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Advertising and Social Identity

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INTRODUCTION

A legal debate is brewing over who should control the advertiser's message. On one side are those who contend that in the struggle between advertisers and consumers over brand definition, business-friendly legal rules lock in the stability of trademark meaning, placing consumers at a crippling expressive disadvantage.[1] Those sympathetic to this view, who I will call the semiotic democratists, insist on legal changes that redistribute the balance of power to consumers and encourage the relativity of advertising meaning.[2] The alternative, they argue, is a world where citizens lack the key cultural ingredients for personal expression.[3]

As evidence of their claims, the semiotic democratists point to a legal regime that is increasingly placing more

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1. *See, e.g.*, ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 25 (1998); Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 219 (2005); Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-Informational Advertisements*, 27 WHITTIER L. REV. 435, 447 (2005); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461, 462 (2006).

2. William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 193 (Stephen R. Munzer ed., 2001); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 601 (2007).

3. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society,* 79 N.Y.U. L. REV. 1, 35, 42-43 (2004); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 137-47 (1993).

weapons in the hands of advertisers. The law tends to prevent alternative constructions of the original meaning of a trademark selected by the advertiser. Trademark doctrine blocks secondary uses of marks if they are likely to confuse consumers, even if the downstream user seeks to use the mark for a completely different product from the original or to communicate a very different message from the original advertisement.[4] Federal dilution law, a relatively recent phenomenon, allows trademark holders to stop uses of their marks, not because they are confusing to consumers, but because they threaten "the identity and hold upon the public mind of the mark."[5] Finally, in deciding whether marks are eligible for trademark protection, courts rely on evidence of advertising expense, in effect, rewarding advertisers with the ability to control meaning based on the amount of money they spend.[6]

On the other side are those who believe that the current legal regime provides the necessary breathing space for advertising meaning.[7] They note that the law contains multiple limits on the ability of mark holders to control

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4. *See, e.g.,* Recot, Inc. v. M.C. Becton, 214 F.3d 1322, 1326 (Fed. Cir. 2000) (positing potential confusion with the FRITO LAY snack food trademark if defendant were permitted to use FIDO LAY in association with its pet food).

5. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927). Scholars credit this article with initiating the concept of dilution that is found today in United States law. *See* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 135 n.701 (2004).

6. Trademark law is structured so that marks that are merely descriptive of the product being sold (e.g., using the mark DIGITAL to identify a brand of computer) will not be protected unless they have "secondary meaning," i.e., an association in the public mind between the mark and the mark's source of origin. Trademark doctrine recognizes the amount spent by the mark holder on advertising and the frequency of such advertising as proof of secondary meaning. COOMBE, *supra* note 1, at 63; Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 N.M. L. REV. 1, 27-28 (2008).

7. *See* Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide,* 41 CONN. L. REV. 921, 960 (2009) (contending that trademark and unfair competition law offers adequate safeguards against the semiotic control of fictional characters by trademark owners); *cf.* Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1329-30 (2001) ("Certain features of copyright law appear expressly to support semiotic democracy as an independent value.").

meaning. Trademark's fair use doctrine permits non-trademark holders to use a trademark to accurately describe characteristics of their goods or to use the mark to describe the mark holder's product.[8] The First Amendment helps safeguard other downstream uses of marks, such as parody, that are explicitly intended to subvert established meanings.[9] False advertising regulation stops trademark holders from building up the meaning of their marks with false or misleading statements.[10] All these legal counterweights, it can be argued, leave commercial signifiers freely available as resources "for the construction of identity and community . . . ."[11]

More importantly, these scholars maintain, for a variety of reasons, that the concerns over the ability of advertisers to control meaning are overstated. Some contend that the messages bound up in advertising are naturally polysemic and audiences cannot be forced to construe them in a single way no matter how hard the advertiser tries.[12] Others accept the ability of advertisers to shape receipt of their messages, but argue that strong and consistent brand definitions facilitate personal expression.[13] After all, it arguably means more to ride a Harley-Davidson motorcycle when that brand has one central meaning than when it is subject to multiple and perhaps conflicting interpretations.[14]

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8. New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 306 (9th Cir. 1992).

9. *See* Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 259-61 (4th Cir. 2007).

10. Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 310-11 (1st Cir. 2002).

11. COOMBE, *supra* note 1, at 7.

12. *E.g.,* JONATHAN BIGNELL, MEDIA SEMIOTICS: AN INTRODUCTION 224-25 (2d ed. 2002); David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion and Identity,* 49 IDEA 233, 242, 248 n.84 (2009).

13. *See* Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 952 (2006).

14. *See generally* John W. Schouten & James H. McAlexander, *Subcultures of Consumption: An Ethnography of the New Bikers,* 22 J. CONSUMER RES. 43 (1995). On a related point, Laura Bradford convincingly argues, from a search costs perspective, that consumers benefit from being able to rely on familiar and emotionally-significant brand names as a heuristic shortcut when making decisions, and they are harmed by secondary brand uses that demand extra

Relatedly, some maintain that even when subject to the meaning inscribed on advertising by the advertisers, consumers in a targeted demographic still benefit from the business world's recognition of their "voice" in a commoditized form.[15]

This Article approaches the debate over advertising from a different angle. It is difficult to know which side has the better argument over the multivalent quality of advertising's meaning. Evidence on consumer perception is easy to come by, yet inconsistent.[16] The truth probably lies somewhere in between: consumers sometimes rework commercial appeals to their own liking, but sometimes they consume the exact message promulgated by the advertiser. The more important question is exactly how advertising influences us even as we are influencing it. Even if there is a dynamic relationship between advertiser and audience, it is still worth investigating what the effects are of exposure to certain advertising meanings. If the effects are neutral or benign, there is no need to revise legal rules privileging advertisers.

This Article examines one effect of advertising: its role in shaping our identities. Advertising can have many potential impacts, but one of the most powerful may be its influence on our sense of self. Identity is central to many areas of the law from sexual harassment[17] to immigration[18]

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cognitive effort. *See* Laura Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227 (2008).

15. David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223, 242-43 (2002).

16. *See* Hammer, *supra* note 1, at 440-48 (maintaining that the inability of consumers to cognitively process most advertisements results in the production of unnecessary consumptive wants and deleterious lifestyle goals); Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 700 & n.198 (2009) (discussing a recent trend in marketing literature crediting consumers with greater power to resist advertising messages).

17. *See, e.g.*, Todd Brower, *Social Cognition "At Work": Schema Theory and Lesbian and Gay Identity in Title VII*, 18 L. & SEXUALITY 1, 7 (2009).

18. *E.g.,* Hernandez-Montiel v. INS, 225 F.3d 1084, 1094-96 (9th Cir. 2000) (holding that a persecuted homosexual Mexican man with a female sexual identity qualifies for asylum under particular social group standard), *overruled by* Thomas v. Gonzales, 409 F.3d 1177, 1180 (9th Cir. 2005).

to information privacy.[19] Yet a thorough discussion of how identity relates to advertising law has been lacking. To determine just what the stakes are in this discussion of the stability of advertising's message, we need to evaluate advertising's role in the development of autonomous, fully-realized identities. If advertising does not disrupt the process of healthy self-definition, then perhaps legal rules that allow trademark creators to preserve a chosen meaning should be permitted. On the other hand, if advertising damages our ability to find a sense of self, then laws that give trademark holders the ability to control trademark meaning may need revisiting.

In this Article, I will illustrate the centrality of advertising to self-definition through one strategically selected example: niche marketing directed to gays and lesbians.[20] Niche marketing refers to the relatively recent advertising strategy of making targeted appeals to particular social groups.[21] Niche marketing to gays and lesbians has its own idiosyncrasies, but it is symptomatic of a larger trend. If marketing targeted to particular identity groups produces a more pronounced effect on our sense of self than previous advertising efforts, this has important implications for how we structure the law to protect the sanctity of advertising meaning. In Part I, I discuss the psychological literature on how we arrive at our sense of self and how advertising may influence this process. Part II describes niche marketing to the gay community and its

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19. *See, e.g.,* Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227 (2003). In the realm of intellectual property, a recent treatment of copyright's fair use defense proposes greater solicitude for "identity-based uses of copyrighted works." *See* Jennifer Rothman, *Liberating Copyright: Thinking Beyond Free Speech,* 95 CORNELL L. REV. 463 (2010).

20. Unless otherwise specified, I use the term "gay and lesbian" as well as the term "gay" in this Article to describe individuals who are gay, lesbian, bisexual, or transgendered. I realize that these terms not only fail to explicitly acknowledge those who are bisexual or transgendered, but their precise content is often up for debate. Nevertheless, I use them for convenience and because these are the terms used by advertisers to describe their targeting of the GLBT community. For an excellent historical treatment of representations of identity in the early gay civil rights movement, see Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s*, 119 YALE L.J. 316 (2009).

21. *See infra* note 73.

probable effects on gay identity. Part III suggests where the legal debate over advertising should go from here. By exploring how advertisers construct their appeals to one group and how identity theory predicts this group has been affected by those appeals, I hope to shed some light on which side should have the upper hand in the battle over meaning—the advertisers or the recipients of their messages.

I. ADVERTISING AND IDENTITY

If we are to assess the potential threat of advertising regulation to personal development, we need to understand how identities are formed. In this Part, I distill the psychological and sociological literature on identity formation and evaluate advertising's potential to influence that formation process.

A. *Identity Formation*

Identity can be conceptualized in many different ways. Some describe identity as the life-narrative that we present to ourselves and others.[22] Others emphasize that arriving at an identity means making the choice to pick from a set of roles available to us in society.[23] Some view consistency as the hallmark of an identity[24] while others note its changing and idiosyncratic nature.[25] I will not attempt to arrive at a complete definition of identity in this Article. Instead, I will emphasize some of the commonly agreed upon facets of identity theory. Even if social scientists do not agree on exactly what identity means, they do agree on several points regarding how our sense of self is formed in the modern age.

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22. Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet,* 57 VAND. L. REV. 965, 974 (2004).

23. Jan E. Stets & Peter J. Burke, *A Sociological Approach to Self and Identity*, *in* HANDBOOK OF SELF AND IDENTITY 128, 134 (Mark R. Leary & June Price Tangney eds., 2003).

24. DAVID GAUNTLETT, MEDIA, GENDER AND IDENTITY 99 (2002).

25. *See* COOMBE, *supra* note 1, at 295; Robert Nozick, *Personal Identity Through Time*, *in* PERSONAL IDENTITY 92, 92 (Raymond Martin & John Barresi eds., 2003). Devotees of queer theory particularly stress the fluid nature of identity. *See* GAUNTLETT, *supra* note 24, at 139; ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 8 (1996).

In post-modern thought, it is accepted that we do not merely inherit our self nor does our self magically spring into being. Rather, the self is "made." The individual constructs his or her identity reflexively, responding to events, knowledge, relationships with other people, and other stimuli in a constant, dynamic process.[26] Our identities have a fragile quality, as we can borrow or discard aspects from the outside world to remake ourselves at our choosing.[27] Modern life, with its focus on the secular and its displacement of tradition, leaves individuals with less guidance than ever before in selecting an identity path to follow.[28]

This process of self-definition is a crucial one. Basic human needs of security, belonging, and personal autonomy drive our adoption of various identities.[29] Although our identities develop throughout our lives, formation of a secure identity marks the successful transition from adolescence to adulthood.[30] By developing and verifying our identity, we construct reserves of self-esteem that serve as a critical buffer when traumatic events leave us prone to crippling self-doubt.[31] Many personality disorders can be tied to the faulty development of the self or emotional disturbances that leave an actor unable to integrate various inputs into a cohesive identity.[32]

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26. GAUNTLETT, *supra* note 24, at 99.

27. *See* Charles D. Raab, *Identity: Difference and Categorization*, *in* LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 227, 232-33 (Ian Kerr et al. eds., 2009).

28. *See* ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY 194-96 (1991); Michael H. Kernis & Brian M. Goldman, *Stability and Variability in Self-Concept and Self-Esteem*, *in* HANDBOOK OF SELF AND IDENTITY, *supra* note 23, at 106, 113; Richard M. Ryan & Edward L. Deci, *On Assimilating Identities to the Self: A Self-Determination Theory Perspective on Internalization and Integrity Within Cultures*, *in* HANDBOOK OF SELF AND IDENTITY, *supra* note 23, at 253, 254.

29. Ryan & Deci, *supra* note 28, at 254.

30. *Id.*

31. Alicia D. Cast & Peter J. Burke, *A Theory of Self-Esteem*, 80 SOC. FORCES 1041, 1048-49 (2002).

32. Drew Westen & Amy Kegley Heim, *Disturbances of Self and Identity in Personality Disorders*, *in* HANDBOOK OF SELF AND IDENTITY, *supra* note 23, at 643, 649. Moreover, it has been shown that when an individual concludes that the larger society devalues her own social identity, the result is underperformance on a variety of academic tests. *See* Jennifer Crocker & Diane

Three additional points with regard to identity formation are important in assessing the special impact of advertising on our identities. First, it is important to realize that much of the process of self-definition occurs subconsciously. We are constantly evaluating our narrative of self, but in unconscious ways.[33] Unconscious identity preferences can form rapidly—potentially from a single exposure to an implicit trigger.[34] For example, college students that have only been on campus for a few days exhibit the same subconscious identification with their particular school as students in their fourth year.[35] Hidden stimuli may not only alter the process of identity formation, but can also produce changes in behavior that we do not even notice or cognitively process.[36] Depending on whether a positive or negative self-construct has been implicitly activated, we may unconsciously mimic or disparage others in an effort to reinforce our sense of self.[37]

Second, artifacts from popular culture are also part of the process of self-definition. Social and cultural forces are an essential component in identity formation.[38] "[S]ociety influences the self through its shared language and meanings that enable a person to take the role of the other, engage in social interaction, and reflect on oneself as an object."[39] By using language to describe and identify the other, human beings rely on use of tangible cultural symbols to articulate and understand a view of themselves.[40] As anthropologist Michael Taussig has described, citizens interact with properties outside of

M. Quinn, *Psychological Consequences of Devalued Identities*, *in* SELF AND SOCIAL IDENTITY 124, 134 (Marilynn B. Brewer & Miles Hewstone eds., 2004).

33. Thierry Devos & Mahzarin R. Banaji, *Implicit Self and Identity*, *in* HANDBOOK OF SELF AND IDENTITY, *supra* note 23, at 153, 154.

34. *Id.* at 156-57, 165.

35. *See* Kristin A. Lane et al., *Me and My Group: Cultural Status Can Disrupt Cognitive Consistency*, 23 SOC. COGNITION 353, 383 (2005).

36. Devos & Banaji, *supra* note 33, at 163.

37. *Id.* at 162-63.

38. Marilynn B. Brewer & Masaki Yuki, *Culture and Social Identity*, *in* HANDBOOK OF CULTURAL PSYCHOLOGY 307, 318 (Shinobu Kitayama & Dov Cohen eds., 2007).

39. Stets & Burke, *supra* note 23, at 128.

40. *Id.* at 130.

themselves by imitating and recreating them.[41] This process of mimesis provides an intense connection to the original and its outside creator.[42] Through ritual, prosaic and impersonal items are converted into meaningful, socially significant symbols. To use one common example, clothing is routinely used to construct identity.[43] Particular fashions establish boundaries with other groups while reinforcing the wearer's identification with a particular group.[44] The physical incidents of culture are essential properties in telling us about ourselves.

Third, although we have several identities—some tied to specific situational roles, some expressly personal—identities anchored to group membership are crucial to the identity formation process.[45] Social identity theory posits that our identities develop by two separate processes: categorization and comparison.[46] We categorize ourselves as part of a particular social group and then compare that

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41. MICHAEL TAUSSIG, MIMESIS AND ALTERITY: A PARTICULAR HISTORY OF THE SENSES 19 (1993).

42. *Id.* at 21.

43. *See* Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 918 (9th Cir. 1980) ("We commonly identify ourselves by displaying emblems expressing allegiances. Our jewelry, clothing, and cars are emblazoned with inscriptions showing the organizations we belong to, the schools we attend, the landmarks we have visited, the sports teams we support, the beverages we imbibe.").

44. Kate Schofield & Ruth Ä. Schmidt, *Fashion and Clothing: The Construction and Communication of Gay Identities,* 33 INT'L J. RETAIL & DISTRIBUTION MGMT. 310, 320 (2005); *see also* Mark R. Bandsuch, S.J., *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 311 (2009) (discussing the importance of clothing and facial hair to expression of one's social identity).

45. Brewer & Yuki, *supra* note 38, at 307; Stets & Burke, *supra* note 23, at 145.

46. *See* Stephen Cox & Cynthia Gallois, *Gay and Lesbian Identity Development: A Social Identity Perspective*, 30 J. HOMOSEXUALITY 1, 10 (1996). Insights from social identity theory have proved influential in the discussion of various legal subjects including contract law, employment discrimination, and corporate law. *See, e.g.*, Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2042-43 (2006); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 402-03 (2008); D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 33-37 (2009).

group to other social groups in a favorable way.[47] We are naturally attracted to definitions of self that involve group membership, and, by using the group to verify our identities, we build up essential reservoirs of self-worth.[48] At times, these social identities become so strong that we not only see group membership as one component of our self, but we actually view our "self as *part of* the larger collective unit."[49] In other words, rather than perceiving ourselves as unique individuals, we come to see ourselves "as exemplars of the group."[50]

This phenomenon can happen without conscious awareness.[51] In coming to identify with a specific social group, we are particularly prone to the influence of broad stereotypes, which can have a profound yet unconscious impact on our identities.[52] For example, when female Asian-American subjects were asked about their capabilities on standardized tests, their evaluations of their verbal and math skills changed depending on whether the category "Asian-American" or the category "female" was subconsciously primed.[53] Priming with the former category resulted in a higher math score, and the latter with a higher verbal score.[54] So identity formation is not simply a matter of consciously choosing the best social role for ourselves. Instead, outside forces are constantly pushing our identities in different directions without our knowledge.

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47. Green, *supra* note 46, at 402-03.

48. Devos & Banaji, *supra* note 33, at 159; Stets & Burke, *supra* note 23 , at 147.

49. Marilynn B. Brewer, *Optimal Distinctiveness, Social Identity, and the Self*, *in* HANDBOOK OF SELF AND IDENTITY, *supra* note 23, at 480.

50. Devos & Banaji, *supra* note 33, at 154-56; *see also* Dominic Abrams & Michael A. Hogg, *Collective Identity: Group Membership and Self-Conception*, *in* SELF AND SOCIAL IDENTITY, *supra* note 32, at 147 ("[T]here are times when we see ourselves wholly in terms of our representativeness of a group, and we embody the group's perspective as our own.").

51. *See* Devos & Banaji, *supra* note 33, at 154-56, 170.

52. *Id*. at 165.

53. Stacey Sinclair et al., *Self-Stereotyping in the Context of Multiple Social Identities,* 90 J. PERSONALITY & SOC. PSYCHOL. 529, 532 (2006).

54. *Id.*

B. *Advertising's Role in Identity Formation*

One of these outside forces is advertising. Given the importance of comparison and appropriation of cultural symbols in determining our identities, modern advertising plays a critical role in shaping our sense of who we are.[55] Some speculate that as constraints of religion, family, and geography have become less powerful, this has increased the importance of commoditized forms in representing the self.[56] Others attribute the rise of brand names as a means for self-definition to a calculated campaign by corporations to encourage us to define ourselves via consumption.[57] Regardless of the reason, people today adopt logos and brand names to identify with corporate and celebrity entities. Displaying a PORSCHE logo communicates material success.[58] Wearing the NIKE swoosh allows its bearer to feel athletic, provocative, and "in-your-face."[59] Drinking a PABST BLUE RIBBON beer can make imbibers feel "cool" or "alternative" (or at least the makers of PABST managed to communicate those qualities to consumers just a few years ago).[60]

Anecdotally speaking, it appears that advertising images have become increasingly important to adolescent self-representation. When I was in high school in the late 1980s, students proudly displayed brand names and logos on their clothing to differentiate themselves as preppies, jocks, or goths. They also decorated the inside of their lockers—the only personal space they really had at school, other than their own bodies—with labels from clothing purchases and cutouts from magazine advertisements, informing passersby that they embodied the POLO country

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55. *See* David Brooks, Op-Ed., *Human Nature Today*, N.Y. TIMES, June 26, 2009, at A25 ("Shopping isn't merely a way to broadcast permanent, inborn traits. For some people, it's also an activity of trying things on in the never-ending process of creating and discovering who they are.").

56. Ryan & Deci, *supra* note 28, at 253.

57. *See, e.g.*, Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 13-15 (2008).

58. Jerre B. Swann, Sr. et al., *Trademarks and Marketing*, 91 TRADEMARK REP. 787, 797 (2001).

59. DAVID A. AAKER & ERICH JOACHIMSTHALER, BRAND LEADERSHIP 173 (2000).

60. Rob Walker, *The Marketing of No Marketing*, N.Y. TIMES MAG., June 22, 2003, at 42.

club aesthetic or the sophisticated, avant-garde meaning surrounding ABSOLUT vodka. Today, students and advertisers have upped the ante. Students using social networking sites routinely personalize their online profiles with brand names and logos or choose to utilize applications that display their affinity with a particular product or service.[61] They often display links to retail sites on their homepages.[62] Tapping into this desire to accessorize the self with brands, thousands of corporations have established a marketing presence inside schools.[63]

In some ways, this behavior makes perfect sense. The average American is exposed to over three thousand advertisements per day.[64] If humans naturally build their identities from the cultural materials available, the omnipresence of advertising must be influencing the formation of modern identities.

Moreover, as discussed previously, much of the development of our identities occurs under the conscious surface of our minds, particularly in forming our understandings of ourselves as part of certain social groups. Advertisers are skilled at using commercial appeals to influence us in a subconscious manner.[65] Employing

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61. *See* Sarah Mart et al., *Alcohol Promotion on Facebook*, J. GLOBAL DRUG POL'Y & PRACTICE, Fall 2009 (describing how Facebook users voice their affiliation with alcohol brands), http://www.globaldrugpolicy.org/print.php?var=3.3.1; *cf.* Sarah Steffes Hansen, *Brands Inspiring Creativity and Transpiring Meaning: An Ethnographic Exploration of Virtual World Play*, J. INTERACTIVE ADVERTISING, Spring 2009, at 4-17 (describing use of brands by participants in virtual worlds), http://jiad.org/article113.

62. *See* Susannah R. Stern, *Expressions of Identity Online: Prominent Features and Gender Differences in Adolescents' World Wide Web Home Pages*, 48 J. BROADCASTING & ELECTRONIC MEDIA 218, 231 (2004) (revealing that one quarter of all adolescents studied linked to retail product/service sites in their home pages).

63. *See* NAOMI KLEIN, NO LOGO 92-93 (2002).

64. HELGA DITTMAR, CONSUMER CULTURE, IDENTITY AND WELL-BEING: THE SEARCH FOR THE "GOOD LIFE" AND THE "BODY PERFECT" 2 (2008); JEAN KILBOURNE, CAN'T BUY MY LOVE: HOW ADVERTISING CHANGES THE WAY WE THINK AND FEEL 58 (2000); *see also* Tim Kasser et al., *Some Costs of American Corporate Capitalism: A Psychological Exploration of Value and Goal Conflicts*, 18 PSYCHOL. INQUIRY 1, 5 (2007) (putting the number at 3,600).

65. GERALD ZALTMAN, HOW CUSTOMERS THINK 9 (2003); Bartholomew, *supra* note 6, at 40-44; *see also* RONALD D. MICHMAN ET AL., LIFESTYLE MARKETING: REACHING THE NEW AMERICAN CONSUMER 121 (2003) ("The goal is to learn about

research data from psychology and neuroscience, marketers attempt to create positive affective tags in our minds upon initial exposure to a brand.[66] These affective tags remain dormant until a subsequent trigger (perhaps exposure to the brand name in the supermarket aisle) brings the tag up from the subconscious and leads to a decision to purchase.[67] It only stands to reason that constant exposure to these persuasive entreaties has some impact on our psychological makeup, even if we do not realize it at the time.[68]

For years, cultural critics have sounded the alarm over an advertising culture that operates subconsciously and continually intrudes on our private space. In 1951, Marshall McLuhan warned of an advertising apparatus made up of "many thousands of the best-trained individual minds [that] have made it a full-time business to get inside the collective public mind."[69] Around the same time, Vance Packard charged that the "depth manipulators" of advertising were invading the "privacy of our minds."[70] In the 1960s and 1970s, a public outcry erupted over the use of subliminal images in advertising, resulting in congressional hearings decrying the practice.[71] For a long time, many in the academic community have bemoaned advertising's influence on our culture.[72]

What may be different in the twenty-first century is the explicit targeting by advertisers of a key component of identity: group membership. In recent years, advertisers have become more concerned with tailoring their message to diverse identities instead of encouraging all consumers to adopt the same broad American message. In the next Part, I

consumer motivations that are not necessarily known to the consumer because these motives are beneath the surface of consciousness.").

66. *See* Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 508 (2008); Annette Schäfer, *Buy This,* SCI. AM. MIND, June 2005, at 72-75.

67. Bartholomew, *supra* note 6, at 39-44.

68. Assaf, *supra* note 57, at 28; Kasser et al., *supra* note 64, at 5-6.

69. MARSHALL MCLUHAN, THE MECHANICAL BRIDE, at v (1951).

70. VANCE PACKARD, THE HIDDEN PERSUADERS 266 (1957).

71. William M. O'Barr, *"Subliminal" Advertising*, ADVERTISING & SOC'Y REV., (2005), http://muse.jhu.edu/journals/asr/v006/6.4unit03.html.

72. *See generally* Richard W. Pollay, *The Distorted Mirror: Reflections on the Unintended Consequences of Advertising*, 50 J. MARKETING 18 (1986).

describe this change and, through the example of advertising to the gay community, try to illustrate its potential effects on overall identity formation.

II. ADVERTISING AND THE CONSTRUCTION OF GAY IDENTITY

Advertisers label a marketing focus on a relatively small group of consumers sharing a similar characteristic as "niche marketing."[73] As described below, today's advertisers target various identity groups, seeking a more intimate connection with individual consumers by appealing to the ethnic, religious, cultural, racial, and sexual parts of their self-image. If any single group represents the phenomenon of niche marketing, it is the gay community.[74] In a marked change from prior practice, advertisers now tailor their appeals to members of this community, offering not only a product, but also necessary tools for what the advertiser defines as the gay lifestyle.[75] The targeting of this subculture by Madison Avenue represents a valuable case study of what happens when advertisers "discover" a particular social grouping and launch a sustained effort to win that group's hearts and minds. The move from

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73. Tevfik Dalgic & Maarten Leeuw, *Niche Marketing Revisited: Concept, Applications, and Some European Cases, in* HANDBOOK OF NICHE MARKETING 3, 5 (Tevfik Dalgic ed., 2006).

74. *See* M. Wayne DeLozier & Jason Rodrigue, *Marketing to the Homosexual (Gay) Market: A Profile and Strategy Implications, in* GAYS, LESBIANS, AND CONSUMER BEHAVIOR: THEORY, PRACTICE, AND RESEARCH ISSUES IN MARKETING 203, 207 (Daniel L. Wardlow ed., 1996) ("In marketing to homosexuals, the marketer is entering the world of niche marketing."); Amy Gluckman & Betsy Reed, *The Gay Marketing Moment, in* HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 3, 12 (Amy Gluckman & Betsy Reed eds., 1997) (describing how Absolut Vodka began targeting gay consumers by looking for a "niche" that had not yet been exploited by other advertisers). Some would argue that it is impossible to delimit the gay community as a discrete category (a.k.a. a "niche") given several differences in behavior and self-identification that may or may not be deemed "gay" depending on the context and the categorizer. *See* JAGOSE, *supra* note 25, at 7-10. What I am concerned with here is not so much the ability of advertisers to pinpoint who is and who is not homosexual, but rather the likely effects on those who consume the advertisers' messages regardless of the advertisers' accuracy in targeting the gay market niche.

75. Skover, *supra* note 15, at 224 ("[S]avvy vendors now pitch the LesBiGay identity itself as a product.").

generalized cross-cultural appeals to niche advertising may be having a significant effect on modern identity construction. As advertising increasingly articulates what it means to be a member of a particular group, it reifies group identity in a particular way and edges out alternative, non-commercial methods of group representation. As a result, there are fewer and fewer reference points available to those considering categorization within the group and those already within the group comparing themselves to others.

A. *Niche Marketing*

In the early twentieth century, advertisers justified their work by explaining that they were using persuasive techniques to raise immigrants and lower economic groups to a higher, more uniform socioeconomic level.[76] Their tactics involved broad appeals to conspicuous consumption that applied to everyone, regardless of ethnicity or religious affiliation.[77] Instead of pitching their product to the particular identificatory points or aspirations of specific groups of consumers, the ad men designed a message that could fit everyone, relying on universal appeals. Psychologist Walter Dill Scott, the first to truly link the formal academic study of psychology with advertising, contended that standardized, empirically tested techniques could predict the "action of large groups of people."[78] His book on the psychology of advertising instructed advertisers to rely on rules of emotional persuasion that were "of universal application to all persons."[79] His colleague, psychologist Albert Poffenberger, explained that individual and group differences were an anathema to the advertiser "who necessarily uses a mass appeal, must get beneath these individual peculiarities, and must find some common ground upon which all people or large groups of them can be met."[80] He went on to explain that the advertiser "should do this by seeking out the motives and springs of action, with

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76. *See* DANIEL POPE, THE MAKING OF MODERN ADVERTISING 257-58 (1983).

77. *See* JOSEPH TUROW, NICHE ENVY: MARKETING DISCRIMINATION IN THE DIGITAL AGE 30-31 (2006).

78. Quentin J. Schultze, *"An Honorable Place": The Quest for Professional Advertising Education, 1900-1917*, 56 BUS. HIST. REV. 16, 19 (1982).

79. WALTER DILL SCOTT, THE PSYCHOLOGY OF ADVERTISING IN THEORY AND PRACTICE 175 (1921).

80. ALBERT T. POFFENBERGER, PSYCHOLOGY IN ADVERTISING 578 (2d ed. 1932).

which human beings are naturally endowed, and the habits which our modern civilization has made almost common property."[81]

Obeying the instructions of psychologists, early twentieth-century advertisers constructed their messages in a way they believed could homogenize tastes and create a controllable and predictable desire for consumption.[82] This notion of control was crucial to the development of American business and advertising in the early 1900s.[83] By reading the American public as a like-minded mass with similar tastes, desires, and insecurities, business leaders believed that they were imposing some sort of order on the unprecedented new world spawned by industrialization and mass immigration.[84] And, in its own way, the broad appeal of early twentieth century advertising affirmed democratic principles by bringing Americans together through the standardization of consumer preferences.[85]

But social and technological change has caused advertisers to reverse course. As social groups organized in the latter part of the twentieth century along lines of race, ethnicity, and gender for political and civil rights, advertisers took note and began to construct markets specifically focused on social identities based on group membership.[86] Meanwhile, advances in computing power and data collection opportunities permitted marketers "to customize commercial announcements so that different people learn different things about products depending on what the marketers conclude about their personalities, their

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81. *Id.*

82. *See* Bartholomew, *supra* note 6, at 23-24 (describing the alliances formed between psychologists and advertisers in the early 1900s).

83. JACKSON LEARS, FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA 5 (1994).

84. DANIEL HOROWITZ, THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875-1940, at 77 (Elephant Paperback 1992) (1985).

85. *See* TUROW, *supra* note 77, at 24.

86. ALEXANDRA CHASIN, SELLING OUT: THE GAY AND LESBIAN MOVEMENT GOES TO MARKET, at xv (2000); *see also* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 161, 309-10 (2003) (tracing the rise of use of "market segmentations" by retailers to the 1960s and 1970s).

lifestyles, and their spending histories."[87] As a result, instead of using the same advertisement to sell everyone the same refrigerator, there are now increasingly smaller identificatory pools that potential consumers are placed in by advertisers so that different advertisements reach different consumer groups.[88] Moreover, rather than receiving the same product as everyone else, the sophistication of digital data collection and categorization suggests that advertisers will be able to hide the ball, providing different products with varying levels of quality and price to different niches of consumers without those consumers even realizing that they are being marketed and sold to in different ways based on their perceived identity.[89]

The switch to targeted advertising has important implications for the interface between advertising and identity. Whereas previous advertisements used broad-based appeals to patriotism or general insecurities, the new advertising can focus its message on the unique aspirations, experiences, and resentments of particular social groups. As explored in more detail below, the principles of social identity theory suggest that these more focused appeals to particular groups are bound to have a more direct impact on identity formation than the advertising of the past.[90] Today's advertisers are well aware of the importance of making their emotional appeals salient to each individual consumer identity.[91] Psychological studies demonstrate that by implicitly referencing the social group that the subject identifies with, the advertiser can elicit changes in

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87. TUROW, *supra* note 77, at 2; s*ee also* CHRIS ANDERSON, THE LONG TAIL 5-6 (2006) (discussing how the Internet has caused the cost of reaching niche consumers to fall); SUZANNA DANUTA WALTERS, ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA 236 (2001) ("[N]iche marketing has itself become the preeminent strategy of both corporations and the media.").

88. Advertisers have been sensitive to some differences in audience since the early 1900s. What has changed in recent years, however, is the statistical sophistication of today's data collection capabilities as well as the rise of identity-based political movements. Advertisers always had some sense of the benefits of tailoring their message to different viewers, but these two forces suddenly made narrow tailoring a rational business strategy.

89. *See* TUROW, *supra* note 77, at 15-16, 179.

90. *See infra* Part II.B.

91. *See, e.g.*, JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, THE MARKETING POWER OF EMOTION 9-12 (2003).

behavior.[92] It is no wonder that advertisers are continually making the effort to customize their appeals to a more fine-grained demographic. In the remainder of this Part, I use advertising to the gay and lesbian community as a case study for the types of messages advertisers send to targeted social groups and their potential effects on identity formation.

B. *Advertising to the Gay Market and Its Effects*

The gay community has the advertising world's attention. Beginning in the 1990s, marketing consultants began to focus on the gay community as a "golden" untapped trove of consuming potential.[93] The mainstream business press quickly repeated this sentiment.[94] As it turns out, the gay community is not as lucrative of a market as originally represented.[95] Nevertheless, large numbers of advertisers continue to consider the gay market a segment worthy of specific targeting.[96] According to niche marketing theory, a particular segment merits targeting when the numbers and needs of that segment can be determined; the segment has sufficient purchasing power; that purchasing power will remain long enough for a satisfactory return on investment; and the segment can be reached through available media.[97] Despite some counterevidence, most marketing theorists have concluded that gays have sufficient visibility and wealth to meet these criteria.[98] By

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92. *See* Devos & Banaji, *supra* note 33, at 163.

93. WALTERS, *supra* note 87, at 235.

94. KATHERINE SENDER, BUSINESS, NOT POLITICS: THE MAKING OF THE GAY MARKET 153 (2004).

95. *See* M.V. Lee Badgett, *Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men*, *in* HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE, *supra* note 74, at 65, 66 (explaining that highly touted market research on gay income came from a biased sample and that gays and lesbians actually earn less than heterosexuals).

96. HOWARD L. HUGHES, PINK TOURISM: HOLIDAYS OF GAY MEN AND LESBIANS 152-54 (2006).

97. *See* Danae Clark, *Commodity Lesbianism*, *in* THE LESBIAN AND GAY STUDIES READER 186, 187 (Henry Abelove et al. eds., 1993); Michael Stuber, *Tourism Marketing Aimed at Gay Men and Lesbians: A Business Perspective*, *in* GAY TOURISM: CULTURE, IDENTITY, AND SEX 88, 93 (Stephen Clift et al. eds., 2002).

98. *See* Stuber, *supra* note 97, at 119.

marketing a product specifically to gays and lesbians, businesses can differentiate one interchangeable product from another and gain a competitive edge.[99] As a result, by 2004, over one-third of all Fortune 100 companies had directly advertised to gays and lesbians.[100]

Advertising targeted to gays and lesbians has some salutary effects. Marketing to someone in a recognizable manner suggests acceptance. "[I]n a capitalist society, market incorporation is of the utmost importance because it summons a social legitimation approaching that of citizen."[101] Indeed, the evidence shows that gay consumers interpret advertisements specifically geared to them as corporate support for the gay social movement and a barometer of social progress.[102] Las Vegas casinos recently decided to offer lavish same-sex commitment ceremonies (even though same-sex marriage is illegal in Nevada) and use advertisements urging same-sex partners to "[d]eclare your love for each other loud and proud."[103] Such marketing practices cannot help but affirm gay identities in a positive way. Moreover, upon realizing that the commercial gaze has been turned on them, members of a targeted niche can demand political changes from advertisers seeking their business. For example, market researchers advise businesses pitching to the gay community to adopt anti-discriminatory workplace policies lest they be viewed as hypocrites and suffer a retaliatory reduction in sales.[104]

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99. *See id.* at 91-92.

100. GLAAD Advertising Media Program, Overview and History of the Global Gay & Lesbian Market, http://www.commercial closet.org/common/news/reports/detail.cfm?classification=report&qID=4784&clie ntID=11064&topicID=384&subsection=resources&subnav=resources   (last visited Feb. 11, 2010).

101. Lisa Penaloza, *We're Here, We're Queer, and We're Going Shopping!: A Critical Perspective on the Accommodation of Gays and Lesbians in the U.S. Marketplace*, *in* GAYS, LESBIANS, AND CONSUMER BEHAVIOR: THEORY, PRACTICE, AND RESEARCH ISSUES IN MARKETING, *supra* note 74, at 9, 33.

102. Gillian Oakenfull, *Effects of Gay Identity, Gender and Explicitness of Advertising Imagery on Gay Responses to Advertising*, 53 J. HOMOSEXUALITY 49, 50 (2008).

103. Tamara Audi, *Las Vegas Goes All Out to Attract Gay Travelers*, WALL ST. J., Nov. 2, 2007, at B1.

104. *See* ROBERT WITECK & WESLEY COMBS, BUSINESS INSIDE OUT: CAPTURING MILLIONS OF BRAND LOYAL CONSUMERS 101-05 (2006).

But there are also negative consequences to such targeting. It may not always be a good thing for a group to attract an advertiser's attention. One recent study revealed a campaign by the tobacco industry targeting lesbians, gay men, and bisexuals produced higher rates of smoking and attendant negative health consequences in each group.[105] Moreover, by hyping the financial strength of the gay market, market researchers may help fuel arguments that there is no need for gay antidiscrimination measures.[106]

What I am more interested in, however, are the implications for identity formation from the targeting of a particular subculture. This process of targeting on the basis of social membership does not only trigger certain behaviors, including the decision to purchase; it also shapes the viewer's sense of self. Although advertisers are sensitive to what they perceive as themes that particularly appeal to gays, their messages also help to realize the gay identity. As Lisa Penaloza writes:

> Marketing activities targeting gays and lesbians typically do so by including elements of gay identity and experience. Because these representations provide a mirroring function for gay/lesbian people, they potentially have an effect upon gay subjectivity and agency, i.e., how gays and lesbians think of themselves and how they view marketing practices and consumption behaviors in relation to group interests.[107]

One should acknowledge that there is no single gay identity. Instead, race, class, gender, and a host of other social circumstances uniquely shape each individual's sexual identification.[108] Yet while stipulating that there are

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105. *See* J A Dilley et al., *Does Tobacco Industry Marketing Excessively Impact Lesbian, Gay and Bisexual Communities?*, 17 TOBACCO CONTROL 385, 385-90 (2008); s*ee also* Harriet A. Washington, *Burning Love: Big Tobacco Takes Aim at LGBT Youths*, 92 AM. J. PUB. HEALTH 1086, 1093 (2002) (detailing R.J. Reynolds's attempts to target gay people in San Francisco's Castro district).

106. *See* Romer v. Evans, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting) (noting the supposed affluence of the gay market in support of the argument that a constitutional amendment prohibiting government actions to prevent discrimination against homosexuals did not violate the equal protection clause).

107. Penaloza, *supra* note 101, at 17.

108. *See* Janna L. Horowitz & Michael D. Newcomb, *A Multidimensional Approach to Homosexual Identity*, 42 J. HOMOSEXUALITY 1, 1-19 (2001)

a myriad of individual experiences when it comes to forging a homosexual identity, I think it is worthwhile to examine the likely overall effects of advertising on that identity formation process. As I discuss below, when analyzed according to the tenets of social identity theory, recent marketing to the gay community seems to have significant effects on the identity construction of those who designate themselves as gays and lesbians.

1. *Niche Advertising and Self-Categorization.* Human beings begin the process of arriving at a stable self-narrative through categorization. We live in a world packed with stimuli sending different messages. To lend some order to this chaos, we automatically place these stimuli in different categories.[109] This categorization process helps account for the differences between people and objects we observe and serves as an essential cognitive tool in predicting future behavior.[110]

We also categorize ourselves by identifying as members of particular social groups. This is not just an exercise in labeling. The self-categorization process causes a gradual adoption of the normative behaviors and values of the group.[111] The categories we decide to place ourselves into have a tremendous impact on who we are.[112]

Today, it is theorized that development of a homosexual identity, like other group identities, follows this exact process.[113] According to social identity theory, the

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(discussing the need for a multidimensional approach to evaluating homosexual identity based on individual experiences).

109. Michael A. Hogg, *Social Categorization, Depersonalization, and Group Behavior*, *in* SELF AND SOCIAL IDENTITY, *supra* note 32, at 203, 205.

110. Cox & Gallois, *supra* note 46, at 11.

111. *Id.*; *see also* GIDDENS, *supra* note 28, at 81 (describing the need in modern life to adopt a particular group lifestyle that includes an "integrated set of practices" for daily living).

112. Abrams & Hogg*, supra* note 50, at 167; Hogg, *supra* note 109, at 208.

113. Of course, to a large degree, an individual's sexual orientation is determined by genetics. *See* Khytam Dawood et al., *Genetic and Environmental Influences on Sexual Orientation*, *in* HANDBOOK OF BEHAVIOR GENETICS 269 (Yong-Kyu Kim ed., 2009). In describing the process of homosexual identity formation, I do not mean to imply that sexual orientation is simply a choice made by the individual. Rather, homosexual identity reflects both biological and environmental influences and this paper probes one particular environmental influence on that identity. Moreover, I would suggest that there are several

comparisons afforded through social interaction produce human sexual identity.[114] In the past, psychologists postulated that homosexual identity developed through a rigid series of stages. Although not in direct conflict with the categorization model of identity formation, these stage models of homosexual development treated homosexuality in an idiosyncratic matter and as a bit of a pathology.[115] For most of the stage theories, the final stage was a reduction of importance of the homosexual identity and a greater integration into the larger society, thereby defining a "healthy" gay identity as one that was relatively unimportant to the individual's overall sense of self and unwilling to challenge the status quo.[116] In contrast, using social identity theory to describe homosexual identity formation has the benefit of applying a theory common to the development of all identities.[117] It also recognizes the potential importance of the gay identity for individuals and acknowledges the frequent psychological need for subordinated social groups to confront the power wielded by dominant ones.[118]

    i. *Constructing Models for Group Identification.* So how does advertising impact this self-categorization process for gays and lesbians? First, advertising's content shapes the models available for group identification. By advertising to a group, we further constitute that group's identity.[119]

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different ways to identify as homosexual, see Roger L. Worthington & Amy L. Reynolds, *Within-Group Differences in Sexual Orientation and Identity*, 56 J. COUNSELING PSYCHOL. 44 (2009), and advertising influences which ways are more salient than others. I am not arguing that advertising makes a person have a homosexual identity, but rather that advertising shapes the meaning of that identity.

    114. Horowitz & Newcomb, *supra* note 108, at 2.

    115. *See* Joanne M. Kaufman & Cathryn Johnson, *Stigmatized Individuals and the Process of Identity*, 45 SOC. Q. 807, 807-11 (2004).

    116. *See id.* at 810-11 (summarizing a critique of stage models of homosexual development).

    117. *Id.*

    118. *See* John C. Turner & Katherine J. Reynolds, *The Social Identity Perspective in Intergroup Relations: Theories, Themes, and Controversies, in* SELF AND SOCIAL IDENTITY, *supra* note 32, at 259, 270 (discussing social identity theory's contribution to understanding social conflict as rational and psychologically meaningful).

    119. Penaloza, *supra* note 101, at 32.

Advertisements do more than represent particular subjects; they also construct archetypes. When we view the ad, we typically do not see its subjects as mere individuals, but rather as types that stand for something larger. And by doing this, the advertiser may convey one possibility about a represented group, but also marginalize and preclude other possibilities about that group.[120] In other words, advertising shrinks the comparisons available for the self-categorization process. For example, an advertisement designed to trigger associations with the gay community that depicts two white, athletically dressed males getting out of a luxury car constructs a specific subject for consumption. Such an advertisement makes a claim to what it means to be gay—that being gay implies being white, male, healthy, and affluent. Once that message is internalized it leaves out many other possibilities. Same-sex relationships, of course, occur among people of color, women, the poor, and those with varying degrees of health. By precluding other equally accurate representations of homosexuality, the advertisement pushes the viewer towards a more limited understanding of gay identity.[121] This is dangerous since psychologists tell us that the more roles and identities available to us in the identity formation process, the better for our psychological well-being.[122] Finding the right social self-categorization for one's sexual orientation is important for developing self-esteem.[123] When we feel that we are only capable of having a select number of identities, problems may arise, particularly if we believe that the identities we are left with are not of our own choosing.[124] This is especially

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120. *See* Steven M. Kates, *Making the Ad Perfectly Queer: Marketing "Normality" to the Gay Men's Community?*, 28 J. ADVERTISING 25, 33-34 (1999).

121. *See* Katherine Sender, *Sex Sells: Sex, Class, and Taste in Commercial Gay and Lesbian Media*, 9 GLQ 331 (2003).

122. Stets & Burke, *supra* note 23, at 133.

123. Cox & Gallois, *supra* note 46, at 12-13.

124. Self-determination theory looks at the social-contextual conditions that help and hinder healthy psychological development. *See* Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCHOL. 68, 68-69 (2000). It posits that self-determination leads to greater happiness and well-being by fostering basic psychological needs of competence, relatedness, and autonomy. In basic terms, the theory maintains that we enjoy more psychological well-being when we perform tasks and make decisions based on intrinsic rather than extrinsic motivations. *See id.* at 68. The theory's creators

true for those searching for a positive gay identity in a heterosexually dominant society. The coming out process involves not only disclosure but investigation of multiple gay scenes and trying to find the right positive identifications for the individual.[125]

Admittedly, there are only a finite number of identities that advertisers can represent. A business determined to attract the gay market must choose between representing white, urban gay male hipsters, rural Latina lesbians, suburban African-American gays, and a nearly endless number of other homosexual identity composites. No advertiser's budget permits it to target every unique personal identity that might be part of its customer base. But all advertisements contain an ideological perspective.[126] Advertisers make a choice to represent targeted markets in a particular way and this choice deserves scrutiny. By using all of the techniques at their disposal, advertisers turn their representation of the gay consumer into an appealing aspirational persona. "By selling to lesbians and gay men, marketers also get to define the contours of the demographic and to create an ideal (Dockers-wearing, Absolut-drinking, Subaru-driving, Ikea-furnishing, Crest-tooth-whitening) queer consumer who embodies the heavily class-, race-, and gender-inflected category of 'good taste.'"[127] By observing the general trend of gay market advertising, we can characterize advertiser choices and what they mean for gay identity.

Advertisers have chosen to represent gay sexuality in a narrow way that can leave out many homosexually-inclined individuals engaging in the self-categorization process. Gay market advertising, like most advertising, is generally conservative, only branching out from traditional

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speculate that it is best for the adoption of identities to be intrinsically motivated and "[t]he more pressure and control that is used in the socialization of identity, the less well anchored that identity will be in the self of the individual." Ryan & Deci, *supra* note 28, at 255, 265.

125. Martin Cox, *The Long-haul out of the Closet: The Journey from Smalltown to Boystown, in* GAY TOURISM: CULTURE, IDENTITY AND SEX, *supra* note 97, at 151, 152-53.

126. *See* WILLIAM M. O'BARR, CULTURE AND THE AD: EXPLORING OTHERNESS IN THE WORLD OF ADVERTISING 2-3 (1994).

127. Sarah E. Chin, *Here, Queer, and Going Shopping*, 12 GLQ: J. LESBIAN & GAY STUD. 150, 152 (2006).

representations of gender and sexuality when prodded.[128] Worried about the stereotype of the promiscuous gay male, advertisers have downplayed that aspect of sexuality. Instead, they have emphasized different characteristics such as tastefulness and trendsetting that would rework gay males into ideal consumers,[129] and have done their best to "straighten up" their advertisements by placing cultural totems that suggest monogamy (e.g., pets, homes, or children) next to their gay referents.[130] These representations fail to recognize those who choose to adopt less conventional manners of outward appearance and more transgressive and public representations of their individual sexuality. When advertisers do emphasize sex and gender in the gay community, they engage in rigid typing, using the most convenient and familiar representations of the gay community in order to make sure that they are sending a message of group inclusion to their intended target.[131] Because advertisers make these particular choices in how to present gay identity, those who possess different characteristics may feel left out and un-validated.[132] For example, the vast majority of gay-themed advertising uses gay male imagery.[133] Such advertising may validate gay males, but it leaves lesbians feeling invisible.[134]

As marketers pitching to the gay community ignore the more radical aspects of gay sexuality, they also stress

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128. *See* GAUNTLETT, *supra* note 24, at 56.

129. SENDER, *supra* note 94, at 145-46.

130. Janet L. Borgerson et al., *The Gay Family in the Ad: Consumer Responses to Non-traditional Families in Marketing Communication*, 22 J. MARKETING MGMT. 955, 972 (2006); *see also* Fred Fejes, *Advertising and the Political Economy of Lesbian/Gay Identity*, *in* GENDER, RACE, AND CLASS IN MEDIA: A TEXT-READER 212, 220 (Gail Dines & Jean M. Humez eds., 2d ed. 2003) (contending that the efforts of advertisers have resulted in a "straight" gay identity designed to be palatable to heterosexuals).

131. *See* Stuber, *supra* note 97, at 107.

132. Eric Newman, *Girl Meets Ploy*, BRANDWEEK, Nov. 5, 2007, at 48 ("It's taken marketers a while to learn that all-purpose 'gay marketing' (usually rife with images of shirtless, beefcake men) says nothing to the lesbian consumer and, in fact, probably does a better job of alienating her.").

133. Oakenfull, *supra* note 102, at 65.

134. *See generally* Katherine Sender, *Neither Fish nor Fowl: Feminism, Desire, and the Lesbian Consumer Market*, 7 COMM. REV. 407, 408 (2004).

sexuality as the key component of gay identity.[135] Such marketing fails to recognize what Martha Minow describes as the "kaleidoscopic nature" of identity.[136] Niche marketing represents a significant change in advertising practice, as it enables the tailoring of commercial appeals to specific identity groups. Nevertheless, as typically practiced today, niche marketing is also quite limited in its ability to recognize the multifaceted nature of identity. This may be most obvious with regard to the inherently complex nature of sexual identity. As Katherine Sender has noted, gay marketers adopt an essentialist notion of sexuality that includes only one hundred percent homosexuals and one hundred percent heterosexuals and leaves out the vast majority of us who fall somewhere in between.[137] This is not necessarily an accurate picture of those considering self-identification as gay or lesbian. There is a great deal of evidence that individuals typically feel both heterosexual and homosexual impulses, just at different levels, which can fluctuate with time and experience.[138] Yet those attempting to reach the gay market deny this complex view of sexual orientation. Instead, market research has tended to construct the gay market around those who are confident in their sexuality, producing advertisements representing sexuality in binary terms.[139] Bisexual and transgender consumers are ignored because their sexual orientation threatens the simplistic marketing view of sexuality.[140] For those modeling themselves on advertising specimens, they are forced to accept supreme sexual self-confidence and rigid obeisance to a heterosexual/homosexual dichotomy.[141]

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135. *See* CHASIN, *supra* note 86, at 48; SENDER, *supra* note 94, at 148.

136. Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 112 (1991).

137. *See* SENDER, *supra* note 94, at 13, 143.

138. *See* ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 468-76 (1953); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 636-50 (1948); *see also* EVE SEDGWICK, EPISTEMOLOGY OF THE CLOSET 67-68 (1990) (rejecting a binary view of sexuality and arguing that most openly gay people are "closeted" with someone).

139. *See* SENDER, *supra* note 94, at 148.

140. *Id.* at 163, 167.

141. One might argue that advertising in general, and advertising to the gay market in particular, also provide a falsely rigid conception of gender by circulating only particular kinds of male and female performance. *See* GAUNTLETT, *supra* note 24, at 140.

Moreover, in addition to forcing an essentialist view of sexuality on consumers, marketers assume that one identity based on sexual orientation must trump all others. There is no doubt that sexuality is popularly viewed as a vital component of identity today,[142] but there are other social identifications that are likely to have just as much importance to selfhood even for those identifying as gay and lesbian. Other badges of identity such as race and ethnicity are often omitted even though they may be much more salient to the sense of self of a viewer who also just happens to self-identify as gay.[143] Gay market advertising has been criticized for its heavy reliance on white models.[144] Some of this may be an effort to reach a particularly wealthy class of gay white males, but it also probably reflects a presumption by advertisers that what is needed to appeal to gay identities is an overriding focus on sexual orientation, rather than race, ethnicity, or other important aspects of identity.[145]

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142. *Id.* at 122.

143. *See* CHASIN, *supra* note 86, at 48; SENDER, *supra* note 94, at 163.

144. *See* HUGHES, *supra* note 96, at 158; Gluckman & Reed, *supra* note 74, at 4.

145. Sonia Katyal makes the important point that some advertisements take a more nuanced view of group identity. I want to be careful not to imply that *all* advertising treats group identity the same. If you look in the right places, you may be able to find campaigns designed to speak specifically to lesbians and members of the transgender community as well as campaigns that treat gay sexuality in a more nuanced, less conventional manner. *E.g.* Posting of Family Equality Council to Family Equality Council Blog, http://www.familyequality.org/ blog/?p=585 (Mar. 13, 2008) (describing recent Kenneth Cole advertisement featuring two lesbian mothers and their daughter). These advertisements might be viewed as fostering social change and encouraging the development of new identity models, rather than limiting the self-categorization process. The problem as I see it is that these sorts of commercial appeals are few and far between. When designer Marc Jacobs creates a transgender-positive ad, it stands out because it is so different from all of the other advertisements designed to appeal to the target market. *See Marc's New Ads: Dude Looks Like a Lady!*, NEW YORK MAG., June 20, 2008, http://nymag.com/daily/fashion/2008/06/marcs_new_ads_
dude_looks_like.html. Despite the creativity involved in generating advertising content, advertising is inherently conservative. *See* GAUNTLETT, *supra* note 24, at 56; *see also* ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940, at xvii-xviii (1985) (revealing that those working in early twentieth-century advertising agencies unconsciously created ad copy biased towards "system reinforcement" of dominant economic and social

ii. *Reducing the Availability of Non-Commercial Identity Models.* Commercial space is part of a collection of spaces that gay people claim and use for identity construction.[146] One might argue that even if gay market advertising articulates a narrow conception of gay identity, there are still many non-commercial resources available for those engaging in the self-categorization process. The gay community itself can provide the more diverse models necessary for healthy sexual identity formation, leaving individuals free to take or leave advertising's more limited offerings. But a second effect of niche advertising is the co-opting of community spaces for identity formation. Not only are there fewer available identity choices as represented by advertising, but there are also fewer outside fora for trying on non-advertising identities.

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hierarchies); Gloria Steinem, *Sex, Lies and Advertising*, *in* GENDER, RACE, AND CLASS IN MEDIA: A TEXT-READER, *supra* note 130, at 223, 223-29 (describing difficulties in convincing advertisers to abandon gender stereotypes in their ads for *Ms.* Magazine). Even in today's world of advertising targeted at specific social groups, a successful advertisement must generate positive feelings among a sufficiently large group of consumers. As a result, the advertiser must take pains not to offend too many onlookers. Because of this inherent bias in advertising content, I have little faith in advertising's overall ability to serve as a progressive force recognizing the vanguard in social change, at least until technology enables an even more individualized delivery of advertising content. If anything, the marketing articles advising businesses on how to appeal to the gay community suggest that advertisers will be behind the identity curve for a long time. Jennifer L. Aaker et al., *Nontarget Markets and Viewer Distinctiveness: The Impact of Target Marketing on Advertising Attitudes*, 9 J. CONSUMER PSYCH. 127, 137-38 (2000) ("[R]educed levels of persuasion occur when a member of a numerical majority group views an advertisement featuring a minority group member."); Gillian Oakenfull & Timothy Greenlee, *The Three Rules of Crossing Over From Gay Media to Mainstream Media Advertising: Lesbians, Lesbians, Lesbians*, 57 J. BUS. RES. 1276, 1284 (2004) (urging advertisers to avoid overtly gay male sexual imagery, given its potential to offend heterosexual consumers); *see also* Katherine Sender, *Selling Sexual Subjectivities: Audiences Respond to Gay Window Advertising, in* GENDER, RACE, AND CLASS IN MEDIA: A TEXT READER, *supra* note 130, at 302, 303 ("While groups who identify with a non-dominant sexual subjectivity are gaining increasing interest from marketers, advertisers continue to be notoriously conservative, especially when it comes to potentially alienating a segment of their existing market.").

146. *See generally* Steven M. Kates, *The Protean Quality of Subcultural Consumption: An Ethnographic Account of Gay Consumers*, 29 J. CONSUMER RES. 383 (2002).

Advertising has always been viewed as intrusive.[147] Yet in the past, marketing relied on mass appeals that left untouched many of the unique cultural spaces devoted to particular social groups. Citizens received their marketing messages from the same basic social media: radio, television, magazines, newspapers, and billboards. These media cast a wide net, hoping to appeal to consumers with broad, emotional themes.[148] This left available a separate sphere of localized, group-based spaces that were relatively untouched by national advertising. Recently, however, new techniques in gathering information on consumers have caused direct marketing to individual identity groups to become an increasingly important part of the advertiser's arsenal.[149] Advertisers now spend more time focusing on targeting the "right" customer, updating individual consumer profiles in a dynamic process.[150] With information rich databases at their disposal that contain a wealth of information about each consumer, the yield from each advertisement is now much greater. As a result, it now makes more sense for advertisers to place advertisements in smaller spaces that can only reach a small audience. In addition, the low transmission cost of Internet communications makes broadcasts to select audiences financially plausible.[151] In general, technology permits effective appeals to smaller groups, thereby resulting in more targeted advertising in specific social enclaves.

This phenomenon is evident in the history of advertising to the gay community. Counter-spaces where gays and lesbians could depart from heterosexual norms and enter into completely gay environments have been

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147. *See* LEARS, *supra* note 83, at 294 (discussing opposition to the first widespread use of billboards).

148. MARCHAND, *supra* note 145, at 66-69 (1985) (discussing emotional appeals found in early twentieth century advertisements); TUROW, *supra* note 77, at 36-38 (describing the switch from mass-oriented periodicals and radio programs to media that targeted small, specific audiences).

149. CELIA LURY, CONSUMER CULTURE 35 (1996); *see also* SENDER, *supra* note 94, at 115-18 (describing advertisers' direct mailing campaigns to gays).

150. *See* SENDER, *supra* note 94, at 66-67.

151. *See* ANDERSON, *supra* note 87, at 210; Saul Hansell, *As Internet TV Aims at Niche Audiences, the Slivercast is Born*, N.Y. TIMES, Mar. 12, 2006, at B1.

crucial to the development of gay identity.[152] The geographical possibilities and restrictions homosexually-inclined people face have a direct influence on identity construction.[153] Before niche marketing, members of the gay community had several relatively ad-free zones at their disposal that assisted their self-definition efforts. Gay bookstores provided crucial meeting spots for gays and lesbians, not just to find reading material, but to meet others that were confirming and experimenting with their sexuality.[154] Similarly, gay bars and bathhouses offered a social sphere where identities could be discovered and affirmed.[155] Gay publications specifically addressed to the gay community also served as important locations of "gay space."[156] Vacation spots like Key West and Fire Island influenced not only those who traveled there, but those who knew of their existence and developed an idea of what they stood for.[157]

Now, however, a central tenet of niche marketing calls on the marketers to invade group meeting places.[158] Market researchers emphasize the need for gay niche advertisers to enter gay social networking sites.[159] Gay bookstores are

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152. *See* Stephen Clift et al., *Introduction*, *in* GAY TOURISM: CULTURE, IDENTITY AND SEX, *supra* note 97, at 1, 3, 38.

153. *See* Cox, *supra* note 125, at 161-62.

154. *See* David Bergman, *Selling Gay Literature Before Stonewall*, *in* A SEA OF STORIES: THE SHAPING POWER OF NARRATIVE IN GAY AND LESBIAN CULTURES 43, 43 (Sonya L. Jones ed., 2000) (discussing the importance of gay bookstores in the formation of gay communities).

155. *See* Allan Berube, *The History of Gay Bathhouses*, 44 J. HOMOSEXUALITY 33, 33-34 (2003); *see also* Howard Buford, *Understanding Gay Consumers*, 7 GAY & LESBIAN REV. 26, 27 (2000) ("Gay culture has traditionally centered around the gay bar; companies with products consumed in bars such as spirits, beer, and cigarettes, saw this marketing opportunity early on.").

156. *See* Fejes, *supra* note 130, at 219.

157. Clift et al., *supra* note 152, at 3.

158. *See* WITECK & COMBS, *supra* note 104, at 113; *see also* Stuber, *supra* note 97, at 100.

159. *See* WITECK & COMBS, *supra* note 104, at 88. One academic report contends that gay sexual identification is rare on Facebook, suggesting that social networking sites may be a poor substitute for the bookstores, bathhouses, and other gay-friendly meeting spaces of the past. *See* Shanyang Zhao et al., *Identity Construction on Facebook: Digital Empowerment in Anchored Relationships*, 24 COMPUTERS IN HUM. BEHAV. 1816, 1829-30 (2008).

dying out as the technology that propels Amazon.com and Barnes and Noble allows for individualized servicing of the need for gay-themed communications.[160] Instead of finding commercial-free public spaces to discuss gay issues, people can now turn to a gay television network that airs gay issues, but only with the willing compliance of national marketers. Rather than providing a "public space" for gay politics and coalition-building, gay publications, under the increasing influence of corporate advertisers, have become centered on consumerism, not civil rights.[161] Many specifically gay businesses that provided a safe haven for community collaboration have had to shut down, as conglomerates now find it worthwhile to produce gay-themed merchandise thanks to niche marketing.[162]

As the number of physical spaces available for non-commercial self-categorization decline, the means for recognizing actual members of relevant social groups are thinning as well. Advertising employs symbols to make its points, often appropriating preexisting symbols of social groups. Symbols represent a crucial aspect of gay identity formation.[163] Particularly for a group whose distinguishing characteristic is not visible, in-group monikers serve as important means to find other group members who may provide guidance in the self-categorization process. As a result, the gay community has created several "codes" designed to let others in the community know that they are there. For example, the rainbow has long been a symbol of homosexuality. It was explicitly adopted by the gay rights movement in 1978 to serve as the organizing symbol of the San Francisco gay pride parade.[164] The word "pride" was originally adopted by those in the gay community to signal an aggressive affirmation of identities focused on a

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160. *See* M. V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 131 (2001).

161. SENDER, *supra* note 94, at 30-36; *see also* WALTERS, *supra* note 87, at 241.

162. WALTERS, *supra* note 87, at 279; *see also* SEAN GRIFFIN, TINKER BELLES AND EVIL QUEENS: THE WALT DISNEY COMPANY FROM THE INSIDE OUT 182-214 (2000) (discussing Disney's target marketing of the gay community).

163. *See* Lisa C. Bower, *Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture, and Community*, 28 LAW & SOC'Y REV. 1009, 1016-17 (1994).

164. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 3 (2000).

particular, disparaged sexual orientation.[165] Other words and symbols have also been chosen by the gay community and reworked to have new in-group meanings.[166]

Advertising alters the meaning of these "codes." For example, "pride" has become a powerful signifier for advertisers attempting to signal affiliation with the gay community. Today, websites entreat browsers to engage in "fabulous pride shopping"[167] and boast "the Internet's **LARGEST SELECTION** for your gay pride shopping . . . ."[168] PRIDE BEER offers the potential to affirm a gay identity while quaffing an alcoholic brew.[169] By appropriating the word "pride," advertisers have made a political symbol non-threatening.[170] Similarly, advertisers use the rainbow flag to immediately bestow gay visibility on their products.[171] Pink triangles and AIDS ribbons appear in ads for alcohol and underwear.[172] These commercial uses of gay "codes" dilute any explicit message of political support for gays.[173]

It would be wrong to argue that advertising's infiltration of historically gay symbols and venues somehow leaves gay men and women with no place to form identities. In fact, advertising, to some degree, validates some aspects

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165. CHASIN, *supra* note 86, at 110-11.

166. *See* Ratna Kapur & Tayyab Mahmud, *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain*, 5 MICH. J. RACE & L. 995, 1023 (2000) ("[W]ords intended to insult gay men and women, such as 'fruit,' 'dyke,' and 'fag,' have been appropriated by the gay community as words denoting pride, self-awareness, and self-acceptance.").

167. *See* Over the Rainbow Shop, http://www.overtherainbowshop.com/ (last visited Feb. 18, 2010).

168. *See* Rainbow Depot, http://www.rainbowdepot.com/ (last visited Feb. 18, 2010).

169. Steven M. Schnell & Joseph F. Reese, *Microbreweries as Tools of Local Identity*, 21 J. CULTURAL GEOGRAPHY 45, 64 (2003).

170. CHASIN, *supra* note 86, at 110-11; SENDER, *supra* note 94, at 128.

171. SENDER, *supra* note 94, at 108; Stuber, *supra* note 97, at 103; Kates, *supra* note 146, at 388.

172. Ronald Alsop, *Cracking the Gay Market Code—How Marketers Plant Subtle Symbols in Ads*, WALL ST. J., June 29, 1999, at B1.

173. *See* KLEIN, *supra* note 63, at 112-13.

of gay identity.[174] At the same time, however, niche marketing shrinks the geography of identity development. Commercial uses of gay symbols make it less clear whether the symbol stands for a bona fide group representative or an out-group marketer. Moreover, at a certain point, repetition of key gay icons in advertising results in their discovery by the mainstream. Advertisers are then forced to co-opt new cultural symbols for their ads or lose the cachet of a gay-themed appeal. The result is a commercial speech regime that burns through and discards the powerful political symbols of an oppressed minority. It is not clear that these symbols are a renewable resource. Their meanings sometimes stem from long histories of discrimination. Once they have been used to sell, they are not as valuable for asserting and observing identities.[175]

2. *Niche Advertising and Social Comparison.* While conservative notions of sexuality and the co-optation of gay spaces and symbols by advertisers limit the reference points available for those assessing categorization within the gay community, advertising also affects the potential metrics for comparing one's gay identity to other group identities. Social identity theory posits that after categorizing one's self into a social group, the individual then compares that social group with other groups, highlighting in-group similarities and out-group differences.[176] Although this process, if taken too far, can lead to stereotyping and deep mistrust of outside groups, it is also a crucial ingredient in developing the self-esteem necessary for a healthy sense of self.[177] We form self-esteem primarily through making favorable comparisons with others.[178] This process requires

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174. *See infra* notes 101-104 and accompanying text.

175. *See* CHASIN, *supra* note 86, at 110; *see also* Assaf, *supra* note 57, at 10-28 (making the larger point that the appropriation of cultural symbols strengthens the advertiser's message while weakening the power of the borrowed symbol).

176. Stephen Worchel & Dawna Coutant, *It Takes Two to Tango: Relating Group Identity to Individual Identity Within the Framework of Group Development*, *in* SELF AND SOCIAL IDENTITY, *supra* note 32, at 182, 189.

177. *See* Cox & Gallois, *supra* note 46, at 13.

178. Marilynn B. Brewer & Wendi Gardner, *Who is This "We"? Levels of Collective Identity and Self Representations*, *in* ORGANIZATIONAL IDENTITY: A READER 66, 70 (Mary Jo Hatch & Majken Schultz eds., 2004) ("Most theories of personal self-esteem assume that global self-worth at the individual level is

that we make the mental choice to compare ourselves to others on the basis of dimensions that are favorable to our own self-categorized social group.[179]

Advertising influences this process because it chooses particular aspects of social groups to highlight. Sometimes these are innate characteristics of the group. An advertiser might pitch a product designed for women by highlighting a particular aspect of female physiology. At other times, the advertiser creates an appealing aspect of group membership out of whole cloth. For example, advertisers disproportionately emphasize athleticism in commercials meant to appeal to African-Americans.[180] Niche advertising reinforces these aspects over and over in direct appeals to those who have already categorized themselves as members of the target group. My supposition is that advertising causes certain lines of difference with other groups to be more salient than others, thereby influencing the process of social comparison.

Advertisers influence the comparison process by depicting particular consumer lifestyles as central to group identity. Lifestyle choices are crucial components of modern identity construction. They provide readily digestible structures to give our personal stories a coherent shape.[181] As other traditional routes of identity formation have declined, identities have become more tightly linked to particular lifestyles.[182] In urban societies, where most of our social interactions occur with complete strangers, individuals can express their identities to others and develop clear lines of comparison with other social groups by adopting and displaying the accoutrements of a particular lifestyle.

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derived from self-evaluation of personal traits and characteristics based on interpersonal comparisons to relevant others.").

179. Michael A. Hogg, *Social Identity and Social Comparison*, *in* HANDBOOK OF SOCIAL COMPARISON: THEORY AND RESEARCH 401, 404-05 (Jerry Suls & Ladd Wheeler eds., 2000).

180. Julia M. Bristor et al., *Race and Ideology: African-American Images in Television and Advertising*, 14 J. PUB. POL'Y & MARKETING 48, 50-51 (1995).

181. GAUNTLETT, *supra* note 24, at 103.

182. *See* GIDDENS, *supra* note 28, at 5; P.D. Glennie & N.J. Thrift, *Modernity, Urbanism and Modern Consumption*, 10 ENV'T & PLAN. D: SOC'Y & SPACE 423, 435 (1992).

Advertisers offer the most accessible representations of what is necessary to participate in a particular lifestyle. People drive Toyota Priuses and buy Seventh Generation cleaning products to be part of an environmentally-conscious lifestyle,[183] wear Brooks Brothers suits to signal personal conservatism and aspirations to high managerial positions,[184] and drive Harleys to display an inner value structure that favors machismo and freedom from workplace restrictions and social conformity.[185] As these examples show, the lifestyle depicted by advertising can become central to a person's concept of self. In marketing terms, a lifestyle is a lived framework that links perceptions of individual products to an overall abstract value structure.[186] Advertisers elect to propagate certain lifestyles that they think will resonate with their target audience *and* encourage them to purchase.[187] Marketing analysts contend that by developing a lifestyle portrait of a consumer, the advertiser can tailor its appeal to the core roles that consumers view as key to their self-definition.[188] The idea is not only to make the products appealing in themselves, but to embed them in the values and beliefs of consumers. Niche advertisers do this by highlighting the appeal of a particular lifestyle supposedly tailored to group identity.

Lifestyle advertising can be particularly salient to groups that have been stigmatized. Given their marginalization in other contexts, the consumer identities of stigmatized group members rise to the surface as a way to assert their political support for their own identity group and to emphasize their differences with others. Particular purchases provide a means to demonstrate a strong commitment to a particular marginalized identity.[189] By

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183. *See* MICHMAN ET AL., *supra* note 65, at 41.

184. *Id.* at 71.

185. *See* Schouten & McAlexander, *supra* note 14, at 51-55.

186. Karen Brunsø et al., *Closing the Gap Between Values and Behavior—A Means–end Theory of Lifestyle*, 57 J. BUS. RES. 665 (2004).

187. *See* GAUNTLETT, *supra* note 24, at 102-03; MICHMAN ET AL., *supra* note 65, at 15.

188. Joseph T. Plummer, *The Concept and Application of Life Style Segmentation*, 38 J. MKTG. 33, 37 (1974).

189. *See, e.g.*, Schofield & Schmidt, *supra* note 44, at 310 (discussing the importance of clothing and fashion to gay identity).

adopting advertisers' prescribed consumption tastes, members of the gay subculture emphasize boundaries with "mainstream" culture and thereby reaffirm their own identities while engaging in the comparison process.[190] A review of the marketing literature on gay niche advertising reveals two key lines of social difference emphasized by advertisers. One of these social demarcation points arguably helps facilitate comparisons useful to building self-esteem, while the other appears to drive a wedge between individuals self-categorizing as gay.

One intergroup comparison point championed in gay market advertising focuses on the supposed closeness of the gay community and the value of gay relationships. While an emphasis on interpersonal connections is common to advertising in general, it is not viewed as a worthwhile strategy for every demographic.[191] Yet market researchers describe the gay community as particularly "connection hungry."[192] Their advice to advertisers is to deploy words and symbols emphasizing the bonds formed between members of the gay community.[193] "Family" is an important signifier in gay advertising.[194] Not only is the word "family"

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190. *See* Kates, *supra* note 120, at 388-90. Theories of gay identity owe a lot to philosopher Michel Foucault. Foucault's work on the history of sexuality proposes that all sexuality, including gay sexuality, has been socially constructed and then internalized. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 29-43 (Robert Hurley trans., Vintage Books 1990) (1976). He was particularly interested in studying gay sexuality because of its newness—Foucault maintained that the social category "homosexual" did not even exist until the late 1800s. *Id.* at 42-43. This allowed him to explore the self-regulatory processes of a group that lacked a built-in lifestyle pattern. *See* GAUNTLETT, *supra* note 24, at 131. In some ways, even though they were adopting sexual identities based on the dictates of outside power structures, the gays and lesbians studied by Foucault had more choice in how to structure those identities than in the present. Foucault studied gay sexuality at a time, however, before advertisers had set their sights on the gay market.

191. *See* Robert T. Green et al., *The Effectiveness of Standardized Global Advertising*, 4 J. ADVERTISING 25, 28 (1975) (arguing that advertising often cannot be standardized for international audiences because of differences in the emphasis on family in various cultures).

192. WITECK & COMBS, *supra* note 104, at 88.

193. *See id.* at 127.

194. For an example of the use of the word "family" in an appeal to the gay niche market, see Joe Bob Hester & Rhonda Gibson, *Consumer Responses to*

used in gay market appeals, but marketers routinely employ cues such as the presence of children and pets and physical contact between the individuals in an ad to suggest familial relationships.[195]

Advertisers' emphasis on relationships and belonging to a larger community is not necessarily a bad thing. In order to maintain a positive sense of self, individuals need to have supportive appraisals from others reflected back at them.[196] This process is particularly crucial for members of stigmatized communities who receive less social affirmation and more negative appraisals from mainstream society.[197] If advertising reinforces the special nature of gay relationships as a metric of difference, this seems to only bolster the instinctual desire to selectively associate with supportive others. In the gay community, it is not always easy to find the necessary positive appraisals. Not everyone lives near an urban center with a large visible gay population or has open-minded family and friends.[198] Commercial imagery and text incanting the value of gay relationships may help convince gay individuals to keep looking.

A second line of difference created and reinforced by niche advertising to the gay market is an emphasis on trendsetting. Market researchers like to cite data showing that self-identified gays and lesbians feel more compelled to keep up with styles and trends and upgrade their purchases than the general population.[199] Yet it is more likely that advertising produced this trendsetting gay market rather than stumbling upon it. Advertisers naturally represent themselves as authentic sources of group meaning, stressing in their appeals the need for a particular type of group affiliation that can be met by copying the

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Gay-Themed Imagery in Advertising, ADVERTISING & SOC'Y REV., (2007), http://muse.jhu.edu/journals/advertising_and_society_review/v008/8.2hester_gibson.html.

195. Borgerson et al., *supra* note 130, at 964-65.

196. Kaufman & Johnson, *supra* note 115, at 809.

197. *See id.* at 827-28.

198. *Id.*

199. HUGHES, *supra* note 96, at 27; *see also* WITECK & COMBS, *supra* note 104, at 126; Stuber, *supra* note 97, at 100.

consumptive practices of a particular group lifestyle.[200] By depicting itself as an authority on the social group, the niche advertiser brings about changes in the viewer's process of identification with the social group. Katherine Sender describes advertising agencies at an early stage of gay niche advertising conceptualizing the gay shopper as trendy and free-spending, long before there was any significant market data to back up this characterization.[201] They cultivated a view of the gay market as affluent and fashionable, which made it more appealing to businesses looking for the next niche market.[202] National gay and lesbian magazine the *Advocate* shifted from discussions of politics and sexuality—things that were not necessarily appealing to advertisers—to a focus on an ideal gay lifestyle that devoted significant time to fashion, fitness, and grooming.[203] An attractive stereotype of the chic gay male developed that advertisers intentionally reinforced. By positioning goods next to this positive gay sensibility, they made their wares more attractive to gay consumers and to heterosexual consumers who wanted to seem hip.[204]

The major drawback to the advertisers' representation of a trendsetting gay lifestyle is that it divides those categorizing themselves as gay by class. To participate in this lifestyle, to be gay according to the advertisers, one must be able to purchase the requisite number and type of consumer goods. Purchasing power becomes a way to differentiate gays from other social groups. As one senior writer for the *Advocate* and *Time Magazine* recently commented, "We all agree that sexual orientation isn't just about whom you sleep with but how much of your identity is

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200. *See, e.g.*, Gregory M. Rose et al., *Social Values, Conformity, and Dress*, 24 J. APPLIED SOC. PSYCHOL. 1501, 1516-17 (1994) (describing research showing that a desire for brand names in clothing can be tied to conformity, and conformity is driven by a need for group affiliation and identification emphasized by clothing advertisers).

201. SENDER, *supra* note 94, at 29; *see also* Kates, *supra* note 120, at 25 (discussing the caricature of the "gay spender").

202. SENDER, *supra* note 94, at 49.

203. Katherine Sender, *Gay Readers, Consumers, and a Dominant Gay Habitus: 25 Years of the* Advocate *Magazine,* 51 J. COMM. 73, 92 (2001).

204. SENDER, *supra* note 94, at 107-08; Stuber, *supra* note 97, at 100; *see also* Sender, *supra* note 134, at 422 (discussing advertisers' use of lesbian themes to connote glamour).

tied up in the things you have to buy (not to mention the price you're willing to pay for them)."[205] But not everyone can afford to participate in an "early adoption" lifestyle. Some describe frustration at not being able to realize a gay identity because they cannot afford the gay lifestyle as described by advertisers.[206] Gay media and advertisements may be received by many, but the lifestyles they describe may only be attained by some.[207]

It is not just the focus on trendsetting but a concurrent emphasis on taste that splits the gay community apart. Appeals to taste naturally fit with the process of comparing social groups and reinforcing cultural differences.[208] We are hardwired to expect taste differences to draw lines between social groups, with some communities liking different foods, different dress, and different ways of communicating. Yet in appealing to the gay market, advertisers have emphasized not just a particular type of gay aesthetic, but the ability of gays to determine the value of cultural goods for gays and non-gays alike. The popular show *Queer Eye for the Straight Guy* projected gay males as somehow having a sixth sense for which products and styles should be consumed and which should not, and compared them to heterosexual consumers completely lacking this ability. This comparison can be viewed as a powerful line of difference with other social groups and a source of cultural power.[209]

But the focus on taste also threatens to leave out large segments of the gay community. Taste is intimately

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205. John Cloud, *The Co$t of Being Gay*, ADVOCATE, Oct. 21, 2008, at 36.

206. *See* Fejes, *supra* note 130, at 219.

207. According to market researchers, gays tend to favor lifestyle, home decorating and design magazines. WITECK & COMBS, *supra* note 104, at 93. Previous researchers have demonstrated that although these magazines do have some less affluent subscribers, the magazine editors only tailor their content to the affluent, in effect, ignoring part of their readership yet making their product appealing to advertisers. *See* Sender, *supra* note 203, at 92 n.12.

208. *See* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 6-7 (Richard Nice, trans., 1984).

209. *See* Kylo-Patrick R. Hart, *We're Here, We're Queer—and We're Better Than You: The Representational Superiority of Gay Men to Heterosexuals on Queer Eye for the Straight Guy*, 12 J. MEN'S STUD. 241, 246-47 (2004) (noting the position of "dominance" the five gay main characters have over their straight male subjects in each episode).

associated with class and status.[210] The taste-making function of advertising can produce cultural stratification as advertisers adopt a more artistic and abstract form of message for a particular subculture, leaving only customers of a certain economic spectrum likely to understand and appreciate the message.[211] Sender contends that gay magazines articulated the notion of the tasteful gay consumer to interpellate a particularly desirable sub-segment of the gay community desirable to advertisers.[212] As part of this project, gay marketers and gay media contrasted the high status, high class tastes of the aspirational gay consumer with low status, low class tastes of those deemed outside of the community. This contrast involved not only consumer goods, but representations of sex embedded in the advertisements for those goods.[213] Sexual representation in gay media now reflects discretion where it once reflected liberation and experimentation.[214] As a result of this shift, self-categorized gay individuals who do not fit the ordained model of conservative, tasteful gay sexuality find themselves having to choose between giving up any claim to gay "good taste" or abandoning a type of sexual identity not recognized by the advertisers. Social identity theory tells us that beneficial comparisons are required to reinforce the desirability of inclusion in the categorized social group.[215] For those without the means to make such comparisons, positive self-esteem is not built up and the group identity becomes less stable.

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210. *See* Herbert J. Gans, Popular Culture and High Culture: An Analysis and Evaluation of Taste 94-95 (2d ed. 1999).

211. Christian Vermehren, *Cultural Capital: The Cultural Economy of U.S. Advertising*, *in* Undressing the Ad: Reading Culture in Advertising 197, 221 (Katherine Toland Frith ed., 1997).

212. Sender, *supra* note 121, at 335-36.

213. *Id.*

214. *See id.* at 352; *see also* Chasin, *supra* note 86, at 129 (discussing how gay market advertising has reinforced traditional gender roles).

215. *See* Jolanda Jetten et al., *Group Distinctiveness and Intergroup Discrimination, in* Social Identity: Context, Commitment, Content 107, 109 (Naomi Ellemers et al. eds., 1999).

III. IMPLICATIONS

Maybe the best evidence of the marketers' influence on gay identity is MTV's choice of name for its gay and lesbian-themed television network: Logo. Started in 2005, Logo provides gay-themed content for television audiences.[216] Its appeal lies in its ability to deliver advertising messages specifically tailored to the gay and lesbian identity group, a perfect example of niche marketing. Logo's website explains why MTV chose that particular name for its network:

> We chose to name the channel "Logo" because as the first and only 24/7 channel for the LGBT community, we wanted a name that people could make their own and give it personal meaning. For us, the word "Logo" is about identity, about being comfortable in your own skin. It's about being who you are.[217]

For a couple of reasons, I think MTV's chosen name for its network is significant. First, the popular understanding of the term logo is as a symbol chosen to represent a brand, i.e., a trademark.[218] In other words, the name of the network meant to capture the gay niche market is synonymous with corporate branding. This suggests to me that advertisers no longer believe that the target market has its guard up. In the past, market researchers detected hostility from the gay community towards advertising.[219] Now, however, commercial entreaties signal affirmation and empowerment of gay identity. Advertising seems to have won the gay community over. One author contends that today, more than anything else—including sexuality—consumption of advertised products constitutes the gay identity.[220]

Second, MTV's choice signals that, after years of niche marketing to a particular identity group, less concession

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216. Logo Frequently Asked Questions, http://www.logoonline.com/about/faq.jhtml, (last visited June 15, 2010).

217. *Id.*

218. *See* Marcel Danesi, Why It Sells: Decoding the Meanings of Brand Names, Logos, Ads, and Other Marketing and Advertising Ploys 78-79 (2008).

219. *See* John J. Burnett, *Gays: Feelings About Advertising and Media Used*, J. Advertising Res., Jan.-Apr. 2000, at 75, 83.

220. Hughes, *supra* note 96, at 152; *see also* Klein, *supra* note 63, at 114 ("Gay identity has dwindled into basically, a set of product choices").

needs to be made to that group's pre-niche marketing semiotic decisions. In the past, advertisers were somewhat limited in the ways that they could send an affirming message to gay community members. The history of gay market advertising shows a continual appropriation of historical symbols of the gay liberation movement.[221] These symbols, once used to suggest a militant, political identity, were co-opted to be used in the service of commerce. In the process, the advertiser could not completely make the advertisement its own; it had to show some deference to the "codes" of the target community. Although the advertiser's efforts could, in part, reshape and depoliticize the meaning of these codes, some respect had to be paid to their original meaning. But now, instead of using symbols originally authored by the gay community and fraught with a historical message, advertisers can signify gay identity with a term of their own choosing. As a result, the advertising process is less of a dialogue between advertiser and group member than it was before. The signifier "Logo" suggests an empty brand name waiting to be filled with meaning by its creator. The copy from Logo's website promises that viewers will author the meaning for the Logo name for themselves, but much of this meaning has been provided by MTV and the advertisers that sell their wares on the network. They choose the network's programming, the content of its advertisements, the contextual cues surrounding the Logo name, and the manner of representing the Logo name itself. The example of Logo suggests that the ability of advertisers to shape group identity increases as group members become more familiar and accepting of the advertisers' presence.

We should be cautious when advertisers invite us to use their products and brands to fill in the gaps of our identity narratives. Our sense of self is produced by many factors. Family, friends, childhood traumas, and workplace triumphs all shape who we are. Advertising is not an omnipotent force. Yet advertising's constant, insistent presence combined with the more targeted efforts of its practitioners should give us some concern. Group-based commercial appeals influence the categorization and comparison processes that social identity theory tells us are essential to optimal self-development. Whereas we may once have shrugged off or failed to notice the homogenous

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221. See *supra* text accompanying notes 164-173.

mass appeal of advertising, now the ads know where to find us based on the very group memberships that form the core of our identity.

If advertisers currently have too large of a role in shaping modern identities, then what is the solution? The semiotic democratists urge legal reform. They offer numerous examples of citizens stymied by trademark doctrine and other legal rules in their efforts to retrain branded messages to better suit their own value systems.[222] Trademark law helps protect the meaning enshrined in the advertiser's message. It blocks others from using the advertiser's mark, the most concentrated representation of its message, in ways that are likely to confuse shoppers or to dilute the mark's commercial presence.[223] In general, social identity theory shows that we should be suspicious of legal regimes that privilege a party that limits the materials and relationships we use to understand ourselves. Healthy identity formation requires the ability to pick and choose from a wide array of contrasting messages.[224]

Where it can, the law should encourage, not stifle, efforts to expand identity models. The scholarly work of the semiotic democratists highlights examples of open resistance to advertising's construction of identity and how the current legal regime sometimes snuffs out that resistance.[225] This resistance is an important step in leveling the expressive playing field between advertisers and consumers. Right now, trademark infringement decisions exhibit little sensitivity to this issue.[226] When defendants use a mark in a way that reworks the potential image for a social group, offering something new from the identity

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222. *See* Gibbons, *supra* note 1, at 248; Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 493-95 (2006) (detailing examples of artists and activists using corporate logos to make political and artistic statements); Madow, *supra* note 3, at 142-46; William McGervan, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 61-66 (2008).

223. *See* 15 U.S.C. § 1125(a), (c) (2006).

224. GAUNTLETT, *supra* note 24, at 255-56; text accompanying notes 122-125.

225. *See supra* notes 1-3.

226. *See* Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 384-87 (2008) (describing the application of trademark law to prevent the use of marks in commentary, parody, and satire and arguing that more courts should subject trademark disputes to a First Amendment analysis).

model constructed by the advertiser, courts should take this into consideration.[227] Some consumer confusion may need to be tolerated to allow for expressive re-workings of established brands.[228] We should also be wary of legal rules that favor familiar tropes of identity designed by advertisers to appeal to wealthy consuming segments. Niche advertising adopts a particular representation of a social niche, usually the most lucrative segment of a particular social grouping.[229] In designing advertisements for the gay market, advertisers have represented gay identity as white, male, rich, and trendy.[230] Because of this predisposition in favor of the dominant aspects of a particular social group, the law of advertising should be especially careful when advertisers contend that their high status product is being harmed by its use in a lower status item. If advertising limits self-categorization to a favored segment within a social group, the law should favor alternative uses of the advertiser's message that include less favored segments within that group and thereby expand the points of reference available for identity formation. Unfortunately, trademark dilution law operates in the opposite direction, prohibiting mark uses that weaken the reputation of a famous mark by creating an unsavory association in the consumer's mind.[231] Consumers should be protected from

227. *See generally* Heymann, *supra* note 16, at 697 ("[W]e should encourage the same construction of self-image through choice by exhibiting greater skepticism of aspects of trademark law that interfere with that autonomy.").

228. Currently, courts often conclude that survey evidence of consumer confusion prohibits a successful parody defense. See, *e.g.,* Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 772, 774-75 (8th. Cir. 1995); Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 400-01 (8th Cir. 1987).

229. *See* TUROW, *supra* note 77, at 66-67 (describing niche marketers' acceptance of the theory that only twenty percent of a merchant's customers generate eighty percent of sales).

230. *See* SENDER, *supra* note 94, at 49; *supra* text accompanying note 144.

231. *See* 15 U.S.C. § 1125(c)(2)(C) (2006). Evaluation of trademark infringement is open to criticism on this ground as well, at least in the Second and D.C. Circuits where courts examine the comparative quality of the parties' goods in determining the likelihood of consumer confusion. *See* Playtex Prods., Inc. v. Georgia-Pacific Corp., 390 F.3d 158, 162 (2d Cir. 2004); Malarkey-Taylor Assocs., Inc. v. Cellular Telecomms. Indus. Ass'n, 929 F. Supp. 473, 477 (D.D.C. 1996). Other legal scholars have criticized courts' use of the quality factor on different grounds. *See, e.g.,* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1644-45 (2006)

some confusing marketplace associations, but they also should be given some freedom to inject new meanings for commercial symbols into society.

Yet law's chilling effect on artistic and political resistance to the marketer's message is not the most important implication of advertising's increasing influence on group identity. Most of us are not semiotic bomb throwers struggling against a pro-business legal regime. We typically do not actively process advertising messages in the first place. Instead, advertising comes at us obliquely, and we digest the advertiser's message without giving it our full attention.[232] The experience of the gay niche market suggests that the heart of the problem lies not with trademark activists trying to put their new stamp on brand meanings, but with the passive receptors of the advertiser's message. Much of the interface between advertising and identity formation occurs under the surface of conscious awareness.[233] Some of these subconscious responses are beneficial. Targeted advertising affirms the identities of some who categorize themselves as gay, and valuably promotes the use of intragroup relationships as a way to emphasize differences with other social groups.[234] But, on the negative side, gay niche marketing has created a circumscribed definition of what it means to be gay, how the gay lifestyle may be lived, and what cultural space is available for the development of the gay identity—all threats to self-categorization for the homosexually-inclined.[235] Marketers also encourage the target market to compare itself to other social groups through metrics that may destabilize the identities of those who fall on the wrong side of a classist line.[236]

I think what is most important is a realization that advertising influences our life narratives. Some are being frustrated in their conscious efforts to re-work marketing texts and logos, but most of us do not realize the real impact

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("Perhaps more than any other, the quality factor is an embarrassment to the multifactor test . . . .").

232. *See* Bartholomew, *supra* note 6, at 40-44; Hammer, *supra* note 1, at 442.

233. *See supra* text accompanying notes 65-68.

234. *See supra* text accompanying notes 101-104, 192-198.

235. *See* discussion *supra* Part II.B.1.

236. *See* discussion *supra* Part II.B.2.

of advertising on who we are. The ads we see and the products we buy help us find a place in the social groups that are necessary for self-fulfillment. They also provide a shorthand for others looking for like-minded travelers in the complex navigation of modern identity. Hence, advertising is crucial to self-definition, yet we often unknowingly accept its impact. This is a mistake because the advertiser's goals and our own psychological needs may not be in alignment. Citizens living in an increasingly commercialized world need to alert themselves to advertising's very personal effects. Regulators can further this process by requiring greater disclosure of the corporate sources behind advertising[237] and more educational resources for citizens to decipher advertising content.[238] Our minds can be trained to be more aware and more observant of many things, including advertising.[239] Ads are here to stay, but their presence needs to be monitored not just by legal and government watchdogs, but by ourselves.

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237. *See, e.g.*, Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 752-53 (2010) (describing new regulations of the Federal Trade Commission that require bloggers to disclose payments or free samples that they receive from companies for reviewing their products).

238. *See* DITTMAR, *supra* note 64, at 145, 208 ("[S]everal media literacy interventions demonstrate that it is possible to increase women's skepticism about the desirability of media that depicts a thin beauty ideal . . . .").

239. *See* Kirk Warren Brown & Richard M. Ryan, *The Benefits of Being Present: Mindfulness and Its Role in Psychological Well-Being*, 84 J. PERSONALITY & SOC. PSYCHOL. 822, 822-23 (2003).