

Trademark Tarnishmyths

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Trademark law protects famous marks from dilution by tarnishment, defined by statute as use likely to “harm the reputation of the famous mark.” Tarnishing uses are typically those that connect a mark with disreputable goods or topics, like sex or drugs. Mark owners worry that consumers will not purchase products connected with sexually explicit or drug-related materials, and courts often presume the same. If those associations likely cause consumers to withhold custom or dissipate goodwill consumers have invested in the mark, anti-tarnishment protection might be justified. But if that harm is more mythic than real, the law penalizing tarnishing use of trademarks may be ripe for judicial skepticism or congressional reevaluation.

Indeed, constitutional invalidation might even be on the table. In a series of recent cases, the Supreme Court invalidated laws targeting false claims to military honors and the registration of disparaging, scandalous, or immoral trademarks on First Amendment grounds. In each case, the Court concluded the regulation was not narrowly targeted to an established harm. If harm via tarnishment happens rarely, or never, then laws penalizing tarnishing speech might violate the First Amendment.

We conducted two experiments to determine whether tarnishment likely occurs in prototypical cases—when the mark in question is affiliated with sex, drugs, or sacrilege. In one study, treatment subjects viewed images of target marks used to sell cannabis products or in off-color, sexual contexts. We hypothesized that participants exposed to the potentially tarnishing instruments would respond by downrating the desirability of the tarnished mark. Instead, we found the opposite: for most marks, exposure to the drug-

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or sex-related stimulus increased or burnished the perceived desirability of the targeted trademark. We also hypothesized the tarnishment effect would be stronger among politically conservative respondents. While we found no net tarnishment effect among conservative respondents, the burnishment effect was more pronounced among liberal respondents.

In a second study, treatment subjects viewed banner ads with cannabis-infused Skittles and satanic-themed Sunday sales of Chick-fil-A sandwiches. We hypothesized that conservative respondents and respondents with high religiosity would evaluate the target brands more negatively after multiple exposures. We found that respondents with high religiosity reported Chick-fil-A was less tasty in the test condition. But we also found that conservative respondents exposed to the drug-related stimuli reported Skittles were more wholesome compared to the control—another burnishment effect.

The results of these experiments suggest that the case for tarnishment might be weak in circumstances where courts have been most willing to presume tarnishment occurs. Indeed, much of what courts have presumed about the tarnishing effect of sex-, drug-, and sacrilege-related uses may be more mythic than material.

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INTRODUCTION

Cannabis has gone mainstream. Legislation or constitutional amendments in many states have legalized the sale and consumption of cannabis in smokable and edible forms. With markets comes marketing, and some firms have engaged in the tried-and-true practice of appropriating or imitating an existing brand to boost sales. Sellers of some candied cannabis products have adapted trademarks and trade dress that mimic famous candy brands like Jolly Rancher Gummies, Skittles, Cheetos, and Starburst Gummies.¹

But cannabis consumption is not without its complications and brand owners may have cause for concern. While many states have legalized the sale and consumption of cannabis, federal law still criminalizes both. Moreover, while support for legal cannabis has inched up over the years, key demographic groups continue to disapprove of its legalization, including Republicans, conservatives, and weekly churchgoers.² Even those who approve worry about consumption by children and youth.³

It is thus unsurprising that some brand owners have sued to prevent the use of their trademarks on cannabis-related packaging. For instance, in May 2021, the Wm. Wrigley Jr. Company sued a variety of firms for *inter alia* trademark counterfeiting, trademark infringement, and trademark dilution for unauthorized use of Wrigley's Skittles and Starburst trademarks on edible cannabis products.⁴

1. See, e.g., *Marijuana Edibles in Candy, Chip Bags Found in Dutch Flat Home with 5 Children*, FOX40 (Apr. 21, 2021, 2:19 PM), <https://fox40.com/news/local-news/marijuana-edibles-in-candy-chip-bags-found-in-dutch-flat-home-with-5-children/> [<https://perma.cc/3PQ9-EQYL>] (reporting that police seized edible cannabis products in packaging that looked like popular candy and chip brands).

2. See Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx> [<https://perma.cc/SUU6-CS5N>] (reporting data from a 2020 poll).

3. See Press Release, Joe Biden, President of the United States, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/> [<https://perma.cc/EV9G-XTX5>] (“[E]ven as federal and state regulation of marijuana changes, important limitations on trafficking, marketing, and under-age sales should stay in place.”); *Survey Finds That Parents Who Support Marijuana Legalization Expect Strict Regulation of Its Availability to Kids*, P’SHIP TO END ADDICTION (July 2013), <https://drugfree.org/newsroom/news-item/survey-finds-that-parents-who-support-marijuana-legalization-expect-strict-regulation-of-its-availability-to-kids/> [<https://perma.cc/V4LV-PSLS>] (reporting data from a March 2013 study).

4. See Complaint, Wm. Wrigley Jr. Co. v. Packaging Papi, LLC, No. 1:21-CV-02364 (N.D. Ill. May 3, 2021); Complaint, Wm. Wrigley Jr. Co. v. Roberto Conde, No. 5:21-CV-777 (C.D. Cal. May 3, 2021); Opinion and Order, Wm. Wrigley Jr. Co. v. Terphogz, LLC, No. 1:21-CV-02357 (N.D. Ill. May 3, 2021).

Wrigley's SKITTLES®	Infringing "Medicated Skittles"
  	  

Trademark law protects against infringing uses of the same or a similar mark on the same or competing goods.⁵ The law also protects a famous mark

5. See 15 U.S.C. §§ 1114(1), 1125(a); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979), *abrogated on other grounds by Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

against a use that dilutes the famous mark,⁶ either by blurring the distinctiveness of that mark, or by tarnishing the mark—creating an association that harms the reputation of the famous mark.⁷ As the court held in one case decided in favor of lawnmower manufacturer John Deere, tarnishing use links a trademark to “products of shoddy quality” or portrays it “in an unwholesome or unsavory context.”⁸ It is a truism that “inherently negative or unsavory associations” like “illicit drugs or pornography” are presumptively tarnishing.⁹ Courts frequently assume that connection to drugs or sex will have an “unfairly destructive effect” on the appropriated trademarks.¹⁰

Perhaps we could add sacrilege to what Handler called the “unholy trinity of sex, drugs, or lawnmowers.”¹¹ In March 2021, rapper Lil Nas X and design studio MSCHF released an unofficial black and red Nike shoe featuring satanic iconography and allegedly containing a drop of human blood.¹² The “666” shoe sold out in less than a minute.¹³ The event did not pass without comment. High profile political and religious figures complained.¹⁴ So did potential Nike purchasers.¹⁵ Nike then sued, alleging tarnishment among its

6. 15 U.S.C. § 1125(c). *See generally* Jake Linford & Kyra Nelson, *Trademark Fame and Corpus Linguistics*, 45 COLUM. J.L. & ARTS 171 (2022).

7. 15 U.S.C. § 1125(c)(2)(C). *But see* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 698 (2004) (“But there is no good reason . . . to limit anti-tarnishment protection to the category of famous marks.”); Robert S. Nelson, *Unraveling the Trademark Rope: Tarnishment and Its Proper Place in the Laws of Unfair Competition*, 42 IDEA J.L. & TECH. 133, 166 (2002) (“Tarnishment is effectively likelihood of confusion.”).

8. *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

9. Jessica Taran, *Dilution by Tarnishment: A Case for Vulgar Humor*, 7 INTELL. PROP. L. BULL. 1, 6 (2002) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 cmt. c (AM. L. INST. 1995)).

10. Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 972 (1993).

11. Michael Handler, *What Can Harm the Reputation of a Trademark? A Critical Re-Evaluation of Dilution by Tarnishment*, 106 TRADEMARK REP. 639, 656 (2016).

12. *See* Oscar Holland & Jacqui Palumbo, *Lil Nas X’s Unofficial ‘Satan’ Nikes Containing Human Blood Sell Out in Under a Minute*, CNN STYLE (Mar. 28, 2021), <https://www.cnn.com/style/article/lil-nas-x-mschf-satan-nike-shoes/index.html> [<https://perma.cc/GWJ7-BQNG>].

13. *Id.*

14. *See e.g.*, Justine Coleman, *Kristi Noem, Lil Nas X Feud on Twitter After Rapper Unveils ‘Satan’ Sneakers*, THE HILL (Mar. 29, 2021, 9:32 AM), <https://thehill.com/homenews/state-watch/545344-kristi-noem-lil-nas-x-feud-on-twitter-after-rapper-unveils-satan/> [<https://perma.cc/27KK-J8QT>].

15. *See* Memorandum for Plaintiff, Nike, Inc. v. MSCHF Prod. Studio Inc, No. 1:21-cv-01679-EK-PK (E.D.N.Y. Mar. 30, 2021) (plaintiff memorandum supporting motion for temporary restraining order & preliminary injunction). Tweets fired off in the wake of the “666” shoe launch included the hashtag #BoycottNike, expressed disgust, called down the wrath of God, and

other claims. After a judge granted Nike’s request for a temporary restraining order,¹⁶ the parties settled.¹⁷



Trademark tarnishment, as understood by the courts and proscribed by federal law, is harm to the reputation of a famous mark stemming from the defendant’s unauthorized use of the mark in an unwholesome or degrading context.¹⁸ Federal and state trademark laws grant firms rights against tarnishing uses even if consumers are not confused.¹⁹ Federal law protects

concluded Nike must have given permission, because “[e]verybody see that big ass Swoosh.” *Id.* at 20.

16. Order Granting Plaintiff’s Motion for a Temporary Restraining Order, Nike, Inc. v. MSCHF Prod. Studio, Inc., No. 1:21-cv-01679 (N.D. Ill. Apr. 1, 2021).

17. Neil Vigdor, *Company Will Offer Refunds to Buyers of ‘Satan Shoes’ To Settle Lawsuit by Nike*, N.Y. TIMES (July 7, 2021), <https://www.nytimes.com/2021/04/08/style/satan-shoe-settlement-nike.html> [<https://perma.cc/V2WZ-UEAP>].

18. See 15 U.S.C. § 1125(c)(2)(C); 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:89 (5th ed. 2022).

19. See, e.g., *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 387 (6th Cir. 2010) (determining the “likelihood of dilution by tarnishment” to plaintiff’s mark).

only famous marks—trademarks that are sufficiently prominent and unique in the marketplace—from tarnishing use.²⁰

This paper empirically investigates whether associating a mark with unwholesome or degrading content is likely to harm the reputation of the mark. We are not the first to empirically test tarnishment; although, to our knowledge, these experiments are the first to test drug- and sacrilege-related tarnishment. We are aware of seven other papers that empirically test tarnishment.²¹ Buccafusco and Heald report that subjects exposed to low-quality readings of public domain audiobooks attach a lower monetary value to the underlying work.²² Buccafusco, Heald, and Bu investigate whether participants exposed to advertisements for pornographic derivatives of popular films find the original film less valuable.²³ They find no statistically significant tarnishing effect among the study populace as a whole, but find a significant effect among respondents who described themselves as “very socially conservative.”²⁴ Those conservative respondents were significantly less likely to select a sequel to a tarnished film than an untarnished film.²⁵

Christo Boshoff reports that subjects whose responses were measured using electroencephalography and electromyography react more positively to brand stimulus when first exposed to tarnishing stimulus, although the tarnishing stimuli were mild, humorous, and parodic, rather than unsavory.²⁶ Kruger and Boshoff test tarnishment of four famous South African brands, finding that sex-related tarnishment had a strong detrimental influence on cognition and attitude strength of the famous brands considered together, and

20. See Linford & Nelson, *supra* note 6, at 177.

21. Dilution by blurring has been the subject of several empirical studies. The results are mixed, but generally call into question whether famous trademarks suffer a loss of distinctiveness from potentially blurring use. See, e.g., Barton Beebe et al., *Testing for Trademark Dilution in Court and the Lab*, 86 U. CHI. L. REV. 611 (2019); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008); Chris Pullig et al., *Brand Dilution: When Do New Brands Hurt Existing Brands?*, 70 J. MKTG. 52 (2006); Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL'Y & MKTG. 265, 268–70 (2000).

22. Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 26–27 (2013). In a subsequent co-authored work, Buccafusco and Heald (with Bu) refer to their own subsequent work as “the first systematic attempt to test the tarnishment hypothesis empirically.” Christopher Buccafusco et al., *Testing Tarnishment in Trademark and Copyright Law: The Effect of Pornographic Versions of Protected Marks and Works*, 94 WASH. U. L. REV. 341, 388 (2016).

23. Buccafusco & Heald, *supra* note 22, at 341.

24. *Id.* at 387.

25. *Id.*

26. Christo Boshoff, *The Lady Doth Protest Too Much: A Neurophysiological Perspective on Brand Tarnishment*, 25 J. PROD. & BRAND MGMT. 196, 200–01 (2016).

differing levels of actual or potential harmful effects depending on the respondent's involvement with the brand and the nature of the tarnishing advertisement.²⁷

Bedi and Reibstein focus on brand association and brand attitude measures for tarnishment.²⁸ Two single-exposure studies find no statistically significant tarnishing effect,²⁹ but a multi-exposure study shows statistically significant tarnishment effects in a sex-related context.³⁰ An accepted paper by Bedi and Schuster finds that negative perceptions of a sampled copyrighted work are created when the sampling work is a critical failure, pointing to a negative spillover effect that can harm perceptions of the underlying work.³¹

Finally, a draft paper by Linford and Perzanowski finds that participants exposed to information that an unpopular politician used a song at a rally report lower likelihood of streaming or purchasing the song or attending concerts by the recording artist.³²

Our paper builds on these works by providing the first test of whether drug-related and sacrilegious uses tarnish appropriated marks in two separate studies. We formed two key hypotheses. First, participants exposed to sex-related, drug-related, or "occult" related uses will have more negative attitudes toward the targeted brands after exposure to the potentially tarnishing use. Second, participants who are socially or politically conservative or who exhibit high religiosity will manifest a stronger negative shift than will politically liberal participants. Our studies generally disprove the first hypothesis but prove in part the second hypothesis.

The results of these experiments suggest that the case for tarnishment might be weak in circumstances where courts have been most willing to presume tarnishment occurs. Indeed, much of what courts have presumed about the tarnishing effect of sex-, drug-, and sacrilege-related uses may be more mythic than material. To the extent this result is generalizable, courts

27. Hannelie Kruger & Christo Boshoff, *The Influence of Trademark Dilution on Brand Attitude: An Empirical Investigation*, 24 MGMT. DYNAMICS 50, 58, 63 (2015).

28. Suneal Bedi & David Reibstein, *Measuring Trademark Dilution by Tarnishment*, 95 IND. L.J. 683, 686 (2020).

29. *Id.* at 706 ("This leads us to conclude that tarnishment is not resulting from a one-time exposure. Rather, it takes several exposures to have a significant effect on the target trademark/brand.").

30. *Id.* at 714–21.

31. Suneal Bedi & W. Michael Schuster, *Measuring Fair Use's Market Effect*, 2022 WIS. L. REV. 1467, 1500–06 (2022). *But see* W. Michael Schuster et al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 177 (2019) (reporting that sales of sampled songs increased after being repurposed in a new work).

32. Jake Linford & Aaron Perzanowski, *Measuring the Harms of Unauthorized Campaign Music*, 75 U.C. L. S.F. L.J. (forthcoming 2023) (on file with authors).

should require some evidence of likely tarnishing effect before granting relief on a claim of dilution via tarnishment. Indeed, anti-tarnishment protection might well be due for congressional reevaluation or vulnerable to constitutional challenge on First Amendment grounds.

The article proceeds in three parts. Part I discusses the law of tarnishment, the theories advanced in defense of a right against tarnishment, and critiques of those theories. Part II explains our experimental studies and our findings. In Part III, we discuss implications of our findings.

I. TARNISHMENT IN THEORY AND IN PRACTICE

Finding evidence of tarnishment requires a clear picture of what tarnishment is and the potential mechanisms that would drive a tarnishing effect. As defined by federal statute, “‘dilution by tarnishment’ is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”³³ This language owes its origin in part to state statutes that predate it by half a century. While those statutes and the case law applying them lack uniformity,³⁴ one can identify trend lines. Early statutes enacted in the mid-twentieth century provided a cause of action for injury to business reputation.³⁵ Statutes from the end of the twentieth century implemented language drawn from a 1992 version of a model state trademark bill, typically providing for injunctive relief where the junior use “causes dilution of the distinctive quality of the owner’s mark.”³⁶ Although that later group of statutes did not expressly refer to tarnishment or harm to business reputation, courts applied those statutory provisions to enjoin arguably tarnishing uses.³⁷ Courts applying state statutes differed on whether the plaintiff was required to show a likelihood of confusion before securing an injunction on tarnishment grounds.³⁸

33. 15 U.S.C. § 1125(c)(2)(C).

34. See Brian A. Jacobs, *Trademark Dilution on the Constitutional Edge*, 104 COLUM. L. REV. 161, 168 (2004) (“[E]xisting state antidilution laws provided little aid to businesses operating in the national market.”); Sarah L. Burstein, *Dilution by Tarnishment: The New Cause of Action*, 98 TRADEMARK REP. 1189, 1195 (2008) (“By 1995, about half of the states had enacted dilution statutes of some type. Despite the fact that the state statutes were often similarly worded and were of just two general types, judicial interpretations and applications of those statutes were largely inconsistent.”).

35. See, e.g., 1947 Mass. Acts 300 ch. 307 (“Likelihood of injury to business reputation or of dilution of the distinctive quality of a trade name or trade-mark shall be a ground for injunctive relief in cases of trade-mark infringement or unfair competition . . .”).

36. See, e.g., 1994 Iowa Acts 181 ch. 1090, § 13 (codified at IOWA CODE § 548.10A (1994)).

37. Burstein, *supra* note 34, at 1205.

38. *Id.* at 1195–96.

In its simplest form, a remedy against tarnishment appears consistent with trademark law's origins in unfair competition. "[B]randing your own inferior or noxious goods with the plaintiff's mark" smacks of unethical behavior the law should deter.³⁹ Indeed, Anglo-American law has long recognized reputational harm might follow from passing off.⁴⁰ But scholars worry that protection against tarnishment allows mark owners to discourage speech in the form of "saying something bad about the trademark owner."⁴¹ Beebe notes that the concept of tarnishment has broadened beyond targeting "shoddy" copies or products that place the target mark in an "unwholesome or unsavory context."⁴² McKenna similarly argues that trademark law should police only those uses that deceive consumers, not those that persuade or compete for meaning.⁴³ Tarnishing uses that change consumers' perception of the target mark without deceiving them as to the origin might only compete for meaning and therefore fall outside the reach of trademark law or be protected with a relatively narrow band of remedies.⁴⁴

A. Potential Mechanisms of Tarnishment

Federal law subjects use of a mark to an injunction if that use is likely to tarnish a similar famous mark. As defined by federal law, tarnishment occurs when an association arises between a junior user's word, name, symbol, or device and a similar senior famous mark, and the association harms the reputation of the senior mark.⁴⁵ Parodies are expressly excluded from liability, but courts require the parodic use to target the appropriated brand, goods, or services sold thereunder while not serving "as a designation of source' for the parodist's 'own goods or services.'"⁴⁶

39. Stacey L. Dogan & Mark A. Lemley, *Parody as Brand*, 47 U.C. DAVIS L. REV. 473, 483 (2013).

40. See, e.g., LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 875–76 (4th ed. 2014) ("The courts have also recognized that damage may occur where the misrepresentation has a negative impact on the claimant's reputation.").

41. Dogan & Lemley, *supra* note 39, at 483.

42. Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 858 (2010).

43. Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 72 (2012).

44. *Id.* at 134–36.

45. See 15 U.S.C. § 1125(c)(2)(C); *id.* § 1127 ("'[T]rademark' includes any word, name, symbol, or device, or any combination thereof . . .").

46. Burstein, *supra* note 34, at 1244 (quoting 15 U.S.C. § 1125(c)(3)(A)). A recent Supreme Court decision failed to provide clarity about the scope of liability for arguably parodic trademark uses. See *Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, 143 S. Ct. 1578, 1583 (2023) (holding

Tarnishment “generally arises when the plaintiff’s trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner’s product.”⁴⁷ Liability follows, consistent with the theory that the selling power of the senior trademark may be harmed by the distasteful association,⁴⁸ if that new association changes consumers’ process for recalling and evaluating the senior mark.⁴⁹

One might describe associational harm as a reduction in brand equity. Aaker argues that brand equity provides value to consumers and brand owners.⁵⁰ Brand equity provides consumers an information processing shortcut via associations that “summarize a set of facts and specifications that otherwise would be difficult for the customer to process and access, and expensive for the firm to communicate.”⁵¹ Bedi and Reibstein argue “[t]hese associations are the reputation that the trademark commands in the marketplace.”⁵² Those associations are the reputation that the anti-tarnishment provision aims to safeguard.⁵³

Changes in brand association can change product sales.⁵⁴ Reductions in brand liking and consideration can drive reductions in sales.⁵⁵ On the other hand, positive attributes can lead to greater market shares and higher prices for brands that enjoy those attributes.⁵⁶

According to associative network theory, brand attitudes or evaluations are retrieved from memory via associational pathways.⁵⁷ These associative

that the sale of purportedly parodic dog toys “falls within the heartland of trademark law, and does not receive special First Amendment protection”).

47. *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 111 (2d Cir. 2010) (quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994)).

48. *See MCCARTHY*, *supra* note 18, at § 24:70 (describing “blurring theory” as a trademark’s loss of “distinctiveness” because “first there was one, now there are two”).

49. Bedi & Reibstein, *supra* note 28, at 698. *But see* Beebe et al., *supra* note 21, at 624 (consumer association between a senior famous mark and a junior mark “does not necessarily result in any material change to consumers’ purchasing preferences”).

50. DAVID A. AAKER, *MANAGING BRAND EQUITY* 16–17 (1991).

51. *Id.* at 111.

52. Bedi & Reibstein, *supra* note 28, at 695.

53. *Id.*

54. Shuba Srinivasan et al., *Mindset Metrics in Market Response Models: An Integrative Approach*, 47 J. MKTG. RSCH. 672, 681 (2010).

55. *Id.* at 680.

56. Arjun Chaudhuri & Morris B. Holbrook, *The Chain of Effects from Brand Trust and Brand Affect to Brand Performance: The Role of Brand Loyalty*, 65 J. MKTG. 81, 81 (2001).

57. Bedi & Reibstein, *supra* note 28, at 697 n.77 (citing John R. Anderson, *A Spreading Activation Theory of Memory*, 22 J. VERBAL LEARNING & VERBAL BEHAV. 261 (1983); Pullig et al., *supra* note 21).

networks represent three forms of brand knowledge: product categories, brand attributes, and brand attitudes.⁵⁸ Connections between these forms of brand knowledge are triggered as consumers retrieve information about the mark.⁵⁹ Use of a mark that creates negative associations can alter these networks in a manner that reduces brand reputation and impacts market share and brand price.⁶⁰ Even if consumers are not confused that the junior product comes from the senior mark owner, the junior use may trigger the retrieval of associations with the senior mark, and thus a transfer of associations from the junior product to the senior brand.⁶¹ *Ceteris paribus*, the more similar the junior and senior trademarks, the more likely the evaluative transfer.⁶²

Literature on harmful brand extensions suggests that the sale of poor quality products under the junior trademark might adversely impact the evaluation of products sold under the senior trademark if consumers associate the junior with the senior.⁶³ But the effect should be weaker for brands

58. *Id.*

59. *Id.*

60. *Id.*

61. Alexander F. Simonson, *How and When Do Trademarks Dilute: A Behavioral Framework To Judge "Likelihood" of Dilution*, 83 TRADEMARK REP. 149, 160 (1993). Stimulus generalization may drive this transfer of associations. *Id.* at 160–61 (citing Eric G. Heinemann & Sheila Chase, *Stimulus Generalization*, in 2 HANDBOOK OF LEARNING AND COGNITIVE PROCESSES (1975); Sarnoff A. Mednick & Jonathan L. Freedman, *Stimulus Generalization*, 57 PSYCH. BULL. 169 (1960); Donald A. Riley & Marvin R. Lamb, *Stimulus Generalization*, in PERCEPTION AND ITS DEVELOPMENT: A TRIBUTE TO ELEANOR J. GIBSON (1979); David M. Boush et al., *Affect Generalization to Similar and Dissimilar Brand Extensions*, 4 PSYCH. & MKTG. 225, 228–29 (1987); Joe Kent Kerby, *Semantic Generalization in the Formation of Consumer Attitudes*, 4 J. MKTG. RSCH. 314 (1967)). The transfer might instead occur via triggering schema as described in schema theory. *Id.* at 160–61 (citing Susan T. Fiske, *Schema-Triggered Affect: Applications to Social Perception*, in AFFECT AND COGNITION: THE 17TH ANNUAL CARNEGIE SYMPOSIUM ON COGNITION (1982); Susan T. Fiske & Mark A. Pavelchak, *Category-Based Versus Piecemeal-Based Affective Responses: Developments in Schema-Triggered Affect*, in HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR (1986); Mita Sujjan, *Consumer Knowledge: Effects on Evaluation Strategies Mediating Consumer Judgments*, 12 J. CONSUMER RSCH. 31 (1985); MARTIN FISHBEIN & ICEK AJZEN, BELIEF, ATTITUDE, INTENTION AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH (1975); Jan B. Steenkamp, *Conceptual Model of the Quality Perception Process*, 21 J. BUS. RSCH. 309 (1990); John J. Wheatley & John S. Chiu, *The Effects of Price, Store Image, and Product and Respondent Characteristics on Perceptions of Quality*, 14 J. MKTG. RSCH. 181 (1977); Valarie A. Zeithaml, *Consumer Perceptions of Price, Quality and Value: A Means-End Model and Synthesis of Evidence*, 52 J. MKTG. 2, 2 (1988); Dawn Dobni & George M. Zinkhan, *In Search of Brand Image: A Foundation Analysis*, 17 ADVANCES CONSUMER RSCH. 110 (1990)).

62. Simonson, *supra* note 61, at 166 (summarizing literature on brand extension studies).

63. *Id.*; Jennifer Aaker et al., *When Good Brands Do Bad*, 31 J. CONSUMER RSCH. 1, 13 (2004); Laura R. Bradford, *Parody and Perception: Using Cognitive Research To Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 743 (2005) (citing JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, PERSUASION IN ADVERTISING 63 (2004)). Keller & Aaker report that

perceived to be unrelated than for parent brand and extension brand, given the likely stronger perceived relationship between parent and extension.⁶⁴ Some recent studies indicate instead that the parent brand is relatively immune to reputational harm from an unsuccessful extension.⁶⁵ Highly-evaluated extensions, on the other hand, have a burnishing or reputation-enhancing effect, even if the new product is unrelated to the source product.⁶⁶

Petty & Cacioppo's "Elaboration Likelihood Model" predicts a dual process theory of attitude change driven by advertising messages.⁶⁷ First, change in attitude may happen via a central route after the individual pays close attention to and evaluates a brand message.⁶⁸ Central route change arguably lasts longer, but the evaluator is more likely to resist the change.⁶⁹ Second, change may occur via a peripheral route, where attitude change occurs because an individual uses negative or positive cues to make quick, crude, and simple inferences about the brand.⁷⁰ Change through peripheral processing is comparatively short-lived.⁷¹ Consumers will take the central route when processing resources are readily available, but they are more likely to default to the peripheral route when under cognitive load.⁷² Many factors can diminish processing resources and thus increase cognitive load, including lack of ability and opportunity, time pressures, distractions, lack of

negative evaluations of brand extensions increased the likelihood that subsequent brand extensions would be evaluated unfavorably, evaluations of the core brand were not adversely affected. Kevin Lane Keller & David A. Aaker, *The Effects of Sequential Introduction of Brand Extensions*, 29 J. MKTG. RSCH. 35, 46 (1992).

64. Simonson, *supra* note 61, at 167.

65. Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 105 (2009) ("[W]ell-known brands are quite resistant to change."); Handler, *supra* note 11, at 679–80 (citing, *inter alia*, Henrik Sjödin & Fredrik Törn, *When Communication Challenges Brand Associations: A Framework for Understanding Consumer Responses to Brand Image Incongruity*, 5 J. CONSUMER BEHAV. 32 (2006)); *see also* Joseph W. Chang, *Will a Family Brand Image Be Diluted by an Unfavorable Brand Extension? A Brand Trial-Based Approach*, 29 ADVANCES CONSUMER RSCH. 299, 303 (2002).

66. Simonson, *supra* note 61, at 167 n.68 (citing Alexander Simonson, *The Impact of Identical Brand Names on the Strength of New Brands and Original Brands: A Study of Brand Appropriation and Dilution* (1994) (Ph.D. dissertation, Columbia University) (ProQuest)). Other disciplines have explored similar dual processing systems and the discussion has reached a broader market in DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

67. Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCH. 123, 124–27 (Leonard Berkowitz ed., 1986).

68. Richard E. Petty et al., *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RSCH. 135, 135 (1983).

69. Higher involvement also results in following the central route. *Id.*

70. *Id.* at 136.

71. *Id.*

72. *See* Richard E. Petty & John T. Cacioppo, *Source Factors and the Elaboration Likelihood Model of Persuasion*, 11 ADVANCES CONSUMER RSCH. 668, 668 (1984).

familiarity, fatigue, and social pressure.⁷³ Indeed, it would be unlikely, if not impossible, for consumers to continually exert the effort necessary for central route processing in every situation.⁷⁴

Experimental data supports this dual-processing model.⁷⁵ The slower, logical, and deliberative process is more difficult to engage, but leads to more lasting change.⁷⁶ Because central processing is a slower and more deliberate path for change, Bedi & Reibstein theorize that consumers who carefully assess tarnishing stimuli are less likely to change brand attitudes.⁷⁷

Conversely, consumers are more likely to form new associations via the peripheral route when under cognitive processing limitations.⁷⁸ But processing through the peripheral route may be less predictive of change in behavior and less likely to last than changes through the central route.⁷⁹ That is not to say that changes induced through the peripheral route are never long lasting – indeed, the evidence is mixed. Some data indicate even quick, associative decisions can be difficult to displace.⁸⁰ But durable change is more likely to occur through the central route than the peripheral route.⁸¹ To

73. See J. Craig Andrews, *Motivation, Ability, and Opportunity To Process Information: Conceptual and Experimental Manipulation Issues*, 15 *ADVANCES CONSUMER RSCH.* 219, 219–25 (1988).

74. Richard E. Petty & Pablo Briñol, *The Elaboration Likelihood Model*, in 1 *HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY* 224, 229 (Paul A. M. Van Lange et al. eds., 2012) (“[I]t is not worthwhile to exert considerable mental effort to achieve correctness in all situations and people do not always have the requisite knowledge, time, or opportunity to thoughtfully assess the merits of a proposal.”).

75. Steven A. Sloman, *Two Systems of Reasoning*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 379, 384 (2002); Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 *TEX. INTELL. PROP. L.J.* 331, 360–61 (2007).

76. Bedi & Reibstein, *supra* note 28, at 700.

77. *Id.*

78. *Id.*

79. Brian W. McNeill & Cal D. Stoltenberg, *Reconceptualizing Social Influence in Counseling: The Elaboration Likelihood Model*, 36 *J. COUNSELING PSYCH.* 24, 25 (1989) (“[A]ttitudinal changes tend to persist longer and are more predictive of behavior than changes induced through the peripheral route.”).

80. Sheff, *supra* note 75, at 361 (citing Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 401 (Thomas Gilovich et al. eds., 2002); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *N.Y.U. L. REV.* 630, 646–54, 660–62 (1999); Nicholas Epley & Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic: Why the Adjustments are Insufficient*, 17 *PSYCH. SCI.* 311, 312 (2006); Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 57 (Thomas Gilovich et al. eds., 2002); Christian D. Schunn et al., *To Calculate or Not To Calculate: A Source Activation Confusion Model of Problem Familiarity’s Role in Strategy Selection*, 23 *J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION* 3 (1997)).

81. EMORY A. GRIFFIN, *A FIRST LOOK AT COMMUNICATION THEORY* 202–05 (10th ed. 2019).

the extent peripheral processing associations can be sticky, use that associates a mark with a negative stimulus may impair the reputation of the mark and reduce subsequent sales even when consumers are unlikely to consciously recall the tarnishing stimulus.⁸²

Scholars like Handler, however, are at the forefront in questioning whether the mechanisms by which negative associations might occur are truly likely to lead to a change in consumer behavior.⁸³ Handler queries whether courts should presume that references to well-known marks in unwholesome contexts necessarily damage brand equity or goodwill.⁸⁴ Indeed, if this “negative contagion” does not occur,⁸⁵ one might reasonably question whether trademark tarnishment demands legal intervention at all.

B. Categories of Tarnishment and Theories of Tarnishment

Trademark dilution comes in two forms, blurring and tarnishment.⁸⁶ Our paper focuses on tarnishment, unauthorized trademark use that creates an association that harms the reputation of the famous mark.⁸⁷ In the following subsections, we discuss three types of tarnishment measured in this study – sex-related, drug-related, and sacrilege-related tarnishment. In each subsection, we also summarize the theoretical and experimental literature describing the specific bases for hypothesizing that exposure to sex-, drug-, and sacrilege-related stimuli might create associations that tarnish brand reputation.

82. Sheff, *supra* note 75, at 362; Bradford, *supra* note 63, at 743. Bedi & Reibstein reported a multi-impression study in which researchers asked test subjects to focus on news stories but presented them with peripheral tarnishing stimuli. Bedi & Reibstein, *supra* note 28, at 714–21. A discussion of their study follows below in Part III, *infra*, and our second study uses the same structure to test drug- and sacrilege-related tarnishment.

83. Handler, *supra* note 11, at 678–79.

84. *Id.* at 686.

85. Katya Assaf, *Magical Thinking in Trademark Law*, 37 L. & SOC. INQUIRY 595, 614–17 (2012).

86. Lynda J. Oswald, “Tarnishment” and “Blurring” Under the Federal Trademark Dilution Act of 1995, 35 AM. BUS. L.J. 255, 262–63 (1999).

87. Joseph J. Galvano, *There Is No “Rational Basis” for Keeping It a “Secret” Anymore: Why the FTDA’s “Actual Harm” Requirement Should Not Be Interpreted the Same Way for Dilution Caused by Blurring as It Is for Dilution Caused by Tarnishing*, 31 HOFSTRA L. REV. 1213, 1253 (2003); Patrick M. Bible, *Defining and Quantifying Dilution Under the Federal Trademark Dilution Act of 1995: Using Survey Evidence To Show Actual Dilution*, 70 U. COLO. L. REV. 295, 305 (1998).

1. Sex-Related Tarnishment

Sex-related tarnishment occurs when the junior user offers a product or service that associates the senior mark with sex or obscenity and that association harms the reputation of the senior mark. Sex-related tarnishment appears more frequently than other types of tarnishment in reported cases.⁸⁸ We summarize a few prototypical cases here.

In *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*,⁸⁹ the Second Circuit held the use of a simulated Dallas Cowboys Cheerleaders uniform in defendant's explicit pornographic film *Debbie Does Dallas* "result[ed] in confusion which has 'a tendency to impugn (plaintiff's services) and injure plaintiff's business reputation.'"⁹⁰ The court concluded that the use of the uniform "unquestionably brings to mind the Dallas Cowboys Cheerleaders."⁹¹ The opinion may have reflected the discomfort of the panelists, but the court opined that the harm seemed likely to last: "[I]t is hard to believe that anyone who had seen defendants' sexually depraved film could ever thereafter disassociate it from plaintiff's cheerleaders."⁹² Other brand uses in pornographic films or adult entertainment have been found tarnishing or harmful to brand identity.⁹³ Nonetheless, in some cases,

88. Bedi & Reibstein, *supra* note 28, at 690.

89. 604 F.2d 200 (2d Cir. 1979).

90. *Id.* at 205 (quoting *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972)).

91. *Id.*

92. *Id.*

93. See, e.g., *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 525 (S.D.N.Y. 2009) (granting plaintiff's motion for summary judgment on its tarnishment claim, concluding that an exhibition of models riding a VIAGRA-branded missile and distributing condoms would likely harm the reputation of Pfizer's trademark); *Pfizer Inc. v. Sachs*, No. 08 Civ. 8065(WHP), 2008 WL 4525418, at *5 (S.D.N.Y. Oct. 8, 2008) (granting preliminary injunction against defendant); *Polo Ralph Lauren L.P. v. Schuman*, No. Civ.A. H97-1855, 1998 WL 110059, at *2 (S.D. Tex. Feb. 9, 1998) (tarnishing use of the Polo Club for an adult entertainment establishment); *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942, 949-50 (N.D. Ill. 2002) (pornographic website's use of "VelVeeda" tarnishes VELVEETA trademark); *Victoria's Cyber Secret v. V Secret Catalogue, Inc.*, 161 F. Supp. 2d 1339, 1355 (S.D. Fla. 2001) (tarnishment likely when defendant uses plaintiff's mark on websites "for entertainment of a lascivious nature suitable only for adults"); *Mattel, Inc. v. Internet Dimensions Inc.*, No. 99 Civ. 10066(HB), 2000 WL 973745, at *8 (S.D.N.Y. July 13, 2000) (finding tarnishment likely when defendant uses plaintiff's BARBIE trademark in connection with pornography); *Cnty. Fed. Sav. & Loan Ass'n v. Orondorff*, 678 F.2d 1034, 1035 (11th Cir. 1982) (holding that plaintiff need not provide proof of harm from defendant's use of plaintiff's Cookie Jar mark for bank services); *Pillsbury Co. v. Milky Way Prods., Inc.*, No. C78-679A, 1981 WL 1402, at *14 (N.D. Ga. Dec. 24, 1981) (finding defendant's depiction of plaintiff Pillsbury's brand spokes-figures in sex acts could injure plaintiff's business reputation, and granting an injunction under Georgia's anti-dilution statute); *Edgar Rice Burroughs, Inc. v. Manns Theatres*, 195 U.S.P.Q. (BNA) 159, 161 (C.D. Cal. 1976) (enjoining

defendants have successfully argued that a pornographic derivative of a mainstream film is protected parody.⁹⁴ For example, in *Lucasfilm Ltd. v. Media Market Group, Ltd.*, the court presumed that a pornographic anime derivative of *Star Wars* was a parody, and thus found it non-commercial, protected speech.⁹⁵

Perhaps the most famous tarnishment case involved a sex-related dispute between lingerie merchant Victoria's Secret and the owners of a Kentucky sex toys shop cheekily named Victor's Little Secret.⁹⁶ The case advanced all the way to the Supreme Court, where the Court found for the defendant on the ground that Victoria's Secret had not shown actual dilution.⁹⁷ In response, Congress amended the federal antidilution statute to clarify that a plaintiff need only establish likely dilution.⁹⁸ A few years later, Victoria's Secret succeeded in securing an injunction against further use of Victor's Little Secret as defendant's business name.⁹⁹ The appellate court that finally disposed of the case identified what it labeled "a clearly emerging consensus in the case law . . . that the creation of an 'association' between a famous mark and lewd or bawdy sexual activity disparages and defiles the famous mark and reduces the commercial value of its selling power."¹⁰⁰ Indeed, the court concluded that sex-related use raised a strong but rebuttable inference of tarnishment, akin to the tort doctrine of *res ipsa loquitur*, with the burden falling on the defendant to establish a lack of tarnishment.¹⁰¹

performance of a pornographic film featuring Tarzan); *cf.* *Eastman Kodak Co. v. Rakow*, 739 F. Supp. 116, 118 (W.D.N.Y. 1989) (holding that comedian's use of Kodak in his stage name was likely to harm the reputation of the Kodak mark in light of the profane and sexualized nature of the performance); *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir. 1996) (finding tarnishment likely when a mark's "likeness is placed in the context of sexual activity, obscenity, or illegal activity").

94. *See, e.g.*, *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33–34 (1st Cir. 1987) (reversing grant of injunction and refusing to apply state anti-dilution statute to defendant's pornographic parody of plaintiff's catalog); *cf.* *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982) (holding defendants' bawdy "spoof" of Miss America pageant entitled to First Amendment protection); *Groucho Marx Prods. v. Day & Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982) (noting "the broad scope permitted parody in First Amendment law"); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980) ("[I]n today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody . . .").

95. *Lucasfilm Ltd. v. Media Market Grp., Ltd.*, 182 F. Supp. 2d 897, 901 (N.D. Cal. 2002).

96. *Moseley v. V Secret Catalogue*, 537 U.S. 418, 418 (2003).

97. *Id.* at 433.

98. *Sheff*, *supra* note 75, at 343.

99. *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 385 (6th Cir. 2010).

100. *Id.* at 387–88.

101. *Id.* at 388–89.

For some brands like Victoria's Secret, the line between tarnishing sex-related merchandise and tasteful but "sexy" merchandise may be vanishingly thin. But courts have also held tarnishing unauthorized uses of trademarks by sellers of sex aids, lingerie, and family planning products.¹⁰² In some of those cases, there is a stark difference between the senior user's brand reputation and the junior user's product line.

Many recent sex-related tarnishment cases involve the use of a mark in the name of a website offering pornographic material. For example, one court concluded defendant's use of Pottery Barn for its sexually oriented website was likely to tarnish the Pottery Barn mark.¹⁰³ Other cases reach similar results.¹⁰⁴

As the summary of the preceding cases suggests, courts refer to sex-related association as presumptively harmful.¹⁰⁵ As summarized by Buccafusco,

102. *See, e.g.*, Pfizer Inc. v. Sachs, 652 F. Supp. 2d 512, 525 (S.D.N.Y. 2009) (finding likely harm to reputation of plaintiff's mark from defendant's display of an adult entertainment exhibition of models riding a VIAGRA branded missile and distributing condoms); Toys "R" Us, Inc. v. Akkaoui, No. C 96-3381 CW, 1996 WL 772709, at *3 (N.D. Cal. Oct. 29, 1996) (use of Adults "R" Us as a mark for sex devices and clothing); Am. Express Co. v. Vibra Approved Lab'ys. Corp., No. 87 CIV. 8840 (CSH), 1989 WL 39679, at *10 (S.D.N.Y. Apr. 19, 1989) (enjoining defendant's "condom cards," sold in sex shops, which parodied the American Express card design and "Don't Leave Home Without It" slogan under the New York anti-dilution statute); Anheuser-Busch, Inc. v. Andy's Sportswear, Inc., No. C-96-2783 TEH, 1996 WL 657219, at *1 (N.D. Cal. Aug. 28, 1996) (granting temporary restraining order against manufacture or sale of "Buttwiser" t-shirts featuring images similar to Budweiser's branding, an image of the buttocks of women in bikinis, and sexual innuendos).

103. Williams-Sonoma, Inc. v. Friendfinder, Inc., No. C 06-6572 JSW (MEJ), 2007 WL 4973848, at *7 (N.D. Cal. Dec. 6, 2007) (finding defendants' use of POTTERY BARN mark on their sexually-oriented websites likely to tarnish "by associating those marks for children and teenager furnishings").

104. *See, e.g.*, Archdioceses of St. Louis v. Internet Ent. Grp., No. 4:99CV27SNL, 1999 WL 66022, at *9 (E.D. Mo. Feb. 9, 1996); Hasbro, Inc. v. Internet Ent. Grp., Ltd., No. C96-130WD, 1996 WL 84853, at *1 (W.D. Wash. Feb. 9, 1996) (holding "candyland.com" as a domain-name combination for a sexually explicit web site diluted plaintiff's trademark, "Candy Land," for a children's game). *But see* Playboy Enters., Inc. v. Netscape Commc'ns. Corp., 55 F. Supp. 2d 1070, 1075-76 (C.D. Cal. 1999) (finding that plaintiff failed to show defendant's ostensible use of plaintiff's mark to connect its brand to other purveyors of adult entertainment would harm plaintiff's mark), *aff'd*, 202 F.3d 278 (9th Cir. 1999).

105. V Secret Catalogue, Inc. v. Moseley, 605 F.3d 382, 385 (6th Cir. 2010) (concluding there is "a rebuttable presumption, or at least a very strong inference, that a new mark used to sell sex related products is likely to tarnish a famous mark if there is a clear semantic association between the two"); *see also* Sandra L. Rierson, *The Myth and Reality of Dilution*, 11 DUKE L. & TECH. REV. 212, 247 (2012) ("[C]ourts have adopted a virtual *per se* rule regarding uses of trademarks in contexts involving pornography, finding almost uniformly that such uses tarnish the image of the mark holder."); *cf.* Mark Bartholomew, *Neuromarks*, 103 MINN. L. REV. 521, 561-62 (2018) (noting the difficulty of measuring tarnishment and positing that courts limit tarnishment causes

Heald, and Bu, courts in sex-related tarnishment cases “trust their intuitions and do not require plaintiffs to prove harm.”¹⁰⁶ The argued harms reflect the brand association theories discussed in Section II.A—consumers exposed to the lewd and disgusting in connection with a brand may create new associations that transfer the disgust to the brand.¹⁰⁷

Other scholars critique the presumption that relating an existing brand with sex will tarnish that brand’s reputation. Some posit the empirical case is too weak to justify the potential cost to market competition and commercial speech interests.¹⁰⁸ Indeed, marketing literature suggests that in some cases, sex increases sales.¹⁰⁹ Protection against tarnishment may effectively grant owners significant control over the associations that develop around the

of action to use of the famous mark with sex, drug, and nudity-related products, ostensibly because one can presume a negative effect from those associations).

106. Buccafusco et al., *supra* note 22, at 351 (citing Cmty. Fed. Sav. & Loan Ass’n v. Orondorff, 678 F.2d 1034, 1035 (11th Cir. 1982)).

107. Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1057 (2006) (discussing the loss of goodwill via association of the mark with an unwholesome product); Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1285 (2008) (“Judges are willing to forbid uses of marks that are likely to incite disgust or fear out of concern that such emotions, once stimulated, will be difficult to put aside even when the consumer knows the use is unauthorized.”); Nelson, *supra* note 7, at 176 (“This presumption is justified due to the highly visceral nature of sex, drugs, dirty humor, and other unsavory elements traditionally deemed to cause dilution by tarnishment.”); Rierson, *supra* note 105, at 246 (describing the justification as grounded in consumer distaste that might rub off on the famous mark); Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235, 1271 (2009) (“[T]he success of a dilution cause of action often turns on the taboo or unsavory quality of the humor.”); Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 260 (2013) (positing that dilutive free riding might result in a net decline in consumers’ overall utility from consuming hedonic goods).

108. Handler argues that a

convincing basis for legal intervention to prevent the likelihood of dilution by tarnishment would [] require “evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future.

Handler, *supra* note 11, at 682 (quoting Case C-252/07, Intel Corp. Inc. v. CPM United Kingdom Ltd., 2008 E.C.R. I-8823, ¶ 77).

109. Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL’Y REV. 119, 137–38 (2012) (critiquing the presumption’s connection to sex negativity and questioning whether a connection to sex impairs the selling power of the mark given advertising research that suggests otherwise); Mark Bartholomew, *Trademark Morality*, 55 WM. & MARY L. REV. 85, 159 (2013) (“[O]ne potential reason for rejecting a moral argument in favor of the presumption of tarnishment from sexually related mark uses is that it is out of step with the sexual mores of large swaths of the population.”).

mark.¹¹⁰ Finally, tarnishment claims might simply provide cover to mark owners trying to prevent otherwise protectable, if tawdry expression, in contravention of First Amendment commitments.¹¹¹

Buccafusco, Heald, and Bu summarize research on the effects of sexual content on advertising, suggesting that sex sells.¹¹² For instance, the Wirtz team reported data from a meta-study indicating that sexual content increased attention to the ad and consumer memory of the ad, but did not increase memory of the brand advertised.¹¹³ Nonetheless, the use of sexual content was positively associated with increased purchaser intention.¹¹⁴ Reichert and Walker hypothesize that sexual stimulus shifts the response of the viewer to “encourage movement toward the stimulus” but inhibits full processing of information.¹¹⁵ But some studies have shown consumers react negatively when sexual content is incongruent with the product advertised.¹¹⁶ Moreover, the greater the attention paid the ad, the smaller the benefit from the added sexual content.¹¹⁷ Thus, sexuality may increase receptivity to ad content when

110. Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 830 (1997) (“Unless senior users of a mark have an absolute right to control the mark and its associations, tarnishment without resulting consumer confusion should not be actionable.”).

111. Long, *supra* note 107, at 1057 (“Unauthorized nonconfusing third-party use of a trademark for criticism, social commentary, parody, or other speech-related purposes can have positive social benefits that outweigh the harm to the trademark holder.”); Taran, *supra* note 9, at 3 (positing “no real harm [is] sustained in tarnishment cases, and that courts use tarnishment as a tool to suppress unwholesome or unsavory speech”); Long, *supra* note 107, at 1057–58 (“[C]ritical or derogatory third-party uses of a trademark often have speech implications, which can tip the social welfare calculus in favor of the third-party use.”).

112. Buccafusco et al., *supra* note 22, at 367.

113. John G. Wirtz et al., *The Effect of Exposure to Sexual Appeals in Advertisements on Memory, Attitude, and Purchase Intention: A Meta-Analytic Review*, 37 REV. MARKETING COMM. 168, 184–85 (2017) (reporting that sexual content had a positive effect on advertisement recognition and recall, but not on brand recognition and recall).

114. Buccafusco et al., *supra* note 22, at 367.

115. Tom Reichert & Kristin McRee Walker, *Sex and Magazine Promotion: The Effects of Sexualized Subscription Cards on Magazine Attitudes, Interest, and Purchase Intention*, 11 J. PROMOTION MGMT. 131, 133 (2005).

116. See, e.g., R. Eric Reidenbach & Ken W. McCleary, *Advertising and Male Nudity: An Experimental Investigation*, 11 J. ACAD. MKTG. SCI. 444, 446–52 (1983) (testing the effect of male nudity on consumer reactions to advertisements of cologne and frying pans); Penny M. Simpson, Steven Horton & Gene Brown, *Male Nudity in Advertisements: A Modified Replication and Extension of Gender and Product Effects*, 24 J. ACAD. MKTG. SCI. 257, 261 (1996); Ben Judd & Wayne Alexander, *On the Reduced Effectiveness of Some Sexually Explicit Ads*, 11 J. ACAD. MKTG. SCI. 156, 166 (1983).

117. Douglas Amyx & Kimberly Amyx, *Sex and Puffery in Advertising: An Absolutely Sensational and Sexually Provocative Experiment*, 2 INT’L BUS. & MGMT. 1, 2 (2011) (“[L]ow need for cognition . . . consumers favor sex appeals while high [need for cognition] customers favor non-sexual appeals.”).

consumers cannot dedicate attentional resources to the ad,¹¹⁸ i.e., when they engage in peripheral processing, even though it may not increase retention of the brand advertised. While the evidence is mixed, those studies indicate that the use of sexual content might increase attention paid to an advertising message without necessarily tarnishing the associated trademark.

2. Drug-Related Tarnishment

Courts have also frequently ruled on challenges to drug-related references that arguably bring a trademark into disrepute.¹¹⁹ Early cases dealing with trademarks and illegal drugs featured uses that connected Coca-Cola to its cocaine-infused roots.¹²⁰ Coca-Cola successfully enjoined defendants Gemini Rising from using “Enjoy Cocaine” in the famous Coca-Cola script on its posters.¹²¹ The court concluded that merely suggesting Coca-Cola’s brand was connected with cocaine tarnishes the “wholesome” mark.¹²² The court concluded that associating the beverage with “such a noxious substance as cocaine . . . would clearly have a tendency to impugn that product and injure [its] business reputation.”¹²³ The court concluded this potential harm was no

118. Tom Reichert, Susan E. Heckler & Sally Jackson, *The Effects of Sexual Social Marketing Appeals on Cognitive Processing and Persuasion*, 30 J. ADVERT. 13, 13 (2001) (“[P]ersuasion is largely the result of peripheral processing and distraction from somewhat unpleasant messages when receivers are expected to counterargue the message or be resistant to change.”).

119. See e.g., *J&B Wholesale Distrib., Inc. v. Redux Beverages, LLC*, 621 F. Supp. 2d 678 (D. Minn. 2007) (granting preliminary injunction under Minnesota anti-dilution statute against use of NO NAME as a mark for defendant’s beverage formerly called “Cocaine”); *NBA Props. v. Entertainment Recs. LLC*, No. 99 CIV. 2933 (HB), 1999 WL 335147, at *9 (S.D.N.Y. May 26, 1999) (granting injunction against use of “distorted NBA Logo containing the basketball player with a gun in his right hand and the words ‘SPORTS, DRUGS, & ENTERTAINMENT’” but refusing to grant a recall of already distributed magazine ads).

120. *Koke Co. of Am. v. Coca-Cola Co.*, 255 F. 894, 896 (9th Cir. 1919) (holding Coca-Cola Co.’s conduct in adorning its product with coca leaves, even though cocaine had been removed from the product, was “deceptive, false, fraudulent, and unconscionable conduct” precluding equitable relief), *rev’d*, 254 U.S. 143, 147 (1920) (“It appears to us that it would be going too far to deny the plaintiff relief against a palpable fraud because possibly here and there an ignorant person might call for the drink with the hope for incipient cocaine intoxication.”); *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972) (granting injunction against defendant’s sale of “Enjoy Cocaine” poster in Coca-Cola Co.’s distinctive script in light of the poster’s “tendency to impugn that product and injure plaintiff’s business reputation”); *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F. Supp. 725, 728–29 (N.D. Ill. 1989) (grant of temporary restraining order pursuant to Illinois Anti-Dilution Act against sale of bubble gum product in the form of white powder sold in a container resembling a Coca-Cola bottle).

121. *Gemini Rising, Inc.*, 346 F. Supp. at 1193.

122. *Id.* at 1189.

123. *Id.*

“flight of fancy” due to the beverage’s connection with the Andean coca leaf plant, which is also the source of cocaine.¹²⁴

A district court in Illinois similarly granted Coca-Cola a temporary restraining order against the seller of bubble gum in the form of white powder in a plastic container resembling a Coca-Cola bottle.¹²⁵ The court applied the Illinois anti-dilution statute and concluded its sale in a Coke-bottle-shaped container was likely to injure Coca-Cola’s reputation because the powder had a color and texture “remarkably similar to the drug” cocaine.¹²⁶

In a more recent case, Pepsico, Inc. successfully secured injunctions against firms repurposing Pepsi, Mountain Dew, and Sierra Mist bottles and cans to create stash safes for consumers to store contraband.¹²⁷ Sellers’ websites included drug-related names like “www.smoke911.com . . . www.bluntshop.com and www.woodenpipe.com.”¹²⁸ The court concluded that the sales of stash safes, “commonly associated with the concealment of illicit narcotics,” was likely to tarnish PepsiCo’s marks and harm the business reputation of those marks.¹²⁹ Likewise, a court held that defendant’s use of Newprot to sell “spice,” i.e., synthetic cannabis, was likely to tarnish plaintiff’s Newport cigarette brand.¹³⁰ News reports documented injuries and illnesses caused by synthetic cannabis, and lawmakers moved to ban it.¹³¹ The court held that the association between the illegal spice and legal tobacco would harm Lorillard and its trademarks.¹³²

Consumption and sale of cannabis was first criminalized under federal law in 1937.¹³³ In recent decades, public opinion has shifted, and cannabis

124. *Id.* at 1189 n.7.

125. *Alma-Leo U.S.A., Inc.*, 719 F. Supp. at 728–29.

126. *Id.* at 728.

127. *Pepsico, Inc. v. #1 Wholesale, LLC*, No. 07-CV-367, 2007 WL 2142294, at *5 (N.D. Ga. July 20, 2007).

128. *Id.* at *2.

129. *Id.* at *4.

130. *Lorillard Tobacco Co. v. Cal. Imps. LLC*, 886 F. Supp. 2d 529, 537 (E.D. Va. 2012).

131. *Id.*

132. *Id.*

133. Marihuana Tax Act of 1937, Pub. L. No. 75-238, ch. 553, 50 Stat. 551 (1937). The Supreme Court declared the Marijuana Tax Act unconstitutional in 1969. *See Leary v. United States*, 395 U.S. 6, 37 (1969). Congress once again criminalized cannabis in the Controlled Substances Act the following year, which classified cannabis as a Schedule I drug. Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1242 (codified at 21 U.S.C. §§ 801–904). The initial regulatory efforts, including the adoption of the term marihuana, used primarily by immigrants from Mexico, were steeped in racist animus. *See Sean M. O’Connor & Erika Lietzan, The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U.L. REV. 823, 834 (2019); Alex Halperin, *Marijuana: Is it Time To Stop Using a Word with Racist Roots?*, GUARDIAN (Jan. 29, 2018),

consumption is more palatable.¹³⁴ The federal government has not yet decriminalized cannabis, which is still classified as a Schedule I Narcotic.¹³⁵ Many states, however, have legalized cannabis. California first legalized medical use of cannabis in 1996.¹³⁶ Thirty-six states, four territories, and the District of Columbia followed suit.¹³⁷ In 2012, voters in Washington and Colorado approved ballot initiatives legalizing the non-medical or recreational use of cannabis.¹³⁸ Those states have been joined in legalizing recreational cannabis use by fifteen other states, the District of Columbia, and two territories.¹³⁹

When Colorado and Washington legalized non-medical use, they were slow to regulate the packaging and product design of cannabis edibles. Moreover, early regulation efforts in those states were quite modest, if not overly permissive.¹⁴⁰ Unfortunately, sellers often inaccurately label cannabis

<https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism> [https://perma.cc/MB3M-4B9L]. The same animus manifested in the scheduling of cannabis under the Controlled Substances Act. *See, e.g.*, John Hudak, *How Racism and Bias Criminalized Marijuana*, WASH. POST (Apr. 28, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana> [https://perma.cc/TQ75-9NE6] (arguing cannabis's scheduling comes from President Nixon's contempt toward the counterculture movement and racial minorities).

134. *See, e.g.*, Press Release, *supra* note 3; Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Nov. 22, 2022), <https://www.pewresearch.org/fact-tank/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/> [https://perma.cc/3JQ3-CWTK] (reporting that 60% of adults say marijuana should be legal for medical and recreational use, 30% for medical use only, and only 10% say marijuana should not be legal for adult use). That is a significant reversal from 1969, when 84% of adults surveyed said marijuana should be illegal and only 12% said it should be legal. *See* Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/JYK5-29XP].

135. *See* 21 U.S.C. § 812(c), Schedule I(c)(17).

136. California Compassionate Use Act 1996 (codified at Cal. Health & Safety Code § 11362.5).

137. *State Medical Cannabis Laws*, NCSL (Sept. 12, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [https://perma.cc/UR79-5U7Q].

138. Washington Marijuana Legalization and Regulation, Initiative 502 (enacted via ballot initiative, Nov. 6, 2012); Colorado Marijuana Legalization Initiative, Amendment 64 (constitutional amendment enacted via ballot initiative, Nov. 6, 2012).

139. *State Medical Cannabis Laws*, *supra* note 137.

140. Robert J. Macoun & Michelle M. Mello, *Half-Baked – The Retail Promotion of Marijuana Edibles*, 372 N. ENGL. J. MED. 989, 990 (2015). Washington state's Liquor Control Board published guidelines in 2014 that prohibited products, labels, or packaging for edible cannabis designed to be appealing to children. Victoria Cavaliere, *Washington State Says Marijuana Brownies OK, but No Lollipops*, REUTERS (July 17, 2014), <https://www.reuters.com/article/us-usa-marijuana-washington-idUKKBN0FM2XI20140717>

edibles or sell edibles with dosages different from those promised on the packaging.¹⁴¹

Many cannabis sellers take marketing shortcuts and produce and package edible products to mimic popular candies.¹⁴² Public health concerns about edibles include increased risk of consumption by children.¹⁴³ Indeed, legalization has correlated with increased incidents of accidental consumption by children. For instance, emergency medical visits by young children in Colorado for accidental cannabis ingestion increased after the

[<https://perma.cc/8384-Z2DX>]. The state legislature later enacted WASH. ADMIN. CODE § 314-55-105 (2022), regulating cannabis labeling and prohibiting the use of packaging or labels especially appealing to persons under twenty-one years of age. *Id.* §§ 105(1)(c), (2)(f)(v), (3)(g)(iv), (4)(f)(iv), (5)(e)(iv), 6(e)(iv), 7(e)(iv). The statute also required the use of child-resistant packaging for cannabis products. *Id.* §§ (1)(b), (2)(b)(i), 3(b)(i), 3(c), 4(b)(1). Colorado's legislature shifted responsibility to the state's Revenue Department in 2014, requiring new rules by 2016 for better identifying edibles. Dan Frosch, *Colorado Grapples with Risks from Edible Marijuana*, WALL ST. J. (May 9, 2014), <https://www.wsj.com/articles/colorado-grapples-with-risks-from-edible-marijuana-1399675707> [<https://perma.cc/GP4B-YN8J>]. By 2017, a statute barred the sale of edible cannabis products shaped as people, animals, or fruit. Kathleen Foody, *Colorado: No Edible Pot Shaped as People, Animals or Fruit*, AP NEWS (Oct. 1, 2017), <https://apnews.com/article/health-north-america-us-news-ap-top-news-denver-6592113466a34285bec1f5e3455f20ef> [<https://perma.cc/W2LJ-3LL2>].

141. Todd Subritzky et al., *Issues in the Implementation and Evolution of the Commercial Recreational Cannabis Market in Colorado*, 27 INT'L J. DRUG POL'Y 1, 3 (2016); Ryan Vandrey et al., *Cannabinoid Dose and Label Accuracy in Edible Medical Cannabis Products*, 313 J. AM. MED. ASS'N 2491, 2491 (2015) (reporting edible cannabis products from three major metropolitan areas failed to meet basic label accuracy standards for pharmaceuticals, with some having negligible doses and others containing significantly more THC than labeled); Dazhe Cao et al., *Characterization of Edible Marijuana Product Exposures Reported to United States Poison Centers*, 54 CLINICAL TOXICOLOGY 840, 844–45 (2016) (decriminalization preceded packaging regulation in some states); David M. Benjamin & Michael J. Fossler, *Edible Cannabis Products: It is Time for FDA Oversight*, J. CLINICAL PHARMACOLOGY 1045, 1046–47 (2016) (reporting Colorado's 2016 packaging regulations and noting lack of clarity on the basis for the limits chosen).

142. John R. Richards et al., *Unintentional Cannabis Ingestion in Children: A Systematic Review*, 190 J. PEDIATRICS 142, 149–50 (2017) (“Many commercial cannabis-infused edibles are . . . indistinguishable to children from their noncannabis counterparts . . . marketed in attractive, colorful packages resembling non cannabis-infused products that if sampled by a child, may be found to be highly palatable.”); Macoun & Mello, *supra* note 140, at 990; Drew Wilson, *Cap'n Crunch vs Kap'n Kronik: Fair Use Protection Does Not Apply in the Circumstance of Marijuana-Infused Products Because the Trademarks Are Used as a “Designation of Source”*, 42 L.A. LAW. 30, 32 (2019).

143. *Exposure Trends During the COVID-19 Pandemic, Special Focus: Cannabis (THC)*, WASH. POISON CTR. (Dec. 8, 2020), https://www.wapc.org/wp-content/uploads/COVID-Snapshot-6_Cannabis.pdf [<https://perma.cc/83Y5-4Y2S>] (reporting a 44% increase in cannabis exposures in the first nine months of 2020 compared to the first nine months of 2019); Richards et al., *supra* note 142, at 150 (confirming increase incidence of unintentional ingestion by minors in states that decriminalized medical or recreational cannabis).

state eased legal restrictions on edibles,¹⁴⁴ with at least one study suggesting that edibles accounted for the plurality of accidental ingestion.¹⁴⁵

Perhaps unsurprisingly, adolescent drug use was reported a top health concern by parents over the previous decade.¹⁴⁶ Youth report concerns about drug addiction among their peers,¹⁴⁷ and a 2018 survey observed increases in reported use of cannabis by youth in the thirty days prior to the survey.¹⁴⁸ Despite the increase in adolescent cannabis use and cannabis-related emergencies in states that have deregulated cannabis, at least one study reports that in those states, citizens see cannabis consumption as less harmful.¹⁴⁹

Policymakers seek means of keeping legal cannabis out of the hands of minors, for whom consumption remains illegal. One medical study suggested that “[r]estricting the extent to which marijuana edibles can look and taste like familiar sweets could also keep the psychological barriers to marijuana

144. George Sam Wang et al., *Unintentional Pediatric Exposures to Marijuana in Colorado, 2009-2015*, 170 J. AM. MED. ASS’N PEDIATRICS 1, 5 (2016) (pediatric marijuana exposure cases two years after Colorado legalization increased significantly compared with two years prior to legalization).

145. George Sam Wang et al., *Pediatric Marijuana Exposures in a Medical Marijuana State*, 167 J. AM. MED. ASS’N PEDIATRICS 630, 633 (2013). Ingestion by children can lead to respiratory impairment, serious anxiety attacks, and psychotic-like symptoms. See Macoun & Mello, *supra* note 140, at 989.

146. *Drug Abuse Now Equals Childhood Obesity as Top Health Concern for Kids*, UNIV. MICH. C.S. MOTT CHILD.’S HOSP. (Aug. 15, 2011), <https://mottmpch.org/reports-surveys/drug-abuse-now-equals-childhood-obesity-top-health-concern-kids#:~:text=Drug%20abuse%20now%20equals%20childhood%20obesity%20as%20top%20health%20concern%20for%20kids,-August%2015%2C%202011&text=In%20the%205th%20annual%20survey,top%20health%20concerns%20for%20children> [https://perma.cc/2LJC-W45S].

147. Drew DeSilver, *The Concerns and Challenges of Being a U.S. Teen: What the Data Show*, PEW RSCH. CTR. (Feb. 26, 2019), <https://www.pewresearch.org/fact-tank/2019/02/26/the-concerns-and-challenges-of-being-a-u-s-teen-what-the-data-show/> [https://perma.cc/44A4-EYWL].

148. Press Release, Richard A. Miech et al., National Adolescent Drug Trends in 2018 (Dec. 17, 2018), <https://monitoringthefuture.org/wp-content/uploads/2021/02/18drugpr.pdf> [https://perma.cc/M7YP-ZDBQ].

149. Yih-Chieh Chen & Jean E. Kleig, *Cannabis-Related Emergencies in Children and Teens*, 31 CURRENT OP. PEDIATRICS 291, 292 (2019); see also Melanie M. Wall et al., *Adolescent Marijuana Use from 2002 to 2008: Higher in States with Medical Marijuana Law, Cause Still Unclear*, 21 ANN. EPIDEMIOLOGY 714, 715 (2011) (reporting higher average adolescent marijuana use and lower perception of riskiness in sixteen states with medical marijuana laws). But see *Youth Online*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://nccd.cdc.gov/Youthonline/App/Default.aspx#:~:text=Youth%20Online%20lets%20you%20analyze,17%20conducted%20during%202003%20%E2%80%93%202015> [https://perma.cc/TK63-KH5X] (reporting that adolescent cannabis use did not increase in the 2-3 years after deregulation in thirteen states).

initiation among children and adolescents from being lowered.”¹⁵⁰ Other advocates view trademark law as a key weapon in the preventative arsenal. The imitation of well-known brands targeted to children and youth plausibly increases the risk of unintentional consumption by minors.¹⁵¹ Owners of famous trademarks thus might reasonably allege tarnishment if their products are associated with a Schedule I controlled substance that can harm children when accidentally consumed.¹⁵²

Food companies have prevailed in trademark litigation to deter cannabis companies from mimicking familiar candy trade dress.¹⁵³ Wrigley has a pending lawsuit against the seller of THC-infused counterfeit Skittles.¹⁵⁴ Seattle-based Conscious Care Cooperative settled with Hershey, the makers of Reese’s Peanut Butter Cups, after Hershey sued for trademark infringement over the sale of “Reefer’s” peanut butter cups in packaging that closely resembled Reese’s packaging.¹⁵⁵ Hershey also secured settlements against cannabis infused imitations of Heath bars, Almond Joy bars, and York Peppermint Patties.¹⁵⁶ Mondeléz International secured a settlement against a company hawking Stoney Patch Kids.¹⁵⁷ Ferrara Candy Co. likewise extracted a settlement with cannabis sellers mimicking Nerds trademarks.¹⁵⁸

Other mark owners who sell products not directly targeted to children have also successfully secured judgments against infringers. Tapatío Foods, maker of Tapatío hot sauce, secured default judgments against two sellers offering

150. Macoun & Mello, *supra* note 140, at 991.

151. *Id.*; Andrew H. Fuller, *Sugar High*, 11 WASH. J.L. TECH. & ARTS 461, 473–75 (2016).

152. Wilson, *supra* note 142, at 30, 33.

153. Macoun & Mello, *supra* note 140, at 991.

154. *See supra* note 4 and accompanying text.

155. Keith Coffman, *Hershey Settles Infringement Lawsuits with Two Edible Pot Companies*, REUTERS (Oct. 17, 2014, 6:56 PM), <https://www.reuters.com/article/idUSKCN0I702R20141018> [<https://perma.cc/BXL5-Y27N>]; Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE. L. REV. 217, 255–56 (2016).

156. *See* Valeriya Safronova, *Big Candy Is Angry*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/style/edibles-marijuana.html> [<https://perma.cc/YT8S-WBYG>].

157. *Id.*; *see also* Mondeléz Canada Inc. (MCI) v. Stoney Patch, No. 2:19-cv-06245 (C.D. Cal. Apr. 28, 2020) (granting injunction against the manufacture and sale of cannabis products that infringe Mondeléz’s rights in SOUR PATCH marks, product design and product packaging).

158. *See* Safronova, *supra* note 156; *see also* Ferrara Candy Co. v. Higharchy LLC, No. 1:21-cv-05757, 2022 WL 521778, at *1 (N.D. Ill. Jan. 28, 2022) (enjoining defendant from selling “Medicated Bud Clusters” and “Medicated Bud Bites” in packaging that imitates plaintiff’s NERDS marks); Ferrara Candy Co. v. Tops Cannabis, No. 2:20-cv-10349, 2021 WL 2134156, at *1 (C.D. Cal. May 4, 2021) (securing injunction against sale of Medicated Nerds Rope).

cannabis-infused hot sauces under the name Trapatio.¹⁵⁹ Additionally, The Gorilla Glue Company secured a consent order and permanent injunction against GG Strains LLC.¹⁶⁰ GG Strains had sold strains of cannabis under the names Gorilla Glue #1, Gorilla Glue #4, and Gorilla Glue #5 via the website gorillaglue4.com and had registered Gorilla Glue #4 as a wordmark in Colorado.¹⁶¹

In both studies described in Part II, we conducted consumer response experiments to test the traditional story that uses related to illegal drugs were likely to tarnish the imitated mark.

3. Unwholesomeness, Disgust, and Sacrilege-Related Tarnishment

While some opine that courts have narrowed tarnishment to reach only associations with sex, drugs, and nudity,¹⁶² that is not entirely true. Indeed, one could instead include drug-related tarnishment within a broader category of uses that purportedly tarnish because the goods or services offered in association with the mark are unwholesome, disgusting, or sacrilegious.¹⁶³ In disgust-related tarnishment cases, a court grants relief when it concludes the

159. Tapatio Foods, LLC v. Ponce, No. 17-CV-07530-MWF-MRW, 2018 WL 1801890, at *1 (C.D. Cal. Apr. 16, 2018) (granting default judgment for Tapatio); *see also Tapatio Sues Duuuuuuuude . . . YOU STOLE NUESTRO FAMOSO LOGO!!!*, TMZ (Oct. 17, 2017, 12:20 AM), <https://www.tMZ.com/2017/10/17/tapatio-suing-marijuana-company-similar-sombrero-logo> [<https://perma.cc/FG8R-DFBT>].

160. The Gorilla Glue Company v. GG Strains LLC, No. 1:17-cv-00193, at *8–9 (S.D. Ohio Sept. 22, 2017) (Bloomberg Law).

161. *Id.* at *7.

162. Jordana S. Loughran, Note, *Tarnishment's Goody-Two-Shoes Shouldn't Get All the Protection: Balancing Trademark Dilution Through Burnishment*, 21 LEWIS & CLARK L. REV. 453, 484 (2017) (“[C]ourts have construed the [dilution by tarnishment] claim narrowly to include only associations with sex, drugs, or nudity.”).

163. Bedi and Reibstein distinguish unwholesome tarnishment from disgust tarnishment. They define unwholesome tarnishment as occurring “when a junior mark launches a product associated with unwholesome ideas or thoughts.” Bedi & Reibstein, *supra* note 28, at 689. Disgust tarnishment instead “occurs when a junior mark launches a product that is associated with bodily disgust.” *Id.* Rierson concludes that outside of the sex or illegal drug contexts, dilution plaintiffs are less likely to prevail. Rierson, *supra* note 105, at 247. One might also separate some tarnishment into a category of low-quality tarnishment. *See, e.g., Steinway & Sons v. Robert Demars & Friends*, No. 80-04404, 1981 WL 40530, at *11 (C.D. Cal. Jan. 28, 1981) (granting injunction against the sales of a beverage holder bearing the Stein-Way mark due to concern that the “public will begin to identify [plaintiff’s] STEINWAY [pianos] with a product incompatible with the quality and prestige attached by the public to plaintiff’s mark”); *see also* Bedi & Reibstein, *supra* note 28, at 689. We do not test low-quality tarnishment in the studies discussed *infra*.

defendant's use will portray plaintiff's mark in an unwholesome way "likely to evoke unflattering thoughts about the owner's product."¹⁶⁴

For example, Anheuser-Busch prevailed against a seller of insecticide for its use of a modification of the beer seller's Budweiser ad slogan, "Where there's life . . . there's bugs." The court held the use was both morally reprehensible and legally impermissible unfair competition under Florida law.¹⁶⁵ Similarly, another court found the sale of "Garbage Pail Kids" cards bearing "dolls with features similar to Cabbage Patch Kids dolls in rude, violent and frequently noxious settings" were likely to tarnish plaintiff's mark under Georgia's anti-dilution statute.¹⁶⁶ The court concluded this use tended to "create[] an undesirable, unwholesome, or unsavory mental association with the plaintiff's mark."¹⁶⁷

Other disgust-related tarnishment claims fail to bring about plaintiff's desired results. For instance, the court concluded that a staged fight at a baseball game between plaintiff's Barney character and defendant's "Famous Chicken" character was not tarnishing, even though there was evidence that some children who viewed the fight were upset.¹⁶⁸ Television and radio personality Dick Clark likewise failed to prevail against America Online for affiliating him with the elderly via an advertisement to members of the AARP.¹⁶⁹

The recent dispute between Nike and Lil Nas X & the art collective MSCHF raises the possibility that sacrilegious depictions of a brand might tarnish the brand in the eyes of consumers. In arguing for a temporary restraining order ("TRO") against MSCHF and Lil Nas X, Nike invoked this potential danger and argued that redecorating and reselling its shoes with satanic imagery triggered disgust from consumers. Nike provided evidence of consumer disapproval in the form of mean tweets.¹⁷⁰ The court granted the TRO and the parties quickly settled.¹⁷¹

Researchers have theorized that for consumers with religious beliefs, brand use that invokes belief systems may trigger reactions that shape

164. *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

165. *Chem. Corp. of Am. v. Anheuser-Busch, Inc.*, 306 F.2d 433, 436, 438 (5th Cir. 1962).

166. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031, 1032, 1040 (N.D. Ga. 1986).

167. *Id.* at 1039–40.

168. *Lyons P'ship, L.P. v. Giannoulas*, 14 F. Supp. 2d 947, 951, 954 (N.D. Tex. 1998).

169. *Clark v. Am. Online Inc.*, No. CV-98-5650 CAS, 2000 WL 33535712, at *6 (C.D. Cal. Nov. 30, 2000).

170. *See supra* note 15 and accompanying text.

171. *Nike, Inc. v. MSCHF Prod. Studio, Inc.*, No. 1:21-cv-01679 (E.D.N.Y. Apr. 1, 2021) (Bloomberg Law).

perceptions of brand strength and affect the likelihood of brand purchase. Studies have borne out that theory in significant part. Correctly assessing receptiveness to religious messaging matters in a country like the United States, where a majority of the populace identifies as religious.¹⁷²

Generally, consumers with high levels of religiosity react positively to religious advertising messages consistent with their beliefs.¹⁷³ Johnson and coauthors define religiosity, or religious commitment, as “the extent to which an individual is committed to the religion he or she professes and to its teachings, such that the individual’s attitudes and behaviors reflect this commitment.”¹⁷⁴ Religiosity is measured using a scale with questions inquiring into personal worship practices and beliefs as well as the respondent’s connection to a religious community.¹⁷⁵

Brands can signal quality by communicating their core values, and those values may be religious.¹⁷⁶ In evaluating new products and services, consumers may draw key information from religious values communicated alongside branding elements.¹⁷⁷ When that information runs counter to a consumer’s ideology, however, that information can negatively influence consumer observations.¹⁷⁸ This negative influence may stem from a threat to the consumer’s self-concept.¹⁷⁹ Thus, religious branding may increase brand

172. A 2014 Pew survey reports that 70.6% of Americans identify as Christian, 5.9% identify with non-Christian faith, and 22.8% identify as religious “nones,” including Atheist and Agnostic. *Religious Landscape Study*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/> [https://perma.cc/CFN6-K2G7].

173. Elizabeth A. Minton, *In Advertising We Trust: Religiosity’s Influence on Marketplace and Relational Trust*, 44 J. ADVERT. 403, 403 (2015); Walter Hodges Henley, Jr. et al., *The Effects of Symbol Product Relevance and Religiosity on Consumer Perceptions of Christian Symbols in Advertising*, 31 J. CURRENT ISSUES & RSCH. ADVERT. 89, 89 (2009); Valerie A. Taylor et al., *Consumer Responses to Christian Religious Symbols in Advertising*, 39 J. ADVERT. 79, 79 (2010).

174. Byron R. Johnson et al., *Escaping from the Crime of Inner Cities: Church Attendance and Religious Salience Among Disadvantaged Youth*, 17 JUST. Q. 377, 379 (2000).

175. See, e.g., Everett L. Worthington, Jr. et al., *The Religious Commitment Inventory—10: Development, Refinement, and Validation of a Brief Scale for Research and Counseling*, 50 J. COUNSELING PSYCH. 84, 89 (2003) (describing ten five-point Likert-type statements, with six statements expressing intrapersonal religiosity (cognitive) and four expressing interpersonal religiosity (behavioral)).

176. Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355, 355 (1973); Brian L. Connelly et al., *Signaling Theory: A Review and Assessment*, 37 J. MGMT. 39, 39 (2011); Nga N. Ho-Dac et al., *The Effects of Positive and Negative Online Customer Reviews: Do Brand Strength and Category Maturity Matter?*, 77 J. MKTG. 37, 37 (2013).

177. Taylor et al., *supra* note 173, at 79.

178. *Id.* at 87.

179. Marc Fetscherin & Daniel Heinrich, *Consumer Brand Relationships Research: A Bibliometric Citation Meta-Analysis*, 68 J. BUS. RSCH. 380, 387 (2015); M. Joseph Sirgy, *Self-Concept in Consumer Behavior: A Critical Review*, 9 J. CONSUMER RSCH. 287, 287 (1982).

reputation and esteem when consistent with consumer beliefs, but may decrease reputation when inconsistent with those beliefs.¹⁸⁰

The positive association of high religiosity consumers with a firm might stem from the firm's adoption of religious symbols on advertisements or product packaging.¹⁸¹ Or the association might instead be based on an assessment of the mark owner's commitment to similar principles signaled by behavior.¹⁸² For example, the decision of Chick-fil-A founder Truett Cathy to close his restaurants on Sunday signals a commitment to holding sacred the Christian day of rest and thus may reflect the values of like-minded customers.¹⁸³ Agarwala and coauthors report that, "[o]verall, the evidence implies that devout consumers have a positive attitude toward relevant religious products."¹⁸⁴

Experimental research supports these theories. Ustaahmetoğlu tests how consumers responded to Muslim religious symbolism in advertisements for instant soup (halal, or permitted) and banking services (haram, or forbidden).

180. This result would follow from the interaction of signaling and self-congruence theories—the consumer signals through brand affiliation the image they desire to present to the world, and the brands selected are consistent with, and protect and enhance consumers' self-concept. See Eugene Cheng-Xi Aw et al., *Go Loud or Go Home? How Power Distance Belief Influences the Effect of Brand Prominence on Luxury Goods Purchase Intention*, 58 J. RETAILING & CONSUMER SERVS. 1, 1 (2021); Isaac Jacob et al., *Attribution Analysis of Luxury Brands: An Investigation into Consumer-Brand Congruence Through Conspicuous Consumption*, 116 J. BUS. RSCH. 597, 597 (2019); Wei Shao et al., *Investigating Brand Visibility in Luxury Consumption*, 49 J. RETAILING & CONSUMER SERVS. 357, 357 (2019) (arguing that consumers choose products with varying brand prominence to signal their intended image and present a desired self-concept); Milton Rokeach & Gilbert Rothman, *The Principle of Belief Congruence and the Congruity Principle as Models of Cognitive Interaction*, 72 PSYCH. REV. 128, 128 (1965).

181. See, e.g., Abou Bakar et al., *The Effects of Religious Symbols in Product Packaging on Muslim Consumer Responses*, 21 AUSTRALASIAN MKTG. J. 198, 198 (2013).

182. Ridhi Agarwala et al., *Religiosity and Consumer Behavior: A Summarizing Review*, 16 J. MGMT., SPIRITUALITY & RELIGION 32, 42 (2018) (citing Judy A. Siguaw & Penny M. Simpson, *Effects of Religiousness on Sunday Shopping and Outshopping Behaviours: A Study of Shopper Attitudes and Behaviors in the American South*, 7 INT'L REV. RETAIL, DISTRIBUT. & CONSUMER RSCH. 23 (1997)).

183. Victoria Leigh Hannon, *Boycotting Chick-fil-A: A Tale of Religion, Politics, and Consumption* 13–14 (May 2, 2013) (M.A. thesis, University of Colorado) (ProQuest).

184. Agarwala et al., *supra* note 182, at 11. Some scholars attribute this effect to social identity theory. *Id.* (citing Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, 33 SOC. PSYCH. INTERGROUP RELS. 74, 74 (1979); HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY 255 (1981); Naomi Ellemers et al., *Self-Categorisation, Commitment to the Group and Group Self-Esteem as Related but Distinct Aspects of Social Identity*, 29 EUR. J. SOC. PSYCH. 371, 371 (1999)). Others attribute the effect to social judgment theory. See, e.g., Safiek Mokhlis, *The Effect of Religiosity on Shopping Orientation: An Exploratory Study in Malaysia*, 9 J. AM. ACAD. BUS. CAMBRIDGE 64, 64 (2006); Erol Ustaahmetoğlu, *The Influence of Different Advertisement Messages and Levels of Religiosity on Attitude and Purchase Intention*, 13 INT'L J. ISLAMIC & MIDDLE E. FIN. & MGMT. 339, 343 (2020).

Ustaahmetoğlu reports that use of a religious symbol in a test condition correlated with a more favorable attitude toward the ad and increased purchase intentions toward the soup.¹⁸⁵ Use of religious imagery in advertising banking services, which are haram, elicited different responses from religious respondents with high and low levels of religiosity. Generally, religious respondents did not report a change in purchase attitude in either a positive or negative direction.¹⁸⁶ But participants with high religiosity expressed lower consumer attitude and purchase intention toward a bank using religious symbolism in a loan advertisement, compared with respondents who saw a non-religious banking message.¹⁸⁷ This result is consistent with social judgment theory's assimilation effect. As religiosity increases, the latitude of acceptance for messages consistent with one's belief increases, but the latitude of rejection for messages inconsistent with religious values also increases.¹⁸⁸ In other words, the intensity of religious feeling expands both the acceptance of messages consistent with the viewer's belief and the rejection of inconsistent messages.

Generally, consumers can process religious messages through a higher-involvement central route or a lower-involvement peripheral route.¹⁸⁹ In one study testing this elaboration likelihood model, participants were exposed to the Christian cross as the peripheral cue for the product. Low-involvement subjects high in religious dogmatism had both a less favorable attitude to the brand and a lower purchase intention when exposed to ads containing the cross. These results suggest "that when subjects are not interested in a particular product, the use of a sacred symbol to promote such a product might be perceived as offensive to them."¹⁹⁰ But highly religious subjects who manifest interest in the product reported more positive feelings when the

185. Ustaahmetoğlu, *supra* note 184, at 350.

186. *Id.*; see also Kim Shyan Fam et al., *The Influence of Religion on Attitudes Towards the Advertising of Controversial Products*, 38 EUR. J. MKTG. 537, 547 (2004) (reporting a similar result).

187. Ustaahmetoğlu, *supra* note 184, at 351.

188. *Id.* See generally Seunghyun Kim et al., *Consumers' Responses to Native vs. Banner Advertising: Moderation of Persuasion Knowledge on Interaction Effects of Ad Type and Placement Type*, 38 INT'L J. ADVERT. 207, 207 (2019); Mary Conway Dato-On & Robert Dahlstrom, *A Meta-Analytic Investigation of Contrast Effects in Decision Making*, 20 PSYCH. & MKTG. 707, 707 (2003); Diederik A. Stapel et al., *Assimilation or Contrast?: Comparison Relevance, Distinctness, and the Impact of Accessible Information on Consumer Judgments*, 7 J. CONSUMER PSYCH. 1, 1 (1998); Joan Meyers-Levy & Brian Sternthal, *A Two-Factor Explanation of Assimilation and Contrast Effects*, 30 J. MKTG. RSCH. 359, 359 (1993).

189. See, e.g., Michael J. Dotson & Eva M. Hyatt, *Religious Symbols as Peripheral Cues in Advertising: A Replication of the Elaboration Likelihood Model*, 48 J. BUS. RSCH. 63, 63 (2000).

190. *Id.* at 67.

cross was used as a peripheral cue, an increase over the already positive feelings toward the product.¹⁹¹

In our second study, described in Section II.B, we analyze whether and how sacrilegious and drug-related stimuli alter the perception of the Chick-fil-A and Skittles brands, compared to the religiosity of study respondents.

C. Tarnishment's Contested Harms & Constitutional Challenges

Criticism of anti-tarnishment laws comes in two broad forms. Some critics find the concept constitutionally infirm, and others find it empirically questionable. But the empirical and constitutional critiques are interrelated. Proof of reputational injury from tarnishing uses would provide evidence that protection against tarnishment addresses an actual harm, that Congress got it right when it crafted federal anti-tarnishment laws, and that courts might reasonably presume tarnishment occurs in sex-, drug-, or sacrilege-related cases.

Similarly, a constitutional challenge to anti-tarnishment laws might turn on whether the tarnishing speech is likely to cause pecuniary or reputational harm to the tarnished mark. Courts have heretofore presumed that tarnishment follows when an unauthorized user connects a trademark with drugs or sex. But if harm via tarnishment happens rarely, or never, then laws penalizing tarnishing speech might violate the First Amendment.¹⁹² In the aftermath of the Supreme Court's decisions in *United States v. Alvarez*,¹⁹³ *Matal v. Tam*,¹⁹⁴ and *Iancu v. Brunetti*,¹⁹⁵ scholars have argued that anti-dilution protection may be vulnerable to constitutional challenge on First Amendment grounds.¹⁹⁶

Courts generally evaluate the First Amendment implications of commercial speech under the Supreme Court's *Central Hudson* test, querying whether a regulation of lawful, nonmisleading speech directly advances a substantial government interest, and whether the regulation is narrowly tailored.¹⁹⁷ Laws restricting political or religious speech must instead meet the more exacting standard of strict scrutiny, which requires that the restriction "further[] a compelling interest" and be "narrowly tailored to

191. *Id.* at 63.

192. U.S. CONST. amend. I.

193. 567 U.S. 709 (2012).

194. 582 U.S. 218 (2017).

195. 139 S. Ct. 2294 (2019).

196. *See infra* notes 232–239 and accompanying text.

197. *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

achieve that interest.”¹⁹⁸ In either case, the government must have a basis for asserting that “the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁹⁹ To the extent tarnishment in fact harms the reputation of a trademark, protection against it may directly and materially advance a substantial government interest sufficient to meet the standard test of intermediate scrutiny for commercial speech.²⁰⁰ Indeed, if the evidence were compelling, the current anti-tarnishment provision would arguably demonstrate a compelling governmental interest under the strict scrutiny test.²⁰¹ But if tarnishment is a phenomenon that resists empirical testing—or is tested and found wanting—it calls into question whether Congress correctly balanced First Amendment rights against the interests of trademark owners.

In *United States v. Alvarez*, the Court held that the Stolen Valor Act, a statute that criminalized making false claims about receiving the Congressional Medal of Honor, was an unconstitutional speech restriction.²⁰² The Act penalized lying about receiving the medal, even if the lie was made in private or was not intended to secure commercial advantage.²⁰³ The Court held that targeting only the lie without establishing a harm caused by the targeted speech went beyond Congress’s constitutional authority because the government had not met the burden that the regulation was necessary.²⁰⁴ The government offered no evidence that the public’s perception of military awards was diluted or tarnished by criminalized false claims.²⁰⁵

The Supreme Court in *Matal v. Tam* held that the federal law barring trademark registration when the mark “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols” was an unconstitutional viewpoint restriction on speech.²⁰⁶ While the eight justices who decided the case were unanimous on that point,²⁰⁷ the Court split evenly on the question

198. *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 464 (2007).

199. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

200. *Cent. Hudson*, 447 U.S. at 564.

201. *See Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) (concluding that the Child Online Protection Act could satisfy strict scrutiny by furthering the governmental interest of protecting minors from harmful speech).

202. 567 U.S. 709, 729–30 (2012) (plurality opinion).

203. *Id.* at 736 (Breyer, J., concurring).

204. *Id.* at 726 (plurality opinion).

205. *Id.* Compare *id.* at 726 (plurality opinion), with *id.* at 734–36 (Breyer, J., concurring) (describing statutes that constitutionally prohibit falsehoods by being limited in context or by requiring proof of injury).

206. 582 U.S. 218, 223, 227 (2017) (holding that 15 U.S.C. § 1052(a)’s disparagement bar against trademark registration violates the Free Speech Clause of the First Amendment).

207. *Id.* at 244 (plurality opinion); *see also id.* at 247 (Kennedy, J., concurring).

of whether the disparagement bar was unconstitutional viewpoint regulation properly subject to strict scrutiny,²⁰⁸ or whether it failed to meet intermediate scrutiny under the standard test for commercial speech.²⁰⁹ But for both the majority and the plurality, the bar was problematic because it denied trademark registration only to those messages the government found offensive because they disparaged persons, institutions, or beliefs.²¹⁰ Positive messages could secure registration without objection, turning the disparagement bar into a “happy-talk clause” that reached further than necessary to meet the government’s interest in protecting the orderly flow of commerce.²¹¹ The Court concluded the harms to be prevented—the bombarding of underrepresented groups with demeaning messages, or the disruption of the orderly flow of commerce with racist messaging—were outweighed by the danger of allowing the government to prevent “speech expressing ideas that offend.”²¹²

The Court in *Iancu v. Brunetti* held that the Lanham Act’s prohibition against registering trademarks that consist of or comprise immoral or scandalous matter was an impermissible viewpoint regulation.²¹³ The Court concluded that the bar against “immoral” matter targeted marks that were “‘inconsistent with rectitude, purity, or good morals’; ‘wicked’; or ‘vicious.’”²¹⁴ Similarly, scandalous matter “giv[es] offense to the conscience or moral feelings”; “excite[s] reprobation”; or “call[s] out condemnation.”²¹⁵ Targeting scandalous or immoral registrations would target both unprotected obscene trademarks and protected but uncouth expressive messages.²¹⁶

208. *Id.* at 248–52 (Kennedy, J., concurring).

209. *Id.* at 244–45 (plurality opinion) (citing *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–65 (1980)).

210. *Id.* at 248–49 (Kennedy, J., concurring).

211. *Id.* at 246 (plurality opinion).

212. *Id.* at 246; *see also id.* at 252–53 (Kennedy, J., concurring).

213. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019) (holding that 15 U.S.C. § 1052(a)’s scandalousness bar against trademark registration violates the Free Speech Clause of the First Amendment).

214. *Id.* at 2299 (quoting WEBSTER’S NEW INT’L DICTIONARY 1246 (2d ed. 1949)). Prior to *Brunetti*, the Trademark Office instructed examiners to consider “whether a ‘substantial composite of the general public’ would find the mark ‘shocking to the sense of truth, decency, or propriety’; ‘giving offense to the conscience or moral feelings’; ‘calling out for condemnation’; ‘disgraceful’; ‘offensive’; ‘disreputable’; or ‘vulgar.’” *Id.* at 2298 (quoting *In re Brunetti*, 877 F.3d 1330, 1336 (C.A. Fed. 2017)).

215. *Brunetti*, 139 S. Ct. at 2299–300 (quoting WEBSTER’S NEW INT’L DICTIONARY 2229 (2d ed. 1949)).

216. *Id.* at 2301–02.

The government in *Brunetti* unsuccessfully argued that scandalous could be read narrowly to include only lewd, sexually explicit, or profane marks,²¹⁷ although some justices writing individually seemed amenable to that interpretation.²¹⁸ Chief Justice Roberts concluded that “refusing registration to obscene, vulgar, or profane marks does not offend the First Amendment.”²¹⁹ Justices Breyer and Sotomayor would have adopted similarly narrow constructions.²²⁰

While the bars against federal trademark registration on grounds of disparagement, scandalousness, and immorality were found constitutionally invalid, they were at least superficially consistent with some common law decisions opining that a lawful trademark must not “transgress[] the rules of morality and public policy.”²²¹ Indeed, the Supreme Court has included fighting words, advocacy intended to and likely to incite imminent lawless action, hate speech, defamation, speech integral to criminal conduct, fraud, true threats, child pornography, profane words, and obscenity as among those categories of expression that do not qualify for full First Amendment protection,²²² due to their “slight social value.”²²³ Disparaging and scandalous marks might reasonably have joined those other low-value categories of expression.

But the Court’s holding in *United States v. Alvarez* suggests that the Court may expand the constitutional protection extended to low value speech. The Court held in *Alvarez* that despite the low social value of lies,²²⁴ they qualified

217. *Id.*

218. See Llewellyn Joseph Gibbons, *Liberty or Licentiousness: Disinsenting, Disparaging, and Scandalous Marks Post-Tam and Brunetti*, 12 HASTINGS SCI. & TECH. L.J. 83, 111–12 (2021) (summarizing the concurring and dissenting opinions in *Brunetti*).

219. *Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part).

220. *Id.* at 2308 (Sotomayor, J., concurring in part and dissenting in part).

221. *Cohn v. People*, 37 N.E. 60, 62 (Ill. 1894) (quoting WILLIAM HENRY BROWNE, A TREATISE ON THE LAW OF TRADE-MARKS AND ANALOGOUS SUBJECTS § 602 (Boston, Little Brown & Co. 1873)).

222. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Watts v. United States*, 394 U.S. 705, 707 (1969); *New York v. Ferber*, 458 U.S. 747, 764 (1982); *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978); *Miller v. California*, 413 U.S. 15, 24 (1973). Note the court’s recent resistance to adding to those categories in recent cases *United States v. Stevens*, 559 U.S. 460, 470 (2010), and *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 805 (2011).

223. *R.A.V.*, 505 U.S. at 383.

224. *United States v. Alvarez*, 567 U.S. 709, 715 (2012); *cf. Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.”); *Brown v. Hartlage*, 456

for full constitutional protection. Thus, because the Stolen Valor Act constituted a content-based restriction on free speech, the Act did not survive the “exacting scrutiny” to which such a restriction must be subject.²²⁵ To survive strict scrutiny, a speech restriction “must be the ‘least restrictive means among available, effective alternatives.’”²²⁶ The government’s failure, articulated in Justice Kennedy’s plurality opinion, was failing to articulate “a direct causal link between the restriction imposed and the injury to be prevented.”²²⁷ The government offered no evidence that public respect for military awards “is diluted by false claims” about receiving them,²²⁸ or that counter-speech could not correct any such harms.²²⁹

One could read *Alvarez* as evidence of the Court’s willingness to apply heightened scrutiny to laws that punish reputation-related harms. *Alvarez* deviated from a line of precedent suggesting that lies have no constitutional value.²³⁰ In light of the Court’s subsequent holdings in *Tam* and *Brunetti*, it is plausible the Court might reevaluate many of the claimed harms that justify trademark protections, including the anti-tarnishment provision. One should exercise caution before embracing the theory whole-heartedly; the majority and concurrence in *Alvarez* each signaled that trademark protection is consistent with the constitutional exercise of the government’s power to regulate commercial speech.²³¹

U.S. 45, 60 (1982) (False statements “are not protected by the First Amendment in the same manner as truthful statements.”); *Virginia Bd. of Pharmacy*, 425 U.S. at 771 (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) (“Spreading false information in and of itself carries no First Amendment credentials.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”).

225. *Alvarez*, 567 U.S. at 715.

226. *Id.* at 729 (quoting *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2002)).

227. *Id.* at 725. Justice Breyer’s concurring opinion eschewed application of any particular standard of scrutiny but concluded the government could achieve its legitimate objective in less restrictive ways. *Id.* at 730 (Breyer, J., concurring).

228. *Alvarez*, 567 U.S. at 726.

229. *Id.* at 726–27.

230. Jake Linford, “Tell the Truth”: *Truth in Music Advertising Post Tam*, in OXFORD HANDBOOK OF MUSIC LAW AND POLICY (Sean M. O’Connor ed., 2020).

231. *Alvarez*, 567 U.S. at 723 (plurality opinion) (contrasting the Stolen Valor Act’s penalty on speech “entirely without regard to whether the lie was made for the purpose of material gain” with *S.F. Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539–40 (1987), which held constitutional a prohibition on “exploiting the ‘commercial magnetism’ of the word ‘Olympic’”); *id.* at 735–36 (Breyer, J., concurring) (comparing the Stolen Valor Act to its closest constitutionally permissible analogs, “[s]tatutes prohibiting trademark infringement” which “are focused upon commercial and promotional activities that are likely to dilute the value of a mark

But some critics see *Alvarez, Tam*, and *Brunetti* as bellwethers presaging increased scrutiny of the current scope of trademark laws. For example, Tushnet argues courts should review with skepticism trademark protections that reach too far beyond prototypical point of sale confusion, including the anti-tarnishment provision.²³² Tushnet posits that the “failure to examine the harms of dilution . . . with a critical eye has allowed courts too easily to equate claimed harm to brand value with the harms of fraud, perjury, and other causes of action that survive First Amendment scrutiny.”²³³ Ramsey similarly concludes that like the bars on registering marks consisting of or comprising disparaging and scandalous matter, “dilution laws regulate trademarks based on their viewpoints or ideas.”²³⁴ Ramsey concedes that unlike the disparaging and scandalous mark bars, dilution protection does not deny protection to certain marks because of their viewpoint. But allowing the owner of a famous mark to seek a remedy against tarnishing but non-confusing uses “that some people might find unsavory” may chill speech.²³⁵ Ramsey critiques anti-tarnishment protection under an intermediate scrutiny test on the ground that there is insufficient evidence “that diluting uses of famous marks actually harm the distinctiveness, reputation, or fame of such marks . . . [or] prevent any of these harms in a material way.”²³⁶

Evidence of harm might establish that anti-tarnishment laws are supported by a substantial government interest, while a lack of such evidence would indicate they are not so supported.²³⁷ As Tushnet argues, a court applying

[and which] typically require a showing of likely confusion”); *see also id.* at 743–44 (Alito, J., dissenting) (arguing the Stolen Valor Act’s prohibition on false claims about military awards functions similarly to trademark law’s constitutionally permissible prohibition on “the proliferation of cheap imitations of luxury goods blurs the “signal” given out by the purchasers of the originals” (quoting William A. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308 (1987))).

232. Rebecca Tushnet, *Stolen Valor and Stolen Luxury: Free Speech and Exclusivity*, in *THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS* 121–22 (Sun et al. eds., 2014).

233. *Id.* at 122.

234. Lisa P. Ramsey, *Free Speech Challenges to Trademark Law After Matal v. Tam*, 56 HOUS. L. REV. 401, 443 (2018); *see also id.* (presuming that any connection with pornographic material is per se tarnishing is “viewpoint discrimination” that perverts trademark law in a manner inconsistent with its justified purposes of preventing economic harm to mark owners and consumer confusion).

235. *Id.* at 444; *see also* Zahraa Hadi, *If Disparagement Is Dead, Dilution Must Die Too*, 33 BERKELEY TECH. L.J. 1189, 1216–17 (2018).

236. Ramsey, *supra* note 234, at 458.

237. *Id.* at 445–53; Mary LaFrance, *No Reason to Live: Dilution Laws as Unconstitutional Restrictions on Commercial Speech*, 58 S.C. L. REV. 709, 718–22 (2007); Hadi, *supra* note 235, at 1190 (“[A]nti-dilution provisions are also subject to First Amendment scrutiny and, in fact, pose bigger threats to free expression than the disparagement provision struck down in *Tam*.”);

Alvarez-style skepticism to the evidence Congress considered when debating the Trademark Dilution Revision Act (“TDRA”) could conclude that the speech-related costs of protection against tarnishment are not justified.²³⁸ In some cases, those costs could include chilling “a constitutionally protected outcome—changed beliefs, not violence or other harmful conduct—and a constitutionally protected mechanism—persuasion, not deception.”²³⁹ The absence of systemic evidence might instead encourage courts to abandon presumptions in favor of tarnishment in sex-, drug-, and sacrilege-related cases. Congress might also reconsider the scope of anti-tarnishment protection.

II. BRAND TARNISHMENT STUDIES

In this part, we report the results of two novel experiments designed to test the effects of exposure to sexual, drug-related, and sacrilegious material that could tarnish the associations consumers have and make regarding brands. This paper is the first we are aware of that attempts to measure drug-related and sacrilege-related tarnishment. These studies build on the Buccafusco, Heald, and Bu study and the Bedi and Reibstein study discussed above.²⁴⁰

The stimuli in our experiments are brand logos for popular brands. Test stimuli are sex-, drug-, or sacrilege-related variations to those brands. The sex-related alterations are crude sexual innuendos based on the brand. Three of the four drug-related versions are edible cannabis brands that have been offered for sale.²⁴¹ The fourth is a stimulus from a classic trademark case in which a court found a poster inviting the viewer to “Enjoy Cocaine” in the

Sara Gold, *Does Dilution “Dilute” the First Amendment?: Trademark Dilution and the Right to Free Speech After Tam and Brunetti*, 59 IDEA: L. REV. FRANKLIN PIERCE CTR. INTELL. PROP. 483, 501–06 (2019) (arguing that the anti-tarnishment provision would fail to satisfy intermediate scrutiny in light of a paucity of evidence that tarnishment harms the senior mark).

238. For a summary of the evidence considered by Congress during debates about the TDRA, see Linford & Nelson, *supra* note 6, at 179–85.

239. Tushnet, *supra* note 232, at 132.

240. See *supra* notes 22–30 and accompanying text.

241. See Complaint, Wm. Wrigley Jr. Co. v. Packaging Papi, LLC, No. 1:21-cv-02364 (N.D. Ill. May 03, 2021); Complaint, Wm. Wrigley Jr. Co. v. Roberto Conde, No. 5:21-cv-777 (C.D. Cal. May 03, 2021); Opinion and Order, Wm. Wrigley Jr. Co. v. Terphogz, LLC, No. 1:21-cv-02357 (N.D. Ill. May 03, 2021); Elaine Watson, *Mondelēz Canada Names Defendants in STONEY PATCH ‘Virtual Knockoff’ Lawsuit, Warns of Public Health Danger*, FOODNAVIGATOR-USA (Jan. 22, 2020), <https://www.foodnavigator-usa.com/Article/2020/01/22/SOUR-PATCH-maker-Mondelez-Canada-tracks-down-defendants-in-STONEY-PATCH-virtual-knockoff-lawsuit#> [https://perma.cc/EK7G-ZXFK]; Coffman, *supra* note 155.

classic Coca-Cola font and script had “a tendency to impugn [the Coca-Cola] product and injure [Coca-Cola Co.’s] business reputation.”²⁴²

We drew the sacrilege-related stimuli from promotional materials by the MSCHF art collective offering to sell reheated Chick-fil-A sandwiches on Sunday. MSCHF claimed its “Sunday Service . . . filled a hole in the market” left by Chick-fil-A’s decision to close on Sundays.²⁴³ The promotional materials included images of devils, goats, and the number 666, “the number of the beast” in the book of Revelation,²⁴⁴ a number often associated with satanism.²⁴⁵

Based on the previous theoretical and experimental tarnishment literature, reviewed in Part I, we made the following predictions about the effects of tarnishing brands on participants’ attitudes toward the trademarks in question, including:

H1: Participants exposed to sexual, drug-related, or sacrilegious stimuli will have more negative attitudes toward the targeted brands after exposure to the stimuli.

H2: Participants who identify as politically conservative or conservative leaning will manifest stronger tarnishment effects than will politically liberal or liberal leaning participants.

H3: Participants with high religiosity will manifest stronger tarnishing effects than will participants with low religiosity when exposed to sacrilegious or drug-related stimuli.

These hypotheses relate to the effects of potentially tarnishing uses on participants’ valuation of the tested trademarks.

A. Study I: Sex and Drugs

We modeled our first study in large part on the Buccafusco, Heald, and Bu study. Their study measured whether exposure to porn parody movie

242. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972).

243. *Sunday Service*, MSCHF, <https://mschfsundayservice.com/> [https://perma.cc/42FY-T8U2].

244. *Revelation* 13:18.

245. *See, e.g., Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1267 (10th Cir. 2000) (evaluating whether defendant’s claims that plaintiff donated profits to a Satanic church and plaintiff’s logo formed the number 666 were false advertising under 15 U.S.C. § 1125(a)(1)(B)).

posters created tarnishing associations and reduced the likelihood that test subjects would select movies for a hypothetical screening. Our study measures whether exposure to sex- and drug-related brand usage reduces the likelihood that test subjects will select certain brands for sale in a retail store, and whether test subjects report significantly different perceptions of brand strength for tested brands after exposure to sex- and drug-related stimuli.

1. Participants

We recruited 1,103 American participants to our study through Amazon Mechanical Turk (“mTurk”), an online participation service.²⁴⁶ We supplemented our mTurk participant outreach with TurkPrime, a service routinely used by academic researchers to ensure a trustworthy participant sample for use in online studies.²⁴⁷ We paid our participants \$1.00 for taking what we characterized as a “brand preference survey,” which the majority of participants completed in approximately fifteen minutes.²⁴⁸

Our sample was 57% female, averaged 45.10 years of age (with a standard deviation of 14.23), and ranged from nineteen to eighty-nine years old. The sample consisted of 26% self-identified conservatives, 21% self-identified moderates, and 53% self-identified liberals.²⁴⁹ Sixty-seven percent of the

246. mTurk is an inexpensive platform for collecting high-quality data from a representative sample of the population. See, e.g., Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com’s Mechanical Turk*, 20 POL. ANALYSIS 351, 366 (2012); Michael Buhrmester et al., *Amazon’s Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSPS. ON PSYCH. SCI. 3, 5 (2011); Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon’s Mechanical Turk*, 44 BEHAV. RSCH. METHODS 1, 2–3 (2012). The mTurk software contains several safeguards to ensure higher-quality data, including blocking IP addresses from taking the survey multiple times, allowing only well-established workers to take the survey, and screening for non-human “bot” accounts. Mason & Suri, *supra*, at 5–6.

247. TurkPrime is a research platform that integrates mTurk with social science research methods. See Leib Litman et al., *TurkPrime.com: A Versatile Crowdsourcing Data Acquisition Platform for the Behavioral Sciences*, 49 BEHAV. RSCH. METHODS 433 (2017).

248. Our survey is sufficiently powered to detect at least moderate tarnishment effects. For example, power calculators recommend a sample of approximately 750 participants to detect, with 80% power, a ten-percentage-point shift in preferences between two brands. See, e.g., *Power (Sample Size) Calculators*, SEALED ENVELOPE, <https://www.sealedenvelope.com/power/binary-superiority/> [https://perma.cc/9SVM-338C].

249. When asked further to describe whether they were “conservative-leaning” or “liberal leaning” on social issues, 35% of the sample identified as the former and 65% identified as the latter.

sample had completed at least a college degree. A description of the characteristics for this sample appears in Table 1.²⁵⁰

250. Although some scholars have critiqued the use of online convenience samples, these samples are used routinely in empirical research and (although not perfectly) appear to generalize to the population at large. Compare Dan Kahan, *Foiled Twice, Shame on Who? Problems with Mechanical Turk Study Samples, Part 2*, CULTURAL COGNITION OF HEALTH, <http://www.culturalcognition.net/blog/2013/7/10/foiled-twice-shame-on-who-problems-with-mechanical-turk-stud.html> [<https://perma.cc/BH65-FJWL>] (critiquing such samples), with Krin Irvine et al., *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320 (2018) (demonstrating substantial replication). Notably, although our sample was more educated and liberal than the general population, our sample more closely approximated gender proportions and age distributions in the general population, compared to typical online convenience samples. For a discussion of these issues, see, e.g., Buccafusco et al., *supra* note 22, at 390; Jake Linford, *Democratizing Access to Survey Evidence of Distinctiveness*, in TRADEMARK LAW AND THEORY: REFORM OF TRADEMARK LAW 225, 239–44 (Dinwoodie & Janis eds., 2021).

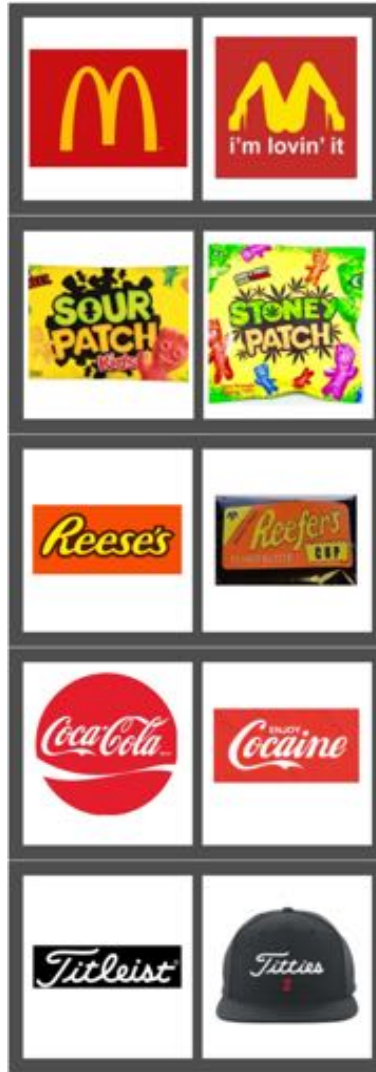
Table 1: Study 1 Participant Demographics

	%	N
Age (Median: 43.00)		
< 30	12.33	136
30-39	31.10	343
40-49	19.58	216
50-59	16.77	185
60-69	15.78	174
70 and above	04.44	49
Gender		
Male	41.70	460
Female	57.39	633
Non-Binary	00.91	10
Education		
High School	08.28	91
Some College	24.11	265
College	49.77	547
Grad or Professional	17.84	196
Political Affiliation		
Very Conservative	11.07	122
Conservative	14.70	162
Moderate	21.14	233
Liberal	30.22	333
Very Liberal	22.87	252

2. Procedures and Measures

We told participants that we were seeking their feedback on several well-known marketplace brands and that they would engage in a series of brand comparisons. All participants made twenty different side-by-side comparisons between logos of two well-known brands. We designated five brands as our “target” brands for the purpose of our experimental manipulation: Coca-Cola, Sour Patch Kids, McDonalds, Reese’s, and Titleist. The experiment featured the logos of these five brands in both their original and ‘tarnished’ forms, as illustrated in Figure 1.

Figure 1. Target Brands and Their Tarnished Forms



For all participants, the final five brand comparisons always included our target brands against well-known competitors: (1) Coca-Cola vs. Pepsi-Cola; (2) Sour Patch Kids vs. Skittles; (3) McDonald's vs. Burger King; (4) Reese's vs. Snickers; and (5) Titleist vs. Wilson.

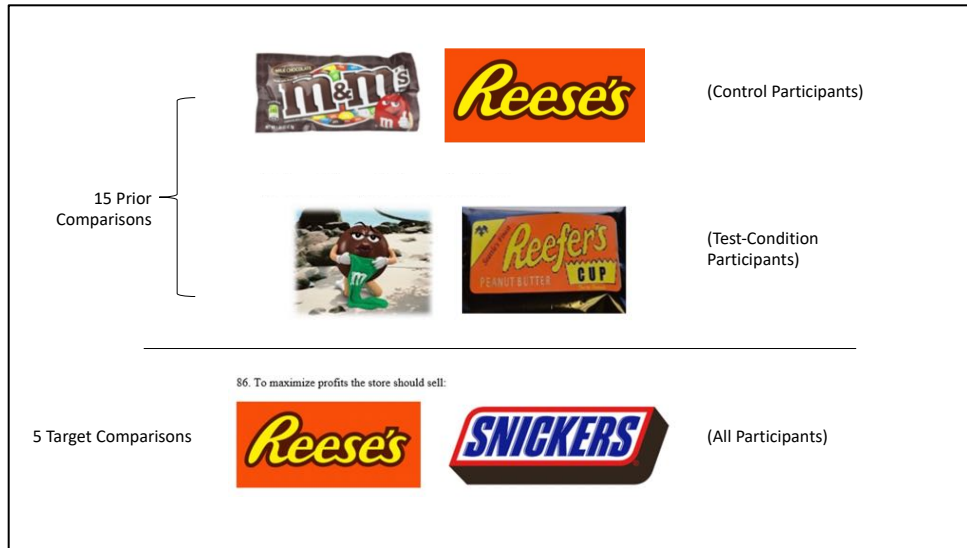
Our experimental manipulation involved the *prior* fifteen comparisons that our participants completed. In the control condition, five of the prior fifteen comparisons involved our target brands—with their original logos—against another competitor. Participants in the test condition also encountered

the five target brands in their earlier fifteen comparisons, but they encountered the target brands in their *tarnished* logo form, reflecting sex-related tarnishment (McDonald's and Titleist) and drug-related tarnishment (Sour Patch Kids, Reese's, and Coca-Cola). For example, participants in the tarnishment condition first encountered the target brand Sour Patch Kids as "Stoney Patch Kids" and chose between Stoney Patch Kids and "Dabheads," another brand with drug-related messaging. Later in the survey, those participants encountered the Sour Patch Kids brand again, but this time they chose between a non-tarnished version of Sour Patch Kids and an alternative brand, Skittles, which served as one of our five target comparisons.²⁵¹

In sum, all participants made twenty brand comparisons, and the final comparisons always involved our target brands. Moreover, all participants first saw those target brands in the earlier fifteen comparisons that they completed. The only difference between our control and test participants involved the nature of the target brand's logo when they initially encountered it: either its regular logo (in the control condition) or its tarnished logo (in the test condition). A visualization of our experimental design appears in Figure 2 below.

251. Some readers may wonder if we "primed" participants to prefer the tarnished brand simply because they were exposed to it earlier in the study, since it is a well-known finding in social psychology that familiarity breeds liking. See, e.g., Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCH. 1 (1968). Participants in both the control and test conditions were exposed to the target brand twice. Thus, the tarnishment manipulation—and not mere exposure—would explain any differences in target brand preferences between the control group and the tarnishment group.

Figure 2. Visualization of Experimental Design for Study 1



Our dependent measures consisted of two questions. First, we asked participants which brand—the target or the alternative—the store should sell. Second, we measured the reputation of each brand by asking participants to rate the strength of each brand on an eleven-point Likert scale. We also asked control questions to gauge participants' familiarity with each brand. We concluded the survey by asking several demographic questions, including participants' age, gender, political orientation, and education level. We then debriefed our participants and concluded the study. A screenshot of our dependent measures and control questions appears as Figure 3 below.

Figure 3. Screenshot of Dependent Measures and Control Questions

87. Which of the brands should the store sell?

Reese's


Snickers


No Opinion

88. Why? _____

89. Please answer the following questions about the brands:

	Have you encountered this brand in a store?		Have you heard of this brand?	
Reese's	<input type="checkbox"/> yes (1)	<input type="checkbox"/> no (2)	<input type="checkbox"/> yes (1)	<input type="checkbox"/> no (2)
Snickers	<input type="checkbox"/> yes (1)	<input type="checkbox"/> no (2)	<input type="checkbox"/> yes (1)	<input type="checkbox"/> no (2)

90. How strongly would you rate Reeses? 

91. How strongly would you rate Snickers? 

3. Results and Discussion

We examined our results in two parts, following our experimental hypotheses. First, we examined whether our participants chose the target brands at a lower rate in the tarnishment condition compared to their non-tarnished counterparts in the control condition. We examined this by (1) pooling all comparisons together, and (2) separating out our sex-tarnished items (McDonald's and Titleist) from our drug-use-tarnished items (Coca-Cola, Sour Patch Kids, and Reese's). We also examined whether tarnishment affected the perceived strength of these brands and whether perceptions of brand strength mediate the relationship between our experimental manipulation and participants' target brand choice. Second, we examined whether brand tarnishment—assuming such an effect exists—is driven by increased perceptions of tarnishment by conservative-leaning participants compared to liberal-leaning participants.

a. Hypothesis 1: Overall Brand Preference

We first examined whether our tarnishment manipulation affected our participants' willingness to choose the target brand over its alternative. We

therefore pooled together the brand choice data across all five of our target comparisons. Our model includes as a predictor variable the condition to which our participants were assigned (the control condition versus the tarnishment condition), and includes as the dependent measure participants' brand choice for all target comparisons. These target choices, however, were nested within individual participants, insofar as each individual was presented with five target brand comparisons, and so their choices might not be independent of one another.²⁵²

To account for this, we constructed a generalized linear mixed effects model of the data, in which (1) experimental condition served as a fixed factor, (2) individual participants served as a random factor (to account for the potential non-independence of their target comparisons), and (3) brand choice (either the target brand or the alternative) served as the dependent variable.²⁵³ We analyzed the data via a mixed effects logistic regression.²⁵⁴

252. For a further discussion of nested designs and hierarchical data, see ANDY FIELD, *DISCOVERING STATISTICS* 936–38 (5th ed. 2017).

253. Mixed effects modeling of data is appropriate when the experimental design consists of at least one “between subjects” factor (here, referred to as a “fixed factor”)—in which each participant is assigned to one experimental condition, as we did here—and one “within subjects” (also termed “repeated measures” or “random”) factor, in which each individual participant responds to multiple items. For a discussion of fixed and random effects, see *id.* at 942–44. Such a design creates a “nested” pattern, insofar as multiple item responses are nested within each individual participant in the study; generalized linear mixed effects models account for the nesting of the data (via fixed and random effects). See, e.g., Benjamin M. Bolker et al., *Generalized Linear Mixed Models: A Practical Guide for Ecology and Evolution*, 24 *TRENDS ECOL. & EVOL.* 127 (2008).

254. A logistic regression is a regression analysis that examines whether an independent variable predicts a binary, dichotomous outcome, such as the decision to choose the target or alternative brand. See ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 299–302 (2d ed. 2016) (discussing logistic regressions). A mixed-effects logistic regression is a multi-level modeling tool that accounts for the fact that participants' individual brand choices may not be independent of each other (that is, their residuals may be correlated), even if those choices are independent of other participants' individual brand choices. See generally FIELD, *supra* note 252.

In a logistic regression, a predictor variable's coefficient (“*b*”) represents the log odds that the target brand was chosen, which can be converted to an odds ratio by taking the exponentiated form of the coefficient. In our analyses, statistical significance in a mixed-effects logistic regression is determined by a z-score and its corresponding p-value. Findings are denoted as “statistically significant” if the statistical tests indicate that the likelihood that the difference between experimental groups observed would occur by chance is 5% or less (as indicated by the p-value as $p < 0.05$). A finding is “marginally significant” if the likelihood of seeing such a finding by chance is greater than 5% but less than 10%. Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 *MICH. L. REV.* 460, 485 n.117 (2003) (citing BARBARA G. TABACHNICK & LINDA S. FIDELL, *USING MULTIVARIATE STATISTICS* (2d ed. 1989)). Our analyses also include a 95% confidence interval constructed around the log-odds point estimate that illustrates, with 95% certainty, the high and low values of the log odds in the general

We analyzed 4,150 brand decisions from 1,067 different participants, who (on average) chose either the target or the alternative brand for four of the five target questions.²⁵⁵ Importantly, and surprisingly, our analysis revealed an enhancement effect of brand tarnishment.²⁵⁶ Participants in the control condition chose the target brands 54.50% of the time, whereas participants in the test condition chose the targets 60.50% of the time, representing a six-percentage-point *increase* in choosing the target brand when exposed to tarnishing stimuli.²⁵⁷ The 95% confidence interval suggests that the “true” percentage-point increase in choosing the tarnished target in the general population ranges from 2.94 to 9.06 percentage-points, which represents a 13% to 46% increase in the odds of choosing the target in the tarnishment condition. We illustrate these results in Figure 4.²⁵⁸

population; confidence intervals that do not include zero are statistically meaningful. *See, e.g.,* FIELD, *supra* note 252, at 65–68 (discussing confidence intervals).

Although we report traditional log-odds values in this Article, log odds are difficult to interpret. To ease the interpretation of the log odds (or their exponentiated, odds ratio form), we also report the marginal effects of our manipulations, which tell us how much an outcome variable changes when a specific independent variable changes. Here, the marginal effects represent the percentage-point change in choosing our target brand when, for example, consumers are exposed to tarnishing stimuli. *See, e.g.,* J. Scott Long & Sarah A. Mustillo, *Using Predictions and Marginal Effects To Compare Groups in Regression Models for Binary Outcomes*, 50 SOCIO. METHODS & RSCH. 1284 (2018). We also report the 95% confidence interval surrounding the point estimate, which tells the reader, with 95% certainty, the “low end” and “high end” of that percentage-point change in the general population. Marginal effects are reported in this Article as “ dy/dx ”: the percentage-point change in the outcome variable that is associated with a one-unit change in the predictor variable.

255. We started with a sample size of 1,103 participants, whom we recruited in the fall of 2019 and summer of 2021 on mTurk. Thirty-six participants did not answer any of the target brand choice questions (or answered “no opinion” to all five target questions) and were subsequently dropped from the analysis, leaving 1,067 participants. Consistent with human subjects’ research norms, our Institutional Review Board does not allow us to force participants to answer every question presented to them, and so the exact number of participants and target decisions vary slightly across our analyses.

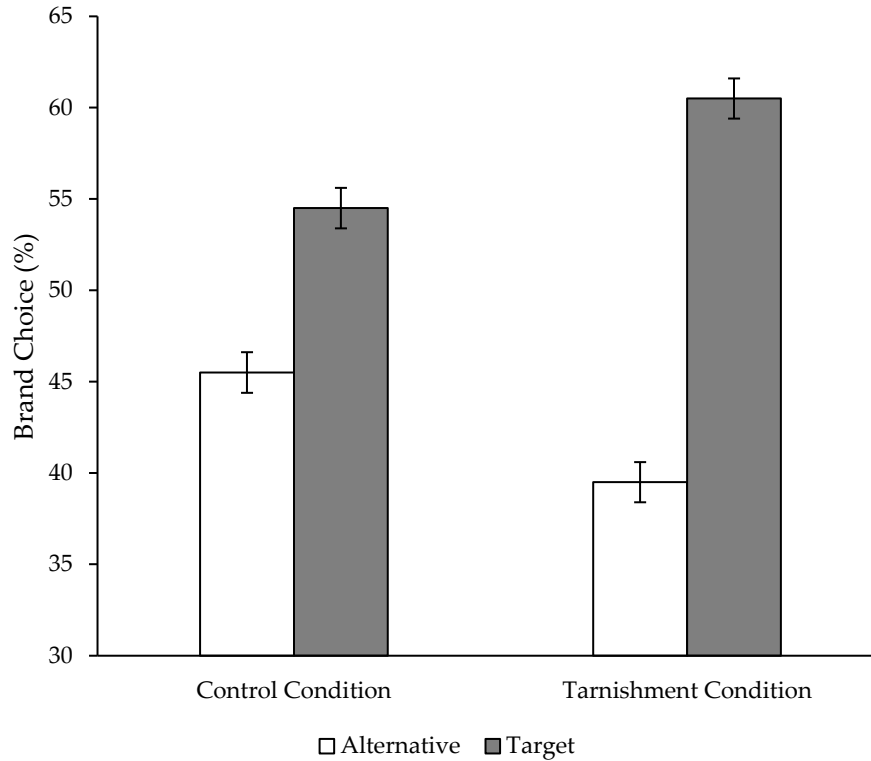
We excluded any individual brand choice decision in which a participant responded “no opinion” because we viewed this response as a decision by the participant to abstain from choosing between the target and alternative brands. We declined to pool together all non-“target” responses—that is, responses that chose the alternative brand and “no opinion” responses—because we believe those responses are meaningfully and psychologically distinct from one another.

256. $b = 0.24$, $SE = 0.07$, $z = 3.83$, $p < .001$, CI [0.12, 0.38].

257. $dy/dx = 0.06$, $SE = 0.02$, CI [0.03, 0.09].

258. The y-axis of this graph does not begin at the lowest possible value on the scale (0.0) so that the reader can more clearly see the differences among the experimental groups. The relevant point estimates, standard deviations, test statistics, and measures of effect size have been reported

Figure 4. Participant Responses by Experimental Condition (Proportions)

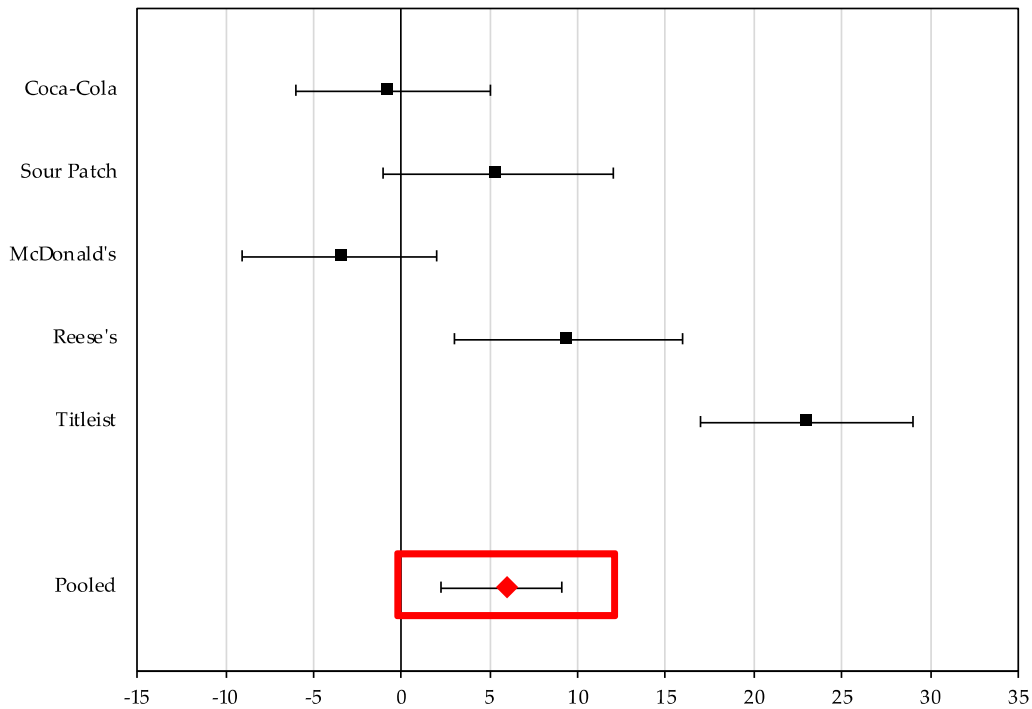


We have also included as Figure 5 a forest plot that shows the point estimate and its associated 95% confidence interval for each of our target brand comparisons as well as our pooled analysis.²⁵⁹

in the footnotes and accompanying text. As in each figure reported in this Article, error bars represent one standard error above and below the point estimate.

259. A forest plot “arrays point estimates (e.g., mean) and confidence intervals (e.g., 95% CI) represented by whiskers . . . in a horizontal orientation A vertical reference line is typically plotted at the null hypothesis, with statistical significance of an individual point and whiskers compared to that reference line.” G.M. Woodall, *Graphical Depictions of Toxicological Data*, in *ENCYCLOPEDIA OF TOXICOLOGY* 786–95 (3d ed. 2014).

Figure 5. Individual Brand Decisions



b. Hypothesis 1(a): Analysis by Tarnishment Type

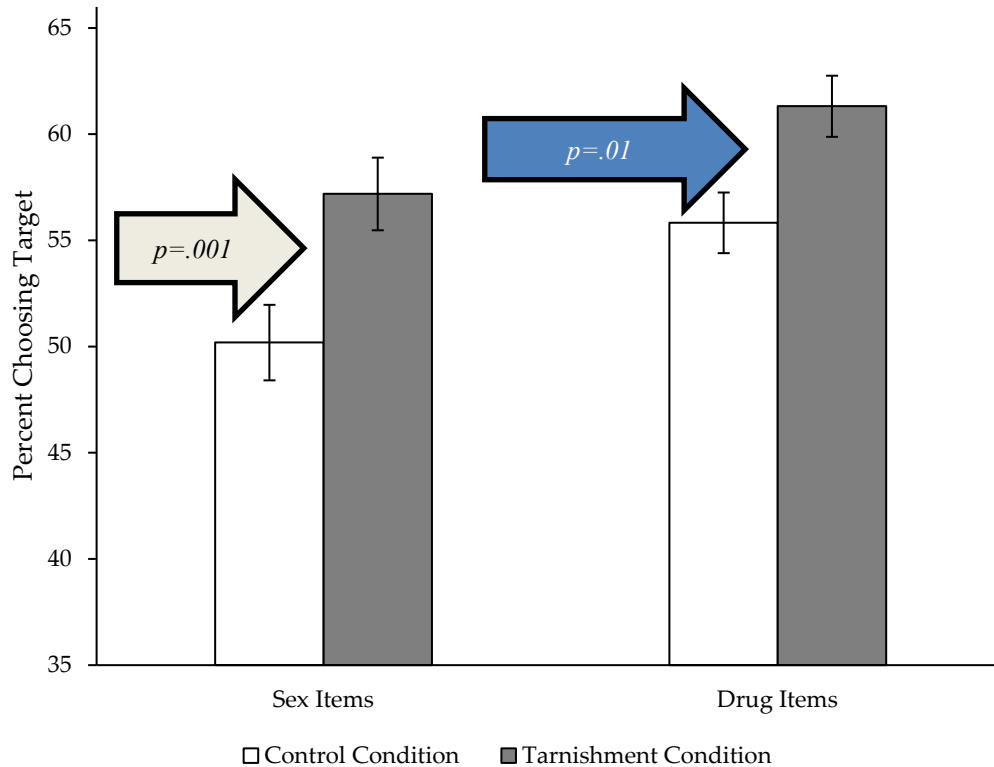
Recall that of our five target brands, two were tarnished with sex-related imagery (McDonald's and Titleist), whereas three of our targets were tarnished with drug-related imagery (Coca-Cola, Sour Patch Kids, and Reese's). We next examined whether the burnishment effect we found is simply a result of the *sex*-related tarnishment items—which would replicate previous work—or whether the effect also is driven by *drug*-related tarnishment, which would extend previous empirical work.

To examine this question, we pooled the sex-related tarnishment items and the drug-related tarnishment items separately. As in our earlier analyses, because our participants made multiple brand decisions, we analyzed our results through two mixed effects logistic regressions, in which the experimental condition served as the fixed-effect predictor, participants served as the random-effect predictor, and target choice served as the outcome variable.

We found that sex tarnishment and drug tarnishment *separately* produced burnishment effects on our participants' target brand choices. Exposure to sex-related stimuli produced a statistically significant, eight-percentage-point

swing in favor of the target brand.²⁶⁰ Exposure to drug-related stimuli produced a milder but reliable burnishment effect: approximately a five-percentage-point swing in favor of the tarnished brand, which also was statistically significant.²⁶¹ Figure 6 illustrates the effects of tarnishment on our participants' preference for the sex-tarnished items and the drug-tarnished items.

Figure 6. Percentage of Responses Choosing Target by Condition and Item Type



c. Hypothesis 1(b): Strength as a Mediator

Because we found a significant burnishment effect with respect to our tarnished target brands when we pooled together participants' target

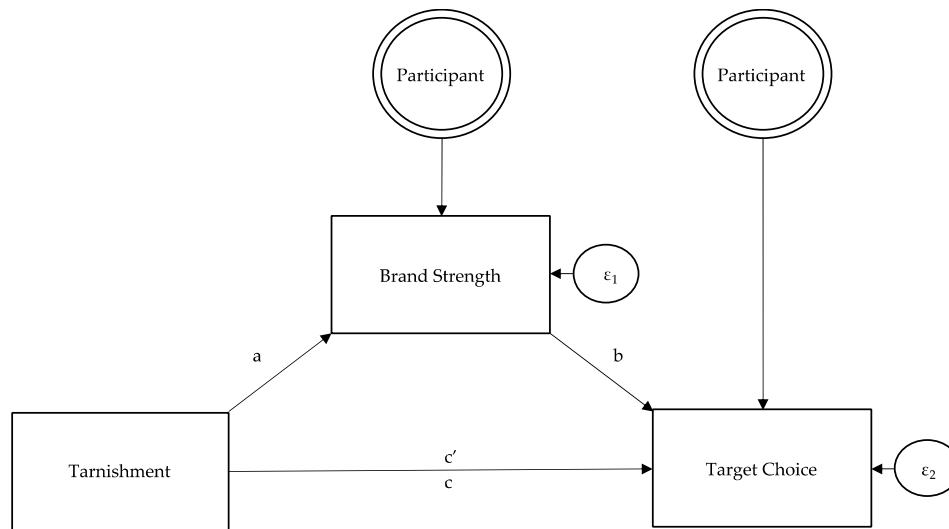
260. For sex-related target items, $b = 0.33$, $SE = 0.10$, $z = 3.26$, $p = .001$, CI [0.13, 0.52]; the marginal effect confidence interval was CI [0.03, 0.13].

261. For drug-related target items, $b = 0.21$, $SE = 0.08$, $z = 2.54$, $p = .01$, CI [0.05, 0.37]; the marginal effect confidence interval was CI [0.01, 0.09].

comparisons, we were interested in examining the psychological mechanism that explains this effect. We hypothesized that the attempted brand tarnishment may have, counterintuitively, instead burnished the target brand and increased our participants' perceptions of the strength of the target brand which, in turn, led them to prefer it when given the option to choose between it and a similar alternative brand.

To test this hypothesis, we constructed a mediation analysis, in which the effect of our tarnishment manipulation on participants' target brand choice flowed entirely through their perceptions of brand strength.²⁶² Figure 7 illustrates the structure of our mediation analysis, and we explain the mediation in more detail below.²⁶³

Figure 7. Multilevel Mediation Model (Effect of Perceptions of Brand Strength)



As the model illustrates, we first will confirm that our tarnishment manipulation produces an enhancement effect on participants' target brand choice (denoted the “c” pathway). Next, we will test (1) whether our

262. A mediation analysis detects “when a predictor affects a dependent variable indirectly through at least one intervening variable, or mediator.” Kristopher J. Preacher & Andrew F. Hayes, *Asymptotic and Resampling Strategies for Assessing and Comparing Indirect Effects in Multiple Mediator Models*, 40 BEHAV. RSCH. METHODS 879, 879 (2008).

263. In this illustration, “participant” signifies that brand strength judgments and target comparisons were nested within individual participants (who rated multiple brands and made multiple comparisons), creating a multilevel model. Epsilon notations represent regression error terms.

tarnishment manipulation also is associated with higher ratings of the target brand's strength on an eleven-point Likert scale, representing the left side of the mediation triangle (the "a" pathway), and (2) whether participants' strength ratings are associated with their target brand choice, representing the right side of the mediation triangle (the "b" pathway). Finally, we will examine whether the effect of tarnishment on target brand choice ("c") is reduced or eliminated when target brand *strength* is added to the model ("c'"), which would suggest that the enhancement effect can be explained by the perceived strength of the target brands.²⁶⁴

The analysis confirmed that our tarnishment manipulation increased the likelihood that participants would choose the tarnished brand.²⁶⁵ Importantly, the analysis also revealed a positive and statistically significant association between our experimental manipulation and brand strength ratings, such that strength ratings *increased* in the tarnishment condition compared to the control condition. Specifically, participants rated the strength of the pooled target brands as a 6.91 out of 10 (with a standard error of 0.72) in the control condition and a 7.51 out of 10 (with a standard error of 0.71) in the tarnishment condition. This was a marginal change of +0.60 points on the Likert scale, with a range of 0.40 to 0.80.²⁶⁶

Finally, and most importantly, the analysis revealed two findings. First, these increased brand strength ratings were positively and significantly related to participants' target brand choices.²⁶⁷ Second, when this relationship was added to the model, the coefficient representing our experimental manipulation was reduced to non-significance, suggesting that perceptions of brand strength mediate the relationship between our tarnishment manipulation and participants' target brand choices.²⁶⁸ An examination of the total, direct, and indirect effects in the model suggest that roughly 91% of the change in the proportion of target brand choice associated with tarnishment is explained by changes in perceived brand strength.²⁶⁹

264. We performed the mediation with the "paramed" procedure (for parametric mediation analyses), available on the Stata statistical software, because it allows for a mixture of binary variables (here, our tarnishment manipulation and participants' brand choices) and continuous variables (our strength measurement).

265. $b = 0.25$, $SE = 0.07$, $z = 3.83$, $p < .001$, CI [0.12, 0.38].

266. $b = 0.60$, $SE = 0.10$, $z = 5.90$, $p < .001$, CI [0.40, 0.80]. This pattern held for all brand strength analyses at the pooled, general level and at the granular level. Additional analyses are on file with the authors.

267. $b = 0.66$, $SE = 0.02$, $z = 29.60$, $p < .001$, CI [0.61, 0.70].

268. $b = 0.05$, $SE = 0.08$, $z = 0.66$, $p = .51$, CI [-0.10, 0.20].

269. Total effect: $b = 1.56$, $SE = 0.13$, CI [1.31, 1.86] (bias corrected); direct effect: $b = 1.05$, $SE = 0.08$, CI [0.91, 1.24] (bias corrected); indirect effect: $b = 1.48$, $SE = 0.07$, CI [1.47, 1.65] (bias corrected). The calculation of the proportion mediated is as follows: (direct effect * (indirect

d. Hypothesis 2: Political Orientation

Our remaining analyses tested our second experimental hypothesis. Specifically, we examined whether our participants' political ideology moderated the effect of tarnishment on their target brand choices. Consistent with academic research finding that people who self-describe as "moderate" politically do not actually tend to hold moderate political views, we used our dichotomous political orientation item—in which we asked participants whether they lean conservative or lean liberal on social issues—as our political orientation predictor variable.²⁷⁰

We examined the effects of our participants' political ideology on our tarnishment manipulation by pooling participants' five target brand choices and constructing a mixed effects logistic regression model, such that (1) the experimental manipulation (control vs. tarnishment) served as the fixed factor and (2) each individual participant served as a random factor. We conducted separate regressions for our conservative and liberal participants.

Surprisingly, we found no effect of tarnishment on target brand choice with respect to conservatives in our sample. Instead, there was a slight increase in the willingness of conservatives to choose the target in the tarnishment condition compared to the control condition—57.88% compared to 53.21%, respectively—which reached marginal significance, suggesting a potential burnishment effect.²⁷¹

There was, however, a meaningful difference in target brand choice among liberals in our sample. Specifically, we observed a reliable burnishment effect, such that liberals preferred the target brands after exposure to sex- and drug-related stimuli more than they preferred them when they were not exposed to those stimuli—62.42% to 55.76%, respectively.²⁷² And unlike the difference with respect to our conservative participants, this difference reached statistical significance.²⁷³ This suggests that the differences in the effects of brand tarnishment on consumer choice may be driven not by increased tarnishment effects on conservatives, but instead on burnishment effects on liberals (and perhaps even a burnishment effect on

effect - 1)) / ((direct effect * indirect effect) - 1)). See, e.g., TYLER J. VANDERWEELE, EXPLANATION IN CAUSAL INFERENCE: METHODS FOR MEDIATION AND INTERACTION 48, 48 (2015).

270. See, e.g., Lee Drutman, *The Moderate Middle is a Myth*, FIVETHIRTYEIGHT (Sept. 24, 2019), <https://fivethirtyeight.com/features/the-moderate-middle-is-a-myth/> [https://perma.cc/2H68-4QSD].

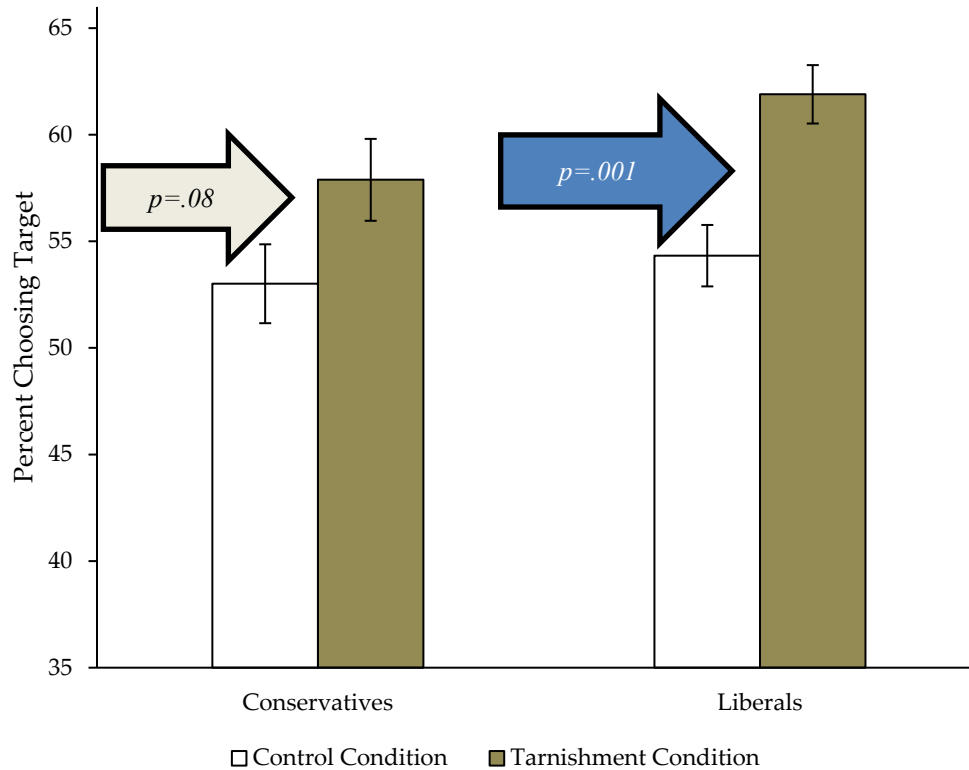
271. $b = 0.19$, $SE = 0.11$, $z = 1.75$, $p = .08$, CI [-0.02, 0.40]. The confidence interval for the marginal effect is CI [-0.01, 0.10].

272. $b = 0.28$, $SE = 0.08$, $z = 3.33$, $p = .001$, CI [0.12, 0.45]. The confidence interval for the marginal effect is CI [0.03, 0.11].

273. *Id.*

conservatives, as well). Figure 8 illustrates the effects of the tarnishment manipulation on our conservative and liberal participants.

Figure 8. Study 1 Percentage of Responses Choosing Target by Condition and Political Ideology



B. Study 2: Drugs and Sacrilege

Our second study is a multi-impression study modeled on a study by Bedi and Reibstein. Those authors hypothesized that if peripheral processing is the mechanism by which tarnishing associations are typically created, a multi-impression study will more likely reveal any such theorized effect.²⁷⁴ The Bedi and Reibstein study tested and reported a tarnishment effect following multi-impression exposure to sex-related stimuli.²⁷⁵ We followed their protocol and tested multi-impression exposure to drug-related and

274. See Bedi & Reibstein, *supra* note 28, at 705.

275. *Id.*

sacrilegious stimuli among those who might be the most susceptible to a tarnishment effect: social conservatives (with respect to illicit drug use) and the highly religious (with respect to sacrilege). To our knowledge, this is the first study testing sacrilege-related stimuli for a tarnishment effect.

4. Participants

For this study, we recruited 321 American participants from the Amazon mTurk online participation service. As in Study 1, we supplemented our outreach with TurkPrime. We paid our participants \$1.00 for taking what we characterized as a “current events” survey. The majority of participants completed the study in under ten minutes.

Our sample was 52% female and 76% white. The median participant was between thirty-five and forty-four years of age and earned between \$50,000 and \$74,999. The sample consisted of 30% self-identified political conservatives, 16% self-identified moderates, and 54% self-identified liberals. Fifty-nine percent of the sample had completed at least a college degree. A description of the characteristics for this sample appears in Table 2.

5. Procedures and Measures

After receiving our participants’ informed consent to participate in this study, we told participants that we were seeking their feedback on four news stories focused on current events. The news stories were short—roughly two to three paragraphs in length—and focused on mundane topics, including the revitalization of Napa Valley’s downtown district, the dangers of feline and canine obesity, surprising areas on a person’s skin that are susceptible to sun-related damage, and the “informed delivery” service offered by the United States Post Office.²⁷⁶ All participants read all four stories.

276. The questions and survey format were modeled on those used by Suneal Bedi and David Reibstein. *See* Bedi & Reibstein, *supra* note 28, at 714–19.

Table 2: Study 2 Participant Demographics

	%	N
Age		
18-24	03.70	12
25-34	33.30	107
35-44	26.50	85
45-54	17.10	55
55-64	12.80	41
65 and above	06.50	21
Gender		
Male	45.90	147
Female	52.20	167
Non-Binary	01.60	05
Education		
High School	10.60	34
Some College	30.40	97
College	41.40	132
Grad or Prof.	17.60	56
Race		
White	76.80	245
Black	08.80	28
Hispanic	04.70	15
Asian/Pac. Islander	06.00	19
Other	03.70	12

The news stories were not the focus of our experimental manipulation, however. We embedded “banner” advertisements within the stories, which included ads for Prada clothing, GAP clothing, Old Navy clothing, Godiva chocolates, Dove soap, Skittles candy, and Chick-fil-A chicken sandwiches. Our experimental manipulation focused specifically on the latter two brands: Skittles and Chick-fil-A.





We randomly assigned participants either to (1) a control condition, in which all ads appeared in their regular, “untarnished” form, or (2) a treatment condition, in which one of the ads that participants viewed was tarnished. This treatment condition was further broken down into two subcategories: in one subcategory, the Skittles ads were tarnished with drug-related imagery

(specifically, for “Cannabis Skittles”);²⁷⁷ in the other subcategory, the Chick-fil-A ads were tarnished with occult-related imagery (specifically, for “www.666chicks.com”).²⁷⁸ Participants were randomly assigned either to the control condition or to one of the tarnishment subcategories. Examples of the untarnished ads, the tarnished Skittles ads, and the tarnished Chick-fil-A ads appear as Figure 9 below.

277. These images were pulled from the complaints in *Wm. Wrigley Jr. Co. v. Packaging Papi, LLC*, No. 1:21-cv-02364 (N.D. Ill. May 3, 2021), *Wm. Wrigley Jr. Co. v. Conde*, No. 5:21-cv-00777-JWH-SHK (C.D. Cal. July 19, 2022), and *Wm. Wrigley Jr. Co. v. Terphogz, LLC*, No. 1:21-cv-02357 (N.D. Ill. Nov. 17, 2021). Additional descriptive text was added by the authors.


278. These images were pulled from <https://mschfsundayservice.com/> [<https://perma.cc/42FY-T8U2>], the website used to promote MSCHF’s Sunday sales of Chick-fil-A sandwiches. Additional descriptive text was added by the authors.

Figure 9. Sample News Articles with Control and Tarnished Target Ads

<p>Excellence in its most pure form. Just Do It. AD</p>  <p>The New Best Kept Travel Secret</p> <p>YouTube Facebook Twitter StumbleUpon LinkedIn</p> <p>The Napa Valley is hiding its best-kept secret in plain view. While most people who visit Napa have their sights set on the smaller towns and in-between countryside of the 30-mile-long valley, surprisingly few realize that the valley's namesake city has come into its own in recent years.</p> <p>A decade ago, the city of Napa was best known for its ailing downtown and lack of visitor appeal. But a major revitalization has transformed the river-front district, putting it on the map of savvy wine-country visitors.</p> <p>With a walkable downtown core that mixes cafes, wine bars, restaurants, shops, and green spaces, it's a nice change of pace from long drives between wineries in the valley. Best of all, you can park once and settle in: Small inns are tucked into the tree-lined residential streets that border downtown, offering a quiet respite within easy walking distance of all the action.</p> <p>SUBMIT A COMMENT</p>	<p>CONTROL</p> <p>Chick-Fil-A Home of the original chicken sandwich!</p>  <p>AD</p>
<p>Excellence in its most pure form. Just Do It. AD</p>  <p>The New Best Kept Travel Secret</p> <p>YouTube Facebook Twitter StumbleUpon LinkedIn</p> <p>The Napa Valley is hiding its best-kept secret in plain view. While most people who visit Napa have their sights set on the smaller towns and in-between countryside of the 30-mile-long valley, surprisingly few realize that the valley's namesake city has come into its own in recent years.</p> <p>A decade ago, the city of Napa was best known for its ailing downtown and lack of visitor appeal. But a major revitalization has transformed the river-front district, putting it on the map of savvy wine-country visitors.</p> <p>With a walkable downtown core that mixes cafes, wine bars, restaurants, shops, and green spaces, it's a nice change of pace from long drives between wineries in the valley. Best of all, you can park once and settle in: Small inns are tucked into the tree-lined residential streets that border downtown, offering a quiet respite within easy walking distance of all the action.</p> <p>SUBMIT A COMMENT</p>	<p>TEST</p> <p>Satan says: Order a Chick-Fil-A sandwich for delivery this Sunday!</p>  <p>AD</p>

What You Need to Know about your Pets

While a lot of people may think chubby cats and dogs look adorable, obesity is a real health problem for many pets in the United States. On Tuesday, veterinary clinic chain Banfield Pet Hospital released their annual report on the "state of pet health," based on data from the



Delicious to the Last Bite.

2.5 million dogs and 505,000 cats treated by the chain of more than 950 clinics. This year's report includes a special focus on overweight pets, and the company compiled a list of the states with the highest percentages of obese and overweight pets.


Overweight animals can be at risk for severe heart disease and respiratory conditions.

Minnesota topped the list for heaviest pets.

CONTROL

TIFFANY & CO.

Sponsored Ad




Taste the Rainbow!
Skittles!

AD

What You Need to Know about your Pets

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2.5 million dogs and 505,000 cats treated by the chain of more than 950 clinics. This year's report includes a special focus on overweight pets, and the company compiled a list of the states with the highest percentages of obese and overweight pets.


Overweight animals can be at risk for severe heart disease and respiratory conditions.

Minnesota topped the list for heaviest pets.

TEST

TIFFANY & CO.

Sponsored Ad



Taste all the colors!
Medicated Skittles!

AD

As an attention and comprehension check, participants answered basic questions about the news stories they had read.²⁷⁹ We then asked them a series of questions regarding their attitudes toward several brands, including Skittles and Chick-fil-A.²⁸⁰ Most importantly, on five-point Likert scales ranging from "strongly disagree" to "strongly agree," we examined the

279. We excluded thirteen participants for failing the attention and comprehension checks.

280. The other brands included McDonald's, Chipotle, Qdoba, Starburst, Sour Patch Kids, Jolly Ranchers, and Patagonia. These brands were included to obscure the true nature of our experiment, which was to examine participants' attitudes toward our target brands: Skittles and Chick-fil-A.

degree to which all participants perceived our target brands as tasty and the degree to which they found the target brands wholesome.

We collected demographic information from our participants, including their age, race, household income, and education level. Most importantly for this study, we also measured participants' political orientation, attitude toward drug use, and degree of religiosity.

With respect to their attitudes toward drug use, we asked participants to rate their agreement with three items (on a five-point Likert scale) that: (1) medical cannabis use should be legal; (2) recreational cannabis use should be legal; and (3) legal drugs should be kept away from children.

We measured political orientation by asking participants to describe their political beliefs on a five-point scale, including "very conservative," "somewhat conservative," "equally liberal and conservative," "somewhat liberal," or "very liberal." As in Study 1 and consistent with prior research, we constructed a dichotomous political orientation variable combining participants who selected "very conservative" and "somewhat conservative" into a broader "conservative" category, and participants who selected "somewhat liberal" and "very liberal" into a broader "liberal" category.

We measured participants' religiosity with ten items from Worthington's "Religious Commitment Inventory-10." The scale includes items to which participants express their level of agreement including: "religion . . . answers many questions about the meaning of life," "my religious beliefs influence all my dealings in life," and "I enjoy participating in the activities of my religious organization," among other items.²⁸¹ Participants' responses to these items were averaged together to form an index variable signifying the extent of each participants' religious affiliation.²⁸²

6. Results and Discussion

We employed the following analytical strategy with respect to our participants' perceptions of the tastiness and wholesomeness of our target brands, Skittles and Chick-fil-A. We constructed linear regression models examining the effects of (1) the ads to which participants were exposed (either untarnished or tarnished), (2) a relevant individual-difference

281. Worthington, Jr. et al., *supra* note 175.

282. The reliability of a psychometric scale is measured by a Cronbach's alpha statistic ranging from 0.00 (lowest reliability) to 1.00 (highest reliability), with acceptable reliability generally greater than 0.70. See Lee J. Cronbach, *Coefficient Alpha and the Internal Structure of Tests*, 16 PSYCHOMETRIKA 297, 297 (1951). The Cronbach's α value for this scale was 0.97, suggesting high reliability.

characteristic that we measured for each participant (i.e., their attitudes toward drug use, their degree of religiosity, or their political orientation); and (3) their interactive effect on our dependent variables. Our analysis yielded interactive effects with respect to the perceived tastiness of Chick-fil-A sandwiches and the perceived wholesomeness of Skittles candy.²⁸³ We discuss these results in more detail below.

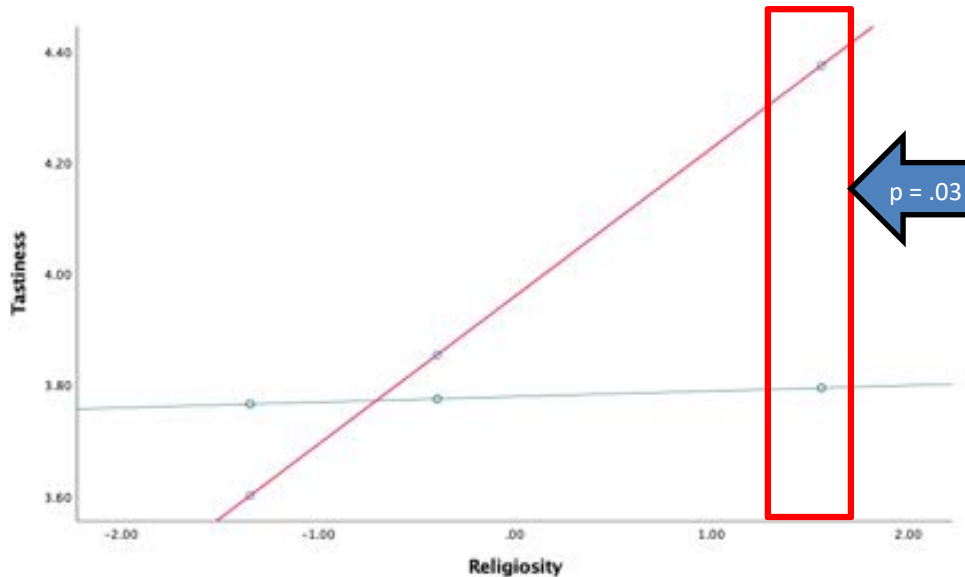
a. Tastiness of Chick-fil-A Sandwiches

First, we tested our prediction that sacrilegious imagery would have a greater effect on highly religious individuals compared to others. To investigate this hypothesis, we employed Aiken and West's simple slopes analysis, in which we examined perceptions of the tastiness of Chick-fil-A sandwiches among low-, average-, and high-religious individuals in the *control* condition, with perceptions of the tastiness of Chick-fil-A sandwiches among low-, average-, and high-religious individuals in the *test* condition. A graph of the analysis appears below as Figure 10.²⁸⁴

283. None of our remaining analyses reached statistical significance.

284. See generally LEONA S. AIKEN & STEPHEN G. WEST, *MULTIPLE REGRESSION: TESTING AND INTERPRETING INTERACTIONS* (1991). A simple slopes analysis calculates model equations for a predictor and outcome variable at low, high, and average levels of the moderator variable. By default, the PROCESS macroinstruction calculates low, average, and high levels of the moderator non-parametrically: at the 16th, 50th, and 84th percentiles of the sample. For a discussion, see *id.* at 489. Because our religiosity variable is continuous, the x-axis in the accompanying figure reflects mean-centered values for easier interpretation. See Dev K. Dalal & Michael J. Zickar, *Some Common Myths about Centering Predictor Variables in Moderated Multiple Regression and Polynomial Regression*, 15 *ORGANIZATIONAL RSCH. METHODS* 339, 339 (2012).

Figure 10.²⁸⁵ Study 2 Interaction of Religiosity and Ad Exposure on Perceptions of the Tastiness of Chick-fil-A Sandwiches²⁸⁶



As the graph illustrates, there was no effect of brand tarnishment on perceptions of the tastiness of Chick-fil-A sandwiches among participants who were low in religiosity.²⁸⁷ But the analysis revealed a statistically significant effect of brand tarnishment among highly religious participants.²⁸⁸ Specifically, highly religious participants in the tarnishment condition rated Chick-fil-A sandwiches as significantly less tasty than did highly religious participants who were not exposed to the www.666chicks.com ads.²⁸⁹

b. Wholesomeness of Skittles Candy

We next tested our prediction that drug-related imagery would have a more tarnishing effect on social conservatives than on liberals. To investigate

285. The red line signifies participants in the control condition, whereas the blue line signifies participants in the tarnishment condition.

286. From left to right, the bullet points represent one standard deviation below mean religiosity levels, mean religiosity levels, and one standard deviation above mean religiosity levels.

287. $b = 0.16$, $SE = 0.25$, $t = 0.65$, $p = .51$, $CI [-0.34, 0.66]$.

288. $b = -0.58$, $SE = 0.28$, $t = -2.08$, $p = .039$, $CI [-1.13, -0.03]$.

289. $M\text{-control} = 4.37$, $M\text{-tarnishment} = 3.79$.

this hypothesis, we examined perceptions of the wholesomeness of Skittles candy as a function of our experimental manipulation on conservatives and liberals separately. A graph of that analysis appears below as Figure 11.

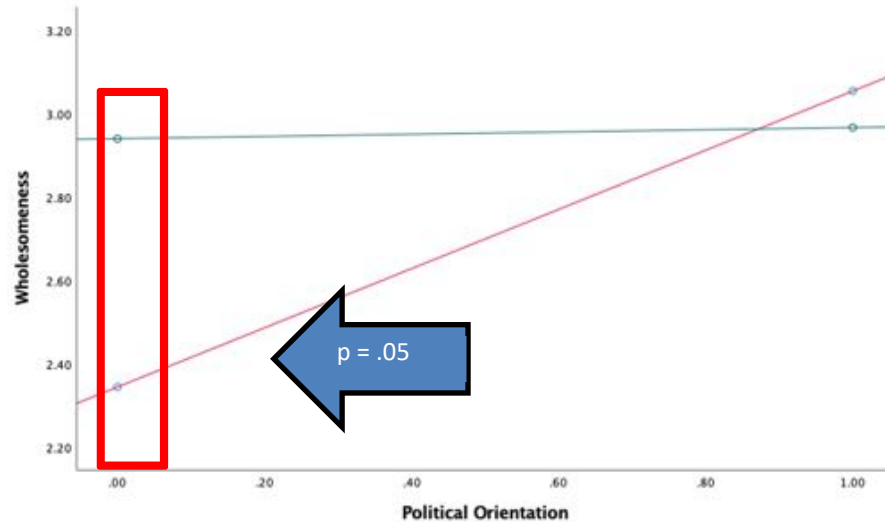


Figure 11.²⁹⁰ Study 2 Interaction of Political Orientation and Ad Exposure on Perceptions of the Wholesomeness of Skittles Candy²⁹¹

As the graph illustrates, there was no effect of target ad exposure on the perceived wholesomeness of Skittles candy with respect to liberal participants.²⁹² There was, however, an effect of target ad exposure on conservative participants.²⁹³ Specifically, conservative participants rated Skittles candy as *more* wholesome when they viewed the tarnished, ‘Cannabis Skittles’ ad than when they viewed the untarnished version of the ad.²⁹⁴

290. The red line signifies participants in the control condition, whereas the blue line signifies participants in the tarnishment condition.

291. Conservatives are represented as .00, and liberals are represented as 1.00 on the x-axis.

292. $M\text{-control} = 3.05$, $M\text{-tarnishment} = 2.97$, $b = -0.09$, $SE = 0.24$, $t = -0.37$, $p = .71$, $CI [-0.55, 0.38]$.

293. $b = 0.60$, $SE = 0.31$, $t = 1.90$, $p = .05$, $CI [0.00, 1.21]$.

294. $M\text{-control} = 2.34$, $M\text{-tarnishment} = 2.94$. In light of this counterintuitive result, we considered the possibility that conservative participants interpreted the Skittles ads (some of which referred to “medicated” Skittles) as ads for *medicine* rather than simply for cannabis-laced candy. If so, perhaps conservatives have come to think of cannabis as a plausible medical intervention. We examined potential comprehension differences between liberals and conservatives with respect to these ads in a separate sample, but the results were inconclusive. These post-tests are on file with the authors.

III. IMPLICATIONS

Our studies produced surprising results, many of which may prove useful to scholars, litigants, courts, and policy makers examining the tarnishment doctrine. In both studies, and contrary to the underpinnings of the tarnishment doctrine, associating well-known marketplace brands with sex- and drug-related messaging produced not a tarnishment effect, but a small yet reliable burnishment effect. Our participants meaningfully and statistically preferred our target brands more when they were exposed to tarnishing stimuli than when they were not. Moreover, exposure to the test stimuli images counterintuitively led participants to perceive those brands as stronger, which influenced their preference for the brands in the tarnishment condition.

We found the same effects when we looked at distinct types of tarnishment. We replicated other scholars' work insofar as we found a burnishment effect in response to sex-related tarnishment, although our findings suggest that the effect is stronger than has been previously reported.²⁹⁵ To the extent this finding is generalizable, courts should stop indulging the presumption advanced by the appellate court in *Victoria's Secret* that any new association connecting the famous mark with lewd or bawdy sexual activity is tarnishing.²⁹⁶ Moreover, courts might reasonably require evidence establishing tarnishment rather than relying on intuitions about likely consumer recoil or judicial distaste.²⁹⁷

We also extended the empirical tarnishment literature by examining the effects of drug-related tarnishment on brand preference. Here, although the effects were weaker than those observed for sex-related tarnishment, we found a reliable enhancement effect on brand choice with respect to drug-related tarnishment as well.

Our examination of the effects of political ideology on our experimental tarnishment manipulation likewise produced surprising results. On the one hand, our studies provide evidence for the hypothesis that conservatives and liberals react differently to tarnishing images, as some tarnishment scholars have posited.²⁹⁸ But the pattern of results that we observed differ from what scholars have predicted. For example, in Study 1, we did not find that differences between conservatives and liberals were driven by stronger tarnishment effects among conservatives. Rather, we found a small (but only marginally reliable) *burnishment* effect among conservatives in response to

295. Cf. Buccafusco et al., *supra* note 22, at 388.

296. See *supra* notes 98–101 and accompanying text.

297. See *supra* notes 89–93, 105–107, and accompanying text; see also Bedi & Reibstein, *supra* note 28, at 727–30 (proposing best practices for surveys measuring tarnishment).

298. Buccafusco et al., *supra* note 22, at 387.

brand tarnishment; it was, however, dwarfed by the larger and more reliable enhancement effect among liberals. In Study 2, we found a significant burnishing effect among conservatives in the test condition with regard to the perceived wholesomeness of Skittles.

In Study 2, we measured religiosity of respondents and their perceptions of Chick-fil-A sandwiches in both the control and test conditions. Participants with higher religiosity report that Chick-fil-A sandwiches are tastier. This may reflect that some of Chick-fil-A's perceptible commitment to Christian principles, including closing stores on Sunday, increases the perception that its food is tasty. Notably, however, there was no effect of religiosity on the other measures (wholesomeness and willingness to buy). This indicates that respondents separate those metrics from taste.

High-religiosity respondents in the test condition reported Chick-fil-A sandwiches as significantly less tasty than those in the control condition. This may indicate a tarnishing association connected to respondents' aversion to the Satanic imagery, the Sunday sales of the sandwiches, the art collective, or a combination of those elements. This result confirms the hypothesis that highly religious respondents will report a tarnishment effect if exposed to stimuli that associate a brand in a manner inconsistent with their religious values.²⁹⁹

Our results are interesting compared to the similarly structured Bedi & Reibstein study of sex-related tarnishment of the Chick-fil-A brand. Bedi & Reibstein reported a statistically significant reduction in how much respondents liked Chick-fil-A and a marginally significant reduction in the perceived wholesomeness of Chick-fil-A in the test condition.³⁰⁰ However, while taste ratings in their study were also lower in the test condition, the effect was not significant.³⁰¹ Bedi & Reibstein also reported an interaction effect vis-à-vis wholesomeness: tarnishing ads had a greater negative effect on conservatives than liberals.³⁰²

Our studies add evidence that conservatives react more negatively (or less positively) to potentially tarnishing stimuli than liberals. Our studies also add evidence that in the context of sacrilegious tarnishment, those with high religiosity react more negatively than those with low religiosity. These studies also fail to confirm the hypothesis that in general, respondents exposed to tarnishing stimuli will be less likely to choose branded goods after

299. See *supra* Subsection I.B.3; see also Bedi & Reibstein, *supra* note 28, at 685.

300. Bedi & Reibstein, *supra* note 28, at 712.

301. *Id.* Their replication of that study reported a significant tarnishment effect on the taste and liking measures. *Id.* at 720.

302. *Id.* at 716.

exposure to sex-, drug-, and sacrilege-related stimuli or to report lower brand strength compared to respondents in the control group.

Indeed, our studies prompt an initial observation that bears further consideration. We assume that firms contemplating a cause of action for dilution via tarnishment have better evidence of how consumers react to new associations with their brands. If firms see the same mixed effect we see in our studies and in the limited empirical literature described herein, one might wonder what motivates undertaking the expense of litigation. Moreover, if a tarnishment effect frequently manifests in tarnishment cases, a rational decisionmaker would pursue a cause of action for tarnishment only if the litigation produces other value that dominates over the potential of suppressing the tarnishment effect.

In addition, some scholars argue that like the bars against registering trademarks that consist of or comprise disparaging, immoral, or scandalous matter, the anti-tarnishment provisions also work a viewpoint-based restriction on the speech of the alleged infringer. Surviving strict or even intermediate (“*Central Hudson*”) scrutiny requires that the government has a justified end and that it is using appropriately tailored means to reach that end. *Ceteris paribus*, the absence of evidence of a tarnishing effect may indicate, in the language of the Court’s decision in *Alvarez*, that there is no “direct causal link between the restriction imposed and the injury to be prevented.”³⁰³

Tarnishment as a means to prevent sacrilegious use, for which we present some evidence of harm, raises one other wrinkle we address briefly. One could imagine a reading of the First Amendment Establishment Clause that bars enforcement of tarnishment in sacrilege cases because doing so assumes a place of prominence for a Christian view of what is likely to harm the reputation of a trademark, thereby violating the Establishment Clause.³⁰⁴ But as noted above, the United States is still a majority Christian nation.³⁰⁵ With

303. *United States v. Alvarez*, 567 U.S. 709, 726 (2012); *see also* notes 232–239 and accompanying text.

304. *See* Stephanie H. Barclay, *First Amendment “Harms,”* 95 IND. L.J. 331, 369–70 (2020) (citing, *inter alia*, *Cantwell v. Connecticut*, 310 U.S. 296, 307–08 (1940) (holding that conviction of a Jehovah’s Witness for disturbing the peace after playing a recording that upset Catholics must be set aside because “a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions”)) (explaining how harms caused by religious insult are harms the Supreme Court treats as irrelevant to its constitutional analysis); *id.* at 371–72 (citing, *inter alia*, *Epperson v. Arkansas*, 393 U.S. 97, 107 n.115 (1968) (holding that coercing a teacher to tailor her teaching to a certain dogma was not justified by an interest in providing citizens education in “accepted social, moral, or religious ideas”)) (explaining that harms from a failure to comply with religious belief are similarly irrelevant).

305. *See supra* note 172 and accompanying text.

the exception of a period during the 1960s and 1970s when it embraced a role as a bulwark against majoritarianism,³⁰⁶ the Supreme Court's religious liberty jurisprudence has been majoritarian, mirroring contemporary public opinion and reflecting the views of powerful social institutions like corporations.³⁰⁷ We suspect the Court is more likely to protect the ability of a mark owner to prevent tarnishing sacrilegious uses than to hold that the statute extending that power is unconstitutional.

Tam mirrors a recent religion clause case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,³⁰⁸ that proves instructive on this point. In *Tam*, the Court held the provision barring registration of a disparaging racist term worked an unconstitutional restriction on speech.³⁰⁹ In *Masterpiece*, the Court held that a state civil rights agency did not maintain sufficient religious neutrality in finding that a Christian bakery owner discriminated against a gay couple for whom the bakery would not bake a wedding cake.³¹⁰ The bakery owner argued that baking the cake effectively required him to speak in favor of gay marriage, which he did not support.³¹¹ In both cases, the petitioner sought a course of action that potentially perpetuated discrimination and bias against vulnerable minorities.³¹² Nonetheless, in both cases, the freedom to speak freely (in *Tam*'s case) or not to speak (in the bakery's case) was given priority of place in the Court's First Amendment

306. Zoë Robinson, *The First Amendment Religion Clauses in the United States Supreme Court*, in *THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY* 219, 230 (Michael D. Briedenbach & Owen Anderson eds., 2020).

307. Zoë Robinson, *Constitutional Personhood*, 84 *GEO. WASH. L. REV.* 605, 646 (2016); Robinson, *supra* note 306, at 220.

308. 138 S. Ct. 1719, 1719 (2018); *see also* 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (holding that a Colorado anti-discrimination law violated the First Amendment by compelling a web designer who desired to enter the wedding website business to provide her services to gay couples or face legal sanction).

309. 582 U.S. 218, 223 (2017).

310. 138 S. Ct. at 1723; *see also* Kristen K. Waggoner, *Mastering Masterpiece*, 68 *CATH. U. L. REV.* 699, 711 (2019).

311. 138 S. Ct. at 1728 (considering the possibility that the bakery's "refusal was limited to refusing to create and express a message in support of gay marriage").

312. Sara Bagley, *Matal v. Tam and Disparaging Marks*, *JIPPEL BLOG* (Apr. 5, 2018), blog.jipfel.law.nyu.edu/2018/04/matal-v-tam-and-disparaging-trademarks/ [<https://perma.cc/MYX8-SKCJ>] (noting that the Court's decision in *Tam* protected racist stereotypes as trademarks like the Redskins mark used until recently by the NFL team that plays in Washington, D.C.); *Masterpiece*, 138 S. Ct. at 1750 n.3 (Ginsburg, J., dissenting) (concluding the bakery discriminated because of the sexual orientation of the couple requesting the cake).

analysis over the harms of reinforcing discrimination based on race or sexual orientation.³¹³

Note two other caveats about our experiments. First, compared with the populace at large, our participants were well-educated.³¹⁴ Psychological literature struggles to address how researchers draw data primarily from an outlier population (Western, educated, industrial, rich, and democratic).³¹⁵ Our population, while typical in other ways, deviates even from the U.S. norm. The education level may shape our results. For instance, a more highly educated survey population might be less likely to treat association with cannabis as harmful to brand reputation.³¹⁶ Second, the types of tarnishing stimuli we selected may be less palatable to political conservatives and the highly religious than to political liberals or those with low religiosity.³¹⁷ A

313. Francis J. Beckwith, *Now, I'm a Liberal, but to a Degree: An Essay on Debating Religious Liberty and Discrimination*, 67 CLEV. ST. L. REV. 141, 148 n.54 (2019) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring)):

[T]he Court has long recognized that freedom of speech includes the freedom not to speak: “The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all”

See also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)) (“[F]reedom of thought and expression ‘includes both the right to speak freely and the right to refrain from speaking at all.’”).

314. In 2021, nearly 37% of census takers had a high school level of education or less. *Education: Census Bureau Releases New Educational Attainment Data*, U.S. CENSUS BUREAU (Feb. 24, 2022), <https://www.census.gov/newsroom/press-releases/2022/educational-attainment.html> [<https://perma.cc/LWA6-8LTG>]. In comparison, fewer than 9% of the participants in our first study and fewer than 11% in our second reported that their highest level of education was high school.

315. Michael Muthukrishna et al., *Beyond Western, Educated, Industrial, Rich, and Democratic (WEIRD) Psychology: Measuring and Mapping Scales of Cultural and Psychological Distance*, 31 PSYCH. SCI. 678, 678 (2020).

316. Cf. Arpana Agrawal et al., *Alcohol, Cigarette, and Cannabis Use Between 2002 and 2016 in Pregnant Women from a Nationally Representative Sample*, 173 JAMA PEDIATRICS 95, 95 (2019) (reporting that while alcohol and tobacco use among pregnant women had fallen in the 21st century, cannabis use showed nominal increases in pregnant women who had completed high school).

317. For instance, a recent study indicates racial attitudes of white Democrats have shifted in favor of policies promoting racial equality, while white Republicans express heightened levels of racial resentment and continued opposition to racially egalitarian policies. Ashley Jardina & Trent Ollerenshaw, *The Polls—Trends: The Polarization of White Racial Attitudes and Support for Racial Equality in the US*, 86 PUB. OP. Q. 576, 576 (2022). Similarly, Democrat leaners are twice as likely as Republican leaners to consider “men getting away with sexual harassment or assault” and “women not being believed” as a major problem for workplace harassment and assault. Rupa Jose et al., *Political Differences in American Reports of Sexual Harassment and Assault*, 36 J. INTERPERSONAL VIOLENCE 7695, 7697 (2021). Liberals even condemn sacrilege, which one

different study with different stimuli might alter the tarnishment dynamic and yield different results.

It is always worth cautioning that these are the results from just one study. Ideally, policymakers should update the current law based on, among other criteria, a critical mass of empirical research that provides convergent evidence in the direction of improvement. It is also worth noting, however, that our results are consistent with theoretical predictions regarding the cognitive and behavioral effects of tarnishment on consumer attitudes, and our results coincide with the work of other researchers.³¹⁸ Of course, no one study can answer every lingering question about the effects of tarnishment on consumer brand choice. Science is incremental, and we leave it to other researchers to explore the additional questions posed by our findings and the findings of other scholars in this empirical space.

research team defines as “harmless violations of [one’s] own sacred objects,” but they differ as to the things that are sacred. Jeremy A. Frimer et al., *Liberals Condemn Sacrilege Too: The Harmless Desecration of Cerro Torre*, 6 SOC. PSYCH. & PERSONALITY SCI. 878, 878 (2015).

318. See, e.g., Buccafusco et al., *supra* note 22, at 387–89; Bedi & Reibstein, *supra* note 28, at 714–21.