

## Photoshop Law: legislating beauty in the media and fashion industry

### ➤ Introduction

The fashion industry is a powerful trend-setter. Coupled with advertising, fashion permeates and pervades every aspect of our lives. The way in which fashion is presented is of great significance and far-reaching consequences.<sup>1</sup> Notably, it strongly influences people's eating behaviours, shaping the social desirability standard of beauty. A salient component of this standard is body shape and body weight.<sup>2</sup> Disconcertingly quaint however, this ideal is often represented by highly atypical women. Compared to other norms, the social norms of beauty are rather unusual; the ideal of beauty is somewhat glamorised, being also decoupled from the 'standard' prevailing in the society at large.

### ➤ Deviant eating behaviours

The fashion industry is alleged to promote the ideal which is unrealistic and completely unattainable.<sup>3</sup> Weight-related perceptions and psychological biases have concerning implications for physical and psychological well-being of individuals, especially those most vulnerable, the adolescent and women predisposed to eating disorders. Promoted norms are so persuasive, that they are capable of affecting personal self-esteem, increasing vulnerability to distress and even sparking off psychiatric disorders.<sup>4</sup>

### ➤ Legislating media excesses

The accumulation of research supports calls for educational interventions or information campaigns to help people with deconstructing advertising messages.<sup>5</sup> Yet, in many countries the problem with eating disorders grew so large that more direct intervention were demanded.<sup>6</sup> It accelerated the discussion on how to impel the media to present a more diversity of shapes. Various solutions were debated, usually boiling down to debiasing actions and preventive measures, such as: (i) bans on ultra-thin models (on runways, in ads and fashion magazines), (ii) restrictions on the use of digital edition techniques, and (iii) warning labels on slimmed or airbrushed images.<sup>7</sup>

---

\* Copyright © 2014 by Jaroslav M. Szewczyk, M.A. in Economics, LL.M, Ph.D. candidate in law at Jagiellonian University, Krakow. Email: [szewczyk.jaroslav@qamil.com](mailto:szewczyk.jaroslav@qamil.com)

I would like to extend my special gratitude to Professor Amnon Reichman (Haifa University) for his help and advice. Many thanks to Professor Ben Depoorter (Ghent University) and Professor Emanuela Carbonara (Bologna University), without their help it would have been hard to write this paper.

<sup>1</sup> Donovan K.C., *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, Notre Dame Journal of Law, Ethics & Public Policy 26(2), (2012): 606-9; For more information see: Kilbourne J., *Deadly Persuasion: Why Women and Girls Must Fight the Addictive Power of Advertising*, New York: The Free Press, (1999).

<sup>2</sup> Tové M.J., Reinhardt S., Emery J.L., Cornelissen P.L., *Optimum body-mass index and maximum sexual attractiveness*, Lancet 352, (1998): 548.

<sup>3</sup> Smolak L., *Body image* (in:) Worell J., Goodheart C.D. (eds.), *Handbook of girls' and women's psychological health: Gender and well-being across the lifespan*, Oxford, (2006): 69-76.

<sup>4</sup> Much depends on coping strategies and the level of norms' internalization. Self-deprecating strategies often lead to maladaptive behaviours like indulgence-eating or other eating disorders.

<sup>5</sup> The proposed interventions posit various remedies, from educational sessions focused on reinforcing a critical stance towards existing ideals, to presentations of distortion techniques; Clay D., Vignoles V. L., Dittmar H., *Body Image and Self-Esteem among Adolescent Girls: Testing the Influence of Sociocultural Factors*, Journal of Research on Adolescence 15(4), (2005): 451-77.

<sup>6</sup> Donovan (n. 1): 584-5.

<sup>7</sup> There have been also many non-governmental initiatives trying to address the same problem:

(1) *Dove Real Beauty Campaign*; arguably the most famous conceptual ad campaign organized by Dove to change 'the conversation about beauty'; It featured women that do not fit into the image of a perfect beauty promoted by the

➤ **Paper's goal**

This paper discusses the Israel's case, where in order to dispel misconceptions about photo images the state decided to enact the so-called Photoshop law.<sup>8</sup> The law opened a discussion on the government's right to intervene in the media industry. The law is construed as an attempt to curb media's discretion in manipulating featured photos. It is also considered a tool in a fight against growing number of eating disorders. The aim of this paper is to analyse the solutions introduced under the Israeli law. The analysis is conducted in the framework of the economic analysis of law. It concentrates on women's behaviours and only those for whom the fashion industry is germane (relatively young and presumably from western societies).

➤ **Paper's structure**

The paper is organized as follows:

In Part II, the supply side of bodily ideals is presented. This part discusses how the ideal of beauty is created and what factors bear on this process. It is divided into three sub-parts: (i) the first deals with general theories; (ii) the second concentrates on the ideals of beauty in the fashion industry; and (iii) the third covers how the ideal of beauty is mediated through advertising in the fashion magazines.

Part III details scientific research findings. They show that idealized portrayals of women have negative effects on women's perceptions of themselves.<sup>9</sup> It is believed that promotion of very slim figures leads to serious health problems, including eating disorders. Even if unrealistic portrayals may not be the major cause of the eating disorder epidemic, it seems that they are one of the prime contributing factors.

Part IV introduces legal and economical analysis. It deals mainly with efficacy and efficiency of the Photoshop law. In the legal section, the emphasis is put on expressive functions of law. However, it is also contemplated whether such law could pass the constitutional scrutiny in the U.S. In the economic section, a formalised model is presented. The offered model shows that in certain scenarios seemingly perverse behaviours might take place.<sup>10</sup> Nonetheless, it bears emphasising that apparently unhealthy behaviours are results of economic calculations, not bounded rationality.<sup>11</sup>

Part V sums up the explored concerns and final conclusions are drawn.

---

media. Another extremely popular campaign was released in 2006 named *Evolution*. It was a short movie demonstrating a transformation of a random woman into a fashion model. Finally, in 2013 Dove released another spot titled *Real Beauty Sketches: You're more beautiful than you think*, which is believed to be the most watched ad ever. In the short movie an FBI-trained artist sketches different women based on their own descriptions and afterwards according to descriptions provided by some strangers. At the end, the resulting drawings are juxtaposed showing the huge gap between self-description and others assessment.

(2) *You're not a sketch – Star Models*; an advertisement campaign organised to promote awareness of anorexia and eating disorders. Magazine ads display women looking exactly as if they were dragged from designers' sketchbooks.

(3) *The Real Barbie Project*; an initiative of Nickolay Lamm, who tries to re-create the world famous doll using real-world body measurements. The popular American icon is all but real. The aim of the project was to show that more realistic doll can also be attractive without implanting false conceptions about human's body.

<sup>8</sup> Adobe Photoshop is the photo editing software. It became so popular that these days in the common parlance 'to photoshop' means to digitally modify.

<sup>9</sup> Levine M.P., Murnen S.K., *Everybody know that mass media are/are not (pick one) a cause of eating disorders: A critical review of evidence for a causal link between media, negative body image, and disordered eating in females*, *Journal of Social and Clinical Psychology* 28, (2009): 9–42.

<sup>10</sup> For instance, a person who is obese may still overindulge itself. Conversely, a skinny person may eat sparingly behaving completely rational, i.e. trying to maximize its welfare.

<sup>11</sup> 'It is a corollary of 'a rational intertemporal maximizing process of a perfectly informed agent (...)', Dragone D., Savorelli L., *Thinness and Obesity: A Model of Food Consumption, Health Concerns, and Social Pressure* (June 10,

## 1. Creation of bodily ideals

Put simply, body weight preferences are shaped by struggling and excluding. For adaptive reasons people admire shapes that seem the hardest to attain. It is in line with environmental studies: If food is hard to come by, the society prefers larger bodies. In a society where there is so much food that it is hard to stay thin, a svelte figure is preferred.<sup>12</sup> However, there are also two other layers bearing on body preferences.

The first is definitely more profound, stemming from evolutionary theories: men prefer mates that look fecund and fertile. That is how the notion of 'prettiness' evolves;<sup>13</sup> being pretty means to be close to the population averages. Deviations from the averages are perceived as defects. The second layer refers to socio-cultural constructs (shaped, inter alia, through fashion advertising),<sup>14</sup> and the notion of rarity: in the recent decades slenderness has become a token of assertiveness, self-control and achievements. Besides, it is also in keeping with a new thread of research: neuro-aesthetics.<sup>15</sup>

Nowadays, the third layer is apparently the most important out of the three mentioned above.<sup>16</sup> Specifically, in the fashion advertising which is addressed particularly to women, who do not necessarily care what is beautiful from the evolutionary perspective.<sup>17</sup>

### 1.1 Standards in the fashion industry

In the fashion industry, the bodily ideals are even more intriguing. Fashion editors, most of all, want to write about aesthetics - it elevates the magazine's status. Thus, in the first place it is noteworthy to revert to the neurological explanations of aesthetic experience.

#### 1.1.1 Peak shift

The prominent champions of neuro-aesthetics, Vilayanur Ramachandran and William Hirstein, developed a universal theory underlying human artistic experience.<sup>18</sup> One of the most salient neural mechanisms mediating this experience was called: 'peak shift'. It

---

2010), LSE Research Paper No. 17, available at SSRN: [http://ssrn.com/abstract=1631744] or [http://dx.doi.org/10.2139/ssrn.1631744]:15.

<sup>12</sup> 'A substantial proportion of the variation between human societies might represent local adaptation to ecological conditions and would thus be very much amenable to evolutionary explanation': 618, 622 (in:) Nettle D., *Ecological influences on human behavioural diversity: A review of recent findings*, Trends in Ecology & Evolution 24 (11), (2009): 618-624; See also: Ember C.R., Ember M., Korotayev A., De Munck V., *Valuing thinness or fatness in women: re-evaluating the effects of resource scarcity*, Evolution and Human Behavior 26, (2005): 257-70; Tove'e M.J., Swami V., Furnham A., Mangalparsad R., *Changing perceptions of attractiveness as observers are exposed to a different culture*, Evolution and Human Behavior 27, (2006): 443-56.

<sup>13</sup> Etcoff N., *Survival of the Prettiest: The Science of Beauty*, Anchor, Reprint edition, (2000).

<sup>14</sup> Therefore liable to swift changes; See the journey through contemporaneous ideals of beauty: from 'the hourglass figure of Mae West' (1900), through busty Marlin Monroe (50'), slender and long-legged Twiggy Lawson (60'), to the 'waif-like, heroin-chic Kate Moss' (90'): Bahadur N., *It's Amazing How Much The 'Perfect Body' Has Changed In 100 Years*, The Huffington Post, available at: [http://www.huffingtonpost.com/2014/02/05/perfect-body-change-beauty-ideals\_n\_4733378.html], retrieved on 24.06.2014.

<sup>15</sup> Ramachandran V.S., Hirstein W., *The Science of Art: A Neurological Theory of Aesthetic Experience*, Journal of Consciousness Studies 6, 6/7, (1999): 15-51; Zeki S., *Inner Vision: An Exploration of Art and the Brain*, Oxford: Oxford University Press, (1999).

<sup>16</sup> Strahan E. J., Wilson A.E., Cressman K.E., Buote V.M., *Comparing to perfection: How cultural norms for appearance affect social comparisons and self-image*, Body Image 3, (2006): 211-227; Popenoe R., *Feeding Desire: Fatness, Beauty and Sexuality Among a Saharan People*, Routledge, (2003).

<sup>17</sup> Frederick D.A., Fessler D.M., Haselton M.G., *Do representations of male muscularity differ in men's and women's magazines?*, Body Image 2 (1), (2005): 81-6.

<sup>18</sup> Ramachandran (n. 15): 16; 'The essence of art, surely, is not merely to depict or represent reality - for that can be accomplished very easily with a camera - but to enhance, transcend, or indeed even to distort reality (...)', Ibid., 16f.

is a mechanism used to amplify the very essence of, or even distort, initial image to 'more powerfully activate the same neural mechanisms that were originally activated by the original object'.<sup>19</sup> The result is a 'super-stimulus', even if the image is more a caricature than a genuine reflection of reality.<sup>20</sup>

The 'peak shift rule' is reductionist to say the least.<sup>21</sup> Nonetheless, it grasps something which is clearly palpable in the fashion world. When some feature, some quirk or kink gets popular; soon it is enhanced and amplified even up to the level of caricature or burlesque. High fashion produces fables for adults. Haute Couture is not about reality; the aim is to create icons of beauty, not templates for people. Thus, when thinness is there, we can presume that models will only get thinner.<sup>22</sup>

### 1.1.2 Androgynous models

Secondly, it is apposite to mention fashion designers, who for some reason prefer to work with androgynous, very thin models.<sup>23</sup> It is apparent that the models chosen to walk down the runways resemble more prepubescent boys<sup>24</sup> rather than curvy women. While it seems unfair to blame just gay designers for the existing skinny standards, at least on the evolutionary level such an accusation seems persuasive. The gay designers, on average, find boyish females more attractive than those with more curvy shapes. Moreover, the tomboy body shape is harder to achieve than the voluptuous one, hence it is also more unique (exclusionary).

### 1.1.3 Class issue

Lastly, problems surrounding body weight become more and more a class issue. The rich are getting thinner, while the poor are getting heavier. Furthermore, the curvier are associated with maternal drudgery of multiple pregnancies, which also implies rather low social status. Fashion is aspirational. In consequence, people that aspire to belong to the elite, to distinguish themselves from the masses, strive to adopt shapes that most people cannot afford - svelte and slim.

## 1.2 Mediation of cultural norms

Norms of appearance are very salient, especially to women.<sup>25</sup> They are mediated through various channels. Firstly, through conversations, chit-chats and or even pejorative comments. Certain shapes are applauded, while others bad-mouthed (so-called: 'body-

---

<sup>19</sup> Ibid., 16f.

<sup>20</sup> Ibid., 18; Coveted features are pushed to the limits. Border traits deliver 'super stimuli'. Why? The explanation is evolutionary. The goal of vision is to do as little processing as necessary for a given purpose. If the purpose is to recognize the ideal of beauty, an observer focuses on the most distinct feature of the beauty ideal. If this feature is thinness, the most enthusiastic (aesthetically) reaction will be to super-thinness.

<sup>21</sup> Hyman J., *Art and Neuroscience* (in:) *Beyond Mimesis and Convention*, R.P. Frigg, M. Hunter, *Boston Studies in the Philosophy of Science* 262, (2010).

<sup>22</sup> There are many examples of various traits that when got trendy were heavily used by the fashion industry: e.g. diastema, dark circles under glazed eyes, thigh-gap.

<sup>23</sup> One of the most often recurring opinion concerns sexual orientation of designers; See also: Goss, F., *Stars of style (Influential gay individuals in fashion)*, *The Advocate* 735 (June 10), (1997): 27. It is believed that gay designers promote boyish look; See also: Odell A., *Are Gay Men to Blame for the Fashion Industry's Problems?*, *New York Magazine* [[http://nymag.com/thecut/2009/08/tracie\\_egan\\_blames\\_gay\\_men\\_for.html](http://nymag.com/thecut/2009/08/tracie_egan_blames_gay_men_for.html)], retrieved on 24.07.2014. Others claim that it has more to do with the manufacturing process and financial aspects. That is to say, garments that have less built-in shape are cheaper to produce and easier to design, and those hang more attractively on linear bodies; Craft K., *The Economics Of Skinny Models*, available at [[http://www.huffingtonpost.com/kira-craft/the-economics-of-skinny-m\\_b\\_126310.html](http://www.huffingtonpost.com/kira-craft/the-economics-of-skinny-m_b_126310.html)], retrieved on 23.07.2014.

<sup>24</sup> I.e. narrow hips, high cheekbones, angular jawlines.

<sup>25</sup> Strahan (n. 16): 211-27.

shaming')<sup>26</sup> or reviled (derogatory adjectives: 'chubby'). Some large sizes or shapes ('muffin-top'<sup>27</sup>) are ridiculed, whereas the famed size zero extolled as ideal.

Secondly, they are framed by clothes industry. There are brands that simply refuse to sell large sizes. In this respect the most blatant example provides the teen retailer Abercrombie & Fitch, which was conspicuously exclusionary. The brand overtly marketed its clothes exclusively to skinny and beautiful people.<sup>28</sup>

### 1.2.1 The role of advertising

However, the most influential medium is advertising, in particular when it appears in glossy magazines. It persuades people on two levels: (i) 'On the first level, it raises the anxiety (...) making the prospective consumer feel guilty, inferior, or somehow insufficient, and persuading [her that she needs] something to get rid of a particular 'intrinsic defect'.<sup>29</sup> (ii) On the second level, it claims to have a perfect solution. 'If the advertisement identifies and satisfies both of these criteria, a consumer is generally 'hooked'.<sup>30</sup> This mechanism is quite compelling; the problem is that it lives off people's anxieties and deeply rooted hang-ups. The success of the marketing campaign can be measured by the number of complexes that it managed to stir up.<sup>31</sup>

The most effective advertisement is a visual one. Typically, it comes across much clearer than a textual one. With the dawn of the mass communication, photography only gained on its significance. It is nowadays the most important channel whereby values, cultural norms and social myths are transmitted.<sup>32</sup> The visual message carried with advertising is shaped by various trend-setters, often very thin models sporting their bodies on the magazines' covers.<sup>33</sup> Besides, it is moulded by clothes designers<sup>34</sup> and fashion editors. Nonetheless, usually the most crucial role in creating the visual message is left to photographers and photo editors.

---

<sup>26</sup> The most famous designer with quite an experience in fat-shaming is Karl Lagerfeld, the creative director of Chanel. He was sued in France for defamation statements, allegedly having said, that: '*There are less than one percent of people who are too skinny. There are nearly 30 percent ... who are too fat. So let's take care of the zillions of the too fat before we talk about the percentage that's left*'; and '*Nobody wants to see curvy women on the runway*'; About his critics: '*They are fat mummies sitting with their bags of crisps in front of the television, saying that thin models are ugly*'; See also: [<http://www.thefashionlaw.com/karl-lagerfeld-is-being-sued-for-all-the-fat-comments/>], retrieved on 18.06.2014.

<sup>27</sup> Meaning the bulge of flesh hanging over the top of low-rider jeans; See: *Word of the Year by American Dialect Society*, (2006).

<sup>28</sup> See: Saner E., *Abercrombie & Fitch: for beautiful people only*, The Guardian, 28.04.2012, available at: [<http://www.theguardian.com/fashion/2012/apr/28/abercrombie-fitch-savile-row>], retrieved on 17.06.2014. It is a brand that does not offer women clothes in sizes larger than L. In the interview with Salon, the CEO said that: '*In every school there are the cool and popular kids, and then there are the not-so-cool kids (...) We go after the cool kids. We go after the attractive all-American kid with a great attitude and a lot of friends. A lot of people don't belong, and they can't belong. Are we exclusionary? Absolutely*'; See: [<http://www.salon.com/2006/01/24/jeffries/>], retrieved on 17.06.2014.

<sup>29</sup> Donovan (n. 1): 608.

<sup>30</sup> Ibid.

<sup>31</sup> Of course, an advertiser must be also effective in persuading that the solution is completely attainable, within a hand's reach.

<sup>32</sup> Donovan (n. 1): 607.

<sup>33</sup> They are openly presented as ideals of beauty, or so-called '*It Girls*'. The '*It Girl*' title is bestowed upon those that are perceived to be the most stylish, trend-setting and the most chic; to be the '*It Girl*' means to have an impeccable body and perfect style.

<sup>34</sup> The subject of fashion designers is particularly precarious. It is common knowledge, that in the view of designers clothes fall better on svelte models. The former editor of Australian Vogue Kirstie Clements in her book *The Vogue Factor* says that so-called 'fit models', i.e. working in workrooms are required to be extremely thin.

### 1.2.2 Photoshop: how to slim you down<sup>35</sup>

The fashion industry casually retouches their photos.<sup>36</sup> Even if a photo passes off for completely natural, it is always somehow modified.<sup>37</sup> Chiefly, already slim models are even further slimmed down and airbrushed.<sup>38</sup> The problem is, that vast majority of women do not fully realise this, or even if they do, they display heuristics that enjoin them to believe in unrealistic and glamorised ideal of beauty.

## ➤ Part II: Public Policy Considerations

### 2. Media influence on individual well-being

In the first place a cautionary note is needed. Problems connected with the promotion of unrealistic ideals concern mainly women. It is not to say, that the men are immune to the cultural norms, however definitely it is less of a problem. Women more frequently report body dissatisfaction ('normative dissatisfaction'),<sup>39</sup> more often diet and suffer eating disorders.<sup>40</sup>

#### 2.1 Self-deprecation

By and large, people are prone to self-serving biases ('self-flattery').<sup>41</sup> However, in terms of body weight, women tend to self-deprecate themselves.<sup>42</sup> Contrary to the social comparison theory, that typically downward social comparisons should be preferred, women usually choose upward comparisons: due to pervasive nature of the cultural norms women often compare themselves to superior targets ('irrelevant others'),<sup>43</sup> and avoid comparisons with people from lower socio-cultural circles.<sup>44</sup>

As noted by Erin Strahan et al.: 'When people know that they will be measured against unattainably high standards, it is not surprising that these standards come to be judged as much more pertinent than they logically should be.'<sup>45</sup> '(...) Models and celebrities are powerful examples of the cultural norms for thinness and beauty in our society. Because the average woman knows that she will be judged according to these cultural norms, images which reflect this norm may not be dismissed as irrelevant. In addition, women may misjudge the attainability of the standard, especially since the cultural norm often implies that weight and appearance are highly controllable.'<sup>46</sup>

---

<sup>35</sup> Photos are usually heavily doctored using image-editing software, of which the most popular is Adobe Photoshop Image Editor.

<sup>36</sup> Donovan K.C., *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, Notre Dame Journal of Law, Ethics & Public Policy 26(2), (2012): 581-3.

<sup>37</sup> Whether it is tummy tucking, so as to remove loose and sagging skin, contouring face lines to get a younger look, enhancing lips or eyes to achieve a more seductive face, diminishing thighs or swapping entire body parts, all is done to create the perfect image of otherworldly beauty.

<sup>38</sup> Although there are a lot of different techniques how to make the model look excellent, a special controversy concerns the body weight. The make-up and hairdo do not raise that many issues. Nobody screams fake! You do not look like this! The fashion industry is particularly criticized for promoting an unrealistic and unattainable body weight, i.e. twiggy, extremely thin and skinny.

<sup>39</sup> Rodin J., Silberstein L., Striegel-Moore R., *Women and weight: A normative discontent*, Nebraska Symposium on Motivation 32, (1984).

<sup>40</sup> Aruguete M.S., Yates A., Edman J., *Gender differences in attitudes about fat*, North American Journal of Psychology 8, (2006): 183-92.

<sup>41</sup> People usually perceive themselves as better than the average.

<sup>42</sup> Strahan (n. 16): 212.

<sup>43</sup> Logically it does not make sense. Top models represent 2% thinnest girls in the population.

<sup>44</sup> Strahan (n. 16): 212.

<sup>45</sup> Ibid., 222.

<sup>46</sup> Ibid., 213.

## 2.2 Media and eating disorders

In recent years there has been an accumulation of correlational research<sup>47</sup> showing that exposure to ultra-thin portrayals of models leads to depressed self-esteem or even eating disorders.<sup>48</sup> Although correlation does not imply causation and the link between media coverage and eating disorders is questionable, it is plausible that such a link indeed exists.<sup>49</sup> It would be unfair to blame only media.<sup>50</sup> However, even if it is only one of the factors, it appears to be quite relevant.<sup>51</sup>

## 2.3 Pro-Ana websites<sup>52</sup>

Elad Yom-Tov and Dana Boyd canvassed web searches for celebrities and models regarded anorexic<sup>53</sup> and peoples' searches for tips regarding anorectic behaviours establishing clear link between those two.<sup>54</sup> They used longitudinal search query data to analyse the connection between eating disorders and exposure to internet images of women allegedly anorexic.<sup>55</sup>

It turned out that: 'People who frequent pro-Ana sites appear to have higher levels of body dissatisfaction and eating disorders (...) viewing these sites appears to increase one's perception of being overweight and negative body perception may be linked to the development of eating disorders.'<sup>56</sup> Searches for presumably anorexic models ('HPAS models') were correlated with anorexic activity searches ('AASs'). Furthermore, searches for HPAS models more often preceded, i.e. triggered AASs.<sup>57</sup>

However, if anorexia is mentioned in a given piece of information, AAS hazards were significantly ameliorated: 'When media coverage (...) use the language of anorexia in conjunction with the celebrity, there is very little increase in searches related to anorexia. This suggests that coverage that simply focuses on the activities of the celebrity has a much greater potential to do harm than coverage that includes reference to their illness or perceived illness.'<sup>58</sup> It means that framing of information is important. If information about HPAS model is accompanied with information about eating disorders it helps to meliorate AASs hazards.

---

<sup>47</sup> Donovan (n. 1): 612-6.

<sup>48</sup> Cusumano D.L, Thompson J.K., *Body image and body shape ideals in magazines: Exposure, awareness and internalization*, Sex Roles, 37, 1997: 701-21; Strahan (n. 16): 223; and literature cited there.

<sup>49</sup> Harrison K., Cantor J., *The relationship between media consumption and eating disorders*, Journal of Communication 47, (1997): 40-67; Hamilton K., Waller G., *Media influences on body size estimation in anorexia and bulimia. An experimental study*, British Journal of Psychiatry 162, (1993): 837-40.

<sup>50</sup> There are many other factors (genetic, environmental, societal) that only if put together in a vulnerable individual lead to development of an eating disorder.

<sup>51</sup> Donovan (n. 1): 589-90.

<sup>52</sup> I.e. existing mainly on the internet phenomena encouraging girls to pro-Anorexic behaviours, weight-loss and self-starvation (Anorexic Propaganda: Pro-Ana).

<sup>53</sup> Identified as 2.5 % of all analysed celebrities (according to BING search engine), with the highest perceived anorexia scores (HPAS), hereinafter: "HPAS models".

<sup>54</sup> Yom-Tov E., Boyd D.M., *On the link between media coverage of anorexia and pro-anorexic practices on the web*, International Journal of Eating Disorders 47(2), (2014): 196-202.

<sup>55</sup> Usually with BMI below 18.5.

<sup>56</sup> Yom-Tov (n. 54): 196-7.

<sup>57</sup> Ibid., 198.

<sup>58</sup> Ibid., 200.

## ➤ Part III: Social Norms

### 3. Social constructivism

If dissemination of certain norms is undesirable, public policy considerations warrant legislative interventions, either to change or calibrate the norm. We know however, that cultural norms as well as eating behaviours are quite complex. The promoted ideal of beauty is a social construct.<sup>59</sup> It is embedded in the existing social structure, shaped by social norms and the social meaning.<sup>60</sup> Social constructs ‘come to see’ in a given context, being contested and rarely stable.<sup>61</sup> Different constructs might be possible at the same time, though not all of them are achievable by the governmental control.<sup>62</sup>

Having said that, it bears emphasising that the state has certain efficacy to influence the social constructs. To do this it has to have a thorough image of reality. In the social context, human behaviours are affected by: (i) internalized norms and values, (ii) exogenous restrictions (‘formal sanctions’), and (iii) informal social norms.<sup>63</sup> They will all be shortly addressed in the following sections.

#### 3.1 Social meaning

If certain body weight creates a stigma, whereas another generates acclaim, those two distinct reactions frame the social meaning. The body weight carries a message (‘semiotic content’) about the status, class and the lifestyle. Some of those associated features are independent of an agent,<sup>64</sup> for they cannot be changed.<sup>65</sup> Yet, they are treated as actions that can be rewarded or punished. Social meaning provides a semiotic resource to bully, to please or to take advantage of others.<sup>66</sup> To change the semiotic content it is necessary to change the text (‘body weight’), or the context (‘associations’).<sup>67</sup>

#### 3.2 Social norms

‘For most economists, a norm is merely a behavioural regularity that can be measured by the mean or median behaviour within a reference group, such that any deviation from the norm results in an observable cost.’<sup>68</sup> The problem with this approach is that it identifies behavioural regularities but not the existing norms. Certain norms clearly exist even if people have problems with respecting them. Furthermore, the social norm is a matter of a degree, rather than all or nothing proposition, enforced with different strength in various contexts.<sup>69</sup>

---

<sup>59</sup> Unger R.M., *Social Theory: Its Situation and Its Task 1*, Cambridge, (1987); Watzlawick P., *The Invented Reality: How Do We Know What We Think We Know: Contributions to Constructivism 15*, Norton, (1984).

<sup>60</sup> The media construct an image, a template of appropriate body weight, thus constraining the social world in which women live; See also: Lessig L., *Social Meaning*, The University of Chicago Law Review 62, (1995): 943-1045.

<sup>61</sup> Ibid., 959-60.

<sup>62</sup> Ibid., 948, fn. 19; See also: Bourdieu P., *The Force of Law: Toward a Sociology of the Juridical Field*, The Hastings Law Journal 38, (1987): 805-53.

<sup>63</sup> Social norms act as social multipliers on effects of public policies, i.e. allow achieving better results without resorting to formal sanctions. It means that if the state wants to influence existing situation it does not have to rely only on formal sanctions, often ineffective, but can leverage expressive features of law.

<sup>64</sup> Social meaning draws its force from associations, biases and heuristics (shortcuts in the process of understating).

<sup>65</sup> Like a black person cannot change its skin colour.

<sup>66</sup> Lessig (n. 60): 956.

<sup>67</sup> Ibid., 962.

<sup>68</sup> Etilé F., *Social norms, ideal body weight and food attitudes*, Health Economics 16, (2007): 946.

<sup>69</sup> Axelrod R., *An evolutionary approach to norms*, The American Political Science Review 80(4), (1986): 1095-1111.



### 3.2.1 Norms as prescriptions

In the behavioural theories of law we can find many definitions of social norms.<sup>70</sup> However, the norms regarding fashion, tastes or body image are particularly puzzling. It is not enough to say that the social norm is a convention with an obligation to obey.<sup>71</sup> They are more complex, described by George Akerlof and Rachel Kranton as ‘prescriptions’.<sup>72</sup> They introduced to the analysis of people’s behaviours the ‘person’s sense of self (identity)’. The prescriptions affect identity, shaping individual’s utility function. The actual behaviour bears upon individual’s utility: ‘violating the prescriptions evokes anxiety and discomfort in oneself and in others’.<sup>73</sup> The prescriptions are context-dependent and bound to social categories: people identify with certain groups (‘significant others’)<sup>74</sup> and differentiate from others.

Since this approach substantially expands economic analysis, it will be very helpful in the next sections. It posits that: (i) ‘identity can explain behaviour that appears detrimental’<sup>75</sup> (e.g. body-tattooing or self-starvation); (ii) identity creates externalities for (and evokes adaptive responses in) others;<sup>76</sup> (iii) preference are malleable to manipulation, and (iv) ‘because identity [and its constraints for that matter] is fundamental to behaviour, choice of identity may be the most important “economic” decision people can make’.<sup>77</sup>

When it comes specifically to eating disorders and how they are engendered, a good extension of Akerlof and Kranton’s theory is a model devised by Joan Costa-Font and Mireia Jofre-Bonet.<sup>78</sup> They use the concept of ‘identity’ as a determinant of health, showing a trade-off between the social acceptability and health. They demonstrate how health is traded off against self-image and how increased average BMI of a peer group reduces probability of anorexic behaviours.

### 3.2.2 Signalling theory

Currently, the social norm for body weight is the norm of thinness. Being thin is associated with coveted attributes. This social norm provides a number of ‘cultural phenomena that prescribe and proscribe [eating] behaviours in specific circumstances’.<sup>79</sup> The question arises, why such a norm exists?

Surely it is a complex phenomenon, partially explained in the section (1.2.1): they help to sell products. However, this explanation is not good enough. It behoves to add one particular explanation from the field of behavioural law: an account under which the

---

<sup>70</sup> Scott R.E., *The Limits of Behavioural Theories of Law and Social Norms*, Virginia Law Review 86, (2000): 1603.

<sup>71</sup> Ibid., 1610.

<sup>72</sup> Akerlof G.A., Kranton R.E., *Economics and identity*, Quarterly Journal of Economics 115, (2000): 715-54.

<sup>73</sup> Ibid., 716-7.

<sup>74</sup> *Etilé* (n. 68): 948; and literature cited there. This concept of the ‘significant others’ is handy but also ambiguous. It is worth noting that the more salient the cultural norms are, the more upward social comparisons are made (e.g. comparison with models, celebrities, stars). When the cultural norms are less salient, comparisons are made rather with relevant peers (people of similar characteristics); See also: *Strahan* (n. 16); and regarding self-esteem: Puhl R.M., Heuer C.A., *The stigma of obesity: a review and update*, Obesity 17, (2009): 954-5.

<sup>75</sup> Ibid., 717, 721; ‘People behave in ways that would be considered maladaptive or even self-destructive by those with other identities. The reason for this behaviour may be to bolster a sense of self or to salve a diminished self-image’, Ibid., 717.

<sup>76</sup> Ibid., 717; E.g. a man wearing a dress: evokes adaptive reactions like baiting and mocking; and creates externalities for undermines identity of being a real man.

<sup>77</sup> Ibid., 717.

<sup>78</sup> Costa-Font J., Jofre-Bonet M., *Anorexia, Body Image and Peer Effects: Evidence from a Sample of European Women*, *Economica* 80, (2013): 44-64.

<sup>79</sup> Hechter M, Opp K-D, *Social Norms*, Russell Sage Foundation: New York, (2011): xi; cited after *Etilé* (n. 68): 946.

social norm is defined as the 'equilibrium-signalling behaviour'.<sup>80</sup> People want to be thin not only because they have internalized the norm, but also to attract the best 'cooperative partners'.

Engaging in different cooperative relationships, whether commercial, social or intimate, people try to persuade others that they possess sought after attributes. Since being thin carries good associations, through 'thinness' people want to signal that they belong to the 'good type'. The signalling theory is based on 'signals', i.e. behaviours or characteristics that are costly to send but have function of disclosing information about the person who sends the signal.<sup>81</sup>

The signal is highly defective and often confusing: (i) some people are thin but do not possess coveted characteristics (thus they 'free ride' on the signal), (ii) some have desired attributes but send the bad signal (thus they suffer negative externalities<sup>82</sup>), lastly (iii) some try to mimic the good signal (*via* costly and short-term diets, medical surgeries or photo edition). Nevertheless, these signals are still being sent, even if inadvertently. The strength of the signal has huge significance, for if the same signal was sent by everyone, it would become ineffective at revealing the type.<sup>83</sup>

In order to sieve out the good types and get rid of the mimics, another signal is used: i.e. 'I am thin but still eating like a normal person'.<sup>84</sup> It is believed that only a genuinely thin person can afford to eat a lot and stay thin. Therefore, only those types are the 'real good types'.<sup>85</sup> Moreover, there is a danger of overshooting: a person may think that the stronger the signal, the better, which obviously not always is the case.<sup>86</sup>

### 3.3 Internalization

Whether we think about bodily ideals in terms of prescriptions or signals, to certain extent they get always, at least partially, internalized.<sup>87</sup> The compliance with the norms is 'sustained by the feelings of embarrassment, anxiety, guilt and shame that a person suffers at the prospect of violating them'.<sup>88</sup> As a result person's behaviour is dictated not by exogenous social constraints but rather endogenous preferences. It seems that 'although most individuals express awareness of (...) societal norms, not all internalize

---

<sup>80</sup> Posner E.A., *Law and Social Norms: The Case of Tax Compliance*, Virginia Law Review 86, (2000): 1788.

<sup>81</sup> Ibid., 1787.

<sup>82</sup> Even if someone is indifferent to existing norms, she is not impregnable to them. They follow people around everywhere like eternal soundtrack to life. Creation of a norm entails production of externalities. Fashion industry promoting certain body image imposes on others social costs. Even if someone is not aware of existing norms of beauty it will be affected on the labour market, on the market for couples, during dates, in all possible social situations. Right signals are rewarded (*positive externalities* – positive discrimination) whereas the bad signals are somehow penalised (*negative externalities* – negative discrimination).

<sup>83</sup> Those rewarded are applauded because their weight is 'better' than the median or mean among the population. If everyone conforms to the norm, nobody gets rewarded anymore.

<sup>84</sup> Mayer M., *You Did Not Eat That' Is Our New Favorite Instagram Account*, Huffington Post [[http://www.huffingtonpost.com/2014/05/25/you-did-not-eat-that-instagram\\_n\\_5378919.html](http://www.huffingtonpost.com/2014/05/25/you-did-not-eat-that-instagram_n_5378919.html)], retrieved on 27.07.2014.

<sup>85</sup> An unintended consequence might be however an eating disorder like bulimia.

<sup>86</sup> It can contribute to another eating disorder like anorexia.

<sup>87</sup> For the most important analysis of internalized behaviours see: Becker G.S., *Accounting for Tastes*, (1996) with concepts of personal and social capital; and Cooter R., *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, Boston University Law Review 78, (1998):903-30; Cooter R., *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, Virginia Law Review 8 (86), (2000): 1577-601, with the idea of 'Pareto Self-Improvement'.

<sup>88</sup> Elster J., *Social norms and economic theory*, Journal of Economic Perspectives 3 (4), (1989):100.

them [however it seems that] internalization predicts body dissatisfaction better than does awareness.<sup>89</sup>

#### ➤ Part IV: Legal and Economical Analysis

#### 4. Analysis of the Photoshop law

The Photoshop law, that is: Act Restricting Weight in the Modelling Industry was passed into law on March 19, 2012.<sup>90</sup> It was the first law of this kind in the world.<sup>91</sup> The new legislation requires a clear labelling of pictures that have been digitally-altered to create a slimmer portrayal of a model.<sup>92</sup> The warning has to be put in a prominent place and cover at least 7 percent of the total advertising space.<sup>93</sup> If the marketing campaign has been produced abroad still it must comply with law otherwise it cannot appear in Israel.

Furthermore, as of January 1, 2013, it is prohibited to produce any advertisement that depicts an adult model without a medical authorization certifying that her/his body mass index (BMI<sup>94</sup>) is at least 18.5.<sup>95</sup> The authorization must be issued by a medical

---

<sup>89</sup> Clay (n. 5): 456.

<sup>90</sup> The full text of law (in Hebrew: *הדוגמנות בתעשיית משקל הגבלת חוק*) is available at: [<http://simply-you.org/shared/law2012.pdf>]; The protocol No 44 of the Employment, Welfare and Health Committee meeting where the bill was discussed is available at: [<http://simply-you.org/shared/20120305-08-knesset.pdf>]; both retrieved on 02.06.2014.

<sup>91</sup> Although, the state of Israel is the first country that introduced restrictions on photo editors, similar initiatives were implemented or discussed in other countries even before. They went in different directions:

[1] France proposed quite strict, though limited in scope, anti 'Pro-Ana' law. The French law became binding from 15.04.2008. Its main purpose is to countervail proliferation of websites promoting 'Pro-Ana' activities. The law is applicable to advertisers, fashion magazines and website providers. It is illegal to publicly incite extreme slenderness ('*thinspire*') and provoke others to deprive themselves of food. Those found guilty might be sentenced to prison or fined with the punishment up to EUR 30.000.

[2] In 2006, Italy became the first country to ban size-zero models from the catwalks.

[3] The move was followed by organisers of shows in Madrid who prohibited models with BMI of 18 or less from catwalks. Furthermore, in 2010, Spain introduced advertising curfew before 10 p.m., meaning that slimming products are banned from television in the time when many children still sits in front of TVs; See: Tremlett G., *Spain curbs 'body image' ads on television*, The Guardian, 18 January 2010, available at: [<http://www.theguardian.com/media/2010/jan/18/spain-television-advertising>], retrieved on 18.06.2014.

[4] In Australia, the *National Advisory Group on Body Image* (2009) issued a report containing recommendations on how to respond to issues that are associated with negative body image. The recommendations are supposed to constitute the basis for a planned *Code of Conduct of the Media Industry*. Among recommendations were: (i) focusing on health and discouraging unhealthy diets; (ii) disclosing airbrushed images and encouraging less use of digital modifications; (iii) setting standard weight, size and/or BMI limits for models, (iv) encouraging more realistic portrayals of women; See also: Krawitz M., *Beauty is only photoshop deep: Legislating models' BMIs and photoshopping images*, *Journal of Law and Medicine* 21 (4), (2014).

[5] In 2014, a bill that specifically addresses image editing in advertising was tabled to the US House of Representatives. The proposed act, named *Truth in Advertising Act*, is meant to address the problem of post-production edition of photos; See: Olson C., Jensen S., *Photoshopped Fashion Ads Should Be Labelled* [<http://www.businessoffashion.com/2014/06/op-ed-photoshopped-fashion-ads-labelled.html>] retrieved on 24.07.2014.

<sup>92</sup> That it constricts peripheral body shape. For different labels proposed in various countries (Brazil, France, Great Britain); See: *Donovan* (n. 1): 586-7.

<sup>93</sup> In order to debias through law.

<sup>94</sup> It is a measure of relative weight (thickness and/or thinness) expressed as a function (proportion) of body mass to body height:  $BMI = \text{mass (kg)} / (\text{height (m)}^2)$  - the weight in kilograms divided by the square of the height in metres ( $\text{kg/m}^2$ ); See: Keys A., Fidanza F., Karvonen M.J., Kimura N., Taylor H.L., *Indices of relative weight and obesity*, *Journal of Chronic Diseases* 25 (6-7), (1972): 329-43; and WHO Report (2000), *Obesity: preventing and managing the global epidemic*, WHO Technical Report Series 894, Geneva: World Health Organization, 2000. It is argued that the optimal body weight is when a BMI ranges from 18.5 to 25. BMI below 18.5 betokens underweight (indicating malnutrition, eating disorders or other health problems), while above 25 (upper limit) bespeaks problems with overweight (above 30 – obesity).

practitioner within three months prior to the date of the photo shooting. The BMI cut-off point is arbitrary, at best, however the limit had to be put somewhere and BMI 18.5 is widely recognized as the threshold for malnutrition.

The intention of law is twofold: a primary goal is to rid advertising from ultra-thin models ('insulation approach').<sup>96</sup> A secondary goal is to limit the use of Photoshop for slimming purposes. It is believed that those two elements, (i) presentation of skinny models, and then (ii) even further modifying their silhouettes, have particularly harmful impact on women's health and overall wellbeing. Furthermore, passing off manipulated images as real is misleading and aimed at deceiving customers (recipients of ads). Therefore, it was considered legitimate to require a clear disclosure of any photo manipulations. It is believed that such a disclosure can be a signal of 'false expectations' or an 'unattainable standard'.<sup>97</sup>

#### 4.1 Efficacy of law: formal sanctions

The bill became law in 2012 and then went into effect on January 1, 2013. As a token of a clenched-teeth compromise it was agreed that the law would be only civil in nature. Consequently, in case of any infringement the only available option is to sue for damages. In reality, it might mean that the law is rather toothless, since any court proceeding will be fraught with difficulties. It can be reasonably posited that they will relate to: (i) causation, (ii) the scope of legal action, and (iii) available evidence.

(i) For rather obvious reasons, it will be difficult to establish a sufficient causal link between an infringement and losses (harm) sustained. In view of the existing research and available psychological tools, it is virtually granted that plaintiffs will face problems with the proximity of cause. In case of eating disorders, there are always some prior causes (like education, upbringing) and superseding intervening causes (like fights with peers).

(ii) Under the law, people suffering from eating disorders (or their siblings) can bring allegedly liable persons to the court and demand damages (as compensation for costs of healthcare, medications, pain and suffering? etc.). It is however still uncertain how far the plaintiff's requests can go.

(iii) Even though it is mandatory to keep the authorizations and original photos (for comparison purposes) for a specified period of time, access to these sources might be limited and advertisers may fail to produce the records.

#### 4.2 Behavioural law theories

Since the violations can be treated only as tortuous acts, public officers (police, prosecutors) do not have any incentives to monitor law compliance. Even if certain private organisations, like the prime advocate of the Photoshop law: the Israeli Center for Eating Habits Reform, might want to chase after all misfeasors, they lack the wherewithal to go after them. It is almost impossible to monitor all advertisers whether they abide by law or not.

Nonetheless, there is a silver lining and the overall situation might not be as dire as it seems. The civil nature of the law might be actually a benefit. The consolation stems

---

<sup>95</sup> Similar idea was entertained by British Fashion Council (BFC) in 2008, however due to some impracticalities and lack of support from Italy and France it was forfeited.

<sup>96</sup> Sunstein C.R., Jolls C., *Debiasing Through Law*, *Journal of Legal Studies* 35, (2006): 199-241.

<sup>97</sup> *Donovan* (n. 1): 591-2.

from the 'gentle nudges' theory proposed by Dan Kahan.<sup>98</sup> Secondly, the expressive law theory shows that not only formal sanctions are relevant after all. Often, just an enactment of law is sufficient to change people's behaviours.

#### 4.2.1 Gentle nudges v. hard shoves

Sometimes civil sanctions are better than criminal ones. This seemingly disingenuous conclusion is counterintuitive 'precisely because the criminal law, in distinction to civil law, is usually understood to reflect society's shared moral ideals, a feature of it that makes criminal law seem a promising vehicle for reforming citizens' attitudes.'<sup>99</sup>

However, it must be remembered that legislation like this (Photoshop law) is highly contested, particularly nowadays, when obesity seems much more grievous than ultra-thinness. Therefore, prosecution of advertisers could actually lead to countervailing effects, undermining the law itself. Introduction of more gentle - civil law, allows to build public support piecemeal. As the society grows accustomed to the enforcement of civil sanctions, the state might also become more prone to implement more condemnatory measures.

Furthermore, it is quite likely that public officers would shirk their duties of controlling advertisers and spots where ad campaigns are made anyway. The lack of interest from police and prosecutors would render this law ineffective. To avoid the law being disrespected or even resisted, probably it is better to bypass them altogether and begin with private actions. If they are properly publicised they can evoke quite impressive results.

#### 4.2.2 Expressive theories of law

In his work on social meaning Larry Lessig posited that, if the state is sensitive enough, it can reconstruct social constructs thanks to mere legal expression, i.e. without resorting to any formal sanctions.<sup>100</sup> If a legal norm carries the social meaning, just due to its expression ('formal promulgation') it can instill in people certain values or inculcate in them social disapproval toward certain acts or values. Cass Sunstein extended Lessig's analysis providing a model for norms' modification (*via* so-called: 'norm cascades').<sup>101</sup> Whereas, Robert Ellickson explained how the market for social norms may work in practise.<sup>102</sup>

Another layer to the expressive law theory added Richard McAdams proposing the 'esteem-based theory':<sup>103</sup> According to him, publication of the legal norm can modify normative behaviours of people by establishing consensual rules of approval and disapproval. A different theory was advanced by Robert Cooter, who suggested that law can influence individual preferences through internalization process, provided however that the state is able to: (i) align law with morality, (ii) rely on citizens' respect for law, and (iii) stimulate individuals to self-improvement.<sup>104</sup>

---

<sup>98</sup> Kahan D., *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem*, *Uni. Chicago Law Review* 67 (2000): 607-45.

<sup>99</sup> *Ibid.*, 642.

<sup>100</sup> Lessig (n. 60); See also: Lessig L., *The New Chicago School*, *Journal of Legal Studies* 27, (1998): 661-90.

<sup>101</sup> Sunstein C.R., *Social Norms and Social Roles*, *Columbia Law Review* 96 (4), (1996): 903-68; Sunstein C.R., Kuran T., *Availability Cascades and Risk Regulation*, *Stanford Law Review* 51(4), (1999): 683-768.

<sup>102</sup> Ellickson, R.C., *The market for social norms*, *American Law and Economics Review* 3(1), (2001): 1-49.

<sup>103</sup> In his view, legal expression can affect social norms via esteem channel; people can start to grant or withhold esteem in response to certain behaviours; See: McAdams R., *The Origin, Development, and Regulation of Norms*, *Michigan Law Review* 96, (1997): 338-433.

<sup>104</sup> Scott (n. 70): 1633.

The complication is that those theories are rather anecdotal and context-specific. Therefore, the state has to be very cautious to rely on them and solutions that they provide. It is not certain what will actually happen as a result of the Photoshop law introduction. However, based on those theories, there are good reasons to believe that even if toothless, the Photoshop law might be quite efficacious.

#### 4.2.3 Expressive functions of law

Although the formal sanctions provided for by the Photoshop law are rather weak, a simple fact that some acts became illegal has its own significance. Legal expression has a power to reconstruct the social meaning therefore it should not be underestimated. It can prompt public condemnation of the ultra-thin ideal and change people's behaviours (both, observed and internalised). It might happen for a couple of reasons:

- The Photoshop law obfuscates the signal that being thin bespeaks the 'good type'.<sup>105</sup>

The law itself and the publicity surrounding it spread information that this signal is quite often phoney. It is virtually a rule, that in advertising and the fashion media almost all photos are somehow doctored. Disclosure labels will demonstrate how pervasive this practice is. In turn, it will reduce the pressure put on women by their own socio-cultural circles.

- Visible marks of digital modifications are helpful in deconstructing advertising messages:

Women have often distorted visions of presented models; the disclosure requirement will be conducive to the aim of debiasing them from clear factual errors.<sup>106</sup> Consequently, the Photoshop law might inhibit internalization of the harmful norms. Cultural norms of ultra-thinness will be counterbalanced by visual signs of deception and internal motivation to abide by law.

- In particular within the fashion world, it can encourage as yet tacit majority (?) to speak up against promoted standards:

As long as there are no rules regarding the promotion of waif-like body shapes the coordination problem exists. It is unknown what the prevailing view on this matter is. When the law like this kicks in it establishes the rules of disapproval. As a result, it gets easier to reprove certain behaviours ('withhold esteem').<sup>107</sup> If someone's opinion is backed by the existing law it is easier to call on others to toe the line.

- The ban on skinny models may impede the promotion of unhealthy norms:

In the Ellickson's theory, models with BMI below 18.5 would belong with the group of 'actors'. Their behaviour affects the welfare of others.<sup>108</sup> In the Sunstein's parlance, especially the top models, could be described as the 'availability entrepreneurs'. Therefore, without going into details, the ban can be seen as a clampdown on the bad norms entrepreneurs.

#### 4.3 Disclosure requirement: experimental check

In the previous section it has been theorised why the Photoshop law might actually work. Yet, there have been also some attempts to test this through experimental studies.

---

<sup>105</sup> See: Section (3.2.2.) above.

<sup>106</sup> Sunstein (n. 96): 228.

<sup>107</sup> McAdams (n. 103).

<sup>108</sup> Ellickson (n. 102): 5.

The most apt question seems to be: whether the disclosure requirement alleviates any of the hazards connected with dissemination of unrealistic images of women?

A couple of studies have been conducted, however falling short on providing unambiguous answer. One of the studies showed clearly positive effects on body satisfaction level when warning labels were affixed to presented images.<sup>109</sup> However, subsequent studies did not find any benefits of such a practice.<sup>110</sup> Nonetheless, it is worth a note, that labels informing about unaltered photos ('Retouch FreeZone' or 'This image has not been altered') do not influence body dissatisfaction level (no negative effects either).<sup>111</sup>

Besides, from the public policy perspective, the studies like those conducted by Elad Yom-Tov and Dana Boyd,<sup>112</sup> indicate that it is better to popularize this law, as the 'anti-Anorexia law', than 'Photoshop law'. If a girl sees the disclosure that is required under anti-Anorexia law, it is more likely that she will not start searching for anorexia tips.

#### 4.4 Economic analysis

Despite the fact that the Photoshop law aims to address specifically the problems with eating disorders, it affects many other areas as well. Particularly, it can have some unintended consequences, like fostering obesity and overweight epidemic.

The formal model of eating behaviours was plotted by Davide Dragone and Luca Savorelli in the paper: 'Thinness and Obesity: A Model of Food Consumption, Health Concerns, and Social Pressure'.<sup>113</sup> It examines potential consequences of policies aiming to bring the desirability weight standard closer to a healthy body standard. The Photoshop law is intended to do exactly that.

##### 4.4.1 The formalised model

The authors advanced a dynamic model of utility maximizing agent.<sup>114</sup> The agent is forward-looking, trying to maximize its overall welfare. Each agent has its own individual healthy weight, but the ideal body standard is common for a whole reference group (G).<sup>115</sup> The reference group needs to be differentiated from the 'significant others'. The reference group is comprised of 'similar others', so people of at least similar age, occupation and gender.<sup>116</sup>

The norm of body weight will mean 'a restriction on the set of actions available to the agent, commonly shared by the members of the society and believed to be shared. The norm-followers act as enforcers by applying sanctions depending on the fulfilment of [the] norm.'<sup>117</sup> Hereinafter the norm will be treated as prescription.<sup>118</sup>

---

<sup>109</sup> Slater A., Tiggemann M., Firth B., Hawkins K., *Reality check: An experimental investigation of the addition of warning labels to fashion magazine images on women's mood and body dissatisfaction*, *Journal of Social and Clinical Psychology* 31, (2012): 105–122.

<sup>110</sup> Ata R.N., Thompson J.K., Small B.J., *Effects of exposure to thin-ideal media images on body dissatisfaction: Testing the inclusion of a disclaimer versus warning label*, *Body Image*, 10, (2013) 472-80; Tiggemann M., Slater A., Bury B., Hawkins K., Firth B., *Disclaimer labels on fashion magazine advertisements: Effects on social comparison and body dissatisfaction*, *Body Image*, 10, (2013): 45-53.

<sup>111</sup> Tiggemann M., Slater A., Smyth V., 'Retouch free': *The effect of labelling media images as not digitally altered on women's body dissatisfaction*, *Body Image* (2013): [<http://dx.doi.org/10.1016/j.bodyim.2013.08.005>].

<sup>112</sup> Yom-Tov (n. 55); Section (2.3.) above.

<sup>113</sup> Dragone (n. 11).

<sup>114</sup> The agent faces an intertemporal (t) problem of utility maximization. The discount rate is given as ( $\rho$ ).

<sup>115</sup> The assumption is that healthy weight is different for every individual (heterogeneous).

<sup>116</sup> *Etilé* (n. 70): 949; and literature cited there.

<sup>117</sup> In accordance with Villatoro D., *A Taxonomy of Social Norms*, available at: [<http://www.iiia.csic.es/files/pdfs/NormClassification.pdf>] retrieved on 27.06.2014, 5.

The observable behaviour will be: under- or over- eating ( $\mu^E$  or  $\theta^E$ ) and observable results will be: under- or over- weight ( $\mu^W$  or  $\theta^W$ ). The generic utility function of an agent  $i$ , is contingent upon three elements:

---

<sup>118</sup> *Section (3.2.1) above.*



## F ( $U_{i,G}$ ):

- (a) Food consumption,  $c_i$ , (being also a body weight predictor,  $w_i$ )<sup>119</sup>  $\{c_i, w_i\}$  subject to a formula:  $w_i(t) = c_i(t) - \zeta w_i(t)^{120}$
  - (b) Individual health weight standard,  $w_i^H$ , and  $w_i^H$
  - (c) Social desirability weight standard,  $w^G$ .  $w^G\}$
- $\rightarrow U_{i,G}$
- 

### 4.4.2 The utility function

It is assumed that the more the agent's body weight departs from her individual health standard, the greater should be the reduction in her health.<sup>121</sup> Furthermore, the difference between body weight and the desirability weight standard is costly, i.e. the agent suffers disutility costs when ( $w_i$ ) does not comply with ( $w^G$ ).<sup>122</sup>

Every agent  $i$ , belonging to a social group ( $G$ ) has her individual utility function ( $U_i$ ;  $c_i$ ). Endogenous variables are: ( $c_i$ ) > 0 and ( $w_i$ ) > 0; while ( $w^G$ ) is exogenously shaped by the social group. The utility from the food consumption depends on calories intake ( $c_i$ ) and the satiety level ( $c_i^F$ ). The generic formula of the individual utility function is following:

### 4.4.3 Generic Utility Function

$$U_{i,G}(c_i, w_i, t) = c_i(t)(c_i^F - c_i(t)/2) - 1/2(w_i(t) - w_i^H)^2 - \beta/2(w_i(t) - w^G)^2 \quad 123$$

or:  $BMI_i$  in lieu of ( $w_i$ )

$$U_{i,G}(c_i, BMI_i, t) = c_i(t)(c_i^F - c_i(t)/2) \quad 124 \quad - \quad 1/2(BMI_i(t) - BMI_i^H)^2 \quad 125 \quad - \quad \beta/2(BMI_i(t) - BMI^G)^2 \quad 126$$


---

<sup>119</sup> The agent has perfect information regarding her metabolism, in particular how eaten calories affect her body weight. The body weight ( $w$ ) depends on calories intake and expenditure. The agent cannot pick and choose her weight: *Dragone* (n. 11): 2, 7.

<sup>120</sup> It means that with time ( $t$ ) body weight changes according to a certain law of motion. In the presented formula ( $\zeta w_i(t)$ ) indicates energy expenditure, qualified mainly by the basal metabolic rate (BMR), which depends on an individual body weight. This condition ensures that a dominant strategy for an agent might be  $oE$  or  $uE$ , not necessary always eating until satiation; See: *Dragone* (n. 11): 7, 8; and *Dragone D., A rational eating model of binges, diets and obesity*, Journal of Health Economics 28, (2009): 799-804.

<sup>121</sup> The health standard means that meeting this standard is optimal for the health of an agent.

<sup>122</sup> Levy A., *Rational eating: can it lead to overweightness or underweightness?* Journal of Health Economics 21, (2002): 887-99.

<sup>123</sup> See: *Dragone* (n. 11): 6.

<sup>124</sup> This is how the utility function would look like, if we abstracted from any health concerns and social norms regarding desirable body image. The agent would maximise its utility function by eating up to a point when it feels sated: ( $c_i^F$ ); (Max  $U$ ): [ $c_i(c_i^F - c_i/2)$ ] = 0.

<sup>125</sup> It means that the agent maximizes its utility if it has personal  $BMI = BMI^H$ , i.e. weighs exactly as it should according to medical standards.

<sup>126</sup> The agent maximizes its utility if her BMI sticks to  $w^G$ .

Utility function

**utility** from the food consumption

$c_i < c_i^E$  means undereating

whereas

$c_i > c_i^E$  means overeating

**disutility** suffered due to unhealthy weight<sup>127</sup>

$BMI \notin < 18.5; 25 >$

**disutility** suffered due to socially undesirable weight

$\beta \geq 0$  parameter

;presses the relevance of socially imposed costs borne by the agent.<sup>128</sup>

#### 4.4.4 Maximization of the utility function

Maximization of the utility function in time requires more advanced calculations with the use of integrals and derivatives.<sup>129</sup> Detailed calculations provided by Dragone and Savorelli will not be run here again. However, it is worth pointing out the most salient conclusions:

Dragone and Savorelli, mathematically proved that given the intertemporal problem of utility maximization, for each agent  $i$ , it is possible to find a saddle point stability. Every agent has her unique steady state of food consumption ( $c_i^*$ ) and body weight ( $w_i^*$ ).<sup>130</sup>

It can be demonstrated that the optimal strategy for an agent  $i$  might consist in  $\vartheta^E$  when she is very thin, or alternatively  $\mu^E$  when she is obese. It can be observed that along the optimal path leading to a steady state, the food consumption follows the trajectory of a decreasing function of body weight.<sup>131</sup>

$$\forall U_{i,G}(c_i, w_i, \vartheta): \exists S(c_i^*, w_i^*) \quad (1)$$

Steady state level

$$\begin{aligned} \max U_{i,G}(c_i, w_i, \vartheta) &\Leftrightarrow \\ mU(c_i) = mDU(w_i) &^{132} \end{aligned}$$

Optimal strategy: marginal utility of consumption equals marginal disutility of weight

(2)

<sup>127</sup> Emotional health is not dealt with, even though certainly agents suffer this type of disutility as well.

<sup>128</sup> They vary from adverse treatment to diminished chances to find a job or intimate partner. It is a corollary of the fact, that people with larger sizes are perceived as lazy, sloppy and wanting on self-discipline: Teachman B.A., Gapinski K.D.; Brownell K.D., Rawlins M., Jeyaram S., *Demonstrations of implicit anti-fat bias: the impact of providing causal information and evoking empathy*, Health Psychology 22(1), (2003): 68-78; Cawley J., *The impact of obesity on wages*, Journal of Human Resources 39, 2007, pp. 451-74; Morris, S., *Body mass index and occupational attainment*, Journal of Health Economics 25, 2006, pp. 347-64; Puhl (n. 74): 941-64; Hamermesh D. S., Biddle J. E., *Beauty and the labour market*, American Economic Review 84, (1994): 1174-94; Satoshi K., *Intelligence and physical attractiveness*, Intelligence 39 (1), 2011: 7-14.

<sup>129</sup> Dragone (n. 11): 15.

<sup>130</sup> Steady level of agent's consumption and body weight  $A(i): (c_i^*; w_i^*)$ .

<sup>131</sup> Dragone (n. 11): 8.

<b>When <math>\beta = 0</math>:</b>	If eating to satiation makes the agent $\phi^W$ If eating to satiation makes the agent $u^W$	Then the steady state is:	(a) $\phi^W$ and $u^E$ (b) $u^W$ and $\phi^E$	
<b>If <math>\beta \neq 0</math></b>	Subject to: $w^H, w^F, w^G$	the steady state might be:	(a) $\phi^W$ and $u^E$ (b) $\phi^W$ and $\phi^E$ (c) $u^W$ and $\phi^E$ (d) $u^W$ and $u^E$	<b>a healthy diet</b> when $w^G$ is very high when $\zeta$ is high when $w^G$ is very low

We can infer that given  $\beta \neq 0$ , the individual steady state crucially depends on  $(p^G)$ . If it is very high, quite likely an agent, though  $u^W$ , will still  $u^E$ . If it is very low, though  $\phi^W$ , she will  $\phi^E$ . These seemingly perverse effects will be a result of pure economic calculations (utility maximization). Of course such behaviour will be optimal only for certain agents. The final result is conditioned on several variables discussed above.

#### 4.4.5 Public policy implications

Nonetheless, when it comes to public policies, the valid question is whether an increase of  $(p^G)$  is welfare increasing or decreasing? Ultimately, it depends on a distribution of body weights (and  $w^H, w^F, w^G$ ) in a given population. Since the question regards the entire population of the group, the easiest way is to consider average variables.<sup>133</sup> Based on the generic utility function of an agent  $i$ , Dragone and Savorelli plotted the average utility function of the social group  $G$ . Using the joint density function they showed, that the ideal body weight that maximizes the average steady state utility of the group  $(p^{G^*})$  should be somewhere in between the average healthy weight and the average satiation weight.<sup>134</sup>

<sup>132</sup> Ibid., problem (13), 9-10.

<sup>133</sup> Dragone (n. 11): 11-2.

<sup>134</sup> Ibid., 12.

				steady state is:
If $w^G = w^{GI}$	and	$\overline{w^E} > \overline{w^{EI}}$ $\overline{w^E} < \overline{w^{EI}}$	then	(a) $o^W$ and $u^E$ (b) $u^W$ and $o^E$

Similar calculations can be done to find the ideal body weight that maximizes the average steady state health level ( $w^H$ ).<sup>135</sup> It should be: 'less than the average healthy weight if the group tends towards being overweight, and it is higher if the group tends towards being underweight'.<sup>136</sup>

Basically, the prime result of their study is encouraging: They showed that introduction of the policy aimed to change the unrealistically low body weight standard should be strictly welfare improving. In spite of the growing concerns regarding overweight, the shift of the skinny ideal of beauty towards healthier standard, should enhance public welfare mainly due to reduction of the social pressure. In particular:

If:

- In a group  $G$ , there is a tendency to be  $o^W$ :  $\overline{w^E} > \overline{w^{EI}}$ , and
- $(n^G) < (\overline{w^{EI}})$

Then:

Depending on how low is  $(n^G)$ , the average agent might be  $o^W$  or  $u^W$ . However, the latter might happen only if  $(n^G)$  is way below average health weight (very low). If  $(n^{EI})$  is equal to  $(n^G)$  then, in the steady state, an average agent is  $o^W$  and  $u^E$ .<sup>137</sup> Moreover, steps taken to move the very low social desirability weight standard closer to the average healthy weight of the group ( $G$ ) is strictly welfare improving.<sup>138</sup> It is also health improving, provided however that the current social desirability weight standard is extremely low, otherwise it can be health worsening.<sup>139</sup>

The deterioration of the average health may happen because, either the group ( $G$ ) is already  $o^W$  and becomes obese, or it may become  $o^W$ , whereas currently it is slightly  $u^W$ . Nonetheless, even if shift would be health worsening, it would still be welfare improving. The greater enjoyment from the food consumption and the reduced disutility stemming from the social pressure would compensate for the disutility caused by the worsened average health condition.<sup>140</sup> It is extremely important conclusion, for it means that under mentioned conditions, the policy aiming to increase the social desirability weight standard  $(n^G)$  closer to the average health weight  $(\overline{w^{EI}})$  will be always welfare improving.

The utility model provided very important, yet intuitive finding, that the eating behaviour and the steady weight crucially depend on social norms regarding the desirability weight standard  $(n^G)$ . If  $\beta \neq 0$ , the eating behaviours and weight are shaped by  $(n^G)$  and  $(\zeta)$ .  $(\zeta)$  indicates energy expenditure qualified mainly by the basal metabolic rate (BMR), therefore it is individual for every person. The only way in which the paternalistic state could influence this parameter is through promotion of

<sup>135</sup> Ibid., equation (18), 13.

<sup>136</sup> Ibid., 13.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid., proposition 2, 13.

<sup>140</sup> Ibid., 15.

active/passive style of life.<sup>141</sup> In turn, (*y*<sup>6</sup>) can be influenced in many ways, among others, through legislation like the Photoshop law.

#### 4.5 Paternalism: Freedom of Speech

The analysis of the Photoshop law cannot be limited to efficacy and efficiency. There are serious doctrinal issues that need to be shortly addressed as well. The photoshop law opened the discussion on the limits of the freedom of speech and the state's paternalism at large.<sup>142</sup> Where is the line between the public interest and the free speech rights of media and advertisers?

The new legislation bumped up against the right of the media industry to pitch the speech in the most commercially effective way.<sup>143</sup> The law that orders affixing special labels is in its core paternalistic. It compels media and advertisers to certain 'speech' because certain images might have negative effects on others. The ban on skinny models goes even further. It prevents some girls from pursuing their dreams of being professional models. It does so, because it is believed that their preferences are ill-formed and influenced by detrimental norms of beauty.<sup>144</sup>

If law like this was to be introduced in the U.S., it would have to be squared with the rights protected under the First Amendment. Although this problem did not arise in Israel - the Photoshop law did not engender serious legal problems - it evoked many discussions concerning the American doctrines. It is necessary to contribute to those.<sup>145</sup>

##### 4.5.1 Commercial speech<sup>146</sup>

Typically, the commercial speech receives less protection than traditional forms of protected expression.<sup>147</sup> Since interests of recipients (oft consumers) usually prevail over interests of speakers (oft companies) it is also more susceptible to compelled disclosure requirements (like warnings, disclosures and disclaimers).<sup>148</sup> States value dissemination of information for: 'disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information.'<sup>149</sup>

##### (a) Reasonable relationship test (*Zauderer*)

---

<sup>141</sup> It is worth pointing out that in the last decades the price of caloric expenditures has rather increased. In post-industrial societies people spend more time sitting than actively working. See: Philipson T.J., Posner R.A., *The long-run growth in obesity as a function of technological change*. Working Paper No. 7423, National Bureau of Economic Research, (1999).

<sup>142</sup> See: Pomeranz J.L., *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, Journal of Health Care Law, 12 (1), (2009): 159-95; Haynes, B.M., Andrews A. H., Jacob C.R., *Compelled Commercial Speech: the Food and Drug Administration's Effort to Smoke Out the Tobacco Industry through Graphic Warning Labels*, Food and Drug Journal, 68(4), (2013).

<sup>143</sup> *Donovan* (n. 1): 585-92.

<sup>144</sup> Sunstein C.R., Thaler R.H., *Libertarian Paternalism Is Not an Oxymoron*, The University of Chicago Law Review 70 (4), (2003): 1159-202.

<sup>145</sup> The aim of this paper is to analyse the Israeli law. Therefore, the American doctrine is presented insofar as it is necessary to outline given concerns.

<sup>146</sup> The commercial speech means an expression concerning economic interests of the speaker and/or its audience. Speech that does 'no more than propose a commercial transaction' is protected by the First Amendment; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. (1976): 748; See: *Donovan* (n. 1): 592-3.

<sup>147</sup> Relating to the 'public discourse'; See: *Central Hudson Gas & Electric Corp. v. Public Service Commissioner*, 447 U.S., (1980): 562-63.

<sup>148</sup> *Riley v. National Federation of the Blind*, 487 U.S. (1988):781, 796 n.9.

<sup>149</sup> *Ibanez v. Florida Department of Businesses & Professional Regulation*, 512 U.S. (1994): 136, 142.

When law mandates disclosure of information, because the speech could potentially mislead the recipients, the most lenient review standard is applied.<sup>150</sup> By and large, the state has considerable latitude in ordering disclosure of information, provided that it is: (i) purely factual,<sup>151</sup> (ii) properly justified and (iii) not unduly burdensome.<sup>152</sup> Otherwise, the law could be reviewed under *Central Hudson* intermediate standard,<sup>153</sup> or be deemed to intrude on the territory of actual ‘compelled speech’ which requires the strict scrutiny.<sup>154</sup>

**(b) Compelled speech (Wooley)**

The ‘compelled speech doctrine’ is aimed at discouraging the state from using private property as a ‘mobile billboard’ deployed to its own ends.<sup>155</sup> Accordingly, everyone has a right to refrain from being the courier of state’s ideological message. Therefore, if mandated information is tinted with ideological message the higher standard of review should apply. In my opinion, the disclosure requirements regarding photoshopped images should be reviewed under Zauderer’s reasonable relationship test.<sup>156</sup>

In view of this standard, the Photoshop law appears to be purely factual, restricted to advertisements and rather ‘innocuous’. It requires disclosure of information on digital slimming alterations, what is reasonable related to the public interest in preventing deception and protecting public health. It does not aim to disturb or dissuade the audience. It does not seem to be too burdensome either. As a result, it seems that this type of requirement could pass constitutional muster even in the U.S.<sup>157</sup>

**4.5.2 Restricted speech (Central Hudson)**

A bigger challenge could present the outright ban on models with BMI below 18.5. In the U.S. this type of restriction on commercial speech, most likely would fall under the intermediate scrutiny review.<sup>158</sup> Usually, a ban cannot stand legal scrutiny when it is too extensive, or it cannot be shown that such a step was indispensable in given circumstances. The state must not choose suppression over a less restrictive

---

<sup>150</sup> In the U.S. so-called: ‘reasonable relationship test’; See: *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. (1985): 626; There is no violation of the freedom of speech, so long as there is a ‘rational connection between the warnings’ purpose and the means used to achieve that purpose.’; *Discount Tobacco City & Lottery v. Food and Drug Administration*, 674 F.3d, (2012): 569-70 and *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104 (2001).

<sup>151</sup> If law compels addressees to express view that are not shared by them (or they do not agree with them) the law must pass ‘strict scrutiny review’; See: *Wooley v. Maynard*, 430 U.S. (1977): 705; and *West Virginia State Board of Education v. Barnette*, 319 U.S. (1943): 624.

<sup>152</sup> *R.J. Reynolds Tobacco*, 845 F. Supp. 2d 266, (2012): 273-4.

<sup>153</sup> *Central* (n. 147); Nonetheless, it seems that this standard should apply only to speech restrictions and not to information disclosures; See: *Haynes* (n. 142): 352-5.

<sup>154</sup> See: *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986).

<sup>155</sup> See: *Wooley* (n. 151): 715; and *Haynes* (n. 142): 356.

<sup>156</sup> Contrary to the opinion of Kerry C. Donovan, who claims that the proper test is *Central Hudson*; See: *Donovan* (n. 1): 609-20. It seems that she confuses two distinct situations: when the speech is restricted (*Central Hudson*), and when the speech is compelled (*Zauderer* or even *Wooley*).

<sup>157</sup> *Donovan* (n. 1): 581-620; Nonetheless, there are also opinions as this expressed in *Hurley* that a speaker’s right to free speech ‘applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.’ *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. (1995): 573.

<sup>158</sup> See: *Discount* (n. 150): 569; and *Central* (n. 147): 561-63; Some argue that if a restriction is ‘content-based’, then it falls under the strict scrutiny review. In such a case, the state could enact the restriction only if it is necessary to serve a compelling state interest and it is narrowly tailored to that end.

policy when less intrusive measures are available.<sup>159</sup> On top of that, it is often necessary to prove that the ban constitutes an effective solution.

The photoshop law is supposed to alleviate problems caused by dissemination of unrealistic portrayals of women. However, there are studies showing that various factors play a role in the development of eating disorders. They range from genes to parental and socio-cultural values. It is certain that media coverage bears heavily on women's body satisfaction levels.<sup>160</sup> However, it is not sure how it exactly translates into the eating disorders. Furthermore, there are less intrusive measures that could be introduced instead, and the efficacy of the ban is still uncertain. As a result, this type of ban would certainly be at risk of being vacated in the U.S.

#### 4.5.3 Freedom of artistic expression

Another problem arises when advertising is treated on a par with art. In such a case, restriction might mean attempts to abridge the 'freedom of artistic expression'.<sup>161</sup> In order to reach this conclusion, firstly one has to prove that ads are form of art. It seems that all depends on the context: some ads have artistic purposes, some are purely commercial. The Israeli law provides a buffer zone (Article 4), excluding certain forms of advertisement (advancing public interests) from disclosure and body weight limits requirements.

### ➤ Part V: Conclusions

#### 5. Concluding remarks

Promoted by media norms of beauty, in particular those regarding body weight and body shape contribute to the development of various psychological disorders. Media pressure and implicit associations implied from advertising lead to low self-esteem, elevated eating disorder symptoms, depression, harmful diets and so on (Part II).<sup>162</sup> It has been also made clear (Part I and III) that people's behaviours are often contrived by advertising and based on a digitally manipulated image of reality. By and large, before publication photos are heavily modified. As a result, people's preferences are often ill-formed and their choices, seemingly rational, produce ill-advised effects.

In such circumstances, states are called upon to act to prevent further damages. In response to such demands, the state of Israel enacted law that is supposed to alleviate growing eating disorders hazards (Part IV). However, this sort of 'paternalist intervention' is inevitably controversial. It generates questions about (i) law's justification (Part II), (ii) its efficacy, (iii) economic efficiency, and (iv) legal and doctrinal legitimacy (all: Part IV). On all these fronts the Israeli law seems to be well substantiated, even if some arguments might seem debatable.

#### *Efficaciousness*

Although the Photoshop law does not provide for severe formal sanctions it still can be efficacious. Thanks to the expressive function of law it can be reasonable expected that existing (unhealthy) norms will change even if just a bit.

#### *Legitimacy*

---

<sup>159</sup> Donovan (n. 1): 600-5.

<sup>160</sup> Costa-Font (n. 78): 44-8, 80.

<sup>161</sup> Murphy J.G., *Freedom of Expression and the Arts*, Arizona State Law Journal 29, (1997): 549.

<sup>162</sup> Ahern A.L., Bennett K.M., Hetherington M.M., *Internalization of the Ultra-Thin Ideal: Positive Implicit Associations with Underweight Fashion Models are Associated with Drive for Thinness in Young Women*, Eating Disorders: The Journal of Treatment & Prevention 16, (2008): 294-307.

As regards the accusation of state's paternalism, it seems that the state just tries to debias its citizenry.<sup>163</sup> Ergo, requiring provision of factual information, even if paternalistic, is an example of mild libertarian paternalism.<sup>164</sup> More controversial seems to be the outright ban on skinny models. Still, it can be said that the state targets the bad 'norms entrepreneurs' trying to hide skinny models from the jealous eyes of the fashion lovers. Moreover, the ban is defended because problems with anorexia seem to prevail over the freedom of speech considerations.

#### *Efficiency*

Given that this law will influence mainly people for whom the cultural norms of beauty are very important ( $\beta \neq 0$ ), and the social desirability weight standard ( $\nu^C$ ) is very low, the policy aimed to raise this standard should be both welfare and health improving. It should happen chiefly due to reducing socio-cultural pressure exerted on women. By debiasing from the disingenuous image of beauty, it should steer them towards internalization of more healthy standards.

Whether this paternalistic intervention will turn out to be effective it is hard to tell. In particular, it might be difficult to achieve substantial effects in reduction of disordered eating. However, there are valid reasons to believe that it will help to alleviate, at least some problems. Of course such law comes at a price. It is being paid by those whose choices have been curtailed and their freedom abridged. Even if the price tag is hard to quantify, it seems that the well-being of the society is something worth paying for.<sup>165</sup>

\* \* \*

---

<sup>163</sup> Sunstein (n. 96).

<sup>164</sup> Sunstein (n. 144).

<sup>165</sup> Unless, in somebody's view commitment to liberty and personal autonomy trumps any other values; See: Mitchell, G., *Libertarian Paternalism Is an Oxymoron*, Northwestern University Law Review 99(3), (2005):1245-77.



## Bibliography

Surname/names' initials/*article's title*/publication or name of a journal/Vol./Issue (No.)/(year)

### A

1. Ahern A.L., Bennett K.M., Hetherington M.M., *Internalization of the Ultra-Thin Ideal: Positive Implicit Associations with Underweight Fashion Models are Associated with Drive for Thinness in Young Women*, *Eating Disorders: The Journal of Treatment & Prevention* 16, (2008).
2. Akerlof G.A., Kranton R.E., *Economics and identity*, *Quarterly Journal of Economics* 115, (2000).
3. Ata R.N., Thompson J.K., Small B.J., *Effects of exposure to thin-ideal media images on body dissatisfaction: Testing the inclusion of a disclaimer versus warning label*, *Body Image* 10, (2013).
4. Aruguete M.S., Yates A., Edman J., *Gender differences in attitudes about fat*, *North American Journal of Psychology* 8, (2006).
5. Axelrod R., *An evolutionary approach to norms*, *The American Political Science Review* 80(4), (1986).

### B

6. Bicchieri C., *The Grammar of Society: the Nature and Dynamics of Social Norms*, Cambridge University Press: Cambridge, Chapter I, (2006).
7. Bourdieu P., *The Force of Law: Toward a Sociology of the Juridical Field*, *The Hastings Law Journal* 38, (1987).
8. Buss D., *The Evolution of Desire* (second ed.), New York: Basic Books, (2003).

### C

9. Cawley J., *The impact of obesity on wages*, *Journal of Human Resources* 39, (2004).
10. Clay D., Vignoles V.L., Dittmar H., *Body Image and Self-Esteem Among Adolescent Girls: Testing the Influence of Sociocultural Factors*, *Journal of Research on Adolescence* 15(4), (2005).
11. Cooter R., *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, *Boston University Law Review* 78, (1998).
12. Cooter R., *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, *Virginia Law Review* 8 (86), (2000).
13. Costa-Font J., Jofre-Bonet M., *Anorexia, Body Image and Peer Effects: Evidence from a Sample of European Women*, *Economica* 80, (2013).
14. Cusumano D.L., Thompson J.K., *Body image and body shape ideals in magazines: Exposure, awareness and internalization*, *Sex Roles* 37, (1997).

### D

15. Donovan K.C., *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, *Notre Dame Journal of Law, Ethics & Public Policy* 26(2), (2012).
16. Dragone D., *A rational eating model of binges, diets and obesity*, *Journal of Health Economics* 28, (2009).
17. Dragone D., Savorelli L., *Thinness and Obesity: A Model of Food Consumption, Health Concerns, and Social Pressure* (June 10, 2010). LSE Research Paper No. 17.

## E

18. Ellickson, R.C., *The market for social norms*, American Law and Economics Review 3(1), (2001).
19. Elster J., *Social norms and economic theory*, Journal of Economic Perspectives 3(4), (1989).
20. Etile F., *Social norms, ideal body weight and food attitudes*, Health Economics 16, (2007).
21. Ember C.R., Ember M., Korotayev A., De Munck V., *Valuing thinness or fatness in women: re-evaluating the effects of resource scarcity*, Evolution and Human Behavior 26, (2005).
22. Etcoff N., *Survival of the Prettiest: The Science of Beauty*, Anchor, Reprint Ed., (2000).

## F

23. Frederick D.A., Fessler D.M., Haselton M.G., *Do representations of male muscularity differ in men's and women's magazines?*, Body Image 2(1), (2005).
24. Frey, B.S., Jegan R., *Motivation Crowding Theory*, Journal of Economic Surveys 15(5), (2001).

## G

25. Garner D.M., Garfinkel P.E., Schwartz D., Thompson M., *Cultural expectations of thinness in women*, Psychological Reports 47, (1980).
26. Goss, F., *Stars of style (Influential gay individuals in fashion)*, The Advocate 735 (June 10), (1997).

## H

27. Hamermesh D.S., Biddle J.E., *Beauty and the labor market*, American Economic Review 84, (1994).
28. Hamilton K., Waller G., *Media influences on body size estimation in anorexia and bulimia. An experimental study*, British Journal of Psychiatry 162, (1993).
29. Harrison K., Cantor J., *The relationship between media consumption and eating disorders*, Journal of Communication 47, (1997).
30. Haynes B.M., Andrews A.H., Jacob C.R., *Compelled Commercial Speech: the Food and Drug Administration's Effort to Smoke Out the Tobacco Industry through Graphic Warning Labels*, Food and Drug Journal, 68(4), (2013).
31. Hechter M., Opp K.D., *Social Norms*, Russell Sage Foundation: New York, (2001).

## K

32. Kahan D., *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem*, The University of Chicago Law Review 67, (2000).
33. Keys A., Fidanza F., Karvonen M.J., Kimura N., Taylor H.L., *Indices of relative weight and obesity*, Journal of Chronic Diseases 25 (6–7), (1972).
34. Kilbourne J., *Deadly Persuasion: Why Women and Girls Must Fight the Addictive Power of Advertising*, New York: The Free Press, (1999).
35. Krawitz M., *Beauty is only photoshop deep: Legislating models' BMIs and photoshopping images*, Journal of Law and Medicine 21 (4), (2014).

## L

36. Lessig L., *Social Meaning*, The University of Chicago Law Review 62, (1995).
37. Lessig L., *The New Chicago School*, Journal of Legal Studies 27, (1998).

38. Levine M.P., Murnen S.K., *Everybody know that mass media are/are not (pick one) a cause of eating disorders: A critical review of evidence for a causal link between media, negative body image, and disordered eating in females*, Journal of Social and Clinical Psychology 28, (2009).
39. Levy A., *Rational eating: can it lead to overweightness or underweightness?*, Journal of Health Economics 21, (2002).

#### M

40. Manski C.F., *Economic analysis of social interactions*, Journal of Economic Perspectives 14, (2000).
41. McAdams R., *The Origin, Development, and Regulation of Norms*, Michigan Law Review 96, (1997).
42. Mitchell, G., *Libertarian Paternalism Is an Oxymoron*, Northwestern University Law Review 99(3), (2005).
43. Morris S., *Body mass index and occupational attainment*, Journal of Health Economics 25, (2006).
44. Murphy J.G., *Freedom of Expression and the Arts*, Arizona State Law Journal 29, (1997).

#### N

45. Nettle D., *Ecological influences on human behavioural diversity: A review of recent findings*, Trends in Ecology & Evolution 24(11), (2009).

#### P

46. Philipson T.J., Posner R.A., *The long-run growth in obesity as a function of technological change*, Working Paper No. 7423, National Bureau of Economic Research, (1999).
47. Pomeranz J.L., *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, Journal of Health Care Law 12(1), (2009).
48. Popenoe R., *Feeding Desire: Fatness, Beauty and Sexuality Among a Saharan People*, Routledge, (2003).
49. Posner E.A., *Law and Social Norms: The Case of Tax Compliance*, Virginia Law Review 86, (2000).
50. Prentice A.M., Jebb S.A., *Beyond body mass index*, Obesity Reviews 2, (2001).
51. Puhl R.M., Heuer C.A., *The stigma of obesity: a review and update*, Obesity 17, (2009).

#### R

52. Ramachandran V.S., Hirstein W., *The Science of Art: A Neurological Theory of Aesthetic Experience*, Journal of Consciousness Studies 6/7, (1999).
53. Rodin J., Silberstein L., Striegel-Moore R., *Women and weight: A normative discontent*, Nebraska Symposium on Motivation 32, (1984).

#### S

54. Saner E., *Abercrombie & Fitch: for beautiful people only*, The Guardian, 28.04.2012.
55. Satoshi K., *Intelligence and physical attractiveness*, Intelligence 39 (1), (2011).
56. Scott R.E., *The Limits of Behavioural Theories of Law and Social Norms*, Virginia Law Review 86, (2000).
57. Slater A., Tiggemann M., Firth B., Hawkins K., *Reality check: An experimental investigation of the addition of warning labels to fashion magazine images on women's mood and body dissatisfaction*, Journal of Social and Clinical Psychology 31, (2012).

58. Smolak L., *Body image* (in:) Worell J., Goodheart C.D. (eds.), *Handbook of girls' and women's psychological health: Gender and well-being across the lifespan*, Oxford, (2006).
59. Stigler G.J., Becker G.S., *De Gustibus Non Est Disputandum*, American Economic Review 67, (1977).
60. Strahan E. J., Wilson A.E., Cressman K.E., Buote V.M., *Comparing to perfection: How cultural norms for appearance affect social comparisons and self-image*, Body Image 3, (2006).
61. Sunstein C.R., *Social Norms and Social Roles*, Columbia Law Review 96(4), (1996).
62. Sunstein C.R. Jolls C., *Debiasing Through Law*, Journal Of Legal Studies 35, (2006).
63. Sunstein C.R., Kuran T., *Availability Cascades and Risk Regulation*, Stanford Law Review 51(4), (1999).
64. Sunstein C.R., Thaler R.H., *Libertarian Paternalism Is Not an Oxymoron*, The University of Chicago Law Review 70 (4), (2003).

#### T

65. Teachman B.A., Gapinski K.D.; Brownell K.D., Rawlins M., Jeyaram S., *Demonstrations of implicit anti-fat bias: the impact of providing causal information and evoking empathy*, Health Psychology 22(1), (2003).
66. Tiggemann M., Slater A., Bury B., Hawkins K., Firth B., *Disclaimer labels on fashion magazine advertisements: Effects on social comparison and body dissatisfaction*, Body Image 10, (2013).
67. Tiggemann M., Slater A., Smyth V., *'Retouch free': The effect of labelling media images as not digitally altered on women's body dissatisfaction*, Body Image (2013):  
[http://dx.doi.org/10.1016/j.bodyim.2013.08.005].
68. Tovée M.J., Reinhardt S., Emery J.L., Cornelissen P.L., *Optimum body-mass index and maximum sexual attractiveness*, Lancet 352, (1998).
69. Tove'e M.J., Swami V., Furnham A., Mangalparsad R., *Changing perceptions of attractiveness as observers are exposed to a different culture*, Evolution and Human Behavior 27, (2006).

#### U

70. Unger R.M., *Social Theory: Its Situation and Its Task 1*, Cambridge, (1987).

#### W

71. Wansink B., Just D. R., Payne C. R., *Mindless eating and healthy heuristics for the irrational*, American Economic Review 99, (2009).
72. Watzlawick P., *The Invented Reality: How Do We Know What We Think We Know*, Contributions to Constructivism 15, Norton, (1984).
73. Wolf N., *The beauty myth: How images of beauty are used against women*, New York: William Morrow, (1991).

#### Y

74. Yom-Tov E, Boyd D.M., *On the link between media coverage of anorexia and pro-anorexic practices on the web*, International Journal of Eating Disorders 47(2), (2014).

#### Z

75. Zeki S., *Inner Vision: An Exploration of Art and the Brain*, Oxford: Oxford University Press, (1999).