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The Law of Advertising Outrage

Mark Bartholomew

Abstract

This article examines the stimulation of audience outrage, both as a marketing strategy and as a subject of legal regulation. A brief history of advertising in the United States reveals repeated yet relatively infrequent attempts to attract consumer attention through overt transgressions of social norms relating to sex, violence, race, and religion. Natural concerns over audience reaction limited use of this particular advertising tactic as businesses needed to be careful not to alienate prospective purchasers. But now companies can engage in “algorithmic outrage”—social media advertising meant to stimulate individual feelings of anger and upset—with less concern for a consumer backlash. The ability to segregate audiences based on psychological profiles enhances the effectiveness and reduces the risk of shocking advertising. Should anything be done about outrageous advertising? Different government regulators have long sought to protect public sensibilities from shocking commercial appeals. Recently, however, the legal doctrine undergirding advertising regulation has changed. The courts have become skeptical of efforts to police advertising outrage, recognizing First Amendment arguments on behalf of commercial speakers that once would have been given no legal credit. The article closely examines the 2017 US Supreme Court decision *Matal v. Tam*, which prompted the end of a nearly century-old prohibition on the registration of “scandalous” trademarks, to illustrate this trend.

Fig. 1. A 2016 Ad for French Connection.

Advertising is about attention. Of course, that's not all it's about. According to one longstanding model, effective advertising must not only distract us from the other stimuli battling for mindshare, but also persuade us—whether through information, hyperbole, pleasing aesthetics, or sheer repetition—that we desire the item being advertised, and then prompt us to act on that desire.

But first and foremost, the advertiser needs to get our attention. Without that initial glance or listen, there's no chance to subsequently cause us to engage with the ad and potentially make a decision to purchase. For decades, scholars and marketing professionals have diagnosed and refined tactics for stimulating audience engagement. Experiments determine which colors and which parts of the printed page garner the most attention from readers.² Celebrity endorsements represent a calculated play on our evolutionary desire to know and follow the well-known. Fortune 500 companies use the latest advances in neuroscience to uncover the secrets of audience interest.³

Another tactic is the purposeful stimulation of outrage. By intentionally riling consumers up with overt sexuality, vulgarity, or other transgressions of social norms, advertisers try to break

¹ “French Connection SS16 Campaign,” image credit Harley Weir, in Victoria Moss, “FCUK T-Shirts Are Coming Back to French Connection,” *The Telegraph*, January 25, 2016, <https://www.telegraph.co.uk/fashion/news/fcuk-t-shirts-are-coming-back-to-french-connection/>.

² Henry Foster Adams, *Advertising and Its Mental Laws* (New York: Macmillan, 1922) 82–122.

³ Jaime Guixeres et al., “Consumer Neuroscience-Based Metrics Predict Recall, Liking and Viewing Rates in Online Advertising,” *Frontiers in Psychology* 8 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5671759/>.

their messages out of the commercial clutter.⁴ At the same time, natural limits have checked the use of outrage as an advertising strategy. It is difficult to calibrate offense in the right way: just enough to gain our attention, but not enough to turn audiences off or push them into the arms of a competitor. As a result, outrage has been deployed repeatedly but not frequently as a selling strategy.

But this may be changing. After a brief historical tour of the use of outrage in advertising, this article describes a new technological phenomenon, something I will call “algorithmic outrage.” Algorithmic outrage, like its predecessors, tries to garner audience attention by stimulating feelings of anger and upset. Yet it also represents something new. Advertising on social media platforms allows for outrage to be titrated into perfect proportions, enough to raise our hackles but not so much as to cause us to turn away. When advertisers reach consumers on social media, they can target them as individuals instead of an undifferentiated mass. They can also obfuscate where the message is coming from, thereby avoiding or at least deflecting the righteous anger of the targeted. Algorithmic outrage is also special in that it cries out to be shared on the very platform that brought it to the user’s attention. Outrage breeds more outrage. The result is a new and very different chapter in the use of shock and controversy in advertising.

The article then asks how should we feel about advertising that produces outrage. Should we feel outraged? Or should we consider outrage production as fair play when it comes to attracting consumer attention? Answers may come from a historical exegesis of the law of advertising outrage. Although most advertising regulation focuses on audience deception not emotional reaction, different legal structures exist to restrain advertisers from shocking their audiences. I take a particularly close look at shifting interpretations of the bars against federal registration of “scandalous” or “disparaging” trademarks. Both the barriers erected and the gaps left by legal actors reveal something about cultural priorities and what should be considered “fair” when it comes to competitors and consumers. My goal here is less normative than descriptive. Legal structures may not always get the balance right, but they shape the advertising we see and, more broadly, the societies in which we live.

Advertising and Outrage: A Brief History

In the past two decades, marketing scholars have analyzed the advertising strategy of “shock advertising” (or “shockvertising”), attempting to assess its effectiveness. One definition of shock advertising is an effort to “surprise an audience by deliberately violating norms for societal values and personal ideals . . . to capture the attention of a target audience.”⁵ Others describe shock advertising as advertising designed to trigger negative emotions, particularly fear,

⁴ Sometimes the production of outrage is the result of marketing miscalculations. Take the infamous 2017 Kendall Jenner Pepsi television commercial that seemed to trivialize modern protest movements. This article does not examine such marketing missteps, ones that accidentally inflame audiences. Instead, it examines advertisers’ *calculated* cultivation of outrage.

⁵ Darren W. Dahl, Kristina D. Frankenberger, and Rajesh V. Manchanda, “Does It Pay to Shock? Reactions to Shocking and Nonshocking Advertising Content among University Students,” *Journal of Advertising Research* 43, no. 3 (September 2003): 268–81.

anger, and disgust.⁶ Shock advertising often involves the use of sexuality, profanity, or violence to give audiences a jolt.

One example comes from this 1980s ad for Jordache jeans, part of a print series featuring shirtless women astride shirtless men. While perhaps tame by today's standards, the campaign scandalized many, even as sales of the jeans skyrocketed.⁷ Television stations balked at airing similar images until Jordache "added an almost invisible shirt to the woman's attire to appease the stations."⁸ When Jordache ran a similar print ad featuring a "half-naked girl and boy in the same pose," public opposition caused the ad to be quickly pulled.⁹ The group Women Against Pornography accused Jordache (and Calvin Klein) of demeaning women and portraying them as sex objects.¹⁰

Fig. 2. One Example of Jordache's 1980s Theme of Shirtless Women Astride Shirtless Men.
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Another example of shock advertising comes from the Centers for Disease Control and Prevention's (CDC) campaign, "Tips from Former Smokers," which began in 2012 and continues as of this publication. The campaign featured former smokers suffering serious health effects from smoking, including having a large scar across their stomach after surgery or talking through a stoma. According to the CDC, "millions of Americans have tried to quit smoking cigarettes because of the *Tips* campaign."¹²

⁶ Pavel Skorupa, "Shocking Contents in Social and Commercial Advertising," *Creativity Studies* 7, no. 2 (2014): 69–81; Jessica M. Salerno and Liana C. Peter-Hagene, "The Interactive Effect of Anger and Disgust on Moral Outrage and Judgments," *Psychological Science* 24, no. 10 (2013): 2069.

⁷ Juliann Sivulka, *Soap, Sex, and Cigarettes: A Cultural History of American Advertising*, 2nd edition (Boston: Cengage Learning, 2012), 318.

⁸ Gail Bronson and Jeffrey H. Birnbaum, "Some People Believe that Blue Jeans Ads Are a Little Too Blue," *Wall Street Journal*, October 7, 1980, A1.

⁹ *Ibid.*

¹⁰ Bernice Kanner, "The New Calvinism," *New York Magazine*, September 17, 1984, 31, 35.

¹¹ Sivulka, *Soap, Sex, and Cigarettes*; image Courtesy of Advertising Archives.

¹² "Tips from Former Smokers," About the Campaign, Center for Disease Control and Prevention, last updated April 23, 2018, https://www.cdc.gov/tobacco/campaign/tips/about/index.html?s_cid=OSH_tips_D9393.

Fig. 3. One Example from the Tips from Former Smokers Campaign.¹³

As both of these examples illustrate, it is the violation of social norms that characterizes shock advertising.¹⁴ At the time the Jordache ads ran, it was rare to see topless women in advertising for mainstream clothing brands, and even rarer to see them in intimate poses with men. The images featured in the Tips from Former Smokers campaign lay bare the after effects of violence done to the body, images that are unusual to see in daily life, either because they are rare or typically kept hidden from public view.

Other ads may violate a social taboo or offend without resort to nudity or violence. An ice cream company's ad featuring a pregnant nun (timed for maximum controversy just in advance of a planned visit from Pope Benedict) was banned in the United Kingdom for mocking the beliefs of Roman Catholics.¹⁵ Or take the case of a Michigan brewery that not only features an image of a frog extending its middle finger at the viewer but claims the same as its federally-protected trademark.¹⁶

¹³ "Tip from a Former Smoker," Quit Now New Hampshire, accessed August 8, 2018, <https://quitnownh.org/category/tips-from-former-smokers/>.

¹⁴ Silke M. Engelbart, Delia A. Jackson, and Simon M. Smith, "Examining Asian and European Reactions Within Shock Advertising," *Asian Journal of Business Research* 7, no. 2 (2017): 37–56.

¹⁵ "Pregnant Nun Ice Cream Advert Banned for Mockery," *BBC News*, September 15, 2010, <http://www.bbc.com/news/uk-11300552>. In general, there is some evidence of an increase in the use of religious imagery for purposes of shock value. Karen L. Mallia, "From the Sacred to the Profane: A Critical Analysis of the Changing Nature of Religious Imagery in Advertising," *Journal Media & Religion* 8 (2009): 172, 173.

¹⁶ *Bad Frog Brewery, Inc. v. New York States Liquor Authority*, 134 F.3d 87 (2d Cir. 1998).

Fig. 4. Controversial Ice Cream Advertisement Banned in the UK.¹⁷

¹⁷ “Antonio Federici Immaculately Conceived Campaign,” *Ads of the World*, Agency Network: Contrast, posted September 30, 2010, https://www.adsoftheworld.com/media/print/antonio_federici_immaculately_conceived.

Fig. 5. An Image from the Bad Frog Website Featuring Its Federally Trademarked Logo.¹⁸

Some trace a rise in the use of offensive words and images in advertising to the 1980s, but the use of shock as a marketing strategy goes back much further. In his book *The Attention Merchants*, Tim Wu describes the penny newspapers of the mid-nineteenth century as the first publications to use sensationalism on a mass scale to win over audiences and become attractive to advertisers.¹⁹ Perhaps the most famous example comes from a series of articles in the *New York Sun* in 1835, complete with artistic renderings of the supposed discovery of life on the Moon. As the illustrations below reveal, the *Sun*'s editors had no compunction against using outright fabrication and sexual imagery to garner audience attention. The point was to arouse the reader, not provide truthful information. At the turn of the century, the so-called "yellow press" again turned to shock, with William Randolph Hearst and Joseph Pulitzer using less-than-truthful reportage on crime and sex to battle for the best circulation numbers.

¹⁸ Bad Frog Beer, accessed August 8, 2018, <http://badfrog.com/>.

¹⁹ Even before the penny press, newspapers published outrageous stories. Take, for example, the political attacks on candidates John Adams and Thomas Jefferson in the election of 1800. "The Election of 1800: The Birth of Negative Campaigning in the US," *Mental Floss*, September 23, 2008, <http://mentalfloss.com/article/19668/election-1800-birth-negative-campaigning-us>. The difference is that while these political broadsides were meant to advance a particular candidate, the penny press used outrage to build audiences for commercial advertising.

Fig. 6. A Lithograph of a Supposed “Amphitheater” on the Moon, Printed in the *New York Sun*.²⁰

Fig. 7. Women and “Bat-men,” the Supposed Inhabitants of the Moon.²¹

In the twentieth century, a flood of mass marketed products and accompanying advertisements pushed businesses to adopt some of the same tactics as the penny press and yellow journalists. The century began with an effort by advertisers to secure professional status akin to doctors and lawyers. Advertising professionals drummed out the patent medicine sellers whose outlandish product claims gave the industry a black eye. They also turned away from the “hard sell”—advertising that made overt and concrete claims about the benefits of the product being sold or the inferior qualities of competitors—to more subtle tactics of persuasion, making

²⁰ “Great Moon Hoax,” *Wikipedia, The Free Encyclopedia*, last revised June 27, 2018, accessed August 8, 2018, https://en.wikipedia.org/wiki/Great_Moon_Hoax.

²¹ *Ibid.*

the case for professional respectability by showing the subtleties and artistry that could be employed in their craft.

The pendulum swung back to the use of shock, however, during the Great Depression. Advertisers worried about consumer retrenchment “prepared to become more undignified.”²² For example, coffin retailers resorted to sexy models dubbed “Casket Cuties” in their advertising, draping the models over caskets in sultry poses.²³ Respected agencies like J. Walter Thompson tried to sell everyday goods like disinfectant and toilet paper with images of dying children and families assaulted by gun-toting robbers.²⁴ Executives at J. Walter Thompson internally acknowledged “[p]erhaps our campaign was a little too sensational.”²⁵ But these same executives refused to back down from a successful move to mobilize audiences through surprise and fear, even after the ad campaign came under fire from the medical profession.²⁶

Fig. 8. Casket Cuties

²² Roland Marchand, *Advertising the American Dream: Making Way for Modernity, 1920–1940* (Berkeley: University of California Press, 1985), 304.

²³ *Ibid.*, 317; image from *Advertising Age* November 12, 1932, 20.

²⁴ Sivulka, *Soap, Sex, and Cigarettes*, 171–73.

²⁵ Discussion of Scot Tissue Controversy, JWT Creative Staff Meeting Minutes, September 28, 1932, 6.

²⁶ Scot Tissue, *JAMA*, July 16, 1932.

Fig. 9. Scot Tissue Ad Exploiting Fears over “Inferior” Toilet Paper.²⁷

In what is now a familiar dynamic, advertising executive Bruce Barton represented many in advertising’s old guard when he lamented the surge in such “disgusting advertisements” in response to the economic realities of the time.²⁸ We can see similar complaints by more modern voices of the profession, like *Advertising Age* columnist Bob Garfield who coined the term “advertrocities” to describe each year’s “gratuitously gross” attempts by advertisers to shock audiences.²⁹ But others viewed the return to outrage as a necessary response to financial exigency and growing commercial clutter. If economically anxious and cognitively taxed consumers refused to buy under traditional selling strategies, then other tactics had to be employed, even if there was collateral damage, including, perhaps, a diminishment of the advertising profession as a whole.

Outrage as Branding Strategy: Calvin Klein and Benetton

More modern examples show the continued deployment of outrage, not just as an attention-getting strategy but also as a mechanism for creating brand meaning. Beginning in the 1980s, Calvin Klein used provocative photos of young models, often under the age of adulthood,

²⁷ “1920s USA Scot Tissues Magazine Advert,” *The Advertising Archives*, accessed August 8, 2018,

²⁸ Marchand, *Advertising the American Dream*, 317.

²⁹ Bob Garfield, “2002: Of Propaganda, Ad Triumphs and Advertrocities,” *Advertising Age*, December 30, 2002, <http://adage.com/article/hoag-levins/2002-propaganda-ad-triumphs-advertrocities/50601/>.

to build its brand profile. Perhaps the most famous of these advertisements featured a 15-year-old actress, Brooke Shields, sporting Calvin Klein jeans in 1980 and speaking the line, “You want to know what comes between me and my Calvins? Nothing.” ABC and CBS both banned the Shields commercial, while NBC restricted it to time slots after 9 p.m.³⁰

Video 1. The Infamous 1980 Brooke Shields/Calvin Klein Commercial.

<https://www.youtube.com/watch?v=YK2VZgJ4AoM>.

Calvin Klein continued to shape its brand around child sexuality and scandal. A mid-1990s television campaign appeared to simulate the production of child pornography. In the commercials, we hear but don’t see an older-sounding man speaking and filming youth in a state of undress. This all takes place in an environment that looks like a seedy, wood-paneled basement.

³⁰ Maria Simpson, “Advertising Art or Obscenity? The Calvin Klein Jeans Ads,” *Journal of Popular Culture* 17 (1983), 146; http://onlinelibrary.wiley.com/doi/10.1111/j.0022-3840.1983.1702_146.x/abstract.

Video 2. Calvin Klein Was Accused of Encouraging Pedophilia with these 1990s Television Spots.

<https://www.youtube.com/watch?v=vZVk21Pco-c>.

The campaign immediately ignited controversy; the Justice Department even opened an investigation to determine whether or not the company had violated any child pornography laws.³¹ Undeterred, Calvin Klein continued to feature borderline under-age models and voyeuristic images its advertising.³² Rather than a misstep, the company's repeated combination of sexual innuendo and children represented an intentional move—advertising critic Jean Kilbourne called it a “cold-blooded marketing strategy”—to shape a particular brand message through public uproar.³³

The clothing company Benetton also used controversial images to build brand meaning, in this case to signal a progressive stance on social issues. A 1992 ad campaign used photographs taken by independent photojournalists to implicate the issues of AIDS, immigration, and terrorism. The photograph with perhaps the most visceral impact and generating the most outrage showed a family in tears as their son, an emaciated AIDS patient, lay dying in his father's arms. Despite pushback from those who disagreed with Benetton's progressive agenda or just considered the ads exploitative, the clothing company continued its tradition of controversial advertising loosely wedded to social issues.

³¹ Brian Galindo, “The 1995 Calvin Klein Ad Campaign That Was Just Too Creepy,” *Buzzfeed*, March 28, 2013, https://www.buzzfeed.com/briangalindo/the-1995-calvin-klein-ad-campaign-that-was-just-too-creepy?utm_term=.lvrLpNN4G6#.bizX8mmyLe.

³² David Griner, “Despite Backlash, Calvin Klein Keeps its Racy New Ads Online,” *Adweek*, May 12, 2016, <http://www.adweek.com/brand-marketing/despite-backlash-calvin-klein-keeps-its-racy-new-ads-online-171418/> (speculating that umbrage taken by Fox News, Breitbart would actually help Calvin Klein with its young target demographic).

³³ Alexandra Marks, “A Backlash to Advertising in Age of Anything Goes. (Cover Story),” *Christian Science Monitor* 91, no. 59 (February 22, 1999): 1.

Fig. 10. Photograph of AIDS Activist and Patient David Kirby Utilized for a Benetton Advertising Campaign in 1992.³⁴

For both Calvin Klein and Benetton, shock was used not as a one-off during a sales downturn or an initial period of market entry. Rather, outrage represented a *consistent* approach to develop a particular brand persona. For these companies, outrage represented not just a way to win audience attention, but a way to create brand meaning.

Limits on Outrage as an Advertising Strategy

Calvin Klein and Benetton appear to have come to their own conclusions, but the big question for advertisers has always been whether shock advertising actually works. Marketing scholars have reached a nuanced conclusion about the efficacy of advertising outrage. First, there seems to be widespread agreement that shockvertising can persuade, at least in the short-term. For example, one study indicates that shocking visual images illustrating the consequences of smoking produce higher cognitive involvement with anti-smoking advertising messages as well as greater intention to quit.³⁵

A key point to understand is that outrage also seems to work even when people disagree with the sentiments expressed. Persuasive appeals can upset us, even make us angry or fearful of

³⁴ “Man Dying of AIDS,” Therese Frare poster for United Colors of Benetton, Victoria and Albert Museum, accessed August 8, 2018, <http://collections.vam.ac.uk/item/O76080/man-dying-of-aids-poster-frare-therese/>.

³⁵ Ekant Veer and Tracy Rank, “Warning! The Following Packet Contains Shocking Images: The Impact of Morality Salience on the Effectiveness of Graphic Cigarette Warning Labels,” *Journal of Consumer Behavior* 11, no. 2 (May 2012): 179–272.

the messenger, and still convince us. Studies suggest that even irritating ads beneficially promote brand awareness. Audiences tend to forget initial emotional valences surrounding such advertising while retaining the beneficial effects of familiarity with the advertised good.³⁶ Similarly, studies on shock advertising note not only its ability to attract attention, but its “robust effects on memory.”³⁷

Second, outrage is a well some advertisers can return to often. Wu theorizes that “lurid and shocking” appeals like the Calvin Klein and Benetton campaigns may succeed in the short-term, but not over the long haul. He argues that “a continual diet of the purely sensational wears audiences out, makes them seek some repose.”³⁸ As proof, he cites the ultimate triumph of *The New York Times* and *The Wall Street Journal*, papers that still aimed to attract attention but at a less sensationalist level than the *New York Sun* or the yellow journalists. In line with Wu’s hypothesis, there has been some academic discussion of the dangers of audience fatigue from shocking imagery when it comes to eliciting support for charitable causes.³⁹

At the same time, numerous examples reveal the manufacture of controversy through advertising to be a viable, long-term proposition. Calvin Klein’s advertising strategy, rather than retreating from its flirtation with child pornography, was to embrace it again and again, making it a central part of its brand.⁴⁰ The same holds true for Benetton’s in-your-face proclamations for diversity and social justice. Similarly, the clothier French Connection used the brand “fcuk” (supposedly an acronym for “French Connection UK”) throughout the 1990s and early 2000s, attracting the ire of different citizens groups and regulatory authorities. The company finally stopped using “fcuk” in its advertising in 2005, concerned that the campaign had begun to turn off customers. But it began using the controversial initialism again just ten years later.⁴¹

Third, in calibrating the level of outrage experienced by audiences, the fit between the advertising message and the product being touted is key. As noted by a group of marketing scholars, “From the consumer’s perspective, it is not necessarily the shocking nature of the advertisements that they find disturbing. It is more the ambiguous purpose that underpins such images.”⁴² This is why shock advertising appears particularly useful in the context of advertising for non-profit causes like charitable organizations and social advocacy groups. Social cause

³⁶ Marieke L. Fransen, Peeter W. J. Verlegh, Amna Kirmani, and Edith G. Smit, “A Typology of Consumer Strategies for Resisting Advertising, and a Review of Mechanisms for Countering Them,” *International Journal of Advertising* 34, no. 1 (2015): 6, 11.

³⁷ Dahl, Frankenberger, and Manchanda, “Does It Pay to Shock?”

³⁸ Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (New York: Knopf, 2016), 101.

³⁹ Antje Cockrill and Isobel Parsonage, “Shocking People Into Action: Does It Still Work? An Empirical Analysis of Emotional Appeals in Charity Advertising,” *Journal of Advertising Research* 56, no. 5 (December 2016): 403.

⁴⁰ Clothier American Apparel copied the same approach in some of its advertising. Thomas Hobbs, “American Apparel in Hot Water Again After Ad Banned for ‘Sexualised Depiction’ of Young Model,” *Marketing Week*, March 17, 2015, <https://www.marketingweek.com/2015/03/17/american-apparel-in-hot-water-again-after-ad-banned-for-sexualised-depiction-of-young-model/>.

⁴¹ Natalie Mortimer, “Why French Connection’s Revival of FCUK Signals an Identity Crisis,” *The Drum*, February 1, 2016, <http://www.thedrum.com/news/2016/02/01/why-french-connection-s-revival-fcuk-signals-identity-crisis>.

⁴² Sara Parry, Rosalind Jones, Philip Stern, and Matthew Robinson, “‘Shockvertising’: An Exploratory Investigation into Attitudinal Variations and Emotional Reactions to Shock Advertising,” *Journal of Consumer Behavior* 12, no. 2 (March 2013): 112, 114.

advertising can offer the audience a more direct relationship between the shocking content and the product or service at issue.⁴³ Nudity presented in the service of HIV awareness is arguably at least somewhat relevant given the advertiser's goal of providing information about a sexually-transmitted disease. Graphic images of smoking's consequences seem germane to considering the health benefits of smoking cessation. By contrast, a commercial for Diesel jeans depicting scenes of oppressive daily life in North Korea looks more incongruous to audiences, and they can end up reacting more negatively.⁴⁴

Fig. 11. Part of the “Diesel for Successful Living” Campaign.⁴⁵

⁴³ Katherine Van Putten and Sandra C. Jones, “It Depends on the Context: Community Views on the Use of Shock and Fear in Commercial and Social Marketing,” in *Partnerships, Proof and Practice—International Nonprofit and Social Marketing Conference 2008—Proceedings*, University of Wollongong, New South Wales, Australia, July 15–16 (2008).

⁴⁴ Warren Berger, “Divided Colors of Diesel: The New ‘Brand O’ Campaign: Youth in Asia or a Guide to Successful Dying?” *AdAge*, November 1, 1997, <http://adage.com/article/news/divided-colors-diesel-brand-o-campaign-youth-asia-a-guide-successful-dying/93393/>. Of course, to some degree, humor relies on incongruity, whether of things or ideas. See Laura E. Little, “Regulating Funny: Humor and the Law,” *Cornell Law Review* 94, no. 5 (July 2009):1235, 1245–49 (2009). But too much incongruity, particularly when a social taboo is invoked, can generate more anger than mirth. Another example of shock advertising that appeared too incongruous for its audience is the 2011 Super Bowl commercial run by the discount coupon provider Groupon. The ad began by discussing the hardships of the Tibetan people, but then quickly shifted to focus on the ability of Groupon users to obtain deep discounts on Tibetan food in Chicago. The abrupt change in tone shocked, but also caused viewers to see Groupon as making light of Tibetan oppression, triggering a backlash and apologies from the company. Doug Gross and CNN Wire staff, “Groupon Axes Controversial Ad Campaign,” *CNN*, February 11, 2011, <http://www.cnn.com/2011/TECH/web/02/11/groupon.ad/index.html>.

⁴⁵ “The Diesel ‘North Korea’ campaign. (’97 Epica shortlist.),” Diesel, *Luerzer’s Archive*, accessed August 8, 2018, <https://www.luerzersarchive.com/en/magazine/print-detail/diesel-526.html>.

Somewhat relatedly, outrage's viability as a selling strategy tends to vary by industry. Clothiers have been in a better position to benefit from campaigns designed for maximum shock value than other businesses. Transgressive signals can be particularly appealing to their customer base as they try to signal trendiness and an edgy brand personality. We see this with the long-term success of the Calvin Klein commercials hinting at pedophilia. Or take the 2010 campaign for a streetwear company with cartoon posters portraying the Pope as a child molester and the prophet Muhammad as a terrorist.⁴⁶ More than other retailers, fashion brands can afford to alienate large audience segments, promoting their own brand by contrasting it with the prudish attitudes of the majority.

Fig. 12. A Poster for the New Zealand Company Eshe Streetwear.⁴⁷

⁴⁶ Antonio Moro, "Eshe Streetwear: Religion Is Garbage," *Legs Nerd*, September 1, 2010, <http://leganerd.com/2010/09/01/eshe-streetwear-religion-is-garbage/>.

⁴⁷ "Shocking Religious Advertisements," *Buzzfeed* Community, posted by iraszl, April 3, 2012, https://www.buzzfeed.com/ivanr4/witty-and-shocking-religious-advertisements-1uq3?utm_term=hv6aQp6W08#.yi9KenGqmB.

Media companies do not have the same luxury; they need to appear more trustworthy than transgressive. Yet they are better positioned to invoke outrage than other businesses because they can maintain a certain distance from outrageous content. A news magazine can circulate inflammatory stories while contending that they are merely reporting the facts. Rather than choosing to identify with a particular message that violates social norms, publishers can claim an objective separation from shocking facts and images. Even when the choice to report is clearly a choice and the information presented is not fact-based, there is still a difference between a newspaper or magazine holding itself at arm's length from the stories it features and an advertiser electing to create particular content meant to define its brand.

Leaving fashion and news reporting aside, the problem of fit has caused stolid, broad-based businesses to mostly avoid outrage as an advertising strategy. Although the examples given reveal a longstanding practice by some advertisers to arouse audience indignation, this can be a dangerous gambit. Ads that turn the outrage dial up too high can alienate viewers, damaging brand goodwill and potentially driving customers away. Take Benetton's 2000 campaign depicting death row inmates staring into the camera under the prominent caption "Sentenced to Death." The Benetton advertisements featured photographs and largely sympathetic profiles of twenty-six death row inmates in various U.S. states. The campaign elicited a great deal of controversy in the United States where a majority of Americans at the time supported the death penalty. Victims' families protested, the California Assembly passed a resolution calling for a boycott of Benetton, and the Missouri attorney general sued the company, contending that the inmate photographs had been taken under false pretenses.⁴⁸ After the campaign, Benetton's sales suffered and some department stores ended up abandoning the brand, ultimately foreclosing an attempt by the clothier to expand its presence in the United States.⁴⁹

⁴⁸ Eilidh Nuala Duffy, "Benetton's Most Controversial Campaigns," *Vogue*, December 8, 2017, <http://www.vogue.co.uk/gallery/benettons-best-advertising-campaigns>.

⁴⁹ Jonathan Groucutt, "The Life, Death and Resuscitation of Brands," *Handbook of Business Strategy* 7, no. 1 (July 2006): 101, 104; David S. Waller, Sameer Deshpande, and B. Zafer Erdogan, "Offensiveness of Advertising with Violent Image Appeal: A Cross-Cultural Study," *Journal of Promotion Management* 19, no. 4 (August 2013): 400, 405.

Fig. 13. Image from Benetton’s “Sentenced to Death” Campaign.⁵⁰

For many businesses, audience heterogeneity inevitably introduces an unacceptable degree of risk for shock advertising campaigns. There is great variability on what any single individual considers shocking. Gender, intensity of religious feeling, and language have all been diagnosed as fault lines that impact perceptions of shock advertisements.⁵¹ As one group of marketing scholars writes, “shocking advertising is certainly effective at attracting attention; however, its power of persuasion is dependent on the sector as well as the cultural characteristics of the consumer.”⁵² Inability to predict the reactions of different viewers of an advertisement has limited the use and effectiveness of shock advertising.

Algorithmic Outrage

In an interview for this publication in 2012, the president and CEO of the National Advertising Review Council stressed the downsides of shock advertising, contending that the digital landscape made outrage too difficult to control. Discussing a Super Bowl ad that attempted to use shock and humor, he said: “Social media has really expanded the impact of

⁵⁰ “Benetton – ‘Sentenced to Death’,” United Colors of Benetton ad, *Ad Forum*, accessed August 8, 2018, <https://www.adforum.com/creative-work/ad/player/12831/sentenced-to-death/benetton>.

⁵¹ Parry et al., “Shockvertising”; Waller, Deshpande, and Erdogan, “Offensiveness of Advertising with Violent Image Appeal,” 412; Engelbart, Jackson, and Smith, “Examining Asian and European Reactions within Shock Advertising.”

⁵² Parry et al., “Shockvertising,” 119.

offending a substantial group of consumers . . . you'd find five or ten instances every year where the advertiser goes over the line and they hear back from the public very loudly and very quickly."⁵³ The implication seems to be that shock advertising runs off the rails when advertisers fail to understand or control the size and makeup of their audience and that audience assessment has become more problematic in the age of Facebook and YouTube. In a similar vein, some scholars have posited that "leakage" of shock advertising past a target audience can potentially cause "collateral damage."⁵⁴

Video 3. The controversial Super Bowl ad referenced by C. Lee Peeler, the President and CEO of the National Advertising Review Council, in his 2012 interview with ASQ. Some faulted the ad for being insensitive to the issue of suicide.

<https://www.youtube.com/watch?v=B3NGN4t4hm4>.

The attention-getting benefits of outrage have always had to be balanced against the potential costs of alienating angry or disgusted viewers. Advertising via online platforms has restructured this calculus, but in a different way than suggested above. Rather than creating the conditions for caution, online communications encourage shock as an advertising strategy. Today, even mainstream brands like hamburger chains and snack food makers can play the advertising outrage game thanks to new ways to deliver commercial messaging to individual consumers.

Shock advertising on social media differs in two key ways from the attention-grabbing strategies of the past eras that relied on print ads and short television spots for mass audiences. First and foremost, digital marketing allows for individual customization. Instead of concern over offending those with the most prudish sensibilities, advertisers can try to find that sweet

⁵³ Lee Peeler and Linda M. Scott, "Interview with Lee Peeler," *Advertising & Society Review* 12, no. 4 (2012), .

⁵⁴ Waller, Deshpande, and Erdogan, "Offensiveness of Advertising with Violent Image Appeal," 403.

spot where an advertisement is just controversial or titillating enough to garner attention, but not so much as to turn viewers away or sour them on the brand. As digital theorist Ed Finn writes, innovations in the way market research is collected and commercial messaging conveyed result in advertising “to a market segment of one.”⁵⁵ To the extent that advertising once helped constitute broad, social demographics, it now relies on atomized tracking and delivery systems. Communications professor Katherine Sender chronicles this phenomenon in the context of “the gay market,” which she describes as becoming “so transformed, so porous,” under the influence of social media marketing and advertising driven by constant consumer surveillance “as to not be especially helpful in making sense of contemporary relationships among advertising strategies, media, sexuality, and social collectivities.”⁵⁶

Precise targeting helps neutralize the dangers of shock advertising. For example, audiences are more likely to be angered by advertisements that transgress social norms and feature actors of their own ethnicity. Hence, if one wants to shock, but not offend too greatly, it makes sense to transmit a shocking advertisement to someone of a different race than that portrayed in the ad image.⁵⁷ Burger King ran such a controversial ad in Singapore in 2009. Using a White model instead of an Asian one for this ad was likely the product of a strategic decision to shock Asian audiences, but not too much.⁵⁸

⁵⁵ Ed Finn, *What Algorithms Want: Imagination in the Age of Computing* (Cambridge, MA: MIT Press, 2017), 108.

⁵⁶ Katherine Sender, “The Gay Market Is Dead, Long Live the Gay Market: From Identity to Algorithm in Predicting Consumer Behavior,” *Advertising & Society Quarterly* 18, no. 4 (2017), <http://muse.jhu.edu/article/684249>.

⁵⁷ See Engelbart, Jackson, and Smith, “Examining Asian and European Reactions within Shock Advertising.”

⁵⁸ On a broader scale, one can see a similar tactic from earlier eras as crude stereotypes about minorities were routinely deployed as humor for advertising to primarily white audiences.

Fig. 14. Burger King Ad That Ran in Singapore in 2009.⁵⁹

The more precise targeting afforded by digital advertising makes it easier to achieve these kinds of strategic racial mismatches. Facebook gave advertisers the ability to target users based on a category they label “Ethnic Affinity.” Would-be advertisers could select from the categories of African American, Asian American, Hispanic, and “non-multicultural.”⁶⁰ Although Facebook has been criticized for allowing hate groups to use these kind of targeting tools, large commercial actors have employed them as well. In 2016, Universal Pictures used this feature to show different versions of the trailer for the movie “Straight Outta Compton” to different users. After an investigation revealed that the feature could be used exclude particular racial groups

⁵⁹ Tim Nudd, “Unwitting Star of Burger King’s ‘Blow Job Ad’ Finally Lashes Out at the Company: Likens Treatment of Her Image to Rape,” *Adweek*, August 7, 2014, <http://www.adweek.com/creativity/unwitting-star-burger-kings-blow-job-ad-finally-lashes-out-company-159347/>.

⁶⁰ Alethea Lange and Rena Coen, “How Does the Internet Know Your Race?” Center for Democracy & Technology blog, posted September 7, 2016, <https://cdt.org/blog/how-does-the-internet-know-your-race/>.

from housing advertisements in contravention of federal law, Facebook agreed to temporarily suspend the targeting feature.⁶¹

Yet the customization potential of digital advertising goes far beyond these ethnic categories. Finn explains that the demographic clusters of the past (e.g., Hispanic women age 30–45) “are being replaced by new, rapidly shifting, and mostly opaque designations that are used to produce new kinds of advertising.”⁶² Emotions can now be catalogued and predicted with a force unimaginable to advertisers just a few years ago. As communications scholar John Cheney-Lippold notes, thanks to surveillance capitalism, “love, friendship, criminality, citizenship, and even celebrity have all been datafied by algorithms we will rarely know about.”⁶³ Businesses rush to stockpile patents meant for discerning our emotional state through the screens, cameras, and data trackers that are now part of daily existence. The ability to segregate audiences based on psychological profiles enhances the effectiveness and reduces the risk of shock advertising.

Social media platforms immerse audiences in an environment constructed to record and adjust to individual behaviors and emotional responses. As law professor Ryan Calo and technology researcher Alex Rosenblat argue, this is a recipe for great persuasive power: “The contemporary consumer is a *mediated* consumer, meaning that her interactions occur through a platform that a company can closely monitor and that it took great pains to design and architect.”⁶⁴ Being a mediated consumer means having your experiences with advertising dynamically choreographed. As described by Calo and Rosenblat, “When a company can design an environment from scratch, track consumer behavior in that environment, and change the conditions throughout that environment based on what the firm observes, the possibilities to manipulate are legion.”⁶⁵ Although marketers, psychologists, and computer scientists have long sought ways to quantify their subjects, digital media platforms present a new paradigm where consumer behavior can be modeled and nudged through relentless A/B testing against a massive pool of users and self-refining algorithms can constantly take our affective temperatures.⁶⁶

Consider, for example, the disclosure in 2017 of an internal Facebook report boasting of the social media platform’s ability to sift through user posts and photos in real time to determine when young users felt particular emotions. Among the emotional categories that Facebook

⁶¹ Julia Angwin, “Facebook to Temporarily Block Advertisers from Excluding Audiences by Race,” ProPublica, *Machine Bias* blog, November 29, 2017, <https://www.propublica.org/article/facebook-to-temporarily-block-advertisers-from-excluding-audiences-by-race>. After a follow-up investigation in 2017 revealed that landlords and real estate brokers could still use Facebook’s tools to prevent certain protected classes from seeing ads for housing sales or rentals, the National Fair Housing Alliance filed a lawsuit against Facebook for violation of the federal Fair Housing Act. Tanvi Misra, “Facebook Is Being Sued for Housing Discrimination, Too,” *CityLab*, March 27, 2018, <https://www.citylab.com/equity/2018/03/facebook-is-being-sued-for-housing-discrimination-too/556580/>.

⁶² Finn, *What Algorithms Want*, 109.

⁶³ John Cheney-Lippold, *We Are Data: Algorithms and the Making of Our Digital Selves* (New York: NYU Press, 2017), 254.

⁶⁴ Ryan Calo and Alex Rosenblat, “The Taking Economy: Uber, Information, and Power,” 117 *Columbia Law Review* 117 (2017): 1623, 1651.

⁶⁵ *Ibid.*, 1628.

⁶⁶ A/B testing is a method of comparing two versions of a web interface against each other by randomly assigning users to one of the two versions.

claimed to be able to discern were “stressed,” “defeated,” “overwhelmed,” “anxious,” “nervous,” “stupid,” “silly,” “useless,” and “a failure.”⁶⁷

Not included in the leaked memo but surely top of mind among Facebook and others in the digital advertising industry was the category of outrage. Gaining attention by stimulating feelings of anger and fear are part of the social media business model. According to an early Facebook investor and mentor to Mark Zuckerberg, Facebook’s newsfeed “algorithm exists to maximize attention, and the best way to do that is to make people angry and afraid.”⁶⁸ He posits that Facebook is in the business of manufacturing “outrage cycles” because when users are excited by “low-level emotions” they think less critically and also “share more stuff.”⁶⁹

Former Google “design ethicist” Tristan Harris makes a similar point about digital advertising platforms. He contends that today’s communications portals are specifically designed to trigger outrage at a granular, individual level because this is the most effective strategy for repeatedly capturing the audience attention necessary for successful advertising.⁷⁰ Harris says:

It works on everybody. That’s the thing about this. That’s what this conversation is actually about: A species, us, that are waking up to the fact that things persuade us even if we know that they persuade us. I know that outrage persuades me. It works on me.⁷¹

Advertising professionals agree. As one media consultant advises, “Brands should use the polarized public to their advantage: being offensive pays. We need to create conversations and that’s almost impossible if you’re dribbling out blandness.”⁷² It doesn’t hurt that feelings of outrage have been shown to diminish information processing, often a desirable effect when pitching users on items they may not necessarily need.⁷³

Algorithmic outrage also relies on obscurity. Finn makes the essential point that the highly individualized designations used to profile consumers are “deliberately hidden from us.” This makes algorithmic outrage different from the isolated instances of shock advertising that

⁶⁷ Korin Miller, “Facebook Has Ability to Let Advertisers Know When Teens Feel ‘Worthless.’ What Are the Implications?” *Yahoo Beauty*, May 2, 2017, <https://www.yahoo.com/lifestyle/facebook-ability-let-advertisers-know-teens-feel-worthless-implications-183245572.html>.

⁶⁸ Elizabeth Dwoskin, “Facebook Thought It Was More Powerful than a Nation-State. Then That became a Liability,” *Washington Post*, January 22, 2018, https://www.washingtonpost.com/business/economy/inside-facebooks-year-of-reckoning/2018/01/22/cfd7307c-f4c3-11e7-beb6-c8d48830c54d_story.html?utm_term=.26d88140c1df.

⁶⁹ Hari Sreenivasan, “Investor Says He Tried to Warn Facebook about ‘Bad Actors’ Harming Innocent People,” *PBS Newshour*, March 20, 2018, <https://www.pbs.org/newshour/show/investor-says-he-tried-to-warn-facebook-about-bad-actors-harming-innocent-people>.

⁷⁰ Sam Harris, “What Is Technology Doing to Us? A Conversation with Tristan Harris,” *Sam Harris* podcast #71, April 14, 2017, <https://samharris.org/podcasts/what-is-technology-doing-to-us/>.

⁷¹ Kara Swisher and Recode staff, “Full Transcript: Time Well Spent Founder Tristan Harris on Recode Decode,” *Recode Decode* podcast, *Recode*, February 7, 2017, <https://www.recode.net/2017/2/7/14542504/recode-decode-transcript-time-well-spent-founder-tristan-harris>.

⁷² Wade, “Marketing in the Age of Outrage.”

⁷³ Salerno and Peter-Hagene, “The Interactive Effect of Anger and Disgust on Moral Outrage,” 2074.

came before. An outrageous Super Bowl ad transparently pushes our emotional buttons; commercial messaging mediated through social media creates emotional upset much more discreetly. The surveillance web that continually tracks our behaviors and uses that information to deposit us in different psychographic categories is normally unseen. It only becomes transparent when there is an error in an otherwise smoothly functioning, invisible system, as when OfficeMax accidentally addressed a mailer to a man with the identifying words “daughter killed in car crash.”⁷⁴

Fig. 15. Telltale OfficeMax mailer.⁷⁵

It is not just the architecture of online advertising that effaces the construction of outrage, but also its logic. As Harris argues, outrage inherently demands sharing with others. Unlike some other emotions such as anxiety or embarrassment, we seek validation from others when we believe a social norm has been transgressed. Also, just like the advertisers, social media users realize that a shocking communication will end up getting more shares and retweets than something that lacks such a transgressive flavor. As one technology writer put it, “You’re more likely to be rewarded on Twitter with piles of retweets for spreading lies than you are for spreading truths.”⁷⁶ Law professor Bernard Harcourt maintains that we have moved from a

⁷⁴ Matt Pearce, “Dad Gets OfficeMax Mail Addressed to ‘Daughter Killed in Car Crash,’” *Los Angeles Times*, January 19, 2014, <http://articles.latimes.com/2014/jan/19/nation/la-na-nn-officemax-mail-20140119>.

⁷⁵ Joel Schectman, “How a Family Tragedy Landed on a Retailer’s Mailing,” *Wall Street Journal*, January 29, 2014, <https://www.wsj.com/articles/how-a-family-tragedy-landed-on-a-retailer8217s-mailing-1391042373>.

⁷⁶ Will Oremus, “Lies Travel Faster Than Truth on Twitter—and Now We Know Who to Blame,” *Slate*, March 9, 2018, <https://slate.com/technology/2018/03/lies-travel-faster-than-truth-on-twitter-says-a-major-new-mit-study.html>.

surveillance society to an expository one, where users of social media platforms are willing to disclose personal information that makes them subject to even more social control.⁷⁷ One form of social control is the constant commercial tap on the shoulder, one that is calculated to conjure just the right amount of pique to make us pay attention.

Video 4. Tristan Harris Speaking on the “Attention Economy.”

<https://www.youtube.com/watch?v=awAMTQZmvPE>

This socio-technological engineering may have many consequences, but one is the potential for a wider variety of businesses to capitalize on audience rancor. Brands that would not have gone in for shock advertising in the past now embrace it. The Carl’s Jr. fast food chain released a series of notoriously sexist and overtly sexual ads that triggered controversy. The ads showed scantily-clad women slowly devouring overstuffed burgers in hypersexualized situations like the backseat of a car during a drive-in movie or grinding on top of a mechanical bull. Often featuring celebrities like Paris Hilton or Kim Kardashian, the commercials stayed to a simple formula of “glistening skin, dripping sauce, bountiful cleavage, and porn-y soft lighting.”⁷⁸ Critics attacked the ads as akin to pornography and inappropriate for broadcast television audiences.

⁷⁷ Bernard E. Harcourt, *Exposed: Desire and Disobedience in the Digital Age* (Cambridge, MA: Harvard University Press, 2015), 89.

⁷⁸ Whitney Filoon, “Carl’s Jr. Abandons Its ‘Slutburger’ Ads,” *Eater*, March 29, 2017, <https://www.eater.com/2017/3/29/15105878/carls-jr-no-more-slutburger-ads>.

Video 5. One in a Series of Controversial Carl's Jr.'s Commercials.

<https://www.youtube.com/watch?v=EHWTc8cUhkw>.

Not to be outdone, KFC posted a tweet for its Australian customers containing a graphic image that equated eating its “hot and spicy” chicken with a sex act. KFC faced some criticism for the stunt, but they had to be pleased that the tweet quickly racked up more than 1300 retweets in an hour.⁷⁹

⁷⁹ “KFC Australia Just Posted a Seriously Disturbing Tweet,” *News.com.au*, April 20, 2016, <http://www.news.com.au/finance/business/retail/kfc-australia-just-posted-a-seriously-disturbing-tweet/news-story/d8fc887f7471dec10387280b86103d6e>.

Fig. 16. NSFW (Not Safe For Work) Tweet from KFC Australia in 2016.⁸⁰

The ability to cause offense, and then have that offense registered and circulated online was viewed as a credit to these ad campaigns, not a demerit. As an online advertising consultant wrote in referring to the Carl's Jr. ads: "And what about the Twitter chatter, the rhetorical analyses, the reactionary op-eds? These all amount to (free) pyrotechnics in a laser show of fallout publicity. These viewers weren't going to buy your product (in great quantities) anyway. Now, they're going to help you sell it."⁸¹ Offensive content like the Carl's Jr. ads enjoy the benefits of widespread circulation, the hope among both individual authors and advertisers that their ad or post will go "viral." Even when Carl's Jr pledged to revise its marketing tactics in 2017, with a new emphasis on "food, not boobs," its new advertising featured winking references to its outrageous recent past.⁸² Marketers designing campaigns for maximum sharing on social media tend to emphasize the sexual and the surprising,⁸³ as well as advertising content meant to anger its recipients.⁸⁴

⁸⁰ David Boroff, "Is She Holding Chicken? KFC Australia Tweets 'NSFW' Photo of Couple on Couch," *New York Daily News*, April 15, 2016, <http://www.nydailynews.com/news/world/kfc-australia-tweets-nsfw-photo-man-woman-couch-article-1.2602644>.

⁸¹ Gordon Donnelly, "Recent History's Most Controversial Ads," *WordStream Blog*, April 19, 2018, <https://www.wordstream.com/blog/ws/2017/06/19/most-controversial-ads>.

⁸² T. L. Stanley, "Burgers, Not Boobs: Carl's Jr. Brilliantly Flips the Script by Tearing Down Its Own Smutty Ads," *Adweek*, March 29, 2017, <http://www.adweek.com/brand-marketing/burgers-not-boobs-carls-jr-brilliantly-flips-the-script-by-tearing-down-its-own-smutty-ads/>.

⁸³ Fransen et al., "A Typology of Consumer Strategies for Resisting Advertising." 11.

⁸⁴ Suse Barnes et al., "Roundtable on Social Media and Advertising: Part II," *Advertising & Society Quarterly* 19, no. 1 (2018), <http://muse.jhu.edu/article/689166>.

Defining “Scandalous” and “Disparaging” Trademarks: A Case Study in the Law of Advertising Outrage

Even when sufficiently tempted to employ advertising outrage as a selling strategy, businesses do not have free rein. Advertisers operate in the shadow of regulation, and the advertising regulatory regime has some provisions in place to protect audience sensibilities. But the attitudes of legal actors towards this regulatory project have been changing. As we will see, these legal actors have become gradually more hostile to government limits on shock advertising, reversing past precedents that once provided the government with wide latitude to restrict expression in the commercial sphere.

An interesting and important example of a government agency that has tried to restrain some of the worst abuses of shock advertising comes from the efforts of the United States Patent & Trademark Office (PTO). The PTO assesses whether particular names and symbols are eligible for federal trademark registration. As part of this process, it has determined whether a proposed trademark is “scandalous” or “disparaging,” designations which preclude registration. Although registration is not required for legal enforcement of trademark rights, it offers many legal enhancements that make success in a trademark infringement lawsuit more likely. As a result, registration can be an extremely important component when selecting and managing a brand.⁸⁵

The scandalousness and disparagement bars assess the reactions of different advertising audiences. Courts define scandalousness as something that would trigger outrage among the general public.⁸⁶ According to various judicial definitions, a scandalous mark is one that is “shocking to the sense of truth, decency, or propriety”; “giving offense to the conscience or moral feelings”; “exciting reprobation”; or “calling out condemnation.”⁸⁷ By contrast, disparagement challenges revolve around perceived insults to a particular group’s ethnicity or religion. Disparaging marks are those that “dishonor by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison.”⁸⁸

Trademark law in the United States has contained these sort of prohibitions since at least the nineteenth century.⁸⁹ A century of enforcement of the scandalousness and disparagement bars offers some insights into what kinds of advertising offense will be policed by the legal system. One constant has been a willingness to deem outright verbal or pictorial profanities as

⁸⁵ Max Vern, “A Trademark Visa—Aspects of International Trademark Use and Protection,” *Journal of The Patent & Trademark Office Society* 88 (2006): 847, 850 (contending that “it is of paramount importance to seek trademark registration”). See also [B&B Hardware, Inc. v. Hargis Ind., Inc., 135 S. Ct. 1293, 1300 \(2015\)](#) (“Registration is significant. The Lanham Act confers ‘important legal right and benefits’ on trademark owners who register their marks.”).

⁸⁶ [In re Mavety Media Grp. Ltd., 33 F.3d 1367, 1371 \(Fed. Cir. 1994\)](#).

⁸⁷ [In re Old Glory Condom Corp., 26 USPQ2d 1216, 1218 \(TTAB 1993\)](#).

⁸⁸ [In re Geller, 751 F.3d 1355, 1358 \(Fed. Cir. 2014\)](#).

⁸⁹ Jasmine Abdel-Khalik, “To Live In In-‘Fame’-Y: Reconceiving Scandalous Marks as Analogous to Famous Marks,” *Cardozo Arts & Entertainment Law Journal* 25 (2007): 173.

scandalous. Hence, attempts to register BULLSHIT for purses and wallets and a graphic of a defecating dog for shirts both failed the scandalousness analysis.⁹⁰

Fig. 17. An Image of a Defecating Dog Was Denied Federal Trademark Registration for Failing the Scandalousness Bar.⁹¹

Similarly, aware of race's potential for producing outrage, trademark examiners have regularly vetoed applications for racially-charged trademarks. In refusing the federal registration of BLACK TAIL for pornographic magazines featuring African-American women, an adjudicatory board explained that the mark was "an affront to a substantial composite of the general public" because it "essentially conveys, in vulgar terms, the idea of African-American women as sexual objects."⁹² In 2015, after a long legal struggle, a federal court upheld a PTO determination that the WASHINGTON REDSKINS trademark was disparaging to Native Americans.⁹³

Advertisers' use of religious imagery has often been considered too shocking for trademark protection, but the grounds for such a legal claim migrated over the years from arguments that such imagery is offensive to the general public to claims that it disparages a

⁹⁰ In re Tinseltown, Inc., 212 U.S.P.Q. 863, 866 (T.T.A.B. 1981); Greyhound Corp. v. Both Worlds, Inc., 6 U.S.P.Q. 2d 1635, 1654 (T.T.A.B. 1988).

⁹¹ Steve Baird, "Federal Trademark Registration, the First Amendment, and Freedom of Speech: Part III," *Duets Blog*, September 26, 2017, <https://www.duetsblog.com/2017/09/articles/articles/federal-trademark-registration-the-first-amendment-and-freedom-of-speech-part-iii/>.

⁹² *Mavety* (Fed. Cir. 1994), 6.

⁹³ *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015). In 2018, this decision would be vacated in light of the Supreme Court's decision in *Tam* declaring the disparagement bar unconstitutional.

particular religious sect. Decades ago, merely mentioning religious beliefs in a proposed trademark earned judicial condemnation. Hence, MADONNA wine was rejected for being scandalous.⁹⁴ Likewise, an early trademark treatise maintained that the mark CHRISTIAN could never serve as an appropriate commercial source identifier.⁹⁵ Later, adjusting to an increasingly secular and pluralist society, the PTO moved to reject marks implicating religion for offending a particular religious group, not the public at large. For example, in 2014, a court denied federal registration to the mark STOP THE ISLAMISATION OF AMERICA for being disparaging to the American Muslim community.⁹⁶

Finally, sexual references often trigger the scandalousness bar. For example, the mark BUBBY TRAP for bras was considered scandalous in 1971.⁹⁷ More permissive sexual mores caused a recalibration that allowed marks like TWATTY GIRL for cartoon prints and CUMBRELLA for condoms to survive the scandalousness analysis in 2005 and 2007.⁹⁸ Even so, modern sexually-suggestive marks still failed the scandalousness test. In 2008, the mark SEX ROD for clothing was considered scandalous, the court noting that “the use of the term on children’s and infant clothing makes the term particularly lurid and offensive.”⁹⁹ In 2009, the PTO denied the application to register HAND JOB for manicure and pedicure services.¹⁰⁰

In sum, perhaps inevitably, the PTO and the federal courts that review its determinations gradually narrowed the scope of the scandalousness and disparagement bars. These legal actors recognized that society’s concept of what is shocking, particularly in the commercial realm, had shrunk over the years. Nevertheless, up to the modern day, the bars still retained some bite, resulting in registration denials for a number of trademarks involving issues of race, religion, and sexuality.¹⁰¹

⁹⁴ In re Riverbank Canning Co., 95 F.2d 327, 328-29 (C.C.P.A. 1938).

⁹⁵ Browne at 239-240.

⁹⁶ In re Geller, 751 F.3d 1355 (Fed. Cir. 2014).

⁹⁷ In re Runsdorf, 171 U.S.P.Q. 443 (T.T.A.B. 1971).

⁹⁸ In re Gray, Ser. No. 78622783 (T.T.A.B. 2007); In re Watkins, 2005 TTAB LEXIS 66 (T.T.A.B. 2005).

⁹⁹ Boston Red Sox Baseball Club v. Sherman, 2008 WL 4149008, *8 (T.T.A.B. 2008). A cause of action for trademark dilution law gives business competitors the power to use the courts to stop some kinds of shock advertising. Dilution law allows the holders of famous trademarks to sue to stop behaviors that somehow damage the signaling power of their mark for consumers. Nothing about the defendant’s behavior has to be confusing or misleading; longstanding areas of trademark infringement and false advertising law allow aggrieved businesses to sue for that kind of conduct. Judicial interpretation has limited dilution law’s reach. Courts have largely refused to find unauthorized use of a famous trademark tarnishing unless the use involves sex or nudity. Irina D. Manta, “Hedonic Trademarks,” *Ohio State Law Journal* 74 (2013): 241, 283.. One federal circuit even goes so far as to create a full-fledged legal presumption that sex-related products are “likely to tarnish a famous mark if there is a clear semantic association between the two.” *V. Secret Catalogue v. Moseley*, 605 F.3d 382, 386 (6th Cir. 2010). One can think of scenarios that do not involve sex that still might diminish a mark’s reputation. For example, what if advertising by another business associated a family-friendly brand like Toys R Us with firearms and violence? Nevertheless, sex-related uses seem to be the only ones likely to trigger a successful tarnishment claim. *Compare Toys “R” Us, Inc. v. Feinberg*, 26 F. Supp. 2d 639 (S.D.N.Y. 1998), vacated on procedural grounds, 201 F.3d 432 (2d Cir. 1999) with *Toys “R” Us Inc. v. Akkaoui*, 40 U.S.P.Q.2d (BNA) 1836 (N.D. Cal. 1996).

¹⁰⁰ US Trademark Application Serial No. 77,671,055 (filed Feb. 15, 2009).

¹⁰¹ Enforcement of the scandalous and disparagement bars largely tracked general sentiments about what makes expression profane in the English-speaking world. As described by one linguist, “you’ll find that nearly all the most profane words in Great Britain, New Zealand, and the United States fall into one of these four categories: praying,

The Shrinking Government Role in Regulating Advertising Outrage

The PTO no longer enforces the scandalousness and disparagement bars. Their demise reflects a larger trend toward blurring the distinction between commercial and non-commercial expression. The erosion of this distinction is important because the law has traditionally been more willing to tolerate outrageous tactics in the non-commercial realm, reasoning that this speech arena required more engagement with the hurly burly of ideas. In this domain, individual sensibilities were less worthy of protection. For example, even though political ads featuring racial slurs and graphic images of aborted fetuses seem to violate the Federal Communications Commission's (FCC) rules against "obscene, indecent, and profane" content, the FCC has failed to act to restrict them.¹⁰² By contrast, commercial speech has been considered less at the core of expressive freedoms and subject to more government regulation to insure a moral and well-functioning marketplace. In an early twentieth-century decision approving state restrictions on billboard advertising, the Supreme Court explained "the Legislature may recognize degrees of evil and adapt its legislation accordingly."¹⁰³

In 2017, the Supreme Court decided the case of *Matal v. Tam*. The case centered on an Asian-American rock band that dubbed itself "The Slants." Simon Tam, the band's lead singer, requested registration of The Slants' name, explaining that other bands had adopted the same moniker, leading to confusion in the marketplace.

fornicating, excreting, and slurring." Benjamin K. Bergen, *What the F: What Swearing Reveals About Our Language, Our Brains, and Ourselves* (New York: Basic Books, 2016).18

¹⁰² Milagros Rivera-Sanchez and Paul H. Gates Jr., "Abortion on the Air: Broadcasters and Indecent Political Advertising," *Federal Communications Law Journal* 46, no. 2 (1994): 267.

¹⁰³ *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

Fig. 18. Cover Art from The Slants' 2016 Album *Something Slanted This Way Comes*.¹⁰⁴

The PTO rejected Tam's application on the ground that it was disparaging to Asian-Americans. Tam challenged the rejection as a violation of his First Amendment rights. Despite decades of existence in American law, the Court concluded that application of the PTO disparagement provision to Tam's case or any other was unconstitutional. It explained that the provision "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."¹⁰⁵ For a majority of the Court, it was significant that the disparagement bar was triggered when a particular group (in this case, Asian-Americans) was *offended*. It did not matter to the Court that the bar prohibits disparagement of all groups. Instead, any legal rule restricting offensive speech is deeply suspect because "[g]iving offense is a viewpoint."¹⁰⁶

After *Tam*, there was some thought that even though the Court had declared the disparagement provision unconstitutional, the scandalousness provision might withstand First Amendment scrutiny.¹⁰⁷ An argument was made that the scandalousness bar, because it looks to general public attitudes and does not survey the sensibilities of a particular group for offense,

¹⁰⁴ The Slants, "Something Slanted This Way Comes," *Amazon Music*, accessed August 8, 2018, <https://www.amazon.com/Something-Slanted-This-Way-Comes/dp/B01H2872M6>.

¹⁰⁵ *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

¹⁰⁶ *Id.* at 1763.

¹⁰⁷ Ned Snow, "Denying Trademark for Scandalous Speech," *UC Davis Law Review* 51 (forthcoming 2018).

does not discriminate on the basis of a particular viewpoint. The scandalousness bar does favor some kinds of speech over others, a danger sign when it comes to First Amendment analysis. But supporters of the status quo maintained that because trademark law involves the regulation of *commercial* conduct, it should enjoy a leeway not afforded to non-commercial speech regulation.

Shortly after the *Tam* decision, however, the federal court of appeals charged with review of PTO determinations declared the scandalousness prohibition unconstitutional as well. Erik Brunetti applied to register the trademark FUCT for various items of apparel, a mark that would have been easily rejected as scandalous in the past. Borrowing from *Tam*, the court declared that the scandalousness bar was unconstitutional because there was no legally sufficient government interest in policing offensive trademarks.¹⁰⁸ In the court's view, the scandalousness provision was nothing more than a fishing license for government bureaucrats to strike down particular marks they deemed "off-putting."¹⁰⁹

Central to the *Brunetti* court's analysis was a refusal to consider the scandalousness provision as targeting mere commercial speech. Instead, the PTO was engaging in "value judgements about the expressive message behind the trademark," making the provision subject to "strict scrutiny" and ineligible for the more relaxed First Amendment standard for evaluating commercial expression.¹¹⁰

Tam and *Brunetti* represent an abrupt departure in trademark law jurisprudence. In the past, the government's interest in protecting consumer sensibilities was affirmatively endorsed by legal authorities or taken for granted. After these rulings, FUCT and a host of other vulgar marks suddenly enjoyed the expectation of full federal trademark rights.¹¹¹

¹⁰⁸ In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2017).

¹⁰⁹ Id. at 1351.

¹¹⁰ Id. at 1340.

¹¹¹ Sarah Jeong, "A Supreme Court Ruling Has Opened the Floodgates to a Stream of Gross Trademarks," *The Verge*, July 25, 2017, <https://www.theverge.com/2017/7/25/16020666/us-trademark-law-disparaging-the-piss-tape-is-real>. Some contend that the reasoning of *Tam* and *Brunetti* will cause additional areas of trademark law that regulate on the basis of a trademark's expressive content to be declared unconstitutional under the First Amendment as well. Rebecca Tushnet, "The First Amendment Walks into A Bar: Trademark Registration and Free Speech," *Notre Dame Law Review* 92, no. 1 (November 2016): 381.

Fig. 19. Brunetti’s Trademark.¹¹²

Yet even as these decisions represent a break with the narrow world of trademark law precedent, they match a larger trend towards erasing the distinction between commercial and non-commercial expression. For decades, the Supreme Court designated commercial speech as an inferior sort of expression that deserved much less constitutional protection than non-commercial expression. In a unanimous 1942 decision, the Court declared that “purely commercial advertising” was not entitled to any First Amendment protection.¹¹³ Even when the Court reversed course in 1976, holding that commercial speech did warrant some amount of First Amendment safeguards, it still posited that the government deserved a wide berth in regulating such speech. Unlike other areas of First Amendment law that view government restrictions on expression with a jaundiced eye, the Court’s early commercial speech doctrine only required the government restriction be “reasonable” and not “more extensive than necessary.”¹¹⁴ Government prohibitions on an array of commercial speech—from the marketing of casino gambling to attorney advertising—were blessed by the Court.

This state of affairs began to change in the 1990s. An antipaternalist fervor, one that views any governmental attempts to regulate commercial expression with suspicion, gripped the Court’s commercial speech jurisprudence and continues in full force today. Although technically the Court still considers the First Amendment to apply less stringently to commercial speech, it has become increasingly hostile to government regulation of advertising. On multiple occasions, Justice Clarence Thomas advocated getting rid of the commercial speech doctrine altogether. “All attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible,” he wrote in a case involving limits on alcohol advertising.¹¹⁵ Similar reasoning caused the full Court to strike down state laws restricting the marketing of prescription drugs in an effort reduce health care costs and protect physician privacy. “The fear that speech might persuade provides no lawful basis for quieting it,” Justice Anthony Kennedy wrote for the majority.¹¹⁶

Although none of the commercial speech cases just referenced directly turn on the regulation of shock advertising meant to inflame our sensibilities, they are relevant nonetheless. When no distinction is made between the government’s remit in the commercial sphere versus its authority in the non-commercial sphere, any attempt to protect audience sensibilities from advertising becomes suspect. In an earlier era, the Court trusted the government to impose sensible restrictions on business communications for the benefit of consumers. Today, things have flipped and the concern is that government interventions will do more harm than good.

Take the case of government regulation of cigarette advertising. The Food and Drug Administration (FDA), concerned that its campaigns to reduce smoking had had little effect,

¹¹² “FUCT (clothing),” *Wikipedia, The Free Encyclopedia*, last revised May 24, 2018, accessed August 8, 2018, [https://en.wikipedia.org/wiki/FUCT_\(clothing\)](https://en.wikipedia.org/wiki/FUCT_(clothing)).

¹¹³ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

¹¹⁴ *Bd. of Trustees, State Univ. of NY v. Fox*, 492 U.S. 469, 480 (1989).

¹¹⁵ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 526 (1996) (Thomas, J., concurring).

¹¹⁶ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2670 (2011).

launched a requirement in 2011 that cigarette retailers carry graphic warning labels on cigarette packs to inform consumers of the health consequences of smoking. Images included a man smoking through a tracheotomy hole, a baby enveloped in smoke, and another man lying on an autopsy table with staples in his chest. The FDA's strategy made a certain amount of logical sense. Shock tactics were required, it was argued, given the massive advertising expenditures of the cigarette companies themselves. The FDA could not hope to compete with its own meager budget for advertising spending; the agency referred to its prior attempts to inform citizens about the health consequences of smoking as "like bringing a butter knife to a gun fight."¹¹⁷ Other countries had adopted similar graphic warnings on cigarette packaging for the same reasons. Moreover, this was not an example of a federal agency going rogue. Congress specifically authorized the FDA to require cigarette retailers to carry these graphic images in a 2009 law.

Fig. 20. One of the Graphic Images the FDA Sought to Require on Cigarette Packaging.¹¹⁸

Nevertheless, in 2012, a federal appellate court rejected the FDA's graphic warnings program as violating the cigarette companies' First Amendment rights. It concluded that the "inflammatory" visual warnings were "unabashed attempts to evoke emotion," and, hence, not deserving of the leniency historically afforded to government regulation of commercial speech. It seems that the court did not so much object to the use of shock tactics in advertising so much as it objected to the government employing these tactics, particularly if private businesses were forced to help promote the government's message. The government could mandate the carrying of information on product packaging, but not graphics "primarily intended to evoke an emotional

¹¹⁷ R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221 (D.C. Cir. 2012).

¹¹⁸ Mark Morgenstein, "Tobacco Giants Suing FDA over Warning Labels Mandate," *CNN*, August 17, 2011, <http://www.cnn.com/2011/HEALTH/08/17/cigarette.labels.lawsuit/index.html>.

response” or, even worse, “shock the viewer.”¹¹⁹ Persuasive appeals to emotion were fair game for private advertisers, but the court disapproved of the FDA’s efforts to do anything more than present raw facts for rational consumers to interpret. “In effect, the graphic images are not warnings, but admonitions,” the court chastised.¹²⁰

Like the FDA, the FCC’s authority to restrict outrageous advertising has been questioned in recent years. The FCC has long contended that it can police “indecent and profane” content on broadcast television and radio. In determining whether content is indecent, the FCC looks to “contemporary community standards” and whether “the material appears to have been presented for its shock value.”¹²¹ A seminal U.S. Supreme Court case from 1978, *FCC v. Pacifica Foundation*, upheld the FCC’s ability to prevent such content from being aired on broadcast television and approved of the FCC’s method for assessing whether content is “indecent.” Like the FCC, the *Pacifica* Court was concerned with commercial messaging that would outrage audiences. It was noted that in the particular broadcast at issue, the words the FCC deemed indecent were “repeated over and over as a sort of verbal shock treatment.”¹²²

Today, it seems unlikely that the Court would be so receptive to arguments about the government’s ability to regulate such non-obscene speech.¹²³ In fact, the Court has gone out of its way in a number of recent cases to not affirm the *Pacifica* decision. When actress Nicole Ritchie and U2 lead singer Bono both blurted out the word “fucking” on broadcast television, the FCC fined the responsible networks for violating its prohibition against indecency. The networks challenged the FCC’s determination and won, with the Court faulting the FCC for failing to observe the mechanics of administrative procedure and fair notice.¹²⁴ Another case involved sanctions against ABC-affiliated television stations for airing a television show that, in the FCC’s view, presented a female actor’s nudity “in a manner that clearly panders to and titillates the audience.” Again, the Court rejected the fines for being levied with inadequate notice, with Justices Ginsburg and Thomas authoring a terse concurrence maintaining that *Pacifica* was “wrong when it was issued” and that “time” and “technological advances” had made the decision even more objectionable.¹²⁵ The Court also refused to approve a half a

¹¹⁹ R.J. Reynolds Tobacco Co. at 1216.

¹²⁰ Id. at 1211.

¹²¹ [Complaints against Various Broadcast Licensees Regarding Their Airing of the Golden Globe Awards Program, FCC 04-43, 19 F.C.C.R. 4975 \(Mar. 18, 2004\).](#)

¹²² *FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (1978) (Powell, J., concurring in part and concurring in the judgment). A variety of US government agencies can potentially regulate outrageous advertising. Although they operate in certain defined spaces of the economy, their jurisdictions can overlap. The Federal Trade Commission files suit to prevent deceptive or unfair advertising practices, which could potentially include efforts to emotionally manipulate audiences. The FDA regulates drug advertising as well as some aspects of food and beverage advertising. The FCC sets advertising guidelines for broadcasters. The attorneys general of individual states can also challenge particular advertising actions.

¹²³ Kyle Langvardt, “A Model of First Amendment Decision-Making at a Divided Court,” *Tennessee Law Review* 84 (January 2017): 833, 842.

¹²⁴ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

¹²⁵ *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 259 (2012) (Ginsburg, J. & Thomas, J., concurring). (The implication of the concurrence seemed to be that the arrival of the Internet and cable television makes it discriminatory for the FCC to single out indecency on broadcast television while other media gets a free pass from government censors.)

million dollar fine against CBS for the exposure of one of performer Janet Jackson's breasts during the half-time show of the 2004 Super Bowl, further signaling its newfound reluctance to endorse government efforts to safeguard the sensibilities of commercial audiences.¹²⁶

This growing legal skepticism of government regulation of shock advertising leaves the United States out of step with much of the rest of the world.¹²⁷ In most foreign trademark systems, "generally accepted principles" prevent the registration of marks "consisting primarily of expletives or racial, ethnic, or religious slurs."¹²⁸ The United Kingdom's Advertising Standards Authority routinely polices advertising content for offensive (as well as misleading) content.¹²⁹ A group of Bulgarian female consumers successfully invoked Bulgaria's "Law on Consumer Protection and Trade Rules" against a beer commercial that depicted women as sexual objects.¹³⁰ A splashy television ad from Nike featuring LeBron James using his basketball acumen to defeat dragons and a kung fu master was banned by the Chinese State Administration of Radio, Film, and Television because it seemed to represent an assault on Chinese customs and tradition by a Western outsider.

¹²⁶ Lyle Denniston, "'Wardrobe Malfunction' Case Finally Ends," *SCOTUSblog*, June 29, 2012, <http://www.scotusblog.com/2012/06/wardrobe-malfunction-case-finally-ends/>.

¹²⁷ Mark Conrad, "Matal v. Tam—A Victory for the Slants, A Touchdown for the Redskins, But an Ambiguous Journey for the First Amendment and Trademark Law," *Cardozo Arts and Entertainment Law Journal* 36 (February 2018): 83, 137 ("The *Tam* ruling opens up a gap between the United States and the international community.").

¹²⁸ Griffin M. Barnett, "ICANN Morality Standards and the New gTLDs: A Comparative Analysis of Morality in International Trademark Law in the Internet Age," *Trademark Reporter* 103 (January 2013): 1214, 1230.

¹²⁹ Haroon Siddique, "Yves Saint Laurent Ad Banned for Using 'Unhealthily Underweight' Model," *The Guardian*, June 2, 2015, <https://www.theguardian.com/media/2015/jun/03/yves-saint-laurent-ad-ban-underweight-model>.

¹³⁰ Elena Millan and Richard Elliott, "Offensive Advertising, Public Policy, and the Law: The Rulings on the *Zagorka* Case," *Journal of Consumer Policy* 27, no. 4 (December 2004): 5.

Video 6. LeBron James Offending Chinese Sensibilities in 2004 Nike Commercial.

<https://www.youtube.com/watch?v=il5zqatb6Mg>.

The Law of the Platform

The antipaternalist turn in American commercial speech law does not mean that there is no longer any regulation of advertising shock tactics.¹³¹ Instead, the job of policing advertising

¹³¹ One other potential regulator of advertising outrage in the United States deserves mention. The Advertising Self-Regulatory Council (ASRC) sets policies and procedures for advertising industry self-regulation. In other words, the ASRC sets up a regime for advertisers to police advertisers. Yet sensationalist advertising remains largely outside of this regulatory body's purview. Instead, most of the ASRC's self-regulation involves aggrieved businesses challenging competitor advertising they consider untruthful or inaccurate. This stands in contrast with advertising self-regulation in other countries. For example, the United Kingdom's Advertising Standards Authority (ASA) enjoys a broader mandate, policing advertising not just for being inaccurate but for being offensive to particular groups or by relying on racial or gender stereotypes. Although most of the ASA's work (like the ASRC's) involves claim substantiation, it has investigated enough cases of shock advertising to offer some guidelines for advertisers. For example, it is widely known that the ASA has an "unwritten rule" allowing charities more leeway when it comes to shock advertising (Parry et al., "Shockvertising," 114). The ASRC prefers to avoid such questions.

outrage has been outsourced to private actors. Media interests have a long history of blocking ads considered vulgar or in poor taste. Sometimes such censorship is motivated by a desire to not inflame audience sensibilities; broadcasters and publishers do not want to risk alienating their larger audiences by running a shocking advertisement. At other times, this screening function is motivated by a desire not to offend other advertisers.¹³² For example, the broadcast television networks only dropped bans on comparative ads after the FTC threatened legal action over the practice in 1981.¹³³

Because of these concerns, television networks and newspapers have departments responsible for reviewing all matter, including commercials, for “compliance with legal, policy, factual, and community standards.”¹³⁴ Sometimes this review results in the revision or even refusal to air particular advertising content. Commercial clearance departments at television networks screen more than 50,000 ads a year.¹³⁵ Most of this review centers on concerns over false advertising and product disparagement, but separate from these concerns there is also the goal of preventing some forms of audience outrage. For example, the *New York Times*’ Standards of Digital Advertising says:

Advertisements that are, in the opinion of The Times, indecent, vulgar, suggestive or otherwise offensive to good taste are unacceptable. Taste is judgment in which time, place and context make vital differences. Each advertisement must, therefore, be judged on its own merits.¹³⁶

Invoking these standards, the *Times* refused to run an advertisement urging “moderate Muslims” to quit Islam because of the “vengeful, hateful, and violent teachings of Islam’s prophet.”¹³⁷ Nudity and swearing also trigger rejections for violating publishers’ rules for “taste and decency.”¹³⁸

Like television networks and newspaper publishers, new communications platforms like YouTube and Facebook have their own standards and practices for dealing with advertising outrage. Key differences exist between traditional advertising fora and these platforms, however, when it comes to policing shock advertising.

¹³² Bethonie Butler, “Is There Anything You Can’t Say on TV Anymore? It’s Complicated,” *Washington Post*, March 29, 2016, https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/03/29/is-there-anything-you-cant-say-on-tv-anymore-its-complicated/?utm_term=.388d1dab6130.

¹³³ Sivulka, *Soap, Sex, and Cigarettes*, 301.

¹³⁴ Museum of Broadcast Communications, Standards and Practices, <http://www.museum.tv/eotv/standardsand.htm>.

¹³⁵ Museum of Broadcast Communications, Standards and Practices, in *Encyclopedia of Television*, 2nd edition, ed. Horace Newcomb (New York: Routledge, 2004), 2186, 2187.

¹³⁶ “Advertising Acceptability Manual,” *The New York Times*, last revised 2015, accessed August 8, 2018, <https://www.nytc.com/wp-content/uploads/ADVERTISING-ACCEPTABILITY-2015.pdf>.

¹³⁷ Dave Bohon, “New York Times Runs Anti-Catholic Ad, But Refuses One Critical of Islam,” *New American*, March 21, 2012, <https://www.thenewamerican.com/culture/faith-and-morals/item/1130-new-york-times-runs-anti-catholic-ad-but-refuses-one-critical-of-islam>.

¹³⁸ Belinda Archer, “Can Your Readers Take It?” *The Guardian*, October 30, 2000, <https://www.theguardian.com/media/2000/oct/30/digitalmedia.pressandpublishing>.

The standards and practices for determining the boundaries of advertising outrage on social media are exceedingly vague. Take Facebook’s guidelines for acceptable advertising. “Adult content,” including nudity or even implied nudity, is prohibited.¹³⁹ According to one digital advertising expert: “That means you can’t do things like imply nudity, show too much skin or cleavage, or focus on unnecessary body parts. And yes, that counts even if it’s artistic or educational.”¹⁴⁰ “Graphic violence” may not be posted either, including imagery of violence with comments or captions showing “enjoyment of suffering” or “remarks indicating the poster is sharing footage for sensational viewing pleasure.”¹⁴¹

In addition to the adult content and graphic violence bars, Facebook has some further catch-all provisions. “Sensational content,” which Facebook defines as “shocking, sensational, disrespectful or excessively violent content,” is not allowed. Prohibited examples include images of a car crash and a gun pointing at the viewer of the ad. “Controversial content,” or “content that exploits controversial political or social issues for commercial purposes,” is also prohibited from Facebook ads. Facebook offers no further guidance for defining this term.¹⁴² In addition, all ads on Facebook must not violate Facebook’s “Community Standards.” Similarly, Instagram (which is owned by Facebook) requires all ads on its site to comply with a list of “Instagram Community Standards.” Included in these standards are prohibitions on nudity, hate speech, and “serious threats of harm to public and personal safety.”¹⁴³

These guidelines provide Facebook great latitude in calibrating the level of shock that can be faced by users. The prohibition on graphic violence is countermanded by the acknowledgement that “people have different sensitivities to graphic and violent content” and that Facebook allows some graphic content to be posted “to raise awareness about issues.”¹⁴⁴ Facebook made its Community Standards moderation guidelines public for the first time in April 2018. Even then, the standards offered little purchase for social media users, including advertisers, wanting to know what lines they could not cross. As one technology journalist commented, the published guidelines represent “a series of vague pronouncements [that] might make you feel sorry for the moderator who’s trying to apply them.”¹⁴⁵

Admittedly, the decision-making process of the standards and practices departments of newspapers and television networks can be opaque as well.¹⁴⁶ Sometimes, however, these departments provide detailed explanations of their decisions. For example, in 2009 NBC refused to air an ad from People for the Ethical Treatment of Animals (PETA) titled “Veggie Love.”

¹³⁹ “9. Adult Content,” Advertising Policies, Facebook, accessed August 8, 2018, https://www.facebook.com/policies/ads/prohibited_content/adult_content.

¹⁴⁰ Andrew Hubbard, “Facebook Ad Not Approved? How to Prevent It from Happening Again,” Andrew Hubbard blog, accessed August 8, 2018, <https://andrewhubbard.co/facebook-ad-not-approved/>.

¹⁴¹ “13. Violence and Graphic Content,” Community Standards, Facebook, accessed August 8, 2018, https://www.facebook.com/communitystandards/objectionable_content/graphic_violence.

¹⁴² Advertising Policies, Facebook, accessed August 8, 2018, <https://www.facebook.com/policies/ads/#>.

¹⁴³ Community Guidelines, Instagram, accessed August 8, 2018, <https://help.instagram.com/477434105621119/>.

¹⁴⁴ “13. Violence and Graphic Content,” Community Standards, Facebook, https://www.facebook.com/communitystandards/objectionable_content/graphic_violence.

¹⁴⁵ Sarah Jeong, “Turns Out Facebook Moderation Sucks Because Guidelines Suck,” The Verge, April 24, 2018, <https://www.theverge.com/2018/4/24/17276794/facebook-moderation-guidelines-community-standards-nudity-hate-speech>.

¹⁴⁶ Rebecca Tushnet and Eric Goldman, *Advertising & Marketing Law: Cases and Materials*, 3rd edition (2016), 123.

The commercial was meant to shock by showing a variety of women in lingerie (normally not a deal-breaker for network television) simulating sex acts with various vegetables. The commercial's tagline explained that "studies show vegetarians have better sex."¹⁴⁷ NBC rejected the ad for "depict[ing] a level of sexuality exceeding our standards." It explicitly detailed the objectionable scenes for PETA including "licking pumpkins" and "rubbing pelvic region with pumpkin."¹⁴⁸

Video 7. "Veggie Love" PETA Ad Rejected by NBC for Having "A Level of Sexuality Exceeding Our Standards."¹⁴⁹

<http://features.peta.org/VeggieLove/>. <https://youtu.be/-wDE9XpmDHE>

By contrast, those wishing to advertise on social media lack a body of precedent they can rely on or a real means of appealing adverse "community standard" determinations. This results in some glaring inconsistencies when it comes to policing advertising for "inappropriate" or "sensational" content. On Facebook, female nudity tends to run afoul of the guidelines while

¹⁴⁷ "NBC's Sexually-Explicit Super Bowl Ad Rejection Makes Us Blush," PETA, January 7, 2009, <https://www.peta.org/blog/nbcs-sexuallyexplicit-super-bowl-ad-rejection-makes-us-blush/>.

¹⁴⁸ "Rejected Super Bowl Ads: Veggie Love," *CNN Money*, last updated January 24, 2011, http://money.cnn.com/galleries/2011/news/1101/gallery_rejected_super_bowl_ads/3.html.

¹⁴⁹ "'Veggie Love,' PETA's Banned Super Bowl Ad," PETA, accessed August 8, 2018, <http://features.peta.org/VeggieLove/>.

male nudity does not.¹⁵⁰ “Handmade” art showing nudity and sexual activity can be posted, but digitally made art showing sexual activity cannot.

These inconsistencies are more of a feature than a bug. Online platforms depend on the attention-getting results of shock advertising as part of their business model. As noted, outrage is a more dependable marketing strategy online because the consumer is mediated, her reactions immediately gauged and communications recalibrated in response to those reactions. The online platforms that facilitate advertising outrage have adopted rules that maximize their discretion over potentially shocking advertising content and limit the ability of advertisers to predict what tactics will be vetoed by these private censors. The in-house barriers against outrageous advertising have always been porous. But, on the whole, social media’s standards appear to allow much more shocking content to reach audiences.

The other central difference between social media platforms and more traditional advertising outlets is that social media platforms are largely immunized from legal liability for the ads they choose to run. In 1996, Congress enacted the Communications Decency Act. Section 230 of the Act provides that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” This legal provision makes intermediaries like Google and Facebook immune from responsibility for ads that disparage, infringe, or defame. As a result, advertising content legally treated one way in offline environments is treated completely differently in online environments, all to the advantage of online publishers.

The immunity afforded by section 230 gives online platforms less incentive to block emotionally upsetting advertising than that faced by their analog peers. Publishers and broadcasters have to guard against potential legal repercussions from airing particular advertisements. Public display of an ad containing false or misleading information or defamatory material can subject not just the advertiser to legal liability but also the broadcaster or publisher of the ad as well. Thanks to section 230, social media sites do not face the same potential for liability. Although Section 230’s champions present the immunity provision as a necessary bulwark against lawsuits that would retard online innovation, its generous construction by the courts also signals a modern reluctance to use the judiciary to police advertising outrage.

Should the Law Address Algorithmic Outrage?

The law dealing with advertising and outrage reveals two primary things. First, recent changes in conceptualizing the interplay between commercial speech and the First Amendment leave the government with a limited role in curbing advertising strategies meant to shock and upset. Second, although online communications platforms have some mechanisms for policing objectionable advertising content, these mechanisms are enforced haphazardly and in a way that gives shock advertising a wide berth.

¹⁵⁰ Sapna Maheshwari and Sheera Frenkel, “Facebook Lets Ads Bare a Man’s Chest. A Woman’s Back Is Another Matter,” *New York Times*, March 1, 2018, <https://www.nytimes.com/2018/03/01/business/media/facebook-ads-gender.html>.

The question we are left with is whether a devolution of the power to regulate advertising's "taste" from government officials to private platforms is beneficial. What does the erosion of governmental authority in this sphere mean for sensitivity to gender and cultural differences? How will consumers respond to a steadily increasing diet of algorithmic outrage? So far this article has been descriptive, chronicling outrage as an advertising strategy and as an organizing principle for advertising's public and private regulators. In this final part, I want to offer a preliminary normative take on the problem of algorithmic outrage.

One way to assess the consequences of algorithmic outrage is to try to determine the amount of consumer agency remaining for consumers that are poked and prodded to feel anger, shock, and fear in the digital commercial ecosystem. Some might argue that consumers are simply making a rational tradeoff of their attention, their privacy, and their emotional equilibria for utility and convenience. Others would maintain that consumers are not able to make an informed bargain with modern communications platforms and have entered a kind of digital Skinner box that they cannot escape without legal intervention. We can't know which side is right at this stage. But we can try to place changes to the law of advertising outrage in a larger context to gain perspective on social media's role in public discourse.

The particularly American faith in the "marketplace of ideas" counsels a laissez-faire attitude toward all kinds of speech, including shock advertising. Good commercial taste will inevitably triumph over bad, and legal actors should allow all non-deceptive advertising, however crass or reprehensible.

The marketplace of ideas theory depends on a robust influx of different speech so bad ideas are chased out by the good. Some might argue that new communications technologies are producing a richer public discourse when it comes to commercial speech, just as the theory suggests. As the government's role in policing commercial morality recedes, businesses have been willing to use social media to wade into controversial social issues. Although not at the vanguard on such issues like Benetton, even mainstream companies like Nabisco and Starbucks strategically take stands on hot-button issues like gay rights and immigration with advertising built for sharing on social media. This may not constitute shock advertising, but it represents a related effort to court controversy to draw audience attention. We might view such efforts as enlarging the public sphere in a valuable way.

Fig. 22. Nabisco's Oreo Gay Pride Facebook Post from 2012.¹⁵¹

Yet, as communications scholar Zeynep Tufekci explains it, comparing the public sphere of just a few years ago with today's communications environment reveals some problems with the modern marketplace of ideas:

All this online speech is no longer public in any traditional sense. Sure, Facebook and Twitter sometimes feel like places where masses of people experience things simultaneously. But in reality, posts are targeted and delivered privately, screen by screen by screen. Today's phantom public sphere has been fragmented and submerged into billions of individual capillaries. Yes, mass discourse has become far easier for everyone to participate in—but it has simultaneously become a set of private conversations happening behind your back.¹⁵²

The concern with algorithmic outrage is that it neutralizes the ability of the marketplace of ideas to operate. Even as the techniques of digital marketing capture our attention, they discourage the open testing of ideas.

Deliberation is necessary for the marketplace of ideas to work and social media's current architectures are calibrated to discourage deliberation. Online messaging that offers nuance suffers in this environment, thereby draining the public sphere of the considered thought necessary for the marketplace of ideas to function. According to media theorist, writer, and documentarian Douglas Rushkoff, the techniques of social media rely on "imagery and language specifically designed to evade our logic and empathy" and to appeal instead to our "more

¹⁵¹ Patience Haggin, "Oreo's Rainbow 'Pride' Cookie Prompts Internet Controversy," *TIME*, June 27, 2012, <http://newsfeed.time.com/2012/06/27/oreos-rainbow-pride-cookie-prompts-internet-controversy/>.

¹⁵² Zeynep Tufekci, "It's the (Democracy-Poisoning) Golden Age of Free Speech," *Wired*, January 16, 2018, <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/>.

primitive brain regions” that respond only to the basic stimuli of “fear, hate, and tribalism.”¹⁵³ YouTube’s algorithm for serving up personalized playlists tends not only to reinforce personal biases, but to conduct this reinforcement with a diet of more extreme viewpoints.¹⁵⁴ As noted by journalist Sam Levin, “Creators who discuss [topics like mental health and disability] have argued that YouTube is failing them, while rewarding creators who produce offensive content.”¹⁵⁵ Algorithms for social sharing reward surface and snark, not information and ambiguity when it comes to all manner of posts from science communications to politics to commercial speech.¹⁵⁶ Describing the way in which Google curates the videos we see, which are monetized for advertising, Tufekci says: “It seems as if you are never ‘hard core’ enough for YouTube’s recommendation algorithm. It promotes, recommends and disseminates videos in a manner that appears to constantly up the stakes.” The platform leads “viewers down a rabbit hole of extremism, while Google racks up the ad sales.”¹⁵⁷

When considering the anti-deliberative effects of algorithmic outrage, the greatest concern may come from political advertising. Analysts predict that 2018 will be a record-breaking year when it comes to political ad spending online. Much if not most of this advertising will feature emotive, non-informational appeals. It has become clear in the past year just how simple it is to purchase ads featuring images and slogans meant to incense social media users without those users divining the true source of the message. Russian trolls placed ads like the one featured below to sow division among Americans.

¹⁵³ Douglas Rushkoff, “How Facebook Exploited Us All,” *Los Angeles Times*, March 25, 2018, <http://www.latimes.com/opinion/op-ed/la-oe-rushkoff-leaving-facebook-20180325-story.html>.

¹⁵⁴ Jack Nicas, “How YouTube Drives People to the Internet’s Darkest Corners,” *Wall Street Journal*, February 7, 2018, <https://www.wsj.com/articles/how-youtube-drives-viewers-to-the-internets-darkest-corners-1518020478>.

¹⁵⁵ Sam Levin, “YouTube’s Small Creators Pay Price of Policy Changes After Logan Paul Scandal,” *The Guardian*, January 18, 2018, <https://www.theguardian.com/technology/2018/jan/18/youtube-creators-vloggers-ads-logan-paul>.

¹⁵⁶ Adrienne Jeffries, “At 12, He Had a Viral Science Video. At 14, He Fears He Was Too Rude,” *New York Times*, April 2, 2018, <https://www.nytimes.com/2018/04/02/science/marco-zozaya-vaccines-video.html>.

¹⁵⁷ Zeynep Tufekci, “YouTube, the Great Radicalizer,” *New York Times*, New York Edition, SR6, March 11, 2018; digital version March 10, 2018, <https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html>.

Fig. 23. Instagram Ad Determined to Be Part of Russian Effort to Influence the 2016 US Presidential Election.¹⁵⁸

But it is not just foreign adversaries that deploy outrage as a tactic to stimulate voting among desired groups and depress it among undesired ones. Mainstream political consultants emphasize the same emotive, non-deliberative considerations as commercial brand managers.¹⁵⁹ Social media forms a central conduit for the distribution of these political messages.

Most of the analysis of 2016's political advertising focused on its "fake" character. Many widely-shared paid posts came from inauthentic, foreign sources and that featured claims

¹⁵⁸Andrew Swick, "Russia Loves a Shunned US Soldier," *Slate*, November 3, 2017, http://www.slate.com/articles/technology/technology/2017/11/russian_facebook_and_instagram_accounts_exploited_america_s_civilian_military.html.

¹⁵⁹Michael Serazio, "Branding Politics: Emotion, Authenticity, and the Marketing Culture of American Political Communication," *Journal of Consumer Culture* 17, no. 2 (2015): 225.

that were simply were not true. Some initiatives have already been taken to deal with this threat. A bipartisan bill (dubbed the “Honest Ads Act”) was designed to prevent foreign nationals from buying political ads on social networks. The bill gained traction in Congress and was endorsed, in principle, by Facebook and Twitter.

But there is more to fixing the problems of algorithmic outrage than simply policing advertising for factual misstatements. Customized shock advertising can be viewed as a new kind of intrusion on our inner selves. When advertisers can use social media to seed feelings of anger and fear at an individualized level, they are involving themselves in a particularly intimate way with our psyches. Emotions “are a category of human expression holding a special sensitive status, which argues for special protections against manipulation and experimentation.”¹⁶⁰

Perhaps the appropriate parallel in thinking about algorithmic outrage is the late nineteenth century. In this period, new techniques of mass advertising frightened elites who faced the specter of having their lives become an open book in the service of widely-circulated newspapers and manufacturers of mass-produced goods. Suddenly, anyone’s face and name could be seen by thousands. Shocked by the potential of new technologies to radically revise the boundaries of public and private life, a court characterized a life insurance company’s appropriation and broadcast of an unwitting citizen’s name and likeness in a newspaper ad as being “a slave . . . held to service by a merciless master.”¹⁶¹ Several other courts agreed, creating a new legal right to privacy, designed specifically to address some of the vulnerabilities unleashed by a new technological age.

Algorithmic outrage represents another technological challenge to the status quo. It intrudes on efforts to control our emotional states. It threatens to coarsen our discourse and sabotage our critical faculties, constantly invoking taboos relating to race, sex, and religion to provoke our attention but not our deliberation. Fear and anger are universal emotions yet they are being employed in a way that threatens to erode common ground among disparate groups. Legal solutions to this problem will not be easily drafted or agreed to. In fact, both historical and prudential concerns demand caution when the government seeks to restrict expression to protect audience sensibilities. At the same time, when the attention economy and the consensus needed for democratic governance are at odds, it seems clear which should give way.

¹⁶⁰ Luke Stark, “Algorithmic Psychometrics and the Scalable Subject,” *Social Studies of Science* 48, no. 2 (2018): 204, 207–9, <http://journals.sagepub.com/doi/pdf/10.1177/0306312718772094>.

¹⁶¹ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).