BEYOND THE SMOKE AND MIRRORS: GRAPHIC HEALTH WARNINGS AND THE FREEDOM OF EXPRESSION OF TOBACCO COMPANIES*

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ABSTRACT

In presenting the nature of regulations in the Philippine tobacco industry, the article discusses the proper role of government intervention in and the extent of protection that must be accorded to commercial speech. To assess the standard of protection, US jurisprudence offers two options: the Strict Scrutiny test from *Wooley v. Maynard*, and the Intermediate Scrutiny test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. Here, the article applies *Central Hudson* to previously-filed bills that would have compelled the use of graphic health warnings, in hopes of aiding future legislators in drafting similar measures. The article also espouses the soft-paternalism framework in approaching tobacco control, arguing that this is appropriate because individuals display behavioral and cognitive biases, including "self control problems" and "systematic mispredictions about the costs and benefits of choices." The framework thus serves to reconcile the protection of freedom of speech with the responsibility of the State to safeguard public health.

I. INTRODUCTION

The prevalence of disclosure policies has long been accepted, notwithstanding the fact that private actors are compelled to *speak* for purposes of information dissemination. Among the more notable regulations is that imposed on tobacco companies, which, in the Philippines and in other countries, are required to display the warning "Cigarette Smoking is Dangerous to Your Health" on cigarette packages.

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* *Cite as* Marie Krizel Malabanan, *Beyond the Smoke and Mirrors: Graphic Health Warnings and the Tobacco Companies' Freedom of Expression*, 88 PHIL. L.J. 128, (page cited) (2014). This paper won the Froilan Bacungan Prize for Best Paper in Freedom of Expression (2013), University of the Philippines College of Law.

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The Philippines is one of the largest tobacco consuming countries in the Western Pacific Region, with over 17.3 million persons above 15 years of age consuming tobacco products, including nearly half of men and 10% of women.[1] Among the Filipino youth ages 13 to 15 years, 36% of boys and 20% of girls have smoked cigarettes.[2] It is curious why, despite these alarming figures, there has been a dearth of analysis on tobacco control policies in the country. It is high time to dissect the justifications underlying the smoking policies in the Philippines, and analyze whether or not intrusions upon the freedom of speech of tobacco companies, if any, may be justified in the continuing search for effective tobacco control policies.

Recently, the Philippines started, albeit belatedly, to legislate and implement significant tobacco regulations. Republic Act No. 9211, or the Tobacco Regulation Act, took effect in 2003. This law absolutely prohibits smoking in "public conveyance and public facilities, including airport and ship terminals and train and bus stations, restaurant and conference halls, except for separate smoking areas."[3] At the same time, the said law regulates the advertisement of tobacco products.[4] In 2012, the Restructured Sin Tax Law ("Sin Tax Law") was signed into law.[5] Despite these measures, was there a decrease of smoking behavior among smokers? What if we take a more drastic approach and require *graphic* warnings alongside the *textual* health warnings? In such a case, will the freedom of speech of tobacco companies, specifically, be threatened?

Freedom of speech guarantees "both the right to speak freely and the right to refrain from speaking at all."[6] Much attention has already been given to cases where the government has intervened in restricting the freedom of people and institutions to voice out their opinions, but little has been said about cases when the government *compels* entities to disclose even self-vilifying information.

In the past few years, US jurisprudence has expanded the protection given to speech, and even recognized the protection of so-called commercial speech. The present challenge is to create an environment where one man's

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[1] Global Tobacco Surveillance System, Philippines Global Adult Tobacco Survey (2009), *available at* http://www.who.int/tobacco/surveillance/gats_philippines_fact_sheet.pdf.

[2] Global Tobacco Surveillance System, Philippines (Ages 13-15) Global Youth Tobacco Survey (2011), *available at* http://www.wpro.who.int/philippines/mediacentre/factsheet/GYTS_2011.pdf.

[3] Rep. Act No. 9211, § 5(e) (2003). Tobacco Regulation Act of 2003.

[4] § 3(c).

[5] Rep. Act No. 10351 (2012). Restructured Sin Tax Law of 2012.

[6] Wooley v. Maynard, 430 U.S. 705 (1977).

meat does not have to be another man's poison—an environment of health awareness encompassing the tobacco companies' freedom of speech, as guaranteed by the Constitution. Do the "individual and social benefits of serious efforts to change behavior warrant strong, even severe, intrusions upon personal liberty?"[7] Ultimately, "[e]ven though a law may be legally supportable and even though it may be effective in reducing the toll of injuries, if it offends other socially important interests, maybe it ought not to exist as a law."[8] This Article examines this question in the context of tobacco control.

US jurisprudence is replete with decisions involving compelled speech; some even focus on tobacco advertising. Striking a balance between public health and freedom of expression remains an unrealized goal. The inconsistencies of these US decisions and the difference in the standards the courts apply—which appear to depend on the bench's composition—do not, in any way, reveal the constitutionality (or unconstitutionality) of these policies.

This Article will endeavor to shed more light on the debate regarding the proper role of the government in "filtering information" that citizens receive, and the nature and extent of protection that must be accorded to commercial speech. In light of previous attempts by Congress to enact a picture-based health warning law, such as Senate Bill No. 3283 of the 15th Congress,[9] this Article serves as a guide in the event that such a bill is filed before the current legislature. This is in anticipation of potential legal impediments that future tobacco health warning bills would have to hurdle in order to pass constitutional muster.

The first part introduces the discussion on the constitutional freedom of speech and situates the role of free speech with respect to public health. We begin by reviewing the American commercial speech and compelled speech cases to show how the US courts have been inconsistent in applying standards. Since the right to free speech under the 1987 Philippine Constitution is an almost-verbatim reproduction of the First Amendment Clause of the US Constitution, Philippine jurisprudence concerning this constitutionally-guaranteed right has been largely based on US jurisprudence. However, since commercial speech has not been fully explored in Philippine courts, we will use US cases in this Article and examine how the doctrines of these cases can be

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[7] DANIEL CALLAHAN, FALSE HOPES: WHY AMERICA'S QUEST FOR PERFECT HEALTH IS A RECIPE FOR FAILURE 194 (1998).

[8] TOM CHRISTOFFEL & STEPHEN TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 213 (1993).

[9] S. No. 3283, 15th Cong., 3rd Sess. (2012).

possibly applied by Philippine courts in the future. The *Central Hudson*[10] test and the Strict Scrutiny test will then be applied to the case of tobacco advertising.

This Article argues that this case should be examined under the lens of a soft paternalistic framework. This framework is more apropos because smokers' addiction to tobacco products renders them volitionally deficient in making decisions that will make them render better judgments. Because of this context, the State is allowed minimal intervention in the form of "choice architecture"; here, smokers are not prohibited from smoking, but instead, options available to them are presented in a manner that induces them to choose what will place them in the best position.

II. FREEDOM OF COMMERCIAL SPEECH

Freedom of expression is an inarguably fundamental, constitutionally protected right. The 1987 Philippine Constitution mandates that "[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."[11] However, just like any other right, it is not absolute. Scholars agree that the exercise of the freedom of speech may be restricted if "the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."[12]

Different forms of speech call for different degrees of protection. At one end of the spectrum are categories of speech, such as religious or political speech, the restriction of which is subjected to *strict scrutiny* and, consequently, often not upheld. On the other end of the spectrum are those categories not covered by the mantle of Constitutional protection. Examples include those that incite violations of law,[13] obscene speech,[14] or those that amount to "fighting words."[15] These kinds are subjected to *rational basis* review under the due process clause.

In between these ends is commercial speech. Commercial speech has been defined as speech relating to a "business activity that does no more than

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[10] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1978).

[11] CONST. art. III, §4.

[12] Whitney v. California, 274 U.S. 357, 373 (1926) (Brandeis, J., *concurring*).

[13] *See, e.g.* Brandenburg v. Ohio, 395 US 444 (1969).

[14] *See, e.g.* Miller v. California, 413 US 15 (1973).

[15] *See, e.g.* Chaplinsky v. New Hampshire, 315 US 568 (1942).

solicit a commercial transaction or state information relevant thereto."[16] This definition is fairly close to the US Supreme Court's own early definition: "speech proposing a commercial transaction."[17] The field of commercial speech is so contentious that it was once described as a "notoriously unstable and contentious domain of American jurisprudence [of which no] other realm of First Amendment law has proved as divisive."[18]

Commercial speech receives a certain degree of protection, but merits less protection than other forms of constitutionally guaranteed expression.[19] More specifically, the various forms of commercial speech receive varied degrees of protection. Commercial speech that is potentially misleading, for example, is protected to an intermediate degree, like other commercial speech.[20] However, false and deceptive commercial speech is not given any protection.[21]

Commercial speech, because of its importance to consumers and its market function, indeed deserves protection. This doctrine was extensively discussed in the case of *Virginia Pharmacy,*[22] where the Court held that truthful commercial speech must be accorded limited protection. Two salient points need to be highlighted here. First, notwithstanding the economic interests of the speakers, the *public's* interest in commercial information remains. Second, for as long as the State protects a free enterprise economy, and for as long as resources are allocated through the private sector, then "the free flow of commercial information is indispensable."[23] At the end of the day, advertisements provide information to individuals, and with this information, individuals become capable of making their own choices, which are presumably in their best respective interests. The Court held that pure commercial speech must be afforded protection under the First Amendment because commercial speech was not "so removed from any 'exposition of ideas' and from 'truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of the Government' that it lack[ed] all protection."[24]

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[16] Thomas Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

[17] Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 562 (1978), *citing* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

[18] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

[19] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 US 748 (1976).

[20] In re R.M.J., 455 U.S. 191, 203 (1982).

[21] *Id.*

[22] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 US 748 (1976).

[23] *Id.* at 765.

[24] *Id.* at 762.

The Court concluded that commercial speech, which plays a critical role in furthering economic objectives, is entitled to First Amendment protection.[25] The Court struck down the Virginia statute restricting pharmacists from advertising the prices of prescription drugs.

III. COMPELLED SPEECH

The concept of compelled speech was highlighted in the case of *West Virginia State Board of Education v. Barnette.*[26] The case involves a resolution requiring students to salute the flag while reciting the Pledge of Allegiance. This resolution was struck down because it was considered a violation of the First Amendment. As a final comment, Justice Jackson made a statement that later on served as the backbone of the compelled speech doctrine:

> [I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[27]

The issue of whether the government can compel individuals to participate in disseminating an ideological message that they themselves are opposed to was revisited in the case of *Wooley v. Maynard.*[28] The Court held that New Hampshire may not compel citizens to display on their license plates the state motto "Live Free or Die."[29] Again, such was classified by the Court as a violation of the principles of the First Amendment. The Court elucidated:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain

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[25] *Id.* at 773.
[26] 319 U.S. 624 (1943).
[27] *Id.* at 633-634.
[28] 430 U.S. 705 (1977).
[29] *Id.* at 707, 717.

> from speaking are complementary components of the broader concept of "individual freedom of mind."[30] (Citations omitted.)

In the Philippines, the Supreme Court in the case of *Gerona v. Secretary of Education*[31] ruled on a challenge by Jehovah's Witnesses against a Department Order issued by the Secretary of Education implementing Republic Act No. 1265, which imposed compulsory flag ceremonies in all public schools. Petitioner's children, in conformity with the teaching among Jehovah's Witnesses that the obligation imposed by the law of God is superior to that of laws enacted by the State, had refused to salute the Philippine flag, sing the national anthem, or recite the patriotic pledge; hence, they were expelled from school. The Court concluded that the Filipino flag was not an image that required religious veneration and, thus, the requirement of observance of the flag ceremony or salute provided for in the assailed Department Order did not violate the Constitutional provision about freedom of religion and exercise of religion. The Court explained:

> The realm of belief and creed is infinite and limitless bounded only by one's imagination and thought. So is the freedom of belief, including religious belief, limitless and without bounds. One may believe in most anything, however strange, bizarre and unreasonable the same may appear to others, even heretical when weighed in the scales of orthodoxy or doctrinal standards. But between the freedom of belief and the exercise of said belief, there is quite a stretch of road to travel. If the exercise of said religious belief clashes with the established institutions of society and with the law, then the former must yield and give way to the latter. The government steps in and either restrains said exercise or even prosecutes the one exercising it.[32]

Such doctrine prevailed until 1993, when *Ebralinag v. Division Superintendent of Schools of Cebu*[33] reversed it, holding that freedom of religion required that the protesting members be exempted from the operation of law. The Court ruled that compelling citizens to salute the flag, sing the national anthem, and recite the patriotic pledge during a flag ceremony, at the risk of getting expelled from school, is "alien to the conscience of the present generation of Filipinos who cut their teeth on the Bill of Rights[,] which

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[30] *Id.* at 714, *citing* Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

[31] 106 Phil. 2 (1959).

[32] *Id.*

[33] 219 SCRA 256 (1993).

guarantees their rights to free speech, and the free exercise of religious profession and worship."[34] In his concurring opinion, Justice Cruz elucidated:

> Freedom of speech includes the right to be silent. Aptly has it been said that the Bill of Rights that guarantees to the individual the liberty to utter what is in his mind also guarantees to him the liberty not to utter what is not in his mind. The salute is a symbolic manner of communication that conveys its message as clearly as the written or spoken word. As a valid form of expression, it cannot be compelled any more than it can be prohibited in the face of valid religious objections like those raised in this petition. To impose it on the petitioners is to deny them the right not to speak when their religion bids them to be silent. This coercion of conscience has no place in the free society.[35]

In the past, lawmakers pushed for the approval of Senate Bill No. 3283 or the proposed picture-based health warning law.[36] This bill mandated the placing of graphic health warnings on cigarette packs. It provided that the picture-based health warnings to be issued "must always present the devastating effects of tobacco use and exposure to tobacco smoke."[37] As of this printing, a similar bill has not been filed before the new Congress. Whether the Philippines is ready for such a drastic step remains to be uncertain.

IV. UPHOLDING REGULATIONS OF COMMERCIAL SPEECH

The doctrine of compelled speech protects against the compelled disclosure of either facts or opinions.[38] When confronted with cases wherein entities are compelled to make certain disclosures, US courts choose between (1) the Strict Scrutiny test from *Wooley v. Maynard*[39] and (2) the Intermediate Scrutiny test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[40]

The trajectory of the US Supreme Court seems to be towards stricter restrictions on commercial speech and, thus, there stands a chance that the

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[34] *Id.* at 270.

[35] *Id.* at 275 (Cruz, J., *concurring).*

[36] Marvin Sy, *Senate seeks graphic health warnings on cigarette packs*, Phil. Star, Jan. 8, 2013, *available at* http://www.philstar.com/headlines/2013/01/08/894461/senate-seeks-graphic-health-warnings-cigarette-packs.

[37] S. No. 3283, §15.

[38] Riley v. National Federation of Blind, 487 U.S. 781, 797-98 (1988).

[39] 430 U.S. 705 (1977).

[40] 447 U.S. 557, 571 (1978).

Supreme Court may apply the least deferential test known as "Strict Scrutiny." The Strict Scrutiny test under *Wooley* was applied in disclosures of "subjective and highly controversial" information.[41] By themselves, images of cadavers and crying children may possibly be classified as "subjective and highly controversial," and would, therefore, require the application of the Strict Scrutiny test.[42] Under this test, there are two components which must be satisfied: *first*, there must be a compelling government interest; and *second*, the regulation must be "narrowly tailored to achieve a compelling governmental interest."[43]

Under the Strict Scrutiny test, it is unlikely that the provision requiring the use of tobacco graphic health warnings would survive the constitutional challenge because of the high standards the test imposes. To survive examination under Strict Scrutiny, the proposed law must make sure to avoid depictions of cartoons or digitally enhanced images illustrating the negative health consequences of smoking.[44] The graphic warnings to be chosen must be as factual and uncontroversial as possible.

On the other hand, for as long as the legislature drafts future bills with much attention, the government has better chances of upholding the constitutionality of the regulation if what is applied is the *Central Hudson*[45] test. There, Justice Powell did not employ the Strict Scrutiny test that was often applied in cases of restrictions on expression. Rather, what was applied was a four-prong intermediate scrutiny test that balanced the government's interests with the interests served by commercial speech:[46]

First, the judiciary must determine whether the speech concerns unlawful or misleading activity.[47]

Second, the government must have a substantial interest involved.

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[41] Stephanie Bennett, *Paternalistic Manipulation through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 MISS. L.J. 1909, 1917 (2012), *citing* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651 (7th Cir. 2006).

[42] *Id.* at 1921.

[43] *Id.* at 1917 n.27.

[44] R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 46 (D.D.C. 2011), *citing* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

[45] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1978).

[46] *Id.* at 566.

[47] *Id.*

Third, the regulation must advance the said substantial interest.[48]

Fourth, the regulation must not be more extensive than necessary.[49]

Applying the four-pronged test, the Court held that a New York statute prohibiting promotional advertising of electricity met all the stated factors—with the exception of the fourth.[50] The prohibition was more extensive than necessary because the statute effectively banned electric companies from promoting energy conservation as well.[51]

V. TRAJECTORY OF THE COMMERCIAL SPEECH DOCTRINE

Unfortunately, the ruling in the case of *Central Hudson* did not settle, once and for all, everything in the area of compelled speech. In 1986, the Court in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* applied the *Central Hudson* test and upheld a Puerto Rican law on the advertisement of gambling.[52] Using the first prong of the *Central Hudson* test, the Court concluded that gambling was a lawful activity and its advertisement was not misleading.[53] The questioned law also satisfied the other parts of the test, but the most controversial aspect of the decision is the reasoning of the Court in relation to the judiciary's deference to legislature. The Court asserted that the greater authority of the legislature to completely ban casino gambling necessarily includes the lesser power to ban advertising it.[54]

Later on, the Court *reverted* to the application of the Strict Scrutiny test on commercial speech. In the case of *Liquormart, Inc. v. Rhode Island,*[55] the Court held that the advertising restrictions impermissibly regulated commercial speech and therefore violated First Amendment rights. In this case, alcohol advertisements were prohibited to promote temperance. Liquor store operators argued that their constitutional right to freedom of speech was violated. It was Justice Stevens who penned the decision of the Court, but four opinions were submitted. Although the case reached a unanimous 9-0 decision as to the result,

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 566-571.

[51] *Id.* at 570.

[52] Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 331 (1986).

[53] *Id.* at 340-41.

[54] *Id.* at 346.

[55] 116 S. Ct. 1495 (1996).

the members of the Court had different approaches in analyzing the commercial speech issue. Considering the impact of this case to current jurisprudence, it is important to look at the various facets presented by the justices in this case and to examine their differences and similarities.

The main decision of this case was penned by Justice Stevens. Justice Stevens' opinion applied the *Central Hudson* four-prong test in the case of *Liquormart*, albeit with some modifications. His decision, in which his colleagues concurred, held that the statutory ban on the advertisement of liquor price failed First Amendment scrutiny. Justice Stevens provided for a more stringent standard by stating that the ban must materially advance the state's interest. In this case, the ban failed to promote temperance in consuming alcoholic spirits because "the State [p]resented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption."[56] Justice Stevens also made a modification on the fourth part of the *Central Hudson* test by requiring the State to show that the policy reasonably fit the ends to be achieved. He stated that if there are alternative means that do not involve any restriction on speech but can, nevertheless, achieve the State's goal, then the abridgement of the freedom of speech is violated. Therefore, for Justice Stevens, the regulation on commercial speech was unconstitutional.

Justice Thomas concurred in the decision penned by Justice Stevens, but argued that the *Central Hudson* test should *not* have been applied in this case. Eloquently, he wrote:

> In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* should not be applied... Rather, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.[57] (Emphasis supplied, citations omitted.)

He further held that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[58]

The views expressed by Justice Thomas were, in turn, concurred in by Justice Scalia, who likewise expressed hesitations with the formulaic use of the *Central Hudson* test. Justice Scalia wrote that he "share[d] Justice Thomas's

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[56] *Id.* at 1509, *citing* Edenfield v. Fane, 507 U.S. 761, 771 (1993).

[57] *Id.* at 1520 (Thomas, J., *concurring*).

[58] *Id.*

discomfort with the *Central Hudson* test, which seems to [him] to have nothing more than policy intuition to support it."[59]

Justice O'Connor, on the other hand, who was joined by Justices Souter and Breyes and Chief Justice Rehnquist, focused on the *last* prong of the test. She saw the regulation failing only the fourth component, and said that the advertising ban was more extensive than necessary because of the different alternative methods available in promoting temperance.[60]

Years later, the US Supreme Court, for the first time, had to directly address the issue of tobacco advertising in the case of *Lorillard Tobacco v. Reilly*.[61] This case showed that laws restricting commercial speech to manipulate the behavior of consumers will most likely be struck down as unconstitutional *despite* the government interest that the policy espouses. This case adopted Justice O'Connor's approach in *Central Hudson*, which has, nevertheless, eased the burden of proof on the part of the State under the *third* prong of the *Central Hudson* test.

In these recent cases, the application of the *Central Hudson* test has been so rigorous, such that the line between this and the Strict Scrutiny test has been blurred. Because of the inconsistency in applying these tests, there has been no clear rule as to what forms of advertising regulations can overcome constitutional scrutiny, especially when regulations with regard to advertisements of harmful products, such as tobacco, are involved.

VI. APPLYING THE *CENTRAL HUDSON* TEST, AS MODIFIED BY *LIQUORMART*, ON TOBACCO GRAPHIC HEALTH WARNINGS

Does a law compelling tobacco companies to place graphic tobacco health warnings on cigarette packs violate the protection of tobacco companies against compelled speech? The answer is in the negative.

The first and second prongs of the test are not in dispute. The more critical factors that must be examined concern the third and fourth prongs of the *Central Hudson* test.

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[59] *Id.* (Scalia, J., *concurring*).
[60] *Id.* (O'Connor, J., *concurring*).
[61] 533 U.S. 525 (2001).

Does the regulation advance a governmental interest? Pursuant to recent US jurisprudence, scrutiny under the third part of the test requires more rigor. What is crucial for the law to pass the third and fourth prongs of the *Central Hudson* test is that the extent of the problem must be set out and backed up by scientific evidence. The State then needs to prove that the graphic health warnings directly advance its interest of providing the population with the health consequences of smoking.

Senate Bill No. 3283 was indeed backed up by empirical data. According to the sponsorship speech of Senator Pia Cayetano, studies have shown that picture-based health warnings are 60 times more effective in preventing and encouraging cessation than text-based warnings alone.[62] Furthermore, a study by the Center for Disease Control in Atlanta showed that from 2008 to 2010, more than 25% of the 14 country participants were affected by warning labels.[63] The use of prominent pictorial warnings is considered to be the most effective way of communicating to the public the health hazards of smoking. In a study among Filipino youth in 2008, majority of respondents claimed that visual warnings are more effective in conveying the health risks of smoking.[64] Some even claimed that graphic designs depicting the negative consequences of smoking would stop them from buying cigarettes.

In choosing which graphic health warnings should be used on cigarette packs, it is important to remember that only those that present fair descriptions of the health risks of cigarette smoking must be selected. The focus should be in making sure that the primary constitutional value underlying graphic health warnings is the "circulation of accurate and useful information."[65]

By informing the people about the health consequences of smoking and discouraging individuals from starting or continuing to smoke, the visual warnings directly serve this state interest. Because of the known public consequences of smoking, the substantial state interest is served in attempting to reduce the percentage of the population who smoke, and in effectively communicating to smokers the negative health consequences of smoking.

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[62] S. Journal No. 22, 15th Cong., 3rd Sess. 468 (2012), *cited in* Sy, *supra* note 36.

[63] Sy, *supra* note 36.

[64] Aries Rufo, *Congressmen got cash to oppose anti-smoking graphic warning bill*, ABS-CBN News, Jan. 18, 2009, *available at* http://www.abs-cbnnews.com/nation/01/18/09/congressmen-got-cash-oppose-anti-smoking-graphic-warning-bill.

[65] Post, *supra* note 18, at 2.

The strength of this regulation on tobacco graphic health warning rests mainly on its ability to deter creation of new markets for the tobacco industry. Even when adult smokers who have a habit of smoking are already too addicted to cigarettes, the use of graphic health warnings surely has a significant effect in making sure that the youth will not even attempt to get into the habit of smoking. These tobacco graphic health warnings aim to target not only the smokers, but also and more importantly, children, who still have a chance to be spared from tobacco addiction. Therefore, in the words of Justice Thomas, any "attempts to dissuade legal choices by citizens by keeping them ignorant" should be impermissible.[66]

Examining the fourth prong of the *Central Hudson* test, the last issue to be examined is whether there is a reasonable fit between the goal and the means chosen to achieve the goal. Does the law restrict the least possible amount of speech necessary to achieve its objectives? This prong has, by far, been the most controversial component of the *Central Hudson* test. US jurisprudence has shown that depending on the composition of the bench, the court may decide to apply the "reasonable fit" standard, or apply the stricter standard, which is the "least restrictive means" standard. To ensure that the regulation will be upheld, the legislators must anticipate the application of the toughest interpretation that the Court may use in evaluating the law.

Employing health graphic warnings is not more extensive than necessary for the government to be able to achieve the state interest. The textual warnings employed at present are easily ignored by smokers.[67] Using graphic warnings will most likely lead to better recall of the health consequences of smoking and to a higher likelihood of cessation.[68] However, in arguing for the necessity of having to use graphic warnings that can evoke emotional reactions, it is no less important to contend that bare textual warnings do not serve substantial state interests.

It is not enough to empathize with big tobacco companies who seem to be at a great disadvantage because of the alleged infringement in their freedom of speech. What should not be overlooked is the context in which this regulation of tobacco graphic health warnings will be applied. Based on the soft

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[66] Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1520 (1996) (Thomas, J., *concurring*).

[67] Paul M. Fischer et al., *Recall and Eye Tracking Study of Adolescents Viewing Tobacco Advertisements*, 261 JAMA 84, 88 (1989). Two-third of the respondents ignored the textual warnings or did not pay much attention at the warnings for them to remember words.

[68] Geoffrey T. Fong et al., *The impact of pictures on the effectiveness of tobacco warnings*, 87 BULL. WORLD HEALTH ORG. 640, 640-42 (2009).

paternalism framework, to be discussed below, *education* is justified in this case. If education could serve substantial government interests, then, according to the principle of the least restrictive means, the regulation should be upheld. It is important to recognize the inherent difficulty in disseminating adequate and intelligible information to people whose decisions are rendered *volitionally deficient* because of addiction. When an individual is in "some state of excitement or absorption incompatible with the full use of the reflecting faculty", soft paternalistic intervention is warranted.[69] This dilemma calls for some kind of regulation such as the implementation of the use of tobacco graphic health warnings. By pointing out the health consequences of smoking *without* actually prohibiting the public from consuming cigarettes, education increases autonomy, contrary to anti-paternalistic arguments.

Other than highlighting the fact that the products we are dealing with in this case are not ordinary food products for consumption, but rather tobacco products that contain highly addictive substances, it must be proven that the government has previously tried another approach that did not work. The State must show that, despite the higher taxes on tobacco products and advertising restrictions, tobacco consumption is still prevalent. There must be available independent empirical data to show that the previous measures passed by the legislature, e.g. the Tobacco Regulation Act or the Sin Tax Law, have been ineffective in curbing the smoking problem of the country.

Regardless of the test that courts will apply, the regulation on tobacco health warnings must be carefully drafted. Studies documenting the problem must sufficiently back up the proposed legislation. It must be thoroughly explained whether there are other less restrictive means to accomplish the goals that the government wants to achieve. It must be explained why other means, if any, did not work in the past, and why they would not work in the future.

VII. EXPLAINING THE LIBERTARIAN-PATERNALIST FRAMEWORK

At one end of the spectrum are libertarian policies with a high regard for personal autonomy. Libertarian policies are in the form of government implementing policies with minimal interventions. The protection of the freedom of speech is based on the belief that people will make better decisions if they are more fully informed. At the other end of the spectrum are paternalistic policies, which invoke the irrational nature of consumers. Under this paradigm,

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[69] JOHN STUART MILL, ON LIBERTY 166 (1974 ed.).

the state withholds information, choices, or both from the public, in the belief that they will make bad judgments anyway.

Much criticism has been thrown against paternalism. In the area of free speech alone, paternalism is strongly disfavored. The protection of the freedom of speech is hostile to paternalism. This aversion stems from the skepticism towards the premise that people respond irrationally to certain types of information. Regardless of the disfavor that paternalism has received through the years, laws still require motorcycle drivers to wear helmets and drivers are required to use seatbelt. Paternalism indeed still pervades the law.

VIII. SOFT PATERNALISM AS A FRAMEWORK FOR APPROACHING TOBACCO CONTROL

Unlike the premise of traditional economics that accords full rationality to people, behavioral economics diverges from such path by recognizing that people can act in irrational ways. Veering from the concept of "full rationality," behavioral economics integrates systematic biases into economic models and develops a more pragmatic approach by recognizing the concept of "bounded rationality" instead, which libertarian paternalism espouses.[70]

In the face of competing extreme stances, it is always helpful to find a middle ground. Professors Cass Sunstein and Richard Thaler found this middle ground in the framework of "libertarian paternalism." Christine Jolls and Cass Sunstein refer to their proposals for de-biasing behavior through law as a "middle ground" between *laissez-faire* and more heavy-handed paternalism.[71] The term "libertarian paternalism" refers to informed-choice policies intended to improve an individual's welfare by freeing him from the limitations of his cognitive biases and by changing his behavior without necessarily limiting his choices.[72] In a nutshell, it is a "permit but discourage" approach.[73] The libertarian paternalistic framework aims to reduce the errors that people commit due to their respective cognitive biases and bounded rationality. Therefore, each

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[70] Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998).

[71] Christine Jolls & Cass Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

[72] Cass Sunstein & Richard Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161-62 (2003).

[73] WILLIAM BOGART, PERMIT BUT DISCOURAGE: REGULATING EXCESSIVE CONSUMPTION (2011).

individual is better off as measured by his own preferences.[74] This approach is starkly different from hard paternalist framework, which bans some things and mandates others. With an element of minimal government intervention, consumers are given the freedom to make "bad" choices.[75]

Sunstein and Thaler explain the idea of a "nudge."[76] A nudge is any change in the context "that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives."[77] Thus, working within the soft paternalistic framework, a nudge encourages people to make certain decisions, albeit the absence of any formal mandate.

In applying the new paternalist framework, Sunstein and Thaler used the analysis in the setting of a cafeteria. If fruits are placed before the pastries, the customers are more likely to choose the former than the latter. A cafeteria owner who chooses this placement, then, is acting paternalistically.[78] No coercion is involved. No patron is precluded from making alternative choices. No option is blocked. If consumers prefer to do so, they are free to avoid the fruit and pick up the cake.

Other than the cafeteria setting, the other example set forth in the works of Sunstein and Thaler is the case of "Save More Tomorrow."[79] In this setting, the goal was to encourage employees to invest more in their pension fund savings. Employees were asked, during a considerable time before their scheduled pay increase, whether they would be willing to set aside the next year's raise for their pension fund. The time difference between their sign-up date and their start- up date must be as long as possible. The question must be asked in such a period as the employees would be more inclined to agreeing to set aside their raise for a pension fund, as compared to asking them the same question right after receiving paychecks inclusive of their raises already. There are two psychological mechanisms involved in this case. First is the Endowment Effect. It is more difficult for people to part with something they already have in hand than to forego it when the money is not yet in their hands. Second, the strength of people's wills is higher for future costs and benefits, *vis-à-vis* present ones.

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[74] Richard Thaler & Cass Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003).

[75] *Libertarian Paternalism is Not An Oxymoron, supra* note 72, at 1162.

[76] RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 2 (2009 ed.).

[77] *Id.*

[78] *Libertarian Paternalism is Not An Oxymoron, supra* note 72.

[79] *Libertarian Paternalism is Not An Oxymoron, supra* note 72, at 1159-60, 1164-66.

These two elements explain why people entertain the fact of future loss of income rather than a present loss.

Using tobacco graphic health warnings is a "nudge" by itself and is a step towards implementing an informed-choice policy of the government. Though the visual warnings may, in a certain sense, impinge upon a constitutionally-protected freedom of speech, they nonetheless still preserve the ultimate libertarian value—the power to choose what a person wants for himself. This argument fits perfectly within the framework provided by Sunstein and Thaler in the libertarian- paternalism model.

The premise of this proposal is that many smokers are uninformed and irrational. Therefore, they may make "systematic mistakes" in their choices. As such, interventions geared towards an informed-choice police are necessary to reduce those mistakes and to increase consumers' welfare. The new paternalist framework is more appropriate in approaching tobacco control policies because individuals display behavioral and cognitive biases. These biases include "self control problems" and "systematic mispredictions about the costs and benefits of choices."[80] In short, individuals are not fully rational.

Karen Sokol termed the activities of tobacco companies as belonging to a two-pronged strategy called "disinformation plus path-dependence strategy."[81] This strategy consists of (1) disinformation campaign in encouraging non-rational decision-making and (2) subsequent deprivation of free choice on the part of consumers who eventually become addicted to tobacco products.

The implementation of this strategy by the tobacco industry has garnered more and more smokers throughout the years. It was only until recently when Republic Act No. 9211[82] was passed banning media advertising of tobacco products that the tobacco industry has been regulated in the Philippines. However, given the strength of this disinformation campaign that goes along with continued manufacture of highly addictive tobacco products, the information provision regulation that is currently in place right now turns out to be completely inadequate.

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[80] Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism,'* 151 U. PA. L. REV. 1211, 1218 (2003).

[81] Karen Sokol, *Smoking Abroad and Smokeless at Home: Holding the Tobacco Industry Accountable in a New Era,* 13 N.Y.U. J. LEGIS. & PUB. POL'Y 81 (2010).

[82] Tobacco Regulation Act of 2003.

The disinformation prong of the tobacco industry's strategy involved suppression of information regarding the nature of the products it manufactures and of massive advertising campaign glamorizing the use of tobacco products. The use of these strategies by the tobacco companies in attracting younger people to smoke justifies the application of soft paternalism framework in crafting tobacco control policies.

Intervention is legitimized by soft paternalism where "it is difficult for the individual decision makers to obtain, process, and use information on the consequences of their choices."[83] Soft paternalism is both justifiable and consistent with Millian liberalism.[84]

Soft paternalism justifies intervention of the State on the individual's liberty if he lacks the requisite capacity to decide for his own good.[85] Intervention is legitimized when the individual's decision to engage in a restricted conduct is under any of the following conditions: (1) he is not informed; (2) he does not adequately understand; (3) he is coerced; or, (4) otherwise not substantially voluntary.[86] Furthermore, the motive of the agent, which is the State in this case, must be to protect the subject from harm, or to ensure that the subject consented to the harm.[87]

Within the soft paternalistic framework, overriding the smokers' decision to smoke is warranted because the consumers are not fully aware of the adverse effects of smoking, or even if they are, their decision is not fully autonomous since it is influenced by the addictive substance that tobacco products contain.[88]

Did Senate Bill No. 3283 violate the protection of tobacco companies against compelled speech? No, it did not. There are two important considerations in examining whether a regulation of the tobacco industry, in the form of compelled use of tobacco graphic health warnings, is a must. The case for regulation is strongest if (a) there are powerful asymmetries in available

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[83] Richard Zeckhauser, *Measuring Risks and Benefits of Food Safety Decisions*, 38 VAND. L. REV. 539, 541-42 (1985).

[84] *See* Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 667-79 (2004).

[85] GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 124 (1988).

[86] Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1161-1164 (1986).

[87] C. Edwin Harris Jr., *Paternalism and the Enforcement of Morality,* 8 SW. J. PHIL. 85, 91 (1977).

[88] *Legal Interference with Private Preferences, supra* note 86, at 1166-1169.

information, and (b) the addiction is one in which the benefits of consumption decrease over time, and the costs of non-consumption increase.[89] The tobacco companies, in employing the dis-information plus path-dependence strategy get the upper hand, while the smokers end up being victims of addiction.

Sunstein identified four categories of cases in which interference with individuals' consumption is justified.[90] The first category involves collective preferences. For example, the government, thought to be acting paternalistically, acts in behalf of the individual members who may choose to satisfy their short-term consumption choices. The second category covers preferences that are products of an existing legal regime. A change in the legal rules would entail a change in preferences as well. A third category that can be a subject of intervention, according to Sunstein, includes preferences made by consumers based on lack of adequate information. For example, if people smoke because they do not know how smoking can take a toll on their health, there is little objection to the conclusion that the government may validly intervene. Because one of the main causes of smoking is the public's lack of information, the remedy is to provide the public with relevant information.

The last category includes preferences that depend on the motivational distortions that characterize addictions, habits, and myopic behavior. When a seller of a commodity consciously manipulates the preferences of consumers by bringing about an addiction, then government intervention is justified. By making their products look more palatable to the public, to minors even, tobacco companies consciously manipulate the preference of consumers in the form of advertisements. Worse, they take advantage of the addiction to sell more of their goods to the public.

The important fact to highlight is that smokers do not receive perfect information when they start to get into the habit of smoking. Such is the dilemma that tobacco graphic health warnings aim to remedy. Tobacco companies effectively market their products to both adults and young smokers. Naturally, now that too many people have already gotten into the habit, it is high time for the government to step in. The two conditions required for the argument of regulation to flourish are present in this case. First, do smokers know what they are getting into, but proceed happily regardless? Secondly, do smokers benefit more as they consume more? Stated differently, do smokers continue to smoke over time because of the pleasure of consumption, or simply because they do not want to experience the pain of withdrawal?

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[89] Sokol, *supra* note 81.

[90] *Legal Interference with Private Preferences*, *supra* note 86, at 1138-1169.

Dworkin says that "[a] person is autonomous if he identifies with his desires, goals, and values and such identification is not influenced in ways which make the process of identification in some way alien to the individual."[91] A person's decision is not considered autonomous when he has been using products with addictive substances. Sunstein defined an addictive product as one that a person would rather not be exposed to if only he were "armed with perfect information."[92] Sunstein goes a little further by adding that addiction in which "the subjective costs of not consuming a particular good increase dramatically over time, while the subjective benefits decrease or remain stable."[93]

Robert Goodin explains that

> a man may know the facts [about the dangers of smoking, and may] wish to stop, but [may] not have the requisite willpower[.] In [such a case] there is no theoretical problem. We are not imposing a good on someone who rejects it. We are simply using coercion to enable people to carry out their own goals.[94]

He argues that intervention in the case of addiction "helps people implement their own preferred preference[.] It overrides people's preferences, to be sure. But the preferences which it overrides are ones which people themselves wish they did not have."[95]

Not including the poorest decile, almost 70% of the poorest half of the Filipino population have at least one family member who smokes.[96] A Filipino household with smokers shells out PHP 2,320 a year on tobacco, which is roughly around 3.6% of the expenditures on food.[97] Surprisingly, expenditure on tobacco is larger than the expenditure that these families allot for medical care and education, combined.[98] One reason to explain why those who earn very little still manage to set aside a portion of their income to buy cigarettes is the smokers' addiction to tobacco products.

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[91] GERALD DWORKIN, THE CONCEPT OF AUTONOMY, IN THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 54, 58 (1989 ed.).

[92] *Legal Interference with Private Preferences, supra* note 86, at 1159, 1161.

[93] *Id.* at 1158.

[94] Robert Goodin, *In Defence of the Nanny State, in* RIGHTS AND THE COMMON GOOD: COMMUNITARIAN PERSPECTIVES, 124 (1995).

[95] *Id.*

[96] Family Income and Expenditure Survey (2009).

[97] *Id.*

[98] *Id.*

John Stuart Mill, a known proponent of paternalism, argues that when individuals make unwise decisions, such is a good reason for "remonstrating with him, or reasoning with him, or persuading him, or entreating him."[99]Mill himself allowed labeling of dangerous products. The compulsive desire imposed by addiction naturally impinges on the autonomy of an individual. State regulation, such as the use of graphic health warnings, ensures that the individual's choice reflects his true preferences.[100]

IX. CONCLUSION

Imposing picture-based health warnings is indeed a laudable policy that serves as an additional government regulation on tobacco products. To avoid threats of future legal challenges, the potential constitutional infirmities must be addressed as early as now. Stronger evidence, i.e. empirical studies, must show that tobacco graphic health warnings advance governmental interest. The State must be prepared to argue that less restrictive means of tobacco regulation available in the past or at present, are not sufficiently effective to curb smoking.

The recent jurisprudence in the United States illustrates the inability of the current *Central Hudson* doctrine to strike a perfect balance between the tobacco companies' freedom of speech against the State's compelling interests. This Article argues that the use of tobacco graphic health warnings is compatible with the soft paternalistic framework, a promising approach in crafting tobacco control policies. By reconciling the protection of freedom of speech and the responsibility of the State to protect public health, regulations that apply soft paternalism can potentially satisfy the competing interests in the debate on tobacco control policy. Naturally, not everyone can be pleased. Somehow, the soft paternalism framework may continue to be insufficient in addressing all the problems. Undeniably though, this framework presents several areas of reform. Given its potential, legislators should seriously consider soft paternalism as an approach to tobacco control in the Philippines.

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[99] JOHN STUART MILL, ON LIBERTY 68 (1974 ed.).

[100] Thaddeus Mason Pope, *Is public health paternalism really never justified? A response to Joel Feinberg*, 30 OKLA. CITY U. L. REV. 1 (2005).