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Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching

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VANITY FARE: THE COST, CONTROVERSY, AND ART OF FASHION ADVERTISEMENT RETOUCHING

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I. INTRODUCTION

The cover of the June 2010 edition of *Marie Claire* magazine featured the lovely forty-five-year-old Sarah Jessica Parker, looking impossibly gorgeous.[1] This impossibility is not a testament to her natural appearance—it is the work of photoshopping.[2] Her hands look almost like a newborn's hands on the body of a woman. They are smooth and plastic-like, and show no trace of the veins and wrinkles that exist naturally.

London Fog made Christina Hendricks, of *Mad Men* fame, the face of its fall 2010 advertisement campaign, because they found that she was "sexy and gorgeous" with a modern appeal that complemented perfectly what the company was seeking to represent.[3] However, the actual campaign showed a Hendricks whose waist had been made smaller, and whose hips were less wide.[4] Appar-

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1. *See* Melissa McEwan, *Impossibly Beautiful*, SHAKESVILLE (May 6, 2010), http://shakespearessister.blogspot.com/2010/05/impossibly-beautiful.html.

2. Photoshopping means to digitally edit or alter a picture or photograph, and its etymology stems from Adobe Photoshop, a well-known and widely used graphics editor. It uses tools such as an airbrush to modify photographs, by altering size, cropping, removing unwanted elements, doing selective color changes, enhancing images, sharpening and softening images, retouching and repairing images, correcting image distortion, changing color depth, and adjusting crop and rotation. For a full description of Photoshop's capabilities, see *Using Photoshop CS5: Retouching and Transforming*, ADOBE, http://help.adobe.com/en_US/photoshop/cs/using/index.html (last visited Mar. 12, 2012).

3. Cristina Everett, *'Mad Men' Star Christina Hendricks Lends Her Sex Appeal to London Fog's Fall Campaign*, NYDAILYNEWS.COM (Aug. 25, 2010), http://articles.nydailynews.com/2010-08-25/entertainment/27073631_1_christina-hendricks-london-fog-fall-campaign (quoting Dari Marder, chief marketing officer of London Fog).

4. Dodai Stewart, *Not Even Christina Hendricks Is Safe from Photoshop*, JEZEBEL (Aug. 25, 2010, 3:24 PM), http://jezebel.com/5621871/christina-hendricks-curves-fall-victim-to-london-fogs-photoshop/gallery/.

ently she did not, quite naturally, complement what the company wanted to represent.

In October 2009, Ralph Lauren released an advertisement that featured model Filippa Hamilton. In this advertisement, Hamilton's appearance had been photoshopped so dramatically that her head was now larger than her waist.[5] Similarly, on May 26, 2010, Ann Taylor's company account tweeted an apology for its "overzealous" photoshopping on its company website and in its magazine. This particular instance of photoshopping was shocking because of its sloppiness—many of the models appeared to be made out of rubber.[6] Ann Taylor promised to use "more real, beautiful images."[7] However, less than three months later, Ann Taylor once again was under fire for its photoshopping. This time, they displayed the same model in two different ways. The first image was a thumbnail version of an unretouched model, and the second image appeared once an interested purchaser clicked the thumbnail. This second image showed a different photoshopped image of the model, who now appeared to not have ribs.[8]

In an advertisement for Campari liquor, Jessica Alba's post-pregnancy waistline was praised. However, pre-photoshopped images proved that her waistline had been slimmed, her breasts had been enhanced, her collarbones were made more prominent, and her knees were made more defined.[9] Likewise, Kiera Knightly was given a breast enhancement in the 2004 *King Arthur*

5. Cory Doctorow, *The Criticism that Ralph Lauren Doesn't Want You to See!*, BOINGBOING (Oct. 6, 2009, 10:32 AM), http://www.boingboing.net/2009/10/06/the-criticism-that-r.html. Uproar created by this advertisement led to attempts by Ralph Lauren to remove the image from the Internet, but the image went viral too quickly, and can still be easily found.

6. The images no longer appear on Ann Taylor's website, but can still be found on certain blogs. *See, e.g.*, Jenna Sauers, *Ann Taylor's Photoshop Insanity*, JEZEBEL (May 24, 2010, 3:00 PM), http://jezebel.com/5546459/ann-taylors-photoshop-insanity.

7. Ann Taylor had tweeted apologies about its "overzealous" use of photoshop. The tweets can no longer be found on Twitter, but are saved in their original form on some blogs. *See* Jenna Sauers, *Ann Taylor Apologizes for Photoshop Horror*, JEZEBEL (May 26, 2010, 2:20 PM), http://jezebel.com/5548382/ann-taylor-apologizes-for-photoshop-horror.

8. The images no longer appear on Ann Taylor's website, but can still be found on certain blogs. *See, e.g.*, Margaret Hartmann, *Ann Taylor Mistakenly Reveals Their Photoshop Process [Updated]*, JEZEBEL (Aug. 3, 2010, 4:45 PM), http://jezebel.com/5603467/a-model-gets-photoshopped-before-your-very-eyes.

9. For pictures of Jessica Alba's pre- and post-photoshopped pictures see Cara Harrington, *Jessica Alba Photoshop—Before and After Photos*, HOLLYWOOD DAME (Dec. 8, 2008), http://hollywooddame.com/2008/12/08/jessica-alba-photoshop-before-and-after-photos/.

movie advertisements in the United States. In the advertisements released in the United Kingdom, her image had not been altered. Knightly has claimed that movie executives told her this was done in case her flatter chest "turned people off."[10]

Finally, then fifty-nine-year-old Twiggy was made the spokesperson for Oil of Olay's Regenerist Definity Eye Illuminator campaign in December of 2009. Twiggy's advertisement was airbrushed to show her with softened and reduced wrinkles and with no sign of under-eye bags or crow's feet.[11] The words on the advertisement claimed "Olay is my secret to brighter-looking eyes," and that the product "reduces the look of wrinkles and dark circles for brighter, younger-looking eyes."[12]

These images all seem harmless, but together they show an epidemic of beauty that is unrealistic and impossible to reach. This has contributed to very real problems of depression, anorexia, bulimia, and other serious health issues among young women. Women are at risk for life-long health problems due to the "never-ending treadmill of unrealistic beauty attainment."[13] Currently, in the United States alone, nearly ten million women suffer from eating disorders such as anorexia or bulimia.[14] Forty percent of newly diagnosed cases of eating disorders are in fifteen- to nineteen-year-old girls, but symptoms can start as early as kindergarten.[15] More than eighty percent of women are reported to be dissatisfied with their appearance.[16]

The growing use of photoshopping in advertisements coupled with startling statistics regarding female eating disorders has led to the serious contemplation of legislation in countries such

10. Katie Hampson, *My Flat Chest Is a Turn-Off, Says Keira*, DAILY MAIL ONLINE (July 19, 2006), http://www.dailymail.co.uk/tvshowbiz/article-395379/My-flat-chest-turn-says-Keira.html.

11. Eventually, the Olay advertisement was banned in the United Kingdom for being misleading by their Advertising Standards Authority after almost 1,000 complaints were voiced. *See* Mark Sweney, *Twiggy's Olay Ad Banned over Airbrushing*, GUARDIAN (Dec. 16, 2009), http://www.guardian.co.uk/media/2009/dec/16/twiggys-olay-ad-banned-airbrushing.

12. *See id.* For a comparison of Twiggy as photographed by the paparazzi around the same time, and the image of Twiggy as portrayed by Olay, see *Twiggy Before Olay: Twiggy After Olay Airbrush Ad*, CELEBGALZ (Dec. 17, 2009), http://celebgalz.com/twiggy-before-olay-twiggy-after-olay-airbrush-ad-photos/.

13. YWCA, BEAUTY AT ANY COST: THE CONSEQUENCES OF AMERICA'S BEAUTY OBSESSION ON WOMEN & GIRLS 4 (2008), *available at* http://www.ywca.org/atf/cf/%7B711d5519-9e3c-4362-b753-ad138b5d352c%7D/BEAUTY-AT-ANY-COST.PDF.

14. *Id.*

15. *Id.*

16. *Id.*

as England and France.[17] Meanwhile, Australia recently released voluntary guidelines for the fashion and publishing industries, and the New Zealand government has also started to urge the media to portray women accurately.[18] In other countries, private retailers are taking the initiative themselves and have started "no retouching" policies.[19]

Both England and France are pushing for the placement of a "warning label" on retouched images. The purpose of such a warning label on fashion advertisements and magazines that have been retouched is to show that they are not *real* images. Representatives explain that this legislation stems from their belief "in the freedom of young people to develop their self-esteem and to be as comfortable as possible with their bodies, without constantly feeling the need to measure up to a very narrow range of digitally manipulated shapes and sizes."[20]

In the United States, however, one blogger opined that this type of legislation should be filed "squarely under 'would never happen in the U.S.'"[21] This comment stems from the First Amendment and the recognition that there is a commercial right of free speech, including freedom to advertise.[22] The outer boundaries of what the right covers has never fully been solidified, and therefore, what exactly the government can regulate has led to mixed results in the Supreme Court. While earlier decisions indicate that the Court would give substantial deference to the government in its regulation of commercial speech—even allowing speech to be regulated in paternalistic ways—more

17. *See U.K.: Curb Airbrushed Images, Keep Bodies Real*, CBSNEWS.COM (Sept. 20, 2010), http://www.cbsnews.com/stories/2010/09/20/world/main6884884.shtml [hereinafter *Curb Airbrushed Images*]; Steven Erlanger, *Point, Shoot, Retouch, and Label?*, N.Y. TIMES, Dec. 3, 2009, at E1.

18. *See* Frances Morton, *Touch-up: Photoshopping Is All Around Us*, N.Z. HERALD (Sept. 5, 2010), http://www.nzherald.co.nz/entertainment/news/article.cfm?c_id=1501119&objectid=10671260.

19. For example, Jacob, a Canadian retailer that specializes in clothing for women and girls, has instituted a "no retouching" policy. *See About Us—No Retouching Policy*, JACOB, http://www.jacob.ca/about-us/no-retouching-policy (last visited Feb. 11, 2012).

20. Rosa Prince, *Airbrushing of Photos Should Be Banned, Liberal Democrats Say*, TELEGRAPH (Aug. 3, 2009, 7:00 AM), http://www.telegraph.co.uk/news/politics/liberaldemocrats/5962358/Airbrushing-of-photos-should-be-banned-Liberal-Democrats-say.html (quoting Jo Swinson, Member of Parliament for East Dunbartonshire).

21. Barb Dybwad, *Photoshopping Illegal? France Set to Regulate Airbrushed Pics*, MASHABLE TECH (Sept. 24, 2009), http://mashable.com/2009/09/24/photoshop-disclaimer/.

22. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976).

recent decisions indicate uncertainty among the Court on the issue of regulating speech and the level of deference that should be given to the government.[23] Therefore, the question of whether photoshopped commercial advertisements can be regulated by the government is a hotly contested area of free speech rights.

This Note discusses this topic in four parts. Part II details different foreign legislation and governmental action that has been taken in regards to photoshopping, including the aims of different countries on regulating certain trends in the modern photoshopping of advertisements. Part III discusses commercial free speech as it exists in the United States, with particular emphasis on the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[24] and its interpretation in the cases that followed. Part IV focuses on advertising in America, and considers whether the government may constitutionally place a warning label on advertisements depicting photoshopped images. This Note concludes that legislation mandating warning labels on photoshopped images on advertisements could potentially pass constitutional scrutiny.

II. THE CURRENT TREND IN PHOTOSHOPPING ADVERTISEMENTS AND FOREIGN RESPONSES

Since 2009, English and French politicians have been interested in legislation regulating photoshopped images. In France, Valerie Boyer, of the Union for a Popular Movement party, is leading the fight.[25] Boyer was inspired by an earlier bill that she introduced into the National Assembly, the lower house of Parliament in France, which sought to ban websites that encourage anorexia and bulimia.[26] This bill was born during a time when eating disorders were the subject of growing concern in France, where "many young women are obsessive in their pursuit of thinness."[27]

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23. *Compare* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986), *with* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

24. 447 U.S. 557 (1980).

25. *See* Eric Pfanner, *Looking at the World With a Merciless Eye: Saying No to the Digitally Altered Photo*, N.Y. TIMES, Sept. 28, 2009, at B5.

26. *See id.* This earlier bill drafted by Boyer "would make the promotion of extreme dieting a crime punishable by up to two years in prison and a fine of some $45,000. That law is largely aimed at Internet sites and blogs advocating an 'anorexic lifestyle' like the pro-ana (for pro-anorexia) movement." Erlanger, *supra* note 17, at E7.

27. Pfanner, *supra* note 25.

Driven by her earlier research, Boyer has taken on a "quest to rid the media of misleading images."[28] Boyer proposes that any advertisement meant for public distribution—whether for editorial purposes or as a print advertisement—would require a warning label if the images were retouched or digitally manipulated.[29] The retouched photographs would carry the following warning label: "Photograph retouched to modify the physical appearance of a person."[30] Violators of the rule could be subject to a fine of approximately $55,000.[31] Boyer intended its scope to be broad, wanting it to cover everything from newspaper and magazine advertising to billboard photos and product packaging.[32] Within a month of presenting the bill, Boyer's proposed legislation garnered backing from over fifty other legislators who wished to see it introduced as formal legislation.[33]

Likewise, Deputy Wladimir Costa, a member of the National Congress of Brazil's Chamber of Deputies, is pushing a similar bill that would also require a warning label on retouched images.[34] Costa says the goal is not to stop advertisers from using Photoshop; instead it is to promote awareness in the consumer that the image has been retouched. The Brazilian warning would read: "Attention: image retouched to alter the physical appearance of the person portrayed."[35]

Jo Swinson, a member of Britain's Parliament from the Liberal Democratic Party, first proposed in England a similar labeling system for advertisements containing altered images of

28. *Id.* The *Times* writes that this topic "consumes her." Erlanger, *supra* note 17, at E6.

29. *See* Erlanger, *supra* note 17; Pfanner, *supra* note 25; Bruce Crumley, *France May Put Warning Labels on Airbrushed Photos*, TIME WORLD (Oct. 05, 2009), http://www.time.com/time/world/article/0,8599,1927227,00.html.

30. *See* Crumley, *supra* note 29. Other sources report slightly different wording, such as: "Retouched photograph aimed at changing a person's physical appearance." *French MPs Want Health Warnings on Airbrushed Photographs*, TELEGRAPH (Sept. 21, 2009), http://www.telegraph.co.uk/news/worldnews/europe/france/6214168/French-MPs-want-health-warnings-on-airbrushed-photographs.html [hereinafter *French MPs Want Health Warnings*].

31. *See* Crumley, *supra* note 29.

32. *See French MPs Want Health Warnings*, *supra* note 30. In France, it is estimated that this would result in ninety-nine percent of fashion photographs containing such a warning. *See Christiane Amanpour's Body Image in Advertising and How We Perceive Ourselves* (CNN television broadcast Apr. 1, 2010) [hereinafter *Amanpour*], *available at* http://transcripts.cnn.com/TRANSCRIPTS/1004/01/ampr.01.html (comments of Jim Bittermann, CNN Correspondent).

33. *See* Crumley, *supra* note 29.

34. Tom Hennigan, *Attention: Retouching Can Damage Your Health*, IRISH TIMES, Apr. 27, 2010, at 19.

35. *Id.*

models. The Liberal Democrats adopted the proposal as part of their official platform in 2009. It calls for a complete ban on altered photographs in advertisements aimed at children under the age of sixteen.[36] Swinson's proposal calls for a warning label that operates as a rating system.[37] Under this rating system, all advertising photographs would be rated on a scale, depending on the degree of retouching. For example, the highest warning number would constitute cosmetic changes from Photoshop, but the lowest would reference something less severe, such as altered lighting. Swinson's plan would work through the Advertising Standards Authority, which already regulates the content of advertisements in Great Britain. The hope was to encourage advertisers to adopt the plan rather than force it upon them.[38] The Liberal Democrats have been pressuring the Advertising Standards Authority by launching a website that allows consumers to report instances of noticeably altered ads.[39]

In October 2010, British officials met with advertisers, fashion editors, and health experts to discuss how to curtail the current practice of airbrushing in advertising.[40] Equalities Minister Lynne Featherstone is leading these consultations and once again indicated that advertisers will not be required to use warning labels. Instead, the hope is that advertisers will adjust their practices on a voluntary basis. This is similar to the policy introduced in Australia, "where magazines that signed up to a code of conduct would refrain from photo tampering. Magazines that adhere to the guidelines will receive a 'body image tick' of approval."[41]

The tradition of photoshopping within the advertising and photography industry will undoubtedly be the biggest struggle that these legislators face, no matter if the warning label is optional or mandatory. Photoshopping has always had a place in the hearts of advertisers and photographers, in their goal to offer "an escape to a more glamorous world."[42] In fact, this escape is part of the appeal of advertisements and women's magazines.[43] As advertisers argue, the placement of a warning label "undermines the allure of perfectly photographed people and places in marketing campaigns, which, in many cases, is what sells. A

36. *See* Pfanner, *supra* note 25.
37. *Id.*
38. *See id.*
39. *See id.*
40. *See Curb Airbrushed Images*, *supra* note 17.
41. *Id.*
42. *Id.*
43. *Id.*

svelte model with perfect skin . . . is likely to make you want to eat high-fiber cereal more than a model with visible imperfections."[44] To those like fashion designer Karl Lagerfeld or legendary photographer Dominique Isserman, "the whole point is to create a more beautiful world, not one that is less so."[45]

Furthermore, fashion photographer Mark Nolan sees readers as driving the content of magazines; therefore, "[t]he government should stay away from policing the market."[46] According to Nolan, the government should "back right off" since "[m]agazines should be an icon for looking your best. [Readers] know what they get are the most glamorous, the best-looking girls. It's always been that way."[47] Advertisers and magazine editors argue that a warning label simply tells people what they already know. As Christine Leiritz, chief editor of *Marie Claire*, says, "Of course [the photographs are] all retouched," but her "readers are not idiots, . . . especially when they see those celebrities who are 50 and look 23."[48] Leiritz thinks it is important for magazines, not the government, to police themselves, since "'fashion provides a dream' that is important for women."[49]

While it is true that editors, advertisement managers, and photographers have used technology to make smaller improvements, such as "taming the occasional stray hair or erasing a blemish,"[50] changes in technology have dramatically altered the kind of retouching that can be done. It has resulted in "much more extensive trickery [that] is approved without anyone batting a lash: flabby stomachs are tightened, necks and legs are lengthened, and bosoms are reshaped. The result: a flawless body shape no amount of dieting or cosmetic surgery can achieve."[51] Images can be manipulated in any way that is desired, from making a model slimmer or taller to changing skin

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44. *See* Crumley, *supra* note 29.

45. *See Amanpour*, *supra* note 32 (comments of Jim Bittermann, CNN Correspondent).

46. *Curb Airbrushed Images*, *supra* note 17 (citing Mark Nolan).

47. *Id.* (quoting Mark Nolan).

48. Erlanger, *supra* note 17, at E7; *see also* Rik Myslewski, *UK, France Mull Photoshop Fakery Laws*, REGISTER (Sept. 29, 2009), http://www.theregister.co.uk/2009/09/29/photoshop_laws/ ("Although guaranteeing the accuracy of images used for editorial purposes is a laudable goal, children in the UK and France are inured to digital enhancements and are quite able to distinguish reality from fantasy without a rating system.").

49. Erlanger, *supra* note 17, at E7 (quoting Christine Leiritz).

50. *Curb Airbrushed Images*, *supra* note 17.

51. *Id.*

color and swapping body parts.[52] As Hany Farid, a professor at Dartmouth College who specializes in digital photo forensics, says, "The trend does seem to be more and more 'extreme Photoshopping.' Everybody's just moving towards Barbie dolls . . . . I don't think there's a single photograph in those [magazines] that's not retouched. They're all manipulated to hell."[53] According to Farid, most people do not understand the extent to which photo manipulation exists in the world today—even in things such as political campaigns.[54]

While advertisers scoff at the premise of the legislation[55]—which they interpret as implying that retouched images can cause eating disorders[56]—politicians and lobbyists claim that that is not their implication at all. Instead, politicians and lobbyists emphasize that it is undeniable that the retouched photographs are a factor that can lead to eating disorders and depression among girls, "especially for the most vulnerable young girls."[57] As Susan Ringwood, the chief executive officer of Beat, a British

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52. *See* Morton, *supra* note 18; *see also* Jenna Sauers, *Regulating Photoshop: A Hazy Proposition, Not A Solution*, JEZEBEL (July 26, 2010, 5:39 PM), http://jezebel.com/5596674/regulating-photoshop-a-hazy-proposition-not-a-solution.

> While most Photoshop effects are in fact named for lower-tech procedures that have been performed since the dawn of photography—airbrushing, dodging and burning, and collage have all been traditionally used to alter fashion images—the reality is that these techniques were so labor- and time-intensive that they were rarely used consistently and in combination. What used to take hours in a darkroom can now be done in seconds. What used to be a one-shot procedure can now be reverted, re-attempted, undone, re-done, and tweaked again and again as necessary. Never before have images been so highly malleable, so easily "perfectable." What used to be exceptional and difficult has now been made easy—and it's become the norm.

Id.

53. *Curb Airbrushed Images*, *supra* note 17.

54. *Id.*

55. In Brazil, Edson Aran, head of the editorial team at the Brazilian edition of *Playboy*, is a "heavy user of Photoshop" and described the proposal of legislation by Deputy Costa as "too stupid to even bother commenting on." Hennigan, *supra* note 34. Likewise, "[i]n France, Inès de La Fressange, a former model and clothes designer, calls Ms. Boyer's bill 'demagogic and stupid,' arguing that the causes of anorexia are complex." Erlanger, *supra* note 17, at E6.

56. *See* Erlanger, *supra* note 17, at E6 (citing de La Fressange).

57. Erlanger, *supra* note 17, at E6 (quoting Phillippe Jeammet, professor of psychiatry at the Université Paris Descartes); *see also Curb Airbrushed Images*, *supra* note 17 ("We know these images by themselves don't cause eating disorders directly, but they certainly are an influence on people, particularly those already ill, or seriously at risk.") (quoting Susan Ringwood, chief executive officer of Beat).

charity that is trying to tackle eating disorders in Britain, explains:

> Digitally sculpted models are particularly harmful to girls trying to recover from an eating problem . . . [because] [t]hey cannot understand why anyone worries about them [if] when they look around them they see pictures of people who look just like them who are celebrated as successful . . . . It [perpetuates] their disturbed views that they are right.[58]

Britain's Royal College of Psychiatrists recently backed this viewpoint, submitting a paper to the Advertising Standards Agency that calls for notice on any airbrushed advertisement marking it as such.[59] The group of forty-four academics, doctors, and psychologists claim that the "pictures promote unrealistic expectations of perfection, encouraging eating disorders and self-harm,"[60] and that the images "are linked to body dissatisfaction and unhealthy eating in girls and women."[61] Swinson agrees with this thinking, explaining, "When teenagers and women look at these pictures in magazines, they end up feeling unhappy with themselves."[62]

Images that represent "perfection" can come with a price, which is what most concerns Boyer's legislation. As Jill Wanless, an associate editor at the British weekly magazine, *Look*, says, "Sometimes readers want hyper-reality in a way—they want to be taken out of their own situation . . . . But there's a line that can be crossed when you alienate them by presenting something completely unattainable."[63] Boyer takes this idea one step further and emphasizes that the "widespread use of digital technology to alter images is feeding the public a steady visual diet of falsified people, places, and products,"[64] and to pass off such

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58. *Curb Airbrushed Images*, *supra* note 17 (internal quotation marks omitted).

59. *See* James Kirkup, *Airbrushed Images Harming Girls and Boys, Experts Say*, TELEGRAPH (Nov. 9, 2009), http://www.telegraph.co.uk/news/politics/liberaldemocrats/6516537/Airbrushed-images-harming-girls-and-boys-experts-say.html.

60. *Id.*

61. HELGA DITTMAR ET AL., THE IMPACT ON BODY IMAGE AND BEHAVIOURS: A SUMMARY OF THE SCIENTIFIC EVIDENCE (2009), *available at* http://www.nationaleatingdisorders.org/in-the-news/in-the-spotlight.php?year=2009 (follow Nov. 9, 2009 "PDF file" hyperlink).

62. Pfanner, *supra* note 25 (quoting Jo Swinson).

63. *Curb Airbrushed Images*, *supra* note 17 (quoting Jill Wanless).

64. Crumley, *supra* note 29 (citing Valérie Boyer). Boyer explains that the "schizophrenia" that exists between the real world and the world that is represented in advertisements leads to a "standardized and brainwashed world."

imagery as real is misleading. The artificial reality created by these images leads the public to expect the impossible from themselves and from the world.[65] As Boyer argues, "When writers take a news item or real event and considerably embellish it, they are required to alert readers by calling the work fiction, a novel or a story based on dramatized facts. Why should it be any different for photographs?"[66] People who think like Boyer believe that photographs that have been modified from their original form should contain a label explaining as much—just like food-labeling rules that mandate consumers must be alerted of the presence of additives and preservatives.[67]

Therefore, in a world where advertising can control what is considered beautiful, proposals advocating for warning labels on retouched images seek to alert consumers that these images are not attainable. Advocates for these labels anticipate that a warning will help signal that the represented idealized beauty is nothing but a "false expectation[ ] of how the world should look—

Erlanger, *supra* note 17, at E6–7 (quoting Valérie Boyer). The world becomes one in which "[i]f someone wants to make life a success, wants to feel good in their skin, wants to be part of society, one has to be thin or skinny, and [even] then it's not enough . . . ." *Id.* at E6.

65. It has also led to the increasing use of something called "reverse retouching." Recently, Leah Hardy, a former UK *Cosmopolitan* editor, wrote an article describing the process. It is also a process that Jane Druker, the editor of *Healthy* magazine, Alexandra Shulman, editor of British *Vogue*, Robin Derrick, creative director of *Vogue*, and Johnnie Boden, founder of a clothing brand, have all admitted to using as well. This "deranged but increasingly common process" involves using models that are "cadaverously thin and then adding fake curves so they look bigger and healthier." Hardy describes how models would show up the day of a shoot looking like an "anorexic waif with jutting bones and acne." Due to retouching, however, "[t]hey had 22-inch waists (those were never made bigger), but they also had breasts and great skin. They had teeny tiny ankles and thin thighs, but they still had luscious hair and full cheeks." Due to photoshopping, Hardy articulates that readers of her magazine, and of other magazines that have admitted to using reverse retouching, "never saw the horrible, hungry downside of skinny. That these underweight girls didn't look glamorous in the flesh. Their skeletal bodies, dull, thinning hair, spots, and dark circles under their eyes were magicked away by technology, leaving only the allure of coltish limbs and Bambi eyes." She sums it up as "[a] vision of perfection that simply [doesn't] exist. No wonder women yearn to be superthin when they never see how ugly thin can be. *But why do models starve themselves to be a shape that even high fashion magazines don't want?*" Leah Hardy, *A Big Fat (and Very Dangerous) Lie: A Former Cosmo Editor Lifts the Lid on Airbrushing Skinny Models to Look Healthy*, DAILY MAIL ONLINE (May 20, 2010), http://www.dailymail.co.uk/femail/article-1279766/Former-Cosmo-editor-LEAH-HARDY-airbrushing-skinny-models-look-healthy-big-fat-dangerous-lie.html (emphasis added).

66. Crumley, *supra* note 29 (quoting Valérie Boyer).

67. *Id.*

and how they should look as well."[68] Boyer explains that the false images create "parallel worlds: one in which everything in ads and photos is gorgeous, slim, chic and what we aspire to, and our daily reality of imperfection, normality and frustration that we can't be like those other people who—literally—don't exist."[69] These images lead to a standardization of beauty, which not only promotes unrealistic expectations about body shape, but also fails to celebrate the diversity of sizes and shapes that exist.[70] While advertisers insist that they are creating a "dream," Boyer insists that it rather discourages young women from exerting full control over their lives, since they are chasing a reality that very often does not exist.[71]

International politicians and lobbyists, from Brazil to England, are united in their belief that some sort of warning label system on these images is necessary. At the least, they argue, it prevents advertisements from presenting an intentionally fabricated picture of reality to the world. Ideally, a warning label could prevent young women from believing that an eating disorder is the way to achieve the perfect figure that is represented, or from becoming depressed if they do not look like the represented figure. The question, therefore, is whether such a law could pass in the United States, where freedom of speech is one of the most closely guarded constitutional rights.

III. THE RIGHT TO COMMERCIAL FREE SPEECH

A. *The Beginnings of the Commercial Speech Doctrine*

Prior to 1976, the Supreme Court held that commercial speech was a completely unprotected category of speech, meaning that the states had unlimited discretion to restrict it. This principle was established in the 1942 decision of *Valentine v. Chrestensen*,[72] in which the Court explained "that the Constitution imposes no such restraint on government as respects purely commercial advertising"[73] in terms of regulating commercial speech. Thus, the Supreme Court refused to acknowledge that commer-

68. *Id.*

69. *Id.* (quoting Valérie Boyer).

70. *See* Morton, *supra* note 18; *see also Curb Airbrushed Images*, *supra* note 17 (explaining that the government meeting with advertisers and fashion editors is the "latest initiative . . . to force the fashion industry to show more diverse—and realistic—kinds of beauty").

71. *See* Pfanner, *supra* note 25; *see also* Erlanger, *supra* note 17, at E7 (citing Boyer, in which she insists that the warning label is a matter of "honesty" and questioning why lies are necessary to "dream").

72. 316 U.S. 52 (1942).

73. *Id.* at 54.

cial advertising could constitute speech, since "[a] law restricting or banning particular forms of commercial advertising would seem on its face to 'abridge the freedom of speech.'"[74]

However, in 1976, the Supreme Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* ("*Virginia Pharmacy*").[75] In *Virginia Pharmacy*, the Supreme Court swept away previous distinctions[76] for its "commercial speech" exemption by holding that "speech which does 'no more than propose a commercial transaction'" is still of such social value to be entitled to First Amendment protection.[77] The Court focused its decision on the importance of the free flow of information, and the right of the consumer to receive information.[78] Now, without a sufficient interest, the government could not regulate commercial speech.[79]

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74. Ashutosh Bhagwat, *A Brief History of the Commercial Speech Doctrine (With Some Implications for Tobacco Regulation)*, 2 HASTINGS SCI. & TECH. L.J. 103, 105 (2010).

75. 425 U.S. 748 (1976).

76. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that advertisements dealing with political and social matters which newspapers carry for a fee are entitled to full First Amendment protection); Smith v. California, 361 U.S. 147 (1959) (holding that books that are sold for profit are entitled to First Amendment protection); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) (holding that motion pictures which are exhibited for an admission fee are entitled to full First Amendment protection). In these cases, despite the commercial element involved, the Court held full First Amendment protection was necessary because *expression* was disseminated for profit or through commercial channels, and therefore could not be exposed to greater regulation just because it was not free. *See* CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 28, 2002, S. DOC. NO. 108-17, at 1176 (2002). Also, the Court overturned a State's regulation of commercial speech in *Bigelow v. Virginia*, 421 U.S. 809 (1975), but managed to keep intact the "commercial speech" exception by formally holding that the regulation was regulating speech that "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" *Id.* at 822. In *Virginia Pharmacy*, the Court notes that this holding made "the notion of unprotected 'commercial speech' all but pass[ ] from the scene." *Virginia Pharmacy*, 425 U.S. at 759.

77. 425 U.S. at 762 (citation omitted).

78. *See id.* at 763–64 (consumers' interest).

> So 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. It is a matter of public interest that those decisions . . . be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

79. *See id.* at 766–70 (explaining that "[a]rrayed against these substantial individual and societal interests are a number of justifications for the advertising ban," but finding that the justifications that Virginia has supplied for the

The Court refused a "highly paternalistic approach"[80] to defining when the government could regulate speech. The government could not satisfy the sufficient interest requirement by claiming that the speech was not in the public's best interest to know, because knowledge could lead to results that would negatively affect the consumer.[81] Instead, the Court explained that the alternative to a paternalistic approach is one in which it is assumed that "this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[82] Moreover, the choice between these two approaches, "between the dangers of suppressing information, and the dangers of its misuse if it is freely available,"[83] was not up to the Court. Rather, the First Amendment mandates that the free flow of information is necessary.[84] Therefore, the government did not have complete power to suppress or regulate commercial speech.

The Court, however, emphasized that its decision was a *narrow* decision, and did not grant commercial speech rights the same full First Amendment protection that is received by other speech, such as political speech. Rather, *Virginia Pharmacy* recognized several important exceptions to the protection of commercial speech. Among the most important of these exceptions are false or misleading speech[85] and speech concerning illegal activities or transactions.[86] Furthermore, the Court discusses that due

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ban "far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is").

80. *Id.* at 770.

81. *Id.* at 769.

82. *Id.* at 770.

83. *Id.*

84. *Id.* The Court's decision

> introduced a strong anti-paternalistic element into commercial speech law, arguing that the First Amendment required states to trust the ability of consumers to make good use of truthful, non-misleading commercial information. By imposing substantial constraints on the power of government to suppress or limit commercial speech, the Court's emphasis on the social value of commercial advertising and hostility toward paternalistic regulations opened a new era in the constitutional treatment of commercial speech regulations.

Bhagwat, *supra* note 74, at 105 (citation omitted).

85. *Virginia Pharmacy*, 425 U.S. at 771–72.

86. *Id.* at 772. The *Virginia Pharmacy* decision also mentions that "[a]dvertising through electronic media (meaning, in 1976, broadcast television and radio) *may* receive lower protection," and that "[t]he prior restraint doctrine may not apply to commercial speech regulations." Bhagwat, *supra* note 74, at 106 (citing 425 U.S. at 773, 772 n.24).

to the attributes of commercial speech (such as being different in nature from other types of speech, being easier to verify for truth than other types of speech, and being more durable than other kinds of speech), it may be less necessary to "tolerate inaccurate statements for fear of silencing the speaker. [The State] may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[87] Therefore, while commercial speech is constitutionally protected, there are limitations on this protection that make regulation of such speech subject to a lower level of scrutiny than other First Amendment speech.

B. Central Hudson *and the Four-Prong Commercial Speech Test*

Since the Supreme Court's decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,"[88] the protection "available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[89] In order to measure the validity of governmental restraints upon commercial speech, the Supreme Court developed a four-prong test in *Central Hudson Gas & Electric Corp. v. Public Service Commissioner* ("*Central Hudson*") that has become the core of the commercial speech doctrine.

In *Central Hudson*, the Court explained that the First Amendment protection of commercial speech comes from the "informational function of advertising."[90] Therefore, when looking at regulations of commercial speech, the threshold question is whether the commercial speech concerns truthful and lawful activity. After all, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[91]

However, the government's power to regulate speech is more circumscribed when it comes to advertising that is neither of these things. In the case of commercial speech, the government must (1) assert a "substantial interest to be achieved by

87. *Virginia Pharmacy*, 425 U.S. at 771–72 n.24.

88. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 455–56 (1978).

89. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

90. *Id.*

91. *Id.*

restrictions on commercial speech,"[92] and (2) the regulation must be in proportion to the interest and be designed to achieve the goal. Under this approach, the Court "declined to uphold regulations that only indirectly advance the state interest involved."[93] It also explained that the restrictions must be narrowly drawn, extending "only as far as the interest it serves. The government cannot regulate speech that poses no danger to the asserted governmental interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well."[94]

The Court concluded that a four-part analysis had developed through their decisions in commercial speech cases, explaining:

> 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.[95]

The test, therefore, "establishes an 'intermediate' level of scrutiny for commercial speech regulations, less protective than strict scrutiny, but with some teeth nonetheless."[96] For example, applying the four factors in *Central Hudson*, the Court held that the regulation which completely banned any advertising by electric utilities that promoted the use of electricity during the energy crisis of the 1970s was unconstitutional because it was more extensive than necessary to promote the government's interest in encouraging energy conservation.[97] The Court explained that "the commission had failed to show that its legitimate interest in energy conservation could not be protected adequately by more limited regulation of commercial expression."[98]

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92. *Id.* at 564.

93. *Id.*

94. *Id.* at 565 (citation omitted).

95. *Id.* at 566.

96. Bhagwat, *supra* note 74, at 107.

97. *Central Hudson*, 447 U.S. at 571–72.

98. EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH: FIRST AMENDMENT PROTECTION OF EXPRESSION IN BUSINESS 85 (1985); *see also Central Hudson*, 447 U.S. at 571 ("In the absence of a showing that more limited speech regulation would be ineffective, [the Court could not] approve the complete suppression of Central Hudson's advertising.").

The Court's decision in *Central Hudson* introduced a period of greater tolerance for the regulation of commercial speech. In his concurring opinion, Justice Blackmun voiced his fear that the four-part analysis established by the Court left open the possibility that a properly tailored regulation could suppress advertising for the sole purpose of protecting consumers from information as a means of discouraging consumption, a paternalistic approach that the Court had previously condemned in *Virginia Pharmacy*.[99] Cases following *Central Hudson* proved Justice Blackmun's concerns valid, as the Court started to show a growing deference to the government.

Perhaps the best example of judicial deference to advertising legislation came in the Court's decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.[100] In *Posadas*, the Court upheld the constitutionality of a ban by the Puerto Rican government on casino advertising directed at residents of Puerto Rico, even though gambling was legal in Puerto Rico. The Court concluded that Puerto Rico's "substantial" interest in discouraging casino gambling by residents justified a ban on advertisements targeting residents even though residents could legally engage in casino gambling, and despite the fact that advertisements aimed at tourists were permitted.[101] Applying the *Central Hudson* test, the Court found that the legislature's interest in reducing gambling in order to increase the "health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest,"[102] and that the restriction on casino advertisements aimed at residents was a reasonable means for the government to reduce the demand for gambling among its citizens.[103] In explaining its decision, the Court asserted that "the greater

99. *Central Hudson*, 447 U.S. at 573–74 (Blackmun, J., concurring); *see* Bhagwat, *supra* note 74, at 107. Since the Court predicated its decision on much narrower grounds (namely, the state's failure to exclude as feasible alternatives less restrictive forms of regulation), the Court's decision could signal a movement away from its earlier opinion that paternalistic reasons were not satisfactory for regulating speech. *See* ROME & ROBERTS, *supra* note 98, at 125. However, the Court did clarify that they would "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy," signaling that the Court did not fully embrace paternalistic means as a reason to regulate commercial speech. *Central Hudson*, 447 U.S. at 566 n.9.

100. 478 U.S. 328 (1986).

101. *Posadas*, 478 U.S. at 340–45.

102. *Id.* at 341.

103. *Id.* at 341–42.

power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[104]

Therefore, *Posadas* involved a statute that sought to "restrict expression because of its message, its ideas, its subject matter or its content."[105] Earlier decisions by the Court indicated that it was beyond the power of the government to restrain speech that neither advocated illegal activity nor was deceptive or misleading, simply because there might be adverse—albeit legal—effects in allowing ideas or information to be disseminated; *Posadas*, however, changed this belief.[106] This was a "flat rejection" of the anti-paternalistic ideals that the Court voiced in *Virginia Pharmacy*.[107] While the Court determined that the statute passed the *Central Hudson* test, it strongly implied that legislatures would have enhanced power to regulate commercial speech when the speech concerned "vice" products or activities—creating the so-called "vice" exception to the commercial speech doctrine.[108]

Furthermore, the Court's application of the standard *Central Hudson* test consisted of a much broader interpretation of its four prongs, indicating that stiffer commercial speech regulation would be permitted. Earlier case law indicated that once speech is deemed not misleading, fraudulent, or illegal, "the burden is on the government not merely to assert that it has a 'substantial' interest, but to demonstrate the nature of that interest by something more than an *ipse dixit*."[109] In regards to this second prong, the *Posadas* Court did not shift the burden of proof to the government; instead it relied upon the assertions that Puerto

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104. *Id.* at 345–46.

105. Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful"*, 1986 SUP. CT. REV. 1, 2 (citation omitted) (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)). *Posadas* was also an example "where the commercial speech distinction, rather than shoring up the protection given to noncommercial speech, provides a convenient avenue for denying protection to speakers who may have had something unpopular to say." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 649 (1990).

106. *See generally* Kozinski & Banner, *supra* note 105.

107. Bhagwat, *supra* note 74, at 108; *see also supra* notes 80–84 and accompanying text.

108. *See* Jo-Jo Baldwin, Note, *Constitutional Law—Freedom of Speech. No Longer that Crazy Aunt in the Basement, Commercial Speech Joins the Family.* 44 Liquormart Inc. v. Rhode Island, *116 S. Ct. 1495 (1996)*, 20 U. ARK. LITTLE ROCK L.J. 163, 177 (1997).

109. Kurland, *supra* note 105, at 7; *see* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 n.20 (1983).

Rico's counsel made regarding the legislative intent.[110] This was a new, extremely deferential approach.

Next, regarding the third prong, *Posadas* distanced itself from establishing a governmental obligation to demonstrate that the means chosen (here, the suppression of speech) would effectively secure the ends it seeks. Here, there was "no demonstration that the means, cutting off speech, [would] effectuate any of the hypothetical ends."[111] While the Court thought that it was clear that advertising of casino gambling aimed at Puerto Ricans would result in increased patronage of casinos by residents of Puerto Rico,[112] there was no evidence presented that local casino advertising actually would lead to an increase in the amount of gambling done by Puerto Ricans.[113]

Finally, when it came to the fourth prong of the *Central Hudson* analysis, *Posadas* was "even more deficient."[114] Earlier case law had established that if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive. Once again, the *Posadas* Court did not require a demonstration that an alternative means to the ends asserted by the State was not available.[115] The Court emphasized that it was up to the legislature to decide if "counter-speech"—the promulgation of additional speech by the State designed to discourage gambling—would be as effective. The Court once again deferred to the government decision.[116]

The Supreme Court continued to move towards allowing stiffer commercial speech regulation by expanding the fourth prong of the *Central Hudson* test even further following its decision in *Posadas*. In *Board of Trustees v. Fox*,[117] the Court rejected the idea that the fourth prong required the government to use

110. The substantial interest of the government to reduce the demand for casino gambling by the residents of Puerto Rico was demonstrated by the counsel for the government of Puerto Rico, who explained the legislature's belief that excessive gambling by Puerto Ricans "would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986) (citation omitted) (quoting Brief for Appellees); *see* Kurland, *supra* note 105, at 7–8.

111. Kurland, *supra* note 105, at 7.

112. *Posadas*, 478 U.S. at 341–42.

113. *See* Kurland, *supra* note 105, at 9.

114. *Id.* at 10.

115. *Id.* at 7.

116. *Posadas*, 478 U.S. at 344.

117. 492 U.S. 469 (1989).

the "least restrictive means"[118] to serve the alleged governmental interest. Rather, the Court explained that there must only be a "reasonable fit" between the means and the ends, in which the means are "narrowly tailored to achieve the desired objective."[119] This decision showed the growing trend of greater deference to legislative judgment, as first established in *Posadas.* Overall, the end of the 1980s signaled a period in which "the commercial speech doctrine appeared to have retreated greatly from the strong promise of the *Virginia Pharmacy* decision."[120]

C. *The Modern Movement: Tightening of the* Central Hudson *Prongs*

In more recent years, the Court seems more willing to invalidate commercial speech restrictions, issuing a series of decisions in numerous areas that lend strength to a new era of commercial free speech and "substantially reviving the [commercial speech] doctrine."[121] *44 Liquormart, Inc. v. Rhode Island*[122] is perhaps the most significant decision illustrating the Court's definitive move away from its decision in *Posadas.* While the Court in *44 Liquormart* was splintered and produced no majority opinion, the eight-part principal plurality opinion, written by Justice Stevens, was guided by the principle that "[t]he objective of commercial speech jurisprudence is to advance the consumers' interest in receiving factual, undistorted information so that they may make well-informed economic decisions."[123] This is the reason states

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118. The *Central Hudson* test of "least restrictive means" came from a series of earlier cases that articulated a similar feeling. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."). Cases immediately following *Central Hudson* seem to follow this idea. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983). *But see* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 539 (1987) (applying the *Central Hudson* test deferentially to Congress and explaining that Congress "reasonably could have determined" the restrictions to be able to further the State's interest).

119. *Fox*, 492 U.S. at 480; *see also* Bhagwat, *supra* note 74, at 107 (explaining that in *Fox* the Court no longer required "the government to use the least speech-restrictive means possible; it only required a 'reasonable' fit" between the State's interest and the regulation).

120. Bhagwat, *supra* note 74, at 108.

121. *Id.*

122. 517 U.S. 484 (1996).

123. Baldwin, *supra* note 108, at 180; *see 44 Liquormart*, 517 U.S. at 495–500, 496 ("In accord with the role that commerical messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services.").

are given latitude in enacting commercial speech regulations that protect consumers from false advertising, and it "is the reason a state cannot justify censoring truthful commercial speech in order to protect its citizenry from making decisions the state fears will be unwise."[124] If a commercial speech regulation promotes an interest separate from fair dealing in the marketplace, a certain amount of "special care" should be taken when reviewing the regulation.[125]

The Court reiterated that the typical reason why commercial speech can be subject to greater governmental regulation than other types of speech is due to the government's interest in protecting consumers from "commercial harms."[126] Bans that target truthful, non-misleading speech rarely serve the purpose of protecting consumers from such commercial harms. Rather, they "serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy."[127] Since the First Amendment directs the Court "to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," a teaching that applies equally to accurate information about consumer products, the Court should not give strong deference to such legislation.[128] The decision also put to rest any thought that the "vice" exception to the commercial speech doctrine still existed.[129] The involvement of "vice" products would no longer reduce the Court's scrutiny.[130]

When attempting to fix the limits of the "special care" that was needed to review complete bans of commercial speech, Justice Stevens indicated that it should be more demanding than the test set forth in *Central Hudson.* As he explained:

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124. Baldwin, *supra* note 108, at 180.

125. *44 Liquormart,* 517 U.S. at 504 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980) (explaining that these speech prohibitions rarely survive constitutional review)).

126. *Id.* at 502 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993)). For example, the Court explained how earlier decisions established that the "State may require commercial messages to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive' and that it may restrict some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers." *Id.* at 498 (citations omitted).

127. *Id.* at 503 (citation omitted).

128. *Id.*

129. *Id.* at 513–14.

130. *See* Bhagwat, *supra* note 74, at 110.

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[131]

Therefore, the decision hints that the "special care" review of commercial speech bans should be equivalent to strict-scrutiny review, but stops short of declaring that truthful, non-misleading speech is entitled to full protection under the First Amendment.

Furthermore, the plurality squarely rejected *Posadas*, claiming that it was erroneous and would not give force to its "highly deferential approach."[132] The Court found that the *Posadas* decision

> clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available.[133]

While the plurality articulated no standard to be applied to this fourth prong of the *Central Hudson* test, it was clear that the Court was substantially tightening the narrow tailoring requirement of this prong, particularly in terms of regulation on nonmisleading speech.[134]

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131. *44 Liquormart*, 517 U.S. at 500–01.

132. *Id.* at 509–10.

133. *Id.*

134. In his concurrence, Justice Thomas predicted that the Court's present version of the fourth prong of the test would dramatically affect commercial speech jurisprudence if faithfully applied to future cases. He reasoned that in the future, there almost always would be a speech-neutral alternative available to advance the state's interest, and therefore the Court's application of this prong would consume the entire *Central Hudson* test. Justice Thomas found that the Court's current application of the *Central Hudson* test was a return to the principle in *Virginia Pharmacy*, where attempts to manipulate a consumer's choices by keeping them ignorant are constitutionally impermissible. 517 U.S. at 523–28 (Thomas, J., concurring); *see also* Baldwin, *supra* note 108, at 186.

The *44 Liquormart* decision shows that the burden is once again back on the government to prove that it has a substantial interest in the regulation of the commercial speech, that the means chosen effectively secure the ends that it seeks, and that there are no reasonable, alternative means to the ends sought that are less restrictive. In terms of the third and fourth prongs of the *Central Hudson* test, post-*44 Liquormart* cases showed a substantial tightening of the requirements necessary for the regulation to pass as constitutionally appropriate.

Regarding the third prong, the government must prove that the particular regulation will directly and materially advance its asserted interest.[135] In *Edenfield v. Fane*,[136] the Court expanded on this point. Citing back to *Central Hudson*, the Court explained that the burden would not be satisfied by mere speculation or conjecture,[137] "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."[138] Ineffective or remote support for the regulation will therefore not suffice. Empirical data is not necessarily required; rather the Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'"[139] Unlike the

135. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999); *see also* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (holding that a prohibition on displaying alcohol content on beer label did not directly and materially advance the government's interest in curbing strength wars between brewers due to inconsistencies in the regulatory scheme).

136. 507 U.S. 761 (1993).

137. *See Central Hudson*, 447 U.S. at 564.

138. *Edenfield*, 507 U.S. at 770–71.

139. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)). However, proper interpretation of exactly what is necessary to show that a regulation materially advances the government's purported interest is somewhat controversial, and has recently caused a circuit split in terms of alcohol advertising on college campuses. In the Fourth Circuit, the court recently agreed with the argument that "history, consensus, and common sense support the link between advertising bans in college newspapers and a decrease in demand for alcohol among college students" due to the fact that college student publications "primarily target college students and play an inimitable role on campus. This link is also supported by the fact that alcohol vendors *want* to advertise in college student publications." Educ. Media Co. at Va. Tech v. Swecker, 602 F.3d 583, 589–90 (4th Cir. 2010) (citations omitted). However, an earlier decision by the Third Circuit found a similar ban to be unconstitutional because the government did not show that its statute would combat underage drinking to any sort of mate-

Court's earlier cases on commercial speech, such as *Posadas*, the Court now views a link between the interest of the government and the purported means of reaching that end as being critical. The regulation must directly advance the governmental interest; otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."[140]

Finally, the more recent cases show a substantial tightening of the narrow tailoring requirement of the fourth prong of the *Central Hudson* test. While the commercial speech restriction must be narrowly drawn, the restrictions have only needed a "reasonable fit" with the government's interest, rather than the least restrictive means possible. However, in *City of Cincinnati v. Discovery Network*, the Court held that the city's prohibition of commercial publications to reduce the number of newsracks on the streets did not reasonably fit the legitimate interest of reducing visual clutter.[141] The Court explained that the city could not prohibit "commercial" publications but still allow newspapers since "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault."[142] This case proved that the "'reasonable fit'" standard still "has some teeth."[143] Furthermore, "[a]s the governmental interest becomes further removed from protecting a fair bargaining process, it may become more difficult to establish the absence of less burdensome regulatory alternatives and the presence of a 'reasona-

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rial degree, or that the law provides anything more than "ineffective or remote support for the government's purposes." Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (quoting *Edenfield*, 507 U.S. at 770). The court expounded that it agreed that, in general, the promotion of alcoholic beverages encourages consumption, and if the statute had the effect of greatly reducing the number of ads viewed by underage drinkers, it would have held that the third prong of the statute had been met. However, the court explained that, because the statute only applies to a "very narrow sector of the media . . . and the Commonwealth ha[d] not pointed to any evidence that eliminating ads in this narrow sector [would] do any good," the prong was not met. *Id.* at 107. Therefore, while a split does exist, it is clear that the courts will no longer simply defer to the legislative intent.

140. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 771)).

141. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417–18 (1993) ("The benefit to be derived from the removal of 62 newsracks while about 1,500–2,000 remain in place was considered 'minute' by the District Court and 'paltry' by the Court of Appeals. We share their evaluation of the 'fit' between the city's goal and its method of achieving it.").

142. *Id.* at 426.

143. S. Doc. No. 108-17, at 1182 (2002).

ble fit' between the commercial speech restriction and the governmental interest."[144] In fact, the existence of an alternative that either is a more limited restriction or would not freeze speech at all may be fatal.[145] This may mean that regulations aiming to protect the fair bargaining process between the consumer and advertiser may be more likely to withstand the scrutiny of the Court than regulations concerning general health or moral concerns of the government.[146]

Overall, the commercial speech doctrine is anything but clear. While the Court's precedent is split on exactly what constitutes commercial speech, the level of protection it should be given, and the amount of deference that should be shown to legislation regulating it, the test first established in *Central Hudson* is still good law and applies to any analysis concerning regulation of commercial free speech.

Regarding the application of the *Central Hudson* test, the deference the Court has given to the government has fluctuated over the years. It has been true since *Virginia Pharmacy* that if the speech is false, deceptive, or misleading, the government may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent deception.[147] However, newer cases interpreting the *Central Hudson* test have moved away from a strong deference to the legislature. Now, the government must assert a substantial interest to be achieved by the restrictions on the commercial speech. Next, the restriction on speech must "directly advance" the governmental interest. Finally, the regulation cannot survive if a more limited restriction exists that would serve the government's interest just as well.

More recent Court decisions indicate that truthful, non-misleading advertising may eventually receive full constitutional protection.[148] This higher level of protection would "entail strict scrutiny for content-based restrictions of non-misleading commercial speech, resulting in an upholding of the law only if it is narrowly tailored to advance a compelling governmental interest—a standard that is generally fatal."[149]

144. *Id.* at 1185.
145. *Id.* at 1181.
146. *Id.* at 1185.
147. *See supra* note 87 and accompanying text.
148. *See* Bhagwat, *supra* note 74, at 110.
149. *Id.* at 111.

IV. COMMERCIAL FREE SPEECH AND FASHION ADVERTISEMENT PHOTOSHOPPING

A. *Advertising in America*

In a capitalistic society such as the United States, it is nearly impossible for the average American to escape advertising. By 2000, "[t]he average American [was] exposed to at least three thousand ads every day and will spend three years of his or her life watching television commercials. Advertising makes up about 70 percent of our newspapers and about 40 percent of our mail."[150] As Jean Kilbourne describes, "Advertising is our *environment.* We swim in it as fish swim in water."[151] More than anything else in modern culture, from art to literature to newspaper articles, advertising "allows us to track our sociological history: the rise and fall of fads, crazes, and social movements; political issues of the times; changing interests and tastes in clothes, entertainment, vices, and food; and scenes of social life as they were lived."[152] As such, advertising has become so absorbed by society that it has become the dominant culture of our times, commanding the public's attention to a particular style of existence.[153]

The power in advertising lies not in its ability to actually sell goods. "Recent studies have shown that consumers use less advertising in decision making. Advertising is not supplying the reason for purchasing as it did a generation ago."[154] Exempting supermarket and classified advertisements, upwards of ninety-nine percent of advertising has no effect. It has been estimated that of the 3,000 advertisements consumed each day, the average consumer notices only about eighty and reacts to about twelve.[155]

Therefore, advertising must exist for a reason other than to increase sales. As James Twitchell puts it, "[d]eception is the

150. JEAN KILBOURNE, DEADLY PERSUASION: WHY WOMEN AND GIRLS MUST FIGHT THE ADDICTIVE POWER OF ADVERTISING 58–59 (1999); *see also* JAMES B. TWITCHELL, ADCULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE 2 (1996) ("Assuming they reach maturity with consciousness intact, the current crop of teenagers will have spent years watching commercials. No one has done the numbers on what happens if you factor in radio, magazine, newspaper advertisements, and billboards, but today's teens probably have spent the equivalent of a decade of their lives being bombarded by bits of advertising information.").

151. KILBOURNE, *supra* note 150, at 57.

152. ANTHONY J. CORTESE, PROVOCATEUR: IMAGES OF WOMEN AND MINORITIES IN ADVERTISING 3 (1999).

153. *See id.*; *see generally* KILBOURNE, *supra* note 150.

154. TWITCHELL, *supra* note 150, at 239.

155. *Id.* at 3.

reality of [advertising culture]."[156] The social cost of advertising comes not from its economic value, but from its ability to deliver what is essentially a sales pitch. The cultural ramifications of this pitch results in giving a value to objects, and in doing that, advertising gives value to our lives. The biggest drawback to advertising, in the eyes of a company that advertises, is that it cannot create desire. While "advertising cannot create desire, it can channel it. And what is drawn down that channel, what travels with the commercial, is our culture."[157] Advertising's great power comes from its ability to decide what exactly travels with that commercial, because "what is carried in and with advertising is what we know, what we share, what we believe in. It is who we are. It is us."[158]

Most fashion advertisers insist that advertising simply reflects the current society and cultural attitudes or that it reflects a perfect dream world. However, advertising is not an imitation of society; rather,

> advertising is an effective and pervasive medium of influence and persuasion, and its influence is cumulative, often subtle, and primarily unconscious . . . . It is both a creator and perpetuator of the dominant attitudes, values, and ideology of the culture, the social norms and myths by which most people govern their behavior.[159]

While a particular advertisement for a fashion cosmetic line may not specifically work, the culture that is depicted in the advertisements certainly does. In the end, it is undeniable that advertising influences society. The cosmetic industry grosses over $20 billion a year. The diet industry grosses over $33 billion a year. Dwarfing both of these massive industries is the cosmetic surgery industry, which grosses over $300 billion annually.[160] These statistics signal that the advertising world is seen as depict-

156. *Id.*

157. *Id.* at 4.

158. *Id.* Twitchell emphasizes the importance of studying advertising, which he says is too important not to study. While most academics consider advertising valueless, and therefore not important to study, Twitchell posits that advertising culture has become so strong that it has overpowered different cultures and attempts to create a "monolithic, worldwide order immediately recognized by the House of Windsor and the tribe of Zulu." Commercial speech does not try to overcome different culture, but rather to "enlist[ ] them to sing the same tune. If ever there is to be a global village, it will be because the town crier works in advertising." *Id.* at 43.

159. KILBOURNE, *supra* note 150, at 67.

160. *See* CORTESE, *supra* note 152, at 56; TWITCHELL, *supra* note 150, at 152.

ing what is normal, leaving the average consumer fighting to keep up with whatever image of perfection it depicts.

A successful fashion advertisement is persuasive on two levels. On the first level, it raises the anxiety level of an individual, making the prospective consumer feel guilty, inferior, or somehow insufficient, and persuading that person that they need something to get rid of a particular "intrinsic defect." Next, the advertisement should convey that it provides the solution. If the advertisement identifies and satisfies both of these criteria, a consumer is generally hooked.[161] Advertisers are constantly bombarding consumers, especially young women whom the advertising world views as "prime targets" as inexperienced consumers,[162] with the message that they are inherently flawed.[163] These consumers need to change, and to eliminate whatever is wrong with them. Advertisements come equipped with an assumption, sometimes explicit, that something is wrong with the consumer's physical appearance.[164] This creation of the "intrinsic defect" is essential in order to create artificial needs to sell unnecessary products.[165]

Regardless of the intent of advertisers, the message that comes across from fashion advertising is that what is most important about young women is their beauty, their bodies, and their clothes. Advertising presents an ideal image of what our culture should be, a culture of flawlessly beautiful and extremely thin women. As women are struck with this image in advertising over, and over, and over again, girls of all ages get the message that in order to fit in they, too, must be flawlessly beautiful and, most importantly, thin. The female prototype in advertising is young (with no lines or wrinkles), good-looking, sexual, and perfect (with no scars or blemishes, and usually even no freckles, birthmarks, or pores).[166] More destructive is the message from advertisers that this idealized image can be achieved through hard work, effort, and self-sacrifice.[167] Despite the fact that the image itself is a façade, advertisements insist that the look can be

161. *See* CORTESE, *supra* note 152, at 62–63.

162. KILBOURNE, *supra* note 150, at 129 ("Adolescents are . . . prime targets. They are in the process of learning their values and roles and developing their self-concepts. Most teenagers are sensitive to peer pressure and find it difficult to resist or even to question the dominant cultural messages perpetuated and reinforced by the media.").

163. *See* CORTESE, *supra* note 152, at 62–64; KILBOURNE *supra* note 150, at 108–54.

164. *See* CORTESE, *supra* note 152, at 63.

165. *See* KILBOURNE, *supra* note 150, at 71.

166. CORTESE, *supra* note 152, at 54.

167. KILBOURNE, *supra* note 150, at 132.

achieved through the purchase of vast quantities of beauty products or designer clothing.[168] Regardless of what advertisers say, the amount of money generated from the fashion industry creates such an enormous financial stake in the advertisement world's narrow ideal of femininity that the industry must keep the image going. In order to continually increase revenue, they must insist that this image is the cultural norm, and that it can be attained. Therefore, the industry continues with a constant stream of their representation of perfect, and unattainable, female beauty.[169]

B. *Fashion Advertising and Regulation: The* Central Hudson *Test*

Therefore, the question arises regarding the government's ability to alert young women to the amount of photoshopping done in advertising, in order to break the cycle created by the "intrinsic defect." If the government were to place some sort of warning label on photoshopped images (either 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), would this legislation pass the test established in *Central Hudson*?[170]

As a preliminary matter, it is important to note that fashion advertising is commercial speech. While fashion editors may attach strong rhetoric to the contrary, claiming it is the creation of a "dream world," this argument does not circumvent the fact that, at its core, it seeks nothing more than a commercial purpose to sell clothes, or make-up, or a brand.[171]

1. The First Prong: Deceptive or Misleading Speech

The first prong of the *Central Hudson* test asks if the speech is misleading or deceptive in nature. If it is either misleading or deceptive, then the speech deserves no First Amendment protection, and any further analysis under the *Central Hudson* test is unnecessary. If fashion advertisements fail this first prong, then the government is free to regulate the advertisements.

It is arguably true that many fashion advertisements would fail this first prong, since many ads clearly do mislead. For example, the Twiggy advertisement for Olay Definity Eye Illuminator was found to be misleading in England, and was pulled from cir-

168. *See* CORTESE, *supra* note 152, at 54.

169. *Id.* at 54–57.

170. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

171. *See supra* notes 42–49 and accompanying text.

culation.[172] The United Kingdom's Advertising Standards Authority explained that they decided to ban the advertisement because the post-production retouching gave consumers a "misleading impression of the effect the product could achieve."[173]

It seems unwise for possible government regulation of photoshopping to rely on fashion advertisements not passing the first prong of the *Central Hudson* test for two reasons. First, the law is not as simple as making a quick judgment on an advertisement as being misleading or deceptive. The Federal Trade Commission ("FTC") defines a misleading advertisement as one that contains a material representation, either express or implied, or a material omission of fact that is likely to mislead consumers acting reasonably under the totality of the circumstances.[174] An express claim would be a misstatement of fact on the product label, and an implied claim typically means the message that a consumer can infer from the advertisement when considered in the entire context of the advertisement. The Commission considers whether the advertisement is misleading from the perspective of a person acting as a reasonable consumer under the circumstances, and this standard may change if an advertisement is aimed at particularly sophisticated or vulnerable groups. A representation is material if it is "likely to affect a consumer's choice or use of a product or service," meaning that the targeted consumer would have chosen differently if not for the deception in the advertisement.[175]

The next concern is the FTC's long held belief that advertisements using "puffery" do not warrant enforcement action. "Puffery" is a legal term used to describe advertisements that express subjective views in such a way that no reasonable person could take them literally. While both literally false and literally

172. *See supra* notes 11–12 and accompanying text.

173. *See* Sweney *supra* note 11 (quoting the Advertising Standards Authority ruling).

174. Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 46 (2004). The Lanham Act creates a federal cause of action for false advertising in interstate commerce, allowing for a broad range of remedies, from injunctive relief and damages to corrective advertising. *See* 15 U.S.C. § 1125 (2010). However, "courts have almost universally rejected consumer actions, holding that a plaintiff must suffer some sort of commercial . . . injury to have prudential standing and have consistently rejected consumer actions. . . . [T]his has effectively limited Lanham actions to claims between competing sellers." Dillard, *supra* note 174, at 38 (emphasis and footnote omitted).

175. Dillard, *supra* note 174, at 48 (quoting Fed. Trade Comm'n, *Enforcement Policy Statement on Food Advertising*, FTC.GOV (May 1994), http://www.ftc.gov/bcp/policystmt/ad-food.shtm).

true-but-misleading advertisements are actionable, puffery delivers vague, subjective assertions that the law generally holds does not deceive substantial numbers, and therefore is neither misleading nor harmful.[176] By legal definition, "puffery claims praise the advertised item by using subjective terms, stating no fact explicitly, and thus representing no factual content to consumers and so creating no basis for them to believe anything about the item that would affect their purchasing decision."[177] The FTC and advertisers explain that because the "puffs" are subjective opinions, they cannot amount to objective facts. This can be a tough line to draw, as the line between a subjective opinion and an objective statement of fact can be almost nonexistent.[178] However, the most widely adopted rule provides the following: "only a *deceptive* claim is illegal, whether or not it is false. What is not deceptive is not illegal, whether or not it is true."[179] Puffery proves that not every example of false advertising is deemed deceptive and actionable.

This, therefore, sets up a standard in which an advertisement must be judged on a case-by-case basis, making it impossible to say that all advertisements in which photoshop is used are misleading or deceptive. After all, not every false advertisement will be considered deceptive, and not all factually true advertising will be considered non-deceptive. However, if the speech is misleading or deceptive, the use of additional information, warnings, or disclaimers may be *required* to prevent deception by a consumer, a mandate first established in *Virginia Pharmacy*. Once again, it is inevitable that some of the most obvious uses of photoshopping would satisfy this threshold requirement. For purposes of reaching all photoshopped images, and to ensure the legality of placing some sort of warning regarding the amount of photoshopping done in an advertisement, the placing of such a warning must satisfy the other prongs of the *Central Hudson* test. After all, it is those advertisements that are not obviously deceptive that are perhaps most worrisome in terms of effect on a young consumer.

176. *See* IVAN L. PRESTON, THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING 24 (rev. ed. 1996).

177. *Id.* at 12.

178. *See* Dillard, *supra* note 174, at 51–52 (citing Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 499 (5th Cir. 2000), where the Fifth Circuit held that the phrase "Better Ingredients. Better Pizza." was puffery since the word "better" was used in an unquantifiable context and therefore stated opinion).

179. PRESTON, *supra* note 176, at 5.

2. The Second Prong: The Government's Interest in Regulating Fashion Advertisements

In order for the government to regulate commercial speech, the government must first prove that they have a substantial interest in regulating the speech and that interest will be advanced by the restrictions on commercial speech. Due to the alarming side effects of youths' exposure to photoshopped images in advertising, it seems that the government would clearly be able to demonstrate a substantial interest in the placement of a warning label system on photoshopped advertisements indicating that the image was not realistic.

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.[180] 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.[181] As the ideal female body size decreases, growing empirical evidence shows that this has a role in fueling women's body dissatisfaction and increasing the incidence of eating disorders.[182] On average, studies have demonstrated that young women feel worse after exposure to thin images than other types of images.[183] In fact, body dissatisfaction is so common now that it can be described as "normative discontent," which also suggests that the thinning image of beauty portrayed in advertising can be detrimental to a large number of women.[184]

Images depicted in advertising perpetuate unreachable standards for women in almost every imaginable way. Furthermore, these images not only affect how women view themselves, but

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180. *See* Katherine Frith, Ping Shaw & Hong Cheng, *The Construction of Beauty: A Cross-Cultural Analysis of Women's Magazine Advertising*, 55 J. COMM. 56, 57 (2005) (quoting GERMAINE GREER, THE WHOLE WOMAN (1999); CORTESE, *supra* note 152).

181. Emma Halliwell & Helga Dittmar, *Does Size Matter? The Impact of Model's Body Size on Women's Body-Focused Anxiety and Advertising Effectiveness*, 23 J. SOC. & CLINICAL PSYCHOL. 104, 105 (2004).

182. *Id.* at 105–06.

183. *Id.* at 106.

184. *Id.* at 107 (quoting Judith Rodin, Lisa Silberstein, & Ruth Striegel-Moore, *Women and Weight: A Normative Discontent*, *in* 32 NEBRASKA SYMPOSIUM ON MOTIVATION, 1984: PSYCHOLOGY AND GENDER 267 (Theo B. Sonderegger ed., 1985).

also how men judge the real women in their lives. One study has shown that males downgraded the physical attractiveness of an average-looking female and were harsher in evaluations of potential dates after having watched one episode of the 1970s show *Charlie's Angels*, a show featuring three beautiful, thin women, as compared to males who watched a different program.[185] Another study has shown that male college-aged students who viewed centerfolds from magazines such as *Playboy* were more likely to thereafter find their own girlfriends less sexually attractive.[186]

However, the most alarming standard is the one internalized by women themselves.[187] As young women try to make sense of what is expected of them in society, advertising delivers a very clear message that they are expected to be flawlessly beautiful and very thin. In a culture that can be toxic to a young woman's self-esteem, advertising rises above as one of the most potent messengers.[188] As the YWCA reports:

> Engulfed by a popular culture saturated with images of idealized, air-brushed and unattainable female physical beauty, women and girls cannot escape feeling judged on the basis of their appearance. As a result, many women feel chronically insecure, overweight and inadequate, as these beauty images apply to an ever-shrinking pool of women. Moreover, the diet, cosmetic and fashion industries are often too willing to exploit these narrow beauty standards so women and girls will become cradle-to-grave consumers of beauty products, cosmetic surgery and diet programs.[189]

Advertisers cannot even use the excuse that "thin sells" anymore, since studies have proven there is no empirical support for

185. Douglas T. Kenrick & Sara E. Gutierres, *Contrast Effects and Judgments of Physical Attractiveness: When Beauty Becomes a Social Problem*, 38 J. PERSONALITY & SOC. PSYCHOL. 131, 132–34 (1980).

186. *See* Douglas T. Kenrick, Sara E. Gutierres & Laurie L. Goldberg, *Influence of Popular Erotica on Judgments of Strangers and Mates*, 25 J. EXPERIMENTAL SOC. PSYCHOL. 159 (1989).

187. Halliwell and Dittmar's study also proves that adult, non-student women can be negatively affected by the use of slim models in advertising, proving that this "phenomenon" is not limited to young women. *See* Halliwell & Dittmar, *supra* note 181, at 119–20.

188. *See* KILBOURNE, *supra* note 150, at 131–32.

189. YWCA, *supra* note 13, at 2.

the proposition that extremely thin models sell products better.[190]

Statistics indicate that women, starting at increasingly earlier ages, suffer from unrealistic and unreachable idealized notions of beauty. For example, the more frequently girls read magazines, the more likely they are to diet and to feel that magazines influence their ideal body shape. Another study has shown that seventy percent of college women feel worse about their looks after reading women's magazines.[191] Teenage girls who watch television commercials depicting underweight models become more dissatisfied with their own bodies.[192]

The amount of advertising that a young woman sees can change the way that a young woman perceives the shape of her own body, indicating that body image is influenced by observing idealized body shapes. A woman's perception of her body is a psychological construct, meaning that an individual woman's self-image is part of her mental construction of her self.[193] Body image has been proven to be elastic, and can fluctuate in response to media content that focuses on the presentation of the ideal body shape, even if media content is minimal. Today, average young women are found to overestimate the size of their own bodies, in a society where the ideal body is becoming thinner. Women with eating disorders are found to make even greater overestimations.[194] One-third of young women between the ages of eight and seventeen have a distorted perception of their own weight.[195]

Exposure to media that touts unrealistically thin ideals of beauty affects young women at an early age. Girls as young as nine have internalized thin ideals; for example, in a study of one-hundred girls between nine and twelve-years-old, forty-nine percent expressed a desire to be thinner.[196] Eighty-one percent of

190. *See* Halliwell & Dittmar, *supra* note 181, at 118 (concluding that while attractiveness can influence advertising effectiveness, model thinness does not).

191. *See* KILBOURNE, *supra* note 150, at 132–33.

192. *See* YWCA, *supra* note 13, at 6.

193. Philip N. Myers, Jr. & Frank A. Biocca, *The Elastic Body Image: The Effect of Television Advertising and Programming on Body Image Distortions in Young Women*, 42 J. COMM. 108, 108 (1992).

194. *Id.* at 109.

195. JUDY SCHOENBERG ET AL., GIRL SCOUT RESEARCH INST., THE NEW NORMAL? WHAT GIRLS SAY ABOUT HEALTHY LIVING 8 (2006), *available at* http://girlscouts.org/research/publications/original/gs_exec_summary.pdf.

196. *See* Levina Clark & Marika Tiggemann, *Appearance Culture in Nine- to 12-Year-Old Girls: Media and Peer Influences on Body Dissatisfaction*, 15 SOC. DEV. 628, 639 (2006).

ten-year-olds are afraid of being fat.[197] Over one-half of teenage girls use unhealthy weight control methods such as skipping meals, fasting, smoking cigarettes, vomiting, and taking laxatives.[198] Sixty-seven percent of women between the ages of twenty-five and forty-five are trying to lose weight. Of these dieters, fifty-three percent are already at a healthy weight and still trying to lose weight.[199] More than one in three "normal dieters" will progress to pathological dieting.[200]

In the United States, nearly ten million women suffer from an eating disorder. Forty percent of newly diagnosed eating disorders are in girls fifteen to nineteen years-old. Symptoms can occur, however, in girls as young as five-years-old.[201] More than eighty percent of women are reported to be dissatisfied with their appearance.[202] Furthermore, as minority women become "acculturated," meaning as values are absorbed by minority cultures, the "dominant standards of beauty are internalized" and minority women may be more susceptible to eating disorders.[203]

Advertising cannot cause an eating disorder. 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."[204] Advertising does not promote healthy lifestyles; rather, it contributes to abusive and abnormal cultural attitudes about thinness. "It thus provides fertile soil for those obsessions to take root in and creates a

197. NAT'L EATING DISORDERS ASSOC., FACT SHEET ON EATING DISORDERS (2010) [hereinafter FACT SHEET] (citing Suzanne W. McNutt et al., *A Longitudinal Study of the Dietary Practices of Black and White Girls 9 and 10 Years Old at Enrollment: The NHLBI Growth Health Study*, 20 J. ADOLESCENT HEALTH 27 (1997)), *available at* http://www.nationaleatingdisorders.org/uploads/file/in-the-news/In%20the%20News%20Fact%20Sheet%20PDF.pdf.

198. *Id.* (citing DIANNE NEUMARK-SZTAINER, I'M LIKE SO FAT!: HELPING YOUR TEEN MAKE HEALTHY CHOICES ABOUT EATING AND EXERCISE IN A WEIGHT OBSESSED WORLD 5 (2005)).

199. *See* YWCA, *supra* note 13, at 4.

200. FACT SHEET, *supra* note 197.

201. *Id.*

202. *Id.*

203. NAT'L EATING DISORDERS ASSOC., EATING DISORDERS IN WOMEN OF COLOR: EXPLANATIONS AND IMPLICATIONS (2005), *available at* http://www.nationaleatingdisorders.org/nedaDir/files/documents/handouts/WomenCol.pdf.

204. KILBOURNE, *supra* note 150, at 135.

climate of denial in which these diseases flourish."[205] Advertisers that not only use thin models,[206] but then retouch them to look even thinner, help perpetuate a cultural norm from which most women feel out of touch. The National Eating Disorders Association has found that one of the most pertinent social factors that can contribute to eating disorders is cultural pressures that glorify "thinness," as well as narrow definitions of beauty that include only one certain body type.[207] Furthermore, psychological factors that can contribute to eating disorders are low self-esteem, depression, and feelings of inadequacy.[208]

Therefore, the government would seem to have a significant interest in regulating fashion advertisements in some form. A recent survey found that nearly ninety percent of young women felt that the fashion industry and the media put a lot of pressure on them to be thin; and sixty percent of young women compare their bodies to fashion models—despite the fact that almost the same percentage finds the body image represented by the fashion industry to be too skinny.[209] Nearly half of the young women surveyed wished they were as skinny as the models in fashion advertisements, and that these models provide an ideal body shape to which they strive.[210] The alarming side effects of these statistics create a substantial interest for the government to promote awareness of retouching and unrealistic images in advertising through the use of a warning label on photoshopped images.

3. The Third Prong: The Government's Regulation Must Directly Advance Its Interest

The proposed regulation must also directly advance the governmental interest. This burden will not be satisfied by speculation, but rather requires a showing that the restriction will alleviate proven harms in a material way. This can be proven by empirical evidence, but at times has been proven by a common

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205. *Id.*

206. "Most fashion models are thinner than 98% of American women." FACT SHEET, *supra* note 197 (citing LINDA SMOLAK, NATIONAL EATING DISORDERS ASSOCIATION/NEXT DOOR NEIGHBORS PUPPET GUIDE BOOK (1996)).

207. NAT'L EATING DISORDERS ASSOC., FACTORS THAT MAY CONTRIBUTE TO EATING DISORDERS (2004), *available at* http://www.nationaleatingdisorders.org/uploads/file/information-resources/Factors%20that%20may%20Contribute%20to%20Eating%20Disorders.pdf.

208. *Id.*

209. GIRL SCOUT RESEARCH INST., BEAUTY REDEFINED: GIRLS AND BODY IMAGE (2010), *available at* http://www.girlscouts.org/research/pdf/beauty_redefined_factsheet.pdf.

210. *Id.*

sense justification.[211] A warning label system placed on advertisements with photoshopped images would satisfy this prong.

First, often regulations that failed the third prong had incoherent inconsistencies throughout the regulatory plan. For example, if a regulatory scheme prohibited one form of advertising, but allowed another similar form, then the scheme is unlikely to pass the third prong.[212] If the government were to place a warning label on advertisements with photoshopping, the regulation would apply across the board to photoshopped images. Next, there are numerous studies that link photoshopped images in advertising that reinforce images of beauty with problems ranging from self-esteem to serious health problems in young women.[213] Such a strong link has already caused the British Royal College of Psychiatrists to strongly suggest that a notice be placed on any airbrushed advertisement.[214]

Therefore, not only does empirical evidence exist that establishes that the government's interest would be materially advanced by the regulation of speech, common sense says as much as well. In an advertising world, the barrage of images of idealized perfection has led young women to maintain unrealistic expectations of what is "normal" and "beautiful." Having a label on photoshopped images in advertisements, literally warning them that what they see is not reality, seems an obvious way to alleviate the horrendous effects that advertising can have on young women.

4. The Fourth Prong: The Regulation Must Not Be More Extensive Than Necessary to Serve the Purported Interest of the Government

Finally, the regulation cannot be more extensive than necessary to serve the purported interest of the government. The regulation need not be the least restrictive means possible, but it must "reasonably fit" the interest. It seems likely that the placement of a warning label on advertisements with photoshopped images would reasonably fit the government's interest in assuaging the impact that these images of idealized beauty can have on young women.

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211. *See supra* notes 128–33 and accompanying text.

212. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995) (finding that the regulatory scheme failed the third prong when the government prohibited advertising the amount of alcohol content on a beer label, but not in a general advertisement for the beer); Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004).

213. *See supra* notes 167–95 and accompanying text.

214. *See supra* notes 59–62 and accompanying text.

Recent cases such as *44 Liquormart, Inc. v. Rhode Island*[215] 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.[216]

A regulation on photoshopped advertisements would most likely have a paternalistic purpose, promoting an interest from fair dealing in the marketplace. Justice Stevens' plurality opinion in *44 Liquormart* makes clear that the objective of commercial speech jurisprudence is to advance the consumers' interest in receiving factually undistorted information so that they may make well-informed economic decisions.[217] A warning label on fashion advertisements is in a unique position because it would seek to increase the factual accuracy of information received through fashion advertisements, but the main purpose of doing so would be for a paternalistic reason, namely, to raise awareness about the incredible amount of retouching done in advertisements in order to prevent the alarming side effects of young women's exposure to such photoshopped images. However, an easy argument can be made that such a regulation would allow consumers in general to make more-informed economic decisions. After all, Americans spend over $40 billion a year on dieting and diet-related products.[218] Such a massive dollar figure shows that advertising, which includes photoshopped images of idealized beauty, *does* have a very real impact on economic choices. Therefore, even under the current anti-paternalistic theory of commercial free speech, a regulation alerting the consumer public about the use of photoshopping would likely be constitutionally permissible.

Furthermore, recent cases on commercial free speech have made it clear that there has been a substantial tightening of the narrow tailoring requirement of this prong of the *Central Hudson* test. The Court in *44 Liquormart* made it clear that suppression of speech cannot be chosen over a less speech-restrictive policy, or if a speech-neutral alternative was available to advance the same governmental interest. Here, the 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

215. 517 U.S. 484 (1996).
216. *See supra* notes 123–34 and accompanying text.
217. *See supra* notes 122–23 and accompanying text.
218. FACT SHEET, *supra* note 197.

to only use a certain amount of photoshopping. It is only alerting consumers that the image that 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.

Furthermore, the idea of "counterspeech"[219] rather than using a warning label to regulate speech is not as effective. The number of advertisements that the government would have to release to counter the impression given by photoshopping in advertisements would be unrealistic. Furthermore, most people are aware on some abstract level that photoshopping is done, but are not aware of the extent that it is done. Therefore, for those images that are photoshopped the "best"—meaning they are not deceptive—the counterspeech by the government would likely prove ineffective.

Finally, Congress has already considered non-speech related mechanisms to serve its interest. The Healthy Media for Youth Act, introduced in Congress in 2010, is bipartisan legislation that would establish a national task force to develop voluntary guidelines and other measures to promote positive media images of girls and women.[220] The bill would support media literacy programs, promote research on the effect of media images on young people, and encourage the adoption of voluntary guidelines to promote healthier media images for youth.[221] Such a "multi-pronged attack"[222] shows that Congress is considering non-speech related mechanisms. A warning label system on photoshopped images in advertisements would only complement the overall desire of Congress to promote "healthy media."

Overall, a warning label system on retouched fashion advertisements could pass the *Central Hudson* test. While some ads would undeniably be stopped at the threshold issue, if the advertisement was misleading or deceptive, the standard for what constitutes "misleading" is too elusive to guard against the trickiest advertising affecting young girls, namely, advertising in which retouched images are not as obvious, allowing more young people to believe the images are natural. Therefore, it is essential for the regulation to satisfy the rest of the *Central Hudson* test.

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219. *See* Posadas de P. R. Assocs. v. Tourism Co. of P. R., 478 U.S. 328, 344 (1986).

220. Healthy Media for Youth Act, H.R. 4925, 111th Cong. (2010).

221. *Id.* §§ 3–5.

222. *See* Educ. Media Co. at Va. Tech v. Swecker, 602 F.3d 583, 591 (4th Cir. 2010) (approving the use of a similar "multi-pronged attack" on underage and abusive drinking).

While the underlying purpose of the regulation might be paternalistic in nature, the regulation would also allow for more authenticity in advertisements than currently exists, rather than prohibiting certain commercial messages, which the Court prefers to avoid. Furthermore, the fashion and diet industry is a multi-billion dollar industry that relies on a continuing desire to look better. The warning label system would certainly help with consumer choices, and assist consumers in making well-informed economic decisions. Finally, the placement of a warning label would be the most effective and least speech-prohibitive means of raising awareness of the retouched images.

V. CONCLUSION

Our society today is one driven by advertising. The average American is exposed to about three-thousand advertisements on a daily basis.[223] As changes in technology make more extensive photoshopping easier, the trend in advertising is towards "extreme photoshopping." With the click of a few buttons, the female prototype in these advertisements is created: young, good-looking, sexual, perfect, and above all, thin. Images are easily manipulated without a second thought. However, this has led to an epidemic of beauty that is literally unrealistic and impossible to meet. The losers in this battle are not the fashion advertisers who have created a multi-billion-dollar industry—it's young women.

The health implications of young women trying to attain an unrealistic, idealized image are substantial. Young women suffer from very real problems, including depression, low self-esteem, and eating disorders. This has led to the introduction of regulations in several foreign countries that would institute a warning label system on photoshopped images.

Even with the First Amendment protection of speech, the United States could nevertheless enact legislation allowing for a warning label system on advertisements depicting photoshopped images. While the regulation must not be more oppressive than necessary, only a complete ban of honest commercial speech is close to being granted full First Amendment rights. Therefore, since the government has a real and demonstrated interest in the health of young women that a warning label would directly and materially advance, and the regulation of commercial speech by the warning label is no more extensive than necessary to advance the government's interest, the use of a warning label could pass constitutional muster.

223. KILBOURNE, *supra* note 150, at 58.