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Judicial Recognition and Control of New Media Techniques: In Search of the Subliminal Tort, 14 J. Marshall L. Rev. 733 (1981)

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COMMENTS

JUDICIAL RECOGNITION AND CONTROL OF NEW MEDIA TECHNIQUES: IN SEARCH OF THE "SUBLIMINAL TORT"

The history of the common law has been characterized by a gradual expansion of recognized protectable interests. While injured parties no longer need to fit their claims within rigid forms of pleading, they must still bring their claims within recognized causes of action.[1] These claims inevitably encompass an ever widening array of behavior.[2] The final stage of this process is often a newly recognized interest with its own cause of action: a new tort.[3]

The twentieth century has put a severe strain on the process of creating new torts in two ways. First, modern science has created new types of harm[4] which do not fit neatly into existing causes of action.[5] As a result, a remarkable number of

1. *See generally* MAITLAND, FORMS OF ACTION 196 (1936). The liberalization of pleading may have been more a matter of form than substance. *See* Wilson, *Writs v. Rights: An Unended Contest*, 18 MICH. L. REV. 255 (1920).

2. This process may be illustrated by the development of the tort of intentional infliction of emotional distress. Originally, recovery for mental distress was only permitted when incident to an independent tort. *E.g.*, Gadsden Gen. Hosp. v. Hamilton, 212 Ala. 531, 103 So. 553 (1925) (incident to false imprisonment); Trogdon v. Terry, 172 N.C. 540, 90 S.E. 583 (1916) (incident to assault). An early exception to this rule permitted recovery for mental distress caused when a common carrier insulted a passenger. *E.g.*, Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899). This exception came to apply when a prospective passenger had not yet bought a ticket. *E.g.*, St. Louis-San Francisco Ry. v. Clark, 104 Okla. 24, 229 P. 779 (1924).

3. One example is the tort of intentional infliction of emotional distress which is now independently recognized and no longer needs to be pleaded as an incident of another tort. *Compare* Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954) (action for mental distress based on over zealous efforts of collection company) *with* cases cited in note 2 *supra*.

4. These new harms include chemical and nuclear toxins in the environment, noise pollution, and computer record keeping which has posed a new threat to privacy.

5. Persons injured by defective products, for example, originally based their claims on the fiction of an "implied warranty." The use of this concept to obtain relief was called "pernicious and unnecessary" and was eventually largely disregarded when product liability based on strict liability was recognized as an independent tort. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134 (1960).

new causes of action have been created.[6] Second, modern science has identified with new precision the psychological and physiological effect of these harms.[7] This alone has expanded the number of recognized protectable interests.

A new type of harm created by modern science resulted from the invention of techniques to influence a person's thoughts, moods, and behavior without his awareness. This influence is accomplished by transmission of information designed to be perceived subconsciously, and not consciously. This comment finds that there is a right to be free from such influence and examines the degree to which the law has recognized the subconscious as a protectable interest. How the law has protected this interest is considered and a proposal is made for the creation of a new tort.

THE PROBLEM

Modern society, with its attendant advantages, has also bred noxious gases and odors, discomforting and dangerous noises, and unpleasant sights.[8] Aside from these incidental sensory assaults, modern society has produced an assault of informational data. Each day we are exposed to an unprecedented avalanche of advertising and other information designed to influence our attitudes and behavior. The invention of techniques for the mass dissemination of sound and pictures may be the most culturally significant technological change of the twentieth century.[9] Consequently, the common law has been challenged to determine when media assaults are actionable.

Actionable media assaults naturally fall into two categories:

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6. The right to privacy, the intentional infliction of emotional distress, and product liability based on strict liability were all created in the twentieth century. *See generally* W. PROSSER, LAW OF TORTS (4th ed. 1971) [hereinafter cited as PROSSER].

7. *See, e.g.*, Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) (examining the evolution of the law's sensitivity to the psychological aspects of emotional distress).

8. Such evils may cause compensable injuries through the concept of "private nuisance." *See, e.g.*, McClung v. Louisville & Nashville R.R., 255 Ala. 302, 51 So. 2d 371 (1951); Kosich v. Poultrymen's Serv. Corp., 136 N.J. Eq. 571, 43 A.2d 15 (1945).

9. *See generally* M. MCLUHAN, UNDERSTANDING MEDIA (1964). This technological change is a continuing process, and as such represents a continuing problem. *See* Columbia Broadcasting, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1972) ("The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.").

patent assaults and subliminal assaults.[10] Patent assaults are those which are consciously perceived, and may be offensive either because of their content[11] or because of the manner in which they are broadcast.[12] Subliminal assaults include "[a]ny technique whereby an attempt is made to convey information . . . by transmitting messages below the threshold of normal awareness."[13] Subliminal communications are necessarily assaults and are in and of themselves offensive.

Subliminal communication is *prima facie* offensive[14] because it violates the fundamental principle of personal autonomy.[15] This principle states that an individual's identity and sense of self worth are threatened when his behavior is manipulated or controlled by others.[16] When subliminal communication

10. This distinction seems logically compelled, but has not been judicially recognized.

11. Finding content offensive raises first amendment issues. These cases often involve "obscene" matter. *See, e.g.*, Rowan v. United States Post Office Dept., 397 U.S. 728 (1970) (a statute enabling persons to delete their names from a mailing list used to send advertising of a sexually provocative nature held constitutional). *But see* Cohen v. California, 403 U.S. 15 (1971) (wearing a jacket emblazoned with the words "Fuck the Draft" was constitutionally protected behavior).

12. Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance making it illegal to drive a sound truck emitting raucous noises was constitutional); Guarina v. Bogart, 407 Pa. 307, 180 A.2d 557 (1962) (noise from drive-in movie theater held to be a nuisance).

13. Code, *National Association of Radio-T.V. Broadcasters*, revision of 1958, *quoted in In re* Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016, 17 (1974), and B. KEY, THE CLAM-PLATE ORGY 134 (1980) [hereinafter cited as CLAM-PLATE]. Subliminal assaults include patent information that is designed to have a subliminal effect. *See* notes 41-55, and accompanying text *infra*. *See also* Shevrin & Dickman, *The Psychological Unconscious*, 35 AM. PSYCHOLOGIST 421 (1980) [hereinafter cited as *The Psychological Unconscious*] (discussing techniques for transmitting information that is in different degrees patent, but nevertheless designed to circumvent conscious awareness).

14. A *prima facie* presumption is not conclusive. BALLENTINE'S LAW DICTIONARY 987 (3d ed. 1969).

15. "[T]he general moral principle of personal autonomy . . . [is] that forcing individuals to do what they do not wish to do, or preventing them from doing what they wish to do is *prima facie* wrong." Shapiro, *Legislating The Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 253 (1974) [hereinafter cited as *Behavior Control*].

16. In democratic societies, there is a fundamental belief in the uniqueness of the individual, his basic dignity and worth as a human being, and in the need to maintain social processes that safeguard his sacred individuality. Psychologists and sociologists have linked the development and maintenance of this sense of individuality to the human need for autonomy—the desire to avoid being manipulated or dominated wholly by others.
Westin, *Science, Privacy, and Freedom: Issues and Proposals For the 1970's*, 66 COLUM. L. REV. 1003, 1022 (1966). *See also* Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34, 38 (1967).

is used to affect an individual's behavior without his awareness, the principle of personal autonomy is violated.

Subliminal communication also violates the related principle of mental privacy.[17] This principle protects mentation, which includes a person's thoughts, moods, and perceptions.[18] Accordingly, it is *prima facie* wrong to effect substantial changes in a person's mentation against his will.[19] The right to be free from such changes is justified on purely moral grounds,[20] and is intrinsic to the notion of a free society.[21] The right also derives from the Constitution.[22]

Subliminal communication violates the principle of mental privacy because it seeks to make changes in a person's mentation against his will. Subliminal information is perceived only subconsciously and is intended to evade the mind's critical re-

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17. *See* Note, *Mental Privacy: An International Safeguard to Governmental Intrusions Into Mental Processes*, 6 CAL. W. INT'L L.J. 110, 118-19 (1975). *See also* Rogers v. Okin, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979); Rennie v. Klein, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("The right of privacy is broad enough to include the right to protect one's mental processes from governmental interference."); Kaimowitz v. Department of Mental Health, Civ. No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), *reprinted in* 42 U.S.L.W. 2063 (July 31, 1973). ("If one is not protected in his thoughts, behavior, personality and identity, then the right of privacy becomes meaningless.") *Id.* at 2064.

18. "Mentation" refers to any mental activity outside of the regulation of the body's autonomic functions. *Behavior Control*, *supra* note 15, at 246 n.14, 253 n.42. The concept of mentation includes the mental activities of the subconscious. *Id.* at 261 n.68.

19. *Behavior Control*, *supra* note 15, at 253.

20. *Id. See also* Ruebhausen and Brim, Jr., *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1185-88 (1965).

21. "[W]ithout freedom of thought there can be no free society." Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring).

22. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."). Mental privacy has also been explained as a first amendment protection. The rationale is that the first amendment protects communication, and mentation is a necessary antecedent of communication. "The First Amendment . . . honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone." Public Utilities Comm'n v. Pollack, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting). *See also* Kaimowitz v. Department of Mental Health, Civ. No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), *reprinted in* 42 U.S.L.W. 2063, 2064 (July 31, 1973). ("[I]f the First Amendment protects the freedom to express ideas, it necessarily follows that it must protect the freedom to generate ideas. Without the latter protection, the former is meaningless.").

sources.[23] Once a person has subconsciously perceived subliminal information his thoughts, moods, and behavior can be influenced without his awareness. Employees' attitudes regarding their jobs,[24] a shopper's purchasing decisions,[25] and even a voter's choice of candidate[26] are potential targets. Such influence is clearly offensive because it is antithetical to the fundamental American principle of a free society.

That the subconscious mind can be a media target is an idea new to the twentieth century.[27] That such media targeting can influence attitudes and behavior make this area ripe for social concern and judicial attention. Before the legal implications of subliminal communication can be discussed, it must first be shown which subliminal techniques are being used.

Three Subliminal Techniques

Subliminal Sounds and Images

Subliminal sounds and images are those stimuli transmitted below the threshold of conscious perception.[28] The principle behind this technique is that sensory data which may be too dim, too silent, or too distorted to be registered consciously will nev-

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23. *See generally* CLAM-PLATE, *supra* note 13, at 19-20, 83-104; *The Psychological Unconscious*, *supra* note 13, at 426-30.

24. Case history, *Southern Bell Telephone Co. of Kentucky - Study of Employee Reactions to Muzak* (study available to potential customers from Muzak Corp.).

25. *See* notes 41-46 and accompanying text *infra*.

26. Apparently, subliminal techniques have already been used in campaign literature. *See* CLAM-PLATE, *supra* note 13, at 150-53 (use in Canadian election); *Media Images of Alcohol: The Effects of Advertising and Other Media On Alcohol Abuse, Hearings Before the Subcommittee on Alcoholism and Narcotics of the Committee on Labor and Public Welfare, United States Senate*, 94th Cong., 2d Sess. 181 (1976) (use in one United States Congressional campaign). *See also* TIME, Sept. 10, 1979, at 71 (politicans sought use of subliminal sounds technique).

27. *See* Reed, Jr. & Coalson, Jr., *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733, 741-44 (1972). [Hereinafter cited as Reed & Coalson]. *But see* N.F. DIXON, SUBLIMINAL PERCEPTION 4-10 (1971) [hereinafter cited as DIXON] (early philosophers such as Plato, Aristotle, and Democritus recognized the idea that people may be affected by stimuli of which they are not aware).

28. *See* note 13 *supra*. The Canadian Radio-Television Commission defines a "subliminal device" as

> [A] technical device that is used to convey or attempt to convey a message to a person by means of images or sounds of very brief duration or by any other means without that person being aware that such a device is being used or being aware of the substance of the message being conveyed or attempted to be conveyed.

CLAM-PLATE, note 13 *supra*, at 146 (citing the CRTC Amendment to the Television Broadcasting Regulations).

ertheless be perceived subconsciously. Once perceived subconsciously these stimuli can affect behavior.[29]

This technique takes several forms. In one variant, a voice, speaking too softly to be consciously audible, gives a simple verbal command.[30] This variant is currently being employed in supermarkets[31] and department stores[32] to reduce shoplifting. To do so, a voice inaudibly whispers and repeats: "I am honest. I will not steal."[33] Stores using this technique report substantial reduction in theft losses.[34]

In the second variant, a picture or written command is flashed during the showing of a film or a television program.[35] The image is flashed for such a brief duration that the viewer is unaware it is shown. One famous use of this technique occurred during the showing of a television commercial for "Husker-Do," a children's game. During this commercial several subliminal flashes of the phrase "Get-it!" were shown. These flashes were apparently perceptible to some viewers because the Federal Communications Commission received complaints. In response, the Commission issued a public notice[36] affirming its position that "broadcasts employing such techniques are contrary

29. *The Psychological Unconscious*, *supra* note 13, at 426-30. That subliminal techniques can affect behavior has long been established by clinical tests. *See* Dixon, *The Effect of Subliminal Stimulation Upon Autonomic and Verbal Behavior*, 57 J. ABNORM. SOC. PSYCH. 29 (1958). More recently, subliminal techniques have been used to modify the behavior of hospitalized schizophrenics. Silverman, Levinson, Mendelsohn, Ungaro, & Bronstein, *A Clinical Application of Subliminal Psychodynamic Activation*, 161 J. NERVOUS AND MENTAL DISEASE 379 (1975). These techniques have also been used commercially. For a discussion regarding their use in movies, see CLAM-PLATE, *supra* note 13, at 90; TIME, Sept. 10, 1979, at 71. For a discussion regarding their use in broadcast media *see In re* Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C. 2d 1016 (1974); *In re* Use of "Subliminal Perception" Advertising by Television Stations, 40 F.C.C. 10 (1957); *In re* "Subliminal" Advertising, 40 F.C.C. 7 (1957).

30. This technique has been clinically proven to affect conscious thought. Mykel, *Emergence of Unreported Stimuli Into Imagery As A Function of Laterality of Presentation* (1976) (unpublished doctoral thesis in Georgia State University - School of Arts and Sciences, Order No. 77-2932, 92 pages).

31. Wall St. J., Nov. 25, 1980, at 25.

32. TIME, Sept. 10, 1979, at 71; MONEY, Sept. 1978, at 24.

33. MONEY, Sept. 1978, at 24; Wall St. J., Nov. 25, 1980, at 25; OMNI, Feb. 1981, at 45-49, 107.

34. One supermarket owner reported pilferage costs went from $50,000 every six months down to $13,000. Wall St. J., Nov. 25, 1980, at 25. One department store chain reported cutting thefts by 37% for a saving of $600,000 during a nine month trial. TIME, Sept. 10, 1979, at 71; MONEY, Sept. 1978, at 24.

35. *In re* Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C. 2d 1016 (1974).

36. *Id.*

to the public interest."[37] As a consequence, the use of subliminal techniques in broadcast media is prohibited.

A third variant involves still photographs, such as magazine advertisements, in which "embeds" are hidden. Embeds are extraneous words or images designed to be subconsciously perceived, and can be detected only with study[38] or special equipment.[39] They operate in still pictures in the same way as brief flashes work in moving pictures. To obtain maximum psychological impact on the subconscious, the images must have high emotional value. Often their content is sexual.[40]

Emotional Conditioning

Emotional conditioning is a familiar advertising technique by which products are associated with emotions unrelated to their use.[41] This is illustrated by a television commercial for "Vivarin," a stimulant drug whose active ingredient is ordinary caffeine. In the commercial, a housewife describes her life before and after the use of Vivarin. Before use, she tells us, her life was an emotional vacuum. She bored her husband and

37. *Id.* at 1017.

38. *See generally* CLAM-PLATE, note 13 *supra*, at 20-23, 29-34. This book contains enlargements of some common magazine advertisements showing embeds. The author hypothesizes that embeds can be inserted during the process of putting together numerous photographs to make one composite photograph, and by the use of photo retouching techniques. *Id.* at 21, 31. While the Federal Trade Commission (FTC) has not commented on the use or existence of embeds, it recognizes the use of composite photographs and photo retouching. *See* Howard & Hulbert, *Advertising and the Public Interest*, V-8-9 (staff report to the FTC, 1973) [hereinafter cited as Howard & Hulbert]. Regarding the ability of the subconscious to perceive embeds *see* A. EHRENZWEIG, THE HIDDEN ORDER OF ART 32-46 (1976). *See also* DIXON, *supra* note 27, at 124-26 (describing psychological studies noting subliminal sensitivity to embeds).

39. Embeds of distorted images may require special equipment to be viewed normally. One particularly ingenious version of this technique involves photographing an image on a curved reflective surface. The resultant distortion can be corrected by viewing the image on an anamorphoscope, which is a vertical cylindrical mirror. FUNK & WAGNALL'S STANDARD COLLEGE DICTIONARY 53 (1966). *See also* F. LEEMAN, HIDDEN IMAGES 9, 105-34 (1976) (containing examples and the materials for constructing an anamorphoscope and finding that such distortions are found in many paintings made during the seventeenth and eighteenth centuries). Apparently, such distortions are perceived and decoded subconsciously. CLAM-PLATE, *supra* note 13, at 167-78.

40. *See generally* CLAM-PLATE, *supra* note 13, at 20-23.

41. This conditioning occurs precisely as it did with Pavlov's famous dogs: as the sound of a bell automatically initiated their salivation, so the sight of a product instantly conjures the unrelated emotion, thereby stimulating a sale. *See* J. ENGEL, D. KOLLAT, & R. BLACKWELL, CONSUMER BEHAVIOR 230 (2d ed. 1973) ("Classical conditioning probably explains much of advertising effect. . . ."). *See generally* Reed & Coalson, *supra* note 27, at 745-48. It has been clinically established that classical conditioning can affect not only behavior (such as salivating) but can also affect attitudes. Staats & Staats, *Attitudes Established by Classical Conditioning*, 57 J. ABNORM. SOC. PSYCH. 37 (1958).

bored herself. Now, after use of Vivarin, her life is more exciting and her marriage, sex life, and personality have all improved.[42]

With repeated exposures to this commercial, viewers are conditioned to associate Vivarin with a more exciting life. This conditioning is subliminal in the sense that viewers, although consciously aware of the commercial, are unaware of the conditioning. The conditioning lasts long after the commercial is consciously forgotten,[43] and may influence behavior weeks or even months later.[44] While rational viewers *know* that Vivarin cannot make life exciting, the commercial is nonetheless effective. This phenomenon has been judicially recognized[45] and has been the subject of much scholarly attention.[46]

Functional Music

Functional music is best known by the trademark of its largest producer, Muzak. It is designed by psychologists to achieve specific psychological and physiological changes in listeners.[47]

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42. J.B. Williams Co., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19, 671 (proposed complaint). In the printed version of the same advertisement, the housewife after using Vivarin, said: "All of a sudden Jim was coming home to a more exciting woman, me. We talk to each other a lot more than we have in years . . . [a]nd after dinner I was wide awake enough to do a little bit more than just look at television." *Id. See also* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587 (D.D.C. 1971) (case concerned with the regulation of tobacco advertisements) ("The Salem girl was in fact a seductive merchant of death—[and] . . . the real 'Marlboro Country' is the graveyard.") (Wright, J. dissenting).

43. Reed & Coalson, *supra* note 27, at 745-48 (citing psychological studies.)

44. *Id.* Therefore, whether a commercial is consciously memorable may be irrelevant to the commercial's ability to stimulate sales. Ironically, the less seriously a commercial is perceived, the more effective it is in conditioning behavior. *See* T. SCHWARTZ, THE RESPONSIVE CHORD 69 (1973).

45. *See, e.g.*, American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 168 n.17 (2d Cir. 1978). *See also* Howard & Hulbert, *supra* note 38, at V-32. The aspects of this report regarding emotional conditioning are discussed in notes 92-93 and accompanying text *infra*. *See also In re* Coca-Cola Co., 83 F.T.C. 746, 804 (1973) (Commissioner Jones, dissenting).

> [T]he obvious implication [of the advertisement for "Hi-C"] with its picturizations of fresh fruit and its constant use of words such as natural flavor, fresh, etc., is to cause the consumer himself to make the equivalency claim or association between Hi-C and citrus fruits. The evidence makes clear that these equivalency claims are totally untrue. . . .

46. *See, e.g.*, Reed & Coalson, *supra* note 27; Kozyris, *Advertising Intrusion: Assault on the Senses, Trespass on the Mind - A Remedy Through Separation*, 36 OHIO ST. L.J. 299 (1975) [hereinafter cited as Kozyris]; Note, *Psychological Advertising: A New Area of F.T.C. Regulation*, 1972 WIS. L. REV. 1097.

47. *See generally* KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35 (C.D. Cal. 1967); D. WALLECHINSKY & I. WALLACE, THE PEOPLE'S ALMANAC 852-53, (1975) [hereinafter cited as ALMANAC]; PROOF! MUZAK Essential Now More than Ever! (pamphlet III A 62,

Depending on the intentions of the designers of a particular program, the music may increase sales in supermarkets,[48] increase the vigilance of military personnel,[49] or reduce the error rate in a factory.[50] To accomplish these goals, functional music programmers control and regulate such variables as pitch, tempo, and the complexity of orchestration. Functional music programs are frequently designed to reach periodic peaks, followed by periods of silence. The precise patterns vary with the day of the week, the hour of the day, and the particular result the music is designed to accomplish.[51] While the music is patent, it "is arranged and recorded for its effectiveness on a secondary or subconscious level."[52]

The use of music to influence behavior is not new. One ancient use involved the practice of beating drums on a slave ship

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available to potential customers from Muzak Corp.) [hereinafter cited as PROOF!]: "MUZAK Stimulus Progression Programming is an intricate process influenced by a number of factors including tempo, rhythm, instrumentation and size of orchestra; and to maintain control of stimulation, we must identify and control these factors. This is why record albums and other entertainment media are not employed by MUZAK." *See also* Why Does MUZAK Record Its Own Music? (pamphlet available to potential customers from Muzak Corp.):

> Each 15-minute segment of Muzak programming is planned to provide a progressive stimulation. The musical selections are played starting with the least stimulating and advancing to the selections that are most stimulating. *The objective is to provide a psychological/physiological lift* - a sense of forward movement which alleviates the undesirable effects of monotony, tension and fatigue. . . . MUZAK is not in the entertainment business. *MUZAK is a technique of contemporary management* (emphasis added).

Accord, Hamm v. Business Music, Inc., 282 Ala. 168, 209 So. 2d 663 (1968) (functional music was not taxable as music or entertainment). The corporation successfully defended on the grounds that its music was not designed to entertain, but to "*condition* customers and employees of subscribers by subliminally soothing tensions." *Id.* at 170, 209 So. 2d at 664 (emphasis added).

48. ALMANAC, *supra* note 46, at 852.

49. HUMAN ENGINEERING LABORATORIES, ABERDEEN PROVING GROUND, MARYLAND, U.S. ARMY, WORK PERFORMANCE WITH MUSIC: INSTRUMENTATION AND FREQUENCY RESPONSE 20-1 (1968) (Technical Memorandum 9-68, AMCMS Code 5026.11.81900) (study also available to potential customers from Muzak Corp.).

50. Case History, *Mississippi Power & Light Co., Jackson, Mississippi* (study available to potential customers from Muzak Corp.).

51. Functional music is "highly specialized and directly adaptable to subscribers' needs. . . ." Functional Music, Inc. v. F.C.C., 274 F.2d 543, 545 (D.C. Cir. 1959); *accord*, KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 38 (C.D. Cal. 1967) "Musicast [a functional music company] constantly acquires a great number of musical recordings, and selects, edits and arranges the selections in a particular order. The type of music transmitted varies at different hours of the day and even during different days of the week. The program is constantly changed and improved."

52. PROOF!, note 47 *supra*.

to help speed up the rowers.[53] The ancient Romans and Greeks used music to treat mental disorders.[54] Functional music evolved from the discovery that marching music, played in factories during World War II, made for quicker and more efficient production. This incidental discovery formed the basis for research which produced programs that provided greater and more specialized control over moods and behavioral responses.[55]

Common Feature

All sensory input is registered both consciously and subconsciously.[56] The common feature of these subliminal techniques is not that they influence the subconscious, but that they do so intentionally. For this reason, subliminal messages are not protected speech for purposes of the First Amendment. Speech is protected to the degree it conveys ideas, and is necessarily conscious.[57]

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53. ALMANAC, *supra* note 46, at 852.

54. M. CRITCHLEY & R. HENSON, MUSIC AND THE BRAIN 434 (1977).

55. While Muzak Corporation provides studies showing functional music works, it will not provide detailed information showing *how* it works. The use of music to modify behavior is, however, a distinct category of psychology called "musical therapy." *See generally* M. CRITCHLEY & R. HENSON, MUSIC AND THE BRAIN 433-45 (1977). For examples of musical therapy experiments *see* McCarty, McElfresh, Rice, & Wilson, *The Effect of Contingent Background Music on Inappropriate Bus Behavior*, 15 J. MUSIC THERAPY 150 (1978) (contingent music reduced fighting by emotionally disturbed children on school bus); Furman, *The Effect of Musical Stimuli on the Brainwave Production of Children*, 15 J. MUSIC THERAPY 108 (1978) (investigation of effect of music on brainwave patterns and retention of story material).

56. CLAM-PLATE, *supra* note 13, at 19-20.

57. Subliminal influences can be divided into two categories for first amendment purposes: those that are totally imperceptible except to the subconscious (such as subliminal sounds and images), and those which are consciously perceptible but have a secondary subliminal effect (such as functional music and emotional conditioning). Communications that are totally imperceptible except to the subconscious clearly lack the informational value that is the gist of first amendment protection. *See* Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1202 (1965). *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 183 (1973) (Brennan, J., dissenting, quoting with approval Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) ("[T]he ultimate good . . . is better reached by free trade in ideas. . . . [The first amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ."). *See also* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 765 (1979), where the court held that "[a]dvertising, however tasteless and excessive it some times may seem, is nonetheless dissemination of information as to who is producing what product, for what reason, and at what price. . . . [T]he free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system. . . ." *But cf.* Duggan, *Fairness in*

The courts have recognized that even constitutionally permissible speech may contain an impermissible subliminal effect.[58] This subliminal effect may require judicial attention even when unintentionally caused.[59] Examining how the courts have recognized this and other subliminal influences will help determine when subliminal techniques are wrongful and how they can be regulated.

JUDICIAL RECOGNITION AND REGULATION

The common law has shown increasing sensitivity to increasingly intangible harms. Courts have progressed from requiring a showing of actual physical harm,[60] to requiring merely a fear of physical harm,[61] to recognition of a cause of action for emotional distress itself.[62] The next logical step is judicial recognition that a person has a right to be protected from influences and harms which occur at a level below a person's conscious awareness.

While the courts have recognized subliminal influence in a variety of contexts,[63] they have yet to consider intentionally caused subliminal influence as the basis of a cause of action in tort.[64] One great hindrance to judicial cognizance of such a

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Advertising: In Pursuit of the Hidden Pursuaders, 11 MELB. U. L. REV. 50, 56 (1977) (noting that the true purpose of advertising is to persuade, and that the goals of informing and informing for the purpose of selling are almost antithetical).

When communications are perceptible but have secondary subliminal effect, the first amendment analysis becomes more difficult. Protection given to such speech should be balanced against the degree to which the subliminal effect is intentionally caused. *See, e.g.*, Zamora v. Columbia Broadcasting Sys. Inc., 480 F. Supp. 199, 206 (S.D. Fla. 1979) (court refused to grant a cause of action for negligent infliction of subliminal injury by television networks on grounds that such a tort would cause an impermissible interference with "television productions on the basis of content").

58. *See* notes 67-86 and accompanying text *infra*.

59. *Id.*

60. PROSSER, *supra* note 6, at 34-37 (discussing the tort of battery).

61. *Id.* at 37-41 (discussing the tort of assault).

62. *Id.* at 49-62.

63. In addition to those areas mentioned in text, *see* Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331 (2d Cir. 1975) (trademark confusion case) "It is the subliminal confusion apparent in the record as to the relationship, past and present, between the corporate entities and the products that can transcend the competence of even the most sophisticated consumer." *Id.* at 134, (citing with approval Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 365 F. Supp. 707, 717 (S.D.N.Y. 1973)). *See also* People v. Guzman, 66 Cal. App. 3d 549, 559, 136 Cal. Rptr. 163, 169 (1977) (misconduct of juror had subliminal effect on jury requiring mistrial).

64. *But see* Zamora v. Columbia Broadcasting Sys., Inc., 480 F. Supp. 199 (S.D. Fla. 1979) (allegation of negligent subliminal influence did not state cause of action); Buchanan v. Greenwood Cinema, Civ. No. S76-471 (Sup.

cause of action is the common law's reliance on eighteenth century legal doctrines.[65] These doctrines address misuse of media directed towards beliefs at a rational, decisionmaking level.[66] They are adequate to recognize patent misuse of media, such as advertising containing factual errors. These doctrines are, however, conceptually inadequate to recognize the subliminal use of media which is designed to circumvent the mind's decisionmaking facilities. Before the law can protect against such media, it must adopt legal doctrines which recognize that the mind's rational, decisionmaking facilities can be circumvented. The adoption of legal doctrines evidencing this recognition has, in part, occurred.

Recognition

The Fairness Doctrine

The "fairness doctrine" is a creation of the Federal Communications Commission (FCC) and provides that, since the free and open discussion of all controversial issues is in the public interest, radio and television broadcasters must provide a "reasonable amount of time" to present opposing views.[67] Historically, this doctrine applied only to political speeches and editorials.[68] In *Banzaf v. Federal Communications Commission*,[69] however, it was applied to views subliminally expressed in cigarette commercials.

In *Banzaf*, a private citizen requested free television time to express his anti-cigarette smoking views. He claimed that cigarette smoking was a controversial issue and that cigarette commercials had *implicitly* expressed a pro-smoking view.[70] The FCC agreed,[71] and the court of appeals affirmed, saying:

Ct. Hamilton County, Indiana, March 4, 1976), *revenued as* Civ. No. S781-318 (Sup. Ct., Marion County, Indiana) (case awaiting trial) (teenager who fainted during a movie in which a subliminal technique was used brought suit against film company).

65. Reed & Coalson, *supra* note 27, at 753, 760-61. For an example of how the common law is still dependent on eighteenth century legal doctrines *see* note 92 and accompanying text *infra*.

66. Reed & Coalson, *supra* note 27, at 754.

67. Fairness Doctrine and Public Interest Standards, 48 F.C.C.2d 1 (1974); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (discussing the fairness doctrine and reviewing its history).

68. *See generally* Note, *And Now a Word Against Our Sponsor: Extending The F.C.C.'s Fairness Doctrine to Advertising*, 60 CALIF. L. REV. 1416 (1972) [hereinafter cited as *Fairness*].

69. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Inst. v. FCC, 396 U.S. 842 (1969).

70. *Id.* at 1086.

71. Television Station WCBS-TV, 8 F.C.C.2d 381 (1967).

> In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. *It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to. . . .*[72]

The court recognized that advertisements can convey information on a subliminal level. While cigarette advertisements never explicitly stated "cigarettes make you happy and active," that message was nonetheless expressed clearly enough to raise the fairness doctrine. The court examined not merely what the advertisements said, but what psychological impact they had.

The application of the fairness doctrine to commercial advertising was short lived. After its successful use against other advertising,[73] the FCC revised the doctrine so as to exclude commercial advertisements.[74] In so doing, the Commission appeared to reject the holding in *Banzaf*, finding that "standard product commercials, such as the old cigarette ads, make no *meaningful* contribution toward informing the public on any side of any issue."[75] This finding mistakes the lack of patent content for the lack of any content at all. Since the Commission still recognizes that subliminal expression of *non*-commercial issues should trigger the fairness doctrine,[76] the Commission's position on the *Banzaf* case is inconsistent. Its finding was compelled by policy, since *Banzaf* and its progeny were threatening to severely disrupt broadcast advertising.[77]

Misleading Advertising

Recognition of subliminal influence has also occurred with respect to misleading advertising.[78] Advertisements found to be

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72. Banzaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968) (emphasis on "avoid" by court, other emphasis added).

73. *See* Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971) (advertisements for high powered automobiles raised fairness doctrine for commercials on ecological consequences of high gas usage); *In re* Esso, 71 F.C.C. 704 (1970) (commercial by oil company regarding exploration for oil in Alaska raised fairness doctrine as to ecological consequences of exploration).

74. *Compare In re* Editoralizing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (codification of the fairness doctrine before revision) *with* Fairness Doctrine and Public Interest Standards, 48 F.C.C.2d 1 (1974) (codification after revision). *See also* Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975) (refusing to apply the fairness doctrine to a commercial advertisement as a result of the revision).

75. Fairness Doctrine and Public Interest Standards, 48 F.C.C.2d 1, 24 (1974) (emphasis added).

76. Public Interest Research Group v. FCC, 522 F.2d 1060, 1064 n.4 (1st Cir. 1975).

77. *Id.* at 1065; *see generally Fairness*, *supra* note 68, at 1422.

"misleading" may be enjoined. To determine that an advertisement is misleading, the courts have adopted legal doctrines that recognize that the mind's rational, decisionmaking facilities can be circumvented.

For instance, an advertisement's impact is measured not on the "reasonable man" but on the "ordinary purchaser."[79] This hypothetical creature is described as irrational, sub-intelligent, and subject to "impressions."[80] This standard implicitly recognizes that the seeming illogic in much consumer behavior is the product of subliminal influence.

To detect advertisements that are misleading because of their subliminal content, courts recognize that "a statement acknowledged to be literally true and grammatically correct nevertheless [may have] a tendency to mislead, confuse or deceive."[81] Courts recognize that this "tendency to mislead" is intentionally caused.[82] This raises the practical problem of determining how an advertisement that is patently accurate and proper can be found to be misleading and subliminally wrongful.

One solution is to view an advertisement in its entirety, considering its aural and pictorial aspects. This solution focuses not on the accuracy of what an advertisement says but on the

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78. This rule applies to the Lanham Trademark Act and to the Federal Trade Commission Act. The Lanham Trademark Act provides in relevant part: "Any person who shall affix . . . [to] any goods . . . a false description . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person doing business in the locality . . . [who] is likely to be damaged by the use of the false description." 15 U.S.C. § 1125(a) (1970).

The Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in commerce" and provides administrative machinery for enjoining "false advertising." 15 U.S.C. § 45(a) (1976). Both Acts give a manufacturer whose product is being disparaged a practical means to enjoin the offending advertisement. Courts apply the same principles to cases under both Acts to determine whether an advertisement is "misleading." *Compare* American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978) (based on Lanham Act) *with* FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963) (based on the FTC Act). These principles are described in notes 81-85 and accompanying text *infra*.

79. FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963).

80. *Id.*

81. American Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976). *See also* Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943).

82. "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because *advertisements are composed or purposely printed in such a way as to mislead*." Donaldson v. Read Magazine, 333 U.S. 178, 188 (1948) (emphasis added). *See* American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 168 (2d Cir. 1978) (internal memorandum of an advertising firm showed awareness of subliminal effect).

cumulative *impression* of its parts working together.[83] Another solution is to disregard the advertisement and consider instead the *effect* it produces.[84] Rather than concern themselves with how a subliminal effect is produced, courts have sought to determine only that there is such an effect. The determination is accomplished by tests of consumer reactions.[85] In one case where a consumer test was used to determine that an advertisement was misleading, the court said: "What the [consumer] test shows, then, is the powerful 'subliminal' influence of modern advertisements. . . . The subliminal influence is present even though—incredibly enough—the survey showed 46% of the people tested found something in the commerical 'hard to believe.' "[86]

Regulation

While advertisements may be enjoined because their subliminal content makes them "misleading," subliminal techniques have never been outlawed.[87] Although both the FCC and

83. For example, in American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 163 (2d Cir. 1978), the court analyzed an advertisement for aspirin in the context of its sound track (the sound of a muted kettle drum grew louder while in the background a voice enumerated types of pain). The court also noted the visual effect of "pulsating spots." *Id.* at 166. *See also* American Brands, Inc., v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1354 (S.D.N.Y. 1976) (noting allegations that a cigarette package was shown at an angle, "creating and intended to create the impression that the cigarette is larger than shown.").

84. "It is . . . well established that the truth or falsity of the advertisement usually should be tested by the reactions of the public." American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d at 165. *See also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972) (in determining whether a practice is unfair to consumers, the FTC is to function "like a court of equity," considering "public values"). 405 U.S. at 242. *Accord*, Rowan v. United States Post Office Dept., 397 U.S. 728, 736 (1970) (finding constitutional a statute that allows a householder an absolutely subjective standard for determining which mail is offensive).

85. 577 F.2d at 167-68 (use of a consumer test was appropriate); American Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976) (advertisement was not proven misleading because insufficient consumer testing was done). *Cf.* Triangle Publications, Inc. v. Rohrlich, 167 F.2d 969 (2d Cir. 1948), *overruled in part* by Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., 349 F.2d 389 (2d Cir. 1965), *cert. denied*, 383 U.S. 942 (1966). The dissent suggests use of subjective reactions from the audience for whom the advertisement was intended. Psychological testing is also recommended. *See also In re* Coca Cola Co., 83 F.T.C. 746, 802 (1973) (Commissioner Jones, dissenting, basing his opinions in part on a consumer survey). Consumer surveys are also used in trademark infringement cases. *See* Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331, 1341 (2d Cir. 1975).

86. 577 F.2d at 168, n.17.

87. When the use of subliminal techniques was first widely discussed in the mid-1950's, several bills were introduced in Congress but were never passed. *See* CLAM-PLATE, *supra* note 13, at 132-49; *Subliminal Advertising*

the Federal Trade Commission (FTC) have power to regulate some uses of such techniques, their attempts to regulate have been minimal.[88]

The FTC is empowered to stop advertising that is "unfair or deceptive."[89] While subliminal techniques are not deceptive,[90] they are arguably unfair and there has been some attempt to regulate them on that basis.[91] Conversely, the FTC has also considered regulating emotional conditioning on the basis that advertisements using such techniques *are* deceptive. The rationale is that product claims are deceptive unless they can be substantiated. The advertiser in the aforementioned "Vivarin" example, for instance, made two claims: that Vivarin would increase alertness and would give the user a better, more sexually fulfilling life. Under this rationale, both these claims would be evaluated. If they could not both be substantiated, then the commercial would be deceptive and could be enjoined.[92]

Both the FTC and FCC have recently considered rules to control and limit advertising directed towards children.[93] These

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in American Broadcast Media 14 (April 1978) (student project prepared for United States Senator Wendell Anderson by S. Jones and available from Yale Legislative Services) [hereinafter cited as Legislative Services].

88. The FTC is empowered to regulate advertising, and the FCC is empowered to regulate broadcast media. Neither of these agencies have jurisdiction over independent commercial use of subliminal techniques. They could not, for instance, enjoin a supermarket from playing subaudible taped voices whispering "Don't steal!" For a discussion of that technique, see notes 30-34 and accompanying text *supra*.

89. 15 U.S.C. § 45(a)(1) (1976).

90. *But see In re* Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016, 1017 (1974) ("such [subliminal] broadcasts are clearly intended to be deceptive").

91. *See generally* Note, *Unfairness Without Deception: Recent Positions of the Federal Trade Commission*, 5 LOY. L.A.L. REV. 537 (1974); Note, *Section 5 of the Federal Trade Commission Act — Unfairness to Consumers*, 1972 WIS. L. REV. 1071.

92. Howard & Hulbert, note 38 *supra*, at V-32:

> The toothpaste advertiser who claims that regular use of "Whizzwhite" produces teeth 25 percent brighter than any competitive brand should only do so if the claim is true and supported. If he then claims people will like you more . . . and that the same white teeth produce a 25 percent higher rate of job promotions . . . why should the notion of substantiation be less applicable?

This approach misses the point. Substantiation is valuable when a claim is made that might rationally be believed. The danger is not that purchasers of "Whizzwhite" will *expect* to become more popular, but that they will become emotionally conditioned to buy "Whizzwhite" irrespective of their expectations.

93. The FTC published proposed regulations in 43 Fed. Reg. 17967 (April 27, 1978). An attempt to get interlocutory review of the regulations failed. Association of Nat'l Advertisers v. FTC, 617 F.2d 611 (D.C. Cir. 1979). The FCC formulated specific policies to be followed by television broadcasters. Children's Television Report and Policy Statement, 50 F.C.C.2d 1 (1974),

rules are a product of the law's historical sensitivity to the effects of advertising on children[94] and other particularly vulnerable segments of the population.[95] The rationale of these rules would support similar restrictions on the use of subliminal techniques. Since these techniques are designed to bypass the mind's critical faculties, persons of all ages are vulnerable to them.

The FCC has declared that the use of subliminal sounds or images in broadcast media is contrary to the public interest[96] and is "inconsistent with the obligations of a licensee."[97] Such techniques are now also proscribed by the National Association of Broadcasters' Television Code.[98] Subliminal images have been broadcast despite these prohibitions.[99] However, it is difficult to know whether additional, unreported broadcasts have occurred since ordinarily broadcasts of subliminal images cannot be consciously perceived and cannot therefore be the subject of a television viewer's complaint.[100]

The FCC also regulates functional music that is broadcast by radio waves.[101] FCC regulations require all radio stations to broadcast a varied program content to the general public, some

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recon. denied, 55 F.C.C.2d 691 (1975), *aff'd sub nom.*, Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977). These policies included limits to the number of commercials that could be shown children, a requirement that program and commercial content be clearly separated, and a prohibiton of practices that take advantage of the immaturity of children. 50 F.C.C.2d at 19. The effectiveness of these policies was recently reviewed. Children's Programming and Advertising Practices, 68 F.C.C.2d 1344, 1353 (1978). *See generally* Note, *Unsafe for Little Ears? The Regulation of Broadcast Advertising to Children*, 25 U.C.L.A. L. REV. 1131 (1978).

94. *See, e.g.*, FTC v. Keppel & Bros., Inc., 291 U.S. 304 (1934). *See also* Rowan v. United States Post Office Dept., 397 U.S. 728, 732 (1970) (noting Congressional concern on the impact of obscene materials on children).

95. *See, e.g.*, S.S.S. Co. v. FTC, 416 F.2d 226 (6th Cir. 1969) (advertisements aimed at the poor); Doris Savitch, 50 F.T.C. 828 (1954), *aff'd*, 218 F.2d 817 (2d Cir. 1955) (special appeal to women who fear they are pregnant).

96. *In re* Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016, 1017 (1974).

97. *Id.*

98. *See* note 13 and accompanying text *supra*.

99. *In re* Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016, 1017 (1974) (noting, that on one occasion, television stations continued to broadcast a commercial containing subliminal statements even after being told not to by the National Association of Broadcasters TV Code Authority).

100. Subliminal flashes may be as fleeting as 1/3000th of a second. B. KEY, SUBLIMINAL SEDUCTION 33 (1973). Presumably, the FCC will receive complaints only when, for some reason, flashes of a much longer duration are used.

101. Some functional music is transmitted over telephone lines. *See* Hamm v. Business Music, Inc., 282 Ala. 168, 209 So.2d 663 (1968).

of which must include the spoken word.[102] To achieve the desired subliminal effect, functional music programs must be broadcast without interruptions.[103] In order to comply with FCC rules, functional music broadcasters devised a system whereby the public could receive functional music with the requisite minimal content and private subscribers would rent a device whereby that content could be deleted.[104]

In 1955 the FCC, having found that functional music "is highly specialized and directly adaptable to [a] subscriber's needs [and is] formulated in their interest rather than that of the general public,"[105] banned broadcast of functional music to the public. Private subscribers were still permitted to receive functional music by the use of special equipment.[106] Broadcast to the public was effectively ended, whether or not minimum content was added.[107]

The FCC's ruling was challenged. In *Functional Music v. Federal Communications Commission*,[108] a functional music broadcaster sought the right to broadcast as long as the minimal content requirements were met. The court held for the broadcaster, and noted that, despite the Commission's assertion that functional music was not intended for the public, the commercial broadcasts had in fact been popular. The court said "functional music can be, and is, of interest to the *general* radio audience."[109]

In *Functional Music*, the court stressed that the people freely listened to the music.[110] The court's characterization may not have been correct, since the radio audience consented to listen to music, not functional music. They were not aware that their moods and heartbeats were being altered in preconceived patterns by functional music psychologists. Perhaps if the court had identified the interest being invaded by functional music, it would not have permitted commercial broadcast. The court ex-

102. 47 C.F.R. § 73.4210 (1979). Regarding FCC policies *see generally* 47 C.F.R. §§ 73.4000-.4275 (1979). *See also* KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 37 (C.D. Cal. 1967).

103. 264 F. Supp. at 37.

104. *Id.*

105. Functional Music v. FCC, 274 F.2d 543, 545 (D.C. Cir. 1958). The FCC found that functional music was not "broadcasting" for purposes of the Communications Act. "Broadcasting means the dissemination of radio communication intended to be received by the public. . . ." *Id.* at 545 n.3.

106. This equipment allowed multiplex transmission by which the same FM radio channel could broadcast multiple signals, only one of which could be received by the public. *Id.* at 545.

107. *Id.* at 545-46.

108. 274 F.2d 543 (D.C. Cir. 1958).

109. *Id.*

110. *Id.*

plicitly left this possibility open in holding that "[w]hether or not [a] functional music service may be barred as objectionable for reasons other than its [supposedly not being intended for the public] . . . is not before us. We merely conclude that the reasons which the Commission relies upon do not support its action in barring functional music."[111]

TOWARDS A PRIVATE CAUSE OF ACTION

Privacy Law

A variety of causes of action may be available to the victim of subliminal influence.[112] Of these, an action in privacy is most applicable. A privacy interest was formally recognized in the twentieth century,[113] and stated most eloquently, is the right to be "let alone."[114] This right takes two forms.[115] One form involves publicity, in which some private fact is exposed either by commercial packaging[116] or by the news media.[117] Another form

111. *Id.* at 548-49.

112. One theory would premise a consumer cause of action under the FTC's "unfair or deceptive" clause. This theory uses the doctrine of implication, and has proven largely unsuccessful in this area. *See generally* Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970). *Compare* Guernsey v. Rich Plan, 408 F. Supp. 582 (N.D. Ind. 1976) (finding a consumer cause of action could be implied) *with* Greenberg v. Michigan Optometric Ass'n, 483 F. Supp. 142 (E.D. Mich. 1980) (finding there was no such cause of action). *See also* Kozyris, *supra* note 46, at 337. (suggesting privacy, nusiance, and public interest in the media as applicable theories).

One interesting contractual theory is undue influence. Undue influence requires "influence" sufficient to create or alter a contract, and requires that the influence be "undue." Where the influence was not caused by a person in a confidential relationship, it must be shown that the free agency of the injured person was overcome. *See, e.g.*, Federman v. Stanwyck, 63 Ohio 78, 108 N.E.2d 339 (1949). Undue influence could be used, for instance, to avoid a contract for the sale of a car on the grounds that the purchaser was unduly influenced by the functional music being played in the dealership showroom.

113. Privacy law has been traced to the famous article by Earl Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

114. *Id.* at 193.

115. *Cf.* PROSSER, *supra* note 6, at 814. Prosser identifies four forms of privacy, but notes that three forms require or usually involve publicity whereas the fourth form, intrusion, does not. The classification of privacy interests suggested here is a variant of Prosser's. *See also* Whalen v. Roe, 429 U.S. 589, 598-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."). For an analysis of privacy cases that reject Prosser's classification *see* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964) [hereinafter cited as Bloustein].

116. The classical case is where a photograph of the plaintiff's face has been used without his consent to advertise the defendant's product. *See,*

involves "intrusion upon seclusion."[118] It is from this form that the victim of subliminal influence may find a cause of action.

Actionable "intrusion" originally involved a physical intrusion upon a plaintiff's place of solitude.[119] The notion of intrusion has since been applied in situations where there was a non-physical intrusion,[120] and more recently where the intrusion was to the plaintiff's thought processes alone.[121] This latter variant is called mental privacy, and protects against interference in a person's moods or thoughts against that person's will.[122] The common feature of the intrusion cases is that the actionable wrong is not the publicity associated with private facts but rather the *invasion* itself.

The Expectation Interest

Non-physical intrusions have been found where a person's legitimate expectation of privacy was violated. The expectation interest was defined by *Katz v. United States*.[123] In *Katz*, the FBI monitored and recorded the telephone conversations a suspected criminal had while in a public phone booth. The court held that the FBI's actions had violated the suspect's privacy, and enunciated a two part test.[124] First, "a person must have exhibited an actual (subjective) expectation of privacy."[125] Second, the expectation must be one "that society is prepared to recognize as 'reasonable.' "[126] This test would find the use of subliminal techniques to be an invasion of privacy if, for example, consumers expect, and reasonably so, that they will know when they are being manipulated or influenced.

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e.g., Olan Mills, Inc. v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952).

117. Publicity is required, although it need not be through the aegis of the news media. *E.g.*, Kerby v. Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577 (1942) (distribution of a letter to a thousand men was held sufficient publicity).

118. *See generally* PROSSER, *supra* note 6, at 807-09.

119. *Id.*

120. Kovacs v. Cooper, 336 U.S. 77 (1949) (sound can invade privacy).

121. Rennie v. Klein, 462 F. Supp. 1131, 1144 (D.N.J. 1978); Kaimowitz v. Department of Mental Health, Civ. No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), *reprinted in* 42 U.S.L.W. 2063, 2063-64 (July 31, 1973).

122. See notes 17-22 and accompanying text *supra*.

123. 389 U.S. 347 (1967).

124. 389 U.S. at 361 (Justice Harlan, concurring). The two part test has since been adopted by the Court. Smith v. State of Maryland, 442 U.S. 735, 740 (1979).

125. *Id.*

126. *Id.*

Freedom To Not Hear

Non-physical intrusions have also been found in the use of sound. The Supreme Court recognizes that the privacy interest encompasses a "very basic right to be free from sights, sounds, and tangible matter that we do not want."[127] This right "not to be spoken to"[128] is balanced against the inevitability of unwanted speech and other stimuli received by merely walking outdoors. The balance tips in favor of finding a protectable privacy interest when offending stimuli invade the home[129] or affect an otherwise "captive audience."

An audience is "captive" when it is powerless to avoid an offending communication.[130] Thus an ordinance making it illegal to drive around in a sound truck, blaring amplified speeches,[131] was found constitutionally valid, as was a state statute forbidding all advertising of cigarettes on billboards.[132] Regarding billboards, the Supreme Court said "[b]illboards, street car signs, and placards and such are in a class by themselves. . . . [They] are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer."[133]

Privacy is invaded, then, when a person cannot choose to avoid an offending communication. By this test, aural rather than visual communication is more likely to cause an invasion, since one can stop looking more easily than one can stop hearing.[134] In no event, however, can one stop one's perception of

127. Rowan v. United States Post Office Dept., 397 U.S. 728, 736 (1970).

128. *See generally* Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?* 67 NW. U.L. REV. 153 (1972). *See also* Public Util. Comm'n v. Pollak, 191 F.2d 451, 458 (D.C. Cir. 1951), *rev'd* 343 U.S. 451 (1952) ("Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to society . . . ."); Note, *Freedom of Attention*, 2 CATH. U. L. REV. 84 (1952).

129. 397 U.S. at 738.

130. *Compare* Rowan v. United States Post Office Dept., 397 U.S. 728 (1970) (finding householders are captive to the mail they receive and can therefore be protected from the receipt of unwanted mail) *with* Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (finding unconstitutional an ordinance that made it an offense to show films containing nudity at a drive-in movie theater where the screen was visible from a public street). In *Erznoznik* the Court said "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' " *Id.* at 212.

131. Kovacs v. Cooper, 336 U.S. 77 (1949).

132. Packer Corp. v. Utah, 285 U.S. 105 (1932).

133. *Id.* at 110.

134. The privacy of bus passengers was not contingent on their ability "to sit and to try not to listen." Public Util. Comm'n v. Pollack, 343 U.S. 451, 469

subliminal phenomena, unless the offending source can be identified and circumvented. The pervasiveness of subliminal influences may make this impossible.[135] Functional music particularly involves captive audiences because of its common use in elevators, restaurants, retail stores, and in the work place.[136]

Zamora's Subliminal Tort

The first attempt at a private cause of action for subliminal influence was made by a minor, Ronny Zamora, who was convicted of first degree murder. At trial he had unsuccessfully pleaded an insanity defense based on "involuntary subliminal television intoxication."[137] Zamora then brought a civil action against the three major television networks[138] for causing him to be involuntarily addicted to and "completely subliminally intoxicated by" the extensive viewing of the television violence they had broadcast.[139] The complaint was phrased in negligence, alleging that the broadcasters had failed to use ordinary care to prevent Zamora from being "impermissibly stimulated, incited and instigated"[140] to duplicate the violence he had watched. The complaint was dismissed for failure to state a cause of action.[141]

A number of factors influenced the court's decision, among them: that a duty was not articulated;[142] that the element of causation was lacking;[143] and that the complaint required an imper-

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(1952) (Douglas, J., dissenting). *See also* Lehman v. City of Shaker Hts., 418 U.S. 298, 320 (1970) (Brennan, J., dissenting).

135. Kozyris, *supra* note 46, at 301-03 (describing in detail the number and types of daily advertising intrusions). The courts have been flexible in deciding what media is actionable. *Compare* Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) ("The radio can be turned off, but not so the billboard or street car placard") *with* note 62 and accompanying text *supra*.

136. "Employees during working hours are the classic captive audience." NLRB v. United Steelworkers of America, 357 U.S. 357, 368 (1958) (Warren, J., dissenting).

137. Zamora v. State, 361 So. 2d 776 (Dist. Ct. App. Fla. 1978). The relevant test for insanity was the M'Naughten Rule, which required the inability to distinguish right and wrong at the time of the criminal act. *Id.* at 779. The "subliminal" defense was heard by the jury without the benefit of expert testimony directed to the effect of television on adolescents. Such testimony was excluded on relevancy grounds, in that the expert would have been unable to testify that the effect included the inability to distinguish right and wrong. *Id.*

138. Zamora v. Columbia Broadcasting Sys., Inc., 480 F. Supp. 199 (S.D. Fla. 1979) (The other two networks sued were American Broadcasting Co., Inc., and National Broadcasting Co., Inc.).

139. *Id.* at 200.

140. *Id.*

141. *Id.* at 207.

142. *Id.* at 202.

143. *Id.* at 204 (court analyzed the chain of causation as "at some point

missible judicial meddling in television programming content in contravention of the first amendment.[144] The court, however, expressed sympathy for the attempt to state a cause of action. The court suggested that it would be more inclined to grant a cause of action if the plaintiff would allege that he had reacted to "any specific program of an inflammatory nature."[145] "One day," the court concluded, "medical or other sciences with or without the cooperation of the programmers may convince the FCC or the courts that the delicate balance of first amendment rights should be altered to permit some additional limitations in programming."[146]

The failure of the *Zamora* court to recognize a private cause of action for the victim of subliminal influence is not surprising. The case had a number of special problems that made it a poor vehicle for such recognition.[147] In light of the privacy law principles discussed, the victim of a subliminal tort does not share Zamora's difficulty in establishing the element of causation. The victim need only prove the occurrence of the invasion it-

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(unspecified in any way) he became captive to the violence he viewed and turned to unlawful conduct.").

144. *Id.*

145. *Id.* The court dismissed the complaint only "[u]pon the election of the plaintiffs not to amend." *Id.* at 207.

146. *Id.* at 206.

147. These problems are described in notes 142-43 and accompanying text *supra*. *Cf.* Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973). In *Stevens*, the defendant drug company promoted a drug by encouraging physicians to prescribe it. The plaintiff was injured by the drug, and sued both the drug company and the prescribing doctor on the grounds that the drug label contained inadequate warnings. Both the doctor and the drug company were found liable. The drug company appealed, arguing that the drug warning label was clearly adequate and that the prescribing doctor was aware of the warning but nevertheless prescribed the drug. 9 Cal. 3d at 64, 507 P.2d at 660-61, 107 Cal. Rptr. at 52. The court rejected these arguments, finding that the *desired result* of the drug company's promotions was to subliminally influence physicians to prescribe the drug irrespective of the warning label. 9 Cal. 3d at 69, 507 P.2d at 664, 107 Cal. Rptr. at 56. The court said:

> [t]he record reveals in abundant detail that [the drug company] made every effort *employing both direct and subliminal advertising*, to allay the fears of the medical profession which were raised by knowledge of the drug's dangers. It cannot be said, therefore, that Dr. Beland's prescription of the drug *despite his awareness of its dangers* was anything other than the foreseeable consequence—indeed the desired result—of [the drug company's] overpromotion.

9 Cal. 3d at 69, 507 P.2d at 664, 107 Cal. Rptr. at 56. The court also said that "[i]t is reasonable to assume that the company's efforts consciously or subconsciously influenced him." 9 Cal. 3d at 68, 507 P.2d at 664, 107 Cal. Rptr. at 55.

The doctor in *Stevens* did not appeal. He should have pleaded "the subliminal defense." Unlike *Zamora*, the acts that were alleged to have a subliminal effect were intentional, thus providing a stronger basis for the court to provide relief.

self,[148] and need not prove the highly attenuated relationship between watching television and becoming incarcerated. The victim need not demonstrate a breach of duty because, as in privacy, the tort requires an intentional act.[149] Most fundamentally, the victim of a subliminal tort need not become embroiled in a discussion of "the delicate balance of first amendment rights"[150] since subliminal messages are not protected speech.[151]

The Subliminal Tort

Once the problems of the *Zamora* case can be overcome, the remaining problem is to determine the elements of a subliminal tort. Privacy law provides a sound conceptual basis for such a tort, but has yet to adopt the legal doctrines that recognize the subconscious as a separate protectable interest.[152] Such recognition is a prerequisite of a cause of action for purely subliminal injuries. Accordingly, the subliminal tort may be derived in part from privacy law, and in part from those non-tort areas (such as the fairness doctrine and misleading advertising cases) that have recognized the subconscious. Thus formulated, a subliminally injured person should be required to prove three elements:

1) that a subliminal invasion has occurred;
2) that the subliminal invasion was intentional; and
3) that the invasion was wrongful.[153]

Proof of an invasion can be accomplished by the same techniques used in misleading advertising cases. One technique involves the examination of an offending communication in its entirety, considering its aural and pictorial aspects.[154] This

148. See notes 119-22 and accompanying text *supra*. The rationale is expresed by Bloustein, *supra* note 117, at 973:

> The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts.

149. *See generally* PROSSER, *supra* note 6, at 802-18.

150. Zamora v. Columbia Broadcasting Sys., Inc., 480 F. Supp. 199, 207 (S.D. Fla. 1979).

151. *See* note 57 and accompanying text *supra*.

152. *See* notes 63-66 and accompanying text *supra*.

153. *Cf. Behavior Control*, *supra* note 15, at 262-63. The author proposes factors to be considered in determining when psychological treatment that changes mentation is intrusive. The proposed factors include: (i) the extent to which the change is reversible; (ii) the extent to which the resultant psychic state is "unnatural" (related to the magnitude of change); (iii) the extent to which the change can be resisted; and (iv) the duration of the change.

154. *See* note 83 and accompanying text *supra*.

would be useful in showing the use of subliminal embeds in still pictures[155] and the use of inappropriate associations with examples of emotional conditioning. The other technique involves disregarding the offending communication, and using survey and other scientific evidence to show that the communication produced a subliminal *effect*.[156] Such evidence would be useful to show, for instance, that an advertisement was repeated a sufficient number of times to cause conditioning that would influence behavior. In the case of functional music, psychological studies have been used non-judicially to show that music does modify behavior.[157] Similar studies could be used by a plaintiff or a class of plaintiffs to show that their behavior was modified. The use of science, such as would be required, is no stranger to the courtroom.[158]

Proof of intent can be accomplished by the same techniques that are used in proving other intentional torts. In the misleading advertising cases, for instance, proof of intent is not required but has nonetheless sometimes been found.[159] The element of intent serves also to avoid the proof problems that appeared with the use of negligence in the *Zamora* case, and serves to narrow the range of actionable speech.

Proof that the invasion was wrongful can be accomplished by showing that the invasion was an attempt to modify behavior. The intent to control a person without his awareness is inherently wrongful. To determine whether a particular subliminal invasion is wrongful the cases defining the expectation interest provide guidelines.[160] Following these guidelines, the subliminal victim can show an actual expectation of privacy.[161] The

155. *See* notes 38-40 and accompanying text *supra*. Embeds may also be susceptible to detection by computer image enhancement. Legislative Services, *supra* note 87, at 39.

156. *See* notes 84-85 and accompanying text *supra*. Subliminal techniques would be actionable even if they had other than their intended effect. Voices whispering "Don't Steal!," for example, might not reduce theft in a particular situation but could still invade one's subconscious and cause unpredictable, even violent reactions. *See* Legislative Services, *supra* note 87, at 7-8 (subliminal stimuli evoked pathological manifestations); OMNI, Feb., 1981, at 107 (subliminal stimulus of innocuous phrase causes violent reaction). Evidence of a subliminal effect can be shown even in the absence of such dramatic reactions. *See The Psychological Unconscious*, *supra* note 13, at 427-28 (effects of subliminal stimuli are detectable through word associations and analysis of dream content).

157. *See* note 55 and accompanying text *supra*.

158. On the technical competence of the courts *see Behavior Control*, *supra* note 15, at 323-24.

159. *See* note 82 and accompanying text *supra*.

160. *See* notes 123-26 and accompanying text *supra*.

161. *See* note 125 and accompanying text *supra*. This is not to say that actual knowledge of the use of a subliminal technique (by, for instance, the

court could then determine whether the expectation was one that society is prepared to recognize as "reasonable."[162] Whether it is reasonable to expect to be free from subliminal influence is a policy question.

The Policy Question

Defining when a subliminal invasion is objectively wrongful will require drawing fine distinctions. A supermarket manager may discover that by painting his walls a certain color, he will improve the atmosphere of his store and will accordingly improve sales. While this use of color operates and is intended to operate on a subliminal level, it cannot be said to be unreasonable. If, however, the manager installs a system of speakers that subaudibly whisper "Buy eggs!,"[163] his behavior is unreasonable. Between these examples may be other cases more difficult to decide.[164] The resolution ultimately depends on an emotional test: would a reasonable person, discovering that his or her behavior had been manipulated without personal knowledge, feel an instinctual sense of anger, revulsion, or fear? Reasonable people may come to different conclusions.

The question remains whether all techniques to influence subliminally should be prohibited. If subaudible voices whispering "Don't steal!" can reduce shoplifting in a supermarket, the use of such a technique will be economically attractive. Likewise, there is great incentive to use functional music pro-

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posting of a sign) will necessarily obviate liability. In certain circumstances the subliminal assault may be unavoidable (such as exposure to functional music programs used in elevators). The actual expectation of privacy must be considered in light of the plaintiff's helplessness to avoid the offending communication. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (balancing the right to use sound trucks against the helplessness of listeners to escape interference with their privacy).

162. *See* note 126 and accompanying text *supra*.

163. The use of subliminal messages to sell has been called "inevitable." MONEY, Sept., 1978, at 24. Whether such use is already widespread is a matter of conjecture. Among other uses, subliminals are being used to inspire sales personnel and to help people lose weight. TIME, Sept. 10, 1979, at 71.

164. In his famous essay, *On Liberty*, John Stuart Mill wrote:

> There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against despotism.
>
> But although this proposition is not likely to be contested in general terms, the practical question, where to place the limit—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done. . . .

MILL, ON LIBERTY 7-8 (Bobbs-Merrill, 1956).

grams which increase factory workers' efficiency[165] and reduce their error rate.[166]

Are these techniques inherently wrongful? The answer is that these uses of subliminal stimuli are no more appropriate than use, for instance, to influence a voter's choice of a candidate.[167] The invasion of privacy occurs whether or not the objective behavior modification has social utility.[168] Even the seemingly beneficial effects may be ultimately destructive. A society that must function by the use of subliminal stimuli rather than the conscious willingness of its people is bound to become unstable.

CONCLUSION

The discovery of new media techniques for the modification of the behavior of persons without their awareness raises the specter of a society whose freedom has become an illusion. No clear regulatory or common law prohibitions exist against most of these techniques. Nevertheless, a clear movement of the law indicates a growing sensitivity to the concept and the pervasiveness of subliminal influences, and to the companion notion that such influences are *prima facie* offensive.

Firmly established principles of privacy and non-tort law, in tandem, provide the basis for individual victims of subliminal influence to seek a remedy. It is through the efforts of such individuals that the courts can decide which subliminal media techniques are being used, and which are wrongful and must be stopped.

Charles B. Kramer

165. Case study, *Effect of MUZAK on Industrial Efficiency* 14-18 (1964) (study available to potential customers from Muzak Corp.).

166. *See* note 50 *supra*.

167. *See* note 26 and accompanying text *supra*.

168. Regarding radio on public buses, Justice Douglas wrote: "The government may use the radio (or television) on public vehicles for many purposes. Today it may use it for a cultural end. Tomorrow it may use it for political purposes. So far as the right of privacy is concerned the purpose makes no difference. . . . Once privacy is invaded, privacy is gone." Public Util. Comm'n v. Pollak, 343 U.S. 451, 468-69 (1952) (Douglas, J., dissenting).