state is not justified in preventing an individual from hearing or reading different ideas simply because it believes that the ideas are wrong and fears that individuals might reach bad decisions. The best hope for the realization of truth by the individual and the collectivity is the freedom of all persons to engage in discussion and debate. The state must treat individuals as agents capable of making decisions for themselves and of realizing the truth, even if some individuals on some occasions make incorrect decisions.

K.L. Polin, "Argument for the Ban on Tobacco Advertising: A First Amendment Analysis" (1988) 17 Hofstra L. Rev. 99 at 118:

Despite the industry's public denial, their marketing plans explicitly target the young. Each year, as 1,000,000 smokers quit and another 350,000 die from tobacco use, the product, in order to continue sales success, must attract droves of new, young consumers.

⁶*Ford, supra*, note 2 at 767.

With *Ford* and *Irwin Toy* do the cigarette companies have a knock-down argument? I believe that their case is not yet won. Those who support the federal ban on cigarette advertising may have moved too quickly over s. 2(b) and the meaning of expression, seeking to resolve the constitutional issue under s. 1, fighting the battle on the "firm" ground of statistical evidence. This firm ground crumbles very quickly once we reflect on the reasons which underlie freedom of expression. Statistical evidence of the harm caused by smoking and the influence of advertising is, perhaps, beside the point, if the basis of the freedom is that individuals should be free to choose, rightly or wrongly.

Instead of resolving the issue of the constitutional validity of the ban on cigarette advertising under s. 1 (which would, or at least should, mean victory for the cigarette companies), the courts need to step back and carefully examine the application of freedom of expression to cigarette and other advertising. The issue should not be whether cigarette advertising effectively encourages individuals to engage in the harmful activity of smoking. Rather, the issue should be if cigarette advertising is effective how does it influence behaviour — how does it lead or encourage individuals to smoke? Does it influence decision-making in a way that should be protected under freedom of expression? The cigarette companies have been permitted to take the high ground of individual liberty and freedom of choice. Perhaps, if a more subtle view of communication and human agency is taken, that ground can be reclaimed.

B. Reconceiving the Arguments

In this paper I want to consider the problems that arise when established freedom of expression doctrine is applied to lifestyle advertising.

Classical freedom of expression doctrine rests on a simple view of language and human agency. Language is viewed as a transparent medium which an individual uses to convey his/her pre-linguistic ideas and feelings to others. Censorship is generally objectionable because it distorts the natural reason of human agents. However, censorship is justified when an individual seeks to use language to deceive his/her audience or in circumstances where the audience has little opportunity to judge the truth of the statements made before they take action.

In recent years courts and commentators, increasingly sensitive to the complexity of language and human agency, have begun to make some adjustments to the theory and doctrine of classical freedom of expression. There has been a gradual shift in the justification of the freedom from the discovery of truth to individual self-expression and self-development. In these more recent accounts of the freedom's justification there is a recognition that language is not simply a neutral or transparent medium used by the individual to convey his/her ideas and feelings but is, rather, a medium that gives form to the individual's ideas

and feelings. Along with this shift in justification there has been an extension of the freedom's scope beyond the spoken and written word to include different forms of "symbolic speech."

Yet in spite of these changes, the courts have held on to the essentials of classical doctrine, its lines and categories. They have avoided a careful examination of the scope of the freedom and have maintained a fairly general understanding of expression as the conveyance of meaning. They continue to view the printed and spoken word as the paradigm of expression and have simply extended the freedom's protection to include other established forms of symbolic expression which are considered analogous to the printed and spoken word. As well, the courts continue to assume that a reasonably clear line can be drawn between "expression" which is protected under the freedom and "conduct" which falls outside the freedom's scope.

However, the rise of visual imagery as the dominant means of public communication, and the corresponding decline of the spoken and printed word, may yet lead to a more radical transformation of classical freedom of expression theory and doctrine. In recent freedom of expression cases, many of which concern the regulation of lifestyle advertising (which makes no particular arguments or claims but instead relies on the association of different images), the courts have grappled with the problem of fitting visual imagery into the framework of classical doctrine. The tensions and contradictions which surface in these cases reveal clearly the inadequacy of classical doctrine with its simple understanding of expression and its bright line between expression, on the one hand, and manipulation and other forms of conduct, on the other.

If the courts are to come to grips with lifestyle advertising they must reflect on the nature of meaning and expression and the values which underlie the freedom. All instances of visual imagery should not be protected simply because in some instances a visual image can be an important and effective means of expressing an idea or a feeling; for in other cases, such as lifestyle advertising, visual imagery can affect consumer behaviour while discouraging conscious recognition of that effect.

I. Classical Freedom of Expression

A. *The Place of Milton and Mill*

John Milton and John Stuart Mill are routinely cited when English speaking courts and commentators consider the theoretical foundation of freedom of expression.⁷ Most contemporary writing concerning freedom of expression

⁷In *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to D.L.R.], the first impor-

occurs within the theoretical and doctrinal framework established by these men, a framework which has truth and understanding as the core values of the freedom.

The striking claim of Milton and Mill, and of classical freedom of expression theory, is that censorship is not justified simply because the state believes that the views expressed are false or may encourage harmful activity. Milton and Mill believe that while the state is justified in prohibiting lies, it does wrong when it tries to prevent the expression of sincerely held views even though it (reasonably) believes those views to be false. This narrowing of the scope of legitimate censorship from false statements to insincere statements (intentionally false statements) is based on a scepticism about the state's ability to decide for the general population what is true and what is false and on a faith, characteristic of the Enlightenment, in the power of human reason and the progress of truth when undistorted by censorship. This scepticism and this faith set Milton and Mill apart from other thinkers and marked the beginning of freedom of expression theory.⁸

In *Areopagitica*,⁹ Milton argues that the free and open exchange of ideas and information is essential to the realization of truth. The quest for truth involves debate, discussion, and reflection. Milton believes that if men and women are permitted to engage in free and open discussion they will make wise decisions and truth will prevail.¹⁰ Without the distorting effect of censorship

tant decision by the Supreme Court of Canada concerning freedom of expression under the *Charter*, Milton and Mill were the first two authors cited in the Court's discussion of the freedom's justification.

⁸The Enlightenment's faith in the progress of reason became important in American free speech jurisprudence through the writings of Z. Chafee *e.g.* "Freedom of Speech in War Time" (1919) 32 *Harvard L. Rev.* 932 at 956:

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest.

⁹J. Milton, *Areopagitica* (New York: A.M.S. Press, 1971).

¹⁰*Ibid.* at 58:

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

And *supra* at 25:

See the ingenuity of Truth, who, when she gets a free hand, opens herself faster than the pace of method and discourse can overtake her.

For some doubts about the extent of Milton's commitment to this principle see L. Levy, *Constitutional Opinions* (New York: Oxford University Press, 1986).

truth will ultimately emerge from the processes of individual and collective reasoning.

J.S. Mill in *On Liberty*¹¹ argues that censorship inhibits the progress of human knowledge for two general reasons. First, no one is infallible, especially not the state. As history shows, mistakes will be made, truth will be suppressed: "We can never be sure that the opinion we are endeavouring to stifle is a false opinion."¹² Indeed, Mill argues that in the absence of freedom of discussion we have no ground for thinking a particular view to be either true or false.¹³ As well, it is very often the case that within a so-called "false" view, there is a grain of truth; so that the progress of truth often involves the synthesis of old and new ideas. Secondly, even if the censor happens to get it right and suppresses only false opinions, still something is lost. The expression of false views has value because the "collision" of truth with error, gives us a "clearer perception and livelier impression of truth."¹⁴ We will have a better understanding of truth and its grounds if we must address competing views, if we must distinguish truth from falsity.

But the argument of these men does not rest simply on a belief in the general utility of truth and a conviction that truth is more likely than not to win out in a free and open public debate. Also present in their writings is the suggestion that expression, reflection and judgment are important to the realization of rational human agency. The connection between freedom of expression and the realization of human agency, which is submerged in the writings of Milton and Mill, anticipates many later accounts of the freedom's justification which emphasize self-expression and self-realization.¹⁵

Milton believes that the true nature of men and women resides in their capacity for reason. God has trusted man "with the gift of reason to be his own chooser."¹⁶ Milton believes that the life of reason is in discussion and debate. The free exchange of ideas and information is necessary to the realization of

¹¹J.S. Mill, *On Liberty* (Hammondsworth: Penguin Books, 1982).

¹²*Ibid.* at 76.

¹³*Ibid.* at 79:

Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action: and on no other term can a being with human faculties have any rational assurance of being right.

¹⁴*Ibid.* at 76.

¹⁵This understanding of the freedom's justification became more explicit in the writings of Chief Justice Brandeis and in the judgments of Brandeis J.

According to Brandeis J. in *Whitney v. California*, 274 U.S. 357 (1927) at 375 [hereinafter *Whitney*]:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty as both an end and as a means.

¹⁶Milton, *supra*, note 9 at 19.

human reason and to the development of society as a product of reason. At times it appears that for Milton the product of truth is less important than the process of reason. He could not see the value of truth if it were simply,

a fugitive and cloistered virtue unexercised and unbreathed, that never sallies out and seeks her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather, that which purifies us is trial, and trial is by what is contrary.¹⁷

Similarly, Mill's defence of freedom of expression at times seems to involve more than the claim that the freedom has instrumental value.¹⁸ Mill cares that the individual hold the truth "as a rational being."¹⁹ He wants the individual to participate in the truth — participate in the sense of being able to distinguish truth from falsity and of knowing the grounds for his/her opinion. He seeks the "cultivation of intellect and judgment" and believes that this will come with the individual's effort to know the truth.²⁰ He sees in freedom, generally, and in freedom of expression, particularly, the value to the individual of self-expression and self-creation and of exposure to a diversity of views and lifestyles.²¹

And so beneath Mill's apparently instrumental and contingent argument in support of freedom of expression is a belief in the value of participation in social discourse to the expression and development of the individual as a rational reflective agent. Insofar as Mill believes the freedom to be valuable for non-instrumental reasons, it ceases to be an argument against him that truth may not always win out in the free exchange of ideas. For even if the freedom does not always lead to the truth, it is vital to the expression and development of human agency.

B. *The Privileged Position of the Printed Word*

For Milton and Mill the emergence of truth and the expression and development of reason require that the individual be free to speak and write his/her

¹⁷*Ibid.* at 20.

¹⁸In the introduction to *On Liberty*, *supra*, note 11 at 70, Mill says that he regards "utility as the ultimate appeal on all ethical questions;" but to this he adds that "it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being."

But even before he introduces his argument, Mill, *supra* at 57, quotes from Wilhelm von Humboldt, *Spheres and Duties of Government*:

The grand, leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity.

¹⁹Mill, *ibid.* at 97.

²⁰*Ibid.*

²¹Mill's view is echoed by the Supreme Court of Canada in *Irwin Toy*, *supra*, note 3 at 968: "[I]n a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."

opinions. In their writing about freedom of expression Milton and Mill are concerned principally with the freedom to produce and distribute books, pamphlets, newspapers and other printed materials without interference from the state. Their concern is with state efforts to suppress new and challenging ideas by interfering with an author's opportunity to present his/her views and the reader's opportunity to reflect on this material and to reach his/her own judgment about its truth.²²

In the theory and doctrine which have been built upon the writings of Milton and Mill, the "word," and more particularly the printed word, is the paradigm of expression. This follows from the emphasis Milton and Mill place on the discovery of truth. Words are instruments which enable individuals to make statements (to describe the world and to convey their ideas) the truth of which can be debated and judged. Whether printed or spoken, words effectively convey ideas and information, and encourage reflection and reasoned judgment on the part of both the speaker/author and the listener/reader. Indeed, Milton regards the printed word as the expression of reason:

[B]ooks are not absolutely dead things, but do contain a potency of life in them to be as active as that soul whose progeny they are; nay they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them. ... [U]nless wariness be used, as good almost kill a man as kill a good book: who kills a man, kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself, kills the image of God, as it were, in the eye.²³

The power of the printed word to reach large audiences, to articulate complex ideas and to present arguments in a clear, rational and dispassionate way makes print the more significant means of discussion, persuasion and truth development.²⁴ In contrast to the spoken word, the printed word "is easier to

²²However, it is worth noting that Mill also takes seriously the problem of private censorship. He recognizes that, for those who are not financially independent, social pressure to conform can be as significant a censor as state prohibition: "men might as well be imprisoned as excluded from the means of earning bread" (*supra*, note 11 at 93). This particular insight of Mill's, though, does not seem to have been taken up by those who have adopted his account of the freedom. One reason Mill's concern about private censorship may have been forgotten is that freedom of expression, particularly in the United States, is thought of as a constitutional principle, with the result that it is often assumed to be simply a right of the individual against the state.

The more modern concern with "private censorship" has to do with the power of a small group of property owners — the owners of the mass media — to restrict access to the effective means of communication in our society.

²³Milton, *supra*, note 9 at 6.

²⁴As Milton writes *ibid.* at 34:

When a man writes to the world, he summons up all his reason and deliberation to assist him; he searches, mediates, is industrious, and likely consults and confers with his judicious friends; after all which done, he takes himself to be informed in what he writes, as well as any that wrote before him; if in this, the most consummate act of his fidelity and ripeness, no years, no industry, no former proof of his abilities, can bring him to that state of inaturity, as not to be still mistrusted and suspected, unless he carry

verify or refute, and it is invested with an impersonal and objective character ...²⁵ As Roland Barthes writes, the individual in writing “think[s] better, more firmly”; she/he thinks less for the other and “more for the ‘truth’.”²⁶ Although the writer must imagine an audience to whom she/he is writing and the reader must imagine an author, “[w]riting and reading are solitary activities that throw the psyche back on itself.”²⁷ In the view of Walter Ong, because “[w]riting separates the knower from the known” it permits “the conditions for ‘objectivity,’ ... personal disengagement or distancing.”²⁸

Oral communication is less likely to be oriented simply to the conveyance of ideas and information, to the expression of reason. According to Ong, it is “performance-oriented,”²⁹ “embedded in the human life world, connected with action and struggle.”³⁰ Oral communication is more likely to be spontaneous, impulsive, emotional because it is more closely connected with the immediate context:

Spoken utterance is addressed by a real, living person to another real, living person or real, living persons, at a specific time in a real setting which includes always much more than mere words. Spoken words are always modifications of a total situation which is more than verbal. They never occur alone in a context simply of words.³¹

Generally then, communication by print is more individualized and more distanced from immediate circumstances and so allows space for more thoughtful reflection by the reader and correction by other writers. Oral communica-

all his considerate diligence, all his midnight watchings, and expense of Palladin oil, to the hasty view of an unlesured licenser, perhaps much his younger, perhaps far his inferior in judgment, perhaps one who never knew the labour of bookwriting ...

While the dominant flow in the writings of Milton and Mill is a concern for the realization of truth there is, of course, an undercurrent which runs against this flow and which sees self-expression as an important value. In this undercurrent the importance of speech is enhanced because it *appears* to be an immediate and direct expression of the individual. See *infra*, note 60 and accompanying text.

²⁵N. Postman, *Amusing Ourselves To Death* (New York: Penguin Books, 1986) at 21:

In the academic world, the published word is invested with greater prestige and authenticity than the spoken word. What people say is assumed to be more casually uttered than what they write. The written word is assumed to have been reflected upon and revised by its author, reviewed by authorities and editors.

A similar hierarchy exists in judicial decisions. An oral judgment is considered less precise and less significant as precedent than written reasons.

²⁶*The Grain of the Voice* (New York: Hill and Wang, 1985) at 6.

²⁷*Orality and Literacy* (New York: Methuen, 1982) at 69.

²⁸*Ibid.* at 46.

²⁹*Ibid.* at 44. See also E. Havelock, *The Muse Learns to Write* (New Haven: Yale University Press, 1988) at 38.

³⁰Ong, *ibid.* at 101. And *supra* at 43-44: “Writing fosters abstractions that disengage knowledge from the arena where human beings struggle with one another.”

³¹*Ibid.*

tion, on the other hand, is more likely to deviate from the conditions of rational discourse (conditions exemplified by print communication). Oral communication is more likely to involve circumstances which exclude or limit the opportunity for rational reflection and permit an irrational or emotional response. The audience's natural reason is more likely to be distorted by the passion and immediacy of the spoken word.

C. Reason, Manipulation and Censorship

Classical doctrine rejects the claim that ideas and information may justifiably be censored when they are incorrect or when individuals might act upon them and cause harm to others.³² Generally, when there is concern expressed about the harm that may be caused by misleading or untruthful ideas and information, the classical response is not censorship but more communication. The better approach is to open up debate and to make available to readers additional ideas and information so that they can judge for themselves.

According to the classical view communication does not deserve protection from state censorship when it is no longer simply the expression of reason given to the reflective judgment of the audience. In classical doctrine rational agency is viewed as the ordinary human condition. However, rationality can be distorted (human judgment can be manipulated) in certain circumstances. When these circumstances are present the justification for constitutional protection of communication disappears. The use of language to deceive or manipulate others is denied protection under classical doctrine as an abuse of the process of communication, as a distortion of the exercise of natural reason. The classic example of manipulation or deception through communication is the false yell of "fire" in a crowded theatre. This sort of deception is appropriately restricted as an abuse of the communicative process. It involves a clear deviation from the conditions of rational discourse. It involves an intention on the part of the speaker to deceive and it permits the audience only a limited opportunity to assess the truth or value of the statement before acting. This sort of deception

³²The classical view is expressed by the majority of the Supreme Court of Canada in *Irwin Toy*, *supra*, note 3 at 975:

If the government is to assert successfully that its purpose was to control a harmful consequence of the particular conduct in question, it must not have aimed to avoid, in Thomas Scanlon's words ("A Theory of Freedom of Expression," in Dworkin, ed., *The Philosophy of Law* (1971), at p. 161):

a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

draws its power and its danger from its resemblance to ordinary communication.³³

At some point speech which is hostile and abusive towards the listener becomes so provocative and offensive that the state may properly suppress it to spare the listener. Such speech is meant to insult and not to contribute to rational debate; it is immediate, emotional and provocative. In terms once used by the United States Supreme Court, the use of "fighting words" is more like the performance of an act than the communication of an idea or belief. The speech/conduct distinction, which has in the past been used by the United States Supreme Court to define the scope of the freedom's protection, may be, at least in part, a distinction between, on the one hand, those instances of oral communication which are immediate and performance-oriented, and, on the other hand, print communication and those instances of oral communication which are meant to convey ideas and information to a reflective audience.

The state may also act to suppress speech which directs abuse not at the audience but at another person or group, if that speech is meant to "stir up" the audience and encourage them to commit some harmful act against the particular person or group. Mill offers, as an example of a situation in which state intervention is appropriate, the fiery speech condemning the corn merchant which is delivered to an angry and excited crowd near the merchant's home (which he contrasts with the publication in the press of the same statement):

[E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the *press*, but may justly incur punishment when delivered *orally* to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard (emphasis added).³⁴

In the latter case the speaker is inciting the crowd to a violent act or perhaps even leading the crowd in the commission of the act. The speaker is a participant (an actor) and not simply an advocate seeking to persuade others of the rightness of a particular view or course of action.

However, if a speech is delivered in such a way that the audience is still capable of reflection and judgment and is able to separate ideas from invective, reason from emotion (so that the speech is like a printed text) then censorship would not be justified. Advocacy is protected, while incitement is not.³⁵

³³For example, lying is only effective and dangerous because it uses the communicative process which ordinarily is used to make sincere claims. A lie may not only harm the audience in a variety of ways but as well it may damage social discourse, because it may erode the public's general confidence in the sincerity of expressed views.

³⁴Mill, *supra*, note 11 at 119.

³⁵Brandeis J. in *Whitney, supra*, note 15 at 377 states the classical view:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from

The distinction between rational and manipulative communication is central to classical doctrine's definition of the scope and limits of the freedom. Classical doctrine seeks to isolate deception and manipulation from the general background of the expression of ideas and information for the reflection and judgment of others. Yet it offers only vague accounts of the nature of rational agency, the circumstances that may distort or suppress human reason, and the kind of "space" that is necessary to the exercise of human reason. And so classical doctrine is unable to say very much about the occasions when censorship is justified, because the communication is manipulative and the members of the audience are not able to make judgments for themselves. The ambiguity of the idea of manipulation and the flexibility of the category of manipulative action always threaten to erode or even undermine classical doctrine's commitment to individual reason and judgment.³⁶

II. Changes in Classical Theory and Doctrine

A. *Two Important Changes to Classical Freedom of Expression*

In this century, freedom of expression doctrine has undergone two important and related changes. The first change has come with the realization that a

speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

³⁶Some of the problems with the central distinction of classical freedom of expression doctrine between reasoned argument, on the one hand, and incitement or manipulation, on the other hand, are illustrated by the "clear and present danger" cases of the United States Supreme Court which were decided at the beginning of this century. Generally, in these cases the American Supreme Court rests its decision that state censorship is justified on the conditions of communication, particularly the inadequacy of the audience's opportunity to make a reasoned judgment about the message being conveyed. But the Court is often unclear as to what conditions are necessary before the audience can safely be exposed to the speech or writing in question.

While in its rhetoric the Court maintains a commitment to the classical idea that truth will emerge through free and open discussion, sometimes the conditions necessary for the rational consideration of different ideas seem to involve more than simply the opportunity for reflection and reply permitted by the printed word. In these cases it does not seem to matter that the audience has the time and space to make a reasoned judgment. The Court's real concern seems to be the seriousness of the harm that might occur if the audience accepted the argument presented to them. War, for example, was not so much a condition that would distort natural reason as a circumstance that made the risk of mistaken judgment too great. The Court's faith in the general population's capacity to make reasoned judgments and its commitment to the "marketplace" of ideas depended on the seriousness of the harm that would occur if the audience did not make the correct judgment. In these cases "immediacy" is a matter of the seriousness of the harm risked rather than the lack of time allowed the audience to make a reasoned assessment of the message conveyed. See for example the judgment of Holmes J. in *Schenk v. United States*, 39 S.Ct.R. 247 (1918) at 249.

small number of private (non-state) actors have considerable power to control the flow of ideas and information in the community. Because the most important means of public communication are privately owned, simply prohibiting the state from interfering with private communicative activity will not guarantee a vigorous and balanced debate on important social issues. Although freedom of expression doctrine remains focussed on state acts of censorship, Canadian and American courts, in several recent decisions, have shown an awareness of the problem of "private censorship" and have recognized the legitimacy of legislative acts compelling the private owners of communicative fora to permit public communication on/with their property.³⁷ On a few occasions, the courts have even gone so far as to rule that freedom of expression requires private owners to make their properties available for public communication.³⁸

More significant, though, has been the change in the classical account of the value of the freedom and the related change in the definition of the freedom's scope. No longer is the (almost) exclusive emphasis of freedom of expression theory on the contribution of the freedom to the discovery of truth. Courts and commentators now speak of self-expression, autonomy and democracy (sometimes all at once) when they explain the value of the freedom.³⁹ This enlargement of the classical justification reflects changes in our understanding of language and communication.⁴⁰

B. The Classical View of Language

According to classical theory, freedom of expression is valuable because it is through the exchange of ideas and information that we come to have a more complete and accurate knowledge of the world. However, the proper function of communication is distorted when an individual tries to deceive his/her audience with false claims, or when he/she communicates to his/her audience in circumstances which allow the audience little opportunity before acting to reflect upon, and judge, the truth of the statements put to it. For classical doctrine the distinction between, on the one hand, expression which appeals to reason and, on the other hand, manipulation, and other forms of "conduct" which distort the

³⁷See R. Moon, "Freedom of Expression and Property Rights" (1988) 52 Sask. L. Rev. 243.

³⁸See R. Moon, "Access to Public and Private Property under Freedom of Expression" (1988) 20 Ottawa L. Rev. 339. This shift is part of a larger change in our understanding of rights and freedoms and the duties of state and private actors.

³⁹Ford, *supra*, note 2 at 765-67; Irwin Toy, *supra*, note 3 at 976.

⁴⁰This enlargement of the theory has its seeds in the arguments of Milton and Mill. Both writers value not simply truth but more importantly (if less explicitly because it is the foundation) the capacity to know truth, to reason.

Some writers focus on a particular idea — "democracy" and others see the justification as cumulative. I have suggested that all these ideas reflect different aspects of a deeper idea — the constitutive character of discourse. See R. Moon, "The Scope of Freedom of Expression" (1985) 23 Osgoode Hall L.J. 331.

natural reason of the individual and undermine the effort to discover truth, provides the line which defines the scope of the freedom.

Classical theory relies on the fairly simple idea of language as a transparent medium which the individual speaker or writer can use to describe a state of affairs in the world or to express outwardly his/her inner thoughts and feelings.⁴¹ Words are instruments which enable an individual, a conscious thinking being, to present his/her ideas and beliefs to an audience and to appeal to their reasoned judgment.⁴² Words represent different things — objects, ideas and feelings. The meaning of a word is what it refers to, what it designates. The listener/reader understands the words the speaker/writer has selected when she/he knows what each word designates — the distinct thing or idea to which each word refers.⁴³ Truth is the central concept in this view of language and meaning. It may be asked of any statement whether it is true or false, *i.e.*, is it an accurate statement about world: does the statement's proposition truthfully describe or represent reality — is it true that "the earth is flat" or that "he is angry."

C. *Changing Views of Language*

The simple instrumental view of language reflected in classical doctrine no longer seems plausible.⁴⁴ It is now recognized that linguistic communication embraces more than just assertions of fact which may be judged as either true or false. With language we ask questions, give commands, make promises and perform a whole range of other activities.⁴⁵ But more deeply, language is now

⁴¹Obviously there is a degree of oversimplification here. There are different currents running through the writings of Milton and Mill and classical theory in general. Indeed, the primacy of writing in classical theory suggests some awareness that the act of expression (at least in the case of writing) involves articulation or formulation of ideas by the writer.

⁴²See Charles Taylor in *Human Agency and Language: Philosophical Papers 1* (Cambridge: Cambridge University Press, 1985) at 250 [hereinafter *Human Agency*].

T. Eagleton, *Literary Theory* (Oxford: Blackwell, 1983) at 115 speaks of:

the classical 'contractual' model of language, according to which language is just a sort of instrument essentially isolated individuals use to exchange their pre-linguistic experiences.

See also A. Hutchinson, "Talking the Good Life: From Free Speech to Democratic Dialogue" (1989) 1 *Yale J. of L. & Liberation* 17 at 23.

⁴³See Taylor, *ibid.* at 226.

⁴⁴At the end of a century of philosophy which has been obsessed with language and meaning, it is impossible to maintain a simple instrumental account of these things.

⁴⁵J.L. Austin, *How To Do Things With Words* (Oxford: Oxford University Press, 1975).

G. Steiner, *After Babel* (London: Oxford University Press, 1975) at 220:

[t]he great mass of common speech-events, of words spoken and heard, does not fall under the rubric of 'factuality' and truth Statistically, the incidence of 'true statements' — definitional, demonstrative, tautological — in any given mass of discourse is probably small. The current of language is intentional, it is instinct with a purpose with regard to audience and situation. It aims at attitude and assent. It will, except on specialized occasions of logically formal, prescriptive, or solemnized utterance, not

seen as having an expressive or creative dimension as well as a designative dimension.⁴⁶

Language is not simply a way of representing or describing the existing world of objects, ideas, feelings. It is not simply a reflection of the natural order, with different words corresponding to the natural parts of the world. There is no natural or necessary link between a word (the signifier) and what it designates (the signified). Language is rather a way of articulating or organizing the world. In the words of Jonathan Culler: "Languages do not simply name existing categories, they articulate their own."⁴⁷ Meaning cannot be fully separated from the language or other symbolic form in which it is expressed, "because meaning is only manifest in this form."⁴⁸

Using language an individual is able to articulate his/her ideas and feelings. An individual's ideas only take shape, only properly exist, when expressed in language or another symbolic form.⁴⁹ It is in this sense that language (or expression in general) is constitutive of thought. In giving symbolic form to his/her ideas and feelings an individual manifests these to others and to him/herself.⁵⁰

convey 'truth' or 'information of facts' at all. We communicate motivated images, local frameworks of feeling. All descriptions are partial. We speak less than the truth, we fragment in order to reconstruct desired alternatives, we select and slide. It is not 'the things which are' that we say, but those which might be, which we would bring about, which the eye and remembrance compose. The directly informative content of natural speech is small.

⁴⁶Taylor, *Human Agency*, *supra*, note 42 at 263. See also Moon, *supra*, note 40 at 347-48.

⁴⁷J. Culler, *Saussure* (London: Fontana, 1976) at 22. And *supra* at 24:

[T]he fact that these concepts or signifieds are arbitrary divisions of a continuum means that they are not autonomous entities, each of which is defined by some kind of essence. They are members of a system and are defined by their relations to other members of that system.

Eagleton notes, *supra*, note 42 at 108:

Reality was not reflected by language but *produced* by it: it was a particular way of carving up the world which was deeply dependent on the sign-systems we had at our command, or more precisely which had us at theirs.

⁴⁸Taylor, *Human Agency*, *supra*, note 42 at 221. As Steiner observes, *supra*, note 45 at 240:

Because all human speech consists of arbitrarily selected but intensely conventionalized signals, meaning can never be wholly separated from expressive form. Even the most purely ostensive, apparently neutral terms are embedded in linguistic particularity, in an intricate mold of cultural-historical habit. There are no sources of absolute transparency.

⁴⁹See Taylor, *ibid.* at 229. Also Steiner, *ibid.* at 82:

Language does not convey a pre-established or separately extant content, as a cable conveys telegraphic messages. The content is created in and through the dynamics of statement.

⁵⁰Taylor, *ibid.* at 256-57:

[I]n language we formulate things. Through language we can bring to explicit awareness what we formerly had only an implicit sense of. Through formulating some matter, we bring it to fuller and clearer consciousness. ...

Speaking and writing involve more than the selection of words which correspond to the communicator's ideas. The activities of speaking and writing are the expression and the realization of reflective consciousness.⁵¹ Human agency emerges in the effort to articulate thought and feeling and in the effort to understand the expression of others.

Language, in particular, and symbolic communication, in general, enable us to give form to our feelings and ideas and to "bring them to fuller and clearer consciousness" but also to place them in a "public space" before "us."⁵² To express something is to enter with others into dialogue.⁵³ The activity of communication serves to establish different relations with other members of the community.⁵⁴

This understanding of linguistic communication, as the way an individual expresses/realizes him/herself as a conscious agent, supports a new view of the justification for freedom of expression. Freedom of expression still matters because it contributes to the spread of ideas and information and to the growth of knowledge and the realization of truth. But at a more fundamental level, freedom of expression may now be seen as valuable because it is through communication that the individual develops and emerges as an autonomous agent in the positive sense of having the capacity to consciously direct his/her life. It is through participation in social discourse that an individual gives shape to his/her ideas and aspirations and becomes capable of reflection and judgment about the world and about him/herself. It is through communication that an individual places him/herself in the community, creating different kinds of relationships with other community members.⁵⁵ Whether the justification of the freedom is

Finding an adequate articulation for what I want to say about these matters [how I feel or how something looks] brings them in focus. To find a description in this case is to identify a feature of the matter at hand and thereby to grasp its contour, to get a proper view of it.

And, *supra* at 233, he explains that language gives form to our ideas but also to our feelings. It provides new ways of feeling, of responding to things. In expressing his/her feelings an individual gives them a reflective dimension which transforms them. In language an individual's feelings can become more powerful, more refined, more self-aware. To illustrate, the "language user can feel not only anger but indignation, not only love but admiration."

⁵¹See *ibid.* at 229.

C.O. Schrag, *Communicative Praxis and the Space of Subjectivity* (Bloomington: Indiana University Press, 1986) at 171: "Consciousness is given birth in the dialogic and actional encounters with other subjects, and it is able to sustain itself only within such encounters."

⁵²Taylor, *ibid.* at 259.

⁵³See *ibid.* at 234.

Eagleton, *supra*, note 42 at 117: "Language was to be seen as inherently 'dialogic': it could be grasped only in terms of its inevitable orientation towards another."

⁵⁴See Taylor, *ibid.*

⁵⁵Compulsion to communicate can only be understood as a wrong (as a violation of freedom of expression) if we recognize the constitutive character of discourse. Only if we recognize how closely an individual and his/her identity are connected with what she/he says can we understand

described in terms of “democracy,” “autonomy” or “self-expression,” the core idea is the same: that the individual’s freedom to participate in different forms of discourse is vital to his/her life and development as an autonomous agent capable of reflection and judgment.⁵⁶

D. *Judicial Adjustments to Classical Theory and Doctrine*

In the United States a variety of cases involving “symbolic speech” have brought the expressive dimension of communication to the fore.⁵⁷ Wearing a black arm band and burning a flag have been seen by the courts as significant political statements which deserve constitutional protection from state restriction.⁵⁸ In the late 1960s these acts were understood to express opposition to the war in a powerful way.⁵⁹

Once the American courts had extended the protection of the First Amendment to different forms of “symbolic speech” because of their expressive significance, it was inevitable that they would come to recognize the expressive significance of the words chosen to convey a particular message. As the United States Supreme Court states in *Cohen v. California*:

why compelled expression is experienced as an invasion of the person. If freedom of expression only mattered because of its contribution to the realization of truth, then censorship might be wrong, but it is not clear that compelled expression would be wrong. See *supra*, note 37 at 250-53.

⁵⁶I have developed this claim in “The Scope of Freedom of Expression,” *supra*, note 40.

⁵⁷This extension of the freedom’s protection has occurred even though the First Amendment of the American Constitution refers only to freedom of the *press* and to freedom of *speech*. It appears that with this joint reference to the press and to speech, the constitutional framers meant to cover the field of communication or expression as they understood it — the spoken and printed (or written) word. It is true that in modern American constitutional jurisprudence the free speech clause does most of the work, and is thought to cover all forms of communication including the printed word. But the lesser importance of the freedom of the press clause is due to the United States Supreme Court’s interpretation of the clause as a grant of constitutional protection to the institution of the press rather than simply to the printed word as a means of communication. In the 18th century, when the Bill of Rights was drafted, the “press” was reasonably decentralized so that there was no real distinction between, on the one hand, the press as an institution and, on the other hand, communication by printed word.

S. 2(b) of the *Charter* refers to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” which indicates that freedom of the press is simply the freedom to use the press to communicate and is encompassed by the general freedom of expression. Clearly the “press” as an institution has no special rights or privileges under the *Charter*.

⁵⁸*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Spence v. Washington*, 418 U.S. 405 (1974).

⁵⁹*Spence v. Washington*, *ibid.* at 410:

A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behaviour, but it would have been difficult for the great majority of citizens to miss the drift of appellant’s [Spence’s] point at the time that he made it.

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.⁶⁰

In this and other cases, language, and other forms of communication, are viewed not simply as instruments in the search for truth but also as ways of expressing one's deeply held feelings. As self-expression has become a central concern in freedom of expression theory, the significance of the spoken word has grown. While the advantage of the printed word is that it permits the careful articulation of ideas, the advantage of oral communication is that it seems to permit the "direct" and "immediate" expression of the individual's ideas and feelings.⁶¹ The daily activities of an individual are performed using speech, and gesture.

The language of s. 2(b) of the *Charter*, which refers to freedom of "expression,"⁶² supports the extension of the freedom's protection beyond the spoken and written word. The majority judgment of the Supreme Court of Canada in *Irwin Toy* recognizes this:

⁶⁰403 U.S. 15 (1971) at 26.

⁶¹But as Eagleton observes, *supra*, note 42 at 130, whether spoken or written, words are not simply the property of the individual communicator:

[I]n the act of speaking I seem to 'coincide' with myself in a way quite different from what happens when I write. My spoken words seem immediately present to my consciousness, and my voice becomes their intimate, spontaneous medium. In writing, by contrast, my meanings threaten to escape from my control: I commit my thoughts to the impersonal medium of print, and since a printed text has a durable material existence it can always be circulated, reproduced, cited, used in ways which I did not foresee or intend. Writing seems to rob me of my being: it is a second-hand mode of communication, a pallid, mechanical transcript of speech, and so always at one remove from my consciousness. ... Behind this prejudice lies a particular view of 'man': man is able to spontaneously create and express his own meanings, to be in full possession of himself, and to dominate language as a transparent medium of his inmost being. What this theory fails to see is that the 'living voice' is in fact quite as material as print; and that since spoken signs, like written ones, work only by a process of difference and division, speaking could be just as much said to be a form of writing as writing is said to be a second-hand form of speaking.

⁶²*Supra*, note 1, s. 2:

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written and spoken word, the arts and even physical gestures and acts.⁶³

In *Irwin Toy* the majority adopts the view of Thomas Emerson that,

[t]he theory [of freedom of expression] grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of *reason*, and his prospects of creating a rational and enlightened civilization virtually unlimited.⁶⁴

But to this classical understanding of the freedom the Court adds the dimension of self-expression — the importance of the manifestation of self through the expression of opinion:

Freedom of expression was entrenched in our Constitution ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is ... "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.⁶⁵

The Supreme Court's reconception of the classical justification of the freedom emphasizes the importance to the individual of the opportunity to express and develop him/herself through his/her communication with others. Communication is seen as both the conveyance of information and opinion to others and the expression or manifestation by the individual of idea and feeling and, more generally, of personal identity.

E. The Limits of Theoretical and Doctrinal Change

Yet, in spite of the enlargement of the freedom's scope to include different forms of "symbolic speech" and the shift from truth to self-expression as the justification for the freedom, the courts remain attached to many of the assumptions of classical theory and to the established categories of classical doctrine. The courts' attachment to this familiar framework has inhibited the more complete transformation of freedom of expression theory and doctrine which is called for by contemporary conceptions of language and human agency.

1. The Social Dimension of the Freedom

Inasmuch as the courts' revised account of the freedom's justification emphasizes the individual, her/his *self-expression* and *self-development*, it appears to retain the idea of a human agent whose ideas and personality are

⁶³*Irwin Toy*, *supra*, note 3 at 969.

⁶⁴*Ibid.* at 970 quoting T. Emerson, "Towards a General Theory of the First Amendment" (1963) 72 Yale L.J. 877.

⁶⁵*Irwin Toy*, *ibid.* at 968.

formed without language and prior to communicative interaction. Language, and in particular the spoken word, is seen as a medium for expressing the existing inner ideas and feelings of the individual. In this account there is a failure to recognize the constitutive character of discourse and the social dimension of the freedom. There is a failure to see that freedom of expression is valuable because individuals are partly constituted by their communicative interaction with others.⁶⁶

Language is not a transparent medium. It is not a set of instruments which an individual uses to express his/her pre-linguistic ideas and feelings. Our ideas and our feelings are partly constituted by their articulation in language and other symbolic forms. An individual's identity is deeply social in nature because it is shaped by the social activity of linguistic expression — the activity of articulating ideas and feelings and placing them in a public space and the activity of reflecting upon the expression of others — and because it is shaped by a language that develops and evolves in a community and that belongs to a community of speakers before it belongs to an individual.⁶⁷

This the Supreme Court seems to recognize in *Ford* when it decides that language choice is protected as a matter of freedom of expression under the *Charter*:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language, if one is prohibited

⁶⁶Moon, *supra*, note 40 at 345.

⁶⁷In the words of Eagleton, *supra*, note 42 at 63: "Language always pre-exists the individual subject, as the very realm in which he or she unfolds". And *supra* at 71:

[T]he meaning of my words is not determined by my private intentions ... I cannot just choose to make my words mean anything at all ... The meaning of language is a social matter: there is a real sense in which language belongs to my society before it belongs to me.

But, of course, as Steiner notes, the individual is not simply a product of his/her language. Meaning has a private or personal dimension as well as a public dimension, *supra*, note 45 at 170:

No two human beings share an identical associative context. Because such a context is made up of the totality of an individual existence, because it comprehends not only the sum of personal memory and experience but also the reservoir of the particular subconscious, it will differ from person to person. There are no facsimiles of sensibility. No twin psyches. All speech forms and notations, therefore, entail a latent or realized element of individual specificity. They are in part an idiolect. Every counter of communication carries with it a potential or externalized aspect of personal content.

And *supra* at 172:

Active inside the 'public' vocabulary and conventions of grammar are pressures of vital association, of latent or realized content. Much of this content is irreducibly individual and, in the common sense of the term, private. When we speak to others we speak 'at the surface' of ourselves. We normally use a shorthand beneath which there lies a wealth of subconscious, deliberately concealed or declared associations so extensive and intricate that they probably equal the sum and uniqueness of our status as an individual person.

from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.⁶⁸

The Court notes the connection between the form and content of communication and the importance of language to the individual's identity. The language used by an individual shapes the ideas she/he expresses and places him/her within a community of language speakers.

The Supreme Court's decision in *Ford* recognizes not just the individual's right to communicate in the language of his/her choice but also the importance of a linguistic community to the expression and identity of the individual. In upholding the Quebec government's *requirement* that the French language be used on all commercial signs (while rejecting the *prohibition* of languages other than French), the Court recognizes that the government has a legitimate interest in seeking to preserve the position of the French language community in the Province of Quebec.⁶⁹

In *Ford* and other cases, the courts' recognition of the constitutive character of language does not seem to result in any significant changes to its understanding of the theoretical foundation of the freedom. But the importance of language and other forms of expression to the realization and development of the individual, suggests that the good of the individual is a *social* matter. It suggests that his/her identity is constituted in part by his/her participation in public discourse. It suggests also that reflective consciousness emerges through social (communicative) interaction, through the expression of ideas and feelings and through the effort to understand the expression of others in the community.⁷⁰ As

⁶⁸*Ford*, *supra*, note 2 at 748.

The Court, *supra* at 750, also quotes from J.A. Fishman, *The Sociology of Language* (Rowley, Mass.: Newbury House, 1972) at 4:

[L]anguage is not in merely a means of interpersonal communication and influence. It is not merely a carrier of content, whether latent or manifest. Language itself is content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.

⁶⁹The better justification for compelling the use of French may be the history of economic dominance in Quebec by English speakers which has meant that members of the French speaking majority had to conduct their business in English. With the legislative establishment of French as the language of business the political majority decides the question rather than the economically powerful minority.

⁷⁰In "The Scope of Freedom of Expression," *supra*, note 40, I argue that those theories which support freedom of expression on the ground that it is necessary to democracy or that it is an aspect of autonomy, only make sense if they assume the constitutive character of discourse — the social character of human development and flourishing.

Freedom of expression is thought to contribute to democracy because we value participation in the collective enterprise and because we recognize that individuals develop as reflective beings (as capable citizens) through communicative interaction. Freedom of expression is important to autonomy because the capacity to give direction to one's life is expressed/realized in the individual's participation in collective discussion and deliberation.

Michael Sandel has observed *self*-understanding involves more than introspection. It also involves the expression of ideas and feelings in a public space for shared contemplation.⁷¹

2. The Scope of the Freedom

Not only have courts and commentators generally failed to recognize the social character of an “expressive” or “constitutive” understanding of freedom of expression, but as well, they have failed to see that such an account of the freedom makes the definition of its scope and limits difficult. The courts’ focus remains fixed on the printed and spoken word, although the printed word is no longer privileged (the status of the spoken word is enhanced because it is thought to express more directly than the printed word the feelings and ideas of the individual). The spoken and printed word are viewed as the instruments an individual uses to express his/her opinions and make them available for the reflection and judgment of his/her audience. Different forms of “symbolic” expression, are also protected because like the spoken and printed word they are thought to convey/express ideas and feelings.⁷²

But with contemporary views of language and communication the division between expression and conduct becomes less clear. On the one hand, the courts must come to grips with the fact that language is not a neutral or transparent medium so that the absence of state censorship guarantees neither fair and balanced discussion nor wise individual and collective judgment. On the other hand, the courts must recognize that the expressive character of symbolic forms such as physical gestures or visual images may be different from that of the spoken and printed word in significant ways.

Unfortunately some of the rhetoric of these theories (process rhetoric in the case of democratic theories and individualist rhetoric in the case of autonomy theories) does not always fit with the assumptions which underlie the theories.

⁷¹M. Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982) at 181:

For persons encumbered in part by a history they share with others ... knowing oneself is a more complicated thing. It is also a less strictly private thing. Where seeking my good is bound up with exploring my identity and interpreting my life history, the knowledge I seek is less transparent to me and less opaque to others. Friendship becomes a way of knowing as well as liking.

⁷²In the American jurisprudence the spoken/written word model is emphasized by the term “symbolic speech.”

Like words, certain gestures or acts are seen as vehicles for conveying an idea. For example, in a case like *Spence v. Washington*, *supra*, note 58, which concerned the act of superimposing a peace symbol on to an American flag, the United States Supreme Court described the case in this way, *supra* at 411: “We are confronted then with a case of prosecution for the expression of an idea through activity.”

a. *Language, Reason and Manipulation*

The recognition that the value of freedom of expression lies in the constitutive character of discourse points to a tension in the freedom which reflects the idea of language as both “enabling” and “constraining.” Language makes expression possible. It gives the individual a way of articulating or formulating his/her ideas and feelings. But because language is not simply a transparent vehicle for a speaker/writer’s ideas, the meaning of a speaker/writer’s words is not entirely within her/his control, and is not simply a matter of his/her pre-linguistic intentions. The creation of meaning through the use of language is an intentional act; yet the meaning of an individual’s expression is not exhausted by his/her intentions.⁷³ In an important way the public understanding of the words used creates and confines the meaning of the individual’s communicative actions.

The language with which an individual expresses him/herself shapes what he/she says. But more than this, his/her language shapes what he/she thinks and feels. When we use language we give form to our inchoate ideas and feelings and make them available to ourselves and to others for reflection. Because our thoughts and feelings are partly constituted by the language of their expression, we cannot simply stand apart from the words we use to express ourselves in order to determine whether or not they match our real feelings or the way the world really is. To use a language is, in some sense, to assume the world view, the partial perspective, of the particular linguistic community. We are shaped by language at the same time that we shape language.⁷⁴

In classical doctrine’s distinction between expression and manipulation is a recognition that language can be used in ways that discourage or by-pass reflection by the audience — in ways that are not transparent to human reason.

⁷³T. Hawkes, *Structuralism & Semiotics* (Los Angeles: University of California Press, 1977) at 131:

What filled it [the sign] (with signification) is a combination of my intent and the nature of society’s conventional modes and channels which offer me a range of vehicles for the purpose.

⁷⁴Taylor, *Human Agency, supra*, note 42 at 231-32:

[Language] is something in the nature of a web, and to complicate the image, is present as a whole in any of its parts. To speak is to touch a bit of the web, and this is to make the whole resonate. Because the words we use now only have sense through their place in the whole web, we can never in principle have a clear oversight of the implications of what we say at any moment. Our language is always more than we can encompass; it is in a sense inexhaustible. ...

[B]ecause we cannot oversee it, let alone shape it all, our activity in speaking is never entirely under our conscious control. Conscious speech is like the tip of an iceberg. Much of what is going on in shaping our activity is not in our purview. Our deployment of language reposes on much that is preconscious and unconscious.

But the classical distinction seems to assume that there is such a thing as transparent language and undistorted reason that prevails in the absence of manipulative circumstances. However, if these things, transparent language and pure reason, do not exist and if conscious agency is an ideal that can never be fully realized, like perfect self-knowledge and absolute choice, then the distinction between expression and manipulation can never be clear and complete.⁷⁵

The complexity of human agency and reason means that there are not two clearly distinct categories of human action: manipulation and rational expression. Different forms or instances of "communication" will contribute in different ways to the expression/realization of conscious agency, understood as self-awareness and self-direction. Some acts of communication may effectively encourage awareness and understanding of self and the world. Other acts may encourage action by the audience while discouraging an assessment or even an awareness of the reasons for action. Acts of this latter sort may not be deserving of constitutional protection because they do not advance the values which underlie the freedom. But there is no clear and simple line which separates these different kinds of acts. Where (or how) to draw the line may simply be a relative choice the courts must make.

It is here that contemporary understandings of language and agency converge with concerns about the concentration of communicative power. The creation of opportunities for effective communication must follow from the view that participation by the individual in social discourse is a valuable activity. But the redistribution of communicative power seems even more important once we recognize the power of discourse to shape the ideas of the community and its members. If we think that thought and feeling are partly constituted by the forms of expression, then we should be sensitive to the domination of public discourse, the shaping of language, by a small group — by commercial interests through advertising.

Inequality in communicative power is a concern not just because it makes it difficult to respond to particular messages, but in a larger sense because it permits commercial interests to set the tone of public discourse. On the one hand, the domination of public discourse by commercial interests has the effect of marginalizing "radical" views, of making them difficult to formulate and to communicate to an audience, or of transforming or neutralizing them as they enter the public realm. On the other hand, an advertisement which might appear silly or absurd when carefully examined seems to escape critical review because

⁷⁵Schrag, *supra*, note 51 at 175:

Dialogical consciousness, whose presence is always an event and an acquisition, can lose its presence as well as achieve it. It can lose its presence, become absent to itself in its forgetfulness, its self-deception, its unmonitored subordination to the play of political power and ideology — all of which indicate features of communicative praxis under the conditions of finitude and estrangement.

it is no different from the rest of public discourse which is dominated by commercial messages, generally no less absurd or silly.

Concern about the distribution of communicative power is reflected in legislative and judicial efforts to redistribute/redefine property rights through the recognition of rights of access to both state and private properties. Less directly, concern about inequality in communicative power may play a role in the decision whether or not a particular restriction on expression is justified under the terms of s. 1. According to classical doctrine the answer to a false message is not censorship but more expression (expression which responds to the false view); but given the inequality of communicative power in this country, different views may not be forthcoming and so more speech may not always be an adequate answer to the "harm" represented by a false message. This concern may be a factor in the views of those who believe that under s. 1 the state is justified in restricting defamatory statements and hate literature. This concern, I think, has also played a role in the view that commercial expression should not receive the same degree of constitutional protection as other kinds of expression.

b. The Growth of the Freedom's Scope

A related problem raised by the courts' reconception of the freedom's justification concerns the extension of the freedom's scope beyond the spoken and written word. The shift in the theoretical basis of the freedom from the realization of truth to self-expression and self-development makes definition of the freedom's scope difficult. The means by which an individual articulates his/her ideas and feelings are not limited to the spoken and printed word and are potentially unlimited. Indeed, in some sense all human acts can be seen as "self-expressive."

The courts continue to assume that there is something special (and definable) about expression which distinguishes it from other human acts. In *Irwin Toy* the majority of the Supreme Court defines the scope of freedom of expression in the following way: "[I]f the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."⁷⁶ The majority recognizes that "most human activity combines expressive and physical elements" but that "some human activity is purely physical and does not convey or attempt to convey meaning."⁷⁷ The majority

⁷⁶*Irwin Toy, supra*, note 3 at 969.

⁷⁷*Ibid.*:

For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

considers that an act, like double parking, may or may not be a communicative act, depending on whether it is performed for the purpose of conveying a message. However, the majority excludes completely the possibility that a violent act might be considered expression under s. 2(b).⁷⁸

The majority in *Irwin Toy* acknowledges that its approach to the scope of s. 2(b) is “broad” and “inclusive.” The majority seems to assume that this broad category of meaningful human action has a fairly clear boundary.⁷⁹ But once we recognize that expression involves the constitution/realization of self through the articulation of ideas and feelings, it should be clear that this category of constitutionally protected activity has no bright and stable boundary line. There is no simple division between the expression of ideas and feelings, on the one hand, and action or conduct, on the other hand.

Many different forms are used to articulate ideas and feelings — to bring to reflective consciousness and collective attention the variety of human concerns. As Charles Taylor notes:

[W]e cannot draw a boundary around the language of prose in the narrow sense, and divide it off from those other symbolic-expressive creations of man: poetry, music, art, dance etc. If we think of language as essentially used to say something *about* something, then prose is indeed in a category of its own. But once one takes language as being expressive in this way, that is, where the expression constitutes what it expresses, then talking *about* is just one of the provinces constituted by language; the constitution of human emotion is another, and in this some uses of prose are akin to some uses of poetry, music and art.⁸⁰

The standard idea of communication is the representation by an individual of some idea or feeling and the conveyance of that representation to an audience.⁸¹ The person communicating wants his/her audience to recognize that

⁷⁸*Ibid.* at 970. The Court might have relied on s. 1 of the *Charter* to deal with acts of violence which were intended to carry meaning. However, the Court was clearly uncomfortable with the idea of giving an act such as assault (an assertion of power which is in some sense meant to be understood by the victim as such) *prima facie* protection as expression even if restriction under s. 1 was obviously justified. This approach, of course, is fine as long as it is not overextended so that any activity (even clearly expressive activity) is not considered expression under s. 2(b) when it causes harm. For such an approach would undermine the purpose of s. 1 which separates issues of scope from issues of limitation. S. 1 recognizes that the exercise of freedom of expression (and other rights and freedoms) may cause harm and when it does the state *may* be justified in restricting that activity.

⁷⁹However, the Supreme Court of Canada’s pre-emptive exclusion of violent action from the scope of the freedom suggests that the Court was not entirely certain that a clear line could be drawn around the scope of the freedom. It appears that the members of the Court did recognize that if they took a broad view of self-expression, they would soon be faced with embarrassing and offensive claims that sexual and other assaults are protected expression that can only be restricted under the terms of s. 1.

⁸⁰Taylor, *Human Agency*, *supra*, note 42 at 233.

⁸¹*Supra*, note 40 at 351.

he/she is communicating with them and she/he wants them to try and understand the meaning of his/her act. Yet no expressive act is entirely transparent in its meaning to either the actor or the audience. And no human act is without expressive significance and closed to interpretation. There are many different ways to communicate or to express oneself to others (different kinds of meaning), which involve more than simply a straightforward appeal to the conscious, reflective judgment of the audience. A political speech, a dance performance, a gesture, a physical fight, an intimate conversation express/realize human agency in different ways.

The majority in *Irwin Toy*, to prevent the collapse of classical freedom of expression doctrine, attaches the labels "expression" and "manipulation" as conclusions without considering the nature of meaning and communication. Expression is defined in very general terms as the intentional conveyance of a message. The majority avoids the task of defining with any precision the category of meaningful activity, by shifting the focus of review to s. 1 of the *Charter* (and by the pre-emptive exclusion of violent acts from the scope of the freedom). The majority takes an inclusive approach to the scope of s. 2(b) and then relies on s. 1 to justify the restriction of expressive activity when that activity is considered harmful.

F. Present Adjustments and Future Tensions

The courts have made adjustments to classical freedom of expression theory and doctrine which take some account of modern views of language and communication. In recent accounts of the freedom's justification there has been a shift in emphasis from the discovery of truth to self-expression and self-development. In these accounts there is a recognition sometimes explicit, and sometimes not, that human agency is expressed/realized in communicative interaction. Along with this shift in justification there has been an extension of the freedom's scope beyond the printed and spoken word to include other forms of expression.

In spite of these changes, the courts have remained attached to the established categories and distinctions of classical doctrine. They have avoided a careful examination of the scope of the freedom and have maintained a fairly general understanding of expression as the conveyance of meaning. In their definition of the scope of the freedom, the courts have focussed on the spoken and printed word and have simply extended the freedom's protection to include other established forms of symbolic expression which are considered analogous to linguistic communication — which convey a message to an audience.

But is this how music, dance and visual imagery are to be understood — as word substitutes, as simply alternative vehicles for the conveyance of an individual's ideas and feelings? Communication is not a single phenomenon that

can be understood as simply the expression of reasoned opinions or as the conveyance of an individual's pre-articulated ideas and understandings. An individual articulates his/her ideas and feelings through a wide range of "expressive" acts which can, in different and subtle ways, contribute to self-awareness or affect behaviour while discouraging conscious reflection. Once we recognize the variety of communication and the complexity of human agency, all hope seems lost for a simple theory of freedom of expression with a clearly bounded category (or categories) of protected speech and a fixed approach to the justification of limits on the freedom. There is no clearly defined category of ordinary expression which is transparent in its meaning and contrasts sharply with manipulative action which is impenetrable to human reason.

Existing doctrine has generally been flexible enough to deal with the vague concerns courts may have about the general "ideological" character of language or the particular use of language to deceive or manipulate. Language is ordinarily used to state propositions which can be assessed by the listener or reader and so the spoken and printed word are seen to fall within the protection of the freedom. The courts have dealt in a variety of ways with the problem of the concentration of communicative power (the domination of discourse by a small minority), and have sought to open up public discourse to a wider group of participants. The use of language in particular instances to deceive or, in obvious circumstances, to manipulate, has been restricted under s. 1 of the *Charter*.

However, the fundamental change in the character of public discourse, since Milton and Mill and the genesis of classical freedom of expression, necessitates a complete rethinking of established theory. In the last thirty years the visual (and in particular the photographic) image has displaced the printed word as the paradigm of public communication. Commercial visual messages now dominate, indeed define, public discourse. A decision about whether visual imagery (in general or in particular instances) should receive protection under freedom of expression raises a variety of difficult questions concerning the meaning of images, their contribution to reflective agency and their potential to mislead or manipulate.

The categories of classical doctrine have been drawn using the printed word (understood as the expression of reason) as the paradigm of expression. It is not at all clear that visual imagery can be fitted into the existing doctrinal categories. Indeed the courts' attempts to deal with the visual imagery in lifestyle advertising have revealed very clearly the inadequacies of classical doctrine — its simple understanding of expression and human agency and its bright line around the scope of the freedom. The tensions and contradictions which emerge in the cases dealing with lifestyle advertising and other uses of visual imagery may mark the beginning of a more significant transformation of freedom of expression theory and doctrine.

III. The New Paradigm of Public Communication: Visual Imagery and Lifestyle Advertising

A. *The Rise of Visual Imagery*

In the last fifty years the visual image has replaced the printed word as the most significant form of public “communication.” In no other society in history has there been such a concentration of images dominating public discourse.⁸² This dominance is so complete that books, magazines and other forms of print communication have begun to resemble, in presentation and content, visual forms of communication.⁸³

Visual imagery presents difficulties for classical freedom of expression with its simple understanding of human agency and its bright line between expression and conduct. Does visual imagery carry meaning, or at least does it carry meaning in a way that justifies its inclusion within the scope of the freedom? Can it be seen as the articulation or formulation of an idea or a feeling in a public space for an audience to reflect upon? Can it be seen as contributing to the emergence of reflective awareness? It seems plain that the visual image is different from the spoken and printed word in ways that need to be accounted for in freedom of expression doctrine. Neil Postman writes that,

Whenever language is the principal medium of communication — especially language controlled by the rigors of print — an idea, a fact, a claim is the inevitable result.⁸⁴

In this regard visual imagery is different from the printed/spoken word. A visual image does not carry a message in an obvious or direct sense. But as the saying “a picture is worth a thousand words” suggests, a visual image can “communicate” in a way that words cannot.⁸⁵ Visual images are particularly valuable

⁸²See J. Berger, *Ways of Seeing* (London: B.B.C. and Penguin Books, 1977) at 129.

⁸³Postman, *supra*, note 25 at 28:

We are now a culture whose information, ideas and epistemology are given form by television, not by the printed word. To be sure, there are still readers and there are many books published, but the uses of print and reading are not the same as they once were ... Print is now merely a residual epistemology and will remain so, aided to some extent by the computer, and newspapers and magazines that are made to look like television screens.

⁸⁴*Ibid.* at 49. He continues on the same page:

The idea may be banal, the fact irrelevant, the claim false, but there is no escape from meaning when language is the instrument guiding one’s thoughts.

⁸⁵But as Ong points out, *supra*, note 27 at 7:

We have all heard it said that one picture is worth a thousand words. Yet, if this statement is true, why does it have to be a saying?

as supplements to the printed word. A photo or illustration in a novel, textbook or newspaper article can add content and context to the printed word.

B. Art and Expression

Art, and in particular visual art, can be seen as an important manifestation of the human expressive power.⁸⁶ The importance of visual art in our culture reflects “the crucial place that creation/expression has in our understanding of human life.”⁸⁷ Art gives form to human feelings and concerns by making them visible (or audible) and brings them into the public realm for shared contemplation.⁸⁸ A work of art materializes “a way of experiencing” and brings “a particular cast of mind out into the world of objects, where men can look at it.”⁸⁹

The medium is integral to the work of art.⁹⁰ Henri Matisse described the connection between form and meaning in this way:

The purpose of a painter must not be conceived as separate from his pictorial means, and these pictorial means must be more complete (I do not mean more complicated) the deeper his thought. I am unable to distinguish the feeling I have for life and my way of expressing it.⁹¹

While it is true that we experience art and do not simply interpret it, art is not simply human feeling projected on to objects in the world. Artistic expression works through signs and depends on a practice or institution.⁹²

⁸⁶R. Wollheim, *Art and Its Objects* (New York: Cambridge University Press, 1980) at 59: [O]ur disposition to consider inanimate objects as expressive has its roots in certain natural tendencies, i.e. that of producing objects to alleviate, and that of finding objects, to match, our inner states ...

But, adds Wollheim, *supra*:

[I]t is nevertheless evident that by the time we come to our attitude towards objects of art, we have moved far beyond the level of mere spontaneity. To put it at its lowest: what is in origin natural is now reinforced by convention.

This account may in fact underestimate the constitutive character of art. To create a work of art is not simply to reflect an inner state but is to bring something into being.

⁸⁷C. Taylor, *Sources of the Self* (Cambridge: Harvard University Press, 1989) at 376 [hereinafter *Sources*].

⁸⁸See C. Geertz, *Local Knowledge* (New York: Basic Books, 1983) at 99.

⁸⁹*Ibid.*

⁹⁰See Taylor, *Sources, supra*, note 87 at 374.

⁹¹Quoted in Geertz, *supra*, note 88 at 96.

⁹²Wollheim, *supra*, note 86 at 58:

An artist expresses himself if, and only if, his placing one element rather than another on the canvas is a selection out of a set of alternatives; and this is possible only if he has a repertoire within which he operates.

And *supra* at 57:

In order for us to see a work as expressive, we must know the set of alternatives within which the artist is working, or what we might call his ‘repertoire.’

Art is self-consciously about form.⁹³ To view something as a work of art is to see it as human expression formulated in, and shaped by, a particular medium. In calling something a work of art we underline its artificial character. A work of art is meant to be viewed as a human creation and as "the object of an ever-increasing or deepening attention."⁹⁴ Indeed according to some contemporary views, an important value of art is that it leads us to recognize the artificial character of communicative codes and the conventional nature of perception and understanding.⁹⁵

C. *Lifestyle Advertising*

The assumption that lifestyle advertising falls within the scope of freedom of expression seems to rest on the belief that it is indistinguishable from art and other forms of expression. In attacking the ban on cigarette advertising, the cigarette companies claim that their advertisements communicate a message and so fall within the scope of s. 2(b) of the *Charter*. In its Amended Statement of Claim, filed in the Ontario Supreme Court in October of 1988, Rothmans, Benson & Hedges Inc. states that:

Brand preference advertising provides tobacco consumers *with information* to which they are entitled under s. 2(b) of the *Charter*. It enables them to identify the brand with the combination of characteristics that best satisfies their preferences and tastes, and thus allows them to make a more informed purchasing decision (emphasis added).⁹⁶

⁹³*Ibid.* at 153: "Within art itself there is a constant preoccupation with ... the kind of thing that a work of art is."

⁹⁴*Ibid.* at 123.

E.H. Gombrich, *Art and Illusion* (Princeton: Princeton University Press, 1960) at 389:

The true miracle of the language of art is not that it enables the artist to create the illusion of reality. It is that under the hands of a great master the image becomes translucent. In teaching us to see the visible world afresh, he gives us the illusion of looking into the invisible realms of the mind.

⁹⁵As Culler comments in *Saussure*, *supra*, note 47 at 105:

[A]rtistic activity, be it the poetry of Virgil or the research on pigments by Mondrian, works against social codes and collective categorization, in order to produce a more refined social consciousness of our cultural way of defining content.

Hawkes, *supra*, note 73 at 70, quoting Roman Jakobson:

[W]hat is important in any poem is ... the poet's attitude towards *language* which, when successfully communicated, 'wakes up' the reader, and makes him see the structure of his language, and so that of his 'world' anew.

⁹⁶On file with the author.

This claim is also made by B. McDougall, "Smoking Guns," *Canadian Lawyer* (Feb. 1989) at 20-21:

By advertising a mature product like cigarettes, they [the companies] say, they merely want to persuade confirmed smokers to switch brands.

...

But just what is it that cigarette advertisements communicate? What is their message?

Cigarette advertisements, like so much of contemporary advertising, have little or no obvious propositional content.⁹⁷ After all what could be claimed about a cigarette in an advertisement? How could cigarettes be advertised in an informative way? One brand of cigarettes cannot, at least in an advertisement, be distinguished from another brand on the basis of a characteristic such as taste.⁹⁸ Because of the lack of any "hard" information (of a positive nature) that can be given about the properties of cigarettes, cigarette advertisements generally rely on brand images, the association of a particular brand with a particular lifestyle.

The significance or "meaning" of a lifestyle advertisement is a matter of the organization of different signs within it.⁹⁹ The advertisement differentiates its product from similar products in the market, and gives the product meaning,

The government seeks to control the use and distribution of a legal product by preventing us from talking about it in public. While this approach may pay tribute to the power of advertising, it does little for the public's sense of freedom.

Notice the reference not just to *talking* about the product, as if that is what this advertising does, but also to *us talking*, as if cigarette advertising is part of an open dialogue between company and consumer about the product.

⁹⁷The history of advertising can be seen as a movement from information to image.

Classified advertisements are the remaining example of advertisements which are informative. T. Vestergaard & K. Schroder, *The Language of Advertising* (Oxford: Blackwell, 1985) at 3:

A classified advert ... comes very close to being merely a notice informing interested segments of the public that something is available at a certain price.

The advertisements for Carlton cigarettes may be an exception to this. They claim that Carlton is lower in tar and nicotine than most other cigarette brands and they advise that "If you must smoke then smoke Carlton."

Of course, such an advertisement may be seen as misleading insofar as it suggests that using this product will not damage your health. For as K.L. Polin comments in *supra*, note 5 at 116:

[I]nformation on low tar and low nicotine "conveys the misleading message that 'everything is all right now.'" Cigarettes advertised as low in tar and nicotine are thereby promoted as safer than competing brands. As used, however, they may be even more dangerous because smokers change their manner of use to compensate for lower nicotine levels, and because of the harm caused by unadvertised agents and additives used to compensate for low tar levels.

⁹⁸See J. Williamson, *Decoding Advertisements: Ideology and Meaning in Advertising* (London: Marion Boyars, 1978) at 32 [hereinafter *Decoding Advertisements*].

R. Williams, "The Magic System" (1960) 4 *New Left Rev.* 27 at 27 observes that modern advertising, with its reliance on image and fantasy, is anything but "materialist":

It is impossible to look at modern advertising without realizing that the material object being sold is never enough; this indeed is the crucial cultural quality of its modern forms.... [I]t is clear that we have a cultural pattern in which the objects are not enough but must be validated, if only in fantasy, by association with social and personal meanings which in a different cultural pattern might be more directly available.

⁹⁹See W. Leiss, S. Kline & S. Jhally, *Social Communication in Advertising* (Toronto: Methuen, 1986) at 153 [hereinafter *Leiss*].

by taking a sign (a person or object which carries meaning outside the ad) and using that sign as a signifier for the advertised product.¹⁰⁰ A sign from another meaning system, which has certain feelings and ideas attached to it, is linked to the product not through argument (that the product is like the object) but through the juxtaposition of the sign and the product within the advertisement.¹⁰¹ Colour, shape, and other elements of the advertisement's formal structure, are used to connect the product with the sign and to support the transfer of the sign's meaning to the product.¹⁰²

The picture in Marlboro advertisements is of a cowboy smoking a cigarette. But the cowboy representation has a second level of meaning which arises from the place of cowboys in a wider system of symbols.¹⁰³ Cowboys are conventionally associated with masculinity, strength, freedom, adventure.¹⁰⁴ The values or attributes associated with cowboys are then transferred to the particular cigarettes.¹⁰⁵ The transfer is supported by visual and other links between the product and the symbol. For example, the colours of the western sunset and the cowboy's clothing are matched with the colours of the cigarette packet.¹⁰⁶ Through this transfer of meaning the cigarettes come to represent masculinity, freedom etc.¹⁰⁷ The further implication is that the value transferred to the prod-

¹⁰⁰See Williamson, *Decoding Advertisements*, *supra*, note 98 at 30. Culler, *Saussure*, *supra*, note 47 at 19:

The sign is the union of a form which signifies ... the signifier, and an idea signified, the ...signified. Though we may speak of signifier and signified as if they were separate entities, they exist only as components of the sign.

¹⁰¹See Leiss, *supra*, note 99 at 155.

¹⁰²*Ibid.* at 194. They describe the process this way:

[T]he superimposition of the cigarette package on a beautiful natural setting helps us not only to imagine a moment when we might use the product ... but more importantly to transfer the qualities of coolness and naturalness that we associate with this vista to the cigarette as well.

¹⁰³Barthes, *Mythologies* (London: Paladin Grafton Books, 1973) at 114:

The signifier ... presents itself in an ambiguous way; it is at the same time meaning and form ... As meaning, the signifier already postulates a reading, I grasp it through my eyes, it has a sensory reality.

¹⁰⁴See G. Dyer, *Advertising as Communication* (London: Methuen, 1982) at 123. This is what Barthes refers to as connotation — a second-order signifying system. When the sign becomes the signifier for another signified. See generally Barthes, *supra*, note 103.

¹⁰⁵See Williamson, *Decoding Advertisements*, *supra*, note 98 at 20.

¹⁰⁶See Dyer, *supra*, note 104 at 120.

¹⁰⁷See Williamson, *Decoding Advertisements*, *supra*, note 98 at 26.

Advertisements generally devalue human feelings and ideals such as love and friendship. Apparently, cigarettes can even symbolize women's freedom from male domination. Vestergaard & Schroder, *supra*, note 97 at 164 point out that:

[I]n a well-known series of cigarette adverts, a contrast is drawn between a historical situation when women couldn't smoke cigarettes and a modern, glamorous woman smoking a cigarette; in some of the adverts the woman is smiling incredulously at the thought of the restrictions of the past while the advert is reminding her that she's come

uct will be transferred to the consumer through the act of buying or using it.¹⁰⁸

What is significant is that the transfer of meaning from the cowboy to the cigarettes does not depend on argument. The advertisement makes no simple claim that the product has this attribute, or that the product will make you more successful or more attractive. As Neil Postman observes:

[T]he commercial disdains exposition, for that takes time and invites argument. It is a very bad commercial indeed that engages the viewer in wondering about the validity of the point being made.¹⁰⁹

The advertisement makes no particular claims or assertions and so offers nothing that can be refuted.¹¹⁰

Lifestyle advertisements do not “manipulate” in any simple mechanical way. In most lifestyle advertisements there is no hidden stimulus which “turns us on” without our knowing it, no sexual images traced onto ice cubes.¹¹¹ Rather the advertisements function “poetically, through metaphor, association, repetition, and other devices that suggest a variety of possible meanings.”¹¹² The viewer senses gradually and half-consciously the meaning of the commercial’s imagery.¹¹³ Because the advertisement is organized according to associative rather than logical relations, “the connections are not made explicitly in the text,

a long way. This advert congratulates women for having won from men the right to smoke. By equating Woman’s Lib with demands like the right to smoke, it works to trivialize an important historical movement, projecting what was a minor side-effect as a major achievement of women’s struggle for liberation. Presenting these cigarettes as a symbol of emancipation, and hence as the natural choice for the woman who thinks of herself as liberated, it builds an enclosure around the feminist movement, curtailing its more radical perspective.

¹⁰⁸See Vestergaard & Schroder, *ibid.* at 154.

¹⁰⁹Postman, *supra*, note 25 at 131.

Charles King, an advertising executive, quoted in the conclusion of M. Blonsky, ed., *On Signs* (Baltimore: Johns Hopkins University Press, 1985) at 508, provides an example of “[t]he commercial they never did” during the cola/coffee wars in the 1960s and 1970s:

OPEN ON A YOUNG ADULT COUPLE AT RESTAURANT TABLE.

BOY: I’II have coffee.

GIRL: I’II have coffee, too ... wait, change that to a cola.

BOY: Cola? Instead of coffee?

GIRL: Sure. Colas are cool, refreshing. They go great with food.

BOY: You’re right. From now on, it’s cola for me.

No, you never saw a commercial like that. Because it would have started an argument in your mind. Which *is* better? Cola? Or coffee?

Instead, they used unarguable, low definition signs.

¹¹⁰See Postman, *ibid.* at 73.

¹¹¹See M.C. Miller, *Boxed In: The Culture of TV* (Evanston: Northwestern University Press, 1988) at 31.

¹¹²*Ibid.*

¹¹³See *ibid.* at 32.

but are devolved to the viewer where their associative nature will allow them to be made subconsciously."¹¹⁴

The viewer of a lifestyle advertisement is supposed to see the meaning of the product as already there, and she/he rarely notices that the sign and the product have no inherent similarity, but are only placed together.¹¹⁵ In the words of Roland Barthes:

[E]verything happens as if the picture *naturally* conjured up the concept, as if the signifier gave a foundation to the signified.¹¹⁶

The advertisement appears to be nothing more than a picture of a cowboy smoking a cigarette — natural and innocent.¹¹⁷ It presents itself as “an unmediated picture of external reality”; “the human or cultural agency in the process is masked.”¹¹⁸ Cowboys sometimes smoke cigarettes; it is possible to smoke a cigarette while sitting beside a mountain stream; attractive people sometimes smoke in social settings.

The use of photographic images encourages the transfer of meaning from the signifier to the product in a way that makes the transfer seem natural rather than artificial or conventional. A photographed object is generally experienced as real by someone looking at the photo.¹¹⁹ As Susan Sontag notes, photographs are seen as capturing reality and for good reason:

¹¹⁴J. Fiske, *Television Culture* (London: Methuen, 1987) at 101.

Steiner, *supra*, note 45 at 198: “[T]he active sources of connotation remain subconscious or outside the reach of memory.”

¹¹⁵See Williamson, *Decoding Advertisements, supra*, note 98 at 30.

¹¹⁶Barthes, *Mythologies, supra*, note 103 at 129. And at 130:

[m]yth essentially aims at causing an immediate impression — it does not matter if one is later allowed to see through the myth, its action is assumed to be stronger than the rational explanations which may later belie it. This means that the reading of a myth is exhausted at one stroke.

As Judith Williamson observes in *Decoding Advertisements, supra*, note 98 at 41:

[t]here is a big difference between saying something is true (which admits the potential of the opposite) and assuming the truth of something — which admits nothing, and claims nothing either.

¹¹⁷See J. Culler, *Barthes* (Glasgow: Fontana, 1983) at 38.

Hawkes, *supra*, note 73 at 133 (discussing Barthes, *Mythologies, supra*, note 103):

With *signification* we have, of course, encountered an extremely powerful, because covert, producer of meaning at a level where an impression of ‘god-given’ or ‘natural’ reality prevails, largely because we are not normally able to perceive the processes by which it has been manufactured.

¹¹⁸Fiske, *supra*, note 114 at 21, referring to television in general.

¹¹⁹See R. Barthes, *The Grain of the Voice, supra*, note 26 at 355. And *supra* at 353:

[T]he photographic image is an analogical reproduction of reality, and as such it includes no discontinuous element that could be called [a] *sign*: there is literally no equivalent of a word or letter in a photograph.

Such [photographic] images are indeed able to usurp reality because first of all a photograph is not only an image (as a painting is an image), an interpretation of the real; it is also a trace, something directly stenciled off the real, like a footprint or a death mask. While a painting, even one that meets photographic standards of resemblance, is never more than the stating of an interpretation, a photograph is never less than the registering of an emanation (light waves reflected by objects) — a material vestige of its subject in a way that no painting can be.¹²⁰

Of course, as Roland Barthes points out, “the photographed object is illusively natural.”¹²¹ A photograph is not simply a “mechanical record;” it is composed by the photographer who selects the subject matter, the angle, the lighting.¹²² As well the photographs used in advertising are almost always “touched-up” to “improve upon the appearance of reality.”¹²³

Barthes notes that because photography has the reputation of literally transcribing reality or a slice of reality, no one ever thinks about its real power, its true implications.¹²⁴ The audience is not meant to see the advertisement as a meaningful or significant act or object which is to be viewed carefully in order to gain understanding. It is meant to be looked at quickly, in passing, as a reflection of the way things are — as something that does not require reflection or contemplation. As Michael Schudson observes:

¹²⁰S. Sontag, *On Photography* (New York: Noonday Press, 1989) at 154. See also W. Benjamin, *Illuminations*, trans. H. Zohn (New York: Schocken Books, 1969).

¹²¹Barthes, *The Grain of the Voice*, *supra*, note 26 at 355. And *supra* at 353:

But ... the composition and style of a photo function as a secondary message that tells us about the reality depicted and the photographer himself: this is *connotation*, which is language. Photographs always connote something different from what they show on the plane of *denotation*: it is paradoxically through style, and through style alone, that photographs are language.

¹²²Berger, *supra*, note 82 at 10:

Every image embodies a way of seeing. Even a photograph. For photographs are not, as is often assumed, a mechanical record. Every time we look at a photograph, we are aware, however slightly, of the photographer selecting that sight from an infinity of other possible sights. This is true of the most casual family snapshot ... [Y]et, although every image embodies a way of seeing, our perception or appreciation of an image depends also on our way of seeing.

¹²³S. Ewen, *All Consuming Images* (New York: Basic Books, 1988) at 87:

The photographs that serve as the centrepiece of style are shot under carefully planned conditions. Photographers follow the detailed instructions of an art director. The photograph is then passed on to the touch-up artist, who will remove ‘a few strands of hair, smooth .. a wrinkle, slim a model’s leg’ or do whatever else is necessary to create the effect of immaculate conception. According to Louis Grubb, one of New York’s leading retouchers, almost every photograph you see for a national advertiser these days has been worked on by a retoucher to some degree. It is very, very rare that an art director will go directly from the chrome, the original native source. Somewhere along the line the photo retoucher’s hand is applied. Fundamentally, our job is to correct the basic deficiencies in the original photograph or, in effect, to improve upon the appearance of reality.

¹²⁴See Barthes, *The Grain of the Voice*, *supra*, note 26 at 351.

[I]t is precisely the belief people have that they are detached that makes the power of advertising all the more insidious. Advertising may create attitudes and inclinations even when it does not inspire belief; it succeeds in creating attitudes because it does not make the mistake of asking for belief.¹²⁵

The advertisement encourages unthinking reaction rather than contemplation by a conscious agent. M.C. Miller describes the process in this way: "It's only a commercial,' we say to ourselves, then settle back, watching without really watching, thereby letting each image make its deep impressions."¹²⁶

The viewer has neither the time nor the space to reflect upon a particular ad. As J. Berger comments:

The publicity image belongs to the moment. We see it as we turn a page, as we turn a corner, as a vehicle passes. Or we see it on a television screen whilst waiting for the commercial break to end.¹²⁷

The volume of commercial messages with which the consumer is confronted every day, makes it difficult for him/her to examine a particular advertisement with any care. As well, the near monopolization of public discourse by commercial expression means that no advertisement stands out even though its images and its words might seem silly or absurd when carefully examined.¹²⁸ A lifestyle advertisement for cigarettes is just an ordinary part of public discourse, natural and innocent. As Miller observes the advertisements come at us "in stupefying numbers, each one overcharged and utterly forgettable, so that we find ourselves

¹²⁵M. Schudson, *Advertising, The Uneasy Persuasion* (New York: Basic Books, 1986) at 226. And *supra* at 227:

While viewers are not persuaded, they do alter the structure of their perception about a product, shifting "the relative salience of attributes" in the advertised product.

The viewer may recognize or sense that the advertisement's "story" is silly or that the few statements it makes are absurd. But the verbal or printed claims of the advertisement are generally not so important to the ad's effect. Statements such as "Come to where the flavour is" or "It's time to call for the Blue" are not meant to be taken seriously. Unless the viewer recognizes the artificiality of the ad's central image, the advertisement may still have a real impact. As Northrup Frye observes in *The Modern Century* (Toronto: Oxford University Press, 1967) at 26:

[T]he technique of advertising and propaganda is to stun and demoralize the critical consciousness with statements too absurd to be dealt with seriously by it. In the mind that is too frightened or credulous or childish to want to deal with the world at all, they move past the consciousness and set up their structures unopposed. What they create in such a mind is not necessarily acceptance, but dependence on their versions of reality. ... Like other forms of irony, it says what it does not wholly mean, but nobody is obliged to believe its statements literally. Hence it creates an illusion of detachment and mental superiority even when one is obeying its exhortations.

A similar point is made by Miller, *supra*, note 111 at 14, when he speaks of "pre-emptive irony" which encourages us not to take the process seriously — to look at the material as unimportant.

¹²⁶Miller, *ibid.* at 31.

¹²⁷Berger, *supra*, note 82 at 129.

¹²⁸As Dyer points out in *supra*, note 104 at 86, the words used in advertisements are often used merely to reinforce a photograph or film sequence.

lulled into the receptive state of the well hypnotized.”¹²⁹ Lifestyle advertising, like other forms of propaganda, is so pervasive that it does not need to convince or persuade. As an advertising executive with Coca-Cola puts it, the advertisements come down on us “like the scents of spring, as though through the air [we] breathe and as naturally.”¹³⁰

IV. Classical Doctrine and Lifestyle Advertising

A lifestyle advertisement is meant to affect consumer behaviour while discouraging conscious realization of this effect. It seeks to discourage careful examination by presenting itself as natural, ordinary and routine, as something that does not carry significant meaning and so does not require examination.

The courts have tried to deal within existing doctrine with concerns that visual advertising can deceive and manipulate. But it is not clear how well these concerns can be made to fit within the established doctrinal structure, with its clear and simple line that separates communication of ideas and information from manipulative conduct.

A. *The Exclusion of Commercial Expression*

One way of avoiding some of the difficulties presented by visual imagery is to exclude commercial expression from the scope of the freedom. This was once the approach taken by the American courts and is still on occasion suggested by commentators in Canada and the United States.¹³¹ The explanation often given for excluding commercial expression is that it is not self-expressive.¹³² Whether or not this is a fair statement concerning commercial expression, the justification for the freedom is not usually set out simply in terms of the value of self-expressive actions. Indeed, as we have seen, the clas-

¹²⁹Miller, *supra*, note 111 at 31.

¹³⁰Joel S. Dubow, Communications Research Manager of Coca-Cola U.S.A., quoted in Miller, *ibid.* at 11.

Miller says, *supra* at 11, that the advertisements must come to us in this way for, once isolated and deliberately interpreted, an advertisement will betray not only the devices that enable it to work, but certain larger truths about the system that requires it and that therefore requires that you not think about it.

¹³¹For a recent example see Hutchinson, *supra*, note 42.

¹³²Although commercial enterprises often portray themselves in advertisements as caring individuals, the interaction between business and consumer is generally impersonal and instrumental. Often large scale corporations try to invoke the image of the small business — J.L. Kraft (Kraft cheese) and J.M. Schneider (Schneider’s meats).

For those who favour the exclusion of commercial expression from the scope of the freedom it was perhaps unfortunate that the first commercial expression case to reach the Supreme Court of Canada was *Ford*, *supra*, note 2, in which a group of small businesses challenged the Quebec sign law. The law did seem to restrict the personal and daily expression of small business owners with their customers.

sical justification is listener-centered, focussing on the movement of information and ideas to rational decision-makers and emphasizing the acquisition of knowledge and the process of reflection and judgment. There is no reason to think that whenever "expression" is profit-motivated it will not advance these ends. It is the content or character of the act and not its source that gives it value.

Those who favour the exclusion of commercial expression from the scope of the freedom do not argue that newspapers and books should be considered unprotected commercial expression. Yet most books and newspapers are produced with profit in mind — and in some cases profit is the exclusive concern of the producer. Even if commercial expression is narrowly understood as advertising, which is intended to advance business interests, it may still contain worthwhile information. I expect that those who advocate the exclusion of commercial expression do not believe that the state should be free to ban informative advertising, for example, by the makers of prophylactics concerning birth control and sexually-transmitted diseases.

It appears that the real concerns of those who advocate the exclusion of commercial expression are the inequality of communicative power in a capitalist economy and the "manipulative" character of most commercial expression. The advertising of a relatively small proportion of the population dominates public discourse and displaces other forms of communicative interaction. And, of course, most advertising relies on visual imagery which provides little or no information and is designed to affect consumers in a non-rational way.

There are some important connections between commercial (profit-motivated) speech and visual imagery. Commercial advertising, which now makes up the largest part of public discourse, relies principally on visual imagery which is thought to be the most effective means of selling a product. As well, modern forms of visual communication are expensive and so are used almost exclusively by commercial interests. It would appear that the dominance of visual imagery in public discourse and its persuasive/manipulative effect has enhanced the power of commercial interests in the community and has played a central role in shaping our consumer culture.

In *Ford* and *Irwin Toy*, the Supreme Court has held that commercial expression falls within the scope of the freedom. According to the Court commercial expression advances important freedom of expression values:

Over and above its intrinsic value as expression, commercial expression ... plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.¹³³

Commercial interaction and economic choices could well be important and valuable parts of the life of the individual. But clearly the case for protecting com-

¹³³*Ford, ibid.* at 767.

mercial expression is overstated when it is suggested that commercial advertising is as important as discussion of social and political issues.¹³⁴ This suggestion ignores the bureaucratic character of most commercial enterprises, the lifestyle character of advertising¹³⁵ and the meaninglessness of the economic choices that generally are presented to consumers — this or that flavour of mouthwash. As John Berger points out, when advertising dominates public discourse,

[t]he choice of what one eats (or wears or drives) takes the place of significant political choices. Publicity helps to mask and compensate for all that is undemocratic within society.¹³⁶

In our society this is what most (commercial) expression is about and so this is what freedom of choice has come to mean.

B. The Restriction of False Advertising

Sometimes courts and commentators have tried to deal with visual imagery under existing freedom of expression doctrine by focusing on the “untruthfulness” of particular images. Thus, when a visual image makes a deceptive claim, the state can restrict that image/message just as it does in the case of a deceptive claim in print. For example, an advertisement which connects cigarettes with the healthy outdoors could be seen as lying — as making a false claim that smoking is healthy — and could therefore be restricted.

However, it is not clear that concerns about the deceptive nature of visual images can be brought under freedom of expression doctrine in this way. Visual images make no assertions, contain no propositions. And so, as Neil Postman points out:

When applied to a photograph, the question, Is it true? means only, Is this a reproduction of a real slice of space-time? If the answer is ‘Yes,’ there are no grounds for argument, for it makes no sense to disagree with an unfaked photograph.¹³⁷ [P]hotography is a language that speaks only in particularities. Its vocabulary of images is limited to concrete representation. ... [T]he photograph presents the world as object.¹³⁸

¹³⁴*Ibid.* at 760 paraphrasing without comment Jacques J.A. of the Quebec Court of Appeal: [C]ommercial expression was as much entitled to protection as other kinds of expression because of the important role played by it in assisting persons to make informed economic choices.

¹³⁵It is true that in *Irwin Toy, supra*, note 3 at 987 the Court did recognize that “the techniques of seduction and manipulation [are] abundant in advertising.”

It is unclear to me how this observation can be reconciled with the Court’s enthusiastic attitude towards “commercial” expression when defining the scope of the freedom under s. 2(b).

¹³⁶Berger, *supra*, note 82 at 149.

¹³⁷Postman, *supra*, note 25 at 73.

Visual images do not contain propositions that can be regarded as true or false. Art historian E.H. Gombrich observes, in *Art and Illusion, supra*, note 94 at 67, that “a picture can no more be true or false than a statement can be blue or green.”

¹³⁸Postman, *ibid.* at 72.

A photograph of a man smoking a cigarette while sitting beside a mountain stream is a representation of a possible event.

Visual images are used in advertisements *because* of their non-propositional character. An effective advertisement does not engage in argument, does not make any claims which might be considered and either accepted or rejected. A simple claim in linguistic form that "cigarettes are good for you" could be refuted and so might not go very far, while a carefully constructed lifestyle advertisement might lead the viewer to half-consciously associate the cigarettes with vitality, masculinity and sexual attractiveness.

Concern with false advertising is based on the assumption that advertisements are simply the transparent conveyors of false or misleading statements. But the significance of a lifestyle advertisement, the basis of its impact, lies in its form, in the way the product is presented and perceived and not in the propositions it puts forward.¹³⁹ Advertisements are rarely dishonest in any straightforward sense.

It is true that advertisers seem to be caught in the dilemma that if, on the one hand, their advertisements do not convey a message then they cannot fall within the protection of freedom of expression but if, on the other hand, their advertisements do convey a message then that message is almost certainly false or deceiving (cigarettes are like the healthy outdoors, cigarettes make you sexually attractive). Sometimes the companies try to escape this dilemma by claiming that the advertisements are aesthetic; that the advertisements present the product in an appealing way; that they give form to a feeling or an attitude without making any specific claims or assertions.¹⁴⁰

C. *The Protection of Certain Audiences*

As in *Irwin Toy*, the courts might focus on the susceptibility of the particular audience to manipulative or deceptive "communication." Freedom of expression doctrine ordinarily requires that a willing audience be permitted to receive and assess ideas and information (even from an advertisement) without interference from the state. However, a group, such as children whose reasoning capacities are not yet fully developed, might be seen as particularly vulnerable to deception or manipulation.¹⁴¹ With such an audience special protection by the

¹³⁹See Williamson, *Decoding Advertisements*, *supra*, note 98 at 17.

¹⁴⁰In Rothman's Statement of Claim, *supra*, note 96, the company claims that their advertisements provide consumers with "information."

¹⁴¹See *Irwin Toy*, *supra*, note 3 at 987. This may fit with Mill's view that there is a threshold of reason necessary to have liberty. See for example Mill, *supra*, note 11 at 69:

Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.

state may be appropriate, including the restriction of directed advertising.¹⁴²

Such an approach, though, would not support a general ban on cigarette advertising, unless it could be shown that the advertising was aimed specifically at children. But, more significantly, such an approach raises difficult questions concerning the freedom of expression interests of children. Why is the state justified in protecting children and not adults from the influence of certain forms of communication? Or, as Mr. Justice McIntyre poses the question, in his dissenting judgment in *Irwin Toy*, why is the state justified in interfering with children's freedom to watch advertisements on television?¹⁴³ Protection of freedom of expression would seem even more important in the case of children since the freedom is thought to contribute to the individual's emotional and intellectual development. The restriction of advertising directed at children must rest not simply on the special circumstances of the audience but also on the particular character of the "expression." This the Court in *Irwin Toy* recognizes:

The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising.¹⁴⁴

What is required is an explanation of the way(s) in which (cigarette) advertising is different from other forms of expression so that it should not receive protection when it is aimed at children. Any such explanation would involve a consideration of the relationship between lifestyle advertising and rational agency.

D. The Prevention of Harm under Section 1

Sometimes the courts have tried to fit their concerns about visual imagery within classical doctrine by treating the visual image (in a lifestyle ad) as expression under the freedom but holding that it may be restricted when it causes harm. In the Canadian constitutional context this involves the inclusion of visual imagery within the scope of s. 2(b) of the *Charter* and the use of s. 1 to allow limits on this form of expression in the interests of a competing value

This kind of categorical exclusion of pre-rational or irrational persons may be necessary to maintain classical doctrine's simple idea of rationality.

¹⁴²*Irwin Toy, ibid.* at 987:

In our view, the Attorney-General of Quebec has demonstrated that the concern which prompted the enactment of the impugned legislation is pressing and substantial and that the purpose of the legislation is one of great importance. The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising.

¹⁴³See *ibid.* at 1007-1008.

¹⁴⁴*Ibid.* at 987. The Court continues on the same page:

Broadly speaking, the concerns which have motivated both legislative and voluntary regulation in this area are the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message and the secondary effects of exterior influence on family and parental authority.

or right. For example, the courts might hold that the cigarette advertising ban is a restriction on freedom of expression under s. 2(b) but they might uphold the ban under s. 1 on the basis of empirical evidence which establishes that smoking is harmful and that cigarette advertising leads to smoking.

However, as noted in the introduction, this focus on the harm caused by advertising only works if the courts ignore issues of human agency — that the harm may be caused because rational agents have “chosen” to buy and use the advertised product. The classical view is that the state is not justified in preventing an individual from hearing or reading ideas which might persuade (but not incite) him/her to perform an act which causes harm to him/herself or to others. Once it has been decided that the activity in question is protected expression, its restriction cannot be justified simply because the message it conveys may lead its audience to an incorrect view or to a wrongful act.¹⁴⁵

As well, it is unclear how this approach can be used to restrict advertising which encourages people to buy products which (unlike cigarettes) are not in themselves harmful. In *Irwin Toy*, the provincial law under review prohibited advertising which was directed at children and which encouraged them to buy toys and other safe(?) products. In reviewing this law, the Supreme Court took a simple and inclusive view of the scope of s. 2(b) and held that the advertising in question “cannot be excluded as having no expressive content.”¹⁴⁶ The Court, however, goes on to hold that the state is justified in restricting this expression because the intended audience is particularly susceptible to manipulation. This purpose, says the Court, is both “pressing and substantial.”¹⁴⁷

Yet at the s. 1 stage in *Irwin Toy* the Court is not balancing a competing interest against the value of free expression, but is rather deciding that this sort of activity (advertising directed at children) is not deserving of constitutional protection in the first place — that it does not advance the values of truth, self-expression etc., which underlie the freedom. The Court, in effect, reintroduces the question of meaning and expression at the limitations stage and re-thinks the initial classification of the material as “expression.” In its application of s. 1, the Court recognizes that meaning and expression are complex ideas and that there

¹⁴⁵The classical view is stated by the majority of the Supreme Court of Canada in *Irwin Toy, ibid.* at 976:

In determining whether the government’s purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.

I say “stated” only because this statement comes in the Court’s discussion of the scope of the freedom and receives no mention when limits under s. 1 are discussed. Indeed it is difficult to see how the *Dolphin Delivery* and *British Columbia Government Employees Union v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1, cases can be reconciled with this principle.

¹⁴⁶*Irwin Toy, ibid.* at 971.

¹⁴⁷*Ibid.* at 987.

is no simple and bright line that can be drawn around the scope of protected expression. The Court simply conceals this recognition behind the general language of s. 1, the vague concepts of harm and limits, the empirical evidence concerning the effects of advertising, and a deferential attitude to the legislature's assessment of the empirical evidence.¹⁴⁸

Advertising of the kind considered in *Irwin Toy* does not lead to harm in any direct or obvious way. Children are not put at risk by the toys they are encouraged to buy. The idea of harm caused by persuasive expression does not capture what seems worrisome about advertising directed at children or even what seems worrisome about cigarette advertising. The concern with cigarette and other lifestyle advertising is not the harm that results from being persuaded to purchase the product but is rather the advertisement's power to influence behaviour in a way that seems to by-pass or discourage reflection and judgment — its manipulation of choice.

E. The Indirect Restriction of a Harmful Activity

Along similar lines it is sometimes argued that the ban on cigarette advertising is really just a partial or indirect restriction on the harmful activity of smoking. The argument made is that it would be difficult and unpopular to ban cigarettes outright and that the best alternative is to restrict commercial efforts to persuade individuals to start or to continue smoking. But again an argument of this sort does not fit well with classical doctrine. It amounts to saying that while people have a legal right to perform a particular act, they can be protected from hearing arguments in favour of doing so. Would any (commercial) expression remain protected, if the state's "larger" power to restrict an activity included the "lesser" power to restrict advocacy of that activity?¹⁴⁹ Any time the

¹⁴⁸There are many problems with relying on s. 1 to resolve all questions, not the least of which is that it is impossible to know what should count as a justifiable limit if one does not have a theory about the freedom.

¹⁴⁹In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) the United States Supreme Court upheld the Puerto Rican Government's ban on casino advertising which was directed at Puerto Rico's residents.

Gambling was permitted in Puerto Rico and was an important tourist attraction. However the Puerto Rican Government was concerned that, *supra* at 341:

[e]xcessive casino gambling among local residents ... would produce serious harmful effects on health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.

So while the government permitted casino gambling it prohibited advertising for gambling which was directed at residents.

The Supreme Court held, *supra* at 345-46 that:

the greater power to completely ban casino gambling includes the lesser power to ban advertising of casino gambling...

state restricted a particular form of commercial expression it could simply declare that it was indirectly restricting the activity by denying people information about it — whether the activity was cigarette smoking or the practice of birth control.¹⁵⁰

Clearly, the state cannot justify the suppression of arguments and information in support of a legal activity by claiming that it is simply banning the activity indirectly. The argument that a restriction on cigarette advertising is justified as an indirect restriction on cigarette smoking only seems plausible because of the character of the advertising. Cigarette advertisements encourage a harmful activity without reasons and without argument.

F. The Inability of Classical Doctrine to Deal with Lifestyle Advertising

The various attempts to deal with visual imagery, either by excluding it from the scope of the freedom or by taking account of its “abuses” under s. 1 of the *Charter*, place significant stress on classical freedom of expression doctrine. If advertising and other uses of visual imagery convey meaning, then under classical doctrine they are properly considered expression and cannot be denied protection simply because the messages they carry are thought to be crass or unimportant or because they originate from commercial interests, or because they may be effective in persuading their audience of the correctness of a particular view. To restrict expression for any of these reasons would undermine the central idea of classical freedom of expression — that individuals should be free to make their own decisions based upon available information — and would leave little or no communication secure from censorship. But if visual imagery, in all instances, is considered protected expression, then it appears that the state cannot give practical effect to the very real concern that advertising (sometimes) influences, deceives, manipulates, even though it makes no false claims or deceptive arguments.

[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.

However, Justice Brennan offers a powerful dissenting response *supra* at 350:

I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity.

¹⁵⁰According to the U.S. Supreme Court, *ibid.*, only if the act itself is constitutionally protected — and birth control may be such an act — will communication in support of that act be protected.

Even if the state has the power to restrict a particular activity, its effort to impede that activity by preventing the communication of information and arguments in support of that activity seems wholly objectionable. Indeed communication about a particular activity should, perhaps, be protected even when the activity itself is unlawful.

If the courts are to deal in a satisfactory way with lifestyle advertising and other forms of visual “communication,” they must rethink the lines of classical doctrine. Visual imagery, the new paradigm of public discourse, cannot simply be fitted into the clearly bounded categories of classical doctrine, which are concerned primarily with the protection and limitation of communication by the printed or spoken word, understood as the external manifestation of an individual’s ideas and feelings.

V. Drawing Lines Through Classical Doctrine

A. *Lifestyle Advertising and the Value of Freedom of Expression*

A single and simple answer to the question of visual imagery — either that it should be excluded from the scope of freedom of expression or that it should, in every instance, be considered protected expression — fails to take account of the very different uses to which it is put. There is no bright line which separates art and lifestyle advertising but there are important differences in the contribution made by these uses of visual imagery to the expression/realization of human agency.

A lifestyle advertisement seeks to limit audience reflection and awareness by presenting itself as natural, ordinary and routine and not as something that carries meaning and requires examination and interpretation. As Judith Williamson observes, the advertisement has “a high investment in denying its own workings,”¹⁵¹ in hiding its artificial nature. Through careful design of the advertisement’s structure, the advertiser tries to get the viewer to act for reasons of which she/he is not fully conscious, for example to purchase a product because it is associated with a symbol of love or sexual attractiveness.

The effort to affect people’s behaviour in ways they are not conscious of is not the stuff of freedom of expression. Lifestyle advertising does not deserve constitutional protection because it does not advance the values which are thought to underlie the freedom. A lifestyle advertisement does not seek to articulate inchoate feelings and ideas, to bring these to consciousness and to put them in a public space for reflection or contemplation. It does not contribute to the growth of individual and collective knowledge, the understanding of oneself and of others, the emergence of reflective agency and the development of positive “autonomy” understood as the capacity to give conscious direction to one’s life.

B. *Why “More Speech” is not Always the Answer*

The availability of competing images and other “expressive” acts is no answer to concerns about lifestyle advertising. Because a lifestyle advertisement

¹⁵¹J. Williamson, *Consuming Passions* (London: Marion Boyars, 1986) at 68.

is not part of a discussion between members of the public, because it does not involve the articulation of ideas and feelings for the reflection of an audience, there is no way of joining debate with it, of refuting its claims. An anti-smoking lifestyle advertisement could be put forward in an effort to counteract the impact of the cigarette advertisement. But competing advertisements of this sort involve no discussion or argument, and so do not contribute to informed, reflective consumer judgment. They merely combat one "subconscious message" with another.

It may be possible to neutralize (to some degree) the manipulative effect of a lifestyle advertisement by revealing its ideological character. Demystification seeks to show that there is conscious design where there is the appearance of natural neutral images and that there is unconscious impact without conscious reflection and judgment.¹⁵² Still the effort to "de-mystify" does not take up any argument presented by the advertisement, for there is none to be taken up.

In any event, the question of whether "more speech" might have some effect and lead to a greater awareness of the impact of advertising, seems academic. Wealth has always been a factor in the distribution of communicative opportunities. But with the rise of technologically complex and concentrated fora of public communication it has become an even more significant factor in the communicative process. It has become more costly to get one's message out. The largest part of the population is unable to express its point of view to the general community and so there is no free and open exchange of ideas, no balanced public discussion.

The monopolization of communicative power has become an even greater concern as public communication has ceased to be about argument and rational persuasion and has become a process of subconscious influence or consumer "impact." As long as persuasion was a matter of offering reasons for judgment and action, it was more difficult to "drown out" or overwhelm other voices. The rise of visual imagery (or more specifically the rise of lifestyle advertising) as the new paradigm of public communication has increased the power of wealth to influence public behaviour. The power to create meaning, to shape the social environment, is concentrated in the hands of a wealthy minority who defines the range of ordinary public discourse.

¹⁵²Miller, *supra*, note 111 at 19, talks about "reading" television as a process of demystification: Such a project, however, demands that we not simply snicker at TV, presuming its stupidity and our own superiority. Rather, we need a critical approach that would take TV seriously (without extolling it), a method of deciphering TV's component images, requiring both a meticulous attention to concrete detail and a sense of TV's historical situation.

The courts' understanding and application of freedom of expression must unfold against this background of unequal participation in public discourse. The fact of unequal access to the "marketplace of ideas" limits the effectiveness of any effort to counteract or demystify lifestyle advertisements. The market provides little or no access to competing views. But as well, commercial imagery is so pervasive that it forms the background to any particular instance of communication. Against this background particular lifestyle advertisements seem ordinary and natural and an ideological critique of advertising seems eccentric. At present there simply is no real space for expression which takes a critical position towards lifestyle advertising.

The legislature and the courts must seek to open up opportunities for effective participation in public discourse; broadening participation in the creation of social meaning. Breaking the stranglehold that commercial expression has on public discourse might help to neutralize lifestyle advertising by making the contrast between lifestyle advertising and informative communication more apparent. But the answer to concerns about the manipulation of public choice by lifestyle advertising and other similar uses of visual imagery must involve more than relatively minor judicial efforts to widen access to the effective means of communication. It requires also that advertisers be denied the constitutional right to influence others in this way — a way that has little to do with freedom of expression.

Unable to restructure the background of unequal communicative power and to open up public discourse in any meaningful way, the courts only effective response is to exclude lifestyle advertising from the scope of freedom of expression, as material that is undeserving of constitutional protection because it does not advance the values underlying the freedom. Protection should be denied to material that does not put itself forward as "communication" requiring interpretation but rather seeks to discourage conscious recognition of its meaning and impact.

C. The Fear of Censorship and the Danger of Advertising

The assumption by courts and commentators that lifestyle advertising (and all instances of visual imagery) falls within the scope of the freedom is specifically the result of a failure to examine the nature of lifestyle advertising in anything but the most superficial way and more generally of a failure (or a reluctance) to recognize the problematic character of the category of expressive or meaningful human action. While the courts have gone some way in revising the classical understanding of the justification for the freedom, they have held onto the simple lines of classical doctrine and have been unwilling to look closely at the category of expressive action.

Another explanation for the courts' superficial approach to lifestyle advertising may be an understandable resistance to dividing visual imagery into two categories, to drawing a line, at a point which is not entirely clear, between visual imagery which is constitutionally protected and visual imagery which is outside the scope of the freedom's protection because it is "manipulative" (a line somewhere between art and lifestyle advertising). Behind this resistance is the familiar fear of the slippery slope (and the related fear of chilling effect).

There may be genuine concern that if the distinction between meaningful expression and manipulation is not so clear and complete as classical doctrine supposes, then it is possible that the line will be drawn in the wrong place so that constitutional protection is sometimes denied to art and other valuable uses of visual imagery. Or perhaps more fundamentally the concern may be that there is simply no right place to draw the line — that the suppression of communication, even so-called manipulative communication, has a cost. These concerns will lead some courts and commentators to hold on to the apparently simple and easy solution of including all visual imagery within the scope of the freedom, and relying on s. 1 to deal with possible harms or abuses.

But no matter how generous the courts may be in their interpretation of the freedom's scope, if the freedom is not to become a general liberty of human action, the courts at some point must draw a line between communicative and non-communicative acts. Because our concepts of meaning and communication are now rather imprecise, the line which defines the scope of protected "expression," wherever it is drawn, will be uncertain and therefore unstable. In some cases a simple declaration by the courts that a particular activity involves the conveyance of meaning will not be adequate. In these cases the courts will have to think more carefully about the nature of communication and meaning. Once we recognize that communicative acts are never completely transparent and manipulative acts are never completely opaque, we must accept that all we can do is to draw a line at a reasonable point.

But more importantly, the refusal to draw a line between protected and unprotected uses of visual imagery, and the clinging to a simple inclusive category of expression, will prevent the state from restricting some powerful and pervasive forms of manipulation. Such an approach fails to see that as much, or more, danger lies in the power of visual imagery in commercial advertising to manipulate and mislead, than lies in the risk of state censorship of art and other valuable forms of communication.¹⁵³ An inclusive approach is particularly dangerous given our unwillingness to deal with the unequal distribution of communicative power.

¹⁵³Postman, *supra*, note 25 at 140.

The state should be allowed flexibility in deciding the appropriate limits on lifestyle advertising and other similar material. In *Irwin Toy* the Supreme Court of Canada, in effect, allows the state this flexibility, but it does so at the s. 1 limitations stage of the *Charter*. In deciding the question of whether the Quebec law regulating advertising directed at children could be justified under s. 1 the Court considers whether or not the advertising is manipulative. The Court recognizes the pervasiveness of manipulation in advertising and defers to the legislature's assessment of different studies concerning the manipulative power of children's advertising.¹⁵⁴ At the s. 1 stage, the Court recognizes that there is no bright line which separates expression from manipulation and concludes that the state must retain the power to judge when regulation is justified.

The two levels of government in Canada will, I expect, continue to impose a variety of partial restrictions on advertising, making some odd compromises between different values and interests. Parliament has chosen to restrict advertising of cigarettes. Its reason for imposing this restriction may be the harmful nature of the product. However these advertisements should be denied constitutional protection not because they encourage a harmful activity but rather because of the way they affect or influence behaviour. The harm may be the reason for legislative intervention, but not the reason for the exclusion of this material from the scope of the freedom. Lifestyle advertising which encourages a worthwhile activity (non-smoking) may be no more deserving of constitutional protection under the freedom.¹⁵⁵

¹⁵⁴*Irwin Toy, supra*, note 3 at 990:

Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess.

Yet, ordinarily s. 1 is all about the court second guessing the legislative judgment concerning the accommodation of conflicting values.

¹⁵⁵It might be constitutionally proper for the government to restrict political advertising on television. Election campaigns have become long commercials in which issues are lost to images — images defined by slogans, jingles and, most importantly, visual images including photographs of the candidate, and 15 or 30 second television spots. The state, though, is not about to transform the political campaign by restricting the use of visual images of the candidate and image-based television advertisements. What it has done and will, no doubt, continue to do, is to limit the expenditure of money during campaigns.

The legitimacy of campaign spending ceilings, I think, rests on the current form of political discourse. If political discourse involved the rational discussion of ideas and issues, then inequalities in campaign spending would be of far less concern. As long as all candidates had enough resources to communicate their policies to the electorate, it would matter very little that some candidates had more money than others. But that is not how political communication works. Spending power matters and is a threat to the democratic process because of the image-based character of political discourse. The concern that the rich candidate will "drown out" the poorer candidate makes sense only

Conclusion

Classical freedom of expression doctrine has tried to adapt to modern views of language and communication by making some minor adjustments to the justification and scope of the freedom. The courts now see the freedom as valuable for reasons other than its contribution to knowledge and truth. They now recognize that meaning can be conveyed through media other than the spoken and the printed word. They have begun to recognize the problem of unequal communicative power. As well, they have become more sensitive to manipulation in the communicative process, which they have seen as a basis for limiting expression under s. 1 of the *Charter*.

However, the rise of visual imagery as the new paradigm of public communication requires a more radical rethinking of classical theory and doctrine than has yet been undertaken; a rethinking that takes account of the complexity of communication, choice and agency. The difficulties with classical doctrine, and in particular, with its understanding of the justification for the freedom and the scope of the freedom's protection, have become more and more apparent as the courts have tried to apply the doctrine to lifestyle advertising and other uses of visual imagery.

It is a mistake to include all communicative uses of visual imagery within the scope of s. 2(b) and to rely on s. 1 to deal with perceived abuses. Not only does a reliance on s. 1 fail to address the real problems presented by visual imagery but it also threatens the central idea of classical freedom of expression — that individuals should be free to make decisions for themselves based on available information. Such an approach involves using the lines and categories of classical doctrine but rejecting the reasoning underlying them. It involves maintaining that lifestyle advertising is protected expression — that it advances the values that underlie the freedom — but that it can be restricted because of the character of its message.

If the courts are to come to grips with modern freedom of expression issues such as hate literature, pornography, advertising and election spending, they must rethink the simple and bright line of classical doctrine which separates expression from conduct and manipulation. In defining the scope of the freedom the courts must consider carefully the different forms of communication and their contribution to the realization of human agency. All instances of visual imagery should not be protected under freedom of expression simply because in some cases the visual image can be an effective means of expressing ideas, feelings and facts. For in other instances the visual image can be a significant means of manipulation.

if we see political communication as a matter of "impact" rather than persuasion through argument and information. See *supra*, note 37 at 245-49.

Fear of an open and flexible approach to the scope of the freedom may lead courts and commentators to include lifestyle advertising and other similar uses of visual imagery within the freedom's scope. But there is much danger in giving this ground to the powers that seek to influence through advertising. In our liberal-democracy the risk of improper state censorship is far less than the risk of manipulation of consent through advertising for products such as cigarettes and political candidates.
