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1001 Connecticut Ave NW • Suite 1250 • Washington, DC 20036
202.331.1010 • www.cei.org

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The Five Dumbest Product Bans

An Overview of Regulatory Absurdity

By Eli Lehrer*

Even as the array of consumer products available to the average American expands each day, a bewildering variety of government regulations serve to limit consumer choice. From the aircraft on which Americans fly to the food they buy in the grocery store, government regulation limits product choice at every turn.

There are different types of product bans. Some limits on product choice—bans on child pornography and personal possession of atomic weapons—have widespread popular support and appear wise by any standard. A great many more product bans are likely to remain subject to ongoing debate. For example, there are strong arguments for allowing the sale of meat that has not been government inspected and drugs not yet approved by the Food and Drug Administration (FDA).¹ Even if the costs of these regulations exceeds their benefits—and they well may—many still bring *some* benefits to society. But there is another type of ban—the kind that limits consumer choice but have no social benefit.

This paper focuses on five clearly absurd product bans that seem to serve no social good. While the selection obviously involves some degree of subjective judgment—no means exist to review every product ban in existence—the bans selected meet four criteria:

- No one can present a strong case for *marginal* social harm from the product or service banned. This does not necessarily mean that the product is harmless by all accounts, simply that the act of banning it without banning a much broader category of products has no social utility. For example, banning all alcohol would have some positive social

* *Eli Lehrer is a Senior Fellow at the Competitive Enterprise Institute. The author wishes to thank Wayne Crews, Christine Hall, John Kramer, and Michelle Minton for their assistance with this paper.*

effects—outweighed by the negative ones. Banning sangria simply restricts the availability of a type of beverage without doing anything to restrict the sale of alcohol or the negative consequences of drunk driving and alcoholism.

- The product should have utility to the general public. In other words, it should be something that almost anybody might have a theoretical interest in using. Some pig farmers complain of limitations placed on the drugs they can use on livestock, but these limitations have little relevance for those who do not raise pigs, so would not qualify.²
- A government must have actually enforced the ban within the recent past. Many amusingly archaic laws remain on the books that are not enforced and are today a source of public amusement. Arizona, for example, bans the sale of imitation illegal drugs but no record exists of an attempt to enforce this law.³
- The ban should, at least, exist at the state level. This paper does not deal with local laws, which allow for easier exit from their reach.

By necessities of space and brevity, many delightfully absurd product bans remain unexplored here. The five bans selected are:

Sangria (Virginia). The Commonwealth of Virginia bans most preparations of the popular fortified wine drink (typically red wine with brandy and fruit) even though the state not only allows drinking of substances with the same alcoholic composition as Sangria and actually operates stores that sell all of the alcoholic ingredients needed to make Sangria.

Playing Online Poker in a Legal Casino (U. S.). Although 48 states have legal gambling in some form (and several run casinos), the federal government has made it illegal to place bets online—even in jurisdictions that allow almost all other types of gambling.

The Cardio-Pump (U. S.). No one has ever contended that anybody could do harm using this American-designed device intended to help resuscitate heart attack victims, which may actually help save lives. Although it has found wide use in other countries, the Food and Drug Administration bans its use in the United States.

Wildflower Bouquets (Louisiana). Louisiana's unique-in-the nation florist licensing statute makes it illegal for anybody to arrange two or more types of flowers without passing a largely subjective state licensing exam. In theory, a child could face a fine for picking a bouquet of flowers and selling it at a roadside stand.

Feathers in provocative packaging (Texas, Louisiana, and Georgia). Ridiculously broad laws banning sexual toys in these states could serve to ban the sale of simple feathers if packaged with suggestions that they might be used for sexual purposes.

1. Sangria (Virginia). Sangria, a Spanish punch typically consisting of wine, brandy, and fruit, ranks among the most popular tipples at parties in Spanish homes and Spanish-style restaurants

outside of Spain. Although Sangria's exact alcohol content will differ based on preparation—since, by definition, it is prepared on the spot—Port, which has the same alcoholic ingredients (red wine and brandy), has an alcohol content by volume of between 19 and 22 percent.⁴ There's no argument, in other words, that it's a particularly toxic or dangerous beverage.

Virginia, nonetheless, outlaws its sale under a 75 year-old law that forbids the sale of “wine to which spirits or alcohol, or both, have been added, otherwise than as required in the manufacture thereof under Board regulations”⁵ At least once in the past year, a Virginia establishment has received a fine of \$2,000 for violating this law.⁶ The same law makes it illegal to serve boilermakers (beer with spirits) and Kir Royales (sparkling wine with Crème de Cassis).

The Commonwealth of Virginia, through alcoholic beverage control stores that it owns, actually sells the raw ingredients for Sangria—brandy and red wine.⁷ Sangria and similar drinks may be somewhat easier to get drunk on relative to other drinks but since it is perfectly legal to serve Port in Virginia—which has the same alcohols in similar proportions—it's almost impossible to figure out what the law accomplishes or even could accomplish.

2. Playing Online Poker in a Legal Casino. Although American gambling once existed in only a few tiny islands of freedom, nearly all states have now legalized gambling. By 2007, 48 states had some form of legal gambling and 37 allowed the operation of casinos or card rooms.⁸ (Hawaii, one of the two states that technically outlaws gambling, allows the docking of cruise ships with on-board casinos.) For most states, gambling has become a significant source of tax revenue: Seventeen states get at least 5 percent of their budgets from gambling operations.⁹ States like West Virginia and Kansas even own the gambling devices themselves.¹⁰

Clearly, the United States provides a wide-open market for those who enjoy lotteries and casino gaming, so it seems absurd that current federal law makes it illegal to play online poker. Under a 2006 law, processing payments for online gambling is almost entirely illegal even in jurisdictions where legal gambling is otherwise plentiful.¹¹ This makes no sense for three reasons: First it does nothing to restrict the supposed vice of gambling; second, it has not shut down online casinos; and third, the law is written so broadly as to ban activities that are not really gambling at all.

The law has not shut down online casinos, or even restricted the availability of online gambling in Utah, the one state that has neither *de facto* nor *de jure* legal gambling in any form. Even if it did, federal law must be national, or at least multi-state, in scope, so a law that affects only one state, in this case, Utah, should not be a federal law at all. To find out, I called online casino goldenpalace.com to see if I could set up an account: “No problem,” an account representative told me. “We process the credit cards outside of the United States and nobody really seems to care.”¹² On the other hand, American law enforcement officials have arrested a handful of online gambling executives and appear intent on enforcing the law.¹³

The ban on poker—and other skill-based games like bridge and blackjack—also raises a question of what exactly the government seeks to ban. Poker, unlike games of chance like slot machines

or roulette, requires a specific set of skills just like golf or basketball. Players compete against one another rather than the house and it is possible for a good player to make a living doing it. Even in Utah, it is perfectly legal for individuals to play poker against one another and, indeed, many do. But federal law essentially makes doing so illegal on the Internet.¹⁴

At the margins, the law may limit gambling in some respects in a few places but it hardly reduces the supposed vice of gambling or makes it unavailable.

3. The Cardio Pump. Used improperly, many medical devices and procedures can do harm. Regardless of the level of government regulation, no competent doctor today would perform a frontal lobotomy to treat mental illness or prescribe powder cocaine as an anti-depressant, yet both treatments were once accepted as normal. On the other hand, some devices, drugs, and procedures currently either banned or withdrawn from the market—such as the pain reliever Vioxx—have a potential for harm to some but may bring benefits to others.¹⁵ Obviously, bringing them onto the market (or back to market) involves difficult public policy questions. It is much more difficult to come up with a public policy rationale for banning devices that appear to do no harm whatsoever.

The Cardio Pump, a device intended to assist with CPR, provides a perfect example of a harmless-but-nonetheless-banned medical device. It appears to work and, despite some questions about how well it works, decisions about its use should fall to patients, doctors, nurses, and paramedics.

Clinical tests on the Cardio Pump have produced promising results. Early trials, which received significant media coverage, produced a near 50-percent survival rate increase among heart attack victims in St. Paul Minnesota.¹⁶ The prestigious *New England Journal of Medicine* published the first results.¹⁷ Later tests produced much less conclusive evidence that the device actually increased survival rates and showed that it did result in some minor complications.¹⁸ Still, the Cardio Pump has gone on to become standard equipment in the United Kingdom, France, Chile, Israel, and a dozen other countries.¹⁹ The Food and Drug Administration, nonetheless, ruled that the device should be considered a “significant risk device” and therefore its use required “informed consent”—something that is literally impossible to get for a device that is used only on those suffering heart attacks.²⁰

Nonetheless, aside from the minor complications—all of them well-documented in the medical literature—nobody has ever come to the conclusion that the device harms anybody. Indeed, current U.S. law allows the use of dozens of FDA-approved products that do not appear to work at all. For example, FDA found that the preponderance of the evidence indicates that calamine lotion—once frequently used to treat itches—does not appear to work at all and may have played a role in one case of a boy suffering a delusional episode.²¹ The product remains on the market to this day. Even if the Cardio Pump does no good at all, clinical evidence indicates that little reason exists for continuing a ban on its use.

4. A Bouquet of wildflowers arranged by somebody without a license (Louisiana).

As a result of a Louisiana professional licensing law, it is illegal to sell bouquets of freshly picked wildflowers without a state-granted license. Louisiana, alone amongst the 50 states, requires state-granted licenses for anybody seeking to sell more than one type of flower put together or to arrange flowers in a vase.²²

Louisiana's law is so broad as to be plainly absurd. It makes no exception for small-scale operations so even a child selling wildflowers by the roadside could receive a ticket for "practicing floristry without a state license."

The law's very existence clashes with the two reasons used to justify professional regulation: safety and quality.²³ It does nothing to promote either. Unlike laws to regulate "life and death" professional activities like surgery and civil engineering—professions that would need some form of licensing and oversight even without state laws mandating it—poorly arranged floral bouquets have no chance of injuring anybody.

Neither does the law provide any quality benefit. It takes significant specialized knowledge to practice law, design integrated circuits, or keep the books for a public company, and many people without licenses have difficulty doing these things. Louisiana's law, in contrast, does nothing to improve the quality of floral arrangements. As the Institute for Justice (IJ) reports, the state florist test involves highly subjective judgments. "Harmony," which the state horticultural commission counts as a key principle of floral design, "occurs when all components are in agreement with each other. Textures of material, containers, foliage and flowers should all blend together."²⁴ The inherently artistic nature of flower arranging, however, means that some people will enjoy arrangements that others hate. Just as some people may enjoy atonal music, many may enjoy flower arrangements lacking in "harmony." Even if it were fairly enforced—and it probably is not—the law would do nothing to advance consumer welfare.

Louisiana's floral licensing law serves no valid public purpose. Flower shops have faced fines and threats of fines for not having "licensed florists" on duty. The law stops many florists from practicing their chosen profession and, just as importantly, restricts consumer choice unnecessarily.

5. A Feather with salacious packaging (Alabama, Texas, and Georgia). Many adults purchase aids to improve their sex lives. Several states, however, place absurd and self-contradictory bans on the use of these devices. While it is difficult to see how these bans promote sexual morality, stop the spread of disease, or advance any other state interest, it is easy to see that they impose often absurd restrictions on freedom and commercial speech. This section deals with an Alabama law but also applies to those in several other states.

The plain language of the Alabama's law prohibiting sex toys appears pretty clear: It prohibits, "any device designed or marketed as useful primarily for the stimulation of human genital organs

for anything of pecuniary value.”²⁵ Texas and Georgia have similar laws²⁶ and Mississippi and Arkansas have weaker laws along the same lines.²⁷

While federal courts might overstep their bounds if they were to strike down the law—they have declined to do so when the law has faced challenges—that does not make the law any less absurd.²⁸ The word “marketed” in the Alabama law has particularly odd consequences: It makes it illegal to sell a simple feather in a package saying something like “This feather can improve your sex life.” On the other hand, it remains legal to open a store that sells all manner of sexual devices, herbal supplements intended to increase sexual potency, sex toys that do not involve genital stimulation (say, fur-lined handcuffs), a wide selection of condoms, and many types of pornography. A 2005 court decision *upholding* the law, notes many of these absurdities.²⁹ Furthermore, it remains perfectly permissible to sell devices that are useful for sexual purposes but simply do not mention it or use vague euphemisms (“Good for private personal uses”). In the 19th century, most vibrators were marketed in precisely this way.³⁰ Stores that sell genital stimulators marketed as such, however, have faced fines and threats of fines.³¹

The law does nothing to protect children from sexual materials—marketing them to adults is still perfectly legal—and cannot prevent the spread of disease. Alabama residents have been able to buy sex toys things outside of the state and transport them into the state: Not only can they visit sex toy boutiques elsewhere but now they can also order from a wide variety of websites.³²

In short, the law does not even substantially impede Alabamans’ purchase of sex toys and serves no purpose in protecting children from sexual materials or even preventing people from engaging in unconventional sexual practices in private. (And to say the least, it seems very hard to believe that the latter is a compelling state interest in any case.) In short, the sex toy ban does not appear to accomplish much at all by any standard—other than, like the other bans discussed in this paper, limit the liberty of individuals and entrepreneurs.

Conclusion. America’s absurd product bans have demonstrable, negative consequences for freedom. Nobody can legitimately contend that a society that retracted all of the product bans discussed above would be any less safe, secure, or moral. Instead, these bans simply intrude on the freedom of individuals to live their lives as they please. While the freedom to purchase a sex toy, buy wildflowers a child has picked, or drink Sangria may not be of enormous consequence on its own, the sheer absurdity of these product bans makes them all the more insidious. They serve to ban things that law-abiding men and women seek to do every day and add to a body of regulatory law that, quite simply, works against the common good.

Notes

¹ See e.g. Sam Kazman. “Deadly Overcaution: FDA’s Drug Approval Process,” *Journal of Regulation and Social Costs*, September 1, 1990.

² See e.g. “Pigs Under Scrutiny for Ractopamine,” <http://www.thepigsite.com/swinenews/15254/pigs-under-scrutiny-for-ractopamine>.

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- ³ AZ. Code 13-3453
- ⁴ Port and Douro Wines Institute, "Introduction," <http://www.ivp.pt/pagina.asp?codPag=64>.
- ⁵ Code 1950, § 4-60.
- ⁶ Anita Kumar, "Virginia's Sangria Ban At Issue in 2 Hearings," *The Washington Post*, January 24, 2008.
- ⁷ Virginia Alcoholic Beverage Control, "Stores and Products," <http://www.abc.virginia.gov/wholereal.html>.
- ⁸ American Gaming Association, "State of the States 2007: The American Gaming Association Survey of the Casino Environment," 4.
- ⁹ Richard M. McGowan as cited in: Pamela M. Prah. "States Scramble for Gambling Jackpot," Stateline.org, September 12, 2007, <http://www.stateline.org/live/details/story?contentId=239294>.
- ¹⁰ Ibid.
- ¹¹ H.R. 4911
- ¹² Conversation with Goldenpalace.com account representative, December 18, 2007.
- ¹³ Michael McCarthy, "U.S. cracking down on offshore betting industry," *USA Today*, July 19, 2006.
- ¹⁴ Admittedly, no efforts have been made to crack down on poker sites that do not include a "house" take. On the other hand, however, the authors were unable to find any such sites through conventional web searches.
- ¹⁵ Food and Drug Administration Vioxx (rofecoxib) Questions and Answers, "<http://www.fda.gov/CDER/drug/infopage/vioxx/vioxxQA.htm>.
- ¹⁶ Lawrence K. Altman, "Toilet Plunger Is the Model For Device to Restart Hearts," *The New York Times*, June 3, 1992. See also:
- ¹⁷ T.J. Cohen et al. "A comparison of active compression-decompression cardiopulmonary resuscitation with standard cardiopulmonary resuscitation for cardiac arrest occurring at the hospital," *New England Journal of Medicine*, 1993; 329, 1918-1921.
- ¹⁸ K. Vidhani et al. "The CardioPump CEPOD Guidelines and Validation of New Techniques," *British Journal of Anesthesia*, 1998, 101.
- ¹⁹ Alexander Volokh, "Feel a Heart Attack Coming? Go to France," *The Wall Street Journal*, August 2, 1995.
- ²⁰ Ibid.
- ²¹ For the rational see: The Federal Register. "Proposed Rules: Labeling of Diphenhydramine-Containing Drug Products for Over-the-Counter Human Use," August 29, 1997 (Volume 62, Number 168), Page 45767-45774.
- ²² La. Rev. Stat. 3:3808(I).
- ²³ Of course, it remains to be seen if *any* professional licensing advances either of these goals.
- ²⁴ Louisiana Horticulture Commission handbook, *Flower Arranging* at 3 as cited in, Institute for Justice. "Let a Thousand Florists Bloom: Uprooting Outrageous Licensing Laws In Louisiana," http://www.ij.org/economic_liberty/la_florists/background.html. The state manual also defines "unity" as when "All parts must be related and unified so that the whole composition will be of good design."²⁵
- ²⁵ Ala. Code § 13A-12-200.2.
- ²⁶ For a review of all current laws see: Marybeth Herald, "A Bedroom of One's Own: Law and Sexual Morality After Lawrence v. Texas," *Yale Journal of Law and Feminism*, Vol. 16, 2004.
- ²⁷ Ibid.
- ²⁸ See e.g. *Williams v. Pryor*, 41 F. Supp. 2d. 1257, 1282-84 (N.D.Ala. 1999) and *Williams et al. v. Attorney General of Alabama* 02-16135 (11th Cir. 2005)
- ²⁹ *Williams et al v. Attorney General of Alabama*, 3.
- ³⁰ Rachel P. Maines, *The Technology of Orgasm: "Hysteria," the Vibrator, and Women's Sexual Satisfaction*, The Johns Hopkins University Press, 1999, 82-89.
- ³¹ *Williams et al. v. Attorney General of Alabama*, 4
- ³² For example, the Xandria Collection: <http://www.xandria.com/>