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MARKETING GOODS, MARKETING IMAGES:

The Impact of Advertising on Race

Deseriee A. Kennedy*

The fundamental rules regulating race relations have changed since the Civil Rights Movement. No longer do we witness the "white" and "colored" signs on the doors of restaurants, restrooms, schools, and motels. No longer do we deny African Americans the right to vote. But the passage of legislation does not represent the fundamental empowerment of the oppressed. Instead, we bear witness to a more insidious and complex structure of domination. Race continues to be a decisive variable in the national structure of power, privilege, and class exploitation.¹

Emancipatory movements are concerned not just with changing social realities but also changing representations.²

I. INTRODUCTION

Advertising is an important means of public discourse.³ One commentator has noted that, "[a]s a means of expressing shared values and a

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1. Manning Marable, *Race, Identity, and Political Culture*, in BLACK POPULAR CULTURE 292, 292 (Gina Dent ed.) (Discussions in Contemporary Culture Series No. 8, 1992). This article uses the terms "African American" and "Black" interchangeably to refer to Americans of African descent.

2. JAN NEDERVEEN PIETERSE, WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE 11 (1992).

3. In addition to their primary discourse of goods and services, advertisements contain a secondary discourse about society and culture. See WILLIAM M. O'BARR, CULTURE AND THE AD, EXPLORING OTHERNESS IN THE WORLD OF ADVERTISING 2, 3 (1994) (examining the social and cultural ideologies in advertising by focusing on representations of foreigners and other categories of outsiders).

common national ideology, advertising dwarfs any other genre of communication.”⁴ “The marketplace (and its major ideological tool, advertising) is the major structuring institution of contemporary consumer society.”⁵ Symbols and models used in advertising are important in shaping perceptions of oneself and others,⁶ and the imagery presented in mass media “encapsulate[s] ideas and actions of central importance in human life.”⁷ The mass media influence society and “function as the producers and transmitters of ideologies because the rituals and myths they reproduce for public consumption “‘explain, instruct, and justify practices and institutions . . . linking symbols, formulas, plot and characters in a pattern that is conventional, appealing and gratifying.’”⁸ This effect is conscious and deliberate; in fact, advertising professionals quite frequently view advertising as not merely selling a product but as “a means to a desired end—a person thinking or behaving differently.”⁹ Advertising, however, does not merely

4. BURT NEUBORNE, *FREE SPEECH—FREE MARKETS—FREE CHOICE: AN ESSAY ON COMMERCIAL SPEECH* 19 (1987). William M. O’Barr notes that, “advertising conveys ideas that are political and system maintaining.” O’BARR, *supra* note 3, at 2. “It is art that is both sponsored by and supportive of capitalism.” *Id.* O’Barr examines the social ideologies of advertising: “who is in charge, how society is or ought to be, who is powerful, who is weak, who is dominant, who is subordinate.” *Id.*; see also ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940*, at xix (1985) (“[A]ds surpass most other recorded communications as a basis for *plausible inference* about popular attitudes and values.”).

5. Sut Jhally, *Image-Based Culture: Advertising and Popular Culture*, in *GENDER, RACE AND CLASS IN MEDIA* 77, 78 (Gail Dines & Jena N. Humez eds., 1995) [hereinafter Jhally, *Image-Based Culture*].

6. See MARILYN KERN-FOXWORTH, *AUNT JEMIMA, UNCLE BEN, AND RASTUS: BLACKS IN ADVERTISING, YESTERDAY, TODAY, AND TOMORROW* 44 (1994). The socio/cultural impact of media messages has been noted by groups as disparate as Action for Children’s Television (seeking to reduce television violence and to improve the quality of programming) and the Vatican. See O’BARR, *supra* note 3, at 205; Pontifical Council for Social Communications, *Ethics in Advertising* (visited Feb. 15, 2000) <http://www.vatican.va/roman_uria/pontifical_councils/pccs/documents/rc_pc_pccs_doc_22021997_ethics-in-ad_en.html> [hereinafter Pontifical Council, *Ethics in Advertising*].

7. KERN-FOXWORTH, *supra* note 6, at 44 (quoting art historian Herbert M. Cole). Cole is referring to the importance of symbolic icons, but the idea is equally applicable to advertising imagery. See *id.* In fact, “critical theorist Raymond Williams . . . calls advertising ‘the official art of capitalist society.’” O’BARR, *supra* note 3, at 2.

8. JANNETTE L. DATES & WILLIAM BARLOW, *SPLIT IMAGE: AFRICAN-AMERICANS IN THE MASS MEDIA* 4 (1993) (quoting Stuart Hall, *Significant Representation, Ideology: Althusser & the Post-Structuralist Debates*, in *CRITICAL STUDIES IN MASS COMMUNICATIONS* 98-100 (1985)). Dates & Barlow note that cultural Marxist “Stuart Hall and his associates have more recently focused attention on popular culture and the mass media as sites of ideological struggle between the dominant culture and those subordinate classes and/or groups threatened by its cultural imperialism.” *Id.* “This is why we need to deconstruct language and behavior in order to decipher the patterns of ideological thinking which are inscribed in them.” *Id.*

9. JON STEEL, *TRUTH, LIES & ADVERTISING: THE ART OF ACCOUNT PLANNING* 5 (1998). One advertising executive quipped, “[O]pinions have to be understood before they can be

reflect society, but works as a distorting mirror that enhances certain images. "[T]he degree of distortion of these advertising images [is] determined . . . [in part] by the efforts of advertisers to respond to consumers' desire for fantasy and wish fulfillment."¹⁰ Thus, advertising refracts images, focusing on selected social representations, and thereby wields considerable influence in shaping socio-cultural, norms, roles, and hierarchies.¹¹

As a highly influential means of public discourse, advertisements play a pivotal role in consumer choices, and are instrumental in affecting viewers' perceptions of their world and their interactions with others. Thus, in addition to producing a level of discourse about product and product use, "advertisements also depict a number of things about society, such as who does the laundry, who prepares the breakfast while someone else sits at the table, and who drives and who rides as passengers in a car."¹² "[A]dvertising construct[s] idealized images of people, depicts their patterns of interacting with others, and positions them in the social hierarchy."¹³ Marketers pride themselves on creating advertisements that relate to a consumer's reality as well as a consumer's fantasies.¹⁴ In an attempt to relate to consumers, advertisers deliberately try to cross the distance between screen and consumer through images the consumer can instantly relate to as familiar. This reflective, yet aspirational, replaying of our reality/fantasy is highly influential.¹⁵

manipulated." *Id.* Many view marketing and advertising as applied sciences which draw on fundamental sciences such as psychology, economics, and philosophy. See JERRY KIRKPATRICK, IN DEFENSE OF ADVERTISING: ARGUMENTS FROM REASON, ETHICAL EGOISM AND LAISSEZ-FAIRE CAPITALISM 11-12 (1994).

10. MARCHAND, *supra* note 4, at xvii-xviii.

11. See *id.* at xvii-xviii, xx (Advertisements contribute to a "community of discourse" playing "a significant role in establishing our frames of reference and perception.") (citation omitted).

12. O'BARR, *supra* note 3, at 3.

13. *Id.*; see also MARCHAND, *supra* note 4, at xvii-xviii. In fact, there is a considerable body of literature that examines the impact of commercial images on women and women's roles. See Jhally, *Image-Based Culture*, *supra* note 5, at 81-82; Douglas Kellner, *Reading Images Critically: Toward a Postmodern Pedagogy*, in POSTMODERNISM, FEMINISM, AND CULTURAL POLITICS 60, 66 (Henry A. Giroux ed., 1991) [hereinafter Kellner, *Reading Images Critically*]; George Lipsitz, *The Meaning of Memory, Family, Class and Ethnicity in Early Network Television*, in GENDER, RACE AND CLASS IN MEDIA, *supra* note 5, at 43, 48-50.

14. See JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 208 (1991) (citing Hall, *supra* note 8); MARCHAND, *supra* note 4, at xvii-xviii.

15. See Sut Jhally, *Commercial Culture, Collective Values and the Future*, 71 TEX. L. REV. 805, 810 (1993) [hereinafter Jhally, *Commercial Culture*] ("[C]ommercial speech is a discourse that profoundly addresses us as *individuals*."); MARCHAND, *supra* note 4, at xvii-xviii.

A common critique of advertising has been that the explicit and implicit messages found in advertising are difficult to escape.¹⁶ The repeated images in advertisements that bombard us reinforce social norms and mores, flooding us with messages about society and societal roles.¹⁷

In the contemporary world, messages about goods are all pervasive—advertising has increasingly filled up the spaces of our daily existence. Our media are dominated by advertising images, public space has been taken over by ‘information’ about products, and most of our sporting and cultural events are accompanied by the name of a corporate sponsor.¹⁸

In fact, the power and use of advertising has increased dramatically over the last several years.¹⁹ Advertising has become a fixture in our lives and is present in a number of places where we are captive to its influence. Advertising can now be found in schools, in sporting stadiums, in and on taxis, buses, and trains.²⁰ A substantial amount of public resources, space, and time is spent creating, displaying, and consuming it.²¹ Although one advertisement, trademarked symbol, or celebrity image in and of itself may not create a shared culture or ideology, multiplying the advertisements, symbols, and images does create a cultural thread, which forms a tight weave of cultural imagery and ideology that transcends the symbolic.²²

16. “Now the law must address implied and pictorial messages.” ROSS D. PETTY, *THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY* 15 (1992) [hereinafter PETTY, *THE IMPACT OF ADVERTISING LAW*].

17. The varied messages that advertisements contain can be decoded in a number of ways. One could interpret them as an audience might, interview those who produce the advertisements, or survey and interview the audience itself. See O’BARR, *supra* note 3, at 4-5.

18. Jhally, *Image-Based Culture*, *supra* note 5, at 79.

19. See *id.* at 77-79.

20. For example, a journalist recently noted:

[A]dvertising is becoming ubiquitous in schools. In Colorado Springs, the side of a big yellow school bus becomes a bill board for just \$2,500. A six-foot commercial banner hung inside the school for one calendar year costs only \$700. . . . In Braintree, Massachusetts, a company called Cover Concepts has made a multi-million dollar business out of giving away free book covers that are decorated with corporate advertising. Prego spaghetti sauce sends out free educational materials about viscosity and a sample of its sauce so that kids can see how thick and rich it really is. Gushers fruit snacks are sent out to teachers along with an educational packet that promises to motivate students’ interest in geology and the Earth sciences.

Cynthia Peters, *Media Literacy*, *Z MAG.*, Feb. 1998, at 29-30. For additional examples of the pervasiveness of advertising, see *infra* notes 68-82 and accompanying text.

21. See Jhally, *Image-Based Culture*, *supra* note 5, at 79.

22. “We have two worlds: one grounded in social reality, where social injustice is rife; one rooted in television fiction, where social and economic prosperity abound without division or

Yet, advertising and commercial discourse are problematic not only because of their pervasiveness and consumerist messages. In advertising, cultural and legal discourse converge to create norms.²³ However scant the legal analysis of the impact of advertising on society, its regulation does impact societal issues such as discrimination and stereotypes in advertising.²⁴ Progressive analysis requires that scholars and media critics interrogate commercial media's role in perpetuating and maintaining social roles and racial hierarchies.²⁵ Richard Delgado tells us:

[R]acism is deeply ingrained in our culture, affecting how we see ourselves and others, and how we organize social life These messages tell us that skin color matters, that it is a determinant of action, personality, and character. Racism is much more than the

discrimination." SUT JHALLY & JUSTIN LEWIS, *ENLIGHTENED RACISM: THE COSBY SHOW, AUDIENCES, AND THE MYTH OF THE AMERICAN DREAM* 87 (1992).

23. O'Barr defines discourse as "a flow of ideas that are connected to one another." O'BARR, *supra* note 3, at 3. Law defines the space in which cultural messages are permitted to enter as well as the "filters" through which those messages must pass. For a discussion of media "filters," see generally NOAM CHOMSKY & EDWARD HERMAN, *MANUFACTURING CONSENT* (1988). "This commercial discourse [advertising] is *the ground* on which we live, *the space* in which we learn to think, and *the lens through* which we come to understand the world that surrounds us." Jhally, *Commercial Culture*, *supra* note 15, at 806. By defining the boundaries of unregulated commercial speech, law normalizes some cultural messages.

24. See Ross D. Petty, *Advertising Law and Social Issues: The Global Perspective*, 17 SUFFOLK TRANSNAT'L L. REV. 309, 339 (1994) [hereinafter Petty, *The Global Perspective*]. Much of the analysis in this area has focused on whether specific commercial messages about potentially harmful products such as tobacco and alcohol disproportionately targeted the African American community and other communities of color. See C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2240 (1998) ("[T]he scarcity of scholarly discussion of . . . the pernicious influence of advertising on media content, or of the more general issue, private threats to a free press is curious and deserves comment.") (footnote omitted); Kathryn A. Kelly, *The Target Marketing of Alcohol and Tobacco Billboards to Minority Communities*, 5 U. FLA. J.L. & PUB. POL'Y 33 (1992); Vernellia R. Randall, *Smoking, The African-American Community and the Proposed National Tobacco Settlement*, 29 U. TOL. L. REV. 677 (1998); Celeste J. Taylor, *Know When to Say When: An Examination of the Tax Deduction for Alcohol Advertising that Targets Minorities*, 12 LAW & INEQ. J. 573 (1994). Less attention has been devoted to the overall effect of commercial messages on race and racial hierarchies. But see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819-22 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 119-20 (1995).

25. See Douglas Kellner, *Cultural Studies, Multiculturalism and Media Culture*, in *GENDER, RACE AND CLASS IN MEDIA*, *supra* note 5, at 5; see also Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 486-87 (1992). See generally PIETERSE, *supra* note 2.

occasional, isolated, shocking incident [about which] we sometimes read²⁶

Advertising plays an important role in weaving cultural messages about race into the consciousness of consumers. But note that even advertising critics acknowledge that neither advertising nor "media [is unfairly] and conspiratorially harnessed to a single racist conception of the world."²⁷

Although advertisements do not contain a unified message about race, a startling continuity of race-based images over time have reinforced messages about race and racism and have played a critical role in shaping and maintaining racial identities.²⁸ In fact, the explicit and implicit media messages about race influence not only our perceptions of "others," especially those with whom we may have little real world contact, but also of ourselves.²⁹ Outsider groups have always understood the influential power of stereotypical commercial images. They have worked to rid the market of the most derogatory ones and have vied for control over their own images.³⁰

26. Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA L. REV. 375, 485 n.3 (1995) (quoting Richard Delgado). Delgado goes on to note that these messages are delivered through a number of different media: "They bombard us from many sources—children's stories, advertising logos, movies, television, the lessons of parents and peers." *Id.* Advertising is unique in its pervasiveness and impact, however. See JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* 1-4, 16 (1996). Advertising, alone, is not only provided to the customer without charge, but each advertisement is delivered repeatedly to the same audience. See *id.* at 1-4. In addition, the art and science of marketing is devoted to reaching consumers and delivering effective messages in order to affect behavior. See KIRKPATRICK, *supra* note 9, at 11-12. Thus, the effect of advertising and its messages is cumulative.

27. Stuart Hall, *The Whites of Their Eyes: Racist Ideologies and the Media*, in *GENDER, RACE AND CLASS IN MEDIA*, *supra* note 5, at 18, 20.

28. See *id.* at 20 ("[T]he media construct for us a definition of what *race* is, what meaning the imagery of race carries, and what the 'problem of race' is understood to be."); see also Peggy Davis, *Law as MicroAggression*, 98 YALE L.J. 1559, 1560 (1989). Professor Davis notes that "[c]ommon culture reinforces the belief in black incompetence in that the black is 'less often depicted as a thinking being.'" *Id.* (quoting Chester M. Pierce, *Psychiatric Problems of the Black Minority*, in *AMERICAN HANDBOOK OF PSYCHIATRY* 512, 514 (Silvano Arieti ed., 1974)). As stated by bell hooks:

No studies have been done that I know of which look at the role mass media have played since 1960 in perpetuating and maintaining the values of white supremacy. Constantly and passively consuming white supremacist values both in educational systems and via prolonged engagement with mass media, contemporary black folks, and everyone else in this society, are vulnerable to a process of overt colonization that goes easily undetected.

BELL HOOKS, *KILLING RAGE* 111 (1995).

29. See KERN-FOXWORTH, *supra* note 6, at xii ("Subconsciously, and sometimes consciously, advertising messages are major factors in formulating images of black Americans.").

30. See, e.g., DATES & BARLOW, *supra* note 8, at 194-95, 287-88 (discussing efforts to protest racial stereotypes in the "Amos 'n' Andy" show); *id.* at 208-09 (discussing efforts to protest

"The characters, the models, and the symbols that represent blacks in advertising have always been important to blacks because they are aware that they determined how they feel about themselves and their race and how others perceive them as well."³¹ Historian John Henrik Clarke, noting the "importance of imagery and symbols" in the black community, stated, "'Because what we see about ourselves often influences what we do about ourselves, the role of images and the question of how they control our minds are more important now, in our media-saturated society, than ever before.'"³² To the extent stereotypes present obstacles to reaching goals of racial and economic justice, it is important to examine the source and proliferation of those stereotypes. In fact, the

struggle between the transmission of racist ideology and dogma, and the efforts of oppressed groups to claim control over their own image, is part of the legacy of the American mass media. Racial identity has been—and continues to be—a crucial factor in determining who can produce popular culture, and what images are created. Yet this story has received minimal attention in a historiography that has focused on the celebration of technological achievement and financial success. This is the darker side of media history.³³

Historically, Africans have been both the subject of and objectified by advertisements. Since advertisements were used as a means of trading black bodies during slavery and later as a means of conveying messages about class and power, African Americans have had an intimate and unique relationship with commercial media. The use of stereotypical, derogatory, and demeaning depictions of African Americans in advertisements historically has been a conscious method of contrasting the social status and relative power of

Aunt Jemima and Jack Benny's Rochester); CLINT C. WILSON II & FÉLIX GUTIÉRREZ, RACE, MULTICULTURALISM, AND THE MEDIA: FROM MASS TO CLASS COMMUNICATION 109-11 (1995) (discussing protests against the "Frito Bandito"); Elizabeth Jensen, *Groups Band Together To Press for Diversity Campaign Television: Organizations from 19-member Coalition To Make Networks Include More Minority Characters and Employees on Their Shows*, L.A. TIMES, Sept. 11, 1999, at F2; Teresa Puente, *¡Ay Chihuahua!*, CHI. TRIB., Apr. 12, 1998, at 1 (describing Taco Bell Chihuahua advertisements). In this context, "outsider" is used to refer to groups marginalized by dominant power hierarchies. It is also used "to avoid 'minority'—a term that belies the numerical significance of the constituencies typically excluded from jurisprudential discourse." Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989).

31. KERN-FOXWORTH, *supra* note 6, at 43.

32. *Id.* at 43-44.

33. Jane Rhodes, *The Visibility of Race and Media History*, in GENDER, RACE AND CLASS IN MEDIA, *supra* note 5, at 33, 34.

Whites and Blacks.³⁴ Blacks have been used as a point of departure from which Whites could distance themselves economically, politically, and socially, through the purchase of consumer goods.³⁵ Contemporary commercial messages have excised most of the more explicit uses of stereotypical depictions of Blacks, but more subtle uses of stereotypes continue.³⁶ The continued reliance on one-dimensional "stock" characters in the commercial arena, the absence of a diversity of images of black life, and the segregation of consumer articles in target groups has a direct and severe impact on the black community.³⁷

The impact of media stereotypes reverberates beyond the commercial marketplace. The media, and the images it presents about race and racial hierarchies, are frequently the predominant source of information many have about people of color. In addition, discussions about broader solutions for societal problems are marginalized by the media's focus on the ability of the individual to solve complex problems about life, love, security, and happiness through the purchase of consumer goods. The increasing focus on a consumerist response to social issues, although problematic to the greater society, is particularly troubling for groups who are disproportionately affected by these issues: the poor, women, and people of color.

Current legal regulation of commercial discourse reinforces these racial hierarchies. Despite a multitude of messages about race, class, and power relayed through advertisements, regulation is circumscribed by an analysis confined to falsity and deception. The network of regulation is designed to protect the market, and tangentially the consumer, by focusing on a fairly narrow band of messages, within a larger continuum, delivered to the audience. Because the multiple layers of media discourse are not recognized in advertising regulation, analysis is limited to a single, product-centered message. As a result, legal analysts and consumers are compelled to consciously ignore, while subconsciously absorbing, the myriad of messages about race subsumed in commercial discourse.

This particularized approach to regulating media messages is consistent with the law's announced purpose to protect the commercial marketplace and

34. See, e.g., O'BARR, *supra* note 3, at 109-11 (noting that "[m]any advertisements explicitly depict the structural relationship between African Americans and whites" and the common thread in advertisements prior to the civil rights era was the Black as servant); see also WILSON & GUTIÉRREZ, *supra* note 30, at 114-16.

35. See O'BARR, *supra* note 3, at 109-11.

36. See *id.* at 111-12 ("African-American role models as successful businessmen are not a common theme in advertisements in general-audience magazines.") "Depictions of . . . excellence by African Americans tend to be limited to sports that are associated with brute force rather than intellectual skills." *Id.* "Another familiar depiction of African Americans is as musicians." *Id.*

37. See WILSON & GUTIÉRREZ, *supra* note 30, at 114-17.

its recognized players,³⁸ but it obfuscates the wider social, cultural, and racial impact of media messages. Although contemporary rationales for advertising regulation are justified by reference to market efficiencies, a more expansive analysis of deception in the marketplace—through false representations or otherwise—at one time, included a desire to rid the market of unfair and unethical business conduct.³⁹

Although limited, governmental regulation of even non-deceptive commercial speech is permissible within a narrow range.⁴⁰ Any attempt at advertising regulation that moves beyond deception and addresses the wider socio-cultural impact of commercial messages may not be consistent with the First Amendment. The ongoing debate about commercial speech has been whether the distinction between commercial and non-commercial speech is credible and whether commercial speech requires the same level of First Amendment protection as non-commercial or “political” speech. The debate, thus far, has not wholly incorporated an analysis of the ability of advertisements to influence race and racial hierarchies.

Any analysis of the embrace of commercial speech under the Free Speech Clause must necessarily include an investigation of the impact of the media’s continued replaying of subtle and not so subtle messages about race.⁴¹ This article explores the impact and pervasiveness of advertisements and the historical relationship between the commercial media and people of color. As a result, Part II briefly sets out the history and economics of advertising. Part III shows how, historically, advertising has been used both overtly and

38. See, e.g., *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 691 (2d Cir. 1971) (finding consumers have no cause of action under section 43(a) of the Lanham Act for false and deceptive acts because the congressional purpose of the Act “is to protect persons engaged in such commerce against unfair competition.”). Although many legal analysts historically have maintained that cultural impacts are “beyond law,” there has been an increasing recognition of the need for law to address the impact of manufacturer conduct on behavior. As a result, the number of tort cases against cigarette and gun manufacturers as well as the media have increased in recent years and have met with increasing acceptance.

39. See Federal Trade Commission Statement on Unfairness, Dec. 17, 1980, *reprinted in*, H.R. REP. NO. 98-156, pt. 1, at 33 (1983) (“By 1964 enough cases had been decided to enable the Commission to identify three factors that it considered when applying the prohibition against consumer unfairness . . . whether the practice injures consumers . . . violates established public policy . . . is unethical or unscrupulous.”); see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 223, 244-45 n.5 (1972).

40. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557 (1980); see also *infra* notes 301-401 and text accompanying.

41. Commentators have previously noted and discussed the impact of advertising regulation on public policy and the competitive process. See generally PETTY, *THE IMPACT OF ADVERTISING LAW*, *supra* note 16; J. HOWARD BEALES & TIMOTHY J. MURIS, *STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING* 5, 7 (1993) (taking the position that “advertising is essential for the optimal functioning of a market economy”).

covertly, as a means of supporting a racial hierarchy that places African Americans⁴² squarely at the bottom.

Part IV briefly discusses the law of advertising regulation. It suggests a more aggressive means of regulating advertising that would incorporate an examination of the cultural, social, and racial impact of commercial discourse. Additionally, Part IV argues that such an aggressive stance towards stereotypical and derogatory images of people of color in commercial speech is consistent with current regulation of advertising and that advertising regulations are too narrowly focused on truth while marginalizing discussions about the power of advertising to influence without deception. It recommends prohibiting discriminatory commercial messages, encourages the use of social science data to demonstrate the impact of commercial messages on race, and recommends the adoption of a policy statement encouraging diversity in advertising.

Part V acknowledges that more aggressive advertising regulation may be found to be inconsistent with even the limited First Amendment protections accorded commercial speech. As a result, it asserts that the cultural effect of commercial messages argues in favor of reducing or eliminating First Amendment protection for commercial speech. In so doing, it reviews the Supreme Court's treatment of commercial speech under the First Amendment and sets out the fundamental arguments regarding commercial speech and the Free Speech Clause. Finally, the article concludes by asserting that removal of First Amendment protection from advertising would allow greater regulation of advertising, including prohibiting discriminatory advertisements. Doing so would have a positive socio-cultural impact.

II. THE HISTORY OF ADVERTISING IN THE UNITED STATES

Truthful advertising is viewed by its supporters as the cornerstone of a free market economy.⁴³ Advertising's champions identify their fundamental purpose as selling products by communicating to many consumers at once.⁴⁴ According to this view, truthful advertisements are an efficient, cost-effective means of providing information about price and the attributes of a product.⁴⁵ Quite simply, consumers benefit from more information, and are assisted in their purchasing decisions by the existence of advertisements.⁴⁶ According to

42. See *supra* note 1 and text accompanying.

43. See BEALES & MURIS, *supra* note 41, at 7-9.

44. See KIRKPATRICK, *supra* note 9, at 8.

45. See BEALES & MURIS, *supra* note 41, at 7-9.

46. See *id.* at 5, 7-9.

this view, this product information makes each of us a smarter consumer. We make more informed decisions about increasingly complex products.

Advertisements help to provide information about goods so consumers can purchase them.⁴⁷ Advertising maximizes the flow of information to consumers so that we can first identify our needs and then make realistic choices about goods that meet our needs. For example, advertisements tell consumers that they need a vacation, a luxurious car, more life insurance, and then tell them why one particular product brand or product is the best choice for fulfilling that need.

Seen as providing "free" information to consumers about goods and services offered for sale, advertising becomes central to the existence of a robust and healthy free market economy.⁴⁸ Advertising's supporters suggest that as consumers gain knowledge and information about goods and services, they make better, more informed decisions about purchases, and inferior and unwanted goods will be pushed out of the market.⁴⁹ This creates greater rivalry among firms, resulting in a more effective competition among the players in the market.⁵⁰ Improved competition in an efficient marketplace ultimately benefits consumers in the form of lower prices and more innovative, useful goods.⁵¹ Advertisements encourage innovative activity by providing an effective way of informing consumers about the availability of new products or new applications of existing products.⁵² Advertisements then become a nearly indispensable component of stimulating and expanding the American economy. From this vantage point, "[t]ruthful advertising about goods and services is an unequivocal social good. It reduces uncertainty, promotes competition, and increases the likelihood of consumer satisfaction."⁵³

47. See George S. Stigler, *The Economics of Information*, 64 J. POL. ECON. 213, 220 (1961).

48. See Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 8 (1992) ("Advertising contributes to consumer welfare by providing information"); Mary L. Azcuenaga, *Advertising Regulation and the Free Market*, Remarks Before the International Congress of Advertising and Free Market, in Lima, Peru (May 11, 1995). Under this view, "[o]ne of the fundamentals of a market economy is the free of flow of information about goods and services." *Id.*

49. See Azcuenaga, *supra* note 48.

50. See *id.*

51. See *id.*

52. See *id.*

53. BeVier, *supra* note 48, at 14. "Economist-critics of advertising claim that it impedes competition in three ways. First, they claim that advertising creates barriers to entry; second that advertising distorts taste; and third, that advertising manipulates demand." *Id.* at 4-5.

This economics-based analysis of advertising assumes advertisements contain information that is helpful and that the consumer evaluates commercial messages rationally.⁵⁴ Under this scheme the advertisement itself becomes a good which promotes market efficiencies, primarily by lowering consumer cost of searching for information about the goods they wish to purchase, increasing competition, stimulating economic growth and creating overall market efficiencies.⁵⁵ In an economics-based analysis of advertising, the myriad of benefits that accrue from advertising evolve primarily from its role as a source of information.⁵⁶ Viewed in this way, as a source of product information, commercial speech takes on an emotionally neutral mask with little impact on society or culture.

However, even proponents of advertising have begun to recognize that the format and style of advertising has changed substantially over time.⁵⁷ Advertisements have moved decidedly away from substantive messages about the uses and benefits of a product and towards more subtle, imagistic advertisements that contain few direct statements, if any, about product price, quality or attributes. Instead, these highly visual and coded depictions contain a multitude of subtle and implicit messages about culture and society.

Early product advertisements were consistent with the "rational economics" view of the purpose and style of advertisements. These early advertisements were designed to educate the public about a product's use.⁵⁸

54. A law and economics approach to law views the world through rational choices and assumes that people are "rational maximizers" of self-interest. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 35; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 1 (1992); SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET 289 (1989) ("In neoclassical economic theory, decisions about what and how much to produce are made by the market, which operates—by definition—for the benefit of the consumer. In reality, those decisions are made by managers who ask a number of questions for the benefit of their companies.").

55. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 35; BEALES & MURIS, *supra* note 41.

56. See BEALES & MURIS, *supra* note 41, at 7-8 (citing Stigler, *supra* note 47); BeVier, *supra* note 48, at 8 (advertising lowers search costs and facilitates competition); see also STRASSER, *supra* note 54, at 28 ("By advertising branded products, manufacturers explicitly intended to eliminate price competition and to eclipse price sensitivity: the consumer who would accept no substitutes for Ivory soap or Steinway pianos would be unwilling to settle for another product just because it was cheaper.").

57. See BeVier, *supra* note 48, at 15-16 (asserting that the result of the law's increasingly stringent regulation of false commercial statements, ironically, is fewer true factual statements in advertisements).

58. See STRASSER, *supra* note 54, at 6. Strasser notes:
[n]ew techniques for national marketing emerged in tandem with the mass-produced products they promoted. People who had never heard of toothpaste had to be told they needed it; the very idea of chewing gum and flashlights had

Advertisements in the 1920s contained significant amounts of textual material to explain the product.⁵⁹ Advertisements, known as “reason why” vehicles, frequently contained a full page of explanatory text, which provided explicit detail regarding what the products were, what they did and why people should want to buy them.⁶⁰ The consumer society was literally being taught how to read the commercial messages.⁶¹

After the Second World War, the United States advertising industry underwent a creative revolution, which challenged the use of advertising predominantly to send a product message.⁶² The revolution involved using advertisements to tell a story and to promote the purchase of products and services as a social good.⁶³ In addition, there was a perceived need to expand the economy through increases in government spending, foreign trade, and consumer debt.⁶⁴ Commercial network television and advertisements as a means of selling goods played an important role in expanding the emerging economy.⁶⁵ The mass media and advertisements helped legitimate and transform values and helped Americans develop a level of comfort with the new world of 1950s consumerism.⁶⁶

During this time, the importance and influence of the mass media grew dramatically.⁶⁷ Some believed that advertising was at the center of the replacement of family and community values with the values and mores

to be introduced to a population accustomed to goods made at home or by craftspeople.

Id. at 6-7.

59. See Jhally, *Image-Based Culture*, *supra* note 5, at 78; STRASSER, *supra* note 54, at 7. For example, Proctor and Gamble had to educate consumers about new products such as Crisco. *See id.* at 8-15. In promoting Crisco, Proctor and Gamble used pamphlets with illustrations of demonstrators using the products, recipes, and a book entitled, *The Story of Crisco*. *See id.* Proctor and Gamble also sponsored demonstrators who toured the country conducting week-long cooking schools. *See id.*

60. In fact, this informational rationale remains one of the principal rationales spouted by supporters of advertisements despite the transmogrification of the genre away from serving primarily an informational role to serving more of an experiential function.

61. See Jhally, *Image-Based Culture*, *supra* note 5, at 78.

62. See STEEL, *supra* note 9, at 33.

63. *See id.*

64. See Lipsitz, *supra* note 13, at 44-45.

65. *See id.*

66. *See id.* at 45.

67. “The priority of consumerism in the economy at large and on television may have seemed organic and unplanned, but conscious policy decisions by officials from both private and public sectors shaped the contours of the consumer economy and television’s role within it.” *Id.* The importance of commercial network television is evidenced, in part, by the fact that the federal government began to allow corporations to deduct the costs of advertising from their taxable incomes during the war. *See id.*

being mass produced and circulated by the media.⁶⁸ Commentators have even asserted that “industry exceeds the ability of the church and the school in its ability to promote images about our place in society—where we belong, why, and how we should act toward others.”⁶⁹ While not all agree that advertising has completely or even partially replaced family and church as a source of social mores and understanding, its capacity to reach unprecedented numbers of individuals and influence them is uncontroversial. It has undoubtedly become a primary force in shaping attitudes as well as behavior.

Within the realm of the increasing influence of advertising and media images, marketing discourse has changed as commercial communication moved further and further away from a “product” informational format.⁷⁰ The current system relies heavily on visual representations and is characterized by the increasing speed of the images that constitute it.⁷¹ Recent commercial messages are fifteen seconds and shorter; many advertisers use the “‘vignette’ approach [to advertising]—in which narrative and ‘reason-why’ advertising are subsumed under a rapid succession of life-style images, meticulously timed with music, that directly sell feeling and emotion rather than products.”⁷²

Advertisements have become more symbolic, encoding goods and services with meanings independent of their functional values.⁷³

68. Commercial messages historically have not been limited to formal advertising; advertising has been directly incorporated into the shows themselves. Early television shows often presented dilemmas or tensions, which could often find indirect resolutions through the purchase of a consumer good. *See id.* at 47. As an example, Lipsitz describes an episode of “‘Mama’s Birthday’ broadcast in 1954.” *Id.* at 49-50. In the episode, “Mama cannot leave the house [to attend a show] because she has to cook a roast for a guest whom Papa has invited to dinner.” *Id.* The resolution lies, in that show, in a more modern appliance. *See id.* Thus, television delivered entertainment while reinforcing the idea that modern dilemmas could be solved through the purchase of consumer goods. Television programming devoted a considerable amount of time to promoting its own importance in a modern world. “The television industry recognized and promoted its privileged place within families in advertisements like the one in *The New York Times* in 1950 that claimed, ‘Youngsters today need television for their morale as much as they need fresh air and sunshine for their health.’” *Id.* at 50; *see also* Douglas Kellner, *Advertising and Consumer Culture*, in *QUESTIONING THE MEDIA: A CRITICAL INTRODUCTION* 329, 340 (J. Downing et al. eds., 1995).

69. JOSEPH TUROW, *BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD* 1-2 (1997).

70. *See* Jhally, *Image-Based Culture*, *supra* note 5, at 78-79.

71. *See id.* at 84.

72. *Id.*

73. *See* Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1870-71 (1991) (quoting *Mishawaka Rubber & Woolen Mfg. v. S.S. Kresge*, 316 U.S. 203, 205 (1942)) [hereinafter

Advertisements based on visual images give an impression of a nexus between the lifestyle and the product. In other words, advertising has become not just about products but about a person and her life.⁷⁴ Factual text is replaced with imagery about desired lifestyles. Thus, life insurance is sold not by explaining actuarial facts and premiums but by picturing tender moments and a loving family. Nike doesn't just make sneakers but makes shoes for people who "Just Do It." Pepsi does not just sell beverages but represents the "Choice of a New Generation." In these contemporary media messages about products, messages about the product and its use become secondary to subtle and implicit messages about lifestyle, image, and society. In this way, there is a collaborative effect between culture and advertisements. Advertising both influences and shapes as well as refracts images central to American culture.

Social critics of advertising point out that contemporary forms of commercial messages fail to follow the efficient "informational" model, and that public space has become so saturated with commercial speech that the clearest message (and that most frequently being received by the consumer) is simply one of consumerism.⁷⁵ Under this view, the predominant message received through advertisements is not information about a particular product, its price, attributes, or quality, but a directive to consume.⁷⁶ This view asserts that advertising places material consumption at the center of American popular cultural life.⁷⁷ A consumerist, commercial society promotes the view that societal acceptance can be gained by purchasing the

Coombe, *Objects of Property*]. Justice Frankfurter, in discussing trademarks, noted the powerful role symbols play in our society:

[T]he protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.

Mishawaka Rubber, 316 U.S. at 205.

74. See Jhally, *Image-Based Culture*, *supra* note 5, at 79.

75. See MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS EFFECTS ON AMERICAN SOCIETY* 6 (1984).

76. A related fear is that advertisements explicitly and implicitly persuade the purchase of consumer goods, frequently influencing those with limited resources to spend money on status goods and services of little real value.

77. See Jhally, *Image-Based Culture*, *supra* note 5, at 79.

"right" goods.⁷⁸ Thus, in contrast to the view that advertising promotes overall economic efficiencies, critics assert that advertising creates an insatiable desire for goods by purporting to provide intangibles like "happiness" through the purchase of a consumer good.⁷⁹

The result is that advertising no longer has as its primary function educating consumers about a product's function.⁸⁰ Instead it "talks to us as individuals" and addresses us about who we are, who we strive to be, and how we can become happy.⁸¹ Contemporary advertising messages not only sell products but also sell images of self and others and the promise of well-being and happiness through the purchase of consumer goods.⁸²

Advertisements direct consumers' questions about identity, social values and societal roles toward the marketplace.⁸³ Resolution of human and social problems may be found, they suggest, through the purchase of goods or services.⁸⁴ Quality of life surveys that ask what people are seeking in life and what makes them happy report that people are searching for things like

78. In fact, the power of advertising to encourage consumption even in the face of evidence of the negative health effects of consuming goods such as nicotine and alcohol has been repeatedly noted. See Stephen J. Heishman et al., *Nicotine Addiction: Implications for Public Health Policy*, 53 J. SOC. ISSUES 13, 22 (1997) (noting that "although cigarettes are the source of more morbidity and mortality than any product invented, they are the object of the largest marketing effort in the United States Such marketing influences cigarette consumption"). The advertising of products perceived as dangerous or unhealthful has been the subject of community action and protest. See generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); Melanie Wells, *Beer, Cigarettes Billboards Get the Boot*, USA TODAY, Dec. 16, 1997, at 3B. In addition, the marketing of baby formula, particularly in Third World Countries, has been the subject of debate and boycotts, as a result of accusations that mothers were choosing formula over breast milk to the detriment of their babies' health in large part because of advertising. See Petty, *The Global Perspective*, *supra* note 24, at 310 ("The World Health Organization adopted the International Code of Marketing of Breast-Milk Substitutes and resolutions on pharmaceutical advertising and tobacco products."); Sijke Selinda Barkhuis, Note, *Breast-Feeding and the Law*, 3 TEX. J. WOMEN & L. 417, 425 (1994). But see Laura Epstein, *Women and Children Last: Anti-Competitive Practices in the Infant Formula Industry*, 5 AM. U.J. GENDER & L. 21, 24-27 (1996) (asserting "[t]hat there is no evidence to support fears of a drop in breast-feeding rates in reaction to advertising").

79. See Jhally, *Image-Based Culture*, *supra* note 5, at 140. Note the Sprite advertisement, which commands, "Obey Your Thirst, Drink Sprite." Thus, the response to even the most basic of human needs, thirst, is a command to purchase a carbonated soft drink. See Pontifical Council, *Ethics in Advertising*, *supra* note 6 ("Advertising also can be, and often is, a tool of the 'phenomenon of consumerism . . .'").

80. Early advertisements were used to "educate" the public about a product's intended use. See STRASSER, *supra* note 54, at 6-7.

81. Jhally, *Image Based-Culture*, *supra* note 5, at 79.

82. See Jhally, *Commercial Culture*, *supra* note 15, at 807-08.

83. See *id.*

84. See Jhally, *Image Based-Culture*, *supra* note 5, at 79.

personal autonomy, self-esteem, good friendships, a happy family life.⁸⁵ Marketers then link their goods/products to these aspirations.⁸⁶ "The marketplace cannot directly offer the real thing, but it can offer visions of it connected with the purchase of products."⁸⁷

Under either an economics-based or cultural critique of advertising, it is clear that as advertising messages have continued to proliferate over time, "[p]opular culture matters like never before."⁸⁸ The proliferation of commercial messages has continued to such an extent that advertising messages are a predominant form of speech⁸⁹ and they exist in virtually all public and private spaces. The average American is exposed to thousands of advertisements each day; some estimate a daily exposure of about 600 to 1200 commercial messages.⁹⁰ Advertisements are increasingly found in spaces not traditionally used for advertising, such as in schools and in and on modes of public transportation.⁹¹ Corporations sponsor sports teams, and "[m]ore and more stadiums are operating under corporate names—like

85. *See id.*

86. *See id.*

87. *Id.*

88. BEN AGGER, *CULTURAL STUDIES AS CRITICAL THEORY* 3 (1992) (citing A. ROSS, *NO RESPECT: INTELLECTUALS AND POPULAR CULTURE* (1989)).

89. Jhally notes that "[e]conomic growth is a value that is expressed in the most compelling and powerful forms by an advertising industry that spends more energy and resources on creating messages than any other creative force in society (perhaps even in human history)." Jhally, *Commercial Culture*, *supra* note 15, at 807. "[T]he basic problem is the pervasiveness of the culture of commercial speech in general . . . we should be more troubled by the dominance of the commercial culture than by any particular allegedly harmful instance of commercial speech." R. GEORGE WRIGHT, *SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE* 5 (1997) [hereinafter WRIGHT, *SELLING WORDS*]. For a discussion of the First Amendment and commercial speech, see *infra* Part V.

90. *See* Kathryn Rem, *Feeling Swamped by Sales Pitches*, *STATE JOURNAL-REGISTER* (Springfield, IL), May 31, 1998, at 21. Petty estimates that each American is exposed to approximately 20,000 advertisements on television alone in a single year. *See* PETTY, *THE IMPACT OF ADVERTISING LAW*, *supra* note 16, at ix; Robert W. McChesney, *The Political Economy of Global Communication*, in *CAPITALISM AND THE INFORMATION AGE: THE POLITICAL ECONOMY OF THE GLOBAL COMMUNICATION REVOLUTION* 1, 20 (Robert W. McChesney et al. eds., 1998) [hereinafter, McChesney, *The Political Economy*].

91. *See* WRIGHT, *SELLING WORDS*, *supra* note 89, at 181-82; *see also* Rem, *supra* note 90, at 21. Television screens built into gasoline pumps display advertisements, "[t]he Airport Network broadcasts in dozens of airports, the Food Court Entertainment Network plays in mall food courts, the Better Health Network runs in doctors' offices," "cassette-tape ads in Avis rental cars "advertise local businesses," "[s]ound-and-color video clips from major motion pictures are being tested on automated teller machines," "[a] vodka company commissioned a 20 acre ad, sculpted in crops, next to the Kansas City airport," "[l]asers have been used to beam messages onto clouds," in grocery stores the "in-store network Checkout Channel broadcasts to shoppers waiting to pay" and "[s]ome supermarkets have video screens mounted on shopping carts" and many more have print advertising inserts. *Id.*

Continental Airlines Arena in New Jersey, 3Com Park in San Francisco, Coors Field in Denver and Fleet Center in Boston.”⁹²

Advertising is proliferating in public schools as well.⁹³ “Pepsi-Cola last year supplied an outdoor electronic message board . . . [a]dorned with a Mountain Dew logo” to a high school and in return, Pepsi was allowed to install additional vending machines.⁹⁴ According to a study by the University of Wisconsin at the Milwaukee Center for the Analysis of Commercialism in Education, “[s]ix million children received advertising filled cafeteria menus[,]”⁹⁵ “[twenty-five] million students received ad-laden book covers[,]” and “[e]ight million students watch Channel One, a news program broadcast in classrooms that includes commercials.”⁹⁶

The importance of advertising to advertisers is evident in the resources devoted to its creation and dissemination. In fact, Professor Baker has described advertising as a subsidy for newspapers and as “a threat to a free and democratic press.”⁹⁷ “In the United States, \$120 billion is spent annually on advertising. This is roughly 2.5 percent of the gross national product, more money than we spend on public education.”⁹⁸ Every day of our lives, twelve billion display advertisements, two and a half million radio

92. Rem, *supra* note 90, at 21. As advertisers continually search for advertising-free space for their commercial messages, advertising messages can also be found in increasingly unlikely places such as on the floor of supermarkets, on urinal walls, and on the bottom of the cups in golf course holes. *See id.*

93. *See* Peters, *supra* note 20; Jeff I. Richards et al., *The Growing Commercialization of Schools: Issues and Practices*, 557 ANNALS AM. ACAD. POL. & SOC. SCIENCE 148 (1998).

94. Rem, *supra* note 90, at 21. There is an intense debate about whether school is an appropriate venue for commercial messages and the susceptibility of children to advertisements. Schools that take advantage of this corporate largesse point to the ability of corporations to provide needed equipment and funds in an era of insufficient school budgets. *See id.*

95. Jerry Langdon, *As Kids' Influence Grows, More Ads Aim at Them*, DENV. POST, Aug. 26, 1998, at C10. Channel One, a product of Whittle Communications, is advertiser supported and has been the source of considerable debate. *See Benefits of Channel One for Schoolchildren Debated: Cost, Ads Draw Criticism*, WIS. ST. J., April 2, 1998, at 11A (citing University of Wisconsin at Milwaukee, Center for the Analysis of Commercialism in Education, *The Hidden Costs of Channel One*); ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 46-47 (1999) (stating that Channel One is shown in twelve thousand United States schools) [hereinafter, MCCHESENEY, RICH MEDIA].

96. Langdon, *supra* note 95, at C10; *see also* MCCHESENEY, RICH MEDIA, *supra* note 95.

97. Baker, *supra* note 24, at 2099, 2104; *see also* C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 362 (1998) (“Dependency on advertising can also undermine [journalist] performance.”).

98. PETTY, *THE IMPACT OF ADVERTISING LAW*, *supra* note 16, at ix; *see also* Kellner, *Reading Images Critically*, *supra* note 13, at 66. “The average American watches about 20,000 television commercials each year. Major manufacturers will spend a quarter of a million dollars to produce a 30-second television commercial that is designed to promote a 30-cent item.” DEAN K. FUEROGHNE, *LAW & ADVERTISING* vi (1995); *see also* MCCHESENEY, RICH MEDIA, *supra* note 95, at 39-40.

commercials, and over 300,000 television commercials are dumped into the collective consciousness. Advertising is consuming larger and larger quantities of newspaper, magazine, radio, and television space.⁹⁹

While purely commercial advertising has increased and expanded in scope, the distinctions between what is advertising and what is not has become increasingly blurry. There is a decreasing space between the source of commercial messages, the companies that produce and sell goods to the public, and the source of "non-commercial" messages. The result is often a greater overlap between reality/news and commercial messages and a close and sometimes incestuous relationship between "pure advertising" and other forms of media-driven communication.¹⁰⁰ This blending of public messages confuses the line between fact and fiction and provides more vehicles for corporate messages that influence societal views, create stereotypes, and reinforce racial hierarchies.

Some even assert that the advertising industry almost entirely finances the United States media system both directly as owners of media conglomerates and indirectly as a source of revenue.¹⁰¹ It should not be surprising,

99. See BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 138-41, 154-73 (1987); MCCHESENEY, *RICH MEDIA*, *supra* note 95, at 54-57, 191-92. While it is clear that advertising is pervasive and influential, its economic impact has long been hotly debated. See generally Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321 (1990). Some estimate that advertising constitutes "65% of newspaper space and 22% of television time." Baker, *supra* note 24, at 2139.

100. See BAGDIKIAN, *supra* note 99, at 163-64; MCCHESENEY, *RICH MEDIA*, *supra* note 95, at 56-57; McClesney, *The Political Economy*, *supra* note 90, at 20; see also G. Bruce Knecht, *Hard Copy: Magazine Advertisers Demand Prior Notice of 'Offensive' Articles*, WALL ST. J., Apr. 30, 1997, at A1; Fen Montaigne, *The Home Front, Name that Chintz! How Shelter Magazines Boost Brands*, WALL ST. J., Mar. 14, 1997, at B1; Yumiko Ono, *Marketers Seek the 'Naked' Truth in Consumer Psyches*, WALL ST. J., May 30, 1997, at B1; Lawrence Soley, *The Power of the Press Has a Price, TV Reporters Talk About Advertiser Pressures*, EXTRA!, July-Aug. 1997 (visited Mar. 29, 2000) <<http://www.fair.org/extra/9707/ad-survey.html>>; Elizabeth M. Whelan, *When Newsweek and Time Filtered Cigarette Copy*, WALL ST. J., Nov. 1, 1984; G. Pascal Zachary, *All the News? Many Journalists See a Growing Reluctance To Criticize Advertisers*, WALL ST. J., Feb. 6, 1997, at A1.

101. See EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA: THE NEW MISSIONARIES OF CORPORATE CAPITALISM* 137 (1997). Television, newspapers, and publishing houses have recently undergone increased consolidation and, in some instances, are owned by large and frequent commercial messengers. See *id.* at 43. For example, all three networks are owned by major corporate conglomerates: ABC by Disney, NBC by General Electric, and CBS by Westinghouse. See *id.* at 83, 94, 96; Kellner, *Cultural Studies*, *supra* note 25, at 9. Rosemary Coombe notes that the sources for our information (magazines, newspapers, television, books, and motion pictures) are becoming increasingly consolidated in the hands of fewer and fewer entities. See Coombe, *Objects of Property*, *supra* note 73, at 1862-63. Noting the pervasiveness of "commodified forms," Coombe states, "Any consideration of contemporary life must take into account both the production and the consumption of media-disseminated cultural forms." *Id.* at 1863. In addition, "[n]ewspapers obtain about 75% of their revenue from advertisers, general-

therefore, to find that corporations purchasing advertising space and time influence, to varying degrees, the ideological content of all media forms.¹⁰² As commercial messages proliferate, the public's exposure to the commercial messages increases and, arguably, people become desensitized to commercialization and commercial discourse. Advertising, under this view, becomes less noticeable as "selling" messages and becomes subtly ingrained in societal discourse.¹⁰³

Heavy reliance on advertising as a means of commercial communication has been criticized for draining and wasting resources that might otherwise be spent more meaningfully on research and development or salary and benefits for workers.¹⁰⁴ Corporate waste becomes more acute as advertising encourages a continual and unnecessary change in the tastes and desires of consumers.¹⁰⁵ This view holds that advertising serves to create consumer desire for continually new and improved product forms, which, in reality, may differ little, if at all, from prior good offerings. Thus, under this view, as tastes are distorted, we become dissatisfied with a detergent that we had previously believed to be cleaning our clothes and seek out a new and improved version.¹⁰⁶ Advertisements may create a desire for goods and services consumers may not need.¹⁰⁷ Our shampoos are improved to add conditioners, highlights, wash away gray, and give us shinier, bouncier hair. An associated claim is that by manipulating consumers "advertising, by its

circulation magazines about 50%, and broadcasters almost 100%." Edward Herman, *Media in the U.S. Political Economy*, in QUESTIONING THE MEDIA: A CRITICAL INTRODUCTION, *supra* note 68, at 84; *see also* Baker, *supra* note 24, at 2103.

102. *See* GENDER, RACE AND CLASS IN MEDIA, *supra* note 5, at 71; *see also* Herman, *supra* note 101, at 75; Peters, *supra* note 20, at 25 ("Almost no one wants to look at key questions of who owns and controls the media. There is little attention to the profit-driven nature of our economy and how that gives rise to a commercially driven media.").

103. *See* Jhally, *Image-Based Culture*, *supra* note 5, at 79, 81.

104. *See* WRIGHT, SELLING WORDS, *supra* note 89, at 195; Kellner, *Reading Images Critically*, *supra* note 13, at 80-81; STRASSER, *supra* note 54, at 290 (noting advertising's ecological consequences).

105. *See* KIRKPATRICK, *supra* note 9, at 4 (restating the critique thus, "consumers may want safer automobiles; but what they get . . . are racing stripes and aluminum hubcaps."). A related form of this argument is that the proliferation of goods and increased resources devoted to promoting goods has a negative impact on the environment by adding to a "disposable" consumerist lifestyle. *See* Pontifical Council, *Ethics in Advertising*, *supra* note 6, at 8. The flip side of this argument is that consumer choice is a hallmark of democracy and serves the interests of consumers by not only providing goods to fulfill almost any conceivable taste but also by creating competition which lowers prices.

106. *See* BeVier, *supra* note 48, at 6 ("Economist-critics' second argument is that advertising distorts tastes by permitting product differentiation and the development of brand names.").

107. Critics note that advertising's creation and manipulation of consumer tastes "is the opposite of what advocates of capitalism claim about a free-market economy . . . that producers conform to the tastes and preferences of consumers." KIRKPATRICK, *supra* note 9, at 4.

very nature, is inherently deceptive," or is at the least, "'merely' coercive."¹⁰⁸

This increased production of substantially similar consumer goods, which are frequently indistinguishable by their ingredients or function, creates a need to distinguish the products by some means other than by pointing to the function of goods.¹⁰⁹ A proliferation of cola soft drinks creates a need for the producer to create distinctions among Coke, Pepsi, Dr. Pepper and RC Cola, for example. Similarly, breakfast cereal manufacturers through advertising try to create meaningful distinctions among Corn Pops, Sugar Smacks, Apple Jacks, Froot Loops, and Frosted Flakes.¹¹⁰ In these cases, marketers differentiate goods less by factual product information and more by product image and personality. Marketers distinguish their product by infusing their goods with positive characteristics and sometimes by infusing their competitors' goods with negative or at least not as positive characteristics as their own products.¹¹¹ Artful advertisements help to create the impression that goods of a particular class have real, quantifiable differences that do not, in fact, exist, or at least are exceedingly difficult to measure.¹¹² Thus, cola soft drinks are not distinguished in advertisements through a discussion of price or relative product quality. Instead, we are told that Coke "adds life" and Pepsi "is the choice of a new generation." Used in this way, advertising can convince consumers to purchase goods based on

108. *Id.*

109. See Mensch & Freeman, *supra* note 99, at 341 ("[P]rofit-seeking sellers of consumer goods will try to distinguish their products from ostensibly similar ones in order to build around themselves a protective wall of cross-inelasticity, thereby gaining some control over price and increasing profits [T]he obvious basis for differentiation lies in advertising.").

110. Even advertisers seem to have begun to see the irony in creating distinctions between products whose purpose and use are substantially similar. For example, television advertisements for Apple Jacks depict children happily enjoying their cereal. When an "out of it" adult questions their love of Apple Jacks the retort is "because we do." The commercial message more explicitly acknowledges consumer choice based not on concrete differences but instead on seemingly idiosyncratic individual preferences. See Joe Crea, *Packing Kids' Lunches Poses Tough Choices*, CLEV. PLAIN DEALER, Sept. 1, 1999, at 1F.

111. But see BeVier, *supra* note 48, at 6-7 (dismissing arguments that advertisements create barriers to entry, excessive product differentiation, or manipulate demand, stating that "advertising . . . is an efficient way to convey information that facilitates the process of matching consumers' preexisting tastes with products that can satisfy them").

112. See SCHUDSON, *supra* note 75, at 9 (stating that critics contend that advertising "shapes consumer values and choices" and blame it for the sale of "marginally differentiated products that do not differ significantly from one another . . ."); Mensch & Freeman, *supra* note 99, at 341-45 (noting a study issued in 1970 and again in 1980 that illustrated that consumers would pay more for identical products as a result of an "almost imaginary superiority . . . in the mind of the consumer") (citation omitted).

irrational motives instead of "rational differences" in product quality or price.¹¹³

A related critique is that as the cost of distinguishing one product from another increases so does the cost of entering an industry.¹¹⁴ Increased use of advertising and the proliferation of substantially similar goods in some industries may raise a barrier to entry for newcomers to the marketplace or make it difficult for marginal players to remain.¹¹⁵ Barriers to entry detract from a competitive model by increasing the amount of capital it takes to successfully enter a given market and adversely affecting small brands/producers which are already doing business but cannot afford to advertise at the same level as the companies with deeper pockets.¹¹⁶ An opposite view is that rather than creating barriers to entry, advertising is a means of market entry.¹¹⁷ In this view, advertising makes it possible to reach a large number of potential customers and, therefore, creates an entry point for new products and firms.¹¹⁸ The result is more goods and greater economies of scale and, in turn, lower prices.¹¹⁹ Name brand products that are heavily advertised are innovators that create a market for less expensive generic products.

Socio-cultural critiques of advertising take a more expansive look at the impact and effect of advertising. Under their view, advertising is not merely

113. See Pontifical Council, *Ethics in Advertising*, *supra* note 6, at 6; BeVier, *supra* note 48, at 5 (arguing that "[f]ar from creating a diversity of taste that would not otherwise exist, advertising and the use of brand names is an efficient way to convey information that facilitates the process of matching consumers' preexisting tastes with products that can satisfy them"); JULIET SCHORR, *THE OVERWORKED AMERICAN* 119-20 (1991). Schorr notes that advertising has played a role in the American cycle of work and spend. *See id.* It is used to "persuade consumers to acquire things they most certainly did not need [A]dmen and businessmen had to instill . . . the 'consumption ethic.'" *Id.* (citations omitted).

114. See Mensch & Freeman, *supra* note 99, at 341-45 (noting economists who refute the "basic entry barrier theory, arguing [that] . . . the introduction of advertising actually increases competition").

115. See BeVier, *supra* note 48, at 5 (stating that "[t]his barrier-to-entry argument is unconvincing"). BeVier also asserts that advertising is a means of providing product information that is a cost of doing business. *See id.*

116. A study by the Food Marketing Policy Center at the University of Connecticut found that of the average price consumers pay for a range of everyday consumer products, up to seventy percent goes to profits and marketing costs. For example, 69.6% of the price of soft drinks, 55.3% of the price of chips and snacks, 69.3% of the price of breakfast cereals, and 52% of the price of cookies and crackers goes to marketing and profits. The cost breakdown for a box of cereal is 12% for capital expenditures, 33% percent raw value, 20% profit and 35% for marketing. *See* Ellen Neuborn & Mary Motta, *A Peek Behind the Price Tag: Cereal Makers Not Only Ones Milking Profits*, *USA TODAY*, June 13, 1996, at 1B.

117. *See* KIRKPATRICK, *supra* note 9, at 136.

118. *See id.*

119. *See id.* at 140.

a source of information which efficiently stimulates a free market economy. The notion of efficiency is challenged by those who assert that advertising encourages corporate and consumer waste, which may serve to raise consumer costs and make it more difficult for outsiders to enter a market and compete. A focus on market efficiency is further challenged by those who assert that advertising has developed into a highly coded and symbolic message system about American culture. This wider view of advertising asserts that the overlapping effects of messages, which contain few facts, link products with lifestyles, and push consumerism directly influence as well as refract societal values. Moreover, the prevalence and dominance of advertising as a means of public discourse makes it a powerful ideological tool.¹²⁰ The commodity image system thus provides a narrow vision of the world that is "connected with what one *has* rather than who one *is*"¹²¹ The ability of advertising to reach and influence has led some to describe "advertising as part of a new *religious* system in which people construct their identities through the commodity form, and in which commodities are part of a supernatural magical world where anything is possible with the purchase of a product."¹²²

An important part of the magic of advertising is media stories about social roles.¹²³ Commercial messages demonstrate and reinforce social politics by playing and replaying the framework of acceptable social hierarchies and roles. Quite simply, advertisements create media stories about social roles by the inclusion of some (sometimes out of proportion to their representation in society) and the exclusion of entire groups of "others."¹²⁴

Moreover, of those included in media displays, the stories and placement of characters within the scene contain additional messages about societal roles and hierarchies. Media spectacles demonstrate who has power and who is powerless, who leads and who follows, who serves and who is served. "[Media] dramatize and legitimate the power of the forces that be and show

120. In fact, critics assert that advertising promotes homogeneity and is hegemonic in its ability to persuade the relatively powerless consumer to consent to the very system that oppresses or subordinates them. Rather than requiring overt force (as represented by the military or police), the media assists in reinforcing the current hierarchical social and economic system. See JOHN STOREY, AN INTRODUCTORY GUIDE TO CULTURAL THEORY AND POPULAR CULTURE 120 (1993).

121. Jhally, *Image-Based Culture*, *supra* note 5, at 80.

122. *Id.*

123. See HOOKS, *supra* note 28, at 112-13. A related critique is that advertising promotes morally offensive or immoral images. See KIRKPATRICK, *supra* note 9, at 5.

124. See O'BARR, *supra* note 3, at 2. O'Barr notes that "outsiders who appear in advertisements provide paradigms for relations between members of advertising's intended audience and those defined outside it The most frequently depicted qualities of such relationships are hierarchy, dominance, and subordination." *Id.*; see also Mensch & Freeman, *supra* note 99, at 354-66 (discussing "advertising as cultural reality").

the powerless that they must stay in their places or be destroyed.”¹²⁵ Race has historically played an important role in creating and maintaining a social hierarchy in media messages. African Americans have played a unique role in the commercial marketplace. Blacks have been the subject of advertisements, which were used to trade in black bodies, and have been identified by advertisements, which created stereotypical idea of “blackness” in order to sell products. Yet, the literature examining the impact of advertising and its regulation often either ignores or addresses only briefly the racial impact of advertising and the history of race and advertising in America.¹²⁶

III. THE PECULIAR HISTORY OF RACE AND ADVERTISING

Within the powerful and pervasive realm of commercial discourse is a peculiar racial history, which reinforces cultural and racial messages and norms.¹²⁷ African Americans, in particular, have had an intimate and unusual relationship with advertisements.¹²⁸ This history has included: objectification and the use of advertisements to sell black bodies, the exclusion or marginalization of Blacks,¹²⁹ the degradation or subjugation of

125. Kellner, *Cultural Studies*, *supra* note 25, at 5.

126. Petty notes that advertising raises five important social issues: “the regulation of television advertising, advertising for tobacco and alcohol products, advertising to children, stereotypes and discrimination in advertising, and comparative advertising.” Petty, *The Global Perspective*, *supra* note 24, at 339. In addition, George Wright states that “[t]he relationship between mainstream advertising and American racial and ethnic minorities has been equally complex. This is again a large story, about which we can say little here.” WRIGHT, *SELLING WORDS*, *supra* note 89, at 175.

127. See KERN-FOXWORTH, *supra* note 6, at ix. Kern-Foxworth’s book is described as the first “single literary work [to provide] a comprehensive report on the history and status of blacks in advertising.” *Id.* at xi; PIETERSE, *supra* note 2, at 188.

128. In fact, advertisements provide the basis for serious historical and cultural study. They provide invaluable sources of historical and cultural information. See KERN-FOXWORTH, *supra* note 6, at 2.

129. See *infra* notes Part III; Sandra Clark, *Nonwhite Models Are Discovering a Black List Among Advertisers*, STAR TRIBUNE (MINNEAPOLIS-ST. PAUL), May 17, 1992, at 11. A study commissioned by New York City’s Department of Consumer Affairs entitled “‘Invisible People,’” found that African-Americans constitute 11 percent of magazine readers, yet are only 3 percent of the people shown in national ads . . .” *Id.* A study conducted by Thomas Schwartz, an associate journalism professor at Ohio State, of three major fashion magazines found that “minority models totaled 0 percent in 1967, 4.9 percent in 1977 and 1.6 percent in 1987, for an overall average of 2.5 percent . . .” *Fashion Ads Are Thin on Minority Models*, ATLANTA J. & CONST., Aug. 16, 1991, at E2. The article further states that other researchers “have shown that the percentage of minorities in ads in general-interest magazines [as opposed to fashion magazines] has grown . . .” *Id.*

Blacks by relying on stereotypes to depict Blacks,¹³⁰ the segregation of Blacks through the use of target marketing,¹³¹ and the use of Blacks to promote ideals of false integration and racial harmony.¹³² Advertising images of African Americans lack a diversity and complexity common in depictions of Whites.¹³³ The lack of diversity of images means that each image carries greater weight. No image of African Americans is neutral, and the impact of each can only be understood within a larger historical context.¹³⁴

Early in this country's history, advertisements were a primary means of engaging in the sale of slaves.¹³⁵ During this period Blacks were the subject of advertisements. Individual slaves and slave auctions were frequently announced through newspaper and billboard advertisements.¹³⁶ Advertisements were also used to announce the arrival of slave ships, as well as slave "raffles" and lotteries.¹³⁷ Slave traders and slave catchers similarly relied on advertising in order to market their particular skills and expertise in obtaining the return of captured slaves.¹³⁸

Advertisements seeking the return of runaway slaves were common in the eighteenth and early nineteenth centuries.¹³⁹ In an era in which the individual dignity of Blacks was legally denied through institutional slavery, these advertisements often provided amazing detail about the identity of the runaway slave, such as: name, "age, sex, height, color, scars and any visible

130. See *infra* notes Part III. See generally KERN-FOXWORTH, *supra* note 6; M.M. MANRING, *SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA* (1998); PIETERSE, *supra* note 2.

131. See *infra* note 208 and text accompanying.

132. See *infra* notes 235-41; PIETERSE, *supra* note 2, at 209. Pieterse notes that even in advertising campaigns such as the "United Colours of Benetton" that portray an "international 'rainbow'" recreates imagery in which whites are "presented in the dominant, active position." *Id.* Pieterse further states that the campaign strategy "does not shift frontiers in inter-ethnic image-making, but merely recycles them." *Id.*

133. See *infra* notes 232-33; Ellen Seiter, *Different Children, Different Dreams: Radical Representation in Advertising*, in *GENDER, RACE AND CLASS IN MEDIA*, *supra* note 5, at 99, 99-100.

134. See *infra* notes 139-205 and text accompanying.

135. See KERN-FOXWORTH, *supra* note 6, at 1-3. "[S]lavery . . . would not have been such an effective institution without the vehicle of advertising." *Id.* at 3.

136. See *id.* at 3. Slave advertisements were specific and detailed the skills of each individual slave. Kern-Foxworth provides this example of such an advertisement that appeared in the Boston News-Letter on March 21, 1734: "A Likely Negro Man about Twenty-five years of Age, has had the Small Pox, and speaks pretty good English, suitable for a Farmer, &c. To be sold, Enquire of the Printers." *Id.*

137. See *id.* at 4.

138. See *id.* at 7-11.

139. See *id.* at 10. "Almost every issue of every newspaper published in the colonies contained such advertisements." *Id.* (citation omitted).

body markings” or deformities, clothing, “place of birth, musical and linguistic talents, speech impediments,” “primary language, ritualistic African markings, religious inclinations, and information about relatives and friends,” “the kind of work they performed,” “number of previous owners, frequency of escape attempts,” and the “type of chains in which [they] were shackled.”¹⁴⁰ Advertisements were also a means of identifying and capturing “outlaw” slaves.¹⁴¹ Outlaw slaves were slaves who lived on their own, often on the outskirts of a town and were considered a “threat” to slave owners and Whites in town.¹⁴² These advertisements sought their return, often inviting their death by offering large rewards for the return of their heads.¹⁴³

Slave advertisements seeking the return of runaway and outlaw slaves were a “unifying force for all slave owners. [The message contained in these ads was that] whites were expected to ban [sic] together and were, therefore, obligated to help recapture runaway slaves.”¹⁴⁴ Thus, slave advertisements seeking the return of runaway slaves explicitly noted the personal risk involved in aiding or harboring them.¹⁴⁵ Severe penalties attached to anyone, including Whites, who assisted escaped slaves. Used in this way, advertisements played an unambiguous role in maintaining a racial caste.

Blacks were commodities to be displayed, sold, and returned. In depicting Blacks as commercial objects, slavery advertisements were explicit

140. *Id.*

141. *See id.* at 21-22.

142. *See id.* at 21.

143. *See id.* at 21-22.

144. *Id.* at 12. Leon Higginbotham notes that the law placed heightened penalties on those slaves who sought to procure their own freedom. *See* A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR; RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 176 (1978). Moreover, in South Carolina, for example,

[t]he statute made it clear that all members of the community were to be involved in the capture of runaway slaves Special patrols received a reward of forty shillings for capturing a slave who had been away for more than six months. If the slave had escaped over twelve months previous and was taken alive, the members received four pounds from the master; but if he was killed, they received forty shillings from the public treasury.

Id. In addition, penalties ranging from fines to death were imposed for encouraging or aiding slaves to escape. *See id.* at 188. The concept that slaves could not become “free” from entering a free state and that a public obligation existed to return fugitive slaves existed prior to the enactment of the Constitution and, in fact, was explicitly included in Article IV, Section 2 of the United States Constitution. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 83 (1994). In addition, state slave codes restricted the mobility of Blacks, and White militia were called upon to return fugitive slaves. *See id.* at 125. The Fugitive Slave Act of 1850 expanded federal involvement in the capture of fugitive slaves. *See id.* at 187.

145. *See id.*

in their message about social caste and hierarchy.¹⁴⁶ In this way, as informative tools of the commercial market, advertisements served as a means of directly communicating to consumers and the electorate consistent messages about the economic, political, and social power of Blacks.¹⁴⁷

Prior to and after the Civil War images of Blacks were also used to sell other products.¹⁴⁸ Stereotypical, grossly derogatory, and demeaning images of Blacks were used to sell commercial goods to consumers.¹⁴⁹ Even after the Civil War ended formal slavery, advertising continued to use stereotypical and demeaning images of Blacks that appealed to the White majority who were the primary, if not the sole, target for consumption of consumer goods. In fact, some have noted that "stereotyping *increased* in the wake of slave emancipation."¹⁵⁰ The relationship between Blacks and commercial discourse shifted so that advertisements no longer explicitly sold Blacks as goods, but commodified demeaning and stereotypical images of Blacks as a means of attracting a market for consumer goods.¹⁵¹

Historically, advertisements frequently relied on derogatory terms, offensive and exaggerated depictions of Blacks as a central part of the images and products being sold to American customers.¹⁵² These advertisements have represented stereotypical myths about the "natural" inferiority of Blacks.¹⁵³ In these advertisements, derisive terminology for Blacks, pictures of Blacks with animals, as cannibals, or as a source of pitying humor were common.¹⁵⁴ For example, in the early 1900s through the 1930s, "Nigger Head" canned fruits and vegetables, ties, tobacco and oysters and Pickaninny Brand peanut butter were common brands.¹⁵⁵ In addition, the Gold Dust Twins were popular characters depicting cartoons of Black men in frilly

146. See KERN-FOXWORTH, *supra* note 6, at 11-12.

147. These ad messages were consistent with concurrent doctrine, which in most slave states, denied basic human rights as a matter of law. See *id.* at 170. For example, in most slave states, slaves were unable to use the legal process in their behalf, move about freely through society, trade without the explicit consent of their owner, or own property. See *id.* at 170-76. Slave codes also prevented slaves from entering into contracts, offering testimony in court, or striking a White person in self defense. In addition, the killing of a slave was rarely regarded as murder and the rape of a female slave was characterized only as a trespass. See FRANKLIN & MOSS, *supra* note 144, at 124-25.

148. See KERN-FOXWORTH, *supra* note 6, at 29.

149. See *id.* Blacks were used on early forms of advertising such as trading cards, advertising cards, advertising stamps, blotters, bottles, boxes, and tins. The images "served as mirrors of American social attitudes and prejudices." *Id.* at 35.

150. PIETERSE, *supra* note 2, at 235.

151. See KERN-FOXWORTH, *supra* note 6, at 35.

152. See *id.* at 30.

153. See *id.* at 29.

154. See *id.* at 30-33.

155. See *id.* at 30-31.

tutus.¹⁵⁶ These early advertisements also frequently depicted cartoonish figures of Africans engaged in acts of cannibalism and Black children about to be devoured by alligators.¹⁵⁷ In an advertisement for Beech-Nut brand chewing gum, Whites about to be eaten by Africans bargain for their lives with Beech Nut gum.¹⁵⁸ These advertisements created an "African connection [which] was a not-so-subliminal threat to whites, a connection that stirred up subconscious anxieties of black retaliation."¹⁵⁹

Many of the advertisements, which included images of African Americans, had no apparent connection with the product other than to portray stereotypical images that were consistent with the racial hierarchy at the time. Many advertisements commented on the color of African Americans' skin and what was believed to be a commonly held desire of Blacks to rid themselves of their dark hues.¹⁶⁰ Thus, an advertisement for Payson's Indelible Ink portrayed a young African American boy and contained the copy "Both Indelible!"¹⁶¹ Similarly,

[a]nother common advertising theme during this period was that [B]lacks were so disgusted with their plight that they really wanted to be [W]hite. It was not uncommon to . . . see an advertisement claiming that a product had the power to cleanse the black skin of Negroes and miraculously change it to white.¹⁶²

Thus, a soap's ability to perform was measured in these early advertisements by its power to erase blackness.¹⁶³

Other advertisements, popular prior to the civil rights movement, replayed the consistent theme of Blacks as laborers, agricultural workers,

156. *See id.* at 46-48. A Gold Dust Washing Powder advertisement depicted two miniature Black men wearing only ruffled skirts bearing the words "Gold Dust." *See id.* In 1925, the Gold Dust Twins also became the subject of a radio show of the same name in a format similar to the "Amos 'n' Andy Show." *See id.* at 47.

157. *See id.* at 31. The Beech-Nut chewing gum ad, which appeared in 1933, consists of a nine panel cartoon in which simple magic tricks and Beech-Nut gum saves stranded whites from being devoured by African cannibals. *See id.* at 113-15. An advertisement for "Little African" cigars included the text, "A Dainty Morsel," and depicted a Black infant being pursued by an alligator. *Id.*

158. *See id.*

159. *Id.* at 31.

160. *See id.* at 31-32.

161. O'BARR, *supra* note 3, at 114.

162. KERN-FOXWORTH, *supra* note 6, at 31.

163. *See id.*; *see also* JACKSON LEARS, FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA 164 (1994) ("A preoccupation with cleanliness, often carrying racial overtones, had been a central theme in bourgeois culture. . . . [C]lean hands joined white skin, white bread, and white sugar as emblems of refinement.").

servants, and mammies.¹⁶⁴ Depicting African Americans as happy servants and porters was not limited to any particular industry or product and was commonly used by such diverse advertisers as Otis Elevators, N.H.M. Hotels, Pabst Beer, Monroe Calculating Machine Company, Inc., Walker's DeLuxe Whiskey, and Northern Pacific Railway.¹⁶⁵ These advertisements usually depicted African American men cheerfully serving Whites.¹⁶⁶ The characterization of African Americans as servants in these advertisements was designed to provide a degree of cachet to the product. Blacks in the advertisements were depicted as willing and happy servants with wide eyes and full grins. In order to emphasize the difference and inferiority of the Blacks depicted in the advertisements, the copy of the advertisements was frequently written to mimic a dialect that many believed was spoken by Blacks.¹⁶⁷ Advertisement copy therefore frequently included text apparently spoken by the depicted Blacks like, "Boss, dese elevators run on de haphazard schedule" and, "Yes, suh, Everybody's on the go again."¹⁶⁸ The text reinforced the visual imagery that the Blacks depicted were natural servants who were inferior to the Whites they served.

Messages about racial hierarchies were clear even in those advertisements in which no Whites were depicted. For example, an advertisement for Pabst Beer depicts a Black bellboy and reads, "These sho am quality folks."¹⁶⁹ In advertisements with copy like "Mista Joe brand, We Serve the Best" and "Stairway to the stars," the presence of African American servants in the advertisement relied on racial imagery to convey messages about socio-economic status.¹⁷⁰ With oblique references to plantations and explicit references to country clubs, the Whites depicted in the advertisements as well as those in the target audience were obviously well-to-do and "discriminating." One of the messages in these advertisements was that purchasing these products would place the purchaser in the role of the advertisement's model—that of master. In the 1920s and 1930s, Blacks in advertisements primarily "functioned as symbols of the capacity of the leading lady and leading man to command a variety of personal services."¹⁷¹ These advertisements also "epitomized a whole constellation of nurturant

164. See O'BARR, *supra* note 3, at 109 ("African Americans were usually depicted in the pre-civil rights decades of the twentieth century as workers."). African Americans were depicted picking cotton by American Cyanamid Company and Gilbert Paper Company. See *id.* at 117-18.

165. See *id.* at 109, 120-125.

166. See *id.* at 109, 130-39.

167. See *id.* at 117, 120-22, 131, 139.

168. *Id.* at 120-21.

169. *Id.* at 122.

170. *Id.* at 131-32.

171. MARCHAND, *supra* note 4, at 193.

values [These figures] took care of ([W]hite) people.”¹⁷² The Black body, therefore, beyond representing inferiority, was used to represent comfort and nostalgia in an age of modernity.¹⁷³

The Blacks in the advertisements were designed to provide a point of departure from which consumers could measure themselves and their status in American life. This message is explicitly made in an advertisement that depicts a young White woman with a worn and shabby suitcase.¹⁷⁴ In the initial frame, a Black porter ignores the young woman’s presence and is shown whistling with his hands in his pocket, refusing to serve her.¹⁷⁵ In the next frame, the young woman has acquired the advertised product, Hercules Luggage.¹⁷⁶ This frame depicts the Black porter rushing to serve her.¹⁷⁷ The clear message is that the purchase of the product will upgrade your status so that Blacks will willingly serve you.

Depictions of African American women similarly included servant imagery but contained more complex messages about Black women as mammies. African American women were frequently shown as stereotypical overweight “Aunt Jemima” characters, with exaggerated features and wearing a bandana on their heads.¹⁷⁸ These women served Whites not only because of the superiority of Whites but because the nature of “good” Black women was to be surrogate mothers to Whites in the tradition of the Black mammy.

Some advertisements contained few clear messages about Blacks’ social status as workers, servants, or mammies and instead seemed to have the general purpose of capitalizing on and illustrating stereotypes about Blacks. Thus, advertisements for Shell Industrial Lubrication and Auto-Lite Spark Plugs depicted young Black boys in various poses with watermelons.¹⁷⁹ The depictions of Blacks in these advertisements seem to have had no other purpose than to replay and reinforce the dominant economic, political, social, and racial hierarchies at the time.

172. LEARS, *supra* note 163, at 384.

173. *See id.* at 384-85.

174. *See O’BARR, supra* note 3, at 136.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.* at 126-29. Advertisements for Alturas Garfield Citrus Cooperative, Aunt Jemima Pancake Flour, Servel Electrolux Refrigerator, and Shippers’ Car Line relied on “Aunt Jemima” characters to sell products. *See id.*; *see also* MANRING, *supra* note 130, at 16 (noting that the Aunt Jemima character played a large role in America’s racial historiography: “the figures that are made ordinary, those subtle stereotypes, in some ways are the best indicators of what our values are”).

179. *See O’BARR, supra* note 3, at 115-16.

Advertisements of the pre-civil rights era were consistent in the depiction of appropriate roles for Blacks and Whites. William O'Barr aptly notes that the image of Blacks in commercial discourse has been "a constituent part of the discourse about blackness and whiteness, about race and social status, and about inequality in America."¹⁸⁰ Early advertisements depicting Blacks seemed primarily concerned with reinforcing a social hierarchy with African Americans left squarely at the bottom. Clear parallels can be drawn with the messages contained in these advertisements and the reality of Black life and Jim Crowism.¹⁸¹ The refractory nature of advertisements serves to reinforce and perpetuate racial realities. Early advertisements clearly contained a multitude of messages apart from messages about product quality and price. These advertisements commodified stereotypes of Blacks to sell image and lifestyle. They cannot be seen as merely reflecting a social reality but as perpetuating racial hierarchies by continually replaying messages about Black inferiority. In fact, cultural historian Jackson Lears notes that "[t]he question is, Why did these particular [racial] stereotypes survive and flourish anomalously amid the disenchantment of abundance imagery?"¹⁸²

In an effort to project a more consistent image of democracy, during World War II, the War Department made integrating African Americans into primetime network programs a priority.¹⁸³ Any progress on integrating Blacks in the mass media, however, was short lived, and the overtly negative depictions continued until the mid-1960s.¹⁸⁴ "Many of the changes that occurred in the portrayal and appearance of blacks in advertising were directly related to . . . the Civil Rights Movement."¹⁸⁵ Groups such as the

180. *Id.* at 107.

181. See FRANKLIN & MOSS, *supra* note 147, at 259-63, 277-85.

182. LEARS, *supra* note 163, at 124.

183. See DATES & BARLOW, *supra* note 8, at 203. The idea that domestic improvements in civil rights and race relations are intricately linked with foreign policy goals has been raised by a number of legal scholars. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980) (stating that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites" and that *Brown* "cannot be understood without some consideration of the decision's value to whites . . . [including] those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation."); see also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64-65 (1988).

184. See KERN-FOXWORTH, *supra* note 6, at 40. "It was difficult to prepare a meal without using food products featuring a stereotypical pickaninny, [B]lack mammy or [B]lack sambo." *Id.* But note that in the 1950s Coca-Cola used Alice Coachman's image to sell its product. Alice Coachman was the first Black woman to win an Olympic gold medal. See Valerie Lynn Gray, *Going After Our Dollars*, BLACK ENTERPRISE, July 1997, at 68.

185. KERN-FOXWORTH, *supra* note 6, at xix.

Urban League and the NAACP urged greater equality in advertisements.¹⁸⁶ In fact, the Kerner Commission's Report on Civil Disorders, recognizing the power of the media to affect and reinforce racial hierarchies, recommended increased diversity in advertisements.¹⁸⁷ "The commission recommended in 1968 that 'Negro reporters and performers should appear more frequently—and at prime-time—in news broadcasts, on weather shows, in documentaries and in advertisements.'"¹⁸⁸

Progress in removing stereotypical and demeaning images of Blacks and in incorporating healthy, diverse images of Blacks was slow and spotty.¹⁸⁹ A 1963 print advertisement for the American Telephone and Telegraph company featuring a well-dressed Black male model was a landmark event solely because it portrayed a middle class African American man.¹⁹⁰ The uncoupling of the Black male from derogatory, stereotypical imagery in an advertisement alone was sufficient to give rise to considerable press.¹⁹¹ Kern-Foxworth notes that despite pressure to improve racial diversity and images in advertising there was little significant improvement.¹⁹² She notes two television surveys published by the New York Ethical Society. The first New York Ethical Society survey, published in 1962, "recommended[] improvements be made in the use of Blacks in advertising"¹⁹³ The second report noted some increase in the number of Blacks depicted in advertising but "concluded 'that the industry was not keeping abreast of national political and social developments and that continued glaring

186. CORE, NAACP, and other civil rights groups met with advertising organizations such as the American Association of Advertising in order to work towards the integration of the mass media. See DATES & BARLOW, *supra* note 8, at 465.

187. See KERN-FOXWORTH, *supra* note 6, at xix; see also Patricia Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L.J. 509, 511 (1996).

188. KERN-FOXWORTH, *supra* note 6, at xix (emphasis added).

The Kerner Commission concluded that television and print media failed to communicate "to the majority of their audience—which is [W]hite—a sense of the degradation, misery and hopelessness of living in the ghetto. They [had also failed to communicate] to whites a feeling for the difficulties and frustrations of being a Negro in the United States . . . [and had] not shown understanding or appreciation of—and thus [had] not communicated—a sense of Negro culture, thought or history."

Worthy, *supra* note 187, at 511-12 (examining the laws and regulations adopted by the federal government and the courts to ensure "diversity of viewpoint" in broadcast programming and exploring the establishment of a regulatory framework for reducing the effects of racial stereotyping on television).

189. See generally KERN-FOXWORTH, *supra* note 6.

190. See *id.* at 39-40; DATES & BARLOW, *supra* note 8, at 469.

191. See KERN-FOXWORTH, *supra* note 6, at 39-40.

192. See *id.* at 40.

193. *Id.*

deficiencies outweigh the few improvements.’”¹⁹⁴ Any advances in media portrayals of African Americans were limited and short-lived.¹⁹⁵ After the Johnson administration, reporting by advertising agencies ceased, and no real attention was given to African Americans as consumers until the 1980s.¹⁹⁶

As television became the dominant form of relaying commercial messages, the use of derogatory stereotypical depictions of African Americans continued in this new media form.¹⁹⁷ “[I]n 1969 local stations reported diminishing advertiser interest in programs featuring [B]lacks or focusing on [B]lack issues. ‘It just isn’t chic anymore, said a spokesperson for WNEW-TV, New York, for advertisers to sponsor a [B]lack show.’”¹⁹⁸ Moreover, there was intense resistance from advertisers and White consumers to the use of positive depictions of people of color in entertainment.¹⁹⁹ Media and advertising executives feared a White backlash if Blacks were shown in commercials that were not minstrel or comedic in nature.²⁰⁰ Kern-Foxworth notes that “[t]elevision executives and advertisers feared alienating consumers and therefore avoided programming and commercials that were too flattering or egalitarian toward [B]lacks.”²⁰¹ In

194. *Id.* at 40 (citation omitted).

195. *See* DATES & BARLOW, *supra* note 8, at 461. Kern-Foxworth discusses a 1969 New York Times article that noted some positive changes in advertising occurring as a result of governmental prodding to feature Black and Puerto Rican talent in their advertising. *See* KERN-FOXWORTH, *supra* note 6, at 40.

196. *See* DATES & BARLOW, *supra* note 8, at 466. “[A]lthough the advertising researchers of the 1960’s studied African Americans as consumers . . . little changed in the industry regarding African American consumers and minority markets, except for a few integrated advertisements.” *Id.*

197. *See* KERN-FOXWORTH, *supra* note 6, at 38.

198. *Id.* at 40. For example, the Nat King Cole Show, in 1957, was largely financed by NBC and eventually failed due to an inability to attract advertisers. *See id.* at 38-39. Kern-Foxworth states that Nat King Cole was quoted as saying, “‘Madison Avenue, the center of the advertising industry, and their big clients didn’t want their products associated with Negroes.’” *Id.* at 39.

199. *See id.* at 38.

200. *See id.* Kern-Foxworth notes that an ad executive explained to a Black actor that a company such as Pillsbury could not afford to become associated too closely with Black Americans or Black issues. According to this executive, “[i]f it became a popular perception that a Pillsbury product was a ‘nigger flour,’ the company would be severely hurt in sales.” *Id.* (citation omitted). This fear of White backlash to advertisements that link consumer products and Blacks continues today. *See* Kofi Asiedu Ofori, *When Being No. 1 Is Not Enough: The Impact of Advertising Practices on Minority Formatted & Minority-Owned Broadcasters*, Dec. 4, 1998 (report prepared by the Civil Rights Forum on Communications Policy for the Office of Communications Business Opportunities, Federal Communications Commission).

201. KERN-FOXWORTH, *supra* note 6, at 38. The “Ethel Waters Show” was “dropped by NBC because of a threatened boycott by the network’s southern affiliates.” DATES & BARLOW, *supra* note 8, at 197-98 “This tactic was used successfully by southern radio-station owners and managers on a number of occasions in the 1930s and 1940s.” *Id.* at 467-69.

fact, White consumers have used boycotting successfully to protest a perceived close association between Blacks and marketers.²⁰²

The cultural, economic, and political power of commercial messages was clear to those who opposed positive depictions of African Americans. Media scholar, Marilyn Kern-Foxworth, notes,

[T]he use of [B]lacks in pejorative and stereotypical advertising kept them emotionally bound to the idiosyncratic whims of their former masters. With advertising, former slaveowners became masters over different objects. They made them subservient. They made them docile. They made them act stupid. They made them appear ignorant. They made them ugly. They made them grotesque. They made them want to be [W]hite. If it were domestic work or menial labor, [B]lacks could do it best [and] . . . advertisers discovered that [B]lacks advertised their subservience the best. Advertisers used little black pickanninies with braids and spindly legs, tar black Sambos with oversized rubbery red lips and large bugging eyes and overweight mammies to sell everything from cigarettes to cereals.²⁰³

In light of these recurrent patterns it is difficult not to conclude that positive images of Blacks were contrary to prevailing perceptions of Black inferiority. Improving the images of Blacks in commercial depictions would present a disharmonious message to a consumer politically and economically invested in maintaining a racial hierarchy. There was considerable social comfort in and economic reliance upon the subjugation of Blacks. These images of Blacks reinforced stereotypes and maintained a comfort level with the established system of racial and social caste. Commercial images that contradicted beliefs that Blacks were inferior might influence social roles and hierarchies based on race and destabilize economic hierarchies. It appears that in the mind of White sponsors, elevating the image of Blacks in the media may have had negative economic consequences.²⁰⁴ They feared reprisals from white consumers who they believed would cease buying goods if the goods were associated with positive, realistic images of Blacks.²⁰⁵

Contemporary advertisements have become increasingly subtle in their depictions of African Americans and other people of color. These depictions

202. See KERN-FOXWORTH, *supra* note 6, at 38.

203. *Id.* at 40-41.

204. See *id.* at 38; DATES & BARLOW, *supra* note 8, at 197-98, 467-69.

205. See DATES & BARLOW, *supra* note 8, at 197-98, 467-69, 478.

are now less transparently and explicitly stereotypical.²⁰⁶ However, some stereotypical images continue to exist, and there remains an uneasy relationship between advertising images and a more representative and realistic racial imagery in advertising.²⁰⁷ In addition, current advertisements often rely on subtle stereotypes about the “natural” inclination of and ability of Blacks in athletics and entertainment. The problem is magnified through the increased use of target marketing to segregated audiences.²⁰⁸ In target marketing, advertisers tailor their advertisements to the particular “target” audience. Thus, advertising geared to a “Black market” may contain Black or multi-cultural models, while advertisements selling the same product to a predominantly White market may contain few, if any, models of color.

Margaret Russell used the term “dominant gaze” in her examination of “the tendency of American popular cinema to objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them.”²⁰⁹ According to Russell, “the ‘dominant gaze’ subtly invites the viewer to empathize and identify with its viewpoint as natural, universal, and beyond challenge; it marginalizes other perspectives to bolster its own legitimacy in defining narratives and images . . . the dominant gaze’s

206. See O'BARR, *supra* note 3, at 112 (indicating that advertisements now contain depictions of successful Blacks and Blacks in contexts where only Whites would have appeared before the civil rights movement).

207. While Aunt Jemima continues to adorn packages of Aunt Jemima products she has recently undergone a facelift. See *id.* at 99. The original Aunt Jemima was a caricature of a heavy-set African American woman with a handkerchief on her head. See *id.* The new Aunt Jemima has lost weight, has softer features and has removed her bandanna. See *id.* In addition, Betty Crocker has been altered to depict a more “multi-cultural” image. See WRIGHT, SELLING WORDS, *supra* note 89, at 175. Yet, Uncle Ben continues to smile broadly on Uncle Ben’s converted brand rice, and Rastus continues to serve Cream of Wheat cereal. See Nancy Kruh, *Collecting Controversy; Evolving Images: Aunt Jemima, Uncle Ben and The Chef of Cream of Wheat*, DALLAS MORNING NEWS, Feb. 13, 1994, at 1F. Aunt Jemima has undergone several changes since its inception. See Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7, 9 (1994). In 1917 the company changed the caricature to an image of an actual person. See *id.* Over the years, Quaker Oats hired several black women to make public appearances as Aunt Jemima. See *id.* In 1968, Quaker Oats changed the appearance of the Aunt Jemima trademark in response to allegations that the mark was racist and depicted African Americans in a degrading manner. See *id.* at 10. The new Aunt Jemima that has resulted is a thinner, more modern African American woman. See *id.*

208. See *supra* notes 179-84 and accompanying text.

209. Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, in CRITICAL RACE THEORY: THE CUTTING EDGE 56, 57 (Richard Delgado ed., 1995). William O'Barr similarly argues that “representations of foreigners and other categories of outsiders who appear in advertisements provide paradigms for relations between members of advertising’s intended audience and those defined outside it.” O'BARR, *supra* note 3, at 2. According to O'Barr, “most frequently depicted qualities of such relationships are hierarchy, dominance and subordination.” *Id.*

power lies in projecting stereotypes and biases as essential 'truths.'²¹⁰ Professor Russell notes three ways in which the dominant gaze has

operated to perpetuate the subordination of Blacks in mainstream Hollywood films[:] . . . (1) in the proliferation of degrading stereotypes which serve to dehumanize Blacks' history, lives, and experiences; (2) in the marginalization or complete absence of indigenous perspectives on Blacks' history, lives and experiences; and (3) in the co-optation—or "Hollywood-ization"—of ostensibly "racial" themes to capitalize on the perceived trendiness or fashionableness of such perspectives.²¹¹

. . . .

[T]he unchallenged transmission of racial stereotypes in films not only weakens resistance to their falsity but also strengthens the legitimacy of their narrative source.²¹²

The use of a dominant gaze to construct and disseminate images of people of color is extremely powerful in commercial discourse. Yet, there has been little attempt to address the objectification and marginalization of people of color in commercial media. Current examples of the most explicit stereotypical racial imagery include the continued use of the image of the Black cook Rastus to sell Cream of Wheat and Uncle Ben to sell rice. A contemporary advertisement for the Krystal restaurant chain (a hamburger fast food restaurant) depicts an African American woman who shrieks, in a

210. Russell, *supra* note 209, at 57. Russell notes that Mas'ud Zavarzadeh states: both momentous and trivial films fulfill this hegemonic function . . . the distortive messages conveyed in so-called 'minor' or 'trivial' films have a far greater effect on popular culture precisely because of their insignificant nature; they create "the space in which the daily is negotiated; it is the space that is represented in the common sense as 'real.'"

Id. (quoting MAS'UD ZAVARZADEH, *SEEING FILMS POLITICALLY* 1-4 (1991)). Here, I argue that the nature and number of advertisements make them even more powerful in their ability to create and distort images and reality. Similarly, John Storey notes that movies like *Tarzan*, which depict "others," are less about what the movie is presumably about—Africa, and more about the desires and anxieties of imperial conquest. See STOREY, *supra* note 120, at 94.

What the approach does is to shift the focus of attention away from what and where the narratives are about to the "function" that they serve to the producers and consumers of such myths. . . . In effect, it shifts our concern from "how" the story is told to "why"; and from those whom the story is about to those who tell and consume the story. In short, "*Tarzan*" tells us nothing about the colonized, but a great deal about the colonizers.

Id.

211. Russell, *supra* note 209, at 58.

212. *Id.* at 59.

characteristic "sapphire" style, her belief that her husband has been involved with a "Krystal's chick."²¹³ The advertisement for a Krystal's chicken sandwich is designed to be amusing as the husband is shown sheepishly eating a Krystal's chicken sandwich while disputing his wife's claims of his infidelity. Other racial and ethnic groups are similarly depicted in a stereotypical manner. A frequently seen image today is a Chihuahua apparently speaking with a heavy Latino accent. The Chihuahua is used to sell Taco Bell products and is displayed as a source of humor and derision. The use of the heavily accented chihuahua is fairly similar to the use of the "Frito Bandito," a racist depiction of a Chicano used to sell corn chips.²¹⁴

More commonplace than explicit stereotypical imagery, however, is the limited diversity in commercial depictions of Blacks and the use of Blacks to play stock characters.²¹⁵ There is a heavy reliance on Blacks to play out modern stereotypes of African Americans.²¹⁶ Thus, many commercial messages will depict the athletic, entertaining, cool, or hip Black.²¹⁷ Less frequently seen are images of African Americans as the expert or authority in order to sell a product.²¹⁸ In this way, the image of whom Whites believe Blacks to be, the Black with whom the American majority is most comfortable, is commodified and sold back to consumers in the form of a commercial good.²¹⁹ Thus, African American men and boys are frequently depicted playing basketball, smoothly moving across the court, sinking a

213. For an in-depth discussion of African American stereotypes see DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS; AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS* (1973); KERN-FOXWORTH, *supra* note 6; MANRING, *supra* note 130. For a discussion of black stereotypes in Western culture see PIETERSE, *supra* note 2.

214. See WILSON & GUTIÉRREZ, *supra* note 30, at 109-10.

215. Jannette Dates notes:

[m]ajor corporations had developed a strategy that allowed them to bypass black-owned media organizations almost entirely, while they aimed their marketing overtures at black consumers (and the general market) by positioning African American superstars from various fields as pitchers for mass volume sales or as spokespersons endorsing products. Corporations leaned heavily on black sports figures and entertainers for this purpose.

DATES & BARLOW, *supra* note 8, at 497. O'Barr remarks on the replacement of explicitly derogatory stereotypical depictions of Blacks in advertising with current depictions of Black sports figures or musicians. See O'BARR, *supra* note 3, at 108. In contrast, "[W]hites are portrayed as endlessly varied, individual, even quirky and idiosyncratic." Seiter, *supra* note 133, at 100.

216. See O'BARR, *supra* note 3, at 108.

217. "The presence of African-American children in a commercial is used to define the product as 'cool,' modern, up-to-the-minute." Seiter, *supra* note 133, at 104. Seiter further notes that "[i]t is one of the contradictory and compensatory aspects of Black stereotyping that they are presented as enviable for their greater vivacity and looseness. . . . [B]ut these representations suggest . . . that these qualities . . . are not to be valued in the long run." *Id.*

218. See *id.*

219. See *id.*

basket, hanging on the rim—images used to sell sneakers, clothes, and even soda.²²⁰ The imagery of the “athletic” Black is easy for society to accept.²²¹ Similarly, Ray Charles sings and sways to entice us to buy cola. These advertisements are usually not concerned with the accuracy of the images they construct and ultimately little distinguishes them from the historical use of stereotypes in advertising.²²² On the other hand, there are few, if any, commercial messages in the mainstream media about other people of color.²²³ Left out of commercial images in the mainstream media altogether, South-Pacific Islanders, Chinese Americans, Japanese Americans, Latino/as, and others are erased from the predominant form of public discourse.

Theorists suggest that “Black media stereotypes are not the natural, much less harmless, products of an idealized popular culture; rather, they are . . . selective, partial, one-dimensional, and distorted in their portrayal of African Americans.”²²⁴ As a result, advertisements perpetuate and legitimate a culture in which serious inequalities in class, race, and gender exist.²²⁵ “Racial representations help to mold public opinion, then hold it in place and set the agenda for public discourse on the race issue in the media and in the society at large.”²²⁶ According to Professor Peiterse:

Existing differences and inequalities are magnified for fear they will diminish. Stereotypes are reconstructed and reasserted precisely when existing hierarchies are being challenged and inequalities are or may be lessening. Accordingly, stereotyping tends to be not merely a matter of domination, but above all, of humiliation. Different and subordinate groups are not merely described, they are *debased*, degraded. Perceptions are manipulated in order to enhance and to magnify social distance. The rhetoric and the imagery of domination and humiliation permeate society.²²⁷

220. *See id.*

221. *See id.*

222. *See* O'BARR, *supra* note 3, at 100-01.

223. *See* WRIGHT, SELLING WORDS, *supra* note 89, at 175. This problem of exclusion extends to non-commercial media as well. For example, a study of the three largest network nightly newscasts, commissioned by the National Association of Hispanic Journalists and the National Council of La Raza, found that of the approximately 12,000 reports, only 139 stories focused on Latino/as. Of those 139 stories, eighty percent were unfavorable, often on topics like illegal immigration or crime. Shauna Snow, *Calendar*, LOS ANGELES TIMES, June 6, 1997, at F2.

224. DATES & BARLOW, *supra* note 8, at 5.

225. *See id.* at 4.

226. *Id.* at 5.

227. Jan Nederveen Pieterse, *White Negroes*, in GENDER, RACE AND CLASS IN MEDIA, *supra* note 5, at 23, 26. A similar effect has been referred to as “orientalism.”

The mass media is a particularly dangerous tool in the creation and perpetuation of racial stereotyping.²²⁸ Media scholar Janette Dates notes the danger of stereotyping, stating:

Stereotypes are especially effective in conveying ideological messages because they are so laden with ritual and myth, particularly in the case of African Americans; but, invariably, these [B]lack representations are totally at odds with the reality of African Americans as individual people. Despite the technological, economic, and political developments . . . that allow for contradictory and complex image developments . . . the end result remains still a series of sharply conflicting [B]lack images in the mass media that have grave implications for American society as a whole. The conflict is indicative of a deep cultural schism . . .²²⁹

Similarly, Professor Peggy Davis notes how stereotypes about Blacks once assimilated are rarely questioned and actors will “develop[] a pattern of interpreting and remembering ambiguous events in ways that confirm, rather than unsettle[], stereotyped beliefs.”²³⁰ She goes on to note that “[t]he traditional stereotype of [B]lacks includes inferior mentality, primitive morality, emotional instability, laziness, boisterousness, closeness to

Edward Said shows how a Western discourse on the Orient—“Orientalism”—has constructed a “knowledge” of the East and a body of “power-knowledge” relations articulated in the interests of the “power” of the West. Said demonstrates Foucault’s claim that the ‘truth’ of a discourse depends less on what is said and more on who is saying it and when and where it is said. According to Said, “The Orient was a European invention.” “Orientalism” is the term he uses to describe the relationship between Europe and the Orient, in particular, the way “the Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience.”

STOREY, *supra* note 120, at 93 (quoting EDWARD SAID, *ORIENTALISM* 1 (1985)).

228. See DATES & BARLOW, *supra* note 8, at 5. In speaking about mass media’s portrayal of race and racial images, James Baldwin stated, “[i]f I’m not who you say I am, then you’re not who you think you are.” *Id.* at 6. Stereotyping is harmful not only in the creation of negative and harmful images of people of color, but in the perpetuation, without challenge, of unrealistically positive images of Whites.

229. *Id.* at 5. The focus of the Dates and Barlow text is the “‘split image’ which . . . characterized African American representations in the mass media throughout the twentieth century.” *Id.* at 2. Their study focuses on the conflict between “African American portraiture [that] has been created and nurtured by succeeding generations of white image makers . . . [and] [i]ts opposite [that] has been created and maintained by black image makers in response to the omissions and distortions of the former.” *Id.* at 3. “This war of images casts light on the historical trajectory of the race issue in American society . . .” *Id.* Dates and Barlow go on to assert that “the situation offers scholars a unique opportunity to explore the dynamics of cultural conflict as manifested in mass-media imagery.” *Id.*

230. Davis, *supra* note 28, at 1562.

anthropoid ancestors, occupational instability, superstition, care-free attitude, and ignorance.”²³¹

The impact of advertising on race and racially based hierarchies is complicated by the variable relationships between commercial messages and people of color.²³² In some instances Blacks or “Blackness” as popularly conceived becomes part of the commodity being sold. These advertisements rely heavily upon stereotypical imagery. Stereotyping by role and exaggerated speech and gestures is commonplace and consistent with images of Blacks historically relied upon by the mass media.

Furthermore, some advertisements co-opt racial themes in purporting to further democratic and equality ideals. This frequent use of African American imaging occurs in advertisements like the Benetton United Colors campaign, which frequently depict a multicultural rainbow of models, interacting on a personal and intimate level. Not only is the degree of racial interaction depicted in these advertisements not entirely realistic, but these advertisements are also less about the experiences of African Americans and more about how Whites view people of color in a hollow celebration of racial harmony in America. Consumers identify with the images in advertising and see themselves like the successful, happy, incredibly clean, integrated images in the advertisements. These images stand in direct contrast to the reality of “hypersegregation” in American communities.²³³

231. *Id.* at 1561 (citing G. ALLPORT, *THE NATURE OF PREJUDICE* 196-98 (1954)). Professor Davis also notes:

[c]ommon culture reinforces the belief in black incompetence in that the [B]lack is “less often depicted as a thinking being” [on television; that] [W]hites but not [B]lacks, are likely to exert authority or display superior knowledge; that [W]hites, but not [B]lacks, dispense goods and favors; and that [B]lacks are disproportionately likely to be dependent and subservient.

Id. (quoting C. Pierce et al., *An Experiment in Racism: TV Commercials*, in *TELEVISION AND EDUCATION* 62, 82 (C. Pierce ed., 1978)).

232. See O’BARR, *supra* note 3, at 12 (noting that advertisements “depict ideologies about relationships between us and them [“outsiders”]”). O’Barr notes:

advertising defines the boundaries of its audience in line with the boundaries of the markets [It] is deeply concerned with the appropriateness and even the morality of its representations. It takes care not to offend the members of its audience For those defined as outside . . . these considerations do not apply.

Id.

233. See Rebecca Fannin, *Reach vs. Environment (Advertising to Blacks)*, *MEDIA WEEK*, June 1, 1989, at 42 (stating that the general audience no longer sees the Black underclass; they see media depictions of wealthy [B]lacks “and they say there’s no [race] problem”); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 74 (1993). According to Massey and Denton, Blacks are hypersegregated because, “[n]ot only are [B]lacks more segregated than other groups on any single dimension of segregation, but they are also more segregated on all dimensions simultaneously. . . [and] at once.” *Id.* The dimensions of segregation are an unevenness in living

Inapposite to the use of racial imagery to depict racial harmony is the fact that the most frequent depictions of people of color occur in "target marketing" vehicles. "Target marketing" divides the consumer market according to income, geographic location, gender, age, ethnicity, and race for the purpose of selling a product.²³⁴ For example, the advertising and media industry's response to the growing Latino/a population was not to incorporate greater numbers of Latino/a people into mainstream media but to target the population directly through vehicles designed for that population.²³⁵ Similarly, the bulk of advertisements depicting African Americans appear in magazines, on radio stations, and following television shows geared towards the Black community.²³⁶ "Target marketing" serves to segregate markets into discrete units, a practice which serves to fractionalize more than unite.²³⁷ Joseph Turow notes that advertisements also serve to "separate audiences into different worlds according to distinctions that ad people feel make the audiences feel secure and comfortable."²³⁸ Through the use of target marketing,

[c]apitalism . . . has discovered a way to commodify racial and cultural difference as a form of controlled diversity. By harnessing those few positive associations accorded to other social groups in the minds of white, middle-class suburban America, management has found ways to repackage this difference in order to increase desirability for their product or service.²³⁹

patterns "so that [Blacks] are overrepresented in some areas and underrepresented in others"; racial isolation; clustering of [B]lack neighborhoods; a concentration of housing inhabited by [B]lacks; and the centralization of these neighborhoods "around the urban core or spread out along the periphery." *Id.*

234. See TUROW, *supra* note 69, at 88. "[M]edia were increasingly encouraging people to separate themselves into more and more specialized groups and to develop distinctive viewing, reading, and listening habits that stressed differences between their groups and others." *Id.* at ix. Turow further states that "fragmentation, fractionalization, regionalization, decentralization . . . were the buzzwords at the 1980 meeting of the Association of National Advertisers." *Id.* at 90.

235. See *id.* at 86-88; WILSON & GUTIÉRREZ, *supra* note 30, at 128.

236. See TUROW, *supra* note 69, at 88-89. Turow notes the existence of the "Nielsen Hispanic Index" used to measure viewing habits of Hispanic American households. See *id.* at 85; see also Seiter, *supra* note 133, at 105 (noting that one difficulty of target marketing is that it "confirm[s] [W]hite advertisers' preconceptions about the unsuitability of [minority images in advertising] for [w]hite audiences").

237. Turow explains that the targeting of consumers by race led to some fear that some ethnic groups were favored over others by receiving larger percentages of advertising dollars. See TUROW, *supra* note 69, at 87-88. "[T]he more a population in U.S. society could be shown as distinctive, and the more it could be divided against itself and others, the more likely marketers were to consider it important." *Id.* at 88.

238. *Id.* at 2.

239. Matthew Murray, *The Suburban Economy*, Z MAGAZINE, Nov. 1998, at 8.

However, many advertisements, including those targeted to African Americans, “feature [W]hite models or [W]hite models in roles of dominance”²⁴⁰ The use of target marketing best exemplifies the idea that under contemporary methods of advertising the audience has become the product which is sold to the advertisers. Media outlets sell particular demographic groups to certain advertisers depending on the likelihood that that segmented group will purchase the advertised product and their desirability (to the advertiser) as consumers.²⁴¹

Examining stereotypes of the dominant groups is critical to “understand[ing] the latent content of stereotypes of oppressed groups.”²⁴² The “[p]ositive stereotypes [of the dominant group] are as important as negative ones in defining the field of what the media communicate to us about race.”²⁴³ Advertisements generally portray social ideals.²⁴⁴ They normalize commitment, friendship, intimacy, parenting, and beauty ideals.²⁴⁵ These images, however, are not presented on a neutral racial plane. Blacks “are still largely invisible in advertising” and advertisements are used to “reproduce and even sometimes exaggerate long-standing social inequalities.”²⁴⁶ Juxtaposed against stereotyped images of people of color is the dominant idealized imagery in commercial discourse of Whites. In fact, the predominance of white models in advertisements is such that white models are frequently used even in selling products that are bought predominantly by people of color.²⁴⁷ Some note that viewers will contrast these positive images of Whites in commercial media with the dominant negative imagery of people of color in news and entertainment messages to support convictions about race and racial hierarchies.²⁴⁸

240. Corliss L. Green, *Ethnic Evaluations of Advertising: Interaction Effects of Strength of Ethnic Identification, Media Placement, and Degree of Racial Composition*, J. ADVERTISING, Apr. 1, 1999, at 49.

241. See generally Ofori, *supra* note 200.

242. Seiter, *supra* note 133, at 99.

243. *Id.* (“Positive, laudatory stereotypes about white men, for example, may be as persistent as pejorative stereotypes of Black women. The association of reasoned authority with white men is as strong as the association of heightened sexuality with Black women.”).

244. See SCHUDSON, *supra* note 75, at 220.

245. See *id.* at 220-21 (noting that advertisements rarely, if ever, portray the sick, the old, or the poor).

246. *Id.* at 220; see also Seiter, *supra* note 133, at 100 (“It is very difficult for [W]hites to see how whiteness as a norm informs all media representation, ‘as if it is the natural, inevitable, ordinary way of being human’”).

247. For example, although fifty-five percent of Aunt Jemima brand products are purchased by Black consumers, in the 1980s, the parent company “normally spent only a small portion of its advertising budget in [B]lack markets.” DATES & BARLOW, *supra* note 8, at 470-71. These “general audience” advertisements overwhelmingly featured white models. See *id.* at 476.

248. See Seiter, *supra* note 133, at 100.

Moreover, many, believing racism is a thing of the past, will be unable to explain these sharp disparities of images between Whites and African Americans in the media.²⁴⁹ The dichotomy of the existence of numerous and diverse positive images of Whites and a dearth of diverse and positive images of people of color can cause Americans to more readily accept these negative images, even those that purport to depict images of the viewers' own outsider group.²⁵⁰ In this way, the media generally, and advertising in particular, help to define/create a meaning of "Whiteness" and "Blackness." "[R]acial images in the mass media are [thereby] infused with color-coded positive and negative moralistic features. Once these symbols become familiar and accepted, they fuel misperceptions and perpetuate misunderstandings among the races."²⁵¹

The result is that commercial messages influence views of consumer products and the corporations that produce them.²⁵² The mass media is a

249. See JHALLY & LEWIS, *supra* note 22, at 97.

250. See *id.* Sut Jhally and Justin Lewis conducted a study of viewer perception of *The Cosby Show* in order to further understand issues of race and class in America and as portrayed by the media. See generally JHALLY & LEWIS, *supra* note 22. In their analysis, Jhally and Lewis state that many of the Black people whom they interviewed about *The Cosby Show* felt that Blacks just need to "get[] [their] act together." *Id.* at 128. In response to this notion, they go on to state:

Unless they address the broader structural factors, the only way that [B]lacks can reconcile real-life economic and social problems with images of success is through individual pathology—blame and self-blame for those who have not made it in the open meritocracy. Because the invisible structures of class, and not the visible structures of race, define the workings of the economic system, the only explanation for massive black poverty must lie in [B]lacks themselves. When this assumption of individual pathology is attached to race, we confront a system of racist belief at the heart of [B]lack culture itself, a form of self-hatred.

Id. at 129.

Recent discussions about the plight of African Americans—especially those at the bottom of the social ladder—tend to divide into two camps. On the one hand, there are those who highlight the structural constraints on the life chances of [B]lack people. This point of view involves a subtle historical and sociological analysis of slavery, Jim Crowism, job and residential discrimination, skewed unemployment rates, inadequate health care, and poor education. On the other hand, there are those who stress the *behavioral* impediments to [B]lack upward mobility. They focus on the waning of the Protestant ethic—hard work, deferred gratification, frugality, and responsibility—in much of [B]lack America.

Cornel West, *Nihilism in Black America*, in BLACK POPULAR CULTURE 37 (Gina Dent ed., 1992).

251. DATES & BARLOW, *supra* note 8, at 4; see also Seiter, *supra* note 133, at 99-100.

252. See Margaret Russell, *Law and Racial Reelism*, in FEMINISM, MEDIA, & THE LAW 136 (Martha A. Fineman & Martha T. McClusky eds., 1997) [hereinafter Russell, *Law and Racial Reelism*]. "Patricia Hill Collins has referred to these representations as 'controlling images'—ideology-laden depictions 'designed to make racism, sexism and poverty appear to be natural, normal and an inevitable part of everyday life.'" *Id.* at 140 (citation omitted).

significant force in producing and regulating the distribution of ideas. The reality of our segregated communities is that most of the images that one ethnic or racial group has of another are developed, to a large extent, by the media.²⁵³ There is a consistency of not only consumerist images but stories of power and domination, hierarchy, and status. These media images feed on themselves and become part of the dominant ideology. The public is sold images and goods (often in combination) through movies, television, and print media by infusing the commodities with images that reinforce racial privilege and affect images/perceptions of African Americans and other outsiders.²⁵⁴ This commodification of racial images occurs openly and blatantly as well as more subtly. These images and symbols help us to understand and make sense of the world and affect how we interact with and think about others, how we structure our lives, our morals, ethics, and reasoning.

A constant theme in commercial discourse is that complex personal and social problems may be resolved by an individual through the purchase of a consumer good. While an individualist, commerce-oriented approach to problem-solving has an arguably negative impact on the wider society, its effect on marginalized and outsider groups is more pronounced. People of color, women, and the poor are hampered in their efforts to direct the public's attention to those issues that disproportionately affect them. Thus, contemporary legal, economic, and political struggles for the recognition of group rights and harms stand in direct contrast to the predominant commercial message of resolution through individual, market-based self-help.²⁵⁵

A related effect is the inability of marginalized peoples to control the creation and dissemination of images which skew messages about race and

253. See MASSEY & DENTON, *supra* note 233, at 3-4 (noting that the degree of hyper-segregation has contributed substantially to the creation of two societies, "one black, one white").

254. See O'BARR, *supra* note 3, at 206. William O'Barr equates advertising with pornography, noting, "[W]hen viewed repeatedly, the discourse of advertising reiterates themes to which we ultimately become desensitized The ideology of dominance and subordination becomes familiar We become used to the images, the social relations, and the inequalities of power that make up the discourse of advertising." *Id.*

255. While individualism is a cornerstone of Jeffersonian democracy, the predominant focus on the marketplace as the ultimate site for solutions to complex problems, in commercial discourse, is a separate issue worthy of reflection and discussion. See WRIGHT, SELLING WORDS, *supra* note 89, at 183 ("[C]ommercialization has taken the place of a now lost faith in the competence and authority of public institutions and collective decision making."). The individualistic approach to social problems is contrary to efforts to recognize group rights in other contexts. Assaultive speech scholarship is an example of one area in which scholars have examined the issue of group rights within a First Amendment context. See *generally* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda et al. eds., 1993).

culture.²⁵⁶ Advertisers and media conglomerates are in a position to create and control a large number of the images that are viewed. Thus, corporations and advertising agencies are, in essence, significant contributors to a definition of Blackness. Unfortunately, these corporate-produced images usually lack the authenticity of images created and promoted by members of the group being defined, and may frequently contain stereotypical views.²⁵⁷ Oppressed groups face barriers to their ability to control the creation and dissemination of their own images,²⁵⁸ and these barriers have an economic effect on Black businesses and the Black community. The issue of lack of diversity of advertising models and in advertising agencies is also of concern to those who object to the tax deductibility of advertising expenditures.²⁵⁹ Advertisers often bypass Black-owned media organizations, exerting a harmful effect on Black-owned public relations businesses, advertising firms, and other businesses that depend on advertising dollars like radio,

256. See JHALLY & LEWIS, *supra* note 22, at 136. Jhally and Lewis note the dangers inherent in such racial stereotyping and idealizing:

Television, despite the liberal intentions of many of its writers, has pushed our culture backward. White people are not prepared to deal with the problem of racial inequality because they no longer see that there *is* a problem Commercial television becomes Dr. Feelgood, indulging its white viewers so that their response to racial inequality becomes a guilt-free, self-righteous inactivity. Television performs an ideological conjuring trick that plays neatly into the hands of free market proponents in the Republican party, with their irresistible recipe of "don't worry, be happy."

Id.

This retrograde development has burdened us with a new, repressed form of racism. Although television portrays a world of equal opportunity, most [W]hite people know that in the world at large, [B]lack people achieve less material success, on the whole, than [W]hite people. They know that [B]lack people are disproportionately likely to live in poor neighborhoods and drop out of school. How can this knowledge be reconciled with the smiling faces of the Huxtables? If we are blind to the roots of racial inequality embedded in our society's class structure, then there *is* only one way to reconcile this paradoxical state of affairs. If [W]hite people are disproportionately successful, then they must be disproportionately smarter or more willing to work hard.

Id.

257. See Seiter, *supra* note 133, at 99-100; DATES & BARLOW, *supra* note 8, at 523; PIETERSE, *supra* note 2, at 11; Ofori, *supra* note 200.

258. The "struggle . . . and the efforts of oppressed groups to claim control over their own image, is part of the legacy of the American mass media." Rhodes, *supra* note 33, at 34; *see also* Ofori, *supra* note 200.

259. See, e.g., Debra Gersh Hernandez, *Advertising Tax Looms in Wake of Calls for Balanced Budget*, EDITOR & PUBLISHER, Apr. 1, 1995, at 29. See generally Taylor, *supra* note 24 (recommending a state-imposed tax on alcohol beverage advertising expenditures to discourage the alcohol industry from targeting minority communities with alcohol advertisements).

newspapers and magazines.²⁶⁰ For example, “in the 1990s [B]lack public relations firms averaged less than 2 percent of the annual general market advertising, and public relations and marketing budgets for direct promotions to the black community.”²⁶¹ A related problem is the refusal of some marketers to advertise on radio stations which target Black listeners. Referred to as a Non-Urban Dictate, this practice further diverts economic resources away from the Black community.²⁶²

Thus, the “secondary discourse” of advertising projects images that “help construct for their intended audience ideas about those who are defined as outside that audience.”²⁶³ The images of the “other” that have been selected for inclusion are instructive about our perceived place or role in society which is determined by income, race, ethnicity, gender, sexual orientation, and the other ways in which the media and advertising have chosen to segment their audience.²⁶⁴ These images lacking in representational diversity serve to perpetuate stereotypes and racial hierarchies. Advertising law, as part of the legal regulation of the competitive process, cannot claim neutrality because it plays a central role in the media’s creating and perpetuating stereotypes of people of color and the marginalization and commodification of their imagery.

IV. THE REGULATION OF ADVERTISING

Even strong proponents of advertising in a free market economy generally believe some regulation of advertising is appropriate.²⁶⁵ Deceptive and fraudulent advertisements are seen as directly conflicting with the benefits of

260. See DATES & BARLOW, *supra* note 8, at 497.

261. *Id.* at 520. In addition, Black participation in the advertising industry does not equal Black consumption of products. See *id.*

262. See Ofori, *supra* note 200.

263. O’BARR, *supra* note 3, at 45. The primary discourse of advertising is messages about the product itself while the “secondary discourse” is all other messages contained in an advertisement. See *id.*

264. See *id.*; see also TUROW, *supra* note 69, at 88.

265. See BeVier, *supra* note 48, at 5 (false advertising impedes competition). BeVier goes on to note, however, that this alone does not “suggest that competitors ought to have a private remedy against their rivals’ deceptive advertising.” *Id.* at 8. BeVier states, “False advertising . . . is unequivocally bad. It increases uncertainty and impedes informed decision making. It is highly correlated with consumer dissatisfaction and disappointment.” *Id.* at 14. But note also that there are often strong reactions to advertising critics; one commentator stated that “[t]o criticize advertising is to criticize capitalism and ethical egoism. . . . To criticize advertising—at the most fundamental level—is to assault man’s consciousness.” KIRKPATRICK, *supra* note 9, at 2.

truthful advertisements.²⁶⁶ The primary economic critique of advertising holds that untruthful advertising is disruptive of the free flow of market information, creating "market failure."²⁶⁷ Fraudulent or deceptive information "injects imperfect information into the market that undermines consumers' ability to exercise appropriate purchasing choices."²⁶⁸ It may induce consumers to purchase goods that fail to meet their needs and expectations, which may, in turn, result in a loss of faith in the market.²⁶⁹ Another economically-based criticism of advertising "claims that advertising is a means by which businesses establish monopoly power over the market."²⁷⁰

Advertising is regulated through a network of laws, which allow challenges to advertising to be raised through private litigation, government regulation, or industry self-regulation.²⁷¹ Advertising regulation has largely

266. However, scholars in favor of advertising have argued that administrative intervention is unnecessary since the market itself deters misleading advertising. Posner argued that this deterrence occurs in four ways:

(1) buyers can easily evaluate the truthfulness of many claims; (2) most sellers' profitability would be adversely affected by developing a reputation as being dishonest; (3) competitors may expose misleading advertising claims in their own advertising or in private lawsuits; and (4) consumers may be able to sue either individually or in a class action for breach of contract, fraud, or the tort of innocent misrepresentation.

PETTY, *THE IMPACT OF ADVERTISING LAW*, *supra* note 16, at 45. Phillip Nelson, who applied an economic model to advertising, divides goods into two categories: search goods and experience goods. *See id.* at 35. According to this theory, advertisers have no incentive to make false claims about search goods because consumers would discover the falsity before purchase and decide not to buy the good. *See id.* Since claims for experience goods can only be evaluated after purchase, advertisers have greater incentive to make false claims. *See id.* However, consumers are more skeptical of experience goods claims. *See id.* "Since consumers are doubtful about informational claims, advertisers often resort to image advertising. . . ." *Id.* Advertisers bombard consumers with advertisements and consumers view the large number of advertisements as an indication of the high quality of the goods. *See id.*

267. The critics of advertising fall into several somewhat distinct but overlapping groups: social; philosophical; economic; and environmental/ecological. Some economists, however, view advertising positively. *See* Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 822-26 (1999) (asserting that a more in-depth and sophisticated economic analysis of advertising has led some to conclude that truthful advertisements are "an important tool for enhancing the competitive market").

268. Azcuenaga, *supra* note 48.

269. *See id.* at 4.

270. KIRKPATRICK, *supra* note 9, at 5. In addition, according to this view, advertising creates barriers to entry, product differentiation, brand loyalty, and increased prices. *See* Mensch & Freeman, *supra* note 99, at 341-53.

271. *See* Petty, *The Global Perspective*, *supra* note 24, at 314.

Major networks review about 50,000 advertisements each year and receive about 200 challenges to them, mostly from competitors. The National Advertising Division (NAD) of the Council of Better Business Bureaus

left unaddressed the social-cultural impact of advertising. The regulations were originally designed to protect competitors in the marketplace from unethical market behavior, and have since expanded to protect ultimate consumers. However, this expansion has been forced into a narrow framework of analysis. The focus of regulation continues to be on controlling false messages in commercial media. Yet this structure is ill-equipped to deal with the majority of advertisements, which contain few, if any, direct statements upon which truth or falsity may be measured. Instead they contain a multitude of subtle cultural messages about societal roles and behavior. A combination of common law doctrine, state unfair competition laws, the Federal Trade Commission Act, and the Lanham Act serve to regulate unfair and deceptive practices in the marketplace as well as false and misleading statements of fact.

The common law of false advertising provides little relief for the harms that result from false advertising.²⁷² Traditionally, common law false advertising rules provided competitors relief only when a rival had been "passing off" or "palming off" their products as those of the aggrieved competitor.²⁷³ While originally confined to the act of substituting a lower-quality product for a higher-quality one without the consumer's consent, passing off was later expanded to include situations in which a consumer received a good from a source other than the source expected.²⁷⁴ Early common law cases complaining of false advertising were essentially brought

receives about the same number of complaints each year and opens approximately 100 formal cases each year The Federal Trade Commission (FTC) opens more than 50 advertising investigations each year and takes action in more than half of them. There are probably as many or more advertising complaints filed by rival companies under the federal Lanham Act. . . . Challenges by state attorneys general and private lawsuits filed in state courts further increase the number and expense of legal challenges made to advertising each year.

Id. at ix-x.

272. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 16-18 (describing the historical development of false advertising). Petty notes that "passing-off" protection "began with English laws requiring silversmiths to mark their products ensuring the proper content of silver. The mark of a craftsman soon became a known and valuable indicator of quality." *Id.* at 17.

273. At first the claim was confined to misrepresentation of source. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. b (1985) (reviewing the historical development of liability for deceptive marketing); *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925), *rev'd*, *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 U.S. 132 (1927); PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 16. "Under common law, courts have been reluctant to allow businesses to sue for redress against a rival's advertising misrepresentations even when such misrepresentations took business away from the injured firm. Traditionally, there has been no general competitive tort for false advertising." *Id.*

274. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 16.

as unfair competition cases. In the typical unfair competition case, the defendant was accused of "passing off" his goods as those of the plaintiff, and the plaintiff claiming injury was required to prove that the defendant had diverted business away from the plaintiff for his own gain.²⁷⁵ Relief was precluded, however, unless the plaintiff could establish that sales were diverted from the plaintiff to the defendant.²⁷⁶ Proving this was usually impossible unless the plaintiff was the sole alternative source of the goods.²⁷⁷ Few false advertising situations fell into that pattern.²⁷⁸ For example, in *Mosler Safe Co. v. Ely-Norris Safe Co.*,²⁷⁹ the plaintiff was denied recovery under a common law claim for defendant's allegedly passing off its product as an "explosion chamber" safe.²⁸⁰ The United States Supreme Court, in denying recovery, found that "there are other safes with explosion chambers beside that for which the plaintiff has a patent."²⁸¹ The Court was unconvinced that plaintiff's "lost" customers would have indeed purchased the product from the plaintiff rather than the other makers of explosion chamber safes.²⁸² The common law was unable to provide an effective remedy for false advertising to those unable to identify their commercial harm.

Contemporary common law regulation of advertising, although significantly broader than the common law doctrine of passing off, continues to take a fairly narrow view of the permissible scope of advertising regulation. The Restatement (Third) of Unfair Competition would find liability for "[o]ne who . . . makes a representation relating to the actor's own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of

275. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. b.

276. See *Ely-Norris Safe Co.*, 7 F.2d at 603.

277. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 16.

278. The limitations of the "passing off" construction of deceptive marketing laws and the "single source" requirement probably encouraged the public regulation of advertising. See *id.* "In the early decades of the twentieth century, many state legislatures enacted criminal prohibitions against false advertising (the so-called Printers Ink Statutes), but their impact was blunted by strict construction and sporadic enforcement." *Id.*; see also *Electronics Corp. of America v. Honeywell, Inc.*, 428 F.2d 191 (1st Cir. 1970), *aff'd*, 487 F.2d 513 (1st Cir. 1973); *Ely-Norris Safe Co.*, 7 F.2d at 603; *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900).

279. 273 U.S. 132 (1927). Similarly, in *American Washboard Co.*, the Sixth Circuit cited *Mosler Safe Co.*, and refused to allow recovery for passing off since plaintiff failed to establish that it was the only manufacturer of a genuine aluminum washboard. See *American Washboard Co.*, 103 F. at 281.

280. See *Mosler Safe Co.*, 273 U.S. at 134.

281. *Id.*

282. See *id.*

another.”²⁸³ There is a “likely commercial detriment” when a representation is “material” and there is a reasonable basis for believing that the representation “has caused or is likely to cause a diversion of trade from the other or harm the other’s reputation or good will.”²⁸⁴ The materiality of a representation is determined from the audience’s perspective.²⁸⁵ “If a significant number of prospective purchasers are likely to attach importance to the representation in determining whether to engage in a proposed transaction, the representation is material.”²⁸⁶

In determining whether any particular advertisement or advertising message will be likely to deceive or mislead, the Restatement (Third) directs attention to “the meaning likely to be attributed to the representation by its audience and the relationship between that meaning and the true facts.”²⁸⁷ “[R]epresentation[s] may be likely to deceive or mislead because they are literally false . . . [or] if the audience is likely to infer additional facts that are false.”²⁸⁸ Thus, half-truths and ambiguous statements that may imply false information may be actionable.²⁸⁹ Furthermore, “[t]he meaning of any statement depends on the context in which it is made . . . [determined] in light of all the circumstances surrounding the representation, including the character and sophistication of the audience and the subject matter of the communication.”²⁹⁰ According to the Restatement (Third), “[t]he misrepresentation may be written or oral, or it may be conveyed through visual images or inferred from other conduct of the actor.”²⁹¹

283. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 (1985).

284. *Id.* § 3.

285. *See id.* § 3 cmt. b.

286. *Id.*

It is not necessary that the representation be the sole or predominant factor influencing the conduct of prospective purchasers. Nor is it necessary to demonstrate that the purchasers would have acted differently in the absence of the representation. It is sufficient if the representation is likely to influence prospective purchasers to some substantial degree.

Id. “Puffing,” or exaggerated sales talk, is not ordinarily actionable as deceptive marketing since the statements are not generally relied upon by consumers in making purchasing decisions. *See id.* § 3 cmt. d.

287. *Id.* § 2 cmt. d.

288. *Id.*

289. *See id.*

290. *Id.* When the representation is literally false, a court may conclude that the representation is likely to deceive or mislead; when the conclusion that the representation is likely to deceive or mislead requires inferences that be drawn from the representation, “direct evidence of the meaning attached to the representation by the relevant audience may be necessary to establish a likelihood of deception.” *Id.*

291. *Id.* § 2 cmt. g. *See, e.g.,* Castrol, Inc. v. Quaker State Corp., 977 F.2d 57 (2d Cir. 1992); Coca-Cola v. Tropicana Prods., 690 F.2d 312 (2d Cir. 1982).

The Restatement (Third)'s focus is on providing relief to competitors in the marketplace who can establish a diversion of trade as a result of a material misrepresentation. Much like prior Restatements and the common law treatment of false advertising, the Restatement (Third) seems to trust in the ability of the marketplace itself to excise falsehoods, and displays a reluctance to interfere in the competitive marketplace. In addition, consistent with an economics-based view of the role of advertising in the marketplace, the Restatement (Third) focuses on the information-providing function of advertising.²⁹² It asserts:

[c]ompetitive markets cannot operate efficiently unless consumers have access to information about the goods and services offered by competing sellers. Much of the information available to prospective purchasers is provided by sellers in the form of advertising. If the message that it communicates is accurate, advertising can function as a convenient, low-cost source of information that assists consumers to choose intelligently among competing products. False or deceptive advertising, however, can result in improvident expenditures or force consumers to spend additional resources in an effort to acquire more reliable information. Deceptive advertising also threatens harm to other sellers who are thereby deprived of the opportunity to compete on the merits of their goods and services.²⁹³

Noting the harm to consumers and the market that will result from deceptive advertisements, the Restatement (Third) further warns that "unless the cause of action for deceptive advertising is carefully circumscribed, it may inhibit the dissemination of useful information and function as a barrier to vigorous competition."²⁹⁴ Thus, analyses of advertising's impact are

292. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. d (1985) ("If the message that [advertising] communicates is accurate, advertising can function as a convenient low-cost source of information that assists consumers to choose intelligently among competing products.").

293. *Id.*

294. *Id.* The following Restatement rules are only indirectly concerned with protecting the interests of consumers: Restatement (Third) of Unfair Competition section 2 cmt. a and section 3 cmt. e ("Imposition of liability under this Section serves as an indirect form of consumer protection."). However, the Restatement (Third) takes a fairly broad view of the category of competitors which may seek recovery for false and misleading commercial statements. The Restatement (Third) envisions protecting the interests of direct competitors of the actor who makes deceptive or misleading misrepresentations. Where the plaintiff does not deal in the same kind of goods, she may establish "a likelihood of harm through evidence indicating that a significant number of consumers are nevertheless likely to substitute purchase of the actor's product for that of its own." *Id.* § 3 cmt. f. Note that commercial harm as a result of deceptive marketing may be found "in a threat of harm to the business reputation or good will of another." *Id.* Moreover, nonprofit entities, such as charitable, educational, governmental and religious organizations may

narrowly drawn. The dangers of harmful advertising are limited to the adverse effects on an efficient market economy,²⁹⁵ which will, according to the Restatement, adversely affect an entire industry by “unfairly depriving them of the opportunity to compete on the merits of their products in the marketplace or by threatening harm to their reputation and good will.”²⁹⁶

Commercial messages face legal challenges most often under the Lanham Act. Although primarily a trademark statute, section 43(a) of the Lanham Act provides competitors with a statutory cause of action for false or misleading representations.²⁹⁷ The Lanham Act targets advertisements that are deceptive or have the tendency to deceive a substantial segment of the audience. According to the Lanham Act,

[a]ny person who, on or in connection with any goods or services, . . . uses in commerce any word, term, name, symbol or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which, . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person

bring suit for deceptive marketing if they suffer a threatened or direct detriment, “such as the disruption of economically valuable relations with present or potential donors, members or customers.” *Id.*

295. The Restatement (Third) warns that “[u]nless prospective purchasers can accurately compare the products offered by competing sellers, the free enterprise system cannot operate efficiently.” *Id.* § 2 cmt. a.

296. *Id.*

297. The Trademark Act of 1946, more commonly known as the Lanham Act, is found at 15 U.S.C. § 1051-1072, 1091-1127 (1994). Consumers cannot sue under section 43(a). *See Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971) (stating that “Congress’ purpose in enacting § 43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interests of consumers generally . . .”). Trademark laws allow a company a means of identifying the source, sponsorship, or affiliation of a good as distinguished from other sources. *See* Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 761-62 (1990); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999). In order to advertise effectively, therefore, a good must be identifiable—and the most frequent means of doing so is by trademark. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1693 (1999). Trademarks are those words, symbols, phrases, or designs that the public associates with a single source of goods or services. *See* Carter, *supra* at 761-62; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. c (“[T]rademarks came to function as an important instrument of advertising.”).

who believes that he or she is or is likely to be damaged by such act.²⁹⁸

The statute excepts from liability the "[f]air use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark . . . noncommercial use of a mark [and] . . . [a]ll forms of news reporting and news commentary."²⁹⁹ The injunction is "the principal remedy in Lanham Act cases" and "often cases are effectively over after a preliminary injunction is issued."³⁰⁰

Like the Restatement (Third), the Lanham Act addresses both literal deception as well as statements that, although literally true, may tend to mislead, confuse, or deceive.³⁰¹ Courts measure deceptiveness either by assessing their own view of whether they would be deceived by the advertisement or through the use of consumer survey evidence.³⁰² Courts have increasingly turned to survey and anecdotal evidence of audience perception of the advertisement in order to determine whether a commercial message tends to deceive.³⁰³ The question is, "what does the person to

298. 15 U.S.C. § 1125(a)(1) (1994). As of 1997, the Lanham Act has included a prohibition against diluting the "distinctive quality of the mark" under section 43(a). *Id.* § 1125(c). Dilution will not be discussed in this article. For a history and critical analysis of the Lanham Act, see Burns, *supra* note 267.

299. § 1125(c)(4).

300. PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 20.

To obtain a preliminary injunction, the plaintiff must prove that (1) the plaintiff will likely win the lawsuit because the advertising is false, (2) the defendant's advertising is likely to cause or have caused injury to the plaintiff, and (3) the plaintiff's injury without the injunction is likely to be higher than the defendant's injury with the injunction.

Id. "[L]ikelihood of injury . . . in injunction cases . . . is presumed in . . . explicit comparative advertisements . . . [or may] be proven by establishing direct competition between plaintiff's . . . and defendant's . . . product[s]." *Id.* at 20-21. Where damages are sought, plaintiff must prove lost sales. *See id.* at 21.

301. *See Coca-Cola v. Tropicana Prods.*, 690 F.2d 312, 317-18 (2d Cir. 1982); *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978) ("Section 43(a) of the Lanham Act encompasses more than literal falsehoods cannot be questioned Were it otherwise clever use of innuendo, indirect intimations, and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed."); *see also* SHARI SIDMAN DIAMOND & LINDA DIMITROPOULOS, AMERICAN BAR FOUNDATION WORKING PAPER SERIES, DECEPTION AND PUFFERY IN ADVERTISING: BEHAVIORAL SCIENCE IMPLICATIONS FOR REGULATION 2 (1991) (writing a critique of courts' reliance on behavioral science to identify deceptive advertising).

302. *See* PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 20; *Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 386 (2d Cir. 1986) (holding that a claim that car rental firm had more new cars than its competitor was not deceptive because it was reasonable to imply from the advertisement that it only referred to cars available to rent).

303. *See* DIAMOND & DIMITROPOULOS, *supra* note 301, at 3.

whom the advertisement is addressed find to be the message?"³⁰⁴ Behavioral science data shows that "audiences readily draw inferences from advertisements and are unable to distinguish this inferred information from direct assertions in the advertisement."³⁰⁵

Statutes creating legal remedies for unfair competition vary broadly from state to state but are primarily based on two model statutes, the Uniform Deceptive Trade Practices Act (UDTPA) and the Unfair Trade Practices and Consumer Protection Law (UTPCPL). The UDTPA was proposed by the Commissioners on Uniform State Laws in 1964. It is currently the basis of unfair competition laws in ten states.³⁰⁶ The UTPCPL was developed by the Federal Trade Commission and was first published in 1967. Some version of the UTPCPL has been adopted in thirty-nine states and the District of Columbia.³⁰⁷

The UDTPA created a private right of action for a person damaged by a deceptive trade practice of another with a remedy of injunction and costs.³⁰⁸ However, proof of monetary damage, loss of profits, or intent to deceive are not required in order to obtain relief.³⁰⁹ The Act lists a number of practices which are likely to cause confusion or otherwise injure the economic market.³¹⁰ A plaintiff relying on the UDTPA does not need to prove

304. *American Home Products Corp.*, 577 F.2d at 166.

305. *DIAMOND & DIMITROPOULOS*, *supra* note 301, at 2.

306. The following states have adopted some version of the UDTPA: Colorado; Delaware; Georgia; Hawaii; Illinois; Maine; Minnesota; Nebraska; New Mexico; Ohio; and Oklahoma. Some of these states have also adopted some form of the UTPCPL.

307. The UTPCPL model contains three different forms for defining an unlawful act or practice. The following states have adopted some version of the UTPCPL: Alabama (Form 3), Alaska (Form 1), Arizona (Form 2), Arkansas (Form 2), California (Form 3), Colorado (Form 3), Connecticut (Form 1), Washington D.C. (Form 4), Florida (Form 1), Hawaii (Form 1), Idaho (Form 3), Illinois (Form 1), Indiana (Form 3), Kentucky (Form 2), Louisiana (Form 1), Maine (Form 1), Massachusetts (Form 1), Minnesota (Form 2), Mississippi (Form 3), Missouri (Form 2), Nebraska (Form 1), Nevada (Form 3), New Hampshire (Form 3), New Jersey (Form 2), New York (Form 2), North Carolina (Form 1), North Dakota (Form 2), Oregon (Form 3), Pennsylvania (Form 3), Rhode Island (Form 3), South Carolina (Form 1), South Dakota (Form 3), Tennessee (Form 2), Texas (Form 3), Vermont (Form 1), Virginia (Form 3), Washington (Form 1), West Virginia (Form 3), Wisconsin (Form 1), Wyoming (Form 3).

308. *See* UNIF. DECEPTIVE TRADE PRACTICES ACT § 3 (1966).

309. *See id.* § 3(a). Attorneys' fees are available only if the "party complaining of deceptive trade practice has brought an action which he knew to be groundless or . . . the party charged with a deceptive practice" acted willfully. *Id.* § 3(b).

310. The Act defines a deceptive trade practice as, *inter alia*, passing off goods or services as those of another; causing a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; causing likelihood of confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another; using deceptive representations or designations of geographic origin in connection with goods or services; representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship,

"competition between the parties or actual confusion or misunderstanding."³¹¹

In its model form, the UTPCPL contains three different alternative forms. The first form states that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful.³¹² The second form states that "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce" are unlawful.³¹³ The third form sets forth a laundry list of actions which are to be considered unfair methods of competition or unfair or deceptive acts or practices and therefore unlawful.³¹⁴ The list echoes that found in the UDTPA.³¹⁵

The Federal Trade Commission ("FTC")³¹⁶ is arguably the most expansive consumer protection organization.³¹⁷ It has the "greatest control

approval, status, affiliation, or connection that he does not have; disparaging the goods, services, or business of another by false or misleading representation of fact; or engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding. *See id.* § 2(a)(1)-(5), (8), (12). The Act also defines deceptive trade practice: representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand; representing that goods or services are of a particular standard, quality, grade, or that goods are of a particular style or model, if they are of another; or advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity; and making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions. *See id.* § 2(a)(6), (7), (9)-(11).

311. *Id.* § 2(c).

312. UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW § 2 (Alternative Form No. 1).

313. *Id.* (Alternative Form No.2).

314. *See id.* (Alternative Form No.3).

315. The list of unlawful acts set forth in the UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW is the same that appears in the UNIF. TRADE DECEPTIVE PRACTICES ACT section 2 in addition to "engaging in any act or practice which is unfair or deceptive to the consumer." UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW (Alternative Form No. 3) § 2(1)-(13).

316. The Commission is composed of five Commissioners who are appointed by the President with the advice and consent of the Senate. *See* 15 U.S.C. § 41 (1994).

317. According to Ross Petty:

The Federal Trade Commission was established in 1914 as an independent regulatory agency empowered to create and enforce emerging antitrust policy. From the beginning, it pursued false advertising cases. Initially, it had to prove that false advertising injured competitors and therefore constituted an illegal "unfair method of competition."

PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 19. Beginning with the Wheeler-Lea Amendments enacted in 1938, the FTC began to focus its energies on protecting consumers from unfair or deceptive acts. *See* FUEROGHNE, *supra* note 98, at 5. But the modern "consumer movement" did not really begin until 1962, when President John Kennedy gave a speech to Congress stating that every person, as a consumer had "[t]he right to safety . . . [t]he right to be informed . . . [t]he right to choose . . . [t]he right to be heard" John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest (March 15, 1962), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY 235, 236 (1963); *see also* FUEROGHNE, *supra* note 98, at 6.

over advertising and the way it is used” of any other regulatory body.³¹⁸ It states, “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”³¹⁹ “The Commission is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”³²⁰ Although an independent body, the FTC is led by a commissioner who is a presidential appointee, and the agency has had a tendency to shift its focus according to changes in presidential administration.³²¹ The FTC may declare an act or practice unlawful on the grounds that the act is deceptive or unfair if the representation or omission of material information would be likely to mislead reasonable consumers under the circumstances.³²²

In determining whether an advertisement is unfair or deceptive, the FTC first examines the advertisement to interpret the information both explicitly and implicitly present in the advertisement.³²³ In reviewing an advertisement, the Commission takes in the net impression of the advertisement to determine whether it is deceptive or unfair.³²⁴ The Commission can use its own expertise to determine the meaning of the advertisement.³²⁵ The deception standard is whether a representation or omission is “likely to mislead.”³²⁶ In order to be “likely to mislead” the representation or omission must be material.³²⁷ Material has been defined as

318. FUEROGHNE, *supra* note 98, at 20. In fact, the breadth of FTC power prompted former President Ronald Reagan to assert that the FTC was a “rogue agency gone insane.” See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 49.

319. 15 U.S.C. § 45(a)(1) (1994).

320. *Id.* § 45(a)(2).

321. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 43.

322. See FUEROGHNE, *supra* note 98, at 27.

323. See *id.*

324. In FTC unfair advertising actions, the FTC must “consider the advertisement in its entirety.” *Avis Rent A Car System v. Hertz Corp.*, 782 F.2d 381, 385 (1986); *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

325. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391 (1965).

326. *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, app. at 175 (1984). *Cliffdale* represented a heightening of the deception analysis. See FUEROGHNE, *supra* note 98, at 27. Prior to *Cliffdale*, the FTC looked to whether the advertisement had the “tendency or capacity” to deceive. Commissioner Pertschuk’s dissent in *Cliffdale* noted, “Under the guise of making the law more ‘clear and understandable,’ the majority has actually raised the evidentiary threshold for deception cases.” *Cliffdale*, 103 F.T.C. at 184 (Pertschuk, Comm’r, dissenting). “This change requires the Commission to prove a probability of deception not the mere possibility” but does not “require proof of actual deception.” PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 50.

327. *Cliffdale*, 103 F.T.C. at 175.

"important to the consumer in making his purchasing decision."³²⁸ Thus, the FTC need only establish that the claims at issue are material to consumer choice and that customers are likely to be misled.³²⁹ The advertisement is viewed from the perspective of a consumer acting reasonably under the circumstances, but if an advertisement is targeted "primarily to a particular group, the Commission examines reasonableness from the perspective of that group."³³⁰ The FTC "addresses the likelihood that consumers will believe the message and allow it to affect their purchase behavior."³³¹ Advertisers must have a "reasonable basis" for their advertising claims before making them.³³²

The FTC, when considering advertisements for unfairness violations, "takes into account whether a practice, which is not considered unlawful, offends public policy as established by statute, common law, or otherwise."³³³ The FTC also considers a practice "unfair if it is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury to consumers, competitors, or other business people."³³⁴ "In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence."³³⁵ "Such public policy considerations may not serve as a primary basis for such determination."³³⁶ The FTC rarely challenges advertisements on unfairness grounds.³³⁷ FTC regulation has been used to protect children from advertisements depicting unsafe conduct.³³⁸ The FTC has broad

328. FUEROGHNE, *supra* note 98, at 33. It is unclear what percentage of the audience must be likely to be deceived in order for an advertisement to be considered deceptive by the FTC. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 51-52.

329. See *Cliffdale*, 103 F.T.C. at 175.

330. *Id.* "[T]he reasonable consumer standard appears to make it more difficult to prove deception. The modern standard provides room for argument that despite any evidence of deception of substantial numbers of consumers, those consumers were not behaving reasonably." PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 51. The burden of proving an advertisement's truthfulness is on the advertiser. See FUEROGHNE, *supra* note 98, at 61.

331. PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 51.

332. See *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

333. FUEROGHNE, *supra* note 98, at 9.

334. *Id.*

335. 15 U.S.C. § 45(n) (1994).

336. *Id.* The FTC does not, however, rely on ethics or morality as "an independent basis for a finding of unfairness" Letter from Federal Trade Commission to Senators Wendell H. Ford and John C. Danforth (Dec. 17, 1980), reprinted in H.R. REP. NO. 98-156, pt. 1, at 40 (1983) [hereinafter FTC Policy Letter]. According to the FTC, "[c]onduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well." *Id.*

337. See PETTY, THE IMPACT OF ADVERTISING LAW, *supra* note 16, at 44.

338. See *id.* at 44-45 (citing *In re A.M.F. Inc.*, 95 F.T.C. 310 (1980)). In *A.M.F., Inc.*, the FTC settled a case alleging that children would imitate unsafe bicycle riding shown in advertising.

powers, including the ability to issue cease and desist orders proscribing the offending action, to impose monetary sanctions, and to issue corrective advertising orders,³³⁹ which would require an advertiser to spend a specific percentage of its future advertising budget to correct false claims.³⁴⁰ The FTC also has rulemaking authority, which allows it to prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce."³⁴¹ Despite the FTC's broad powers, its ability to have a wide-ranging impact on advertising is hampered by a narrow focus on competition. The FTC's focus on the impact of advertising on the competitive marketplace to the exclusion of examining cultural impact hinders the FTC's ability to create effective change.

The examination of false, deceptive, or unfair commercial messages by the FTC and courts has not been limited to explicit falsehoods.³⁴² In examining advertising claims, courts have willingly examined implicit as well as explicit claims in order to detect falsity and deceit. In so doing, courts in particular rely on social science data in order to ascertain the nature of the messages of the advertisements and how those messages are perceived by their audience.³⁴³ Although social scientists, for some time, have measured and studied the impact of advertising on culture and ideas,

See A.M.F., Inc., 95 F.T.C. at 310. In *In re Mego Int'l Inc.*, 92 F.T.C. 186, 186 (1978), the FTC accepted a consent order prohibiting depictions of young children using electrical appliances.

339. *See* FUEROGHNE, *supra* note 98, at 10. The most frequently offered example of FTC's requirement of "corrective advertising" is the imposition of such an order against the makers of Listerine mouthwash. Listerine had run an advertising campaign that it was an effective treatment for colds and sore throats. As a result, it was required to disclose in corrective advertising that Listerine could not cure colds or sore throats. *See Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977); PETTY, *THE IMPACT OF ADVERTISING LAW*, *supra* note 16, at 48.

340. *See* FUEROGHNE, *supra* note 98, at 10. The FTC can apply its cease and desist orders industry wide. *See id.* at 11.

341. 15 U.S.C. § 57 (a) (1994).

342. An advertisement that is literally false violates section 43(a) of the Lanham Act. *See Castrol, Inc. v. Penzoil Co.*, 987 F.2d 939, 941 (3d Cir. 1993) (holding that Penzoil's claims that its product "outperforms any leading motor oil" was literally false and therefore violated section 43(a) of the Lanham Act). Advertisements may also be false by implication. *See Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190, 1193-94 (S.D.N.Y. 1987) (holding that manufacturer's advertisements claiming that users of their home pregnancy kit could get results "in as fast as ten minutes" was implicitly false because most users would not get results that quickly). The Lanham Act also prohibits advertisements that are not literally false but that are "likely to deceive." 15 U.S.C. § 1125(a); *Johnson & Johnson v. GAC Int'l*, 862 F.2d 975, 980 (2d Cir. 1992); *Coca-Cola v. Tropicana Prods.*, 862 F.2d 312 (2d Cir. 1982). In deciding whether an advertising claim is likely to deceive, courts frequently rely on consumer survey or other evidence regarding whether the public will be misled by the claim. *See Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992).

343. *See supra* note 342 and accompanying text.

including race, courts do not, by and large, include this data in their analyses.³⁴⁴

One means of ferreting out stereotypical and demeaning images from advertisements could be to regulate the use of stereotypical or demeaning images of people of color in advertisements. Such a regulation could mimic non-discrimination legislation by prohibiting discriminatory commercial messages. Courts then could rely on social science studies that show the impact of subtle advertising messages and the impact of advertising on race and gender issues in the same way that they rely on social science data to determine deception. In addition, advertisers might be encouraged to use actors who are representative of the American community in commercial messages. Furthermore, the FTC could issue a policy statement about the government's commitment to the constructive, positive, and realistic portrayal of people of color and women.³⁴⁵ Such regulations and advisory statements would arguably be no less precise than current standards used to measure deception. Other countries either prohibit or discourage the use of stereotypical or demeaning images in advertisements.³⁴⁶ In fact, the advertising industry frequently adopts foreign advertising to local cultures and mores. The advertising industry will adjust its advertisements to reflect the ethnicity of groups in foreign nations. For example, "[s]ome nations like Korea and Australia require that the principal actors in television commercials be nationals."³⁴⁷

Although each of these suggestions may prove helpful in ridding commercial messages of discriminatory images, each is problematic.³⁴⁸

344. See generally KERN-FOXWORTH, *supra* note 6; WRIGHT, SELLING WORDS, *supra* note 90.

345. Federal statutes explicitly prohibit discrimination in housing advertisements. See Petty, *The Global Perspective*, *supra* note 24, at 346.

346. See *id.* Although speech protections differ substantially in foreign jurisdictions, their methods to minimize or prohibit stereotypes are instructive. See Australia Office of Government Information and Advertising (visited Feb. 22, 2000) <<http://www.ogia.gov.au/>> (showing the Australian policy on the use of non-discriminatory language and images in government advertising and information material) [hereinafter Australian Policy]. The Australian advertising policy seeks the "constructive and positive portrayal" of outsider groups. *Id.* The instructional guide educates advertisers about discrimination and stereotypes, and how to avoid discriminatory language and images. See *id.*; see also Petty, *The Global Perspective*, *supra* note 24, at 346 (noting that Brazil, Malaysia, Norway, Iceland, Portugal, Canada, and New Zealand all recognize, in various ways, the need to excise race and gender stereotypes from the media). The fact that advertisements are also subject to industry regulation and self-regulation has often been offered as a solution to the problems of stereotypes and lack of diversity in the media. This article takes the view that such self-regulation is largely ineffective and argues for government intervention.

347. O'BARR, *supra* note 3, at 200.

348. See Jhally, *Commercial Culture*, *supra* note 15, at 809 ("[T]rue/false distinction[s]" in commercial discourse are "exceedingly difficult, if not impossible, to draw.").

Critics of advertising regulation assert that such regulation may have the effect of chilling speech, that it creates enforcement costs, and that it has anti-competitive effects.³⁴⁹ Setting aside any practical difficulties of instituting these practices (which may be overcome using the practices of other nations as examples) the most common objection to instituting such policies and procedures is the First Amendment. Section V reviews the ways in which advertising is regulated and posits that the current laws and regulations, which are centered on the truth-falsity dichotomy, are not effective in regulating contemporary lifestyle and symbolic advertisements and could be used more effectively against the discriminatory "secondary discourse" of advertising.

While advertisements have long been actionable under the network of laws that regulate advertisements if they prove to be either deceptive or unfair the ability to regulate advertisements was, for a time, more expansive.³⁵⁰ In the early 1960s the FTC defined a practice as unfair if the practice offended public policy, was "immoral, unethical, oppressive or unscrupulous or if it caused substantial injury to consumers, competitors or other businesspersons."³⁵¹ Later, in *Federal Trade Commission v. Sperry & Hutchinson Co.*³⁵² the United States Supreme Court endorsed the ability of the FTC to use its broad powers to protect consumers from unfair practices in the marketplace.³⁵³ The case expressed approval for reviewing cases solely on an unfairness theory.³⁵⁴ Amid public and political pressure to scale

349. See Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 FLA. L. REV. 487, 508-14 (1993). See generally BeVier, *supra* note 48.

350. Actionable deception in commercial messages may be explicit, literal, or implicit. See *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 251 (6th Cir. 1973) ("[T]he commission's finding (that Firestone's 'broad stopping claim' was 'unfair and deceptive to consumers' because it was 'without substantial scientific test data to support it') was supported by evidence in this record"); *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297 (2d Cir. 1992) (stating that a plaintiff may recover under the Lanham Act for false advertising if the advertisement is literally false or is literally true but nonetheless is likely to mislead or confuse consumers). If the deception is explicit, courts may impose liability without proof of consumer reaction, but if the deception is implicit, courts rely on evidence of the audience's response to the ad in order to determine whether the messages had a tendency to deceive. See *id.* Moreover, deception may occur through verbal as well as visual depictions. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (noting that the televised depiction of a test purporting to illustrate proof of a razor's ability to shave sandpaper but instead depicting a razor shaving sand on plexiglass was materially deceptive); *In re Campbell Soup Co.*, 77 F.T.C. 664, 665, 670 (1970) (holding deceptive and unfair an advertisement purporting to depict a bowl of soup—ready to eat—but that contained glass marbles designed to force solid ingredients to the top of the bowl, thus making them more visible).

351. FUEROGHNE, *supra* note 98, at 9.

352. 405 U.S. 233, 239 (1972).

353. See *id.*

354. See *id.* at 239-40.

back its expansive powers, in 1980, the FTC narrowed its definition of unfairness. The 1980 Policy Statement indicated that the FTC would no longer rely on the "unethical or unscrupulous" nature of a practice in determining if that practice was legally unfair.³⁵⁵ Instead, it renders an analysis of market morality and ethics less visible in asserting that "conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well."³⁵⁶ Yet, courts can and arguably should continue to assess market morality and ethics in examining advertising and unfair business practices claims.³⁵⁷

Cases decided under state unfair competition statutes often mimic cases decided under the FTC Act as well as the FTC's approach to unfair or deceptive advertisements. For example, in *Omega Engineering, Inc. v. Eastman Kodak Co.*,³⁵⁸ in assessing Kodak's liability under the Connecticut Unfair Trade Practices Act, the United States District Court in Connecticut noted that, conduct which is immoral, unethical, oppressive, or unscrupulous violates the CUTPA.³⁵⁹ In that case, Kodak persuasively argued that its actions were "fair and commercially reasonable" and the district court concluded that its behavior "was neither immoral, unethical, oppressive nor unscrupulous."³⁶⁰ Thus, although somewhat suppressed, analysis of market morality continues to be used by some courts to evaluate market behavior within a framework of morality. Despite the ability and willingness of courts to examine the morality, ethics, or fairness of market behavior, the predominant focus of advertising doctrine—from common law causes of action to consumer protection statutes to FTC enforcement—is market efficiency.

355. FTC Policy Letter, *supra* note 336, at 33-40. For a practice to be unfair, the resulting injury must: (1) be substantial; (2) not be outweighed by any offsetting consumer benefit; and (3) be one that consumers could not reasonably have avoided. *See id.* at 36-37.

356. *Id.*

357. *See Webb v. Theriot*, 704 So. 2d 1211, 1215 (La. Ct. App. 1998):

La. Rev. Stat. Ann. 51 section 1409(A) confers a private right of action on "[a]ny person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal," from unfair trade practices. A practice is considered unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Id.; *see also* *Informix Software, Inc. v. Oracle Corp.*, 927 F. Supp. 1283 (N.D. Cal. 1996); *Roustabouts, Inc. v. Hamer*, 447 So. 2d 543 (La. Ct. App. 1984).

358. 30 F. Supp. 2d 226 (D. Conn. 1998) (examining whether statements regarding performance of batteries violated the UTPA).

359. *See id.* at 260.

360. *Id.* at 261.

Advertising doctrine and its focus on market efficiencies is viewed, “not simply as a set of prohibitions, but as an authoritative and pervasive discourse that defines, shapes and is imbricated within the everyday life of cultural practice.”³⁶¹ “[T]he law, as discursive cultural practice, is generative of categories, distinctions, and valuations—of knowledges, spaces, identities, and subjectivities.”³⁶² By creating norms and rules, law impacts the scope and direction of a discussion about rights. Advertising law is most clearly enmeshed in American cultural practices and, as a result, plays a powerful ideological role.³⁶³ As a result, Professor Rosemary Coombe urges us to “acknowledge the politics of meaning making and the conflictual nature of struggles to fix and transform meanings in a world where access to the means and the mediums of communication is limited.”³⁶⁴ To do so, one must recognize and reckon with popular culture’s ideological function³⁶⁵ and how advertising doctrine, which focuses on economic efficiency, is often insensitive to the cultural values and needs of outsiders.³⁶⁶ Advertising law

361. Rosemary J. Coombe, *Publicity Rights and Political Aspiration: Mass Culture, Gender Identity and Democracy*, 26 NEW ENG. L. REV. 1221, 1266 (1992).

362. *Id.* at 1267.

363. See O’BARR, *supra* note 3, at 2.

364. Coombe, *Objects of Property*, *supra* note 73, at 1861. In this article Coombe sets out to “indicate how intellectual property laws may function to deprive us of possibilities for dialogic interaction with the cultural reality or life world known as postmodernism.” *Id.*

365. Cultural studies can be helpful in understanding the convergence of culture and law. As a discipline, cultural studies

promote[] a multiculturalist politics and media pedagogy that aims to make people sensitive to how relations of power and domination are *encoded*, or embodied, in cultural texts, such as those of television or film. But it also specifies how people can resist the dominant encoded meanings in media cultural products and to produce their own critical and alternative meanings It can also point to moments of *resistance* and criticism within media culture and thus help promote development of more critical consciousness.

Kellner, *Cultural Studies*, *supra* note 25, at 8. Many recognize the importance of symbols and nontangible property in today’s market economy. Symbols and nontangible property generates millions of dollars of business.

Cultural studies is valuable because it provides some tools that enable one to read and interpret one’s culture critically. It also subverts distinctions between ‘high’ and ‘low’ culture by considering a wide continuum of cultural artifacts . . . and by refusing to erect any specific cultural hierarchies or canons. Cultural studies insists that culture must be studied within the social relations and system through which culture is produced and consumed and that the study of culture is therefore intimately bound up with the study of society, politics and economics.

Id. at 8.

366. The focus of this article is on the African American, Afro-Caribbean, and African communities and their cultures but will attempt to illustrate the application of the theory to other outsider groups.

reinforces a belief in the ability of the market to allocate resources efficiently. This occurs both explicitly through the doctrine's focus on advertising's informative function in the marketplace and implicitly through the law's failure to recognize the wider impact of advertising on culture.

This more expansive view of advertising regulation is consistent with an attempt to regulate stereotypical or demeaning commercial messages. The truth-falsity dichotomy is too narrow to counter the ability of commercial messages to explicitly and subtly affect racial hierarchies.³⁶⁷ The patchwork of common law and statutory measures designed to regulate advertising approach the issue as if advertising's central focus is still providing concrete, verifiable information.³⁶⁸ Advertising regulation has not kept pace with the highly imagistic and symbolic forms of advertising which are prevalent in contemporary society. Moreover, a truth/falsity paradigm leaves untouched the creation and perpetuation of cultural stereotypes despite the historical and contemporary use of advertisements in this manner. Nor is there an attempt to address the absence and marginalization of people of color in commercial media. "The impact of these activities on Americans' views of themselves and others will be profound, enduring, and often disturbing."³⁶⁹

Moreover, current advertising doctrine, with its base of support in economic analysis, is improperly grounded in an analysis that seems to privilege and reinforce cultural biases and hierarchies. This approach allows corporations to create ethical norms and provide the measure of appropriate market behavior.³⁷⁰ The current standard dilutes the idea that commercial conduct, or in this instance speech, impacts wider issues such as social justice and environmental impact.³⁷¹ This effectively marginalizes a discussion of social issues that disproportionately impact people of color and the poor. The current focus in advertising regulation renders irrelevant wider discussions of market behavior and suppresses any race-based critique.

The obvious effect of this is to render it difficult, if not impossible, to critique competitive behavior from the standpoint of its discriminatory or

367. *But see* BeVier, *supra* note 48, at 8 (arguing that the over regulation of advertisements leads to fewer facts in advertisements and produces more image based advertisements).

368. *See* Russell, *Law and Racial Reelism*, *supra* note 189, at 138. Margaret Russell has noted that "[l]egal texts, like popular cultural texts such as films, resonate with interpretative significance far beyond their 'four corners.' Specifically, with regard to issues of race and gender, media-driven stereotypes play a key role in both reflecting and constructing the social reality that law serves to regulate." *Id.*

369. TUROW, *supra* note 70, at 2.

370. Whether corporations can and should be measured by scales of morality and ethics is hotly debated. *See* David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 975-78 (1998).

371. *See, e.g.,* Baker, *supra* note 24, at 2240-41.

degrading effect on people. We cannot effectively discuss the negative impact of business practices that are seemingly "efficient" and not harmful to the market economy. So, those who object to trademarks depicting Native American icons are robbed of the language to create a legally recognized claim. Others who cringe at "Aunt Jemima" and "Uncle Ben" are hindered in their attack. Those concerned about the absence of Asian Americans and Latinos from mainstream advertising imagery are similarly silenced. Current analysis of false, deceptive, and misleading advertising as well as unfair and deceptive trade practices too narrowly focuses on the competitive effect of the statements and practices while ignoring the social, cultural, and racial ramifications of advertisements which omit people of color or perpetuate cultural and racial stereotypes.³⁷² Any attempt to regulate discriminatory commercial messages, however, would have to pass constitutional muster.

V. COMMERCIAL SPEECH AND FREE SPEECH

The United States Supreme Court and constitutional law scholars have shown ambivalence in their responses to First Amendment protections of commercial speech. Initially, the Supreme Court denied First Amendment protections to advertisements. In *Valentine v. Chrestensen*,³⁷³ the Supreme Court upheld a New York statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon any street."³⁷⁴ The Court found that the First Amendment did not restrain the government's regulation of commercial advertising. Then, in *Bigelow v. Virginia*,³⁷⁵ the Supreme Court held that commercial speech was entitled to First Amendment protection because commercial speech has some value in

372. See JHALLY & LEWIS, *supra* note 22, at 139.

The American dream is much more than a gentle fantasy; it is a cultural doctrine that encompasses vast tracts of American life The American dream is insidious, not innocent. It is part of a belief system that allows people in the United States to disregard the inequities that generate the nation's appalling record (by comparison with almost any other industrially developed nation) on poverty, crime, health, homelessness, and education. . . . The ideological dominance of the American dream is sustained by its massive presence in popular culture. . . . The success we are encouraged to strive for is always linked to the acquisition of goods. This whole materialistic charade is fueled by the most influential cultural industry in the United States: advertising.

Id.

373. 316 U.S. 52 (1942).

374. *Id.* at 53 n.1.

375. 421 U.S. 809 (1975).

the marketplace of ideas.³⁷⁶ But it was not until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*³⁷⁷ that the Supreme Court provided a rationale for its extension of the Free Speech Clause to commercial speech.³⁷⁸

In *Virginia State Board of Pharmacy*, plaintiffs challenged a Virginia statute that prohibited the advertising of prescription drug prices by Virginia licensed pharmacists.³⁷⁹ The Court found that advertisements were entitled to First Amendment protection and that a state may not completely suppress the dissemination of concededly truthful information about entirely lawful activity out of fear of that information's effect upon its disseminators and its recipients.³⁸⁰ The Court stated that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising"³⁸¹ According to the Court, "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement in one form or another."³⁸²

Critical to the decision was the distinction created by the Court between commercial and political speech. In framing the issue, the Court stated, "Our question is whether speech which does 'no more than propose a commercial transaction,' is so removed from any 'exposition of ideas,' and from 'truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all

376. *See id.* at 828-29.

377. 425 U.S. 748 (1976).

378. *See id.* at 767.

379. *See id.* at 749-50. The Virginia statute provided that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he "publishes advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." VA. CODE ANN. § 54-524.35 (Michie 1974). The United States District Court for the Eastern District of Virginia found this provision of the statute to be violative of the First Amendment. *See Virginia State Board of Pharmacy*, 425 U.S. at 770.

380. *See Virginia State Board of Pharmacy*, 425 U.S. at 770. The Court also found that advertisements could be subject to reasonable time, place and manner restrictions and false, deceptive, or misleading statements also could be regulated. *See id.* at 771.

381. *Id.* at 757. The Court went on to note:

[h]ere . . . the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question then, is whether this communication is wholly outside the protection of the First Amendment.

Id. at 760-61.

382. *Id.* at 761.

protection.”³⁸³ In the Court’s view, “[a]s to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”³⁸⁴ The Court found that commercial advertising dispenses “information as to who is producing and selling what product, for what reason, and at what price” which, according to the Court, is critical to making intelligent and well-informed decisions in a free enterprise economy.³⁸⁵

In reaching its holding, the Court noted the “commonsense differences” between commercial speech and other forms of speech, which “suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.”³⁸⁶ According to the Court, the truth of commercial speech, for example, may be more easily verifiable by its disseminator than news reporting or political commentary.³⁸⁷ Moreover, commercial speech may be more durable than other kinds of speech, and there is little likelihood of it being chilled by regulation or of being forgone entirely.³⁸⁸ Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.³⁸⁹ Thus, the Court allows the regulation of untruthful commercial speech. “There are [however] difficulties with an effort to draw a bright line between ‘commercial speech’ on the one hand and ‘protected speech’ on the other”³⁹⁰ And in *Virginia State Board of Pharmacy*, Rehnquist, the leading opponent of Free Speech protection of commercial speech objected to the manner in which the Court drew the boundaries of regulating commercial speech.³⁹¹ Rehnquist, dissenting in *Virginia State Board of Pharmacy*, would

383. *Id.* at 762 (citations omitted).

384. *Id.* at 763.

385. *Id.* at 765.

386. *Id.* at 771, 772 n.24.

387. *See id.* at 772 n.24.

388. *See id.*

389. *See id.*

390. *Id.* at 787 (Rehnquist, J., dissenting).

391. *See id.* Rehnquist stated:

The difficulty with this line [between commercial and non-commercial speech] is not that it wavers, but . . . it is simply too Procrustean to take into account the categories of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.

Id. A frequent critic of the extension of First Amendment protection to commercial speech, Rehnquist stated that the First Amendment is demeaned by its association with advertising. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting). *See generally*

not have extended Free Speech protection to the commercial speech in that case.

Later, the Supreme Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,³⁹² set out the standard for evaluating the constitutionality of commercial speech regulation. In *Central Hudson*, the Public Service Commission of New York "ordered electric utilities in New York state to cease all advertising that 'promote[d] the use of electricity.'"³⁹³ The ban was instituted as a means of conserving energy during the energy crisis and continued after the fuel shortage had ceased.³⁹⁴ The Commission prohibited promotional advertising designed to increase consumption and "permitted informational advertising designed to encourage shifts of consumption from peak demand times to periods of low electricity demand."³⁹⁵ In *Central Hudson*, the Court again supported First Amendment protection of commercial speech since, according to the Court, "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."³⁹⁶ Despite its view that commercial speech deserves some First Amendment protection, the Court remarked that such speech "is of less constitutional moment than other forms of speech."³⁹⁷ Further the Court feared that "the failure to distinguish between commercial and noncommercial speech could invite dilution . . . of the force of the [First] Amendment's respect to the latter kind of speech."³⁹⁸ The *Central Hudson* court developed a four-part test for determining whether an expression is protected by the First Amendment:

For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.³⁹⁹

Burt Neuborne, *Free Expression and the Rehnquist Court*, in LITIGATION 1998, at 681 (PLI Litig. & Admin. Practice Course Handbook Series No. 596, 1998).

392. 447 U.S. 557 (1980).

393. *Id.* at 558.

394. *See id.* at 559.

395. *Id.* at 560.

396. *Id.* at 561-62.

397. *Id.* at 563 n.5.

398. *Id.* (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 450 (1978)).

399. *Id.* at 566. The Court found that the advertising in this case was protected by the First Amendment. *See id.* It found that the state's interest in energy conservation was related to the ban.

In *Central Hudson*, the Court reiterated that its objective in extending First Amendment protection to commercial speech "is based on the informational function of advertising"⁴⁰⁰ and further noted that advertising's unique nature permits content regulation of advertising in some instances.⁴⁰¹

The most restrictive application of the *Central Hudson* test came in *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*.⁴⁰² *Posadas* involved a "Puerto Rico statute and regulations restricting advertising of casino gambling aimed at the residents of Puerto Rico."⁴⁰³ The regulation at issue in *Posadas* concerned a lawful activity that was not misleading or fraudulent.⁴⁰⁴ The asserted governmental interest was the reduction of demand for casino gambling by the residents of Puerto Rico.⁴⁰⁵ The Supreme Court took a deferential stance toward the Puerto Rico legislature, finding that protecting the health, safety, and welfare of its citizens by prohibiting the advertising of gambling to Puerto Rico citizens was a substantial governmental interest, and that the restriction directly advanced the government's asserted interest and was no more extensive than necessary to serve the government's interest.⁴⁰⁶

Justice Brennan, joined by Justices Marshall and Blackmun, dissented. Brennan, unmoved by the government's argument, asserted that the Court had consistently invalidated restrictions designed to deprive consumers of accurate information about products and services legally offered for sale.⁴⁰⁷ He further noted that the governmental regulations were a covert attempt to

See id. It found that the relationship between rates and advertising was tenuous but that the state's interest in energy conservation was directly advanced by the ban on advertising. *See id.* at 568-69. But the Court found that the complete suppression of speech was more extensive than necessary to further the state's interest in energy conservation. *See id.* at 569-70. "The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression." *Id.* at 570.

400. *Id.* at 563.

401. *See id.* at 564 n.6.

402. 478 U.S. 328 (1986); *see also* Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 560 (1997) (stating that "[c]ommercial speech protection reached its post-Virginia Board low point in *Posadas* . . ."). Burt Neuborne remarked that, "Justice Rehnquist's most influential free speech opinion for the Court was *Posadas* . . . where he almost derailed the emerging commercial speech doctrine by persuading a narrowly divided Court that the 'greater' power to ban an activity . . . carries with it the 'lesser' power to ban truthful commercial speech" Neuborne, *supra* note 391, at 681; *see also* Burt Neuborne, *The First Amendment & Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 35 (1989) (examining the probable implication of commercial speech doctrine for capital formation and labor relations).

403. *Posadas*, 478 U.S. at 330.

404. *See id.* at 340-41.

405. *See id.* at 341.

406. *See id.* at 341-42.

407. *See id.* at 350 (Brennan, J., dissenting).

"manipulate the choices of its citizens . . . by depriving the public of the information needed to make a free choice."⁴⁰⁸ The regulations, according to Brennan, should have been subject to strict scrutiny instead of the relaxed commercial speech standard relied upon by the majority.⁴⁰⁹ He also stated that Puerto Rico had failed to show a substantial governmental interest or that "'serious harmful effects' [would] result if Puerto Rico residents gamble in casinos"⁴¹⁰ Brennan noted that "[i]t is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us [T]he First Amendment presumes that some accurate information is better than no information at all."⁴¹¹

Since *Posadas*, the Court has backed away from the majority's position in that case. Many have interpreted recent Supreme Court rulings as a movement towards greater First Amendment protection for commercial speech, and some Justices favor abandoning the *Central Hudson* test.⁴¹² In *Rubin v. Coors Brewing Co.*,⁴¹³ Coors "applied to the Bureau of Alcohol, Tobacco and Firearms ("BATF") for . . . approval of proposed labels and advertisements that disclosed the alcohol content of its beer."⁴¹⁴ "BATF rejected the application on the ground that the Federal Alcohol Administration Act . . . prohibited disclosure of alcohol content of beer on labels or in advertising."⁴¹⁵ "The Government took the position that the ban was necessary to suppress the threat of 'strength wars' among brewers, who . . . would seek to compete in the marketplace based on the potency of their beer."⁴¹⁶ The Supreme Court found that the ban infringed upon Coors' freedom of speech.⁴¹⁷

In a footnote, Justice Thomas, writing for the majority, noted the government's reliance on *United States v. Edge Broadcasting*⁴¹⁸ and *Posadas*

408. *Id.* at 351 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 574-75 (1980) (Blackmun, J., concurring)).

409. *See id.* at 351-52.

410. *Id.* at 355.

411. *Id.* at 358 (quoting *Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); *Central Hudson*, 447 U.S. at 562).

412. *See, e.g.,* Redish, *supra* note 402, at 554.

413. 514 U.S. 476 (1995).

414. *Id.* at 478.

415. *Id.*

416. *Id.* at 479.

417. *See id.* at 478.

418. 509 U.S. 418 (1993). The Court held that a federal statute prohibiting a broadcaster licensed in North Carolina from broadcasting advertisements for the Virginia lottery where North Carolina did not allow the airing of lottery advertisements, did not violate the First or Fourteenth Amendments. *See id.*

*de Puerto Rico Associates v. Tourism Co. of Puerto Rico*⁴¹⁹ in support of its argument “that legislatures have broader latitude to regulate speech that promotes socially harmful activities . . . than they have to regulate other types of speech.”⁴²⁰ Thomas rejected this argument, distinguishing those cases by stating that, “[n]either *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard.”⁴²¹ In both cases, according to Thomas, the Court found that the regulations in question survived the *Central Hudson* test.⁴²² In the underlying case, the ban restricted “only truthful, verifiable and nonmisleading factual information about alcohol content on beer labels.”⁴²³ Thus, the Court’s analysis in *Rubin* focused on the substantiality of the government’s interest in the ban and whether the ban was more extensive than necessary to serve that interest.

According to the Court, the government had a significant interest in protecting the health, safety, and welfare of citizens by preventing “strength wars” but the government’s interest in preserving state authority was not sufficiently substantial to meet the requirement of *Central Hudson*.⁴²⁴ The ban “cannot directly and materially advance its asserted interest because of the overall irrationality of the Government’s regulatory scheme.”⁴²⁵ The Court noted that the government regulations prohibited alcohol content disclosure on labels unless disclosure was required by state law.⁴²⁶ By prohibiting advance disclosure in states that affirmatively prohibit such advertisements (only eighteen states prohibited disclosure of alcohol content in advertisements) the Court noted that “brewers remain free to disclose alcohol content in advertisements but not on labels, in much of the country. The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense”⁴²⁷ In addition, the government regulations allow disclosure of alcohol content of wines and spirits and permitted brewers to signal high alcohol content through use of the term

419. 478 U.S. 328 (1986).

420. *Rubin*, 514 U.S. at 482 n.2. Thomas goes on to state that, “[i]ndeed *Edge Broadcasting* specifically avoided reaching the argument the Government makes here because the [C]ourt found that the regulation in question passed muster under *Central Hudson*.” *Id.* (citations omitted).

421. *Id.* at 483 n.2. In *Edge Broadcasting*, the Court held that federal statutes prohibiting “the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that supports lottery,” “. . . does not violate the First Amendment.” *Edge Broadcasting*, 509 U.S. at 421, 436.

422. *See Rubin*, 514 U.S. at 482.

423. *Id.* at 483.

424. *See id.* at 486.

425. *Id.* at 488.

426. *See id.* at 485.

427. *Id.* at 488.

“malt liquor.”⁴²⁸ According to the Court, these inconsistencies and irrationality of scheme meant there was little chance the ban “can directly and materially advance its aim.”⁴²⁹

The Court continued to display some ambivalence towards government regulation of commercial speech in *44 Liquormart, Inc. v. Rhode Island*.⁴³⁰ In that case, the Rhode Island legislature prohibited advertising the retail price of alcoholic beverages except “for price tags or signs displayed with the merchandise within the licensed premises and not visible from the street.”⁴³¹ It also prohibited Rhode Island news media from publishing or broadcasting “any advertisements—even those referring to sales in other States—that ‘make reference to the price of any alcoholic beverages.’”⁴³² In a plurality decision, three Justices⁴³³ noted that “[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them” and asserted that “when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”⁴³⁴ The Justices went on to state that

[r]egulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the “greater objectivity” nor the “greater hardness” of truthful, non-misleading commercial speech justifies reviewing its complete suppression with added deference.⁴³⁵

Taking a dim view of commercial speech bans, these Justices remarked that “commercial speech bans not only hinder consumer choice, but also impede[d] debate over central issues of public policy.”⁴³⁶ Four justices⁴³⁷ agreed that the State failed to establish “any connection between the ban and

428. *See id.*

429. *Id.*

430. 517 U.S. 484 (1996). Justice Stevens announced the opinion of the Court. Justices Scalia and Thomas concurred in part and concurred in the judgment. Justice O'Connor filed an opinion concurring in the judgment in which Chief Justice Rehnquist and Justices Souter and Breyer joined.

431. *Id.* at 489.

432. *Id.* at 490 (citations omitted).

433. Justices Stevens, Kennedy, and Ginsburg made up the plurality.

434. *44 Liquormart*, 517 U.S. at 501.

435. *Id.* at 502.

436. *Id.* at 503.

437. Stevens, Kennedy, Souter, and Ginsburg were the four justices.

a significant change in alcohol consumption.”⁴³⁸ Nor did the state “satisfy the requirement that its restriction on speech be no more extensive than necessary” according to these Justices.⁴³⁹

In a decided move away from the Court’s decision to uphold the advertising ban in *Posadas*, Justices Stevens, Kennedy, Thomas, and Ginsburg stated that “on reflection we are now persuaded that *Posadas* erroneously performed the First Amendment analysis.”⁴⁴⁰ They further stated that “*Posadas* clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less speech-restrictive policy.”⁴⁴¹ The Justices “conclude[d] that a state legislature does not have the broad discretion to suppress truthful, non-misleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.”⁴⁴²

A majority of the Court agreed with the conclusion that “Rhode Island . . . failed to carry its heavy burden of justifying its complete ban on price advertising,” and concluded that the statutes in question “abridge[d] speech in violation of the First Amendment.”⁴⁴³ Justice Scalia concurred in part in the judgment and continued to find *Central Hudson* applicable in commercial speech cases, but noted that “it would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them.”⁴⁴⁴ In a separate concurrence, Justice Thomas rejected the application of the *Central Hudson* test where doing so would keep truthful information away from consumers.⁴⁴⁵ But O’Connor, Rehnquist, Souter, and Breyer announced that they would continue to apply the *Central Hudson* test to determine whether commercial speech regulation survives First Amendment scrutiny.⁴⁴⁶

The Court’s uncertainty about the reach of the First Amendment in the commercial speech arena continued a year later in *Glickman v. Wileman Brothers & Elliott, Inc.*⁴⁴⁷ In *Glickman*, the Court considered the

438. 44 *Liquormart*, 517 U.S. at 507.

439. *Id.*

440. *Id.* at 509.

441. *Id.* The Justices further stated that “[b]ecause the 5 to 4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this court is the final arbiter, we decline to give force to its highly deferential approach.” *Id.* at 510.

442. *Id.*

443. *Id.* at 516.

444. *Id.* at 517 (Scalia, J., concurring).

445. *See id.* at 523 (Thomas, J., concurring).

446. *See id.* at 528 (O’Connor, J., concurring).

447. 521 U.S. 457 (1997).

Agricultural Marketing Agreement Act of 1937 (AMAA), which was enacted to establish and maintain orderly marketing conditions and fair prices for agricultural commodities.⁴⁴⁸ “Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws.”⁴⁴⁹ The expenses of administering orders “are paid from funds collected pursuant to the marketing orders.”⁴⁵⁰ “Marketing orders must be approved either by two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity.”⁴⁵¹ “Among the collective activities that Congress authorized for certain specific commodities is ‘any form of marketing promotion including paid advertising.’”⁴⁵² “The central message of the generic advertising at issue in this case is that ‘California Summer Fruits’ are wholesome, delicious, and attractive to discerning shoppers.”⁴⁵³ In rejecting the respondents’ argument that they were compelled to pay for messages with which they disagreed, the Court found that the collective action in this case did not create a restraint on freedom to communicate any message to an audience, compel any person to engage in any actual or symbolic speech, nor did the practice compel the producers to endorse or finance any political or ideological views.⁴⁵⁴ In fact, the Court stated that “since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program.”⁴⁵⁵ The Court further stated:

The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm’s advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler’s individual advertising budget does not itself amount to a restriction on speech.⁴⁵⁶

448. *See id.* at 461.

449. *Id.*

450. *Id.*

451. *Id.* at 461-62.

452. *Id.* at 462 (citations omitted).

453. *Id.*

454. *See id.* at 467.

455. *Id.* at 470.

456. *Id.*

The Justices found the compelled speech cases inapplicable.⁴⁵⁷ “The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths.”⁴⁵⁸ In addition, “[r]espondents are not required themselves to speak, but are merely required to make contributions for advertising.”⁴⁵⁹ Furthermore, “none of the generic advertising conveys any message with which respondents disagree.”⁴⁶⁰ Finally, “the advertising is attributed not to them, but to the California Tree Fruit Agreement or ‘California Summer Fruits.’”⁴⁶¹

In the Supreme Court’s most recent decision concerning commercial speech, *Greater New Orleans Broadcasting Ass’n v. United States*,⁴⁶² the Court held that federal law that prohibited advertisements of private casino gambling broadcasts by radio or television where such gambling is legal is unconstitutional.⁴⁶³ In a decision by Justice Stevens, the Court reiterated its reliance on the four part test of *Central Hudson* in weighing governmental regulations of commercial speech.⁴⁶⁴ The Court agreed, in *Posadas*, that the government’s asserted interest in reducing the social costs associated with gambling and assisting states that restrict or prohibit gambling within their own borders was substantial.⁴⁶⁵ However, it concluded that these interests did not directly and materially advance the asserted governmental interest and was not more extensive than necessary to serve the interests that support it.⁴⁶⁶ The Court was most disturbed by what it viewed as disparate regulation of tribal casinos and non-tribal casinos, stating that “[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.”⁴⁶⁷ Justice

457. *See id.*

458. *Id.* at 470-71; *see also* Nicole B. Casarez, *Don't Tell Me What To Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 930 (1998) (stating that the Court’s decision in *Glickman* “shows that the Court’s economic approach to advertising still exists . . .”).

459. *Glickman*, 521 U.S. at 471.

460. *Id.*

461. *Id.* at 471.

462. 119 S. Ct. 1923 (1999).

463. *See id.* at 1935-36.

464. *See id.* at 1930 (“In this case, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.”).

465. *See id.* at 1931.

466. *See id.* at 1932.

467. *Id.* at 1933-36 (leaving a door open for further speculation about the impact of the opinion in stating, “[h]ad the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, this might be a different case”) (citations omitted).

Thomas, in a concurring opinion, reiterated his view that greater First Amendment protections for commercial speech are in order. Thomas stated:

I continue to adhere to my view that “[i]n cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,” the *Central Hudson* test should not be applied because “such an ‘interest’ is per se illegitimate and can no more justify regulation of ‘commercial speech’ than it can justify regulation of ‘noncommercial’ speech.”⁴⁶⁸

Under the *Central Hudson* test, it is uncertain whether attempts to regulate stereotypes and demeaning images would pass constitutional muster. First, the asserted government interest in regulating demeaning advertising images would be based on the government’s interest in prohibiting discrimination. The history of race and advertising as a means of objectifying and commodifying Black bodies and images would support a claim that the commercial imagery can play a role in maintaining discriminatory structures. However, the increasingly subtle nature of advertisements and the decreasing reliance on overtly stereotypical and demeaning images would increase the relative difficulty of establishing the link between discriminatory images and discriminatory effect and of reaching a broad consensus on the meaning and impact of the messages they convey.⁴⁶⁹ Thus, while an asserted governmental interest could be viewed as substantial, it is likely that any such regulation would fail the third and fourth prongs of the test. Yet, unlike the regulations in *Greater New Orleans*, such regulations would not necessarily include an effort to keep “legal users of a product or service ignorant in order to manipulate their choices in the marketplace”⁴⁷⁰ Instead, regulations aimed at excising stereotypical or demeaning images from commercial messages could open public debate and expose citizens to a greater spectrum of ideas and information. Despite these apparent benefits of such regulation, many would argue that any attempt to diversify advertising images or to make them more representative would have the effect of chilling speech and have anti-competitive effects.⁴⁷¹ It is

468. *Id.* at 1936 (Thomas, J., concurring) (quoting 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 515 (1996)).

469. The Fair Housing Act explicitly prohibits discrimination based on race or color in advertising housing. See Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(c) (1994).

470. 44 *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

471. See Goldman, *supra* note 349, at 513-14. In addition, such regulation might raise concerns similar to those raised after *Posadas* concerning where to draw the “First Amendment protection line” between product-centered messages and other more political messages contained in commercial speech and fears about what is perceived to be “protective legislation.” *Id.* For

more likely that an attempt to rid the market of stereotypical and demeaning images would be seen as content regulation which would be prohibited, even under the less restrictive First Amendment standard of *Central Hudson*.

The extent to which commercial speech should enjoy First Amendment protection is debated. Some scholars who argue for more protection for commercial speech would clearly reject such a proposal. Noting that "nothing in the text of the First Amendment creates a distinction between commercial and noncommercial speech," these scholars argue in favor of full Free Speech protection on several different grounds.⁴⁷² A primary rationale for full First Amendment protection for commercial speech is "that the commercial/noncommercial distinction makes no sense"⁴⁷³ and that all speech should be equally entitled to First Amendment protection.⁴⁷⁴ There is, according to this group, value in preserving speech without regard to its commercial nature.⁴⁷⁵ Moreover, it is believed that "in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic or religious nature."⁴⁷⁶

On the other hand, other scholars have convincingly argued that reducing or removing First Amendment protection from commercial speech would promote "freedom and well being."⁴⁷⁷ For instance, some assert that the mass media is a "total cultural system" whose primary message is consumption.⁴⁷⁸ Advertising primarily sells consumption and attempts to link overall well-being with the consumption of goods. Yet, social science literature about consumption and well-being finds no relationship between happiness/well-being and consumption of material goods.⁴⁷⁹ Instead, "as constitutional protection for commercial speech increases, so may the

example, a New York district court struck down a regulation prohibiting the use of the name "Crazy Horse" on labels of any alcoholic beverages. See *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227 (E.D.N.Y. 1993); Taylor, *supra* note 24, at 601. "Despite the court's recognition of the government's substantial interest in 'prevention of enhanced appeal of alcohol use among Native Americans,' . . . [T]he Crazy Horse ban was invalid under the fourth prong of *Central Hudson*." *Id.* at 601-02 (citations omitted).

472. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990).

473. *Id.* at 628.

474. *See id.*

475. *See id.*

476. *Id.* at 652.

477. R. George Wright, *Freedom & Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137, 137 (1994) [hereinafter Wright, *Freedom and Culture*].

478. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 710 (1993).

479. *See id.*; WRIGHT, SELLING WORDS, *supra* note 89, at 27.

potential for commercial speech to manipulate and distract the poor, without violating whatever restrictions may exist on fraudulent, deceptive, or misleading commercial speech."⁴⁸⁰ Under this view, advertisements "mutually reinforce one another" and "promote consumptionism as a style of life."⁴⁸¹ Nor is there any "realistic prospect for effective 'counterspeech' tending to promote noncommercial approaches to life's problems and opportunities."⁴⁸² In George Wright's view, "in a cultural context in which consumption is a dominant and only ineffectively challenged theme, largely unregulated speech on behalf of consumer goods and services may change our basic tastes, capacities, and judgments in ways we do not anticipate or even recognize."⁴⁸³ Wright asserts that "we should be more troubled by the dominance of the commercial culture than by any particular allegedly harmful instance of commercial speech."⁴⁸⁴

Collins and Skover, vocal cultural critics of Free Speech protection for commercial speech, argue that commercial culture changes the logic of discourse "as commercial communication moves further and further away from the informational format."⁴⁸⁵ It "debases the normative values once associated with images and ideas and continually reshapes the identity of the consumer by its relationship to goods and services."⁴⁸⁶ Advertisers "directly influence the content of communication and indirectly reshape the media in their own images."⁴⁸⁷ According to Collins and Skover, advertising encourages a discourse of waste, and "the ideals of citizen-democracy succumb to those of consumer democracy."⁴⁸⁸ Following in this vein of viewing advertisements primarily as consumerist messages, Wright asserts, "[P]rotecting ads that do not implicate truth or falsity is . . . misguided Such ads are neither fraudulent, deceptive, misleading, nor the opposite"⁴⁸⁹

Others argue against First Amendment protection on the ground that protecting commercial speech will erode any public conviction of the core

480. Wright, *Freedom and Culture*, *supra* note 477, at 146.

481. WRIGHT, *SELLING WORDS*, *supra* note 89, at 36-37.

482. Wright, *Freedom and Culture*, *supra* note 477, at 149. Advertisers "constitute the most consistent and the most pernicious 'censors' of media content." Baker, *supra* note 24, at 2099. According to Baker, organized private power is the most serious "threat to a free and democratic press" today. *Id.*

483. Wright, *Freedom and Culture*, *supra* note 477, at 152-53.

484. WRIGHT, *SELLING WORDS*, *supra* note 89, at 5.

485. Collins & Skover, *supra* note 478, at 710.

486. *Id.*

487. *Id.*

488. *Id.*

489. Wright, *Freedom and Culture*, *supra* note 477, at 152.

value of freedom of speech.⁴⁹⁰ “Alternatively, it has been argued that commercial speech generates fewer ‘external’ benefits uncaptured by the speaker than does political speech.”⁴⁹¹ “[I]t has [also] been argued that commercial speech is either unrelated, or at best differently linked, to the values thought to underlie the Free Speech Clause.”⁴⁹²

Mary Becker has offered a feminist critique of Free Speech protection for commercial speech, which provides the best support for greater regulation of demeaning and stereotypical commercial images.⁴⁹³ Becker asserts that the press “impedes the democratic functioning of our political system” and “a ‘free’ market in speech means that the market, governed by the ability to pay, determines who can speak.”⁴⁹⁴ “Although white men are a minority in this country, television presents a world in which white men are the majority of the population as well as socially dominant.”⁴⁹⁵ Becker asserts that the “media free market is not a market without censors.”⁴⁹⁶ “Women’s speech is censored directly by media executives and by advertisers who control the substantive content of articles and programs in magazines and on television.”⁴⁹⁷ Thus, “the Free Speech Clause does more for men than for women, protecting speech that supports patriarchy.”⁴⁹⁸ Becker further notes that “the Free Speech Clause impedes needed reform.”⁴⁹⁹ “It makes many direct forms of regulation of sexist speech unconstitutional.”⁵⁰⁰ “It also gives constitutional legitimacy to opponents’ arguments even when the Constitution might not bar such reform.”⁵⁰¹ Becker encourages greater regulation of commercial speech to limit stereotyping and derogatory images of women.⁵⁰² She offers “[t]he African National Congress (ANC) draft Bill of Rights” as an example of incorporating “both a free speech provision and a provision that ‘[e]ducational institutions, the media, advertising and other social

490. See generally Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988).

491. Wright, *Freedom and Culture*, *supra* note 478, at 155 (citations omitted).

492. *Id.* (citations omitted).

493. See Mary Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 453-54 (1992).

494. *Id.* at 486.

495. *Id.* at 486-87.

496. *Id.* at 489.

497. *Id.*

498. *Id.* at 492.

499. *Id.*

500. *Id.*

501. *Id.*

502. See *id.* at 493 (citing African National Congress, *A Bill of Rights for a Democratic South Africa*, Art. 4 § 1 (working draft for consultation)). The Bill of Rights has since been enacted.

institutions shall be under a duty to discourage sexual and other types of stereotyping.'"⁵⁰³

This view would allow regulation of media to maximize diverse and representational images of people of color. Removing First Amendment protection from commercial messages would—at least to the extent necessary to regulate demeaning and stereotypical images—advance democratic ideals. Doing so, moreover, would be no less exact than current analyses of market deception and falsity. On the other hand, extending First Amendment protection to commercial speech removes the speech from scrutiny as a source of power and domination over the lives of people of color. It makes it difficult if not impossible to examine fairly the cultural and economic impact of repeated stereotypical and derogatory messages. This helps to create the phenomena of markets, which are segregated by ethnicity and outsider images for sale that are offered by the consumer majority. Protecting commercial speech under the First Amendment negates discussion of how race and racism become imbedded in everyday life so that racism becomes invisible to the dominant racial group. Protecting commercial speech under the First Amendment marginalizes a discussion of how corporate speech may work to silence outsiders who lack the resources and access to media to reach large numbers of the population. Protecting commercial speech under the First Amendment reinforces an ethic of individualism that works directly against efforts to recognize group harms. The cumulative impact of this misplaced protection is to slow down, if not prevent, critical analyses of current power structures, which tends to reinforce racial hierarchies that presently exist.

VI. CONCLUSION

Commercial discourse, open only to those speakers who are in a position to pay, has steadily and dramatically increased in importance and prevalence in the public sphere. Today it is a dominant source of information not only about products but also about societal values, ideologies, race, and racial hierarchies. This article suggests that the regulation of commercial media should go beyond policing truth-falsity dichotomy to reflect the wider societal impact of advertising in general and direct, and largely deleterious, effect on people of color. Absent the ability to constitutionally impose a greater regulation of harmful stereotypes in the marketplace, it follows that

503. *Id.* (citations omitted).

the history of race and advertising adds compelling support to arguments in favor of removing First Amendment protection from commercial speech.

Removing First Amendment protection from commercial speech would allow greater advertising regulation. Regulation designed to prohibit discriminatory or stereotypical advertisements could be used to diversify images perpetuated in the media. African Americans, like all outsider groups, should have the right to be portrayed in non-discriminatory ways and to participate in creating images that purport to represent them. Such regulations would be consistent with the findings of social scientists, historians, and communication experts who recognize the impact of commercial images infused with racial messages on culture and the struggle to remove racial barriers.