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Allison Clyne Tschannen

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AN ARGUMENT FOR INCENTIVIZING VOLUNTARY REGULATION OF THE FASHION AND MODELING INDUSTRIES

ALLISON CLYNE TSCHANNEN*

INTRODUCTION

In March 2012, Israel’s parliament approved legislation “known in the country as the Photoshop laws. The new regulations on the fashion and advertising industry ban underweight models as determined by Body Mass Index and regulate Photoshop usage in media and advertising.”¹ A photographer who was integral to the passage of the regulation commented, “I realized that only legislation can change the situation. There was no time to educate so many people, and the change had [to] be forced on the industry. There was no time to waste, so many girls were dieting to death.”² The month before, an Arizona politician proposed a similar—but less extreme—solution.³ Katie Hobbs of the Arizona House of Representatives proposed a bill that

states that readers should be made aware of ads that utilize photo manipulation techniques—such as airbrushing out wrinkles, smoothing skin texture or slimming body types—by including this disclaimer: “Post-production techniques were made to alter the appearance in this advertisement. When using this product, similar results may not be achieved.”⁴

The concern underlying the policy presented in the bill is the notion that “consumers, especially teenage girls, can’t readily differentiate

* Associate Managing Editor, *Washington University Jurisprudence Review*; J.D. (2014), Washington University School of Law. I would like to thank Mark O’Horo, Kathryn Swiss, and Spencer Reynolds for their support throughout the editing process. I would also like to thank my family for their constant love and encouragement.

1. Talya Minsberg, *What the U.S. Can—And Can’t—Learn From Israel’s Ban on Ultra-Thin Models*, THE ATLANTIC (May 9, 2012, 7:01 AM), <http://www.theatlantic.com/international/archive/2012/05/what-the-us-can-and-cant-learn-from-israels-ban-on-ultra-thin-models/256891> (last visited June 5, 2014).

2. *Id.*

3. See H.R. 2793, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

4. Erin Skarda, *Battle of the Airbrush: Arizona Bill Targets Digitally Altered Ads*, TIME (Feb. 20, 2012), <http://newsfeed.time.com/2012/02/20/battle-of-the-airbrush-arizona-bill-targets-digitally-altered-ads> (last visited June 5, 2014).

between what is real and faked in photos, which can lead to unrealistic expectations of beauty, as well as body image and self-esteem issues.”⁵

This legislation reflects a growing social consciousness of the connection between unrealistic body and beauty standards propagated by media, advertising, and pop culture, and harmful physical and psychological disorders like anorexia and bulimia. In 2006, Dove’s “Campaign for Real Beauty”⁶ put forth an advertisement called “Evolution” that consisted of “a time-lapsed look at a woman being made up and then Photoshopped for a billboard [illustrating] how our perceptions of beauty are manipulated and distorted.”⁷ Extreme cases of photoshopping celebrities have been met with significant backlash. For example, in 2012 the singer Adele was featured on the cover of *Vogue* magazine. According to one account, Adele’s fans could clearly tell and were not pleased that she had been digitally altered.⁸ Anne Becker, a professor at Harvard Medical School, suggests that pop culture examples such as these provide “an opportunity for parents to talk with their children [about body image and realistic expectations].”⁹

Becker’s statement, however, evokes an inquiry into whether speaking out is enough. This note will explore theories of power and feminist theory in an examination of social control over the female body. This examination will provide a basis for advocating for change that can protect the gendered subject from unrealistic expectations.

I. THEORIES OF THE BODY, FEMININE IDENTITY, AND SOCIOLOGICAL STUDIES

A discussion of some of the critical theories relating to the politics of the body¹⁰ underlying contemporary cultural critique of advertising,

5. *Id.*

6. See *The Dove Campaign for Real Beauty*, DOVE, <http://www.dove.us/Social-Mission/campaign-for-real-beauty.aspx> (last visited June 5, 2013).

7. Raju Mudhar, *Dove’s ‘Evolution’ Ad Wins at Cannes*, THESTAR.COM (June 22, 2007), http://www.thestar.com/entertainment/2007/06/22/doves_evolution_ad_wins_at_cannes.html (last visited June 5, 2014); see also Minsberg, *supra* note 1.

8. Karen Anderson, *Adele’s Vogue Magazine Cover Causing Controversy*, CBS BOSTON (Feb. 14, 2012, 5:43 PM), <http://boston.cbslocal.com/2012/02/14/adeles-vogue-magazine-cover-causing-controversy> (last visited June 5, 2014).

9. *Id.*

10. The “politics of the body” is explained as “the paradigm which re-conceptualised the body from a purely biological form to an historical construction and medium of social control . . . [This] view of the body was central to the ‘personal politics’ articulated by Anglo-American feminists in the late sixties and seventies.” Susan Bordo, *Feminism, Foucault and the Politics of the Body*, in UP

ideology, and its effects on the female (and male, for that matter) body is necessary to understanding the argument for regulation of the advertising industry. While Susan Bordo, for example, qualifies her critique of advertising and media with the comment that censorship is not the answer,¹¹ this paper lends support to a movement toward regulation of these realms in some fashion as a way towards meaningful change.

A. Michel Foucault

Susan Bordo takes inspiration from Michel Foucault's theories of power and the individual subject in order to analyze culture and the female condition. Foucault, as Caroline Ramazanoğlu asserts, believes that "power is generally productive rather than repressive. People are, therefore, social selves, and these social selves are not essential, but historically variable. They are also produced in power relations."¹² As Bordo explains, "modern power [in Foucault's conception] is non-authoritarian, non-conspiratorial, and indeed non-orchestrated; yet it none the less produces and normalises¹³ bodies to serve prevailing relations of dominance and subordination."¹⁴ Where in many conceptions of power, a unified force or ideology suppresses or controls whomever may be in the subordinate position, Foucault views power as something that is not in "the *possession* of individuals or groups [It is] a dynamic or network of non-centralised forces. . . . [T]hese forces are *not* random or haphazard, but configure to assume particular historical forms"¹⁵ Some feminists find this conception of power problematic, as "women's experiences suggest that men can *have* power and their power is in some sense a form of domination, backed by force."¹⁶ Where many critics view social,

AGAINST FOUCAULT: EXPLORATIONS OF SOME TENSIONS BETWEEN FOUCAULT AND FEMINISM 179, 181–82 (Caroline Ramazanoğlu ed., 1993) [hereinafter Bordo, *Politics of the Body*].

11. Susan Bordo clearly states in her critique of postmodern celebration of difference that it "defeats the ability to sustain coherent political critique," instead offering: "My argument here is a plea, not for censorship, but for recognition of the social contexts and consequences of images from popular culture, consequences that are frequently effaced in postmodern and other celebrations of 'resistant' elements in these images." SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY 275 (1993) [hereinafter BORDO, UNBEARABLE WEIGHT].

12. Caroline Ramazanoğlu, *Introduction*, UP AGAINST FOUCAULT: EXPLORATIONS OF SOME TENSIONS BETWEEN FOUCAULT AND FEMINISM 1, 24 (Caroline Ramazanoğlu ed., 1993).

13. By normalization, Bordo "refer[s] to all those modes of acculturation which work by setting up standards or 'norms' against which individuals continually measure, judge, 'discipline' and 'correct' their behaviour and presentation of self." Bordo, *Politics of the Body*, *supra* note 10, at 199 n.2.

14. *Id.* at 190.

15. *Id.* at 191.

16. Ramazanoğlu, *supra* note 12, at 22.

economic, and sometimes physical constraints as the obstacles preventing women from advancing their interests, Foucault believes that “there is no need for arms, physical violence, material constraints. Just a gaze. An inspecting gaze, a gaze which each individual under its weight will end by interiorising to the point that he is his own overseer, each individual thus exercising this surveillance over, and against himself.”¹⁷

B. Susan Bordo and Contemporary Sociological Studies

Bordo reconciles feminist conceptions of power with Foucault’s in an interesting way. Bordo argues:

[Foucault’s] conception of power does *not* entail that there are no dominant positions, social structures or ideologies emerging from the play of forces; the fact that power is not held by *anyone* does not entail that it is equally held by *all*. It is “held” by no one; but people and groups *are* positioned differently within it. No one may control the rules of the game. But not all players on the field are equal.”¹⁸

Within Foucault’s framework:

[O]ne can acknowledge that women are not always passive “victims” of sexism, but that we may contribute to the perpetuation of female subordination, for example, by participating in industries and cultural practices which represent women as sexual enticements and rewards for men—without this entailing that we have “power” . . . in sexist culture.¹⁹

Bordo’s interpretation of Foucault within a feminist framework allows us to conceptualize individuals in dominant *or* subordinate positions in society as fully capable of helping to maintain existing power relations.

In understanding that power is *productive*—that ideology and social structure *produce* the subject—Bordo believes that Foucault’s conception is “particularly useful to the analysis of male dominance and female subordination, so much of which . . . is reproduced ‘voluntarily’, through self-normalisation to everyday habits of masculinity and femininity.”²⁰ In her work, Bordo employs Foucault’s theories to analyze “contemporary

17. Bordo, *Politics of the Body*, *supra* note 10, at 191 (quoting MICHEL FOUCAULT, *The Eye of Power*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS: 1972–1977* 155 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1977)).

18. *Id.*

19. *Id.* at 192.

20. *Id.* at 191 (internal footnote omitted).

disciplines of diet and exercise” and her “understanding of eating disorders as arising out of and reproducing normative feminine practices of our culture.”²¹ Further, Bordo asserts that power that normalizes has the contradictory effects of making one feel in control, while at the same time becoming enslaved by it.²² Bordo explains normalization through Foucault’s “docile bodies”: women’s bodies are “bodies whose forces and energies are habituated to external regulation, subjection, transformation, ‘improvement.’”²³ Bordo believes that, while anorexia is a very complicated disorder,²⁴ culture constantly produces the body.²⁵

Sharlene Nagy Hesse-Biber, Professor of Sociology at Boston College and Director of the Women’s Studies Program, also explores the consequences for the female body in a world permeated by thin culture.²⁶ Hesse-Biber does not seek to simplify the complicated nature of eating disorders through cultural analysis, but her “focus is to *expand* the framework of causality to include ‘culturally-induced’ manifestations of these disorders and in particular, to examine the role that societal institutions and industries play in exerting social control and extracting a profit by transmitting certain messages—such as the thin ideal.”²⁷ Bordo and Hesse-Biber both find Western dualism to be important in understanding eating disorders: “Western societies construct a duality between mind and body, and women are associated with the body and men

21. *Id.* at 192.

22. *Id.*

23. BORDO, UNBEARABLE WEIGHT, *supra* note 11, at 166. The habits and practices that Bordo refers to are those that focus on “self-modification” such as “the exacting and normalizing disciplines of diet, makeup, and dress . . .” *Id.*

24. “Anorexia nervosa is clearly, as Paul Garfinkel and David Garner have called it, a ‘multidimensional disorder,’ with a familial, perceptual, cognitive, and possibly, biological factors interacting in varying combinations in different individuals to produce a ‘final common pathway.’” *Id.* at 140.

25. “[T]he body, far from being some fundamentally stable, acultural constant to which we must *contrast* all culturally relative and institutional forms, is constantly ‘in the grip,’ as Foucault puts it, of cultural practices. . . . Cultural practices, far from exerting their power *against* spontaneous needs, ‘basic’ pleasures or instincts, or ‘fundamental’ structures of body experience, are already and always inscribed, as Foucault has emphasized, ‘on our bodies and their materiality, their forces, energies, sensations, and pleasures.’” *Id.* at 142.

26. *See generally* SHARLENE NAGY HESSE-BIBER, *THE CULT OF THINNESS* (2007) [hereinafter HESSE-BIBER, *CULT OF THINNESS*].

27. Sharlene Hesse-Biber et al., *The Mass Marketing of Disordered Eating and Eating Disorders: The Social Psychology of Women, Thinness, and Culture*, 29 *WOMEN’S STUD. INT’L F.* 208, 209 (2006) (citing Sharlene Nagy Hesse-Biber, *Eating Patterns and Disorders in a College Population: Are Women’s Eating Problems a New Phenomenon?*, 20 *SEX ROLES* 71 (1989)) [hereinafter Hesse-Biber, *Mass Marketing*]. *See also* SHARLENE HESSE-BIBER, *AM I THIN ENOUGH YET? THE CULT OF THINNESS AND THE COMMERCIALIZATION OF IDENTITY* (1996) [hereinafter HESSE-BIBER, *AM I THIN ENOUGH?*].

with the mind.”²⁸ Further, “Western societies also define men’s bodies as the standard against which women’s bodies are judged, and women’s bodies are constructed as deviant in comparison.”²⁹ Bordo explains anorexia as a fundamental contradiction between the female’s attempt to adhere to traditional (and socially valued) feminine qualities, while noting that “to the degree that the professional arena is open to them they must also learn to embody the ‘masculine’ language and values of that arena—self-control, determination, cool, emotional discipline, mastery, and so on.”³⁰ These contradictory values come from a cultural proliferation of fashions that “suggest phallic confidence combined with female allure.”³¹

Numerous studies have been conducted regarding the connection between culture, advertising, and body standards proliferated by the media, and eating disorders and similar conditions that Hesse-Biber describes as “Disordered Eating.”³² One of the most striking examples

28. Hesse-Biber, *Mass Marketing*, *supra* note 27, at 210 (quoting Nita Mary McKinley, *Feminist Perspectives and Objectified Body Consciousness*, BODY IMAGE: A HANDBOOK OF THEORY, RESEARCH, AND CLINICAL PRACTICE 55 (Thomas F. Cash & Thomas Pruzinsky eds., 2002)). The body is not only associated with the feminine, but is also typically perceived as alien, confinement/limitation, the enemy, and “the locus of *all that threatens our attempts at control*.” BORDO, UNBEARABLE WEIGHT, *supra* note 11, at 145.

29. Hesse-Biber, *Mass Marketing*, *supra* note 27, at 210 (quoting Nita Mary McKinley, *Feminist Perspectives and Objectified Body Consciousness*, BODY IMAGE: A HANDBOOK OF THEORY, RESEARCH, AND CLINICAL PRACTICE 55 (Thomas F. Cash & Thomas Pruzinsky eds., 2002)).

30. BORDO, UNBEARABLE WEIGHT, *supra* note 11, at 171. Bordo further explains:

Anorexia *begins in*, emerges out of, what is, in our time, conventional feminine practice. In the course of that practice, for any number of individual reasons, the practice is pushed a little beyond the parameters of moderate dieting. The young woman discovers what it feels like to crave and want and need and yet, through the exercise of her own will, to triumph over that need. In the process, a new realm of meanings is discovered, a range of values and possibilities that Western culture has traditionally coded as “male” and rarely made available to women: an ethic and aesthetic of self-mastery and self-transcendence, expertise, and power over others through the example of superior will and control. The experience is intoxicating, habit-forming.

Id. at 178. Here, we see that Bordo attributes anorexia to a process of initially “pursuing conventional feminine behavior—in this case, the discipline of perfecting the body as an object—to excess.” *Id.* at 179. Then, “[a]t this point of excess, the conventionally feminine deconstructs, we might say, into its opposite and opens onto those values our culture has coded as male.” *Id.*

31. *Id.* at 171.

32. Hesse-Biber, *Mass Marketing*, *supra* note 27, at 211. Hesse-Biber describes “disordered eating” as a combination of “rigid exercise routines, calorie restriction, chronic dieting, bingeing and purging, and the use of laxatives and diuretics to control . . . weight,” but a combination that does not “manifest the full range of psychological traits usually associated with clinical cases of an eating disorder—i.e. interpersonal distrust and perfectionism; [disordered eaters] mimic anorexia and bulimia without the underlying psychological profiles.” *Id.* (citing Sharlene Nagy Hesse-Biber, *Eating Patterns and Disorders in a College Population: Are Women’s Eating Problems a New Phenomenon?*, 20 SEX ROLES 71 (1989)). See also Sharlene Hesse-Biber, *Women, Weight and Eating Disorders: A Socio-Cultural and Political-Economic Analysis*, 14 WOMEN’S STUD. INT’L F. 173 (1991); HESSE-BIBER, AM I THIN ENOUGH?, *supra* note 27; HESSE-BIBER, CULT OF THINNESS, *supra* note 26.

comes from Anne Becker, a professor at Harvard Medical School whose focus has been “on the impact of social and cultural environment on mental health.”³³ Becker was able to interview Fijian girls before and after they received significant access to Western culture through television.³⁴ In 1995, with only extremely limited access to television, “girls in Fiji appeared to be free of the eating disorders common in the West. But by 1998, after just a few years of sexy soap operas and seductive commercials, 11.3 percent of adolescent girls reported they at least once had purged to lose weight.”³⁵ Becker conducted a second study in 2007 on Fiji’s main island, and, out of 520 girls who filled out questionnaires, “Becker found that disordered eating habits were ‘alive and well in Fiji,’ with 45 percent of girls reporting they had purged in the last month.”³⁶ Further, studies have claimed to indicate “that print media and television affect how individuals feel about their bodies. Exposure to magazines and television may lead to body image dissatisfaction and eating disordered symptomatology among girls and women. . . . [D]aily exposure is potentially even more damaging.”³⁷ According to the National Association of Anorexia Nervosa and Associated Disorder (ANAD), “[e]ating disorders have the highest mortality rate of any mental illness.”³⁸ Further, approximately “24 million people of all ages and genders suffer from an eating disorder . . . in the U.S.”³⁹ While men and women both suffer from

33. Anne E. Becker, HARV. MED. SCH., <http://ghsm.hms.harvard.edu/people/faculty/becker/> (last visited June 5, 2013).

34. Corydon Ireland, *Fijian Girls Succumb to Western Dysmorphia*, HARV. GAZETTE (Mar. 19, 2009), <http://news.harvard.edu/gazette/story/2009/03/fijian-girls-succumb-to-western-dysmorphia> (last visited June 5, 2014).

35. *Id.*

36. *Id.* There is a complicated juxtaposition of desires on Fiji, according to Becker: “[P]rosperity has traditionally been associated with food, and with hefty figures. In women especially, Fijians ‘appreciate large, robust bodies.’” *Id.* “Ironically, the same girls sometimes used appetite stimulants,” as the girls “feared what in Fijian is called macake, a disorder that suppresses the appetite—inviting the thinness disparaged by traditional culture.” *Id.*

37. J. Kevin Thompson & Leslie J. Heinberg, *The Media’s Influence on Body Image Disturbance and Eating Disorders: We’ve Reviled Them, Now Can We Rehabilitate Them?*, 55 J. OF SOC. ISSUES 339, 344 (1999). These conclusions were based upon a variety of studies. One group of researchers, for example, developed a questionnaire that “contains two scales: internalization (endorsement or acceptance of media and societally based pressures regarding appearance) and awareness (acknowledgement that such pressures exist).” *Id.* at 342. The researchers “found that internalization is a significant correlate of body dissatisfaction and eating disturbance and predicts variance beyond that associated with simple awareness of pressure and other risk factors, such as negative feedback (teasing) about appearance.” *Id.*

38. *Eating Disorders Statistics*, NAT’L ASS’N OF ANOREXIA NERVOSA AND ASSOCIATED DISORDERS, <http://www.anad.org/get-information/about-eating-disorders/eating-disorders-statistics/> (last visited June 5, 2013).

39. *Id.*

pressures of culture to normalize themselves, only ten to fifteen percent of individuals suffering from anorexia or bulimia are men.⁴⁰ While empirical evidence of this connection is still fairly uncertain,⁴¹ media and advertising have significant impact upon the individual to create himself or herself into what these powerful ideologies present as “normal” and “desirable.”

These concerns are particularly poignant with regard to children and adolescents. Unsurprisingly, “the media have been implicated in a host of society’s ills for the past several decades: school shootings, teen sex and drug use, obesity and eating disorders, even online solicitation of sex.”⁴² Children and teens, for a number of reasons, are believed to be “more susceptible to media influences” than adults.⁴³ To begin with, the young have had fewer life experiences, know less, and are less sophisticated.⁴⁴ Children’s critical thinking skills are also not as developed as those of adults.⁴⁵ Further, teenagers “are notoriously susceptible to peer pressure”⁴⁶ In addition, “[b]oth children and adolescents tend to believe that the media are depicting the ‘real world,’ the so-called cultivation hypothesis. The more TV they watch, the more they expect their own lives to conform to the rules and behavior they see modeled on the small screen.”⁴⁷ For these reasons, solutions directed at remedying the negative influences of the media should have a substantial impact upon the young, especially young women.

In calling for industries that seem to have a strong hold upon young women to change their marketing strategies, it is important to remember the importance this push has not only for the sake of preventing young women from developing eating disorders, but also the importance it has for female agency: “[t]he present-day partnership of capitalist interests and patriarchal perspectives continues to influence women’s bodies through socio-cultural pressures on women to be thin.”⁴⁸ Some feminists believe that thin culture, a culture that “fosters body obsession,” is “part of the backlash against women’s increasing equality in major societal institutions

40. *Id.*

41. See Thompson & Heinberg, *supra* note 37, at 344.

42. Victor C. Strasburger, *Children, Adolescents, and the Media*, 34 CURRENT PROBLEMS PEDIATRIC & ADOLESCENT HEALTH CARE 54, 54 (2004).

43. *Id.* at 55.

44. *Id.* (citing AIMÉE DORR, TELEVISION AND CHILDREN: A SPECIAL MEDIUM FOR A SPECIAL AUDIENCE (1986)).

45. *Id.* at 55–56.

46. *Id.* at 56.

47. *Id.*

48. Hesse-Biber, *Mass Marketing*, *supra* note 27, at 212 (citations omitted).

. . . .”⁴⁹ Women working to be thin “creates a wide gulf in terms of how each gender feels about their bodies. Food choice and bodily outcome become a statement of the self and one’s self-worth more so for women.”⁵⁰ Further, women spend “energy that might otherwise challenge the status quo” in order to achieve the ideal shape and size.⁵¹ Hesse-Biber, quoting Naomi Wolf, notes further:

“The great weight shift must be understood as one of the major historical developments of the century, a direct solution to the dangers posed by the women’s movement and economic and reproductive freedom. Dieting is the most potent political sedative in women’s history; a quietly mad population is a tractable one.”⁵²

In order to claim greater agency and overcome the constraints that thin culture places upon women, it is important to combat such expectations, allowing women to find greater value in their intelligence, their leadership, and their ambition, as opposed to the great value culture places on women as objects.⁵³

II. FIRST AMENDMENT AND COMMERCIAL FREE SPEECH

Regulation of images put forth by the fashion, dieting, and health industries would require an inquiry into the constitutionality of such regulations based on the First Amendment protections. The Supreme Court has developed a body of law protecting commercial free speech, a category of speech that was, initially, not protected. The idea that these industries might be successfully regulated in the United States has been met with skepticism.⁵⁴ Some have postulated that success may be possible so long as the regulation of images is extremely limited.⁵⁵ However,

49. *Id.*

50. *Id.*

51. *Id.* (citing Ilana Attie & J. Brooks-Gunn, *Weight Concerns as Chronic Stressors in Women*, in *GENDER AND STRESS* 218 (Rosalind C. Barnett et al. eds., 1987)).

52. *Id.* (quoting NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 187 (1991)).

53. Further:

The fact that it is women who are sexualized in magazines geared toward both men and women indicates that women’s bodies are constantly on display to be judged. . . . A woman’s value lies largely in terms of her appearance and sexuality. In addition, women are things to be looked at, rather than actors with their own sexual desire.

Julie M. Stankiewicz & Francine Rosselli, *Women as Sex Objects and Victims in Print Advertisements*, 58 *SEX ROLES* 579, 587 (2008).

54. See Minsberg, *supra* note 1.

55. Kerry C. Donavon and Nicole Hunter have recently argued that warning labels similar to

regulations such as small, text-only warnings, (much like the warnings on tobacco products), may prove to be ineffective to combat the pervasive influence of the ideology of slenderness. Further, limitations upon model size and limitations upon how much photoshopping is permissible may be more effective in actually effectuating change. If these proposed regulations would not pass the Constitutional question, perhaps innovative solutions, such as creating a system in which industries receive stamps of approval for adhering to voluntary guidelines, would help further the goals of the feminist movement in reclaiming control over women's bodies and their desires.

A. Virginia Pharmacy Board v. Virginia Citizens Consumer Council

In *Virginia Pharmacy Board*,⁵⁶ the Supreme Court directly addressed “whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.”⁵⁷ The dispute revolved around a portion of the Virginia Code that “provides that a pharmacist licensed in Virginia is guilty of unprofessional conduct” if the pharmacist advertised the prices of prescription drugs.⁵⁸ This prohibition was created by the Virginia State Board of Pharmacy, which “is broadly charged by statute with various responsibilities, including the ‘maintenance of the quality, quantity, integrity, safety and efficacy of drugs or devices distributed, dispensed or administered.’”⁵⁹ The Board was also given the authority to regulate and create laws in “maintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia.”⁶⁰ The plaintiffs in *Virginia Pharmacy Board* argued that users of

those discussed by the Arizona legislature might pass constitutional muster. See Kerry C. Donovan, Note, *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 581 (2012); Nicole Hunter, Note, *Beauty Is in the Eye of the Retoucher: Why Photoshopped Magazine Images Require Regulation*, 33 WOMEN’S RTS. L. REP. 82 (2011). Hunter proposes two alternative arguments to fighting the photoshopping of magazine images: “[r]egulating photoshopped imagery can take two separate paths, with the element separating the paths being whether or not photoshopping is a false or misleading practice.” *Id.* at 111. However, the scope of my critique is limited to her argument applying the *Central Hudson* analysis. See *id.* at 96–103.

56. 425 U.S. 748 (1976).

57. *Id.* at 773.

58. *Id.* at 749–50. The statute provides punishment for the advertisement, “directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.” *Id.* at 750 (internal quote marks omitted).

59. *Id.* at 751 (internal marks omitted) (citation omitted).

60. *Id.* (internal marks omitted) (citation omitted).

prescription drugs should be able to receive information regarding the cost of these drugs from pharmacists, who should be able to disseminate such information through the use of the kind of advertising discouraged by the Virginia Code.⁶¹ The Court, in order to answer the specific question regarding the regulation of prescription drug advertisements, had to determine whether the First Amendment protected commercial speech at all.⁶² The Court asserted that the question was “whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government lacks all protection.”⁶³ The Court held that commercial speech is not so removed from the goals of the First Amendment and merits its protection.⁶⁴ The Court found that consumers and society as a whole “have a strong interest in the free flow of commercial information.”⁶⁵ Further, the Court reasoned that “[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.”⁶⁶ As most decisions are made by private citizens as to what they shall purchase, “[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”⁶⁷ The “free flow of information,” the Court asserted, serves the goal of creating an “enlighten[ed] public.”⁶⁸

61. *Id.* at 754. The Court acknowledges that knowing the prices of products are very important, considering the variation of prices from location to location: “in the Newport News-Hampton area the cost of tetracycline ranges from \$1.20 to \$9.00, a difference of 650%.” *Id.*

62. In earlier cases, such as *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court addressed prohibitions on advertisements that “did more than simply propose a commercial transaction. It contained factual material of clear ‘public interest.’” *Va. Pharmacy Bd.*, 425 U.S. at 760 (quoting *Bigelow*, 421 U.S. at 822). The Court noted that, because the advertisements were about the availability of legal abortions, they “related to activity with which, at least in some respects, the State could not interfere,” and therefore *Bigelow* did not rule on “the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.” *Id.* (quoting *Bigelow*, 421 U.S. at 825) (internal quote marks omitted).

63. *Id.* at 762 (internal quote marks omitted) (citations omitted).

64. *Id.*

65. *Id.* at 764.

66. *Id.* at 765.

67. *Id.* In applying this reasoning to the case at bar, the Court asserted:

Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.

Id. at 763 (citation omitted).

68. *Id.* at 765. In holding that the State of Virginia may not completely suppress advertising through the regulation at hand, the Court balanced the interests of individuals and society against “a number of justifications for the advertising ban.” *Id.* at 766. Primarily, the concern for the State is that

B. *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*

In *Central Hudson*,⁶⁹ the Supreme Court expressed clearly the test for evaluating potential First Amendment violations of commercial free speech. The Public Service Commission of New York had required, beginning in December 1973, a complete halt to all advertising that promoted the use of electricity in the state of New York.⁷⁰ The Commission determined that this cessation was necessary because “the interconnected utility system in New York State [did] not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter.”⁷¹ Three years after the institution of the ban on electricity advertising, Central Hudson Gas & Electric Corporation objected to the ban based on claims to protection under the First Amendment.⁷² Nevertheless, the Commission extended the ban, determining that “promotional advertising [was] contrary to the national policy of conserving energy.”⁷³ Even though the Commission admitted that the ban was far from a perfect method to accomplish the national policy of conserving energy, the Commission believed the ban would have the effect of reducing energy consumption at least to a certain degree.⁷⁴ The Commission later added to its rationale: “[t]he agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost, the Commission feared that additional power would be priced below the actual cost of generation” and would lead to high rates across the board for all consumers.⁷⁵ The trial court upheld the ban, a decision that the New York Court of Appeals affirmed, finding “little value to advertising in ‘the noncompetitive market in which electric

price advertisements will lead to “aggressive price competition” that would lead to a lower standard of “professional services” in order to obtain lower, more competitive prices. *Id.* at 767. This, the State worries, would cause “more painstaking and conscientious pharmacist[s] . . . to either follow suit or to go out of business.” *Id.* at 768. The Court countered that the “open . . . channels of communication” would allow the “‘professional’ pharmacist . . . [to market] his own assertedly superior product” *Id.* at 770.

69. 447 U.S. 557 (1980).

70. *Id.* at 558.

71. *Id.* at 559 (citation omitted).

72. *Id.*

73. *Id.*

74. *Id.* at 559–60. The Commission “acknowledged that the ban is not a perfect vehicle for conserving energy. . . . Still, the Commission adopted the restriction because it was deemed likely to ‘result in some dampening of unnecessary growth’ in energy consumption.” *Id.*

75. *Id.* at 560 (footnote omitted).

corporations operate.”⁷⁶ The Court of Appeals “concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue.”⁷⁷ The Supreme Court held that the ban violated the First and Fourteenth Amendments.⁷⁸ In analyzing the issue, the Court enunciated a four-part test for regulation of commercial free speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁷⁹

The Court briefly acknowledged that speech involved did not amount to being unlawful or misleading.⁸⁰ It further overturned the New York Court of Appeals’ determination that the speech at issue “[conveyed] little useful information” because it denied that the market was at all competitive.⁸¹ Arguing that this speech falls under First Amendment protection, the Court reasoned that “[e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment.”⁸² As for the analysis of the second prong of the *Central Hudson* test, the Court found substantial state interests in banning the advertising.⁸³ First, the Commission argued that energy conservation was a state interest, and the Court agreed.⁸⁴ Further, the Court asserted that the “concern that rates be

76. *Id.* at 561 (quoting *Consol. Edison Co. v. Pub. Serv. Comm’n*, 47 N.Y.2d 94, 110 (1979)).

77. *Id.*

78. *Id.* at 572.

79. *Id.* at 566.

80. *Id.* It is important to note that the Court, in first establishing the *Central Hudson* test in its entirety, made clear that the government’s ability to regulate speech is not as restricted when it concerns speech that is found to be inaccurate or misleading, or that relays information about “illegal activity.” *Id.* at 563–64. The Court states, “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity.” *Id.* (citations omitted).

81. *Id.* at 567.

82. *Id.*

83. *Id.* at 569.

84. *Id.* The Court noted, “[i]n view of our country’s dependence on energy resources beyond our control, no one can doubt the importance of energy conservation.” *Id.* at 568.

fair and efficient represents a clear and substantial governmental interest.”⁸⁵ In analyzing the third prong of the *Central Hudson* test, the Court established that the connection between “restricting protected speech . . . [and] rate structure is, at most, tenuous.”⁸⁶ Failing to believe that the link between advertising and rates was more than speculative, the Court did not view the ban on advertising as justified.⁸⁷ The Court, however, did find a direct causal link between the ban on advertising and energy conservation.⁸⁸ The majority noted that “*Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales.”⁸⁹ Finally, in analyzing whether the regulation “is no more extensive than necessary to further the State’s interest in energy conservation,” the Court asserted that such a complete ban on advertising is unjustified.⁹⁰ For example, it noted that energy conservation as an interest doesn’t account for the ban on “information about electric devices or services that would cause no net increase in total energy use.”⁹¹ The Court reasoned that the lower order, if it bans advertising that would not “endanger conservation or mislead the public . . . violates the First and Fourteenth Amendments and must be invalidated.”⁹² Further, the Commission failed to show “that its interest in conservation cannot be protected adequately by more limited regulation of appellant’s commercial expression.”⁹³

The Court then went on to provide an example of how the Commission might go about fulfilling its goal of conservation without such a restrictive measure, suggesting that the Commission “require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the

85. *Id.* at 569. The concern over rates relates to the State’s desire to prevent “inequities caused by the failure to base the utilities’ rates on marginal cost.” *Id.* at 568. In essence, the Commission believed that promoting “the use of electricity in periods of low demand . . . would increase consumption during peak periods,” leading to an “absence of marginal cost rates.” *Id.* This, in effect, “would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates.” *Id.* at 568–69.

86. *Id.* at 569.

87. *Id.* In explaining why the link was speculative, the Court noted that “[a]dvertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant’s rates remained constant.” *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 569–70.

91. *Id.* at 570.

92. *Id.*

93. *Id.*

foreseeable future.”⁹⁴ Because the Commission’s ban failed the fourth prong of the analysis articulated, the Court reversed the New York Court of Appeals’ decision and invalidated the ban on all advertising by *Central Hudson*.⁹⁵

III. INTERROGATING THE ANALYSIS: *CENTRAL HUDSON* PRONGS AND RECENT SCHOLARSHIP

A. *What Is the “Compelling Government Interest” and How Effective Is the Proposed Solution?*

Two recent note articles have proposed that the solution to the problem of eating disorders in the United States lies in the use of warning labels, arguing that not only would this method of regulation be *effective* in preventing young girls from being affected by unrealistic expectations, but also would be a measure that would pass the *Central Hudson* test.⁹⁶ Donovan writes:

[T]he hypothetical regulation would not go so far as to stifle commercial speech by putting a ban on photoshopping, or even enacting a statute that forces advertisers to only use a certain amount of photoshopping. It is only alerting consumers that the image they are looking at has some level of retouching done. No other method seems to exist that could advance this purpose of exposing the images for being unrealistic other than through the implementation of a warning label system.⁹⁷

I agree with both Hunter and Donovan that, under the *Central Hudson* test, the regulation of photoshopping images and the appearance of women within those images relate to the substantial state interests of reducing the staggering number of occurrences of eating disorders, increasing the self-esteem of young women in the United States, and providing realistic

94. *Id.* at 571 (citation omitted).

95. *Id.* at 571–72.

96. Donovan, for example, proposes “some sort of warning label on photoshopped images (either with a more general label that simply provides that the image has been retouched or a more specific warning that ranks the extent to which an image has been retouched)” Donovan, *supra* note 55, at 609. Hunter suggests similarly that “[r]emoving all photoshopped imagery would likely be viewed as a violation of the First Amendment. Therefore, designing a warning system, similar to the Surgeon General warnings placed on tobacco advertisements, could provide the ideal compromise for acceptable regulation.” Hunter, *supra* note 55, at 102.

97. Donovan, *supra* note 55, at 619.

standards for these women to achieve healthy bodies and minds.⁹⁸ However, there is strong evidence from other fields that warning labels may not fulfill the *Central Hudson* requirement that the regulation further the particular government interest at stake.⁹⁹ I would also argue that, in addition to changes in photoshopping practices there needs to be a change in the expectations of the models themselves. Without effective regulation of both the women being photographed and the technology manipulating their bodies, it is unlikely that regulation would really further the interests of protecting young women from “thin culture” and its ramifications for their minds and bodies. While both these components are necessary, the ability to regulate both effectively may not be possible under constitutional standards. Therefore, it is time to seriously consider creative incentives that may be effective at encouraging the industries to modify their conduct.

B. The Effectiveness of Cigarette Warning Labels

The difficulty in navigating a discussion regarding regulation of the fashion industry and the thin culture it sells lies in finding a solution that is not only *effective*, but also one that the Court would deem, in the end,

98. *Id.* at 612. Donovan explains the state interest as follows:

It is nearly impossible for young people to avoid advertising. Advertisers are notorious for promoting a “beauty ideal” or “the exemplary feminine prototype,” and thus are a major force of the construction of beauty in a culture. Our culture has a dramatic over-representation of thin female models compared to the actual population of adult women. The ideal body weight as depicted in advertisements has continuously decreased, so that the average model depicted in an advertisement is more than twenty percent underweight.

Id. (citations omitted). Donovan notes that this representation of the female body in such an extreme way is a contributing factor in causing eating disorders:

Eating disorders are complex conditions that arise from a combination of long-standing factors, including biological, emotional, and social factors. However, retouched images of women that are unrealistically thin “certainly contribute to the body-hatred so many young women feel and to some of the resulting eating problems, which range from bulimia to compulsive overeating to simply being obsessed with controlling one’s appetite.”

Id. at 615 (citation omitted). Donovan concludes that, because “one of the most pertinent social factors that can contribute to eating disorders is cultural pressure that glorify ‘thinness,’ as well as narrow definitions of beauty that include only one certain body type,” the government has “a significant interest in regulating fashion advertisements in some form.” *Id.* at 616 (citation omitted). Similarly, Hunter argues, “[t]he government has a substantial interest to impose regulation on photoshopped images as advertisements portray ‘flawlessly beautiful and extremely thin women’ that encourage, most specifically, young women to aspire to resemble these models.” Hunter, *supra* note 55, at 100 (quoting JEAN KILBOURNE, DEADLY PERSUASION: WHY WOMEN AND GIRLS MUST FIGHT THE ADDICTIVE POWER OF ADVERTISING 132 (1999)).

99. *Central Hudson*, 447 U.S. at 566.

constitutional.¹⁰⁰ While warning labels or a rating system of some kind have been touted as mechanisms that may pass constitutional challenge,¹⁰¹ such labels are likely insufficient to fight the strong tide of thin culture. A similar approach has been used in another realm concerning the health and welfare of adolescents: the regulation of tobacco advertising.

Studies have shown that such warning labels have proven ineffective in deterring adolescent use of cigarettes.¹⁰² Warning labels “have been required on cigarette packages since 1966 and on all cigarette advertisements since 1972.”¹⁰³ Studies of the labels’ effectiveness have sought to answer questions such as: “Are teenage smokers and nonsmokers aware and knowledgeable about warning labels on cigarette packages and advertisements?” and “Are awareness and knowledge of cigarette warning labels associated with changes in smoking status?”¹⁰⁴ In one such study, the researchers “measured knowledge of warning labels and then monitored changes in smoking behavior during the subsequent [three] months.”¹⁰⁵

Instead of a correlation between knowledge of the warning labels and reduced smoking, the study showed that “a paradoxical, significant increase in smoking from baseline to follow-up among those teenagers with greater knowledge of the warning labels on cigarette packages.”¹⁰⁶ The researchers attempted to explain the paradox of their results, claiming that “adolescents who are more likely to continue or increase their smoking may also be more likely to read and remember the warning labels.”¹⁰⁷ Further, the research showed it was possible “some adolescents have acquired greater knowledge of cigarette package warning labels through exposure to friends or family members who smoke, potentially placing them at greater risk of increasing smoking.”¹⁰⁸ Last, “adolescents are generally not influenced by interventions that focus only on more distal, health-related outcomes. Various research shows that fear appeals must include explicit behavior change instruction or they will prove ineffective.”¹⁰⁹ The researchers noted that their “findings suggest that

100. See Minsberg, *supra* note 1.

101. See Hunter, *supra* note 55, at 102; Donovan, *supra* note 55, at 620.

102. See Thomas N. Robinson & Joel D. Killen, *Do Cigarette Warning Labels Reduce Smoking?: Paradoxical Effects Among Adolescents*, 151 ARCH PEDIATRIC ADOLESCENT MEDICINE 267 (1997).

103. *Id.* at 267.

104. *Id.*

105. *Id.* at 271.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (citation omitted).

warning labels are, at best, ineffective for this target audience. Sizable proportions of adolescents are not seeing, reading, and remembering cigarette warning labels on cigarette packages and advertisements, and knowledge of warning labels was not associated with subsequent decreased smoking.”¹¹⁰ Further, the government has cited a number of sources in making its case for the new, graphic warning labels that indicate that current warning labels are not proving to be working. One such source concluded the following:

[A]n information deficit still exists, especially among juveniles, regarding the dangers of tobacco use. According to the [2007 Institute of Medicine of the National Academies] report, “research suggests that adolescents misperceive the magnitude of smoking harms and the addictive properties of tobacco and fail to appreciate the long-term dangers of smoking, especially when they apply the dangers of their own behavior. . . . These distorted risk perceptions are associated with adolescents’ decisions to initiate tobacco use, a decision that they will later regret.”¹¹¹

Tobacco products:

are unique among tobacco control interventions in that they are delivered at the time of smoking and have a high frequency of exposure that increases with the number of cigarettes per day. Nevertheless, warning labels must be noticed to be effective, and the extent to which smokers attend to warnings depends upon various content and design features.¹¹²

For example, warning labels are more likely to be noticed “when information is presented in a vivid manner that evokes an emotional reaction. Specific, unambiguous warnings (e.g., ‘cigarettes cause lung cancer’) are also more likely to be noticed and less likely to be discounted

110. *Id.* at 271–72.

111. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 525 (6th Cir. 2012). In making its case for the new warning labels challenged by tobacco companies, the government contended “that the purpose of the new warning label requirement ‘is not to stigmatize the use of tobacco products on the industry’s dime; it is to ensure that the health risk message is actually seen by consumers in the first instance.’” *Id.* (quoting *Commonwealth Brands, Inc v. United States*, 678 F. Supp. 2d 512, 530 (W.D. Ky. 2010)).

112. INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION 437 (Richard J. Bonnie, Kathleen Stratton, & Robert B. Wallace eds., 2007) (part of Appendix C, either attached to text as a compact disc or online at http://www.nap.edu/catalog.php?record_id=11795).

than vague, equivocal warnings (e.g., ‘cigarettes are hazardous to your health’).¹¹³

A recent publication, supporting the increased warning label efforts delineated in the 2009 Family Smoking Prevention and Tobacco Control Act, shows similar findings.¹¹⁴ The Act has come under judicial scrutiny in recent years for its alleged violations of the First Amendment.¹¹⁵ Nonetheless, many organizations, such as the Campaign for Tobacco-Free Kids, support the notion that current warning labels on tobacco products just are not making an impact anymore.¹¹⁶ The Campaign for Tobacco-Free Kids argues that because today’s labels use “the same parameters and the same four messages approved by Congress more than 20 years ago, today’s labels are small and easily overwhelmed by the designs on cigarette packages. Moreover, smokers have become habituated to the style of labels, to the point that the labels go unnoticed altogether.”¹¹⁷ Comparatively, countries across the globe have taken a much stronger stance on using warning labels to put individuals on notice of the dangers of smoking.¹¹⁸ In comparison, “warning labels in the United States have consisted of nothing more than miniscule black text on a white background. These warnings have even failed to contain the word ‘death.’”¹¹⁹ A recent study used a focus group of United States citizens, asking them to compare U.S. warning labels to those currently used in Canada, which contain a number of graphic images, colors, and bold lettering describing specific ways that smoking can harm the individual, such as, “Cigarettes Cause Mouth Diseases.”¹²⁰ When it came to the U.S.

113. *Id.* (internal citations omitted) (part of Appendix C, either attached to text as a compact disc or online at http://www.nap.edu/catalog.php?record_id=11795).

114. See Meg Riordan, *Tobacco Warning Labels: Evidence of Effectiveness*, THE CAMPAIGN FOR TOBACCO-FREE KIDS (Mar. 19, 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0325.pdf>.

115. See generally Kristin M. Sempeles, *The FDA’s Attempt to Scare the Smoke out of You: Has the FDA Gone Too Far With the Nine New Cigarette Warning Labels?*, 117 PENN ST. L. REV. 223 (2012).

116. “Warning labels were first required on cigarette packs by the Federal Cigarette Labeling and Advertising Act of 1965. Unfortunately, since the current requirements for warning labels were established in 1984, their effect on smokers has drastically weakened, and the current labels are now virtually meaningless.” Riordan, *supra* note 114, at 1.

117. *Id.*

118. For example, over 50 countries, including Canada, Australia, Spain, France, Colombia, and the United Kingdom require pictures or images on cigarette packs. *Id.* at 4-5.

119. Robert J. Baehr, *A New Wave of Paternalistic Tobacco Regulation*, 95 IOWA L. REV. 1663, 1675 (2010).

120. Michelle O’Hegarty et al., *Young Adults’ Perceptions of Cigarette Warning Labels in the United States and Canada*, 4 PREVENTING CHRONIC DISEASE: PUB. HEALTH RES., PRAC., & POL’Y 1, 3 (2007).

warning labels, those in the focus group who smoked “indicated that they did not pay attention to the U.S. labels.”¹²¹ In comparison, the “participants[, regardless of smoking status,] indicated the Canadian labels were more likely to be seen and were more informative than U.S. cigarette warnings.”¹²²

C. Warning Labels for Retouched Images: Concern for Effectiveness and Constitutionality

Arguably, the old cigarette package warning labels are similar in style and size to the image-retouching warnings proposed by individuals who desire to use them in magazines, advertisements, and other sources.¹²³ The proposed warnings for retouched images would likely be relatively small disclaimers, placed in a corner of a photo or advertisement. Further, the proposed warnings would be plain text. Just as there is concern that the current warning labels on cigarette packages become lost in the design of the cigarette packages themselves,¹²⁴ the argument is even stronger that such small, text-based photoshopping disclaimers would become similarly lost. Fashion and beauty advertisements and photos generally are busy and colorful, and, most would argue, artfully crafted. The models, clothing, backgrounds, and effects all draw the reader directly to the image itself. If cigarette warning labels can be lost in the simple designs of cigarette packaging, surely it is not a far stretch to infer that fashion magazine photographs and advertisements will quickly overwhelm such disclaimers as to the photoshopped nature of the images. In support of this contention—in one study conducted to determine whether “visual literacy, defined . . . as knowledge of digital manipulation of a fashion photograph, reduce[s] the likelihood of social comparison or the likelihood of a subject to idealize an unrealistic image[]”¹²⁵ the author, after determining that “knowledge of digital manipulation [did not] affect a respondents’ [sic]

121. *Id.* at 4.

122. *Id.*

123. The disclaimer system proposed by Donovan, for example, would alert “consumers that the image that they are looking at has some level of retouching done.” Donovan, *supra* note 55, at 619. Further, Hunter also suggests that the warning label proposed could resemble the Surgeon General warnings found on tobacco advertisements. Hunter, *supra* note 55, at 102.

124. Riordan, *supra* note 114, at 1 (“Using the same parameters and the same four messages approved by Congress more than 20 years ago, today’s labels are small and easily overwhelmed by the designs on cigarette packages.”).

125. Kimberly L. Bissell, *Skinny Like You: Visual Literacy, Digital Manipulation and Young Women’s Drive to Be Thin*, 6 STUD MEDIA & INFO. LITERACY EDUC. 1, 3 (2006).

desire to achieve a particular body shape seen in a photograph,”¹²⁶ postulated that “participants in the experimental group may not have processed the visual literacy statement in the way predicted, as the processing of this information was predicted to decrease feelings of similarity, decrease social comparisons made with media models and lower scores on the disordered eating subscales.”¹²⁷ The author further explained:

The reason for this may be related to the way participants in this study processed the verbal and visual information. Cook . . . suggests that when consumers or viewers have to process visual and verbal components of advertisements or related media, the complete processing of information may not occur because one form of information, i.e. the visual information, may be more interesting, dynamic, compelling, or interesting, which would subsequently reduce the likelihood of processing the textual information.¹²⁸

Further, like the vague warnings that have been on tobacco products and advertising for the past twenty years,¹²⁹ the proposed disclaimers on photoshopped images would require a number of inferences in making conclusions that these images impose dangerous and unrealistic expectations upon young women. First, the proposed disclaimer would, in plain and simple language, assert that the photo had been digitally retouched. The motivation, most commonly, behind the desire to put disclaimers on photoshopped images is to combat general “body dissatisfaction” and the “incidence of eating disorders.”¹³⁰ Therefore, young women who view these images will not only be required to *notice* and take the time to read the disclaimer, but they will also have to proceed to interpret the warning that an image has been photoshopped to mean that the image is unrealistic. Then, female viewers will further have to make a connection between the unrealistic nature of these images and how that nature relates to them as women. They will have to see for themselves that those unrealistic images cannot be prototypes for the kind of women they want to be. Unlike with cigarette warnings, which tend to directly (even if vaguely) suggest that smoking leads to serious health problems and addiction, there will be no clear indication in these proposed disclaimers

126. *Id.* at 9.

127. *Id.* at 11.

128. *Id.* (citing GUY COOK, DISCOURSE OF ADVERTISING 75 (1992)).

129. *Id.*

130. Donovan, *supra* note 55, at 612.

that “buying into” these images might lead to lack of self-confidence, unrealistic expectations, and potentially even eating disorders.

One study, claiming to “provide[] the first empirical demonstration of the positive impact of the addition of warnings labels to media images,”¹³¹ set out to “to examine the impact of labelling media images as having been digitally altered on women’s mood and body dissatisfaction.”¹³² In the study:

A sample of 102 undergraduate women aged 18 to 35 years were randomly allocated to view magazine fashion spreads with either no warning labels, generic warning labels that stated that the image had been digitally altered, or specific warning labels that stated the way in which the image had been digitally altered.¹³³

The authors of the study “predicted that women who viewed magazine images with a label would experience lower levels of negative mood and body dissatisfaction than women who viewed images without a label.”¹³⁴

The generic warning label used stated, “Warning: these images have been digitally altered”¹³⁵ The specific label “was individually tailored to contain more detail about which parts of the image had been digitally altered, e.g., ‘Warning: these images have been digitally altered to lengthen legs and trim inner thighs.’”¹³⁶ All labels were formatted “in size 10 Calibri font in either black or white (to contrast the color of the background) and were placed at the bottom of the right-hand page of the fashion spread.”¹³⁷

While the authors found “no differences . . . for negative mood, viewing images without warning labels led to an increase in womens’ feelings of body dissatisfaction in a way that viewing images with the warning labels did not.”¹³⁸ While the study did show that “the labels

131. Amy Slater et al., *Reality Check: An Experimental Investigation of the Addition of Warning Labels to Fashion Magazine Images on Women’s Mood and Body Dissatisfaction*, 31 J. SOC. & CLINICAL PSYCHOL. 105, 117 (2012).

132. *Id.* at 120.

133. *Id.* at 105. The authors of this study state, “There is some urgency in investigating the impact, if any, of the addition of such warning labels to media images that have been digitally altered. To our knowledge there has been no such research to date.” *Id.* at 108. However, the authors note that “other research from the broader media literacy domain . . . suggests that the addition of warning labels might be effective.” *Id.* at 108–09 (citing MICHAEL P. LEVINE & LINDA SMOLAK, *THE PREVENTION OF EATING PROBLEMS AND EATING DISORDERS: THEORY, RESEARCH, AND PRACTICE* (2006)).

134. *Id.* at 117.

135. *Id.* at 111.

136. *Id.*

137. *Id.*

138. *Id.*

served to ameliorate the usually obtained negative effect of exposure to thin ideal media images,” the authors also admitted that “future experiments with a control group will be needed to unambiguously confirm these findings”¹³⁹ Further, the authors admitted that a number of limitations should be taken into consideration in conjunction with the findings of their research.¹⁴⁰ The sample of women used was limited.¹⁴¹ It should be noted that the study also conceded that, “it is possible that the findings may not generalize beyond the laboratory setting.”¹⁴² The authors also indicated that because “the current study examined the use of warning labels on fashion spreads,” it is possible that “the findings may not generalize to other common types of magazine images, such as advertisements or images of celebrities.”¹⁴³ The study was also limited to “one style of label with regards to wording, font, and placement.”¹⁴⁴ While initial research by these authors appears to be successful, it is also worth noting that more research, as they admitted, will be necessary in order to confirm such findings.¹⁴⁵ These initial findings, in essence, may be insufficient to support the conclusion that warning labels on photoshopped images will be truly effective at reducing the instance of eating disorders and disordered eating, and creating more confident women who do not feel constrained to adhere to thin culture.

Case law supports the conclusion that a regulation such as requiring a warning label on photoshopped images may not be upheld under constitutional challenge. In *Edenfield v. Fane*,¹⁴⁶ the Supreme Court held that a “solicitation ban applicable to certified public accountants (CPA’s) enacted by the State of Florida” was, “as applied to CPA solicitation in the business context . . . inconsistent with the free speech guarantees of the

139. *Id.*

140. *Id.* at 119.

141. *Id.* “[T]he findings are specific to a sample of young, predominately White, Australian university students.” *Id.*

142. *Id.* The authors state that:

The way in which women were required to examine the fashion spread images may be different from the way in which women read fashion magazines in a natural setting (e.g., at home or in the doctor’s waiting room). However, the number of images (10) featuring the thin-ideal viewed here was far fewer than one would encounter in a single issue of a typical fashion magazine.

Id.

143. *Id.* at 119–20.

144. *Id.* at 120. The authors noted that “future research might usefully investigate other physical aspects of the warning label, e.g., the use of some form of symbol, to ascertain maximum effectiveness.” *Id.*

145. *Id.* at 117, 118.

146. 507 U.S. 761 (1993).

First and Fourteenth Amendments.”¹⁴⁷ Applying the *Central Hudson* test,¹⁴⁸ the Court held that, even though the interests were substantial, the Florida Board of Accountancy failed to show that “the ban on CPA solicitation advances its asserted interests in any direct and material way.”¹⁴⁹ The Court stated that, “[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁵⁰ Following *Central Hudson*, the Court reiterated “that a regulation impinging upon commercial expression [must] ‘directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.’”¹⁵¹

A recent decision from the D.C. Circuit proves productive in analyzing the issue. In *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*,¹⁵² the D.C. Circuit affirmed the district court’s entry of a motion for summary judgment on behalf of a number of tobacco companies that alleged that “FDA’s proposed graphic warnings violated the First Amendment.”¹⁵³ In doing so, the Court of Appeals employed the *Central Hudson* test, and, assuming that the government had a substantial interest “in reducing smoking rates” asserted that the “FDA has not provided a shred of evidence—much less the ‘substantial evidence’ required by the APA—showing that the graphic warnings will ‘directly advance’ its interest in reducing the number of Americans who smoke.”¹⁵⁴ For example, while there appears to be a general trend across the globe in utilizing graphic warning labels on cigarette packages, the FDA “offers no evidence showing that such warnings have *directly caused* a material decrease in

147. *Id.* at 763.

148. As previously stated, the *Central Hudson* test consists of the following analysis:

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

Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980).

149. *Edenfield*, 507 U.S. at 771.

150. *Id.* at 770–71.

151. *Id.* at 770 (quoting *Central Hudson*, 447 U.S. at 564).

152. 696 F.3d 1205 (D.C. Cir. 2012).

153. *Id.* at 1208.

154. *Id.* at 1218–19.

smoking rates in any of the countries that now require them.”¹⁵⁵ Further, studies from Canada and Australia merely “showed that [while] the warnings on cigarette packs caused a substantial number of survey participants to think—or think more—about quitting smoking . . . it is mere speculation to suggest that respondents who report increased *thoughts* about quitting smoking will actually follow through on their intentions.”¹⁵⁶

The FDA only provided the D.C. Circuit with “two studies that directly evaluate the impact of graphic warnings on actual smoking rates, and neither set of data shows that the graphic warnings will ‘directly’ advance its interest in reducing smoking rates ‘to a material degree.’”¹⁵⁷ Further, the Regulatory Impact Analysis conducted by the FDA “estimated the new warnings would reduce U.S. smoking rates by a mere 0.088%, a number the FDA concedes is ‘in general not statistically distinguishable from zero.’”¹⁵⁸ Concluding that the FDA had not provided “substantial evidence showing that the graphic warning requirements ‘directly advance[] the governmental interest asserted,’”¹⁵⁹ the D.C. Circuit stated, “*Central Hudson* requires FDA to find and present data supporting its claims *prior to imposing a burden on commercial speech.*”¹⁶⁰

It appears that there has only been one study know to have demonstrated “the positive impact of the addition of warning labels to media images,”¹⁶¹ and its findings—and therefore its ability to persuade—are limited.¹⁶² Assuming that the substantial interest in the case of the regulation of photoshopped images is reducing the kind of feelings of

155. *Id.* at 1219.

156. *Id.* Recent commentary on the First Amendment, public health concerns, and commercial speech suggests that compelled disclosure cases are moving toward looking for empirical evidence from the government in order to uphold such measures:

Courts have shown little recognition of the practical constraints on both government and social science when imposing these requirements. . . . Apparently the second-most-influential court in the land[, the U.S. Court of Appeals for the D.C. Circuit,] has held that the FDA—and perhaps by extension other agencies like the Consumer Product Safety Commission and the Environmental Protection Agency—cannot require any particular warning on a new product until *after* the agency has gathered detailed evidence of the effectiveness of the particular warning in averting the identified harm.

Seth E. Mermin & Samantha K. Graff, *The First Amendment and Public Health, at Odds*, 39 AM. J.L. & MED. 298, 302–03 (2013).

157. *R.J. Reynolds*, 696 F.3d at 1220 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

158. *Id.* (citations omitted).

159. *Id.* at 1218 (quoting *Central Hudson*, 447 U.S. at 566).

160. *Id.* at 1221.

161. Slater, *supra* note 131, at 117.

162. See *supra* notes 127–139 and accompanying text.

dissatisfaction with one's body that may lead to eating disorders, disordered eating, and a lack of sense of self-worth, this evidence may be insufficient to prove that disclaimers placed upon photoshopped images will “*directly cause*[] a material decrease”¹⁶³ in the kinds of concerns that would prompt such legislation.

In Bordo's analysis of culture and the produced body, we see that the power itself to influence and *produce* dominant conceptions of femininity is not simply held in one place.¹⁶⁴ Rather, it comes from a number of “processes.”¹⁶⁵ That is not to say that all efforts in a single form to dispel the myth that all women can achieve the physique propagated by thin culture are ineffective, but if this myth is pervasive and perpetuated by a number of mediums, not only by advertisements and magazine images, it would be difficult to argue that such a small step towards meaningful regulation would really achieve the results that many who support photoshopping disclaimers believe it would.

All in all, it does not appear that photoshopping disclaimers, in light of parallel experience with such warnings in other industries, will really directly advance the government's interest in combating the mental and physical effects of unrealistic body expectations to which photoshopped images contribute.

IV. DISCUSSING THE ALTERNATIVES

Proponents of disclaimers and warning labels hope to use these methods to make an impact because there seem to be very few—if any—feasible alternatives. Donovan, in her thorough analysis of the *Central Hudson* test, argues

Recent cases . . . suggest that the Court will no longer give strong deference to regulation that promotes an interest separate from fair dealing in the marketplace. Instead, the Court has hinted that a certain amount of “special care” should be taken when reviewing the regulation. Furthermore, broad paternalistic reasons given by the government can no longer be justified.¹⁶⁶

163. *R.J. Reynolds*, 696 F.3d at 1219.

164. Bordo, *Politics of the Body*, *supra* note 10, at 190–91.

165. *Id.* at 191 (“The dominance of those [historical] forms is achieved, however, not from magisterial decree or design ‘from above’ but through multiple ‘processes, of different origin and scattered location’, regulating the most intimate and minute elements of the construction of space, time, desire, embodiment.”) (citing MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 138 (1979)).

166. Donovan, *supra* note 55, at 618.

As previously noted, Israel's legislation¹⁶⁷ regulating the weight of models, for example, has been met with skepticism. Professor Donald Downs, an expert on the First Amendment, has noted:

[I]t would be very tough to pass something like Israel's law in the U.S. Congress. "In the U.S., it would be hard to justify this type of law on either legal or normative policy grounds The Israeli law is paternalistic in that it prohibits something because of the effect it might have on others in the longer term."¹⁶⁸

Further, the idea of regulating the extent to which a photo is retouched and altered may also not pass constitutional challenge. Unfortunately, the discussion comes to an impasse: it appears to be a choice between, on the one hand, measures such as disclaimers that are ineffective to protect women's health but supported by the First Amendment, and, on the other hand, measures that, given the pervasive nature of thin culture, might actually make a difference but may never be deemed constitutional.

A. Regulating Modeling as a Profession: A Comparison with Steroid Use in Athletics

Models themselves are not only consumers of thin culture, but participants, perpetrators, and victims. Feeling the pressure to be thin in order to make a living, models push themselves to their physical limits in order to fit the body type that their employers desire. According to one source, "[m]ost runway models meet the Body Mass Index physical criteria for Anorexia."¹⁶⁹ Further, the gravity of the problem seems to be increasing, as "[t]wenty years ago the average fashion model weighed 8% less than the average woman. Today, she weighs 23% less."¹⁷⁰ Ana Carolina Restin, an internationally known model from Brazil, reportedly died of complications related to her struggles with anorexia.¹⁷¹ Many women are victimized by thin culture, from those who consume it to those who sell it. Regulating models' weight in the industry would further the

167. See Minsberg, *supra* note 1.

168. *Id.*

169. Madeline Jones, *Plus Size Bodies, What Is Wrong With Them Anyway?*, PLUS MODEL MAGAZINE, (Jan. 8, 2012), <http://www.plus-model-mag.com/2012/01/plus-size-bodies-what-is-wrong-with-them-anyway> (last visited July 10, 2014).

170. *Id.*

171. See generally Tom Phillips, *Ana Carolina Reston: The Model Who Starved Herself to Death*, THE OBSERVER (Jan. 13, 2007), <http://www.guardian.co.uk/lifeandstyle/2007/jan/14/fashion.features4> (last visited July 10, 2014).

same goals as those furthered by regulating and limiting the kind of digital retouching performed upon women's bodies in photographs, such as combating eating disorders and young women's feelings of dissatisfaction about their bodies.

The Academy for Eating Disorders, "a global professional association committed to leadership in eating disorders research, education, treatment, and prevention,"¹⁷² has promulgated a list of proposed guidelines for the fashion industry, in hopes that these rules would be adopted by the fashion industry in order to better protect their employees from eating disorder-related complications and death.¹⁷³ In these regulations, the Academy asks "for industry and government support of a ban of extremely underweight models both on the runway and in fashion magazines."¹⁷⁴ The guidelines were intended to "help the industry take responsibility for the health and wellbeing of models."¹⁷⁵ Some of the most compelling guidelines include: (1) "Adoption of an age threshold requiring that models be at least 16 years of age so as to reduce the pressure that adolescent girls feel to conform to the ultra-thin standard of female beauty." (2) "For women and men over the age of 18, adoption of a minimum body mass index threshold of 18.5 kg/m², (e.g., a female model who is 5'9" . . . must weigh more than 126 pounds . . .) which recognizes that weight below this is considered underweight by the World Health Organization." (3) "Adoption of an independent medical certification affirming that students who are aspiring models do not suffer from an eating disorder and/or related medical complications" (4) "An overall ban of the use of photographic manipulation techniques that artificially slim images of fashion models throughout the entire fashion industry."¹⁷⁶

Of course, in furthering the fight against unrealistic expectations imposed upon women's bodies, it is important to note that the regulation (through labels or bans) of photoshopping is simply not enough, for the models themselves—feeling pressure from the industry, as noted above—have physically (not virtually) conformed to the thin ideal. Not all models

172. *Our Mission*, ACAD. FOR EATING DISORDERS, <http://aedweb.org/web/index.php/about-aed/our-mission> (last visited June 5, 2014).

173. *Guidelines for the Fashion Industry*, ACAD. FOR EATING DISORDERS, <http://aedweb.org/web/index.php/23-get-involved/position-statements/95-aed-statement-on-body-shaming-and-weight-prejudice-in-public-endeavors-to-reduce-obesity-9> (last visited June 5, 2014).

174. *Id.*

175. *Id.*

176. *Academy for Eating Disorders Guidelines for the Fashion Industry*, ACAD. FOR EATING DISORDERS (2007), www.wm.edu/sites/mhwc/documents/AED_Guidelines.pdf [hereinafter *Academy Guidelines*].

need the body-slimming tricks of digital retouching in order to meet cultural expectations.

In arguing that also providing a minimum body mass index threshold would further the same goals as limiting photoshopping women's bodies, it would be productive to draw comparisons between the modeling industry and the regulation of steroid use in athletics. In the decade prior to the Anabolic Steroid Control Act of 1990,

reports of increasing use of anabolic steroids in organized sports, including a purported "silent epidemic" of high school steroid use, came to the attention of Congress. When Canadian sprinter Ben Johnson tested positive for the steroid stanozolol at the 1988 Seoul Olympics, the ensuing media frenzy galvanized Congress into action.¹⁷⁷

In the hearings leading up to the passage of the Anabolic Steroids Control Act of 1990, a number of "witnesses at the hearings were representatives from competitive athletics whose testimony, consistent with Congress's apparent main concern, focused on the purported need for legislative action to solve an athletic 'cheating' problem."¹⁷⁸ The concern was not just about cheating, however. Anabolic steroid abuse is believed to lead to a number of health concerns, including high blood pressure, impaired liver function, tumors of the liver, heart disease, depression, and stroke.¹⁷⁹ The 1990 Act was passed, "criminalizing the possession of anabolic steroids without a valid prescription."¹⁸⁰ Anabolic steroids became a Schedule III substance, putting "steroids in the same legal class as barbiturates, ketamine, LSD precursors, and narcotic painkillers such as Vicodin."¹⁸¹

Again, in 2004, a number of problems arising from deficiencies in the current law and a resurgence of media attention led to a second round of reforms.¹⁸² The Anabolic Steroid Control Act of 2004 "added twenty-six

177. Rick Collins, *Changing the Game: The Congressional Response to Sports Doping via the Anabolic Steroid Control Act*, 40 NEW ENG. L. REV 753, 754 (2006).

178. *Id.* (citation omitted).

179. *Anabolic Steroids and Sports: Winning at Any Cost*, N.Y. DEP'T OF HEALTH, <http://www.health.ny.gov/publications/1210/1210.pdf> (last visited June 5, 2014).

180. Collins, *supra* note 177, at 755.

181. *Id.* (citation omitted).

182. *Id.* at 756. Collins notes:

While dietary supplements have never been embraced by "anti-doping" agencies, prohormone supplements were of particular concern, presenting at least four problems beyond any perceived health issues. First, by their very nature and design they defied traditional sports value: these were little pills that might give the player who swallowed them a chemically-induced advantage over the player who did not. Second, some of the steroid precursor products shared metabolites with banned anabolic steroids, raising the specter of "false

new steroid compounds to the list of substances that are legally defined as ‘anabolic steroids’ and classified as Schedule III controlled substances.”¹⁸³ Congress also passed the Clean Sports Act of 2005 in an “attempt to regulate performance-enhancing substances under its authority to regulate interstate commerce.”¹⁸⁴ The purpose of the Clean Sports Act “is ‘to protect the integrity of professional sports and the health and safety of athletes generally by establishing minimum standards for the testing of steroids and other performance-enhancing substances by professional sports leagues.’”¹⁸⁵ The Clean Sports Act, in essence, “mandates that . . . all four major professional sports leagues and the United States Boxing Commission adopt its minimum testing standards. . . . [Those standards] require random suspicionless testing for all prohibited substances at least five times per year for each athlete.”¹⁸⁶

It would be productive to make comparisons between the modeling profession and being a professional athlete. First, both require a degree of body manipulation and focus: generally, models are required to be thin while athletes are required to maintain their bodies in a way that makes them competitive in their respective sports. Second, members of both professions feel extreme pressure from media attention to achieve “perfection,” depending upon the perceived standard. Third, both the model and the athlete’s livelihoods depend upon the acceptability of, not only their professional skills, but also their bodies. Fourth, some athletes and models, in an effort to achieve the competitive standard that will continue to make them marketable, turn to extreme—and dangerous—measures. For athletes, it is a race to the top—who can be the fastest, the strongest, the most agile? For models, it is a race to the bottom—who can be the thinnest, who can most fully embody the ideal of thin culture? For athletes, the answer most commonly is steroids. For models, it is starvation and deprivation.

One complication, one point at which the comparison fails, is that steroids are illegal, whereas developing an eating disorder is not.

positive” drug tests for illegal anabolic steroids. Third, traditional drug screening might have failed to detect some of the newer “designer” steroid configurations. Lastly, poor quality control at the manufacturing level presented the possibility that some dietary supplement products might inadvertently contain steroid precursors due to “cross-contamination,” resulting in false positives for anabolic steroids.

Id. (citations omitted).

183. *Id.* at 757 (citations omitted).

184. Philip Jacques, *Is Congress’ Latest Effort to De-juice Professional Sports Unconstitutional?*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 97, 99 (2009).

185. *Id.* (citation omitted).

186. *Id.* at 100 (citations omitted).

However, members of both groups feel the need to turn to dangerous methods to maintain their places in their respective endeavors. It seems reasonable that one might propose regulations upon the modeling and fashion industries for the sake of protecting models from dangerous pressures *and* for the sake of working to change the norms in society regarding the ideal body image, an image that, today, is a prison of contempt, insecurity, and suffering for many women across the United States. Indeed, the argument for regulating the body mass index (“BMI”) of models has been made before.¹⁸⁷

Of course, requiring a minimum BMI of at least 18.5 kg/m² (as proposed by the Academy for Eating Disorders)¹⁸⁸ would not just have a positive impact upon the health and wellness of models themselves. Just as regulation of professional sports has affected the national atmosphere and attitude toward steroid use, especially in adolescents, taking a stand against dangerously thin models as role models would send a distinct message to consumers—especially the youth—of the fashion industry.¹⁸⁹

B. A Need for Photoshopping Regulation

While regulation of modeling may have a positive impact on young women, it may not be sufficient on its own to transform the way we think about women’s bodies. This is because we still must contend with

187. See Cassandra A. Soltis, *Dying to Be a Supermodel: Can Requiring a Healthy BMI be Fashionable?*, 26 J. CONTEMP. HEALTH L. & POL’Y 49 (2009). Soltis’s argument focuses upon the ways in which the fashion industry might be regulated through the argument that modeling creates an “occupational hazard” and through the notion that the fashion industry participates in “unfair or deceptive” practices, which could invoke Federal Trade Commission intervention. *Id.* at 61, 63. Soltis’s proposals, in addition to regulating model weight, include, similar to other more recent articles, would have the FTC require a disclaimer on photos that have been altered. *Id.* at 69–70.

188. See *Academy for Eating Disorders Guidelines for the Fashion Industry*, *supra* note 175.

189. Jacques writes:

The [Clean Sports Act of 2005 (CSA)] states that the Senate found the use of anabolic steroids and other performance-enhancing substances by minors to be a public health problem of national significance. The CSA states that experts estimate that 500,000 teenagers have used performance-enhancing substances and based upon the testimony of parents of minors, who used performance-enhancing substances, and medical and health experts, the use of performance-enhancing substances has a number of adverse health effects. It also states that studies and surveys suggest that use of performance-enhancing substances by professional athletes results in increase use by adolescents and that the adoption of a strict drug testing policy by professional sports leagues would reduce the use of performance-enhancing substances by adolescents. Thus, even though the CSA does not state specifically that one of its main purposes is to deter the use of performance-enhancing substances by adolescent athletes, the Congressional findings and extrinsic evidence lead to the conclusion that it is the main thrust behind the proposed legislation.

Jacques, *supra* note 184, at 99–100 (citations omitted).

photoshopping. Through photoshopping techniques, it would be relatively easy to take a woman who would be considered healthy and within a normal weight range, and make her resemble the underweight models that walk the runway. In 2001, the American Medical Association made a stand against egregious and extreme photoshopping, claiming that such actions “can contribute to unrealistic expectations of appropriate body image—especially among impressionable children and adolescents.”¹⁹⁰ The American Medical Association, in response to this concern,

adopted new policy to encourage advertising associations to work with public and private sector organizations concerned with child and adolescent health to develop guidelines for advertisements, especially those appearing in teen-oriented publications, that would discourage the altering of photographs in a manner that could promote unrealistic expectations of appropriate body image.¹⁹¹

While I do not suggest that there should be a wholesale ban upon altering images of women in advertisements and fashion magazines, there must be a point at which it becomes too much. For example, the American Medical Association cites an example where “a model’s waist was slimmed so severely, her head appeared to be wider than her waist”¹⁹² Setting certain limitations upon photoshopping may very well be scrutinized under the First Amendment and the *Central Hudson* test, but I have tried to show that while such restrictions may be considered “more extensive than is necessary to serve that interest” and thus fail the test, one must also remember that what has perhaps been deemed the least restrictive means—warning labels—may also prove ineffective.¹⁹³

C. Paternalism in a Nation of Freedom of Choice—Incentivizing Voluntary Regulation

The case law of commercial free speech and the constitutionalism of regulations of such speech strongly suggest that the Supreme Court heavily scrutinizes paternalistic regulation and favors the recognition that citizens have the right to make informed decisions, even if these decisions may be to their detriment.¹⁹⁴ In light of the notion that the Court will not

190. *AMA Adopts New Policies at Annual Meeting*, AMERICAN MEDICAL ASSOCIATION (June 21, 2011), <http://www.ama-assn.org/ama/pub/news/news/a11-new-policies.page>.

191. *Id.*

192. *Id.*

193. *Central Hudson*, 447 U.S. at 566.

194. *See generally Va. Pharmacy Bd.*, 425 U.S. 748.

likely uphold mandatory regulations such as those that have been discussed in this Note, an alternative for optional regulation and agency-approved guidelines should be delineated. There is an increasing awareness and belief among citizens—especially women—that photoshopping, underweight models, and the “thin ideal” generally can lead to self-consciousness, unrealistic body expectations, and eating disorders among our youth.¹⁹⁵ While perhaps not as fast-acting as regulations such as those implemented in Israel, providing approval of magazines and advertisers that adhere to proposed guidelines, could start a trend away from extreme bodies and towards healthy images,¹⁹⁶ more so than a vague warning label could achieve. Although there may be skepticism that the industry will ignore such initiatives,¹⁹⁷ it is clear that there are a number of leaders in the fashion industry who are willing to respond to the public outcry for change. For example, all nineteen international editors of Vogue magazine, hailed as “the world’s top arbiter of style,” have recently “agreed to ‘not knowingly work with models under the age of 16 or who appear to have an eating disorder’”¹⁹⁸ Further, Vogue has committed to:

[Helping] “structure mentoring programs” for younger models and rais[ing] awareness of the problem of model health. The magazines said they would encourage healthy working conditions backstage and encourage designers “to consider the consequences of unrealistically small sample sizes of their clothing, which limits the

195. See Elise Hu, ‘Seventeen’ Magazine Takes No-Photoshop Pledge After 8th-Grader’s Campaign, NAT’L PUB. RADIO (July 5, 2012, 8:52 PM), <http://www.npr.org/blogs/thetwo-way/2012/07/05/156342683/seventeen-magazine-takes-no-photoshop-pledge-after-8th-graders-campaign>. Julia Bluhm, a young girl concerned with the presentation of women’s bodies in magazines, started a petition in 2012 that “called for the magazine to print one unaltered photo spread each month. The petition—and a demonstration at the corporate offices of Hearst, which owns *Seventeen*—led to more than 80,000 signatures from around the world.” *Id.* Bluhm received a positive response from *Seventeen*’s Editor-in-Chief, Ann Shoket, who “subsequently put out a new policy statement on the magazine’s photo enhancements.” *Id.* Skolet stated “that the entire *Seventeen* staff has signed an eight-point Body Peace Treaty, promising not to alter natural shapes and include images of ‘real girls and models who are healthy.’” *Id.*

196. See Mamamia Team, *The Australian Mags that Are Refusing to Airbrush*, MAMAMIA (July 4, 2012, 9:35 AM), <http://www.mamamia.com.au/health-wellbeing/8-quick-questions-with-helen-mccabe> (interviewing Helen McCabe, who supports Australia’s decision to implement a voluntary code of conduct, claiming, “I think people will get behind it but it needs time to grow, now that it’s been established.”).

197. See Hunter, *supra* note 55, at 103–07.

198. Samantha Critchell, *Vogue Bans Models Who Are Too Skinny, Underage*, TODAY (May 3, 2012, 5:49 PM), <http://www.today.com/id/47286154/site/todayshow/ns/today-style/t/vogue-bans-models-who-are-too-skinny-underage>.

range of women who can be photographed in their clothes, and encourages the use of extremely thin models.”¹⁹⁹

A scheme directed at the fashion, magazine, and modeling industries could be enacted through Congressional legislation, under which an agency could promulgate guidelines that would establish similar protections that may be too paternalistic to initiate through mandatory legislation and bans. These guidelines could also include some kind of incentive for magazines and other publications to adhere to them. The incentive could be an affirmative, government-sanctioned certification or approval of a particular company or publication, placing a kind of “stamp of approval” on publications that are in compliance with government guidelines. Following guidelines similar to those put forth by the Academy for Eating Disorders could provide a beneficial starting point to setting clear expectations of magazines and websites promoting fashion and beauty to adolescents.²⁰⁰ If a particular publication were to agree with and subsequently conform to such regulations, the governing agency could make a determination that the publication was in compliance. Incentives such as *affirmative* labels placed on the cover of magazines and on the homepages of websites, indicating that such publications were advocates of healthy body image, could encourage the public to patronize and support those magazines, as a great number of women—old and young alike—are becoming more and more aware of digital manipulation of photographs and the industry’s use of extremely underweight models. As opposed to the plain and simple text of a disclaimer on a photograph, a “stamp of approval,” an affirmative and positive reward, could be eye catching and attractive. In a similar vein, Australian magazine *DOLLY* has a “‘Re-touch Free Zone’ . . . stamp used to mark photos in the magazine that have not been digitally altered. In *DOLLY*’s case, this is every shot they take themselves, including fashion, beauty and real-life features.”²⁰¹ While this method does not cover the magazine in its entirety, a similar concept could be utilized on the cover in order to cover both reduced-photoshopping *and* the use of healthy models, alerting individuals to a publication’s particular compliance.

199. *Id.*

200. *See Academy Guidelines*, *supra* note 176.

201. Kate Fitzpatrick, *The Backlash Against Airbrushing*, NINEMSN (May 3, 2010), <http://health.ninemsn.com/pamper/beauty/1047660/the-backlash-against-airbrushing>; *see also* Slater, *supra* note 131, at 108 (“The . . . Australian teen magazine, *Dolly*, has been using a tag (‘Retouch free zone’) to indicate when images are free from digital enhancement.”).

In recent years, the Supreme Court has emphasized the role of parents in governing the habits and well-being—physical, mental, and emotional—of adolescents. For example, in 2011, the Supreme Court struck down a California law that restricted the sale of violent video games to adolescents.²⁰² In noting that the Entertainment Software Rating Board “has in place a voluntary rating system designed to inform consumers about the content of games,” the Court stated that such a system already “does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home.”²⁰³ The same logic—trust in parents—could be used to help guide their children in their formative years, leading them to develop a healthy perspective on weight, beauty, and sexuality. In addition to discussing such challenges, as Anne Becker emphasized,²⁰⁴ when young girls begin to take interest in fashion magazines and other such outlets, their parents can use the guidelines and approved resources—if they are concerned with their daughters’ exposure to unrealistic images—to provide enjoyment, creativity, and information through mediums that have pledged to uphold the protections implemented by voluntary guidelines.

Similar certifications have been implemented for the sake of a public that may be concerned with its own health or for environmental reasons. For example, the U.S. Department of Agriculture, in response to a growing trend in the United States towards the purchase and consumption of organic foods, has implemented “an organic certification program that requires all organic foods to meet strict government standards. These standards regulate how such foods are grown, handled and processed.”²⁰⁵ Under the certification program, once a product has been approved under the government standards, it receives a bright green stamp of approval, a label that asserts in large, bold letters that the product is “USDA Organic.”²⁰⁶ Organic food “is a \$29 billion industry and still growing.”²⁰⁷ There appears to be a national trend toward choosing organic food and,

202. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011).

203. *Id.* at 2740-41.

204. *See supra* note 9 and accompanying text.

205. Mayo Clinic Staff, *Organic Foods: Are They Safer? More Nutritious?*, MAYO CLINIC, (Sept. 7, 2012) <http://www.mayoclinic.org/organic-food/art-20043880> (last visited June 5, 2014).

206. *Id.*

207. Allison Aubrey & Dan Charles, *Why Organic Food May Not Be Healthier For You*, NAT’L PUB. RADIO (Sept. 4, 2012, 3:22 AM), <http://www.npr.org/blogs/thesalt/2012/09/04/160395259>.

whether there is clear evidence to support the conclusion or not,²⁰⁸ many consumers choose organic because they are concerned about the negative consequences that food treated with pesticides or food additives may have for their bodies in the future.²⁰⁹ The USDA provides a system of regulation that enables the public to make an informed choice about its food. Similarly, a federal agency could provide positive affirmation to the public that its concerns regarding the presentation of women in the media have been heard, and that the agency will provide a systematic way of enabling the public to make informed choices as to which magazines and companies the public would like to endorse based on whether or not those magazines and companies follow guidelines that encourage what is arguably a healthier self-perception in young women in relation to their bodies and sense of self-worth.

CONCLUSION

The fashion and advertising industries have a distinct impact upon the power that women have over their own bodies. Realization of this power does not seem to be enough. Susan Bordo once noted that women in their twenties “understand that you can be as cynical as you want about the ads—and many of them are—and still feel powerless to resist their messages. They know, no matter what their parents, teachers, and clergy are telling them, that ‘inner beauty’ is a big laugh in this culture.”²¹⁰ Power has a way of producing subjects and bodies that feel under the spell of culture. Further, this power limits the agency of young women, who are distracted by the pressure to live up to unrealistic body ideals.²¹¹ The best way to combat the thin culture that influences women to turn to self-consciousness and eating disorders is to pressure the institutions—numerous as they are—to begin to take steps towards incremental change in conformity with a growing consciousness that today’s models are—ironically—not models for women. The United States should not be looking to regulation that may seem safe and minimal but may also be

208. Aubrey and Charles report that recent studies have complicated the argument by showing “scant evidence of health benefits from organic foods.” *Id.* However, Aubrey notes that such studies have a really hard time uncovering subtle effects of our environment, or what we eat, on our health. Too many other powerful influences get in the way. Also, these studies only followed people for a very short time—about two years or less. That’s hardly enough time to document any particular health benefit. *Id.*

209. Mayo Clinic Staff, *supra* note 205.

210. Susan BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY xxix (2d ed., 2003).

211. See text accompanying *supra* notes 49–54.

fearfully ineffective. Instead, working to influence the industries to transform thin culture into a healthy, self-loving, and accepting image seems to be the better—and more productive—route.

As Tayla Minsburg so astutely posed the question: “But, if not that, then what?”²¹²

212. Minsberg, *supra* note 1.