The Emotion of Disgust, Demand Augmentation, and Wasteful Consumption

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Abstract

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Conventional economic theory assumes that producers supply goods and services in a responsive, reactive way to innate, genuine, and unmanipulated consumer demand. Evidence increasingly suggests, however, that demand is constructed based on the elements present in any given situation, and that the situation is subject to corporate influence. One method by which corporations construct demand is by using the emotion of disgust to create an apparent problem in an advertisement. Corporations reference the emotion of disgust not only because it is incredibly powerful, but also because advertisements are able to quickly alleviate the disgusting problem and thereby increase consumer receptivity to the advertised product. These advertisements exert undue influence over consumers, but more importantly, lead to wasteful consumption that damages the environment in a manner discordant with price. Consistent with the constitutional requirements of the First Amendment commercial speech doctrine, a ban on these advertisements will prevent the environmental degradation that results from this form of demand augmentation. While at certain points in history, it may have been ludicrous to be concerned about wasteful consumption, times have changed. Global climate change will force a restructuring of our economic system to explicitly take into account environmental sustainability and resource conservation by reducing consumption.

Table of Contents

INTRODUCTION 1
I. THE POWER OF DISGUST 6
II. THE CONNECTION OF DISGUST IN ADVERTISEMENTS TO FALSE PROBLEMATIZATION UNDUE INFLUENCE, AND WASTEFUL CONSUMPTION 12
A. FALSE PROBLEMATIZATION 12
B. UNDUE INFLUENCE 16
i. IMPACTS ON THE ADVERTISEMENT VIEWER 16
ii. BENEFITS TO THE ADVERTISER 23
C. WASTEFUL CONSUMPTION 25
III. BANS ON ADVERTISEMENTS 32
CONCLUSION 50

FIGURE I 24

"Savvy marketers and good advertising people know how to appeal to emotion, gut rationality and visceral fears. That's what they're selling – the manipulation of 'yuck.'"
Arthur Caplan[1]

"One cannot defend production as satisfying wants if that production creates the wants."
John Kenneth Galbraith[2]

INTRODUCTION

If environmental law is to have any chance of succeeding at its goals of environmental protection, public health improvement, conservation, and sustainability, the time has come to directly confront consumption. Legal methods to address consumption must, in part, address demand for certain goods and services. Where does that demand come from, why should it be shifted, and how can it be shifted? While conventional economic theory assumes that suppliers supply goods and services in a responsive, reactive way to innate, genuine, unmanipulated demand, this Article questions that assumption. Evidence suggests that demand is constructed based on the elements and stimuli present in a given situation, and that the situation is manipulable in any number of ways. Suppliers are focused on supply only to the extent it is consistent with demand – otherwise there would be unsold good and services that would not improve the bottom line of companies. Making supply consistent with demand, however, often involves augmenting demand through commercial tactics.

This Article will focus on one of the methods used by corporations to construct demand: leverage of the emotion of disgust to create an apparent problem in an

[1] Charles W. Schmidt, *The Yuck Factor: When Disgust Meets Discovery*, 116 ENVIRON. HEALTH PERSPECT. A524, A525 (2008).
[2] JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (1958).

advertisement and to sell a product to solve the supposed problem. At first blush, this marketing tactic does not seem particularly troubling. It is a well-known fact that companies use a variety of methods to sell products and part of the essence of salesmanship is demonstrating the importance of the solution offered by a product to a particular problem. However, this Article will demonstrate that the corporate leverage of the emotion of disgust to manipulate consumer preferences sometimes goes too far. It goes too far when there is a confluence of circumstances involving: (i) false claims made about the existence of problem, (ii) corporate exertion of undue influence over consumers, and (iii) wasteful consumption that damages the environment in a manner discordant with price.[3] In response, laws should prohibit advertisements that reference and rely on the emotion of disgust to sell products.

False problematization, undue influence, and wasteful consumption do not separately and independently justify advertising prohibitions. Instead, they are jointly sufficient and individually necessary conditions that support the prescription, only, however, when the emotion of disgust is leveraged by companies. What is it about disgust that singles it out for special treatment? Part I of this Article will focus on that question, explain why disgust is such a powerful negative emotion, and analyze the reasons that, for example, legal scholar and philosopher Martha Nussbaum has stated with regard to disgust that its "thought-content is typically unreasonable, embodying magical ideas of contamination, and impossible aspirations to purity, immortality and nonanimality, that are just not in line with human life as we know it."[4] After establishing the power of disgust, Part II will claim that corporate use of the emotion of disgust in

[3] *See* James Salzman, *Sustainable Consumption and the Law*, 27 ENVTL. L. 1243 at 1257-58 (1997) regarding the failure of market prices to reflect environmental costs.
[4] MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 14 (2004).

advertisements is a problem when the three aforementioned conditions of false problematization, undue influence, and wasteful consumption exist. Finally, Part III will set forth the prescription: statutory and regulatory bans of advertisements that reference the emotion of disgust and satisfy the three conditions.

The argument made in this Article is a hard one to make. After all, our preferences for certain goods and services certainly feel like our own and claims that corporate bogeymen are selling us stuff that we do not want may sound paranoid and deranged. Even if we acknowledge the wastefulness of certain forms of consumption that extend beyond satisfaction of basic human needs, how do we know when consumption, if ever, is so wasteful in a free market economy as to justify legal intervention? Perhaps more importantly and practically, even though the First Amendment does not apply to commercial speech in the same way it applies to other forms of speech such as political speech and ordinary expressive speech, any government restrictions on commercial speech still must overcome significant burdens.

The claims of this Article therefore must be understood as contingent on categorical demarcation limited to the domain of corporate leverage of disgust through advertising. In other words, this Article is focused on restricting advertisements that reference and rely on the emotion of disgust, without claiming that the products themselves should in any way be restricted or banned. Examples will be helpful. Brawny paper towel commercials often depict huge and exaggerated kitchen messes, with one ad having a large pile of dirt on the kitchen counter and others having babies spill piles of food all over the floor and on their faces, followed by statements such as: “New Brawny paper towels hold up to your toughest messes.” The pesticide company Orkin has ads that

routinely depict human-size rats and insects with liquids oozing from their bodies. The Hanes t-shirt company has an ad that references the wrinkled "bacon neck" collar of someone not wearing a Hanes t-shirt with its "lay flat" collar.[5] What, however, is the problem with these advertisements? All three of these ads are selling products that are not only perfectly legal, but that also tend to do what the companies say they will do, whether clean up kitchen messes, kill insects, or maintain a flat collar. The problems that the ads are depicting, however, are: (i) not just kitchen messes, but gargantuan and repulsive piles of garbage, (ii) not just insects in the home, but six feet tall insects, and (iii) not just a wrinkled collar, but bacon around the neck. In other words, the problem that we as the viewer experience is not the idea of a kitchen mess, but the reality of our own disgust. We are made disgusted by the ad and are likely to address the problem of that disgust by becoming more likely to buy the products in question, products that the advertisements depict as coming to the rescue to take away the disgust. It must be emphasized that the problem with these ads is not that are offend some sort of puritanical sensibility pertaining to proper decorum, but that they are taking advantage of the human tendency to be disgusted in order to sell us products. As this Article will demonstrate, not only is there false problematization, but also coercive influence and excessive consumption, all of which, together, build the case for restrictions on advertisements that explicitly rely on the emotion of disgust to sell products.

At this stage, the reader may well be skeptical of such a seemingly extreme solution to a problem that may, well, not look like that big of a deal – a ban may seem

[5] While perhaps not as extreme as the Brawny ad or the Orkin ads, the ad is making reference to out of place food, something that people tend to have discomfort with. The food referenced also happens to be an animal product, conjuring up ideas of our own mortality. And on top of it, bacon comes from a pig, an animal that many people, societies, and religions historically and currently tend to view as filthy, to such an extent that its consumption is prohibited.

incongruous with the apparent innocuous inanity of many advertisements. Is the Hanes t-shirt ad that references bacon on someone's chest really all that troubling? Is disgust really such a powerful emotion to use in advertisements? Well, perhaps, it would be worth asking the ultimate marketers extraordinaire: cigarette companies. In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act directing the FDA to promulgate regulations requiring cigarette manufacturers to display "color graphics depicting the negative health consequences of smoking" and written warnings on cigarette packages, with the images to occupy 50% of the cigarette package.[6] After rulemaking, the FDA announced final rules and presented the images and warnings, with, for example, a "bare chested male cadaver lying on a table, and featuring what appears to be post-autopsy chest staples down the middle of his torso."[7] The cigarette companies had stated during the course of rulemaking that the "nonfactual and controversial images" were "intended to elicit loathing, disgust and repulsion."[8] In recognition of the power of the labels, the cigarette companies sought a preliminary injunction and they prevailed, with the injunction granted by the United States District Court for the District of Columbia. It is important note that, in contrast to the proposal in this Article, the issue in the case was one of compelled speech, with the government forcing companies to display images that, among other things, made reference to the emotion of disgust and that were designed to harm sales of the product.[9] The constitutionality of regulations that compel speech faces a different legal analysis than regulations that ban speech, as will be

[6] Pub. L. No. 111-31, 123 Stat. 1776 (2009).
[7] This description comes from the district court memorandum opinion in R.J. Reynolds Tobacco Co. v. United States Food and Drug Administration, Civil Case No. 11-1482 (D.D.C.) (2011).
[8] *See* Duff Wilson, *U.S. Releases Graphic Images to Deter Smokers*, NY TIMES, June 21, 2011.
[9] As Judge Richard Leon noted his RJ Reynolds memorandum opinion, compelled speech is presumptively unconstitutional. While the government may "require certain disclosures to protect consumers from 'confusion or deception,' compelled disclosures containing 'purely factual and uncontroversial information' may still violate the First Amendment if they are 'unjustified or unduly burdensome.'"

discussed in Part III. For purposes of this Article, the point in discussing the *RJ Reynolds* case is simply to emphasize that disgust is indeed a powerful emotion, and one that can have a strong impact on viewers, as corporations know all too well. Part I of this Article will now explore the reasons that disgust is such a powerful emotion for companies to use in advertisements.

PART I: THE POWER OF DISGUST

Many commentators and academics have devoted entire books to exploration of the origins of disgust, and there are ongoing debates among psychologists, biologists, cultural anthropologists, and sociologists about where disgust comes from.[10] The import of the arguments has less to do with the answer alone than it does with the supposed implications of the answer. Those who argue that disgust is inborn suggest that its natural origins related to revulsion toward rotten food indicate that disgust is evolutionarily advantageous because it helps people avoid disease: disgust is functional and disgust is therefore good.[11] Those who argue that disgust is culturally and socially constructed tend to emphasize is potential to work danger, particularly when it comes to discrimination against minority groups. Others interpret the same answers (i.e. that disgust is either inborn or conditioned) in exactly the opposite ways, suggesting that inborn, natural tendencies such as disgust have the capacity to harm others (e.g. disgust towards physically maimed or malformed people), and culturally fostered notions of the revolting can promote positive morality-based social norms (e.g. disgust towards racism).

[10] *See* Nussbaum and Valerie Curtis, *Dirt, Disgust and Disease: A Natural History of Hygiene*, 61 J. EPIDEMIOL. COMMUNITY HEALTH 660 (2007).
[11] *Id*.

Part of the reason for the extensive literature on disgust undoubtedly has to do with the reality that disgust is all of these things. Disgust is both natural and conditioned, advantageous in certain contexts and abused in others. For some reason, we have trouble seeing how this can be true with the emotion of disgust, even though it is relatively easy to see that other emotions such as fear or anger, can have positive or negative results, as well as natural and conditioned origins. Fear, for example, can help us to avoid problems and motivate us to succeed, but it can also overwhelm us or lead us to persecute others. We are all born with fear and its accompanying fight-or-flight instinct, but our social and cultural surroundings can make us more or less afraid of certain things. An inborn fear could be improper and a constructed fear could be proper, and vice versa. Disgust has similar features. This Article does not seek to engage in an extensive recitation or analysis of those features. Instead, this Article, as an initial matter, will explain the powerful nature of disgust, a power that makes it an effective emotion to draw upon for companies seeking to sell products.

Exploration of the reasons that disgust is powerful must begin with a description of what precisely we mean by the emotion of disgust. Interestingly, disgust is an emotion that in a linguistic sense, at least in English, evolves into a sentiment that at once evinces the emotion and extends it into an action. With the utterance of the phrases "that's disgusting" or "that's gross," we all know what is meant: "stop," "get away," and "stay away." Disgust then as an idea has embedded within it both a stimulus and an implied response. While our sense of disgust, contextualized, may relate to a continuum of expression ranging from childish jocularity to the earnest condemnation of the morally reprehensible, the feeling of disgust definitionally includes a sense of revulsion. An

impression creates an expression. Martha Nussbaum writes, "Its classic expression is vomiting; its classic stimulants are vile odors and other objects whose very appearance seems loathsome."[12] Disgust is more than a simple, visceral stimulus and response grounded in physiology – psychologists have also demonstrated the complex cognitive content associated with disgust.[13] Taken to an extreme, one manifestation of obsessive-compulsive disorder involves a cognitive focus on exposure to contaminants. But all people, to one degree or another, have psychological and cognitive uneasiness with the notion of incorporation of foreign and offensive objects into our bodies.

The targets of disgust are varied, but commentators have observed that the focus tends to be on animals and animal products, particularly waste products.[14] Some have taken this observation one step further and have inferred that "the motivating idea has to do with our interest in policing the boundary between ourselves and nonhuman animals, or our own animality."[15] The concern we have seems to be that we will be reduced to animals. Others take this idea still one step further still, claiming that the concern we all have is that of our own death, particularly if our body begins to decay afterward.[16]

Clearly then, we are dealing with a complex emotion, but what is the evidence that it is powerful? Disgust relates to the essence of what it means to be human. We are not animals and we are alive; by "policing the boundaries" between ourselves and animals and life and death, humans create self-concepts that enable functionality in the world as we know it.[17] This is not just about abstract theory, but about the incredible

[12] Nussbaum, *supra* note 4, at 87.
[13] *Id*.
[14] *Id*. at 89.
[15] *Id*.
[16] *Id*. at 90-91.
[17] *Id*. at 89.

banality of daily life, whether using mouthwash, applying cosmetics, taking showers, or preparing our food. These routines we engage in, of course, at root often reflect concern with contamination and a desire to maintain the purity of our bodies. But avoidance of contamination and maintenance of the purity of our bodies are obviously impossible in this world, and this constant concern with loss of our elevated humanity is one of the central reasons for the power of disgust.

Disgust often coincides with a separate and distinct emotion, and perhaps the most powerful emotion of all: fear. It has been observed that people tend to associate danger with strong negative emotions, including disgust.[18] Perhaps due to a sense of cognitive dissonance that the level of revulsion toward something could only exist if there were a more rational and legitimate underpinning, such as danger, we are led to believe we are afraid of disgusting things. A sense of disgust therefore sets the stage for manipulation of risk perception.[19] This, of course, leads many in the context of disgust to cling to the notion that the disgust impulse is grounded in rational, self-protective fears, particularly as they relate to germs.[20] To be sure, there is some degree of legitimacy and rationality associated with, for example, fear of germs – there is an actual level of risk associated with these objects of fear. And these objects of fear sometimes overlap with the objects of disgust. In other words, fear of sickness induced by salmonella and disgust at the thought of salmonella may exist simultaneously. The fear of salmonella poisoning is justifiable and steps should be taken to reduce its risks. But disgust as an emotion also stands separately and independently from legitimate risks.

[18] Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 120 (2007) (citations omitted).
[19] *Id*.
[20] *See* Curtis, *supra* note 10, at 661.

The power of disgust manifests itself not only in terms of the intensity of its emotional response to particular objects but also in its capacity to create norms. The disgust impulse is an emotion that reflects sentiments about stimuli. Certain emotional responses, harbored by some, have undergone an historical process of legitimization. With widespread support as a "normal" response to stimuli, the response itself of course does not stop as a mere emotional sensation. Because disgust is a negative, uncomfortable feeling, we take on practices to reduce the stimuli that trigger disgust. These practices themselves then become a norm. Sometimes the "in practice" norm becomes so powerful that even when the underlying "disgust" norm dissipates or weakens, the "in practice" norm persists. For example, the 2009 swine flu pandemic created a widespread feeling of disgust, undoubtedly exacerbated by the illness' origin in swine, animals traditionally thought of as filthy and disgusting. To be sure, there was also a strong element of fear, partly legitimate, of the pandemic, which claimed the lives of 12,470 in the United States.[21] But disgust itself existed as a separate emotion driving the incessant din of news coverage and intense focus of workplaces and schools on the issue. In response, many workplaces and public buildings instituted programs to fight the swine flu, with a central pillar of the strategy involving hand sanitizer. Hand sanitizer became ubiquitous. According to Nielsen Co., during the six month height of the swine flu in the United States, sales of hand sanitizer increased 70%.[22] Dewey Parsons, the

[21] Centers for Disease Control and Prevention estimate *available at* http://www.cdc.gov/h1n1flu/pdf/graph_April%202010N.pdf. However, this figure must be understood in relation to number of people who die every year partly as the result of flu complications. The CDC estimate of this figure in the 1990s was 36,000 per year. Importantly, anyone who has flu when they die is considered for purposes of these statistics to have died from the flu. The vast majority of people who die from the flu are elderly people with other health ailments.

[22] Katie Johnston, *Flu and Fears Create One Feverish Market*, BOSTON GLOBE, November 13, 2009 *available at* http://www.boston.com/news/health/articles/2009/11/13/swine_flu_risks_boost_hand_sanitizer_market/

cofounder of a company that makes hand sanitizer, stated, "I hate saying swine flu helps business, but it does make people conscious that they need to sanitize." And importantly, even though the swine flu epidemic has long since come and gone, hand sanitizer remains. In 2007, Nielsen estimated that sales of hand sanitizers in the United States were $70 million[23], and Global Industry Analysts Inc. estimates that the figure will be $402 million by 2015.[24] A new norm has developed, with hand sanitizer now expected to be available in many contexts. As Joe Drenik, spokesman for Gojo Industries, the maker of Purell hand sanitizer stated, "When Purell came out in the 1980s, it was used behind the scenes. If a business then provided hand sanitizer, it would raise questions about cleanliness. Today, it's just the opposite – the perception is that the facility pays attention to the details."[25] Disgust has been powerful enough to facilitate the development of a new norm involving the use of hand sanitizer.

In sum, disgust is an especially powerful emotion largely because of the impossibility of its elimination, its tendency to coincide with the separate emotion of fear, and its capacity to create social norms. Above all else, disgust is powerful because it is so uncomfortable and disagreeable to us. When we are presented with a disgusting stimulus, the need to respond is profound. Companies that use disgust in an advertisement are well aware of its power: immediately after presenting a disgusting stimulus, a product is presented as a solution to the problem. It is of course not as if the ad is designed to cause the viewer to immediately run out to the store to buy Hanes t-shirts or the Brawny paper towels. Instead, by solving the problem of disgust in the advertisement, the viewer develops positive associations with the product in question and

[23] *See* http://www.cbc.ca/news/story/2007/01/04/hand-sanitizer.html
[24] http://ohsonline.com/articles/2010/06/14/us-hand-sanitizers-market-will-grasp-millions.aspx
[25] *See supra* note 22.

becomes more likely to buy it. The next Part of this Article will examine and explain the reasons that corporate leverage of the emotion of disgust to sell products is problematic.

PART II: THE CONNECTION OF DISGUST IN ADVERTISEMENTS TO FALSE PROBLEMATIZATION, UNDUE INFLUENCE, AND WASTEFUL CONSUMPTION

False Problematization

Corporations wage the battle to promote disgust by working to create and change beliefs.[26] Emotions are based on certain beliefs about the world. By attempting to change those beliefs, corporations work to create emotions. The emotional response is then quieted by the product that the corporation is selling. Yet in many ways marketing influence that relies on emotion is incredibly commonplace and accepted, perhaps begging the question as to which came first (the ubiquity of marketing that relies on emotion or popular acceptance of it as a legitimate method). What is it about the use of the emotion of disgust in an advertisement that is problematic?

As an initial matter, the beliefs that companies promote in an advertisement may be unreasonable or simply false. Corporate manipulation of beliefs is not something we typically get concerned about, unless it goes too far and unless it directly relates to a product. The law generally only intervenes if the statements by a company rise to the level of false advertising. False advertising relates to claims made about a product: the product does not do what the company says it does. Embedded within this idea of

[26] Nussbaum at 27.

falseness, however, is an additional element: the person watching the advertisement and hearing the claim believes it. For example, if an advertisement about cereal claims that it will reduce your chance of heart disease, we commonly tend to assume the claim possesses veracity. If on the other hand, an ad seems to imply and perhaps even claim that wearing certain sneakers will allow you to play basketball like Michael Jordan or that drinking light beer will help you date bikini clad supermodels, no one actually believes these claims. The distinction between the ads may have something to do with direct statements, but it has more to do with an overall social understanding that accompanies the seriousness with which we view certain ads. Surely, the boundaries start to blur, when for example, a cigarette ad associates smoking with the freedom and individuality of the Marlboro Man or the sleight figure of a Virginia Slims model, but in general, there is a relatively well-developed body of law associated with false advertising. In almost all cases the false claims relate to products.

What if, however, there are false claims made about the nature of the problem that the product will supposedly solve? One extreme example relates to a purveyor of doomsday merchandise. While this has been a boon for salesmen throughout history, the imminence of the year 2012 has accelerated sales of doomsday merchandise. As a general matter, the purchasers of these products can look only to themselves for protection. Caveat emptor prevails, in large part of course because until 2012 comes and goes, apparently (or it could be claimed) no one knows for certain that 2013 will arrive. Are there other examples where the problem claimed by an advertisement or a salesman is not really a problem? Of course there are, but most of us tend to start to become uncomfortable at this point of the analysis. We, ourselves, are the best judges of our

problems, and to claim otherwise would be incredibly paternalistic, most of us would say. As Juliet Schor writes, "Someone needs to address the larger question of the consumer culture itself. But doing so risks complaints about being intrusive, patronizing, or elitist."[27] The conventional wisdom is that if a person believes that baldness is problem, then he has every right to buy products that claim to fix it. If it turns out that false claims were associated with the ability of the products to improve or cure the baldness, then perhaps the law should step in, but the law should not step in to claim that baldness is not a problem.

There was another time in history when commentators observed that consumer purchases were solving concocted problems. From the 1930s-1960s, the Frankfurt School put forth the idea of false needs, stating that the desire to have certain things was not necessary and was brought on by the pressures and insistence of a capitalist system focused on market creation. John Kenneth Galbraith extended and further promoted this idea in the 1950s and 1960s. Today, of course, reference to the phraseology and parlance of the Frankfurt School and John Kenneth Galbraith is easily dismissed and disparaged, at least in the United States. Those are the old stories of a bygone era, relegated to a withering consciousness. Our society seems to have moved on and to think that those debates are now settled. Those with even the slightest bit of training in economics "learn" that our preferences are rational and are our own. Even if we do not need a product, we want it, and those wants are what makes the world go round. They are what make us go to work in the morning. They are what cause the evening news and political discussion to focus on job creation and economic growth. They are, in short, at the heart

[27] Juliett Schor, *The New Politics of Consumption*, (1999) *available at* http://bostonreview.net/BR24.3/schor.html

of the modern capitalist system. And perhaps most importantly of all, those "wants" feel very real to the person experiencing them. This Article argues that, nevertheless, the wants are sometimes connected to problems that are concocted, superfluous contrivances. There may have been a time when we could tolerate this waste, but that time is not now. How can we begin to make this argument, at least in terms of consumption brought on by corporate leverage of the emotion of disgust?

When companies use the emotion of disgust to sell a product, the problem that they claim exists is often not a problem at all, that is, until the corporation got around to creating the problem. All emotions are based on beliefs about an object. While our description of disgust demonstrated the complexity of the emotion, the belief in the case of disgust revolves around the idea is that the object is revolting and repulsive. On its face, such a belief seems unassailable: I believe that an object is disgusting. Disgust seems to be a matter of personal taste or opinion. But what if we ask the harborer of the belief: Why do you hold the belief? A rationally articulated answer is likely to have much to do with (i) propagation of norms and habits that are socially accepted and (ii) manipulation of risk perception. The answer, in other words will have to do with the fact that other people share the sentiment and that there is an element of fear that conflates itself with disgust. It may be the case that there are very coherent and legitimate reasons to fear certain things, such as bacteria in the kitchen. And it may be the case that it is justifiable and perfectly acceptable for companies to reference compliance with social norms that involve, for example, having a sparklingly clean kitchen. Why don't marketers then simply use fear and conformity as methods? It turns out of course they use those methods as well, in various forms such as the bandwagon effect or the idea that

"time is running out." But by using disgust, marketers have found an incredibly powerful emotion that is extremely effective as a marketing tool. Disgust works so well as a marketing tool because people will go to great lengths to eliminate disgusting things. Marketers have realized that the problem they can create in order to sell a product is disgust itself. As Franklin Roosevelt famously stated, "The only thing we have to fear is fear itself." Marketers don't want us to realize that the only thing we have to be disgusted by is disgust itself. The point is that when the emotion of disgust is boiled down, it is a problem only because it has been presented to us as a problem.

Undue Influence

Impacts on the Advertisement Viewer

False statements about problems are inherently troubling and violative of all sorts of moral codes as acts by themselves. But the impact on the person who is on the receiving end of the false statement also matters. As has been described, the false statement that companies make in the instant context relates to the creation of the false problem of disgust, which of course then becomes all too real. Disgust as false problematization sets the stage for influence and persuasion by marketers. With potential consumers experiencing the heightened stimulation of disgust, they seek a response that will take away the problem. The response, of course, is receptivity to the purveyed product, which then leads to an increased likelihood to buy the product in the future. The

false problem of disgust blends into influence by marketers. The intensity and power of disgust enables us to be influenced by companies that rely on disgust in advertisements.

As a general matter, however, influence by marketers, even if based on false problematization, is rarely thought to be a problem. We do not like to hear that corporations successfully shape our preferences through advertising. Advertising, after all, is something that works on other people, not us. As law professor Adam Benforado describes, when he surveys his students on "whether advertising matters much and whether we ought to regulate it more rigorously" his "[s]tudents tend to be pretty uniform in providing a strong no on both questions."[28] We do not believe that advertising influences us and (as a result) we do not think it should be regulated.

Yet, in spite of our almost universal sense that advertising does not work on us, we are left with the reality of corporate expenditures on advertising. Estimates suggest that companies annually spend a staggering $350 billion on advertising and promotion.[29] The largest advertisers, such as Procter & Gamble, General Motors, AT&T, GlaxoSmithKline, and Johnson & Johnson, each spend well over $2 billion annually on advertising.[30] Unless these companies are, in an utterly irrational manner, wasting billions of dollars and undermining shareholder value, it is irrefutable that advertising has a tremendously positive impact on sales.

Why is it that we do not want to believe that advertising works on us? The answer first has to do with our intense desire to believe that our choices as consumers are in fact our choices. If they were not our choices, then that would suggest that we are

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[28] Adam Benforado, *Don't Blame Us: How Our Attributional Proclivities Influence the Relationship Between Americans, Business and Government*, 5 ENTREPRENEURIAL BUS. L.J. 509, 522 (2010).
[29] Jon Hanson and Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 122 HARV. L. REV. 1420, 1430 (1999) (citations omitted).
[30] See cnbc.com "*The Biggest Advertisers*" available at http://www.cnbc.com/id/24186387?photo=1

being influenced. We don't want to believe that. Perhaps even more fundamentally, we all recognize the importance of salesmanship. Salesmen who are obvious and slimy (stereotypically, used car salesmen) are labeled as such, but at root, we tend to subscribe to the idea that people have a right, if not a duty, to sell products. That is what makes the world go round. That is what America is all about. In addition, companies work to create a sense of the innocuous around advertising endeavors. Advertising possesses a joviality, a playfulness, and a use of humor that make the observer both doubt that it is really that powerful or serious, and at the same time, enjoy watching it, as evidenced by the annual ritual of Super Bowl ad evaluation. Simultaneously, however, everyone claims that they do not like advertising. As writer Stephen Fox states: "[P]ractically everyone dislikes it . . . Nobody believes it, or admits to believing it. It usually appeals to the less agreeable aspects of human nature: greed, vanity, insecurity, competitiveness, materialism . . . But there it is, one of the dominant forces in twentieth century America. Among the pillars of popular culture, advertising stands with TV, sports, movies, pop music, and the print media as unavoidable features of modern life."[31] Our feelings on advertising our ambivalent, but also involve acceptance of its reality, with perhaps this sense of inability to do anything about it leading us to simply deal with it and move on. We label it as something that exists, and when probed, we may reluctantly agree that it works, just not on us.

When pressed further, with firm evidence that we are influenced by advertising, we tend to defensively view it as an attack on our knowledge and our intelligence, as well an attack on the American way of life, which simply fails to grasp the cultural importance of lemonade stands and Super Bowl commercials. We, after all, are smart enough and

[31] STEPHEN FOX, THE MIRROR MAKERS 5 (1997).

knowledgeable enough to see through advertisements. The methods used by advertisers, however, are not effective because of stupidity or ignorance on the part of the viewer, but because of universal tendencies built into human nature. As E. Chamberlin wrote in 1950, "[S]elling methods which play upon the buyer's susceptibilities, which use against him the laws of psychology with which he is unfamiliar and therefore against which he cannot defend himself, which frighten or flatter or disarm him – all of these have nothing to do with his knowledge."[32] Our adherence to the fallacious notion that we are knowledgeable and intelligent enough to see through advertisements has much to do with the conventional wisdom that ads are seeking to provide us with information. If ads are merely imparting us with factual descriptions of products, then we as savvy consumers can sift through the various statements and arrive at accurate conclusions. To be sure, many ads are in fact conveying information and consumers actually do scrutinize product claims and comparison shop. But just as the full story is not one of corporate indoctrination of consumers, so too is it not one of innocuous information flows readily able to evaluated by discerning consumers. The reality of advertising methods is that various tactics and methods are used all the time, some insidious, some perfectly harmless, and some helpful. Some of the time, however, advertisements go too far.

Legal rules in Europe already recognize that advertisements can go too far. James Whitman writes: "A current French handbook explains reasoning that most Americans may find bizarre: 'Enticing sales tactics ["la promotion"] consist in inciting the purchase of a product of the hire of a service. Such tactics are often harmful to the consumer, because, by offering an advantage, they create pressure to make an inopportune

[32] EDWARD CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE 119-20 (1950).

purchase'."[33] This description incorporates an idea that a purchase that is not advisable represents a harm to the consumer. In the United States, we generally see such an insertion of judgmentalism into purchases as incredibly paternalistic and anathema to our preference for freedom from government intrusion into the market, at least until markets begin to fall apart. For example, with the market meltdown attributed in large part to the subprime mortgage crisis, many have called for regulation of home purchases to ensure that people are not being led to purchase something that they cannot afford. Stringent consumer protection measures, it seems, become acceptable only when the damage from not having them is overwhelmingly obvious and uncontained. In Germany, in contrast, Whitman goes on to mention a statute stating that unfair competitive practices include "actions that have a tendency to harm the decision-making freedom of consumers or other market participants by exerting pressure in a way that displays contempt for their humanity [*in menschenverrachtnder Weise*] or through other inappropriate or irrelevant influence."[34] The core idea here is that people are being duped, and in some ways the duping itself is constitutive of the harm. As the German statute states, the commercial tactic could be viewed as improper if it does not display adequate respect for the "humanity" of the consumer. In other words, there is a sense of fair play and honesty that should accompany market transactions, and when it does not, then the state, at least in Germany, will intervene.

When are marketing tactics misleading and when do they go too far? Surely not when a tempting, succulent cheeseburger appears on the television. Perhaps the emotion of disgust is so powerful that it simply overrides alternative choices, such as the choice

[33] James Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 380 (2008) (citations omitted).
[34] *Id*. (citations omitted).

not to buy, which may have otherwise been embraced. But what makes this different from the succulent cheeseburger or the beer commercials with supermodels? In those situations, choice also withers because of the power of food cravings or sex cravings. So surely, a reduction in choice by itself is not enough to justify advertising bans. In order to distinguish advertisements that rely on disgust from advertisements that rely on food cravings, for example, first it is crucial to assess the extent to which there is cognizance on the part of the advertisement viewer that they are being manipulated. George Lowenstein has engaged in research that suggests that some feelings such as those associated with physiological cravings including drug addiction, hunger, thirst, and sexual desire are so powerful that even if people realize they are acting counter to their own self-interest by responding to the craving, they will succumb to the feeling.[35] Lowenstein writes: "At sufficient levels of intensity, these, and most other visceral factors, cause people to behave contrary to their own self-interest, often with full awareness they are doing so."[36] In response to the emotion of disgust in an advertisement, are people as aware that they are being manipulated as they are with the cheeseburger commercial? While any answer to this question would depend on the specific advertisements in question, as a general matter, the answer is no, people do not appreciate the extent to which they are manipulated by a references to disgust as they are by references to delicious food, supermodels, or celebrities. Why? The answer has to do with problematization. Problematization is more powerful when it is negative. While not having a succulent cheeseburger and being disgusted by human-size cockroaches are both

[35] George Lowenstein, *Out of Control: Visceral Influences on Behavior*, 65 J. ORG. BEHAV. & HUM. DECISION PROCESSES 272 (1996) cited by Jon Hanson and Douglas Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 682 (1999).
[36] Lowenstein at 272-73.

problems, the absence of a cheeseburger is an unrealized gain, while our negative emotional response to the cockroach represents an immediate loss. When people are presented with a loss, it is more threatening than when they are presented with an unrealized gain.[37] In connection with this observation, social psychologists have termed the following phenomena: endowment effect, loss aversion, and status quo bias.[38] The endowment effect reflects a tendency for people to place a greater value on things that they already have, rather than on things that they could have in the future. Relatedly, people tend to prefer the status quo rather than a change to the status quo because uncertainty is thought to present a risk that things will go wrong.[39] People prefer the certainty of their current condition to an uncertain future. The endowment effect and the status quo bias link together to mean that people are incredibly averse to losses, to a much greater extent than they derive an increase in well-being from a gain of the same magnitude.[40] Colloquially, a loss stings to a greater extent than a gain feels good. What does this mean in the context of cheeseburgers and cockroaches? Quite simply, the unrealized gain of an uneaten cheeseburger does not have the same impact on us as the presentation of a cockroach on the television screen. Advertisements that reference the emotion of disgust are so powerful not only because of their complex cognitive content related to mortality and to human relegation to animal status, but also because the revulsion of disgust constitutes a form of loss. It is a loss that we are compelled to offset by the products that marketers are trying to sell us.

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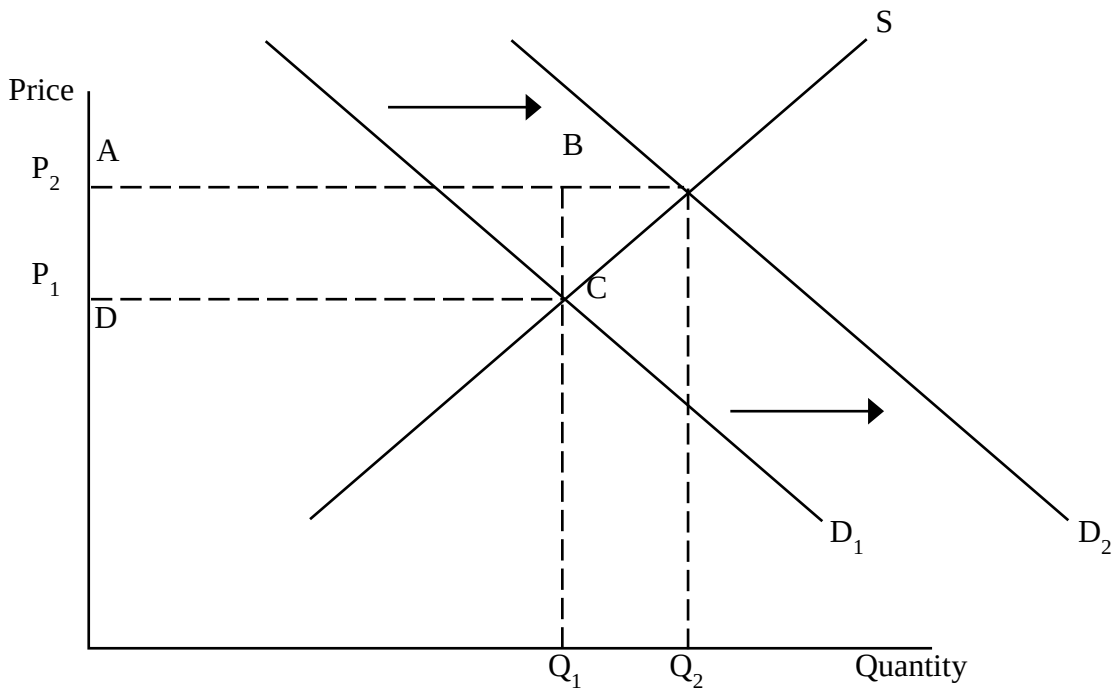
[37] See Daniel Kahneman, Jack Knetsch, and Richard Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).
[38] *Id*.
[39] *See* Hanson & Kysar, *supra* note 35, at 673.
[40] Kahneman at 197-201.

Benefits to the Advertiser

There are two sides to the undue influence coin: in addition to inculcation and manipulation of consumers, producers enrich themselves. A reduction in consumer choice begins to appear more improper when there is an element of appropriation that results in remuneration to the counterparty. By selling more products and services at higher prices as a result of increases in demand, producers are able to increase revenues, as well as profits if costs stay the same or go down as the result of economies of scale. There is also a chicken-egg possibility: producers may overproduce and then be forced to augment demand in order to avoid an inventory surplus of unsold goods. Either way, producers benefit. Importantly, due to the demands of sustained profits, demand must continue to increase in order for the economy to grow. As supply correspondingly increases, demand must also correspondingly increase in order for profits to grow. In other words, there is a constant drive for producers to augment demand.

In certain circumstances, laws already recognize the impropriety of producer enrichment at the expense of consumers. In a monopoly context, for example, the absence of competition enables producers to raise prices and engage in profit-taking. By creating a producer-imposed shortage and reducing the quantity of goods available, price goes up. The producer right to profit is also recognized to be limited in the case of supply shocks. In the case of a natural disaster, for example, gasoline supplies often disappear. But in many states, laws in place to prevent gas stations from engaging in price gouging.

Augmented demand is the flip side of producer imposed supply restriction. When price goes up as a result of demand augmentation, producers are able to capture higher prices not just on the new goods that are able to be sold as a result of the increase in demand, but also on all of the old goods that would have been sold even if demand had not been augmented. As the following graph illustrates, the rectangle ABCD represents the additional revenue that producers are able to generate by augmenting demand. As the demand curve moves to the right, producers become able to charge a higher price for the entire amount of goods indicated by Q1:



The quantum represented by rectangle ABCD therefore represents the benefit that accrues to producers by augmenting demand. The increase in demand as a result of undue influence is improper not only because the will and self-determination of consumers is overrun, but also because producers benefit. However, as has been discussed up to this point, the overall harm of false problematization and undue

influence, while perhaps existent and observable, may still not seem serious enough to justify legal intervention in the form of an advertisement ban, that is, unless we lived in Germany or France. In order to sufficiently make the case for an advertisement ban in the United States, this Article will demonstrate that augmented demand also leads to wasteful consumption. The next section will make the case that the quantum of consumption generated by advertisements that reference the emotion of disgust constitutes waste.

Wasteful Consumption

While all consumption leads to environmental degradation, the preponderance of consumption is crucial to life as we know it. Laws to address consumption therefore must rationalize themselves, particularly when they must overcome a substantial burden of proof in a society that tends to see the benefits of consumption, but not the costs. The difficulty with seeing the costs of consumption may be beginning to change, however. Consumers are well aware that their purchases lead to waste, and that waste must be managed, whether through disposal regulations or recycling initiatives. Consumers are also increasingly aware that their purchases support production that inherently has environmental impacts, whether in the form of toxic pollution or deforestation. Consumers are also beginning to make the final link: their purchases themselves (i.e. products in end-use) have environmental impacts, not only in terms of energy consumption (e.g. automobiles that burn gasoline) but also in terms of the implied carbon and environmental footprints of the products themselves (e.g. the plastic, metal, and

rubber in automobiles). Because advertisements that reference the emotion of disgust conceivably could sell practically any product imaginable, it is worth looking at the overall expanse of environmental impacts generated by consumption. In spite of difficulties with measurement, data is beginning to emerge to assess these impacts. The EPA has estimated that the average household has 100 pounds of hazardous wastes and households generate 1.6 million tons of hazardous wastes per year.[41] In terms of mercury emissions, because coal-fired power plants generate such a high portion of mercury emissions and generate much of the residential electricity in the United States, one estimate suggests that individuals are responsible for 22% of total mercury releases in the air.[42] Individual use and disposal of fluorescent lights, batteries, and thermometers also contribute significantly to mercury releases.[43] Mobile sources represent among the largest source of emissions for several pollutants, including benzene and formaldehyde. Likewise, house construction itself introduces many chemicals into the environment, and ever-larger houses have had ever-greater effects. Residential development also has major impacts on the land, including habitat and wetlands destruction and ecological disruption. And finally, in terms of greenhouse gas emissions, it has been estimated that individual Americans are responsible for 4.1 trillion pounds of carbon dioxide emissions, constituting 32% of the estimated 12.7 trillion pounds emitted annually in the United States.[44] Some have attempted to put a dollar figure on the cost of the greenhouse gases generated by the average American consumer. While estimates vary, the United States

[41] Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 543 (2004).
[42] *Id.* at 562.
[43] *Id.*
[44] Michael P. Vandenbergh and Anne C. Steinneman, *The Carbon-Neutral Individual*, 82 N.Y.U.L. REV. 1673, 1677 (2007).

government estimates the cost to the environment, human health, and the economy is $21 per ton of carbon dioxide.[45] With Americans each responsible for emitting 20 tons of carbon dioxide per year, that means that each American is responsible for $400 of damage per year. Other studies place the figure at 45 times the $400 figure. The Economics for Equity and the Environment Network, an umbrella organization of economists who advocate for environmental protection, have calculated that the damage could be as high as $900 per ton, or $18,000 per American. Finally, it is interesting to note that our by now familiar t-shirt requires nearly four pounds of fossil fuel and one-third of a pound of pesticides to produce, assuming it is not made with organic cotton.[46]

While these attempts at measurement of the impact of consumption on the environment are important in order to build the case to rein in consumption, precise measurements should not be overglorified. We should be careful to not attempt to reduce our assessment of consumption to technocratic, bureaucratic bean counting. While there is inevitably a role for comparing the relative damage wrought by one form of consumption versus another, the overall goal, once the catastrophic imminence of global climate change becomes clear (or hopefully, before then), must be to do everything possible to reduce unnecessary consumption. For example, during World War II the United States government seeking to promote resource conservation, did not mince words in its campaigns as to what had to be done. United States government propaganda posters stated: "When you ride Alone, you ride with Hitler! Join a Car-Sharing Club Today!"; "Plant a Victory Garden. A Garden will Make your Rations go Further."; "The

[45] Douglas Fischer and the Daily Climate, *"Economists Find Flaws in Federal Estimate of Climate Damage"*, Scientific American (July 13, 2011) *available at* http://www.scientificamerican.com/article.cfm?id=economists-find-flaws-federal-estimate-climate-damage

[46] Albert Lin, *Virtual Consumption: A Second Life for Earth?*, 2008 B.Y.U.L. REV. 47, 53 (2008) (citations omitted).

Kitchen is the Key to Victory. Eat Less Bread."; and "Sink a Sub from your Farm. Bring in your Scrap."[47] The focus was not on justifying whether a particular action would actually do much to help the war effort, but simply on doing everything possible to help the war effort. Many, of course, would scoff at the idea that World War II and global climate change are within the same league of seriousness, but will a time come when comprehensive measures, wide-ranging policies, and societal reconceptualizations will be necessary to quell damage to this planet? Eventually, the obviousness of prospective harm from climate change will overcome the hurdles currently impeding collective action on a grand scale. The seeming imperativeness of grand action will not mean that small actions will not matter. Just as victory gardens and scrap metal collections helped with the World War II effort, so too will a variety of small steps be needed to effectively combat climate change.

In time, we will increasingly see the problem with consumption stemming from corporations creating a problem and then selling a product to solve the manufactured problem. Just as we harshly criticize the government for digging holes and then filling them back up again, we should do the same of corporations. The difference that we see is that when it is taxpayer dollars that are being wasted (or that are being used for the sole purpose of creating jobs for construction workers) we feel that it is our money that is being wasted. Whereas when it is a company that is creating a problem, the person who is buying the corresponding product is wasting his own money, rather than taxpayer money. What we overlook in this explanation however is that superfluous products are no longer only the problem of people whose own wallets are depleted by buying the

[47] *See, e.g.* http://www.archives.gov/exhibits/powers_of_persuasion/powers_of_persuasion_home.html

product – consumption also contributes to environmental degradation and global climate change.

As a general matter, consumption involves the appropriation of resources by a consumer. A consumer uses resources today that could have been saved for tomorrow. This use of resources involves a transfer in intergenerational equity, meaning that the capacity to use a resource in the future is reduced or disappears.[48] Many of us tend to shrug this reality off – discussion of the importance of future generations often degenerates into sappiness and sentimentality. People alive today tend to feel that way because, after all, their lives matter too, and, perhaps more importantly, we all have embedded concepts of desperation, the need for survival, and, if not Hobbesian worlds, Great Depression worlds. For some living in severe poverty, those conditions exist today. It must be emphasized, however, that in the past decades and years, there is mounting evidence that thresholds are being crossed.[49] The carrying capacity of this planet may still have some room, but it is not infinite. On a fundamental level, the laws of thermodynamics suggest that, while matter can neither be created nor destroyed, whenever matter changes form, energy is released and some portion of that energy becomes unavailable to do future work.[50] Entropy increases. The universe is moving toward increasing levels of disorder and disorganization. While we generally construe the time horizon on which the impacts of entropy become noticeable to be incredibly long, the inconvenient facts of finitude and increasing problematization remain. It is generally assumed that serious problems are a long way off, perhaps as far off as the sun

[48] *See* Douglas Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1 (2001).
[49] *See id.* and Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009).
[50] Kysar at 13-16 and 21-22.

exploding. The point of course is not to get into a debate as to when entropy will rise to a level that humans have serious problems, but simply to realize that the physical realities of our existence necessarily involve decisions about intergenerational equity and these considerations are rarely taken into account in our policy-making. Crucially, in the context of continuing disregard for intergenerational equity considerations, global climate change is a game-changing accelerant. The issue no longer simply becomes one of sustainability, but one of unpredictable effects. It is a "super wicked problem" that in and of itself has the capacity to induce harm.[51]

In terms of the practical importance of establishing a critical mass of belief in a democratic society to effect change, from a cultural and moral perspective, it is not as if the concepts of conservation, frugality, and sustainability are wholly foreign. For most of human history of course, these ethics were not thought of as cultural descriptions or as lifestyle alternatives, but instead were demanded by the challenges of existence in an often harsh and unforgiving world. Perhaps, ironically, this is part of the problem today. Having adopted, culturally or evolutionarily, tendencies and approaches to accumulate resources, we no longer know when to stop. From a biological perspective, for example, we are programmed to crave fatty foods and to eat whenever we can.[52] While this tendency was crucial to survival over the course of human existence, in a world of grocery stores stocked with practically every food imaginable and fast food restaurants on every corner, our biological tendencies have contributed to a widespread obesity epidemic in the United States.[53] Perhaps incredible accessibility to material "stuff" has

[51] *See* Lazarus, *supra* note 49.
[52] *See* Adam Benforado, Jon Hanson, and David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L. J. 1645, 1675-78 (2004).
[53] *Id*.

similarly contributed to mass consumption. Yet social rules, ethics, and moral codes are supposed to count for something, and, fortunately, they still might. Cultural foundations to shun surplusage and material excess and to embrace thriftiness exist in a variety of cultures and religions, including the Judeo-Christian tradition that predominates in the United States[54], as well as in more recent environmental social movements emphasizing that "small is beautiful."[55] Perhaps most obviously in recent memory is the example of the lambasting of individuals who bought houses, whether for $200,000 or $2,000,000, that they became unable to afford as the economy collapsed. While, questions remain as to collective perceptions of people who purchase 10,000 square foot McMansions if they are *able* to afford it, it seems, at least, our society has little tolerance for people who spend beyond their means, even if their inability to make mortgage payments is clearly linked to broader economic events. The cultural and biological roots of conservation and frugality are beyond the scope of this Article, but for present purposes, suffice it to say that social repudiation of wasteful consumption may not be as anathema to the American way of life as we all seem to think is.[56]

PART III: BANS ON ADVERTISEMENTS

The preceding discussion of the problems associated with advertisements that rely on disgust has rationalized and gestated a rule: if an ad promotes a sense of disgust and

[54] For example, Puritanism and Quakerism, each of which formed a significant role in the founding of the United States, are known for their embrace of frugality.
[55] See Douglas A. Kysar and Michal P. Vandenbergh, *Climate Change and Consumption*, 38 ELR 10825, 10826 (2008).
[56] President George H. W. Bush, for example, was widely reported to have stated in connection with the 1992 United Nations Conference on Environment and Development in Rio de Janeiro that "the American way of life is not up for negotiation." *Id*. at 10827 (citations omitted).

then sells a product to alleviate the disgust, then the ad will be banned. Embedded within the rule are our by now familiar three elements of false problematization, undue influence, and consumptive waste. By promoting a sense of disgust, the ad creates a false problem. With an ad viewer experiencing the false problem of disgust and then becoming more likely to buy the advertised product, the corporation engages in undue influence. By making the product and selling it to a consumer, the corporation promotes wasteful consumption. Advertisements that reference the emotion of disgust are therefore are linked to environmentally-degrading consumption. It is that quantum of environmental degradation, brought on by superfluous consumption resulting from augmented demand, which is the harm that the legal proposal is designed to address.

As previously stated, false problematization, undue influence, and wasteful consumption are jointly sufficient and individually necessary conditions to support an advertisement ban if the emotion of disgust is referenced by an advertiser. If, for example, an advertisement happened to depict something that was objectively disgusting, but that ancillary depiction had nothing to do with the product being sold, then this Article's proposal would not reach the advertisement. Similarly, what if, for example, the government engaged in an ad campaign of its own, such as an anti-smoking campaign, and used disgusting images in the campaign? Such an ad campaign would not be seeking to make money – the remunerative element of undue influence would not be present – and the proposal of this Article would not apply. It could be argued, however, that the government is financially benefitting to the extent that it pays for health care costs through programs such as Medicare and Medicaid and, by reducing smoking, the government saves on those health care costs. Even so, the Article's proposal would still

not apply, because the government is not promoting consumption. Lastly, we could also imagine a variety of scenarios in which arguably wasteful consumption, brought on by advertisements exerting considerable persuasive influence, leads to environmental degradation. Arguably, the entire swath of consumption brought on by advertisements that rely on any method of persuasion, whether the bandwagon effect, celebrity endorsements, or sex appeal falls into this category. The prescription of this Article would not apply, however, due to the absence of both disgust and its inherent effect on the viewer of false problematization stemming from the potency of loss aversion. As described in Part II, disgust is an especially powerful emotion for companies to draw on because of its negativity and implied loss, qualities which differentiate it from the positive emotions and feelings relied on by advertisements depicting supermodels or cheeseburgers.

A ban on advertisements that reference the emotion of disgust could come to fruition through a rule-making by the Federal Trade Commission. Congress has already granted the FTC the power to prevent "unfair and deceptive acts" in commerce.[57] At root, of course, this power to regulate comes from the Commerce Clause[58], grounded in the same fundamental rationales that justify government regulation of commerce. As C. Edwin Baker eloquently states: "All legal regulation of commercial entities (or people acting in commercial roles) involves collective judgments about conditions under which community self-definition, distributive fairness, and individual freedom (including substantive discourses) will best flourish."[59] Regulation of commerce is rooted in the

[57] 15 U.S.C. § 45(a).
[58] U.S. CONST., art. I, § 8, cl. 3.
[59] C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1178 (2004).

very existence of democracy as vessel of public action, and underpinning the proposal set forth in this Article is the belief that, if the public, acting through its government, so chose, advertisements that referenced the emotion of disgust, thereby augmenting demand, could be banned.[60] From the perspective of efficacious regulation of television, radio, and Internet advertising, it would make the most sense for the federal government, acting through the FTC, to serve as the primary regulator. But state and local laws could also ban advertisements that referenced the emotion of disgust. It should also be noted that it is not as if FTC actions to combat advertisements that exploit emotional and psychological weaknesses of consumers have not occurred in the past.[61] What would be new with the proposal in this Article is that regulatory authorities would base their assessment of the advertisement on the existence of disgust, false problematization, undue influence, and wasteful consumption.

Of course, any ban or regulation of speech, even if commercial speech, must pass constitutional muster by finding adequate breathing room within the First Amendment. Government restrictions on commercial speech face a form of intermediate scrutiny, less stringent than the scrutiny that attaches to political speech.[62] Commercial speech restrictions are currently subject to a four-part test, each part of which must be satisfied, as first articulated by the United States Supreme Court in *Central Hudson Gas & Electric*

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[60] *See infra* note 81. Jackson and Jeffries note at 2 in explaining that commercial speech is properly subject to commercial regulation, "In the realm of ideas, the first amendment erects stringent safeguards against governmental restraint. In the economic sphere, by contrast, the majoritarian political process controls. Under the doctrine of commercial speech, ordinary business advertising is part and parcel of the economic marketplace and therefore is excluded from the protections of the first amendment."

[61] For example, Vaughan Black notes that an advertisement for Wonder Bread found to exploit parental concern over healthy development of children was held to be both unfair and deceptive. Vaughan Black, *A Brief Word About Advertising*, 20 OTTAWA L. REV. 509, 528 (1988) citing ITT Continental Baking Co., 83 F.T.C. 865 (1973).

[62] See R. George Wright, *The Openness of the Commercial Free Speech Test and the Value of Self-Realization*, 88 U. DET. MERCY L. REV. 17 (2010).

Corp. v. Public Service Commission.[63] As set forth in that case, the test is satisfied when: (i) "the expression is protected by the First Amendment"; (ii) "the asserted government interest is substantial"; (iii) "the regulation directly advances the governmental interest asserted"; and (iv) the regulation "is not more extensive than necessary."[64] Even before the four prongs are applied to a government restriction on commercial speech, there is a more preliminary question, however, of what precisely is meant by commercial speech. Courts have generally not hovered on this issue for long, circularly describing commercial speech as "speech proposing a commercial transaction" or stating that it is "expression related solely to the economic interests of the speaker and its audience."[65] While it may be obvious, it is nevertheless important to note that a condition precedent to the ban set forth in this Article is that the commercial speech in fact be commercial, meaning that its articulator use it to promote a market transaction that results in remuneration to the articulator. When for example, as earlier described in the context of government anti-smoking campaigns, the government makes reference to disgust, the government is not proposing a market transaction in which it would make money.

The *Central Hudson* court explains that the first prong is satisfied when the speech in question is not misleading and not promoting an illegal activity.[66] In other words, if the speech is misleading or promoting an illegal activity, then it receives no constitutional protection at all, meaning that an outright ban would be constitutionally upheld regardless of the outcome of the application of the other three prongs. Is it possible that the advertising in question could be banned solely on its failure to satisfy the

[63] 447 U.S. 557 (1980).
[64] *Central Hudson* at 566.
[65] *Id.* at 562 and 425 U.S. 748, 762 (1976).
[66] *Central Hudson* at 564.

first prong of the *Central Hudson* test? While the right to produce and consume the products in question is clearly legal, there may be questions as to whether the ads themselves are misleading. The *Central Hudson* court construed the term "misleading" to imply that the statements in the advertisement in question were inaccurate, noting that the legal concern with commercial speech "is based on the informational function of advertising."[67] More specifically, apparently, the claims about the product would have to be inaccurate in order for the ad to be misleading. The court did go on, however, to state that the "government may ban forms of communication more likely to deceive the public than to inform it."[68] This statement seems to imply that deceptive advertising, which is arguably a broader category than false advertising, should not receive constitutional protection. However, the court, while not clearly setting forth the meaning of deceptive advertising, cabins its meaning by referring to it as outgrowth of advertising afflicted by misinformation. The notion is not that a statement in an advertisement is not only improper if it is an outright falsehood, but also if it leads people to draw incorrect conclusions. But what people? Is there an objective reasonable person standard? Or merely a requirement that a certain quantum of people would be deceived, even if they were prone to deception? The court does not answer this question. For our purposes, however, while certain people may be more susceptible than others to the emotion of disgust, we all tend to be susceptible. While the breadth, depth, and substance of our disgust end up being an incredibly complicated biological, sociological, and cultural question as Part I of this Article explained, the capacity to be disgusted is a widespread human characteristic. In addition, due to the power of the emotion of disgust, it is

[67] *Id*. at 563.
[68] *Id.*

unlikely that a reasonable person standard would present much of an impediment to finding that advertisements designed to disgust us do, in fact, disgust us.

The more interesting question is whether false problematization is misleading. False advertising laws are seemingly universally focused on the veracity of claims made about products. If, on the other hand, the misleading claim could be made about the problem that the product is designed to solve, then ads that engage in false problematization may not receive any constitutional protection at all. A problem is false in this context not because it does not exist after it is presented as a problem – after all, once we are disgusted, the need to alleviate the disgust becomes all too real. Instead, the problem is false because it would not exist unless it were presented by the marketer as a problem. The marketer's use of disgust constitutes a prevarication because it makes a claim that the problem existed before the marketer presented it as a problem. In fact, however, the marketer is not making us aware of a problem that exists ex ante, but creating the problem. Nevertheless, from a practical, commonsense perspective, it must be conceded that judicial construal of false problematization as misleading advertising is unlikely to occur anytime soon. Our deeply embedded sense that we, as individuals, are able to determine our own problems will carry the day. But as will be demonstrated, false problematization, while probably unable to stand alone as a justification for an advertising ban, is a critically important component to the overall construct put forth in this Article. False problematization helps us to understand when consumption goes too far, a subject we will now begin to explore in relation to the other prongs of the *Central Hudson* test.

The first prong of the *Central Hudson* test (i.e. that the advertising in question is neither (i) misleading, at least as far as the term "misleading" is traditionally legally understood, nor (ii) promoting an illegal activity) is therefore likely to be satisfied, meaning that the proposed ban would have to satisfy the next three prongs of the *Central Hudson* test in order to pass constitutional muster. The second prong of the *Central Hudson* test asks whether the asserted government interest is substantial. The government has an environmental protection interest. By curtailing augmented demand that leads to excessive consumption, the government reduces environmental degradation that would otherwise occur. Environmental degradation could be construed as a per se harm that involves irreparable damage and corresponding decreases in the resources available to future generations. Alternatively, environmental degradation could be more specifically described in this context as an exacerbation of global climate change. Today, for most of us, global climate change remains an abstract concept generally akin to environmental degradation. It seems a per se harm, but not yet one with specific manifestation. In the near future, this is likely to change. By all indications, global climate change, if left unchecked, will have devastating consequences including mass starvation, disease spreading, species extinction, aridification, and massive flooding. Avoidance of these types of problems, even if they exist on an international scale to a greater extent than within the United States, represents a compelling government interest that would easily satisfy the second prong of the *Central Hudson* test.

Coincidentally, the substantive issue in play in the *Central Hudson* case overlaps with the instant proposal regarding advertisements that reference disgust. In that case, the New York Public Service Commission ordered electric utilities to cease all

advertising that "promote[s] the use of electricity."[69] The genesis of the ban was concern surrounding overconsumption during the 1970s energy crisis. More specifically, the Commission cited its finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter."[70] The ban continued in place for several years, even after the immediacy of the fuel shortage eased. The Commission continued to defend the ban on the basis of a national policy of energy conservation and on its finding that the restriction would "result in some dampening of unnecessary growth" in energy use.[71] It is important to note that the *Central Hudson* court found that the second prong was satisfied. The government's interest in energy conservation was found to be substantial. Similarly, the instant proposal is based on a government interest in resource conservation, particularly as it relates to carbon dioxide emissions that contribute to global climate change.

In relation to the second part of the *Central Hudson* test, it could also be argued that the government has a substantial interest in preventing undue influence. The government has a consumer protection interest in not seeing its citizens influenced by the power of disgust in advertisements. While the harm of excessive influence surely is a form of malfeasance and impropriety, the harm probably only takes on a substantial nature in the instant context when it leads to environmental degradation. The concept of undue influence, as described in Part II, still does considerable work for the analysis, however, by helping to identify the culprit and therefore enabling construction of a legal approach that appropriately targets the culprit. If, for example, consumers were not being

[69] *Id*. at 558.
[70] *Id*. at 559.
[71] *Id*. at 560.

unduly influenced at all, and were, in a completely unfettered manner, choosing to consume products that had disproportionately terrible impacts on the environment, then that consumption should be banned. To take the example to an extreme, let's imagine that some consumers derive utility from the act of engaging in environmental degradation. "Amusement" parks could be set up for consumers to cut down trees, to pour toxic chemicals into water, and to burn noxious chemicals in order to generate air pollution. It is plain to see that the government could ban such activities. With regard to the example of corporate leverage of the emotion of disgust in advertisements, it is clear that consumers are not acting with the same degree of volition in buying products as they would be if they went to such a hypothetical "amusement" park. It is also clear that they are not exercising as much volition as the companies that put advertisements on the air. This fact is important because it demonstrates that the corporate actor augmenting demand is the party responsible for the harm. Even more importantly, it illustrates that the problem this Article seeks to address is rooted in corporate augmentation of demand. Undue influence of consumers is part and parcel of that demand augmentation. After all, if consumers were not influenced at all by the advertisements, then demand would not increase. However, the actual harm that a ban on advertisements seeks to address is environmental degradation brought on by excessive consumption. It is this harm that the government has a substantial interest in reducing.

The third prong of the *Central Hudson* test requires the government regulation to directly advance the governmental interest asserted. Embedded within the idea of direct advancement is a sense of a plausible relationship between the government restriction and

its intended effect.[72] It of course need not be the case that the government restriction function as a panacea in relation to the problem that the government seeks to address, but merely that the restriction "advance" the government interest. The government interest, in other words, could be advanced incrementally, rather than in such a way as to completely eviscerate the problem in question. The *Central Hudson* test leaves room to acknowledge the power and importance of aggregative impacts. Just as victory gardens alone did not defeat Hitler, bans of advertisements that reference disgust will not defeat global climate change. But each action, however small, contributes to achievement of goal.

In the *Central Hudson* case, the court did not hover for long on the third prong, stating the "State's interest in energy conservation is directly advanced by the Commission order … There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales."[73] Interestingly, the court seem to have glossed over the reality that the government's asserted interest in that case was not merely in reducing demand for electricity, but in enabling its citizens to continue to have enough energy to have certain of their requirements met. The government interest in other words, properly stated, was not merely in energy conservation, but in sustaining energy consumption for all. Beyond that, the government interest was in promoting the welfare of its people. The point is simply that the government's interest, on some level, is broad and obvious, but it must be articulated to the court in a way that is sufficiently narrow.

[72] *Id*. at 564.
[73] *Id*. at 569.

With the ban proposed in this Article, there is one additional, though small, step that a court would have to take after it found that there was demand augmentation as the result of the advertisement. The court would then have to identify a link between demand augmentation and environmental degradation. As Part II of this Article demonstrated, all consumption takes a toll on the environment. The only question is when the government will find that the toll is sometimes too much to bear. If the government bans advertising that takes such a toll on the environment, then the government will have to produce evidence that the induced consumption in question imposes such a toll. That evidence will not be difficult to produce, as excess demand for t-shirts, paper towels, and pesticides, to name the three examples we started with in this Article, all take an obvious toll on the environment whether in the form of toxic footprints or carbon footprints. The question will not be whether the particular toll is substantial, but whether the particular toll exists. Again, the legal question is whether there is direct advancement of the government's interest. The links between advertising, demand augmentation, wasteful consumption, and environmental degradation could scarcely be more clear or direct.

The fourth prong of the *Central Hudson* test is the so-called "narrow tailoring" requirement that the regulation cannot be more extensive than necessary.[74] After the *Central Hudson* case, the articulation of this prong has been modified such that the government does not have to employ the least restrictive means of accomplishing its goal, but simply establish a "reasonable fit" between the methods and the ends.[75] The law must be structured in a way that its impacts do not extend beyond it goals. In the proposed matter, the law seeks to reduce the environmental degradation brought on by

[74] *Id*. at 569-70.
[75] 492 U.S. 469 (1989).

the increased demand for products as the result of advertisements that rely on disgust. The root of the problem is advertising that relies on disgust. The excess demand that branches out from that root leads to environmental degradation and it is that particularized environmental degradation that the proposed law would be designed to address. The advertising itself is a condition precedent to the need for the law. The law would not be designed to target the products themselves if not for the presence of advertisements that reference disgust. These considerations are crucial because in recent years, courts applying the fourth prong have considered the availability of direct regulation that focuses on the government interest without restricting speech. For example, in the context of alcohol advertising, courts have employed a "direct-means" analysis that considers whether there are alternative means to achieve the government's goal without impinging speech.[76] It appears that the courts are functioning on the supposition that speech restrictions possess an inherent regulatory breadth, at least compared to other alternatives. This supposition, however, must be understood in relation to the precise problem under consideration. By all measures, banning a certain form of advertisement is a narrower method than banning the product in its entirety. Would it be possible, however, to ban the consumption of a particular product only if the consumption were linked to the advertisement? Such a ban would face a whole host of problems related to Big Brother paternalism, not to mention the ridiculousness of any attempted implementation. For example, if a consumer's purchase of a t-shirt were banned due to that consumer having seen an advertisement that referenced disgust, the government would, to begin with, have to start monitoring and recording exactly who

[76] *See "Note: Fourth Circuit Holds that a Regulation Largely Prohibiting Alcohol Advertisements in College Newspapers is Constitutional*", 124 HARV. L. REV. 843 (2011).

viewed the advertisement. The government would then have to have a system in place to determine who bought the t-shirts as a result of the advertisement. Of course, it could be argued that even if such a bizarre regime were actually able to be implemented, because anyone seeing the ad would not be able to buy the t-shirt, the company selling the t-shirt would have no reason to use an advertisement referencing the emotion of disgust. There would be de facto elimination of the advertising. But this would certainly not be the most direct way to eliminate the advertising. Instead, a government seeking to tailor its regulation to address the problems emanating out from the advertisement should simply ban the advertisement. In summary, since the proposed law is focused on that quantum of demand generated as the result of the advertisement, it is difficult to imagine how the proposed law could possibly be more narrowly tailored – courts would therefore find the fourth prong of the *Central Hudson* test to be satisfied.

This Article's proposal passes constitutional muster based on the current state of law. While the core of the law, which is the *Central Hudson* test, has remained surprisingly intact considering its susceptibility to critique based on its arguable vagueness and open-endedness, there have nevertheless been fluctuations in the doctrine as the result of particular cases.[77] If the law is not sacrosanct, nor impervious to critique, we must also explicate the meanings, rationales, and historical approaches that undergird the current state of the law in order to further confirm the legal feasibility of the proposal. The Supreme Court did not specifically consider commercial speech until 1942. In *Valentine v. Christensen*[78], the court expressed the sentiment that commercial speech was obviously different from the type of speech that the First Amendment generally protects,

[77] See C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009).
[78] 316 U.S. 52 (1942).

simply stating that the "Constitution imposes no such restraint on government as respects to purely commercial advertising."[79] For three decades following the decision, the notion that commercial speech focused on selling products and generating profits did not merit the same constitutional protection as, for example, political speech remained largely unchallenged. Commercial speech was construed as part of the economic system, rather than a form of free expression, and was therefore subject to regulation, consistent with general underpinnings of economic regulation in the post-*Lochner* era.[80] As Professor Thomas Jackson and Professor John Calvin Jeffries, Jr. stated in 1979, "At bottom the doctrine of commercial speech rests on a clean distinction between the market for ideas and the market for goods and services."[81] Then things began to change. As legal scholar C. Edwin Baker notes, over the past several decades, "increased constitutional protection for commercial speech has been powerfully promoted by corporate interests – from groups such as the American Association of Advertising Agencies."[82] The story is the typical one of regulatory capture, the influence of lobbyists and campaign contributors in legislatures, and judicial acquiescence. The primary argument put forth by these corporate interests has been that commercial speech should receive constitutional protection because information flows in the "marketplace of ideas" should be unrestricted and the audience hearing the speech should be entrusted to sort it all out. Yet as William Rehnquist, perhaps unexpectedly, stated in his dissent in the case that opened the door to this argument, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

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[79] *Id*. at 53.
[80] *See* Lochner v. New York, 198 U.S. 45 (1905), *overruled by* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937).
[81] Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. LAW REV. 1, 2 (1979).
[82] C. Edwin Baker, P*aternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1163 (2004).

Council,[83] "The Court speaks of the consumer's interest in the free flow of commercial information, particularly in the case of the poor, the sick, and the aged. It goes on to observe that 'society also may have a strong interest in the free flow of commercial information.' [One] need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack."[84] By demonstrating judicial deference to the legislature, Rehnquist recognizes the importance of collective democratic action in the context of market regulation. He goes on to state: "The Court insists that the rule it lays down is consistent even with the view that the First Amendment is 'primarily an instrument to enlighten public decisionmaking in a democracy.' I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to purchase one or another kind of shampoo."[85] Rehnquist demonstrates agreement with the idea that the more important right to protect is that of the people, acting through their legislature, to make decisions about economic relations, rather than the supposed right of people to be subjected to advertisements for shampoo.

It must be noted, of course, that three decades ago, there was a widespread view among liberals that the First Amendment should be increasingly extended to protect speech and, as a corollary, that the legal meaning of "speech" should be extended.[86] That helps to explain the fact that the liberal justice Harry Blackmun delivered the majority

[83] 425 U.S. 748 (1976). While Christensen seemingly foreclosed the applicability of the First Amendment to commercial speech, Virginia Pharmacy effectively overturned that decision and established that the First Amendment still provided some protection for commercial speech. It would not be until fours years later, in the Central Hudson case, that the Supreme Court would set forth a method to review the constitutionality of government regulation of commercial speech.
[84] *Id*. at 783.
[85] *Id*. at 787.
[86] See Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

opinion in *Virginia Pharmacy*, which Justice Rehnquist dissented. Perhaps the logical extension of the arguments made by "ACLU liberals" in the 1970s regarding free speech led, in part to the decision of the Supreme Court in *Citizens United v. FEC.*[87] While *Citizens United* was not about commercial speech, but instead about whether corporate spending to elect or defeat political candidates constitutes political speech, the signs are clear that courts, at least the current United States Supreme Court, will succumb to commercial interests if the legal doctrine has developed in a way that allows them to do it. In spite of the troubling prostration of the Supreme Court to corporations, the backlash that the *Citizens United* case instigated in the public consciousness has been encouraging from the perspective of the future feasibility of reining in the power of corporations in the First Amendment arena.[88] And importantly, the *Citizens United* case, while showing the Supreme Court's willingness to construe corporations as people, even though they are "instrumental creations that we bring into legal existence in order to serve our interests"[89], did not address the issue of commercial speech. In fact, from the perspective of legal doctrine, the *Central Hudson* test, and the commercial speech doctrine generally, while open to considerable criticism from different directions, remains arguably stable, due to the simple recognition that commercial speech is designed to sell products, and is therefore subject to commercial regulation in the usual course.

While commercial speech remains regulable, many, opposed to regulation of advertisements, tend to conflate the sociocultural and sociopolitical challenges facing such regulation with legal hurdles. James Whitman, describing this confusion, provides a

[87] See *id*. 130 S. Ct. 876 (2010).
[88] Kathleen Sullivan notes "*Citizens United v. FEC* unleashed a torrent of popular criticism, a pointed attack by the President in the State of the Union address, a flurry of proposed corrective legislation in Congress, and various calls to overturn the decision by constitutional amendment." Sullivan at 143.
[89] Baker at 1176.

good summation, rhetorically inquiring: "Why, say Americans, should consumers be 'protected from receiving offers of merchandise'?"[90] Environmental protection is, of course, not at the top of popularity lists these days, and is unlikely to serve as a compelling regulatory rationale from a political perspective. And it will be an uphill battle to persuade people that restrictions on advertising are designed to protect consumers. We are likely to ask what we need protection from. Ourselves? "No thank you," most will respond, "I am a better judge of whether I need to protected than the government is." We are likely to be suspicious of a government that steps in to protect. This is all in spite of the fact that marketers and producers are toiling day and night, studying us, methodically analyzing our every purchase, and observing what makes us buy something. That is what we want to protect? The right to be influenced by powerful corporate interests? It seems that most Americans are so culturally suspicious of government and so inclined to trust a "free" market, that the answer is yes.

It must be emphasized, however, that the political feasibility of the proposal in this Article, seemingly related to existing cultural predispositions, is a separate question from the legal defensibility of the proposal. Nevertheless, the theoretical possibility of laws means little if there are overpowering practical impediments to their fruitionality. In order to begin to chip away at the existing impenetrable bulwark surrounding corporate behavior, it is crucial that policymakers and legislators realize what they are up against: companies focused on profit maximization. While many environmental lawyers and policymakers are inclined to make the now hackneyed references to public-private partnerships, green consumption, and eco-labeling, they may do well to heed the following reality stated by Gro Harlem Brundtland, former Prime Minister of Norway: "It

[90] Whitman, *supra* note 33, at 399.

is simply impossible for the world as a whole to sustain a Western level of consumption for all. In fact, if seven billion people were to consume as much energy and resources as we do in the West today we would need ten worlds, not one, to satisfy all our needs."[91] Rather than believing we will grow our way out of the problem and that environmentalism is a luxury good, it must be admitted that increases in wealth only further degrade the environment. Rather than believe that we can technologically engineer our way out of the problem and that India and China can implement pollution-reducing technology to leapfrog the hard years of industrial waste that afflicted the West, the realities of consumption, and the corporate behavior that contributes to it, must be confronted. And important to the confrontation must be a realization that the tendency of companies and industries to create markets should not be dispositionalized as reflective of inherent malevolence, but as an utterly rational, if not legally required, response to the strictures of corporate law that require profit maximization.[92] In order to increase sales, revenue, and profit, corporations will work incessantly to create markets and to take advantage of consumer tendencies. To do otherwise would be to threaten the existence of the business.[93] Jon Hanson and Douglas Kysar take this analysis one step further: even if the managers of a company do not consciously make decisions to take advantage of the cognitive anomalies and emotional susceptibilities of consumers, they will behave in the marketplace as if they are exploiting these consumer tendencies.[94] In terms of consumer perception, producers will work to minimize perceived costs, by externalizing those costs, and maximize perceived benefits, by touting dubious virtues of products.

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[91] Gro Harlem Brundtland, Oslo Symposium on Sustainable Consumption (Oslo, Norway, Jan. 19-20, 1994), *quoted in* Salzman at 1246.
[92] *See* Hanson and Kysar, *supra* note 35, at 722.
[93] *Id*.
[94] *Id*. at 726.

Environmental law has focused for some time on the attempt by producers to externalize costs, with pollution as the classic example of an externality. Environmental law now must take into account producer behavior that extols the benefits of products. In terms of grandiose statements about products, it is relatively easy for us to see them as misleading when they relate to a hyperbolic or untrue claim about the product itself. When however, the purpose of the product is to solve a concocted problem, it is one additional maneuver that makes it harder for us to see the misleading nature of the product. The key point is that in each case the consumer's willingness to pay for the product increases.[95] Demand augmentation, a form of market manipulation, leads to excess consumption that leads to environmental degradation.

CONCLUSION

Disgust is an extremely powerful emotion, particularly because the negativity of its implied loss begets, in turn, an implied response: we must do something to make the disgust go away. When presented to the advertisement viewer, disgust is a false problem, albeit one that compellingly calls out for a solution: buy a product. The ad sells the product, not by immediately causing the viewer to go out and buy it, but by putting forth the product as a solution to the disgusting problem presented in the ad. The ad viewer develops a positive association with the product and becomes more likely to buy it. The producer accrues a benefit by successfully augmenting demand. Borne of the demand augmentation is an increase in consumption that comports with the drive for production. Increased consumption leads to incremental environmental degradation. In response, in a

[95] *Id*. at 733.

manner consistent with the current body of law that applies to commercial speech, advertisements that reference the emotion of disgust should be banned.

The proposal set forth in this Article is an example of a consumption law. As consumption laws continue to develop in the future, they will seek to reduce consumption, not necessarily by targeting consumers, but by targeting producers that target consumers. While at certain points in our history, it may have been ludicrous to get exercised about wasteful consumption, times have changed. Global climate change will force a restructuring of our economic system to take into account environmental sustainability and resource conservation. The description and prescription of this Article are based on the idea that the law should explicitly sanction sustainability as a goal. Preservationism helps to promote future well-being and reduce future harm. That is the essence of law: to improve well-being and stop harm, not at some fleeting moment in the present, but on a going forward basis.