Historical and Legal Implications of Subliminal Messaging in the Multimedia: Unconscious Subjects

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HISTORICAL AND LEGAL IMPLICATIONS OF SUBLIMINAL MESSAGING IN THE MULTIMEDIA: UNCONSCIOUS SUBJECTS

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I. INTRODUCTION

"Teenagers, take off your clothes" is what people all over the world began to hear as word spread that Disney incorporated a hidden message in its acclaimed movie "Aladdin." The message, unavoidable, yet undetectable

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unless paid close attention to, has been linked to “the power of suggestion” because once people were informed of the rumored dialogue, they too began to hear it.  

Visual hidden messages have also surfaced in Disney movies. For example, in “The Lion King,” Disney artists manipulated their drawings to briefly flash the word “SEX” on the screen, scrawled out in a cloud of dust. This “message[] can be identified as [an] indirect hidden message[], which mean[s] the viewer was not directly intended to see the message, unless possibly looking for such material.” However, a Disney representative argued that this scene was in a wholesome family film, and anything that might be viewed as inappropriate for such a film is perceptional.

Subliminal messaging is not specific to Disney, nor is it solely sexual in nature. In several situations, musicians have included messages in their songs that have not only led to atypical acts by listeners, but have also allegedly led to their self-inflicted deaths. In response to reactions, such as these suicides, courts have explored the issue of whether subliminal messages are considered speech and covered by the same First Amendment protections as actual lyrics—which are classified as speech.

Similarly, this article will explore the conflicting First Amendment rights of both the entertainment industry and the fans of the particular pieces of work. Sections II and III will discuss the history of attempts at unconscious persuasion and current regulations regarding subliminal messaging. This article will further explain how subliminal messages work and the sickness these messages have been reported to cause. This article will also dis-

2. Id.
4. Id.; see LION KING (Walt Disney Pictures 1994).
6. Id.
7. See, e.g., Larry Rohter, 2 Families Sue Heavy-Metal Band as Having Driven Sons to Suicide, N.Y. TIMES, July 17, 1990, at C13.
8. E.g., id. The album that was said to influence the suicides of teenage boys was Stained Class by Judas Priest, and the lyrics at issue included “Let’s be dead” and “Do it.” Id. “Both the group and its record label [were] charged in a civil suit with the liability arising from the manufacture and marketing of a faulty product, as well as negligence and intentional and reckless misconduct.” Id.
cuss the unconscious processing and impact on behavior, as well as the public’s reactions to these messages and the consequences these messages have. The final sections will analyze the First Amendment implications, as previously mentioned, that may exist for both parties to the message—the creator and the viewer or listener. This article will conclude with recommendations by the authors and a brief summary of the issue.

II. THE HISTORY OF ATTEMPTS AT UNCONSCIOUS PERSUASION

The word “subliminal” is a Latin word derived from the words “sub,” meaning below, and “limen,” meaning threshold.10 The Oxford English Dictionary defines subliminal as that existing or functioning “under the threshold of consciousness.”11 Subliminal messages are generally defined as “the projection of messages by light or sound so quickly and faintly that they are received below the level of consciousness.”12 There are various ways to achieve a subliminal message including: A picture or written command flashing briefly on the screen, audio messages “prerecorded and later multitracked over regular [music or] promotional” messages, or even inserting messages into “empty” programming pauses.13 Many studies have shown the effectiveness of these subliminal techniques and how they play into the psychodynamic activity of our unconscious mind.14

The concept of subliminal messages can be dated back as early as 400 B.C.; however, the study of their use and the effect they have on the unconscious mind “did not become prevalent until the mid-to-late 1800s.”15 “The concern[s] about . . . subliminal messages came to the forefront in the mid-1950s [when] James Vicary [stated at] a press conference . . . that his company, Subliminal Projection Inc., was ready to offer the use of subliminals to customers.”16 Based upon the increase of Coca-Cola and popcorn sales after flashing the messages, “Drink Coca-Cola” and “Hungry? Eat Popcorn” “every five seconds for one three-thousandth of a second” over Kim Novak’s face in the movie “Picnic,” Vicary was ready to offer his proclaimed success

11. Id.
14. Id. at 332–35.
15. Pearson, supra note 12, at 776.
16. Id. at 777.
to the world. According to Vicary, the influence was not conscious; however, if the viewer's predispositions were consistent with the subliminal message, the audience would be influenced by it. The public, however, opposed these techniques, voicing concerns such as: general uneasiness of the unknown, the belief that the world was being brainwashed, and an attempt at mind manipulation. The public grew so concerned that they soon believed that "the Soviets would use subliminals to turn neutral nations against the United States, thereby increasing their power throughout the world." Shortly after these concerns grew, all major television networks announced that they "would not accept subliminal advertising or use the technique in their productions." However, this was not the end to experiments in subliminal messages and the effects they have on the unconscious mind.

The next year, "in 1957, a television station in Maine conducted... [a subliminal message] experiment" of its own. The station stated "every eleven seconds at one eightieth of a second," every other day for two weeks: "IF YOU HAVE SEEN THIS MESSAGE, WRITE WTWO." Further, in 1958, CBS-TV in Canada broadcasted subliminals "between one-fifth and one-half second 352 times in one half hour" the words "Telephone Now." Unfortunately, both of these experiments "did not increase mail or calls from viewers" and were ultimately deemed a failure. This upset, however, did not slow down others from experimenting on their own.

The same year, in 1958, on WTTV in Bloomington, Indiana, two university faculty members "superimposed a low-contrast beam, which conveyed a subliminal message [over a nightly television movie] at a dimmer light level than the [original]." This message notified viewers to "Watch

17. Id.
20. Id.
21. Daus, supra note 9, at 243. CBS, NBC, and ABC, along with national and state civic organizations, and the National Association of Radio Television Broadcasters condemned subliminal messages. Id.
22. Capps, supra note 9, at 30.
24. Schiller, supra note 13, at 332.
25. Pearson, supra note 12, at 777; Schiller, supra note 13, at 332.
27. Id.; Schiller, supra note 13, at 332.
Frank Edwards,” and was intended to make the viewers watch the television show without changing the channel.\textsuperscript{28}

Following the rage of visual subliminals, audio subliminals soon became popular with radio stations.\textsuperscript{29} In 1962, the popular network station CBS announced that “subliminals were used in [its] regular program credits.”\textsuperscript{30} The Federal Communications Commission (FCC) received an abundant amount of complaints from their viewers, to which CBS declared the whole “announcement was a hoax.”\textsuperscript{31}

In 1973, both television and radio were issued a warning against any further subliminals due to a public outcry when the Premium Corporation of America superimposed the message “Get It” on a toy called “Husker-Du” during Christmas.\textsuperscript{32} “The Premium Corporation of America ‘claimed that it was inserted by an exuberant but misguided young man from the production house in Minneapolis.’”\textsuperscript{33}

Politics has also been an area that subliminals have boomed in.\textsuperscript{34} According to Dr. Key, the use of SEX “embeds” “have been used in every political campaign of any magnitude in the United States and Canada for at least twenty-five years—if not much, much longer.”\textsuperscript{35} Dr. Key reports:

In a recent U.S. congressional election campaign in Virginia’s 10th District, SEX “embeds” were discovered in the campaign literature of all candidates except one who could not afford to hire an advertising agency. . . . A formal complaint was initiated by one candidate with the Virginia Election Commission, charging the use of subliminal techniques in the candidate’s literature. The commission refused to accept the complaint.\textsuperscript{36}

Subliminals had yet to find their place in the world of advertisements; however, they had evolved into both encouraging and artistic devices.\textsuperscript{37} For example, subliminals had been used in movies such as “The Exorcist” and “My World Dies Screaming” to enhance the tension level by projecting the

\begin{itemize}
\item \textsuperscript{28} Pearson, supra note 12, at 777–78.
\item \textsuperscript{29} Id. at 778.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.; Schiller, supra note 13, at 332–33.
\item \textsuperscript{32} Pearson, supra note 12, at 778; Schiller, supra note 13, at 333.
\item \textsuperscript{33} Schiller, supra note 13, at 333.
\item \textsuperscript{34} See id. at 335.
\item \textsuperscript{35} Id. (quoting Wilson Bryan Key, Media Sexploitation 8 (1976)) (internal quotation marks omitted). SEX embeds is the technique of engraving the letters S-E-X or S-X into the natural lines of faces or hands of candidates in promotional ads. Id.
\item \textsuperscript{36} Id. (omission in original) (quoting Key, supra note 35, at 8).
\item \textsuperscript{37} See Schiller, supra note 13, at 333–34.
\end{itemize}
word “BLOOD” or placing a serpent across a villain’s chest subliminally. Furthermore, subliminals had been shown “to induce weight control, promote safe driving, [and] prevent shoplifters.” For instance, a television station in Los Angeles “flashed ‘DRIVE SAFELY’ during [a] news [programming] in an ... attempt to lower the accident rate.” Additionally, an audio “Black Box” was used by Dr. Hal Becker playing messages such as, “do not steal” and “I am honest” over music in department and grocery stores in order to deter shoplifting. Research in this area illustrates how subliminal messages affect “the moral and ethical implications” of the unconscious mind.

III. CURRENTREGULATION

Since its beginnings in the public eye, subliminals have drawn the attention of governmental restraints on its use. “[O]n February 8, 1958, and March 12, 1958, [r]epresentatives ... introduced bills H.R. 10802 and 11363 [in order] ‘to make unlawful the use of subliminal advertising on television and [to prescribe] penalties.’” There were never hearings held on either bill and, to date, there is no law dealing with the issue of subliminal messages.

Despite having power, although limited, the FCC and the Federal Trade Commission (FTC) have made minimal regulations in the area of subliminals. Acting as a quasi-judicial body, the FCC and the FTC have “wide discretion to determine whether any practice is unfair.”

38. Id. at 333. “The Exorcist” involved a “subliminal deathmask[] in the old priest’s dream sequence.” Id. Purportedly, “after seeing the subliminal deathmask ... a young Indianapolis man fainted and broke his jaw [and was] suing Warner Brothers for $350,000 because ‘the subliminal image constitutes an intentional defect in the movie ... that ... can harm the viewer.’” Id.
40. Schiller, supra note 13, at 334.
41. Pearson, supra note 12, at 779; Schiller, supra note 13, at 334. “The ‘Black Box’ is a soundmixer—like those used by deejays—that mingles bland music with the desired subliminal message.” Pearson, supra note 12, at 779. According to Dr. Becker, the “use of subliminals would increase in the future; ‘[S]omeday there will be audio conditioning in the same way we now have air conditioning.’” Id. at 779–80 (quoting Schiller, supra note 13, at 335).
42. Id.
43. Id. at 781.
45. Pearson, supra note 12, at 782.
46. Id.
47. See Daus, supra note 9, at 253. However, “the FTC has no specific regulations or policy concerning subliminals.” Schiller, supra note 13, at 359.
in *Functional Music, Inc. v. FCC*, the FCC attempted to ban "the broadcast of functional music to the general public, but allowed private subscribers to receive it." The court reasoned that the listening audience had "consented to listen to the music" being broadcasted and did not consider the issue of the unconscious listeners' invasion to privacy. The regulation was overturned when the court held that "functional [music] can be, and is, of interest to the general radio audience." Further action was taken in 1958 by the National Association of Radio and Television Broadcasters (NARTB) by stating it banned subliminals, however, this ban did not supply any enforcement mechanisms, and the NARTB has never actively searched for subliminals.

"Courts have [also] dealt with [the issue of] subliminals both directly and indirectly." An indirect analysis can come from the court discussing a captive audience, the right to privacy, or even deceptive advertising. For instance, the court in *Banzhaf v. FCC* analogized the potential grave consequences cigarettes might have on a person's health with those impacts of subliminals and the grave consequences the unknown might have. Specifically, the court stated "[i]t is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." Furthermore, in *Stevens v. Parke, Davis & Co.*, the court, in finding that a physician could be influenced subliminally to administer the wrong drug, stated:

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51. *Id.* at 784.
52. *Id.* at 784–85.
53. 405 F.2d 1082 (D.C. Cir. 1968).
54. *Id.* at 1099–1101.
55. *Id.* at 1100–01. The court recognized the use of subliminals merely as continued and repetitive advertising which has an effect on the unconscious viewer. *See id.*
The record reveals in abundant detail that Parke, Davis made every effort, employing both direct and subliminal advertising, to allay the fears of the medical profession which were raised by knowledge of the drug’s dangers. It cannot be said, therefore, that Dr. Beland’s prescription of the drug despite his awareness of its dangers was anything other than the foreseeable consequence—indeed, the desired result—of Parke, Davis’ overpromotion . . .

More recently, there have been cases involving people who commit suicide, or attempt to, because of subliminal messages affecting those who already have a predisposition for depression or suicidal thoughts. This “suicide zone” creates a compulsion to attempt suicide and illustrates the effect subliminals have on human behavior.

IV. HOW SUBLIMINAL MESSAGES WORK

The receipt of subliminal messages is undetectable and unnoticeable, however, the effects such messages have on the brain are quite the opposite. Subliminal messages may be sent through text, images, or sound. Each form of media affects the brain by submitting a signal to the brain, which, over time, trains it to perform in a particular way. Generally, subliminal messages work by flashing the message quickly enough so “that the conscious mind [will not] pick up on it, but the rest of [the] brain has time to decipher.”

While subliminal messages may be used positively—by teaching one’s brain to refrain from bad habits, change old habits, and create new, positive habits—these messages may result in negative effects on the person who is receiving the message. For example, the power of these messages may

59. Id. at 664.
61. Id. A “suicide zone” “occurs when a person has both a personality predisposition and a situational predisposition to commit suicide.” Id. at 788 (quoting Vance v. Judas Priest, No. 86-5844, 1990 WL 130920, at *12 (Nev. Dist. Ct. Aug. 24, 1990)).
63. Id.
64. Id. The example given on SubliminalAnalysis.com involves the “psychological dependence on [nicotine and] the act of smoking and the craving for tobacco.” Id. Sending subliminal messages to the nicotine-dependent brain will eventually result in elimination of the craving and the need to smoke. Id.
66. Id.
affect one’s mood rather dramatically, resulting in extreme happiness or extreme depression, depending upon the context of the message. Studies have shown that the negative message with emotional meaning is more likely to be recalled.

Specifically, a United Kingdom study at the University College London asked participants “to recall and identify words with an emotional value” after they were visually displayed “for as little as [seventeen] milliseconds.” The results of the study showed that humans are programmed to respond subconsciously to potential threats. While advertisers may use this information to their advantage and phrase their advertisements using words that are more likely to be recalled by consumers—and while there are clear “evolutionary advantages” to a quick response to a threatening message—the conclusive demonstration “that people are much more attuned to negative words,” may also serve as a severe disadvantage.

V. VIOLENCE AND SICKNESS

Studies show that only 3% of the public is affected by subliminal messages when considering whether the messaging may result in violence. The question proposed by doctors has been whether that 3% of the population suffers from some form of brain damage and if so, whether the lesions on their brain causing the specific damage lend a hand in the eventual violent acts that may occur. Those who have frontal lobe lesions, specifically, are more apt to respond violently to messages suggesting as such, and within that portion of the population, the percentage of those who respond violently to messages increases to 13%.

Typically, people respond to messages regarding how they should act, “what groups they belong to, or what type of person they are,” without the

67. Id.
69. Id. The words in the study included positive words—“flower,” “peace,” “cheerful”—and negative words—“agony,” “despair,” “murder.” Id. The positive words were recalled 59% of the time, while the negative words were correctly recalled 77% of the time. Id.
70. Id.
73. Id. at 00:21:00–35:00.
74. Id. at 00:47:00–1:04:00.
realization they are responding to a message at all.75 "There are groups of people in society who are being given the message 'we expect you to be violent,' and [there are] groups of people who are being given the message 'we don't expect you to be violent.'"76 These people may be given messages both explicitly and with unawareness.77

A major concern of these messages rests on the impact they will have on children.78 It is suggested that children are most susceptible to media influences of violent behavior during "the prime of a child's emotional developmental life."79 "[I]n American society today, where image management has become a lucrative business and a matter-of-fact necessity in commerce, industry, politics, and personal relationships, style has ripened into an intrinsic form of information."80 The mass media has begun to tell people who they are and what they should do, eliminating the need for people to think for themselves and instead, replacing their thoughts with images that may be violent in nature.81

Competing views exist relating to whether media messages influence people and create violence in society.82 One view is that the media does not create violent people and instead, simply offers an aggression outlet for those who may need one.83 These same media supporters blame people's overindulgence in media, victimizing those who go out and act subsequent to viewing violent messages.84 Contrarily, "many political scientists, educators, and criminologists and much of the general public" believe that media influences its audience, providing somewhat of a "cultural training ground" for those who are receiving messages through television, movies, music, and the like.85 Those who take this contrary opinion state that media teaches those in society what their roles are and what is expected of them, often communicating messages that "are confusing, inaccurate, and distorted."86

75. Id. at 1:55:00--:58:00 (quoting Dr. Rebecca Saxe).
76. Id. at 3:00:00--:09:00 (quoting Dr. Rebecca Saxe).
77. Subliminal Messages and Violence, supra note 72, at 3:08--:15.
79. Id.
80. Id. (quoting Pat O'Malley & Stephen Mugford, Crime, Excitement, and Modernity, in VARIETIES OF CRIMINOLOGY: READINGS FROM A DYNAMIC DISCIPLINE 205 (Gregg Barak ed. 1994)) (internal quotation marks omitted).
81. Id.
82. Id. at 70--71.
83. Sgarzi & McDevitt, supra note 78, at 71.
84. Id.
85. Id.
86. Id.
VI. UNCONSCIOUS PROCESSING AND THE IMPACT ON BEHAVIOR

What impact, if any, do subliminals actually have on our behavior? This is a question that is still ripe for controversy. Researchers and scientists agree that subliminal messages do exist and the brain can receive messages without being consciously aware of it. However, the controversy is surrounded around whether the received messages impact human behavior. Particularly, researchers want to know “whether subliminal communication actually has the ability to induce new behavior or whether it can only strengthen behavior to which an individual is already predisposed.”

Theories of the impact subliminals have on human behavior have been presented by various researchers who have come to diverse conclusions, such as:

1) Individuals are capable of unconsciously receiving information, and yet can discriminate, recognize and react to the content of such information, resisting negative content and more readily accepting positive content.

2) A predisposing behavior or response is not always necessary for effective subliminal suggestion, and certain new responses may be induced.

3) Individuals do not react uniformly to subliminal messages presented at the same level of intensity and duration.

4) Certain personality characteristics may predispose some individuals to be more easily influenced by subliminal suggestion.

5) Related to the concept of predisposition, the effectiveness of subliminal communication may be somewhat dependent upon the motivational and emotional states of the receiver.

87. See Pearson, supra note 12, at 788.
88. Id. at 788–89. Specifically, researchers want to know whether “subliminal persuasion” exists. Id. at 788 (emphasis omitted).
89. Id. at 789.
6) [S]ubliminal persuasion is possible yet inefficient.

7) [T]he messages do register in some deep recess of the brain and apparently influence behavior.\textsuperscript{90}

These theories of impact all illustrate how subliminals can affect the viewers’ or listeners’ thoughts; however, what impact does it play on others? Have subliminals been an auxiliary to discrimination, stereotyping, characterizing, and favoritism? Has television and radio shaped the images, messages, thoughts, and values of our society? We are incapable and defenseless against these messages absorbing into our minds because of our inability to even know we are receiving information.\textsuperscript{91}

A. Discrimination, Stereotyping, Categorizing, and Favoritism

Subliminal messages that are positive and convey a message that promote new beginnings and healthy lifestyles have more or less been tolerated in our society. However, it is just as easy for a subliminal message to convey a derogatory or prejudicial statement that manipulates the behavior of the listener towards certain people because of their class, race, or gender. The court in \textit{Vance v. Judas Priest}\textsuperscript{92} argued:

\begin{quote}
[Subliminals] do not convey ideas or information to be processed by the listener so that he or she can make an individual determination about its value. They do not enable an individual to further his personal autonomy. Instead, they are intended to influence and manipulate the behavior of the listener without his [or her] knowledge.\textsuperscript{93}
\end{quote}

Invisible influence—the power of persuasion—in the wrong hands, could lead to the malicious, unethical, and the immoral molding of one’s mind. Our behavior, one could argue, is part of our conscious mind; however, our

\textsuperscript{90} Id. at 789–92 (quoting Hal C. Becker, \textit{Secret Voices: Messages that Manipulate}, \textit{TIME}, Sept. 10, 1979, at 71).

\textsuperscript{91} See Pearson, \textit{supra} note 12, at 788–89.


\textsuperscript{93} Id. at *25.
attitude and the ways it affects our behavior are subconscious. 94 Few people want the way they act—whether accommodating or aggressive towards a person—to be prejudiced by mental bias because of news broadcasts, advertisements, and movies. 95 However, this type of situation happens daily, and it is what psychologists Timothy Wilson and Nancy Brekke describe as “mental contamination.” 96 According to researchers, stereotyping, categorizing, and prejudice are all things that are learned at a young age and are uncontrollable when such an encounter takes place. 97 For example, studies have shown countless times that when an individual is physically attractive, people—subconsciously—tend to treat them in a more accommodating way. 98 Or, on the contrary, an employer might give an employee a less than favorable evaluation because of the employee’s skin color or gender—even if the employer did not intend to be persuaded by such stereotypical social judgments. 99 In both instances, the assessor is influenced by an observed attribute and is unaware of such influence. 100

Furthermore, researchers have speculated that stereotyping is a process of the subconscious. 101 A stereotype is an “abstract structure[] of knowledge or [an] understanding[] that link[s] group membership to a set of traits or behavioral characteristics.” 102 Indeed, one of the most influential cases of subconscious stereotyping is Price Waterhouse v. Hopkins. 103 Here, Ann Hopkins was told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 104 At trial, a social psychologist, Dr. Susan Fiske, testified as an expert witness that “Price Waterhouse was likely influenced by sex stereotyping.” 105 Dr. Fiske based her conclusions not only on the sexual comments made by the

96. Id. More specifically, “mental contamination” is defined as “the process whereby a person has an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable.” Id.
97. Id. at 127.
98. See, e.g., Amy L. Wax, Discrimination as Accident, 74 IND. L.J. 1129, 1135 (1999); see also Wilson & Brekke, supra note 95, at 117.
99. Wax, supra note 98, at 1135.
100. Id.
101. Id. at 1136–37.
102. Id. at 1136.
103. 490 U.S. 228 (1989).
104. Id. at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)) (internal quotation marks omitted).
105. Id.
partners, but also comments made by those who hardly knew her or had contact with her. 106 The Court, in more or less words, only affirmed the pervasiveness of unconscious stereotyping by stating, "some of the partners' remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women." 107

Nonetheless, how can we control something that is invisible? Studies have shown that an individual's attempt to control or suppress one's own discriminatory or stereotypical responses commonly leads to an increase in frequency of the same. 108 Therefore, the issue of unconscious discrimination becomes a double-edged sword. On the one hand, we are defenseless against messages when we do not have the awareness we are receiving them, and on the other hand, if we are aware of them and attempt to control them, they only amplify. 109

B. Activists

Over time, our society has come to accept different walks of life. More than one would presume that prime time television has been one of the most skillfully capitalized resources for gaining acceptance in the wider society. 110 Activist groups, since as early as the 1950s, have been involved in the struggle to control network television. 111 The theory motivating this struggle is that people depend on television for most of their information about the world. 112 Television is the most commanding, comprehensive, and controlling mass medium in our society. 113 It has such considerable power to shape and reinforce the values in American society by just telling a fictional story. 114 For instance, television bears the ability to transform the "contours of the real world" and allows our subconscious to confuse such images with reality. 115 One advocacy group leader proclaims that television "is an electronic vending machine, offering sweet-smelling bodies, stuffed, satisfied

106. Id. Gender-neutral remarks were made, describing Hopkins as "universally disliked" and "consistently annoying and irritating." Id.
108. Wilson & Brekke, supra note 95, at 127.
109. See id.
111. Id. at 6.
112. Id.
113. See id. at 6–7.
114. Id. at 6.
bellies, and great vacant gaps in our cerebral cortex."\textsuperscript{116} By the early 1980s, industry leaders finally accepted the fact that advocacy groups were going to be a permanent part of influencing television programming.\textsuperscript{117}

The portrayals of stereotypical characters in television—such as businessmen, women lawyers, elderly individuals, homosexuals, union workers, and minorities—have influenced how we view these characters in the day-to-day world.\textsuperscript{118} Activists, having knowledge of this influence, have used television to their advantage.\textsuperscript{119} For instance, pro-abortion activists in 1971 used a popular television show entitled \textit{Maude} to educate and influence society about the dangers of an unconstrained population growth.\textsuperscript{120} This led to a number of other activist groups pressuring networks to televise shows concerning their controversial issues in a favorable light.\textsuperscript{121} By the 1972–1973 television season, networks were broadcasting lesbian seduction, wife-swapping, homosexuality, and intermarriage—both race and religion—segments.\textsuperscript{122} The success of these shows and the slowly progressing acceptance of different groups have demonstrated the ability to influence and change the views of our nation based on the subconscious ability to confuse the images of television with reality.

\section*{VII. The Public Reaction}

The term “subliminal advertising” is widely known throughout the public, and a vast majority understands the basic concept of the use of subliminal messaging and views it as a successful means of influence by advertisers of brands.\textsuperscript{123} When subliminal messaging first surfaced, the FCC received numerous inquiries and complaints about the technique.\textsuperscript{124} The majority opinion was that use of such messaging was “sneaky” and worrisome because it left the public unsure what the government would do with this technique in its hands.\textsuperscript{125}

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 6.
\textsuperscript{118} See id. at 7–8.
\textsuperscript{119} Id. at 29–31.
\textsuperscript{120} MONTGOMERY, \textit{supra} note 110, at 31.
\textsuperscript{121} See id. at 38–40.
\textsuperscript{122} Id. at 39–40.
\textsuperscript{125} Id. Specifically, the public expressed concerns that subliminal messages “could be used to brainwash Americans with foreign ideologies.” Id.
Shortly after the Vicary study was conducted, a study in San Francisco determined that 41% of the 324 participants involved were familiar with the term “subliminal advertising,” were of the impression that use of such was unethical, but 67% of those with awareness stated they would not be deterred from watching a television program, despite having a belief that such messages were included in the commercials. A later study conducted showed an increasing public awareness of the term “subliminal advertising” and that the method of advertising was successful in product sales.

In response to the public’s concerns about the use of subliminal messaging and advertising, the FCC provided that the Communications Act was generally applicable to use of these messages. Under Section 303 of the Act, the FCC explained that all communications were controlled and regulated by the Commission, which was “guided by public interest, convenience, or necessity.” “Section 326 [of the Act] prohibits the FCC from censoring broadcast material, including advertising.” However, the government has stated that those on the receiving end of messages are entitled to the knowledge of who is attempting to persuade them. The requirement that all broadcast material “is to be announced as paid for or furnished, and by whom” is a longstanding requirement, dating back to the Radio Act of 1927.

In response to the public’s concern of unbridled access to its subconscious, the FCC contended that Section 317’s applicability would extend to the prohibition of “subjecting audiences to messages received from undisclosed sources.” Application of Section 317 to sponsored subliminal program material presented, for example, at five-second intervals, would, in practical effect, ban unrestricted use of the technique. In addition, Sections 73.1212 and 76.221 (applicable to broadcasting and cable television, respectively) of the Commission’s Rules require that sponsored program matter be announced as such. Therefore, it ap-

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126. Rogers & Smith, supra note 123, at 11.
127. Id. This later study, and a study which followed, also revealed that those who were familiar with subliminal messaging were more educated than those who were not. Id. The researchers recognized a correlation between education and awareness—as the educational level of the participants rose, awareness did as well. Id.
128. FCC Information Bulletin on Subliminals, supra note 124.
129. Id.
130. Id.
131. Id.
132. Id.
133. FCC Information Bulletin on Subliminals, supra note 124.
pears that sponsored telecast or cable-originated material that is
subliminally projected falls within these rules.\textsuperscript{134}

Despite the rules that existed, broadcast companies continued to air sub-
liminal messages and claimed they never received information from the FCC
regarding the ban of such advertisements.\textsuperscript{135} As such, the FCC
issued a Public Notice explaining that “[w]e believe that use of subliminal perception is
inconsistent with the obligations of a licensee, and therefore we take this
occasion to make clear that broadcasts employing such techniques are con-
trary to the public interest. Whether effective or not, such broadcasts clearly
are intended to be deceptive.”\textsuperscript{136}

\textbf{VIII. LEARNING TO SEE THE INVISIBLE}

Subliminal messages are all around, though most are covert.\textsuperscript{137} Howev-
er, one can train his or her self to recognize these messages and decipher the
intent of the message, so long as certain steps are followed.\textsuperscript{138}

First and foremost, it is imperative that the recipient of the message is
able to identify what the nature of the message is, for example, what particu-
lar item a subliminal advertisement is enticing one to purchase.\textsuperscript{139} Next, the
audience member should read, view, or listen to the message carefully, start-
ing at the top or beginning of the message and paying close attention to it all
the way through the bottom or the end.\textsuperscript{140} This will allow the audience mem-
der to determine whether “the message [is] suggestive, embedded, or
overt.”\textsuperscript{141} Messages that are embedded in images are typically more difficult
to decipher, while the rare, overt messages are more visible.\textsuperscript{142}

Important while examining a message for subliminals, is the ability to
recognize if anything seems unusual or misplaced.\textsuperscript{143} In order to best utilize
one’s ability to recognize these items, it is critical to be relaxed; otherwise, a
subliminal message is easy to overlook.\textsuperscript{144} This is because subliminal mes-

\begin{itemize}
  \item[134.] \textit{Id}.
  \item[135.] \textit{Id}.
  \item[136.] \textit{Id}.
  \item[137.] \textit{How to Spot Subliminal Ads: Steps on How to Spot Subliminal Ads,}\textit{ STARTUPBIZHUB},
  \item[138.] \textit{Id}.
  \item[139.] \textit{Id}.
  \item[140.] \textit{Id}.
  \item[141.] \textit{Id}.
  \item[142.] \textit{Id}.
  \item[143.] \textit{Id}.
  \item[144.] \textit{Id}.
\end{itemize}
sages are meant to trigger the subconscious of those who are simply glancing at or thoughtlessly listening to a form of media. Specifically, when looking at advertisements, reading the advertisement in reverse may reveal a message that was undetectable in the original reading. Failure to pay careful attention to the details of the message may result in behaviors in which a person would not have normally engaged. In other words, the messages may remove from a person his or her ability to make a decision about a particular product or may result in atypical behavior due to his or her failure to decipher a message.

Accordingly, the question becomes: Is it constitutional, or even ethical, for companies and organizations to include these messages into their media in order to influence people’s performances?

IX. THE FIRST AMENDMENT

In 1791, freedom of speech was guaranteed by the First Amendment with the adoption of the Bill of Rights. The First Amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech;” however, this right is not absolute. Speech may be regulated because of certain ideas it conveys or by limiting certain types of activities. It has been argued that subliminal messages are not speech because they “are not consciously perceived and are not meant to be heard and discussed, [and] they do not advance the ideals of the Free Speech Clause.” In contrast, subliminal messages, like speech, are intended to convey a message and have been proven to be effective in such conveyance. “[T]he central concern of the First Amendment . . . is that there be a free flow from creator to audience . . .” Freedom of speech is not limited to political expression or comment on public affairs.

145. Id.
146. Id.
147. See How to Spot Subliminal Ads: Steps on How to Spot Subliminal Ads, supra note 137.
148. See id.
150. U.S. CONST. amend. I; Silverglate, supra note 149, at 1246.
151. Silverglate, supra note 149, at 1260.
152. Capps, supra note 9, at 32.
153. Id. at 33.
A. Commercial Speech

Although commercial speech is protected by the First Amendment, it has a somewhat lesser protection for which there are numerous rules and regulations with which advertisers must comply in order to be afforded the protection. The Supreme Court has defined purely commercial speech as speech that "does no more than propose a commercial transaction" and is so removed from any 'exposition of ideas.' If commercial speech "is neither misleading nor related to unlawful activity," then it is protected. Does the very nature of the word subliminals place them into the category of "misleading?" The incorporation of subliminals in advertising and still affording them First Amendment protection under commercial speech has long been a controversial issue.

Advertisements, as early as the seventeenth century, have used people's emotions and nonverbal conditioning techniques in order to sell their products. Intelligent advertisers appeal to a customer's "emotional or psychological needs" and portray a product that effectively conditions a consumer to believe that this product will fulfill his or her needs. So, how is basic advertising different from advertising with subliminals? Both intend to condition a positive response to a product in order to more effectively sell the product, and both change the way people think to motivate sales or ratings. One argument is that where basic advertisements are just intended to trigger feelings and emotions and portray an artistic expression, subliminals in advertisements are only intended to trigger a response in favor of such advertisements. However, supporters of this view also state, "[a] primary purpose of music is to trigger emotion. Listeners often 'consume' musical emotion purely for private enjoyment, but music can be used manipulatively as well to enhance work production or to catalyze in store shopping behavior."

158. Id. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
160. Silverglate, supra note 149, at 1261.
161. Id. at 1262.
163. Id. at 276 (footnotes omitted).
Although our verbal communications are an important factor in human information, they are not the only form through which we receive information. Nonverbal communication, regardless of its categorization as subliminal or not subliminal, plays an important role as well. For instance, when you have a conversation with someone, you perceive him or her not only by what is being said with words, but also by his or her body gesture, posture, tone of voice, eye contact, and tonal inflections. Advertisements use this same technique. One study on television advertisements indicated that:

"Fewer than half of the commercials examined contained even one of some thirteen possible categories of product-intrinsic information. . . . However, information theory holds that "information is a name for the content of what is exchanged with the outer world as we adjust to it, and make our adjustments felt upon it.""

The question remains unanswered: Are subliminal messages a part of commercial speech? Advertisers, whether subliminals are used or not, must still comply with the restrictions and regulations that our government has in place. Psychological methods of persuasion are used in our everyday life; the very purpose of an advertisement is to promote sales by altering your view of a product. Does adding a subliminal message to an advertisement change this purpose? Does adding an extra invisible influence, among the many that naturally occur, violate our right to privacy?

B. Right to Be Free from Unwanted Speech

A chain of Supreme Court of the United States cases beginning in the 1940s balanced the right of an individual's privacy with another individual's right to free speech. These cases held that people should be free from unwanted speech, thereby restricting the First Amendment freedom of speech.

164. Id. at 268.
165. See id.
166. Id. at 268–69.
167. Reed & Whitman, supra note 162, at 274.
168. Id. at 273–74.
so as to only reach a captive audience.\textsuperscript{170} However, the Supreme Court has also held that if the unwanted audience is able to avoid the speech after hearing it, the individual’s freedom of speech will prevail.\textsuperscript{171} Moreover, unless one can illustrate that “the speech is offensive or objectionable, and the unwilling listener or viewer is unable to avoid continued exposure to the message or is captive in his or her home,” then the individual’s freedom of speech will triumph.\textsuperscript{172}

Are all subliminals offensive? Is unaware speech the same thing as unwilling speech? After reviewing the history of attempts at subliminal speech, one can answer both of these questions in the negative.\textsuperscript{173} Furthermore, the court has held in many instances that it is “better to err on the side of free speech” in competing interests.\textsuperscript{174} For instance, the Supreme Court stated in \textit{Martin v. City of Struthers}\textsuperscript{175} that “[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society, that putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.”\textsuperscript{176}

On the other hand, one of the main purposes of free speech is personal autonomy.\textsuperscript{177} Personal autonomy “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”\textsuperscript{178} By allowing the use of subliminals in an attempt to honor the right of free speech, are we ultimately defeating one of its main purposes? Although the speaker is entitled in a subliminal message to communicate his or her free expression, the listener is denied his or her personal autonomy by not being able to make his or her own decisions.

To label subliminal messages, as a whole, protected or unprotected speech would be improper.\textsuperscript{179} The more competent approach is to evaluate each subliminal on a case-by-case basis and discuss each element necessary

\textsuperscript{170} See Frisby, 487 U.S. at 488; Pacifica Found., 438 U.S. at 748–49; Lehman, 418 U.S. at 303–04; Rowan, 397 U.S. at 738; Kovacs, 336 U.S. at 88–89.


\textsuperscript{172} Capps, \textit{supra} note 9, at 37.

\textsuperscript{173} See discussion \textit{supra} Part II.

\textsuperscript{174} E.g., Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977).

\textsuperscript{175} 319 U.S. 141 (1943).

\textsuperscript{176} Id. at 146–47. Further, “[f]reedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.” Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

\textsuperscript{177} Pearson, \textit{supra} note 12, at 794.


\textsuperscript{179} See Silverglate, \textit{supra} note 149, at 1264–65.
to determine whether the speech is protected or unprotected, using a reasonable person standard.

X. RECOMMENDATIONS

Although the concern over subliminals came to the forefront in the mid-1950s, the issues surrounding the proper way to regulate them still have a long way to go. Both federal and state legislation continue in the attempt to protect the balancing interests of freedom of speech and freedom of privacy, however, they have yet to settle this war. Subliminals have become a global issue, encompassing the media, the news, our entertainment, and influencing our everyday decisions and actions.

One of the easiest and probably most effective ways to resolve the issues subliminal messaging may cause is to place warning labels on those messages that contain them. This would allow an individual the ability to refrain from hearing the subliminals if they do not wish to, and still allow an individual to maintain his or her freedom of speech. For example, a simple statement at the beginning of a CD stating, “this CD contains subliminal messages,” or a brief statement at the start of a television or media broadcast to the same extent, could be the beginning of the end of this ongoing battle. Although seemingly one of the simplest solutions, it still poses some problems. Is there really a way to know if a person fully consents to a message when they do not know what it involves? Further, although an individual may consent to hearing the message, he or she has not consented to the effect the subliminal will have on his or her behavior in the future, or throughout his or her entire life. Moreover, what if a person begins watching or listening to a show or the radio in the middle of the program? The warning stating that this message contains subliminals would be missed and, therefore, the individual would never consent.

Another simple, yet problematic, approach is to partially regulate subliminals. A committee could be set up to regulate which subliminals are allowed to be used and which are not. However, how will the government decide who that committee consists of or which subliminals the committee should prohibit? Our society can hardly come up with an exact definition of what a subliminal is, so is there any way to partially regulate something we cannot yet define?

The government could also try to ban subliminals altogether. However, this is an unlikely solution as subliminals currently are afforded First

180. See id. at 1266–69.
181. See id. at 1266–67; see also Pearson, supra note 12, at 781–82.
Amendment protection and a blanket ban would chill the speech of those attempting to deliver the subliminal message. Additionally, there are various naturally occurring subliminal messages that happen daily and it would be impossible to prosecute and deter the use of such subliminals. Moreover, this would lead to a flooding of our courts if we allowed every painter, musician, broadcaster, or company to be sued for the invasion of privacy of an individual whose behavior was affected in some way by a subliminal.

XI. CONCLUSION

Subliminal message use, research, and regulation have come a long way since the 1950s. With the greater use of technology and the means to produce subliminal messages, the use of them is only going to grow with time. How this invisible influence has shaped the images, messages, thoughts, and values of our society is a topic at the forefront of our concerns about subliminals. Are we incapable and defenseless against these messages absorbing into our minds because of the lack of awareness that we are even receiving information? This disputed question lies beyond the concept of communication and goes into the psychological theories of speech. Our experiences throughout life shape our existence—should other people be allowed to shape our experiences through subliminals? This is a question that can only be answered with time.

Until that time comes, we, as viewing audiences, remain at the disposal of filmmakers, musicians, advertisers, and other individuals involved in the creation of media to receive their messages, whether voluntarily or not. While we choose which movies we sit down to watch, which songs we listen to, and which channels we change while watching television, the visual and audio bits that lie beneath the surface of the messages are unavoidable. Until this dispute is laid to rest, children today remain susceptible to hearing their favorite cartoon characters urge them to undress in a public theater or seeing

183. If you flipped directly from Section II of this article to the Conclusion, it is because you likely recognized the subliminal messages the authors embedded throughout the section entitled “The History of Attempts at Unconscious Persuasion.” Though not a controversial attempt, inclusion of this message is to show that these messages carry a certain level of influence over recipients of subliminals. While your freedom of speech was not affected, your concentration on this article in sequential order was impeded due to the type of mind manipulation this article analyzes. The content of the message embedded in this article is not intended to affect the reader’s mood, it is meant to minimally influence the conscious mind—or subconscious mind, depending on how closely you, as the reader, are paying attention to what you are reading—to prove the power of a subliminal message, whether visual or audible.
the word "SEX" flash across the screen as they watch a classic animated film. But those signals could not possibly be intentional—or could they be?

As long as those in the legal field are unable to answer this question, movies, television shows, music, and commercials will continue to be produced, and those responsible for their creation cannot be asked to halt production due to a mere possibility that our lives are being affected by some undetectable and uninvited influence. So, in the meantime, it is lights, camera, action, because as they say, the show must go on!