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## Fashion's Destruction of Unsold Goods: Responsible Solutions for an Environmentally Conscious Future

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### Cover Page Footnote

M.S.L., Fashion Law, 2019, Fordham University School of Law; M.A., 2011, Fashion and Textiles: History, Theory, Museum Practice; B.A. Art History, 2008, Saint Mary's College of California; Assistant Director, Fashion Law Institute. This Note is dedicated to my parents Stephanie Meyer and Allen Elia. I am grateful to Professor Trexler for inspiring the topic of this capstone paper. The first day of your ethics course you challenged me to look beyond the headline of H&M burning their products and to find a solution. Thank you for compelling me to second guess every source and to see what bias the author or establishment may have. I am eternally grateful for Professor Susan Scafidi for your unwavering support and mentorship. Thank you to Anton Baptiste and Elliot Fink for your encouragement and edits throughout the process.

# Fashion's Destruction of Unsold Goods: Responsible Solutions for an Environmentally Conscious Future

Ariele Elia\*

*Over the past two years, headlines of fast-fashion and luxury brands burning their merchandise have flooded media outlets. While this came as a shock to the general public, it has actually been a standard industry practice for decades. As societal norms are leaning more towards environmentally conscious practices, destroying unsold products is no longer viewed as an acceptable option. Brands are facing increased scrutiny related to their environmental impact—such as the amount of textile waste that ends up in a landfill—and how they address the issue. While the media have criticized brands for these practices, they have not suggested long-term solutions to resolve the problem. Brands are left in the dark without a road map showing them how to modernize their systems. Furthermore, when governments introduce new bills focused on textile waste, brands experience added pressure. France is in the process of requiring brands to recycle or reuse their unsold goods by January 2020. However, there is no one-size-fits-all solution for any brand or country: what may work for a fast-fashion brand will not necessarily work for a luxury brand. In the same vein, what may work for France may not work for the United States. This*

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\* M.S.L., Fashion Law, 2019, Fordham University School of Law; M.A., 2011, Fashion and Textiles: History, Theory, Museum Practice; B.A. Art History, 2008, Saint Mary's College of California; Assistant Director, Fashion Law Institute. This Note is dedicated to my parents Stephanie Meyer and Allen Elia. I am grateful to Professor Trexler for inspiring the topic of this capstone paper. The first day of your ethics course you challenged me to look beyond the headline of H&M burning their products and to find a solution. Thank you for compelling me to second guess every source and to see what bias the author or establishment may have. I am eternally grateful for Professor Susan Scafidi for your unwavering support and mentorship. Thank you to Anton Baptiste and Elliot Fink for your encouragement and edits throughout the process.

*Note explores a number of potential solutions to this problem which range from legal solutions, to reusing, manufacturing, technological, and crisis management solutions. Brands must start to address this issue within their supply chain in a thorough and transparent manner, as this is not a fleeting trend.*

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## INTRODUCTION

At the G7 summit in 2019, fashion made a surprising appearance on the agenda. French President Emmanuel Macron tasked François-Henri Pinault, Chairman and Chief Executive Officer of the luxury conglomerate Kering, with uniting fashion brands in the commitment to reduce their environmental impact.<sup>1</sup> To date, fifty-six fashion and textile companies (which includes 250 brands) have signed The Fashion Pact,<sup>2</sup> which aligns with the “Sustainable Development Goals” created by the United Nations in 2015.<sup>3</sup> While this commitment is promising, critics question the speed and level of commitment brands will devote to solving these issues.<sup>4</sup>

As consumers become more aware of the environmental crisis, corporate social responsibility departments and corporate sustainability officers have gained increasing importance and relevance. To avoid losing current and future customers, brands are promoting sustainability campaigns such as take-back programs and carbon-neutral fashion shows.<sup>5</sup> A barrage of false environmental claims—referred to as “greenwashing”—also entered into the fashion

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<sup>1</sup> See *Fashion Pact G7 France*, KERING (2019), [https://keringcorporate.dam.kering.com/m/1c2acf6f32f1c321/original/Fashion-Pact\\_G7\\_EN.pdf](https://keringcorporate.dam.kering.com/m/1c2acf6f32f1c321/original/Fashion-Pact_G7_EN.pdf) [<https://perma.cc/SYJ5-4NA2>].

<sup>2</sup> *24 New Companies Join the Fashion Pact*, KERING (Oct. 25, 2019), <https://www.kering.com/en/news/24-new-companies-join-the-fashion-pact> [<https://perma.cc/293U-YDXD>].

<sup>3</sup> See *Sustainable Development Goals*, UNITED NATIONS DEV. PROGRAMME, <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> [<https://perma.cc/FEP8-JMHH>]; see also G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Sept. 25, 2015).

<sup>4</sup> See *The G7 Fashion Pact: What It Is and What It's Missing*, FASHION REVOLUTION (Aug. 28, 2019), <https://www.fashionrevolution.org/the-g7-fashion-pact-what-it-is-and-what-its-missing/> [<https://perma.cc/KUG7-RF99>].

<sup>5</sup> Brands such as Eileen Fisher and H&M have developed take-back programs which reuse the material to create new garments, but they are still left with more textiles than they can use. Gabriela Hearst debuted a carbon-neutral fashion show for her spring 2020 collection. See Nicole Phelps, *Garbiela Hearst's Spring 2020 Show To Be Carbon Neutral*, VOGUE (Sept. 5, 2019), <https://www.vogue.com/article/gabriela-hearst-carbon-neutral-fashion-show> [<https://perma.cc/N5G3-R8R2>]. Carbon emissions were reduced by casting local models instead of flying them in, eliminating the use of electricity from hair dryers, and sourcing the catering from local chefs and farms. See *id.*

marketing landscape.<sup>6</sup> This led the Federal Trade Commission (“FTC”) to develop the *Green Guides* in 1992, and the FTC has continued to update them as the conversations around sustainability have evolved.<sup>7</sup>

The environmental impact of the fashion industry has increased exponentially since the emergence of fast-fashion brands such as Zara and H&M.<sup>8</sup> Over-production and the disposable nature of these items have resulted in greater amounts of textile waste.<sup>9</sup> Elizabeth Cline, author of *The Shockingly High Cost of Cheap Fashion* discusses the issues around the disposal of mass-produced

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<sup>6</sup> Jasmin Malik Chua, *Circularity: Sustainable Fashion’s Holy Grail or Greenwashing?*, BUS. FASHION (June 12, 2018), <https://www.businessoffashion.com/articles/professional/circular-economy-the-holy-grail-of-sustainable-fashion> [https://perma.cc/DAS3-A9WF].

<sup>7</sup> As the fashion industry begins to incorporate sustainable practices, it is unclear what aspects of its business model is claiming to be environmentally responsible. The term has become a catch-all for any environmental initiatives. Sustainable practices range from reducing energy consumption, water usage, and carbon dioxide emissions, to creating recyclable packaging, eliminating the usage of virgin plastics, and creating regenerative fibers, to name a few. Many brands use the term sustainable purely for marketing purposes without substantiating its environmental claims. This resulted in the FTC developing their *Green Guides* and regulating environmental claims. See 16 C.F.R. § 260 (2012); see also Elizabeth Cline, *Most Fashion Brands Don’t Know Enough About Their Carbon Footprints To Actually Shrink It*, FASHIONISTA (Oct. 25, 2019), <https://fashionista.com/2019/10/fashion-brands-carbon-fooprints-reducing-emissions> [https://perma.cc/2KVM-B4R6]; Sophie Slater, *The ‘Greenwashing’ Hiding the Truth of Your Favourite Fashion Brands*, VICE (May 2019), [https://www.vice.com/en\\_uk/article/kzwmw5a/the-greenwashing-hiding-the-truth-of-your-favourite-fashion-brands](https://www.vice.com/en_uk/article/kzwmw5a/the-greenwashing-hiding-the-truth-of-your-favourite-fashion-brands) [https://perma.cc/G74UPC4N]; *Green Guides*, FED. TRADE COMMISSION, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> [https://perma.cc/NNP3-TYX8].

<sup>8</sup> The American Apparel and Footwear Association, International Trade Commission, and Secondary Materials and Recycling Textile Association conducted a study in 2015 and estimated 16 million tons of textiles were generated in 2015 as compared to around 2 million tons of textiles in 1960. *Textiles: Material Specific Data*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/textiles-material-specific-data> [https://perma.cc/9LPU-E8YJ].

<sup>9</sup> In the same study mentioned *supra* note 8, the researchers estimated that in 2015, 10,540 million tons of textile waste ended up in a landfill, whereas 2,460 million tons was recycled. *Id.* A 2016 study conducted by McKinsey noted that the average consumer bought 60% more clothing in 2014 than in 2000, but kept each garment half as long. See Nathalie Remy, Eveline Speelman & Steven Swartz, *Style That’s Sustainable: A New Fast-Fashion Formula*, MCKINSEY (Oct. 2016), <https://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/style-thats-sustainable-a-new-fast-fashion-formula> [https://perma.cc/URL4-5E52].

garments compared to previous decades when clothing was more expensive.<sup>10</sup> Until recently, this issue was largely unknown to the general public and lacked statistical data.<sup>11</sup> Documentaries and publications have highlighted the overwhelming volume of textile waste shipped overseas to cities such as Panipat, India.<sup>12</sup> As developing countries are now rejecting secondhand clothing, the question remains: where will the waste go?<sup>13</sup> The Ellen MacArthur Foundation has quantified the amount of textile waste that ends up in landfills, but it is a taboo topic among fashion brands to disclose both the amount of waste created during the design process, and the amount of goods which remain unsold.<sup>14</sup> While the media have

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<sup>10</sup> See ELIZABETH CLINE, *OVERDRESSED: THE SHOCKINGLY HIGH COST OF CHEAP FASHION* 4 (2013); see also Tasha L. Lewis, *Apparel Disposal and Reuse*, in *SUSTAINABLE APPAREL: PRODUCTION, PROCESSING AND RECYCLING* 233 (Richard Blackburn ed., 2015).

<sup>11</sup> *Industry Leaders Join Forces to Make Fashion Circular*, ELLEN MACARTHUR FOUND. (May 16, 2018), <https://www.ellenmacarthurfoundation.org/news/industry-leaders-join-forces-to-make-fashion-circular> [<https://perma.cc/3MB6-3565>].

<sup>12</sup> See Aeon Video, *Unravel: The Final Resting Place of Your Cast Off Clothing*, YOUTUBE (Nov. 30, 2019), <https://www.youtube.com/watch?v=bOOI5LbQ9B8> [<https://perma.cc/C7NW-XYUS>]; CLINE, *supra* note 10, at 125; see generally ELIZABETH CLINE, *THE CONSCIOUS CLOSET: THE REVOLUTIONARY GUIDE TO LOOKING GOOD WHILE DOING GOOD* (2019); DANA THOMAS, *FASHIONOPOLIS: THE PRICE OF FASHION AND THE FUTURE OF CLOTHES* (2019); *THE TRUE COST* (Untold Creative & Life Is My Movie Entertainment 2015).

<sup>13</sup> Alden Wicker, *Fast Fashion Is Creating an Environmental Crisis*, NEWSWEEK (Jan. 9, 2016), <https://www.newsweek.com/2016/09/09/old-clothes-fashion-waste-crisis-494824.html> [<https://perma.cc/R97V-L3RH>].

<sup>14</sup> *Industry Leaders Join Forces to Make Fashion Circular*, *supra* note 11; see also *#WearNext—Make Fashion Circular Joins Forces with City of New York and Fashion Industry to Tackle Clothing Waste*, ELLEN MACARTHUR FOUND. (Mar. 4, 2019), <https://www.ellenmacarthurfoundation.org/news/wearnext-make-fashion-circular-joins-forces-with-city-of-new-york-and-fashion-industry-to-tackle-clothing-waste> [<https://perma.cc/9V5C-EHED>] [hereinafter *#WearNext*]. Andrew Nagy writes, “[r]egardless of the reality of fashion’s dark little (open) secret, Burberry is taking the brunt of the fallout . . . .” Andrew Nagy, *Bonfire of the Vanities: Why Burberry’s Admission It Burns Unsold Stock Might Just Help the Fashion Industry*, NATIONAL (July 31, 2018) <https://www.thenational.ae/lifestyle/fashion/bonfire-of-the-vanities-why-burberry-s-admission-it-burns-unsold-stock-might-just-help-the-fashion-industry-1.755700> [<https://perma.cc/UHJ2-VLJ6>]. Sustainability scholar and professor Sass Brown also notes:

There’s actually much more waste produced through the production of goods to begin with. . . . Most production is a result of what we call a detractive system, which in the case of clothing means you cut out the pieces you want from a length of fabric to make a garment and throw

criticized brands for these practices, they have not provided suggestions for long term solutions to resolve the problem. Brands are thus left in the dark without a roadmap to modernize their systems.

The fashion industry is overlooked and underregulated—as compared to other industries such as technology—because it is viewed as a frivolous industry.<sup>15</sup> Although there are laws regarding the disposal of commercial textile waste, governments lack the resources and infrastructure to enforce these laws.<sup>16</sup> For instance, the drawback provision administered by the U.S. Customs & Border Protection (“U.S. Customs” or “CBP”) aims to further promote commerce, but has had the unintended consequence of encouraging the incineration of unsold goods.<sup>17</sup> This contradicts the efforts put forth by the Environmental Protection Agency (“EPA”) to reduce the amount of waste that ends up in a landfill or that is incinerated,<sup>18</sup> and highlights the inefficiencies within government structures,

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away what’s left, resulting in an average of about 15 per cent waste of virgin materials. That waste is replicated along the entire textile supply chain, from raw material growth or production, through spinning, weaving, dyeing, printing and manufacturing.

*Id.*

<sup>15</sup> Susan Scafidi, *Fiat Fashion Law! The Launch of a Label—and a New Branch of Law*, in *NAVIGATING FASHION LAW: LEADING LAWYERS ON EXPLORING THE TRENDS, CASES, AND STRATEGIES OF FASHION LAW* 7, 8 (2012).

<sup>16</sup> N.Y.C., N.Y., ADMIN. CODE § 1–10 (a)(1)(iii) (2015), available at [https://rules.cityofnewyork.us/sites/default/files/proposed\\_rules\\_pdf/dsny\\_proposed\\_commercial\\_recycling\\_rules\\_with\\_certifications\\_annexed-preliminary\\_certifications\\_-\\_8-28-15.pdf](https://rules.cityofnewyork.us/sites/default/files/proposed_rules_pdf/dsny_proposed_commercial_recycling_rules_with_certifications_annexed-preliminary_certifications_-_8-28-15.pdf) [<https://perma.cc/369L-2UQQ>]; see also Interview with Jessica Schreiber, Founder and Executive Director, FABSCRAP (Aug. 15, 2019); The Waste (England and Wales) Regulations 2011, SI 2011/988 art. 5, ¶ 12 (Eng.).

<sup>17</sup> See Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C. § 1313(a) (2018).

<sup>18</sup> On its website, the EPA states their mission is “to protect human health and the environment.” *Our Mission and What We Do*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> [<https://perma.cc/5GCU-3LWZ>]. The agency notes that it “works to ensure that”:

- [n]ational efforts to reduce environmental risks are based on best available scientific information; . . .
- [e]nvironmental stewardship is integral to U.S. policies concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and international trade, and these factors are similarly considered in establishing environmental policy.

*Id.*



particularly the lack of communication between agencies to unite behind and act upon common goals.

As France takes the lead internationally by introducing a new law which bans the incineration of unsold goods, will other countries follow?<sup>19</sup> This Note will explore potential legal, reuse, manufacturing, technological, and crisis management aspects of the fashion business when confronting the issue of negative press exposure and the environmental impact of destroying unsold goods. Each solution is tailored to the various levels of the industry—from fast-fashion companies to luxury brands—because there is no “one size fits all” solution to this perplexing problem.

Part I of this Note examines the practice of brands—such as H&M, Walmart, Nike, and Burberry—destroying unsold goods over the past ten years. Most recently, Burberry announced it would stop incinerating unsold goods following the overwhelming amount of media exposure and public pressure about its practices. Part I.B. then highlights the shift in consumer awareness surrounding the negative impact the fashion industry has on the environment. Governments around the world are increasingly concerned and are proposing legislation to reduce the carbon footprint across various industries.

Part II provides an in-depth analysis of why fashion brands destroy unsold goods. The motivation behind this practice varies depending on the business model and quality of the products, ranging from fast fashion to luxury.

Part III proposes long-term solutions to reduce the amount of unsold goods being destroyed. The first section, *Legal Solutions*, highlights current and proposed laws related to textile waste in the United Kingdom (“UK”), New York, and France. One of the largest challenges addressed is the infrastructure and enforcement to

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<sup>19</sup> Projet de loi relatif à la lutte contre le gaspillage et à l'économie circulaire [Draft Law on the Fight Against Waste and the Circular Economy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], (TREP1902395L), L. 541-9-1, available at [https://www.legifrance.gouv.fr/affichLoiPreparation.do?sessionId=0EF6691B95C2CC1C949174D7205C9BC3.tplgfr33s\\_3?idDocument=JORFDOLE000038746653&type=contenu&id=2&typeLoi=proj&legislature=15](https://www.legifrance.gouv.fr/affichLoiPreparation.do?sessionId=0EF6691B95C2CC1C949174D7205C9BC3.tplgfr33s_3?idDocument=JORFDOLE000038746653&type=contenu&id=2&typeLoi=proj&legislature=15) [<https://perma.cc/9S5Q-CQBK>].

support these laws. This section also investigates the UK Environmental Audit Committee Report and the potential of Shareholder Lawsuits. The next section, *Reuse Solutions*, looks at providing a second life to garments and materials using the following methods: Donating, Upcycling, Unused Fabric, and Recycling. The third section, *Readjusting Manufacturing Practices*, focuses on improving supply chains to create a more efficient system that reduces waste. Following is the *Technology Solutions* section, which highlights two companies, one that uses artificial intelligence to predict trends on Instagram and another that allows brands to design their collections digitally to reduce the waste during sampling. The last section, *Crisis Management Solutions*, provides public relations recommendations for communicating a brand's ethos related to the disposal of unsold goods.

## I. BACKGROUND

### A. *Exposing the Practice of Destroying Unsold Goods*

Over the past two years, media outlets have been flooded with headlines of fashion brands burning their merchandise.<sup>20</sup> While this came as a shock to the general public, it has been a standard industry practice for decades.<sup>21</sup> Moreover, the introduction of fast fashion and mass production has expanded the practice and exacerbated the issue.<sup>22</sup> In 2010, Jim Dwyer of *The New York Times* wrote an article about a student from the Graduate Center of the City University of New York uncovering trash bags of slashed coats, gloves, and sneakers—rendering them unwearable—on 35th Street near Herald

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<sup>20</sup> See, e.g., James Cox, *Burberry Burned \$36.5m of Unsold Clothes Last Year*, N.Y. POST (July 19, 2018), <https://nypost.com/2018/07/19/burberry-burned-36-5m-of-unsold-clothes-last-year/> [<https://perma.cc/D46R-DJAE>].

<sup>21</sup> See, e.g., Nagy, *supra* note 14; see also Jim Dwyer, *A Clothing Clearance Where More Than Just the Prices Have Been Slashed*, N.Y. TIMES (Jan. 5, 2010), <https://www.nytimes.com/2010/01/06/nyregion/06about.html> [<https://perma.cc/PDX4-NSZR>].

<sup>22</sup> “According to a 2016 McKinsey study, clothing production worldwide doubled between 2010–2014.” Remy et al., *supra* note 9; Marc Bain, *H&M’s ‘Sustainability’ Report Hides the Unsustainable Reality of Fast Fashion*, QUARTZ (Apr. 12, 2015), <https://qz.com/380055/hms-sustainability-report-hides-the-unsustainable-reality-of-fast-fashion/> [<https://perma.cc/RC4Q-5G6D>].

Square in New York City.<sup>23</sup> It was revealed that the products were discarded by Wal-Mart and H&M.<sup>24</sup> Seven years later, Dwyer reported on a similar story—this time, however, it was Nike who mutilated their sneakers before trashing them.<sup>25</sup> What made the situation worse was the fact that a few feet from the trash bags sat homeless people in desperate need of warm clothing during the cold winter months.<sup>26</sup> When questioned, a spokesperson for Nike said that the shoes did not meet the company's standard to restock, recycle, or donate.<sup>27</sup>

More recently, it was revealed that this epidemic is not isolated to fast fashion, but occurs at the luxury level as well. In Burberry's 2018 annual 10K report, it stated that its "cost of finished goods physically destroyed in the year was \$38 million."<sup>28</sup> This equates to 20,000 Burberry trenches.<sup>29</sup> This single line in the 200-page report outraged shareholders who "asked why the unsold products were not offered to the company's private investors."<sup>30</sup> One of Burberry's largest scandals in the history of the company ensued. The sensationalized headlines were reposted and retweeted, accompanied with the newly coined hashtag "#burnberry."<sup>31</sup>

Burberry's legal, financial, marketing, and manufacturing teams (to name a few) were left scrambling to piece together a potential solution. A month and a half later, the CEO of Burberry revealed the

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<sup>23</sup> Macy's flagship store occupies an entire city block and was the largest department store in the world until 2009, when it was surpassed by Shinsegae Centum City Department Store in Busan, South Korea. See *Visit Macy's*, MACY'S, <https://www.visitmacysusa.com/new-york-city> [<https://perma.cc/WHM8-URAE>]; see also Dwyer, *supra* note 21.

<sup>24</sup> See Dwyer, *supra* note 21.

<sup>25</sup> See Jim Dwyer, 'Slashers' Work Ruins Shoes Discarded at a Nike Store, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/nyregion/slashers-work-ruins-shoes-discarded-at-a-nike-store.html> [<https://perma.cc/W5ET-TQB6>].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Burberry Annual Report FY 2017–2018*, BURBERRY [https://www.burberryplc.com/content/dam/burberry/corporate/Investors/Results\\_Reports/2018/Burberry\\_AnnualReport\\_FY17-18.pdf](https://www.burberryplc.com/content/dam/burberry/corporate/Investors/Results_Reports/2018/Burberry_AnnualReport_FY17-18.pdf) [<https://perma.cc/FK37-P8Q6>].

<sup>29</sup> Cox, *supra* note 20.

<sup>30</sup> Andrew Ellson, *Luxury Brands Including Burberry Burn Stock Worth Millions*, TIMES (July 19, 2018), <https://www.thetimes.co.uk/article/luxury-brands-burning-stock-worth-millions-zxxscjcmj> [<https://perma.cc/3RW5-HTCW>].

<sup>31</sup> thredUP (@thredUP), TWITTER (July 25, 2018, 4:06 PM), <https://twitter.com/hashtag/burnberry?lang=en> [<https://perma.cc/R8L7-G9UY>]

fashion label's strategy in an exclusive interview with *Business of Fashion*.<sup>32</sup> Below is one component of the plan:

So, within what is labelled as 'destruction,' there is already a significant part that is recycled or used or donated. That was the first step. . . . [W]e are also changing the way we operate and our targets in terms of operational efficiency. The main point is how we look at our model, from design [all the way] to stores. We started with our design and a merchandising approach that is completely changing from the past. Having more frequent and tighter collections that can be really targeted—whether they're targeted from a calendar point of view for some form of event, geography or function—that allows you to be much more precise in the way you design, you buy and you sell. . . . [T]he other element is . . . having a clear global view of our inventory and being able to manage it more efficiently. So, with all of this, we are now in a position to [stop] destroying finished products, which we think, frankly, is just not modern.<sup>33</sup>

At first glance the plan that the Burberry teams devised is convincing, but the implementation is far more complex than what is described, and the long-term effects are yet to be seen. While news outlets covered the initial hysteria surrounding the scandal, none have followed up to see if any solutions were identified or put into effect.

### *B. Why Now?*

If this has been a long-standing industry practice, why is this issue now being brought to light? While social media has enabled news stories to go viral in seconds, this technology also presents a problem: the full context of the story is never presented, and people's attention spans have shortened to the point where most

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<sup>32</sup> Imran Amed, *Burberry Stops Destroying Product and Bans Real Fur*, *BUS. FASHION* (Sept. 6, 2018), <https://www.businessoffashion.com/articles/professional/burberry-stops-destroying-product-and-bans-real-fur> [<https://perma.cc/9XBQ-NBZ8>].

<sup>33</sup> *Id.* (alteration of "[all the way]" in original).

draw conclusions based on headlines, headers, photos, and captions. Rarely today does one read the full article, question the source, or consider the motivation of the publisher or author of the story.<sup>34</sup> In fact, the current trend in fashion journalism has shifted to a shaming and bullying culture. One Twitter user commented, “[h]ey, @Burberry, there is no need to burn \$28 million worth of stock. Donate it to school foundations that can auction or sell it to help educate your future designers!”<sup>35</sup> This Tweet is a prime example of how social media is used as a tool to shame brands into shifting their practices. It is easy for the media to vilify a brand, and even easier for social media users to repost the same story. The trend of vilification does, however, beg the question: whatever happened to uncovering the deeper narrative?

Consumers are also more aware of waste and environmental issues in fashion and beyond.<sup>36</sup> When making purchasing decisions, they demand transparency.<sup>37</sup> Ethical Consumer is a UK-based non-profit focused on improving corporate supply chains and providing sustainable guidelines to consumers.<sup>38</sup> In 2018, it released a study about purchasing habits in the UK.<sup>39</sup> It reported an overall increase of 19.9% in the ethical clothing market and noted 34% of consumers ranging from 18–24 years old chose not to purchase from brands

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<sup>34</sup> In Vanessa Friedman’s article, “The Biggest Fake News in Fashion,” she unveiled that there is no credible source for the “statistic” that “fashion is the second most polluting industry in the world.” Vanessa Friedman, *The Biggest Fake News in Fashion*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/fashion/fashion-second-biggest-polluter-fake-news.html> [<https://perma.cc/4MPV-RVRU>].

<sup>35</sup> Kim Jones Iraggi (@kgiraggi), TWITTER (July 19, 2018, 2:50 PM), <https://twitter.com/kgiraggi/status/1020063451996147712> [<https://perma.cc/5ZD7-CBVQ>].

<sup>36</sup> See, e.g., Clare Carlile, *The UK Ethical Market*, ETHICAL CONSUMER (Dec. 17, 2018), <https://www.ethicalconsumer.org/retailers/uk-ethical-market> [<https://perma.cc/W7HX-E62X>]; *Ethical Consumer Market Report 2018*, ETHICAL CONSUMER, [https://www.ethicalconsumer.org/sites/default/files/inline-files/EC%20Markets%20Report%202018%20FINAL\\_0.pdf](https://www.ethicalconsumer.org/sites/default/files/inline-files/EC%20Markets%20Report%202018%20FINAL_0.pdf) [<https://perma.cc/LW38-CF5M>].

<sup>37</sup> See Deborah Weinswig, *Transparency Is The New Normal: Top Takeaways from the 2018 Innovation Series*, FORBES (May 25, 2018), <https://www.forbes.com/sites/deborahweinswig/2018/05/25/transparency-is-the-new-normal-top-takeaways-from-the-2018-innovation-series/#31e8723b1e85> [<https://perma.cc/273W-HLHC>].

<sup>38</sup> See *About Us*, ETHICAL CONSUMER, <https://www.ethicalconsumer.org/about-us> [<https://perma.cc/9QSN-C22S>].

<sup>39</sup> See *Ethical Consumer Market Report 2018*, *supra* note 36.

they perceived as having a negative impact on the environment.<sup>40</sup> Even government officials are taking to social media to express their thoughts. Mary Helen Creagh, Chair of the British Environmental Audit Committee, tweeted: “About time Environmental Agency cracked down on this flagrant breach of waste hierarchy. [Government] should ban burning [and] landfilling of textile. Burberry faces inquiry call for burning stock.”<sup>41</sup> Therefore, pressure is also building for countries to encourage sustainable practices and reduce the negative impact on the environment. The textile waste that ends up in landfills is a significant problem that governments are struggling to effectively solve.<sup>42</sup> The Ellen MacArthur Foundation reported that New York City sends 200 million pounds of clothing to a landfill each year.<sup>43</sup> To provide a visual, this would be the equivalent

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<sup>40</sup> See Sophie Benson, *Why 2019 Could Be a Watershed Year for Fashion and Sustainability*, ANOTHER (Jan. 8, 2019), <https://www.anothermag.com/fashion-beauty/11404/why-2019-could-be-a-watershed-year-for-fashion-and-sustainability> [<https://perma.cc/84DQ-DLVV>]; see also *Ethical Consumer Market Report 2018*, *supra* note 36.

<sup>41</sup> MaryCreagh (@MaryCreaghMP), TWITTER (July 21, 2018, 8:27 AM), <https://twitter.com/MaryCreaghMP/status/1020691725067735041> [<https://perma.cc/XGT3-FMFB>]. This Tweet is a quintessential example of how the greater context is lost in a 280-character tweet. To the average person the term “waste hierarchy” is seen as a general term, but in fact she is actually referring to the UK Law regulating waste. This law requires that “an establishment . . . which . . . produces . . . waste must . . . take all such measures available to it as are reasonable in the circumstances to apply the following waste hierarchy as a priority order—(a) prevention; (b) . . . re-use; (c) recycling; (d) other recovery . . . ; (e) disposal.” The Waste (England and Wales) Regulations 2011, SI 2011/988 art. 5, ¶ 12 (Eng.). The challenges of enforcing this policy will be discussed *infra* Part III.A.1. While the Tweet includes a link with *The Times* article describing the law in more detail, *The Times* requires a paid subscription to read its articles online. Thus, it would have been more effective to post a link to the actual law. See also Ben Webster, *Burberry Faces Inquiry Call for Burning £90m of Stock*, TIMES (July 21, 2018), <https://www.thetimes.co.uk/article/burberry-faces-inquiry-call-for-burning-90m-of-stock-7jdzqcm9?shareToken=4750fc88af0b268c5b6783e494413b7e> [<https://perma.cc/NH7Q-HHFL>].

<sup>42</sup> The Ellen MacArthur Foundation is the leading non-profit organization conducting research on the circular economy related to fashion. In 2018, the Foundation announced its *Make Fashion Circular* initiative. See *Industry Leaders Join Forces to Make Fashion Circular*, *supra* note 11. The foundation notes: “the fashion industry can capture USD 460 billion currently lost due to the underutilisation of clothes. An additional USD 100 billion from clothing that could be used, but is currently lost to landfill and incineration, can also be captured.” *Id.*

<sup>43</sup> #WearNext, *supra* note 14.

of more than 440 Statues of Liberty.<sup>44</sup> For brands that disregard this issue as a passing trend, this Note urges them to consider the various environmental regulations and policies being proposed on a global level.<sup>45</sup> Brands must start to address this issue in a thoughtful and transparent manner. To better understand the issue at hand, one must first examine the reasons why brands destroy their unsold goods.

## II. WHY BRANDS DESTROY THEIR UNSOLD GOODS

Very few reliable sources publicly documented the practices of brands destroying their unsold goods, with the exception of H&M and Burberry.<sup>46</sup> In general, the public at large appears to be unaware of the inner workings of the fashion industry.<sup>47</sup> As a result, the public tends to make unfair assessments about the motivations behind a brand's actions.<sup>48</sup> Justifiably, brands have become hesitant

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<sup>44</sup> See *id.* The Foundation also notes that “[g]lobally, 73% of the materials used to produce clothing are landfilled or burned at the end of their life, while less than 1% of old clothing goes on to be used to make new clothing.” *Id.*

<sup>45</sup> See, e.g., *Circular Economy and Waste: Analysis of the Draft Law*, GOSSEMENT AVOCATS (Jan. 23, 2019), <http://www.arnaudgossement.com/archive/2019/01/23/economie-circulaire-et-dechets-analyse-du-projet-de-loi-6123254.html> [<https://perma.cc/KHK3-MZ2Q>]; *Fashion Pact G7 France*, *supra* note 1; see also *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation of the Circular Economy Action Plan*, COM (2019) 190 final (Apr. 3, 2019), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0190&from=EN> [<https://perma.cc/Y8VY-BB4D>]; #*Envision2030 Goal: Responsible Consumption and Production*, UNITED NATIONS DEP'T ECON. & SOC. AFF. (Sept. 2015), <https://www.un.org/development/desa/disabilities/envision2030-goal12.html> [<https://perma.cc/8TQB-Z6EJ>].

<sup>46</sup> See, e.g., *Burberry Annual Report FY 2017–2018*, *supra* note 28, at 44–45; *H&M Does Not Burn Unusable Clothes*, H&M (Oct. 21, 2017), <https://about.hm.com/news/general-2017/h-m-does-not-burn-functioning-clothes.html> [<https://perma.cc/3723-2BNR>]; see also Zoe Wood, *Cartier Owner Destroys More Than £400m of Watches in Two Years*, GUARDIAN (May 18, 2018), <https://www.theguardian.com/business/2018/may/18/riche-mont-destroys-nearly-500m-of-watches-in-two-years-amid-buyback-policy> [<https://perma.cc/N9ZJ-EKSF>]; Dwyer, *supra* note 25.

<sup>47</sup> See Nagy, *supra* note 14.

<sup>48</sup> Various companies have been exposed for practices of mutilating or incinerating unsold goods, including Nike, Urban Outfitters, Richemont, H&M, and Burberry. See Chavie Lieber, *Why Fashion Brands Destroy Billions' Worth of Their Own Merchandise Every Year*, VOX (Sept. 17, 2018), <https://www.vox.com/the-goods/2018/9/17/17852294/fashion-brands-burning-merchandise-burberry-nike-h-and-m> [<https://perma.cc/4LR8-2LLM>]. The press makes assumptions as to why these brands incinerate without

to discuss the practice of destroying their unsold goods for fear of negative press exposure. This Note has limited its data to information that was officially confirmed by the brand.<sup>49</sup>

### A. Overproduction

For fast-fashion brands such as H&M, it is economically advantageous to produce in mass quantities. Because neither quality nor fit is the main goal of production,<sup>50</sup> the resulting inferior pieces are treated as fungible and disposed of by either the consumers, when they grow tired of the product, or the store, when the product does not sell.<sup>51</sup> To meet this unsustainable demand, new shipments arrive at stores each week, and employees must clear the retail floor for new products.<sup>52</sup>

Priya Ahluwalia, a graduate of Westminster University, focused on bringing awareness to the over-production of clothing and its detrimental effects in her final MA collection, *Sweet Lassi*.<sup>53</sup> After visiting the largest global recycling center in India, she noted that “[w]hen I saw the sheer amount of clothing that was piled high in these warehouses and in these massive lorries that have all the clothes hanging out the back, it was a real eye-opener to see how much waste we all produce and how much we overbuy.”<sup>54</sup>

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considering how it affects the inner workings and business model of a brand. *See id.* Furthermore, the media fail to mention the drawback incentive provided under U.S. law. *See id.*

<sup>49</sup> In 2018, Richemont, the parent company for Cartier and Mont Blanc, destroyed \$539 million dollars’ worth of timepieces to prevent the sale of grey goods and unauthorized channels of distribution. *See Wood, supra* note 46.

<sup>50</sup> *See* Jim Zarroli, *In Trendy World of Fast Fashion, Styles Aren’t Made to Last*, NPR (Mar. 11, 2013, 4:09 PM), <https://www.npr.org/2013/03/11/174013774/in-trendy-world-of-fast-fashion-styles-arent-made-to-last> [<https://perma.cc/V8KY-P228>].

<sup>51</sup> *See, e.g.,* Wicker, *supra* note 13; *see also* Elizabeth Cline, *Fast Fashion Designs Clothes to Fall Apart—Here’s a Designer That Doesn’t*, ELIZABETH CLINE BOOKS (Nov. 1, 2018), <https://www.elizabethclinebooks.com/blog/2018/11/1/fast-fashion-designs-clothes-to-fall-apart-heres-a-designer-that-doesnt> [<https://perma.cc/G5JN-PPD4>].

<sup>52</sup> *See Inditex, King of Fast Fashion*, HARV. BUS. SCH. TECH. & OPERATIONS MGMT. (Dec. 9, 2015), <https://rctom.hbs.org/submission/inditex-king-of-fast-fashion/#> [<https://perma.cc/US87-742C>].

<sup>53</sup> *See generally Sweet Lassi*, AHLUWALIA, <https://www.ahluwaliastudio.com/sweet-lassi> [<https://perma.cc/ZT6S-PYYU>].

<sup>54</sup> Dominic Cadogan, *The Westminster Grad Shining a Light on Fashion’s Massive Overconsumption*, DAZED DIGITAL (June 12, 2018), <http://www.dazeddigital.com/fashion/>



Some consumers may feel that donating their unwanted fast fashion justifies their overconsumption. In reality, they are potentially stifling the growth of developing nations.<sup>55</sup> Companies such as Trans-America Trading Co., located in New Jersey, collect secondhand clothing and place them in bundles that range from 100 to 1,000 pounds.<sup>56</sup> These bundles are then packed into shipping containers that hold 540 bundles and resold to developing countries.<sup>57</sup> By flooding those countries with cheap or sometimes free clothing, locals become unwilling or unable to afford clothing designed and manufactured in their own markets.<sup>58</sup>

Moreover, this eliminates these countries' ability to be self-sustaining and prolongs their need to rely on external sources.<sup>59</sup> In 2015, East African Countries ("EAC") proposed a ban on the importation of secondhand clothing to take effect by 2019.<sup>60</sup>

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article/40332/1/priya-ahluwalia-westminster-fashion-overconsumption-india-recycling-book [https://perma.cc/RKP8-3AWR].

<sup>55</sup> There is an ongoing debate about whether the importation of secondhand clothing actually stifles developing nations. See Sally Baden & Catherine Barber, *The Impact of the Second-Hand Clothing Trade on Developing Countries*, OXFAM (Sept. 1, 2005), <https://policy-practice.oxfam.org.uk/publications/the-impact-of-the-second-hand-clothing-trade-on-developing-countries-112464> [https://perma.cc/Q6B8-533C]. In 2005, Oxfam, a non-profit that collects donated clothing, reported the statistics about the amount of secondhand clothing imported into African countries. See *id.* Andrew Brooks, author of *Clothing Poverty: The Hidden World of Fast Fashion and Second-Hand Clothes*, noted:

Exporting low-quality clothing that has no value in our society forges a relationship of dependency. . . . You can call me idealistic, but I don't really want to live in a world where people who are in the global south, the only clothes they can afford to buy are clothes you and I don't want.

Wicker, *supra* note 13. The opposing opinion is also presented: Georgetown University professor of economics Peitra Rivoli, for example, says "the secondhand clothing trade creates jobs in not only selling but also cleaning, repairing and tailoring." *Id.*

<sup>56</sup> See *Secondhand Clothing for Export*, TRANS-AMERICA TRADING CO., <https://tranclo.com/buyers/secondhand-clothing-for-export/> [https://perma.cc/VL9Z-5QTE].

<sup>57</sup> See *id.*

<sup>58</sup> See Tara John, *How the US and Rwanda Have Fallen Out Over Second-Hand Clothes*, BBC (May 28, 2018), <https://www.bbc.com/news/world-africa-44252655> [https://perma.cc/L9ME-HMBH].

<sup>59</sup> See Franck Kuwonu, *Protectionist Ban on Imported Used Clothing*, AFRICA RENEWAL, Dec. 2017–Mar. 2018, <https://www.un.org/africarenewal/magazine/december-2017-march-2018/protectionist-ban-imported-used-clothing> [https://perma.cc/5769-4KKG].

<sup>60</sup> See Niyi Aderigbe, *East Africa States Set to Ban Second Hand Clothing to Protect Booming Textile Industry*, VENTURES AFRICA (Feb. 28, 2015), <http://venturesafrica.com/>

Rwanda, Tanzania, and Uganda placed a higher tax on the importation of these goods in the interim to aid in local manufacturing initiatives. Kenya refused to participate because the ban threatens the country's benefits afforded under the African Growth and Opportunity Act ("AGOA").<sup>61</sup> To date, Rwanda is the only country to enforce the ban despite the United States eliminating the AGOA benefit.<sup>62</sup>

The Secondary Materials and Recycled Textile Association noted that the "EAC's 2016 decision to phase out used-clothing would impose 'significant economic hardship' on American's used-clothing industry."<sup>63</sup> This notion further perpetuates the overproduction and consumption of fast fashion while forcing the EAC into an uncompromising position.<sup>64</sup> While India successfully banned the sale of imported second-hand goods, local councils in the UK are purchasing inexpensive land in Poland to use as a dumping ground for their textile waste.<sup>65</sup> Once these countries and landfills reach capacity, where will all the textile waste eventually go?<sup>66</sup> Currently, the options available for surplus clothing are

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east-africa-states-forging-alliance-against-second-hand-clothing-to-protect-booming-textile-industry/ [https://perma.cc/U25U-BRHZ].

<sup>61</sup> See Kuwonu, *supra* note 59.

The loss of US trade could be painful should AGOA be cancelled for the three countries. US imports under AGOA from Rwanda, Tanzania and Uganda totaled \$43 million in 2016, up from \$33 million in 2015, while exports to the three countries rose from \$257 million in 2015 to \$281 million in 2016, according to a statement from USTR.

*Id.*

In March 2018, the US gave Rwanda 60 days' notice that it would be suspending the landlocked country from selling clothes to America duty free . . . Kenya's benefits from A[GOA] are considerably higher than Rwanda: exports to the US amounted to nearly \$600m (£450m) in 2017, compared to just \$43m (£32m) for Rwanda.

John, *supra* note 58.

<sup>62</sup> See Al Jazeera, *Why Are Rwanda and the US Arguing Over Old Clothes?*, YOUTUBE (Jan. 21, 2019), <https://www.youtube.com/watch?v=IZ4JXTp5knk&vI=en> [https://perma.cc/A3E6-5Z77].

<sup>63</sup> John, *supra* note 58.

<sup>64</sup> See *id.*

<sup>65</sup> See Cadogan, *supra* note 54. Ahluwalia noted that "[secondhand clothing is] only allowed to cross the border [in India] if it's been torn or ripped and it's going to be recycled." *Id.*

<sup>66</sup> See *id.*

incineration, placement in landfills, recycling, or upcycling. These solutions will be examined later in the Note.

*B. Discovery of Toxic Elements in Products*

In the exposé documentary *Operation X* released on Danish television, H&M was accused of burning twelve tons of goods.<sup>67</sup> H&M claimed that incineration was necessary because its denim contained unsafe levels of lead, due to metallic paint on a leather patch. It also contended that water damage caused mold to grow on certain garments during a shipment.<sup>68</sup> These assertions were challenged in the documentary by testing two of the jeans sent to the incinerator. The results were inconclusive. When questioned, H&M released its own test results and an associated press release.<sup>69</sup> Claiming that the damaged garments replaced fossil fuels to provide the power plant with energy, the brand sought praise for acting in a sustainable way.<sup>70</sup> On the other hand, it is frightening to think of the quantities of toxic chemicals that were dispersed into the atmosphere as a result of H&M's actions, especially in light of how a majority of H&M's clothing contains synthetic plastics such as spandex.<sup>71</sup>

Does the energy generated from incineration outweigh the energy it took to manufacture the incinerated item? Orsola de Castro, Co-Founder and Creative Director of Fashion Revolution—an organization that focuses on improving the systems for how fashion is sourced, manufacturing, and consumed—shared a similar insight on incinerating: “Harnessing energy is not a really good excuse, because (producing) [the clothing] in the first place is very

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<sup>67</sup> See Heather Farmbrough, *H&M Is Pushing Sustainability Hard, But Not Everyone Is Convinced*, FORBES (Apr. 14, 2018), <https://www.forbes.com/sites/heatherfarmbrough/2018/04/14/hm-is-pushing-sustainability-hard-but-not-everyone-is-convinced/#1e4d55477ebd> [https://perma.cc/J9P4-9KCL].

<sup>68</sup> See Kirsten Brodde, *Why Is H&M Burning New Clothes?*, GREENPEACE (Nov. 7, 2017), <https://www.greenpeace.org/archive-international/en/news/Blogs/makingwaves/hm-burning-new-clothes-fast-fashion-incineration/blog/60640/> [https://perma.cc/SU5T-BHPP].

<sup>69</sup> See *H&M Does Not Burn Unusable Clothes*, *supra* note 46.

<sup>70</sup> See *id.*

<sup>71</sup> Wicker, *supra* note 13.

energy consuming.”<sup>72</sup> Meanwhile, if H&M were to upcycle its denim, it could potentially expose itself to liabilities, and it may cost more than incineration to bring the upcycled denim into compliance.

Therefore, from both a business and safety perspective, H&M destroying its denim was likely the best solution to protect the public from the hazardous garments. H&M nevertheless could have mitigated the media firestorm by being transparent about the damaged goods, and by more fully explaining their decision to incinerate the hazardous stock. Instead, by covering up the product’s disposal and attempting to justify its actions with the “energy to power plants” ploy, the company appeared guilty.<sup>73</sup> If it acted with transparency from the beginning, the backlash from this occurrence would have been less damaging to H&M’s reputation than the notoriety it incurred from the public learning of the burning of clothes. As an immediate solution, H&M should assess the weakness in its supply chain, which allowed for unsafe levels of lead to enter production in the first place. It should then develop a strategy for preventing this from occurring in the future and release a statement detailing this strategy.

### *C. Unpredictable Factors that Lead to Unsold Product*

All retailers are faced with the challenge of predicting trends that affect future sales. No matter how thoroughly thought out in advance, certain factors simply cannot be accounted for, such as weather. In warm winters, coats may not sell as intended, which leads to marked-down merchandise. However, when this happens at the luxury level, brands are left without a solution because they typically do not place their items on sale or sell them at an outlet store.<sup>74</sup> Politics can also have a significant impact on the luxury industry. The Brexit vote resulted in currency fluctuation for the Chinese among others, which caused a reduction of tourism in the

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<sup>72</sup> Emma Hope Allwood, *It’s Not Just Burberry—Burning Clothes Is Fashion’s Dirty Open Secret*, DAZED DIGITAL (July 25, 2018), <http://www.dazeddigital.com/fashion/article/40778/1/burberry-brands-burning-clothes-sustainability-fashion-revolution> [https://perma.cc/9LAC-8XQP].

<sup>73</sup> See *H&M Does Not Burn Unusable Clothes*, *supra* note 46.

<sup>74</sup> See, e.g., *Burberry Annual Report FY 2017–2018*, *supra* note 28, at 131.

UK.<sup>75</sup> Since the Chinese consumers make up 40% of Burberry's sales, they were left with a large amount of inventory.<sup>76</sup> In Burberry's 10K annual report, they acknowledged the challenges of unexpected surplus inventory and maintaining the reputation of the brand.<sup>77</sup> One solution the report discussed is an inventory provisioning plan.<sup>78</sup> Burberry noted in its annual SEC report:

Judgement is required to assess the appropriate level of provisioning for items that may be ultimately destroyed or sold below cost as a result of a reduction in consumer demand, trading conditions, and the one label strategy. Such judgements include management's expectations for future sales based on current forecasts, and inventory liquidation plans.<sup>79</sup>

While it is nearly impossible to correctly predict the salability of each item a brand produces, Burberry is showing an effort to address the issue. The plan put forward in its 10K report will aid in reducing the amount of goods unsold. This is a solid first step to fixing the waste within the brand, but follow-up and further adjustments will be needed in the future to completely solve the issue.

#### *D. Maintaining Prices, Reputation, and Intellectual Property*

Luxury brands will destroy their excess merchandise as a last resort to protect their intellectual property and prevent the goods

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<sup>75</sup> See Charlotte Rogers, *Burning Clothes Is a Bad Move for Burberry's Brand*, MARKETING WK. (July 20, 2018), <https://www.marketingweek.com/2018/07/20/charlotte-rogers-burning-clothes-is-a-bad-move-for-burberrys-brand/> [<https://perma.cc/KH8U-W9TX>]; see also Penny Walker, *Is Brexit Really to Blame for a Fall in Visitor Numbers to the UK?*, TELEGRAPH (Jan. 23, 2019, 5:36 PM), <https://www.telegraph.co.uk/travel/news/is-brexit-to-blame-for-falling-uk-visitor-numbers/> [<https://perma.cc/3Q8S-6QH7>].

<sup>76</sup> Rogers, *supra* note 75.

<sup>77</sup> See *Burberry Annual Report FY 2017–2018*, *supra* note 28, at 58, 131.

<sup>78</sup> See *id.* at 130–131. An “inventory provision” is defined as a “dollar figure companies write off for theft, spoilage, obsolete or damaged inventory,” used “to ensure the inventory figures on the accounting books accurately reflect the physical inventory products in the company.” Osmond Vitez, *Inventory Provision Definition*, BIZFLUENT (Sept. 26, 2017), <https://bizfluent.com/facts-7173238-inventory-provision-definition.html> [<https://perma.cc/5HVB-U6B9>].

<sup>79</sup> *Burberry Annual Report FY 2017–2018*, *supra* note 28, at 131.

from being sold in unauthorized grey markets.<sup>80</sup> Critics have suggested that brands should instead discount their excess products or sell the products at an outlet store.<sup>81</sup> However, if luxury brands were to discount their staple products, people would never pay full price and instead would always expect a discount.<sup>82</sup> In 2015, Chanel announced its harmonized pricing strategy in various markets around the world. This strategy was designed to prevent the purchase of a product in a different country at a lower price and reselling it at a higher price in another country.<sup>83</sup> Past employees of Louis Vuitton claim that it holds internal sales for its employees.<sup>84</sup> To avoid the products being resold online, the company will document the purchase and cross-reference the item if needed.<sup>85</sup> As a last resort, Louis Vuitton will incinerate the remaining product<sup>86</sup> to recoup the tariff rate—which ranges between sixteen to sixty percent—paid to import the item.<sup>87</sup>

The large quantities produced by these brands call into question their luxury status. Typically, a luxury brand has its signature products, such as Chanel’s 2.55 handbag and Cartier’s tank watch. Brands should be able to forecast sales of these items, since they

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<sup>80</sup> Grey market is defined by *Investopedia* as “a market in which goods have been manufactured by or with the consent of the brand owner but are sold outside of the brand owner’s approved distribution channels—an activity that can be perfectly legal.” Will Kenton, *Grey Market*, INVESTOPEDIA (Aug. 12, 2019), <https://www.investopedia.com/terms/g/greymarket.asp> [<https://perma.cc/DCH8-7V32>].

<sup>81</sup> Lieber, *supra* note 48.

<sup>82</sup> See Ellson, *supra* note 30; see also Matthew Dalton, *Why Luxury Brands Burn Their Own Goods*, WALL STREET J. (Sept. 6, 2018), <https://www.wsj.com/articles/burning-luxury-goods-goes-out-of-style-at-burberry-1536238351> [<https://perma.cc/45NB-Q6X5>]; Olivia Pinnock, *No One in Fashion Is Surprised Burberry Burned £28 Million of Stock*, FORBES (June 20, 2018), <https://www.forbes.com/sites/oliviapinnock/2018/07/20/no-one-in-fashion-is-surprised-burberry-burnt-28-million-of-stock/#5e8d15b54793> [<https://perma.cc/ZQW2-H74B>].

<sup>83</sup> Scarlett Kilcooley-O’Halloran, *Chanel Aligns Pricing*, VOGUE (Mar. 17, 2015), <https://www.vogue.co.uk/article/chanel-harmonises-pricing-structure-ahead-of-e-commerce> [<https://perma.cc/W8B6-LCUZ>].

<sup>84</sup> Ahmed Bouchfaa, *Is It True That Louis Vuitton Burns All Their Unsold Bags?*, QUORA (May 30, 2013), <https://www.quora.com/Is-it-true-that-Louis-Vuitton-burns-all-their-unsold-bags> [<https://perma.cc/NC46-MRVH>].

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See Harmonized Tariff Schedule, 19 U.S.C. § 1202 (For example, Section XI details the tariff rates for “Textile and Textile Articles.”).

have been sold on the market for decades. Scarce inventory may in fact be a positive thing for luxury brands, since it would arguably increase the prestige and demand for the product. Although the price point of a Hermès Birkin bag is exponentially more expensive than that of other handbags, customers are still willing to wait months for the moment when a retail associate says the magic words: “[W]e have a Birkin in the back for you.”<sup>88</sup> Luxury brands place a strong emphasis on the reputation of the creative director, the high quality of materials, and the craftsmanship.<sup>89</sup> Charlotte Rogers of *Market Week* discussed how Burberry undermined its own hallmarks: “[t]he burning of product also calls into question how much value Burberry truly placed on its designs . . . consumers may question how much Burberry really cares about sourcing the softest cashmere if ultimately some of it will end up in an incinerator.”<sup>90</sup> Instead of protecting the brand’s image, incineration has the opposite effect—it degrades the brand’s reputation.

As explored in the next section, the brand may be facing internal pressure to incinerate products in order to recoup the high tariff duties. Yet, the public and shareholders scrutinize the incinerating of a luxury product, which poses a challenge for brands. The consumer would be happy to purchase the product at a discount, but luxury brands cannot lower their prices because no one would be willing to pay full price.<sup>91</sup> From the shareholders’ perspective, however, it is unjust to pay a premium for the material and manufacturing, only for the product to be ultimately incinerated. From a legal perspective, this may constitute corporate waste and could

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<sup>88</sup> See Julie Zerbo, *Can the Birkin Bag Survive the Resale Market?*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/fashion/hermes-birkin-resale-secondary-market.html> [<https://perma.cc/2CUQ-X7LA>]; Giordina Ramazzotti, *Everything You Need To Know About Buying An Hermès Birkin Bag*, VOGUE (Nov. 18, 2018), <https://www.vogue.co.uk/article/buying-an-hermes-bag?amp> [<https://perma.cc/58JT-Y5T7>];

<sup>89</sup> See *Hermès Annual Report*, HERMÈS, at 87 (2018), <https://finance.hermes.com/var/finances/storage/original/application/c764cb56f80ca3941fc2149bfb99e5b7.pdf> [<https://perma.cc/6AKA-JUGT>].

<sup>90</sup> Rogers, *supra* note 75.

<sup>91</sup> See Pinnock, *supra* note 82.

potentially result in a shareholder's lawsuit.<sup>92</sup> Is there a middle ground between financial decisions and brand reputation?

*E. Legislation that Refunds 99% of Tariff Duties on Unsold Product*

As conglomerates continue to consolidate the fashion industry, financial decisions supersede the creative visions for brands. Haley Smith Recer, a then-MBA student at Columbia Business School, explained: “[D]ead inventory becomes the silent killer of retailers. Dead inventory can handicap a retailer in many ways—but most importantly, dead inventory ties up precious working capital. . . . \$40,000 of dead inventory can actually represent \$100,000 worth of retail sales and \$60,000 of gross margin dollars.”<sup>93</sup> To mitigate these possibly disastrous consequences, a brand's financial team strategizes about how to deduce the level of unsold inventory or to recoup the cost of it.

Under a U.S. drawback and refunds law administered by CBP, businesses are allowed to claim a ninety-nine percent refund on duties paid for unsold goods that are either exported or destroyed under customs supervision.<sup>94</sup> Originally passed in 1789, this law

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<sup>92</sup> See DEL. CODE. tit. 8, § 141(a) (2019).

The Delaware General Corporation Law's central mandate appears in Section 141(a); it provides that the business and affairs of every Delaware corporation are managed by or under the direction of the corporation's board of directors. In discharging their duty to manage or oversee the management of the corporation, directors owe fiduciary duties of loyalty and care to the corporation and its stockholders.

*The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, DELAWARE.GOV, <https://corplaw.delaware.gov/delaware-way-business-judgment/> [<https://perma.cc/4MP5-CJB5>].

<sup>93</sup> Haley Smith Recer, Opinion, *The Cost of Dead Inventory: Retail's Dirty Little Secret*, BUS. FASHION (July 11, 2017), <https://www.businessoffashion.com/articles/opinion/the-cost-of-dead-inventory-retails-dirty-little-secret> [<https://perma.cc/K2TN-8X9C>].

<sup>94</sup> 19 U.S.C. §§ 1313(a), (j) (2019) (providing “(a) Articles made from imported merchandise. Upon the exportation or destruction under customs supervision of articles manufactured or produced in the United States with the use of imported merchandise, provided that those articles have not been used prior to such exportation or destruction, an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (l) shall be refunded as drawback . . . (j) Unused merchandise drawback. (1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation—(A) is, before the close of the 5-year period beginning on



encourages commerce, competition in foreign markets, and incentivizes imports into the United States by eliminating the burden of paying duties on unsold merchandise.<sup>95</sup> A study conducted by CBP in 2016<sup>96</sup> concluded that \$1 billion of potential drawbacks were left unclaimed while only \$300 million were claimed.<sup>97</sup> The study attributed this to the cumbersome drawback filing process as well as businesses being unaware of the provision.<sup>98</sup> The original version of the law was amended by the Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”),<sup>99</sup> with the goal of “simplifying and modernizing the drawback process.”<sup>100</sup>

Three significant changes were made by the TFTEA that benefit fashion brands. The most revolutionary change was switching from a paper filing system to an electronic system, referred to as the Automated Commercial Environment (“ACE”).<sup>101</sup> This allows for a quicker processing time, provides immediate notifications if additional documentation is needed, and automatically assigns a claim date.<sup>102</sup> The second change enables a business to claim a drawback for unsold merchandise going back five years; previously, claims

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the date of importation and before the drawback claim is filed—(i) exported, or (ii) destroyed under customs supervision.”).

<sup>95</sup> See RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 572 (2008); see also *Webinar: Duty Drawback New Opportunities*, INT’L TARIFF MGMT. (Apr. 2, 2019), <https://salesmktgassociates.wistia.com/medias/tajdikfavf> [<https://perma.cc/KR57-VU2T>].

<sup>96</sup> Interview with Jill LaMadeleine, Tariff Manager, Int’l Tariff Mgmt. (Nov. 11, 2019).

<sup>97</sup> See *Webinar: Duty Drawback New Opportunities*, *supra* note 95. This study was conducted prior to the passing of the Trade Facilitation and Trade Enforcement Act of 2015.

<sup>98</sup> See *id.*

<sup>99</sup> See generally Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122 (codified at 19 U.S.C. § 4301 *et seq.* (2016)). The law was signed by President Obama on February 24, 2016. *Id.* There was a three-year gap between the law being signed and taking effect. During those three years the CBP developed the regulations to be implemented. See *id.*

<sup>100</sup> 19 U.S.C. § 4312 (titled “[p]riorities and performance standards for customs modernization, trade facilitation, and trade enforcement functions and programs” and discussing the various programs developed to create a more efficient system); see also *Webinar: Duty Drawback New Opportunities*, *supra* note 95.

<sup>101</sup> Interview with Yasimeen Midgette (Apr. 16, 2019).

<sup>102</sup> See *id.*

could only be made up to three years.<sup>103</sup> The third change is the substitution method, which allows merchandise to be exchanged if it shares the same Harmonized Tariff Schedule (“HTS”) number.<sup>104</sup> It no longer has to match the size, color, or stock keeping unit (“SKU”) number.<sup>105</sup> For example, Burberry could swap out the tariff duty of cashmere sweaters with a Union Jack print, imported for Fall 2019, with a collection of Fall 2018 Chatterton check cashmere sweaters that would have otherwise been destroyed to recover the duty.

The drawback legislation on articles destroyed under U.S. Customs supervision discusses the specific procedure for destroying unused goods.<sup>106</sup> One of the essential documents required in a drawback claim is the “Notice of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback” form.<sup>107</sup> The form requires the destroyer’s name, address, ID number, method of destruction, and location.<sup>108</sup> After a claim has been accepted in ACE, the applicant has twenty-four hours to upload the form.<sup>109</sup> This form must be filed seven days prior to destruction.<sup>110</sup> Within four days, U.S. Customs will inform the applicant if they wish to supervise the destruction or if a third party can verify the process.<sup>111</sup> The statute notes that if a third party is engaged, it must be a disinterested party, such as a landfill operator, and it “must establish that the merchandise was, in fact, destroyed within the meaning of ‘destruction’ as specified in section 191.2(g) (i.e., that no articles of commercial

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<sup>103</sup> See TFTEA, Pub. L. No. 114-125, § 906, 130 Stat. 122, 228 (amending 19 U.S.C. § 1313 (j)(1)(A)); see also *Drawback in ACE*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/trade/automated/news/drawback> [<https://perma.cc/Y8YC-NGH4>].

<sup>104</sup> See TFTEA, Pub. L. No. 114-125, § 906, 130 Stat. 122, 228 (amending 19 U.S.C. § 1313 (j)(2)(A)).

<sup>105</sup> See *id.*; see also *Drawback in ACE*, *supra* note 103.

<sup>106</sup> 19 C.F.R. § 191.71 (2019).

<sup>107</sup> U.S. DEP’T HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, FORM 7553—NOTICE OF INTENT TO EXPORT, DESTROY OR RETURN MERCHANDISE FOR PURPOSES OF DRAWBACK (2019), available at <https://www.cbp.gov/document/forms/form-7553-notice-intent-export-destroy-or-return-merchandise-purposes-drawback> [<https://perma.cc/FZ75-NDKR>].

<sup>108</sup> *Id.*

<sup>109</sup> *Drawback in ACE*, *supra* note 103.

<sup>110</sup> 19 C.F.R. § 191.71 (2002).

<sup>111</sup> *Id.*

value remained after destruction).”<sup>112</sup> These specifications are set forth to eliminate any bias in the process, thus preventing a business or related party from simply slashing or partially burning its product and claiming it as destroyed.<sup>113</sup>

Ultimately, a brand would need to determine if it is worth the financial investment to file the drawback claim and incinerate the goods. During a training session conducted by International Tariff Management, a speaker noted that if the company can recover \$20,000 or more then it is worth the time and effort to file a drawback.<sup>114</sup> Depending on the size of the brand, and the cost of the duty compared to the cost of goods, it may be more economical to pay the duty. While this is one rationale for why brands may choose to destroy their clothing, it is not the sole reason. For example, brands may also choose to incinerate sample products not intended for sale, defective items, or promotional items sold for a limited time, to name a few.<sup>115</sup> Brands claim they do not take it lightly when they choose to destroy their clothing, but given the existence of a financial incentive that helps the company’s bottom line, it is obvious why brands would utilize this tool. In fact, as the law is currently written, these fashion corporations have a fiduciary duty to their shareholders to destroy the goods if doing so will ultimately save the company money.<sup>116</sup>

Brands are not hiding the fact that they use the drawback provision created by the government. For instance, one LinkedIn user’s profile listed his job as a Senior Director of Operations

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Webinar: Duty Drawback New Opportunities*, *supra* note 95.

<sup>115</sup> Video: Should We Ban Unsold Fashion Waste?, Sustainability Week Panel, (Fashion Inst. Tech. 2019) (on file with author).

<sup>116</sup> DEL. CODE. tit. 8, § 141(a) (2019). “The Delaware General Corporation Law’s central mandate appears in Section 141(a); it provides that the business and affairs of every Delaware corporation are managed by or under the direction of the corporation’s board of directors. In discharging their duty to manage or oversee the management of the corporation, directors owe fiduciary duties of loyalty and care to the corporation and its stockholders.” *The Delaware Way*, *supra* note 90; *see also* William M. Lafferty, Lisa A. Schmidt & Donald J. Wolfe, Jr., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN ST. L. REV. 837 (2019).

for LVMH Watch and Jewelry.<sup>117</sup> On the profile, the individual is credited for “[e]stablishing a duty drawback program and procedures resulting in the recovery of \$300K annually.”<sup>118</sup> As this job description demonstrates, brands are using this incentive to help improve their bottom line. Instead of vilifying brands for following the law, the public and media should question the recent amendment to the U.S. Customs law and perhaps consider reforming it.

### III. LONG-TERM SOLUTIONS

The media have presented a few over-simplified solutions to the complex problem of incinerating garments. They have suggested that brands stop incinerating their stock, sell to outlet stores, donate to developing countries, or recycle the surplus garments.<sup>119</sup> However, the logistics, implementation, and overall impact of those half-hearted recommendations have not truly been considered. Below are potential solutions that were carefully researched and tailored to the different levels of the fashion system as it currently exists. They are broken into the following sections: (A) legal, (B) reuse, (C) manufacturing, (D) technology, and (E) crisis management. There is not one solution that works for all; rather, the solution varies depending on the regions in which a brand operates.

#### *A. Legal Solutions*

As more studies emerge on the environmental impact of fashion and the afterlife of garments, some companies have taken the initiative to reduce waste. Marc Gobetti, the CEO of Burberry, stated that “[m]odern luxury means being socially and environmentally responsible.”<sup>120</sup> However, the majority of fashion companies—especially ones principally concerned with their bottom line—require greater incentives beyond protecting the environment or

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<sup>117</sup> George Goeller, LINKEDIN, <https://www.linkedin.com/in/georgemgoeller/> (last visited Mar. 11, 2019).

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., Pinnock, *supra* note 82; Wicker, *supra* note 13.

<sup>120</sup> Kate Holton, *Burberry Ends Bonfire of the Luxuries After Waste Outcry*, REUTERS (Sept. 6, 2018), <https://www.reuters.com/article/us-burberry-strategy/burberry-ends-bonfire-of-the-luxuries-after-waste-outcry-idUSKCN1LM0MU> [<https://perma.cc/LX7Z-7897>].

avoiding accusations of wasteful practices for them to make changes that could have negative pecuniary effects on business and shareholder value. This is especially pertinent given the financial incentive to burn what is not sold.<sup>121</sup> At the November 2018 *Business of Fashion Voices* annual conference, which addressed the environmental impact of fashion, an audience member pointed out that a majority of companies will not take action until they are pressured to by government and legislation.<sup>122</sup> The development of laws related to fashion waste would be a first step in providing the industry with an acceptable threshold and forcing it to properly consider how much waste is produced and how this waste is disposed.

First, drawbacks and the conflict between the government incentivizing incineration and being environmentally mindful must be addressed. Each government agency has its specific role, function, and goals. CBP specializes in the enforcement and operations of imports into the United States.<sup>123</sup> Given this role, CBP is not necessarily looking at the environmental impact of their practices. Instead, that would fall under the responsibility of the EPA.<sup>124</sup> Therefore, it would greatly benefit the EPA to work with CBP on solutions to reduce the environmental impact of incinerating. For instance, the destruction of goods should be used as a last result. Brands should first make a reasonable attempt to recycle or export the product. To enforce this requirement, a cap should be placed on the amount that a brand can incinerate. The government can also create a separate tax incentive for companies that reduced their waste or utilized recyclable materials in its production.<sup>125</sup> France is

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<sup>121</sup> See *supra* Part II.E (explaining that “if the company can recover \$20,000 or more then it is worth the time and effort to file a drawback”).

<sup>122</sup> Lauren Sherman, *How Can New Technology Help Make Fashion More Sustainable?*, BUS. FASHION (Feb. 21, 2019), <https://www.businessoffashion.com/articles/voices/how-can-new-technologies-help-make-fashion-more-sustainable> [https://perma.cc/5YFG-ZK9J].

<sup>123</sup> See 19 U.S.C. § 4311 (2012).

<sup>124</sup> See National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1969); see also Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623, 84 Stat. 2086 (Oct. 6, 1970) (establishing the EPA).

<sup>125</sup> The UK Environment Audit Committee recently proposed a tax incentive for brands that reduce the environmental impact during their manufacturing process, but the government rejected the proposal. See Laurretta Roberts, *Government Rejects EAC Proposals to Force Fashion to Clean Up Its Act*, THEINDUSTRY.FASHION (June 18, 2019),

currently working on proposals related to this.<sup>126</sup> Other countries and cities have passed laws related to textile waste, but the question remains, how strictly are they enforced?

### 1. New York City Waste Laws

New York City's Department of Sanitation passed a law that requires commercial businesses to recycle textile waste that exceeds 10% of their solid waste per month.<sup>127</sup> While the existence of this law is encouraging, like the British law, it is not actually being enforced as of yet. This Note advocates for other jurisdictions—especially those with large textile manufacturing industries—to adopt similar laws. However, if the governments are not going to enforce the law, it is a futile effort and fails to solve the problem. Another option could be to tax the amount of waste that a commercial business sends to a landfill. This would incentivize a business to limit the waste it produces to avoid facing pecuniary consequences. Instead of financially incentivizing incineration, taxing waste would incentivize sustainability.

### 2. British Waste Laws

In 2011, England and Wales passed a Waste Hierarchy Law that sets forth requirements for businesses that handle waste:

An establishment or undertaking which imports, produces, collects, transports, recovers or disposes of waste, or which as a dealer or broker has control of waste must, on the transfer of waste, take all such

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<https://www.theindustry.fashion/government-rejects-eac-proposals-to-force-fashion-to-clean-up-its-act/> (account required to access the article). The Committee instead will be focusing on taxing single-use plastics in packaging. *Id.* This exemplifies the problem of governments placing a greater emphasis on other industries and ignoring the regulation of fashion. *See id.*

<sup>126</sup> See Brian Spaen, *France Might Ban Stores from Throwing Away Unsold Clothing*, *WORLD ECON. F.* (May 3, 2018), <https://www.weforum.org/agenda/2018/05/france-might-ban-stores-from-throwing-away-unsold-clothing> [<https://perma.cc/3SH6-KPHF>].

<sup>127</sup> N.Y.C., N.Y., ADMIN. CODE § 1-10 (a)(1)(iii) (2015), available at [https://rules.cityofnewyork.us/sites/default/files/proposed\\_rules\\_pdf/dsny\\_proposed\\_commercial\\_recycling\\_rules\\_with\\_cerfications\\_annexed-preliminary\\_certifications\\_-\\_8-28-15.pdf](https://rules.cityofnewyork.us/sites/default/files/proposed_rules_pdf/dsny_proposed_commercial_recycling_rules_with_cerfications_annexed-preliminary_certifications_-_8-28-15.pdf) [<https://perma.cc/369L-2UQQ>]. “It costs New York City \$20.6 million annually to ship textiles to landfills and incinerators.” Wicker, *supra* note 13.

measures available to it as are reasonable in the circumstances to apply the following waste hierarchy as a priority order—

- (a) prevention;
- (b) preparing for re-use;
- (c) recycling;
- (d) other recovery (for example energy recovery);
- (e) disposal.<sup>128</sup>

A guidance was developed by the UK's Department for Environment, Food, and Rural Affairs to aid businesses with following the law.<sup>129</sup> However, the guidance is vague and serves as more of a suggestion than a command.<sup>130</sup> It lacks specifics on what should be reused versus recycled and lacks percentages indicating how much establishments are expected to reduce their waste.<sup>131</sup> The closest that the guidance comes to mentioning penalties is when it says that an establishment is legally responsible for the third parties that transfer their waste and any liabilities that may arise.<sup>132</sup> However, this formulation leaves too much room for interpretation and is difficult to legally enforce.

*The Times* was one of the only sources to mention this law in connection to Burberry incinerating their stock.<sup>133</sup> Peter Jones, principal consultant at Eunomia, a Bristol-based environmental consultancy, noted that “the Environment Agency had taken no action to enforce the waste hierarchy, possibly because it was under-resourced. They received no extra money from the government to enforce regulations after they came into force.”<sup>134</sup> The Environmental Audit Committee proposed a ban on incinerating unsold

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<sup>128</sup> The Waste (England and Wales) Regulations 2011, SI 2011/988, The Waste (England and Wales) Regulations 2011, *supra* note 16.

<sup>129</sup> Guidance on Applying the Waste Hierarchy (June 2011) (Eng.), *available at* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69403/pb13530-waste-hierarchy-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69403/pb13530-waste-hierarchy-guidance.pdf) [<https://perma.cc/7LE6-FKCM>].

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Webster, *supra* note 41.

<sup>134</sup> *Id.*

goods that can be recycled or reused, but the government rejected the proposal in June of 2019.<sup>135</sup>

a) United Kingdom Environmental Audit Committee Report

Mary Creagh, Chair of the Environmental Audit Committee in the UK, presented an *Interim Report on the Sustainability of the Fashion Industry* in January 2019.<sup>136</sup> In the fall of 2018, a voluntary survey was sent out to sixteen fashion retailers about “what steps they are taking to reduce the environmental and social impact of the clothes and shoes [that] they sell.”<sup>137</sup> Brands were asked to participate in various sustainability initiatives, such as the adopting the Sustainable Clothing Action Plan, using organic or sustainable cotton, using recycled material in products, and engaging in the proliferation of in-store “take-back” schemes.<sup>138</sup> Within the report, Creagh ranked each company by the level of engagement with the initiatives. Creagh specifically called out the brand Kurt Geiger (“following reports of stock burning”) for not participating in any of them.<sup>139</sup> She noted that “[b]y publishing this information, customers can choose whether they want to spend money with a company that is doing little to protect the environment.”<sup>140</sup> While some consumers take into account the ethics of a brand when making purchasing decisions, most are interested in the latest trendy item and the price range that fits their budget.<sup>141</sup>

There are a number of flaws with how the 2018 voluntary survey was administered and compiled.<sup>142</sup> To begin with, surveying sixteen brands does not adequately represent the fashion industry in the

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<sup>135</sup> Roberts, *supra* note 124.

<sup>136</sup> See generally ENVIRONMENTAL AUDIT COMMITTEE, INTERIM REPORT ON THE SUSTAINABILITY OF THE FASHION INDUSTRY, 2017–19, HC 1148 (UK) [hereinafter INTERIM REPORT].

<sup>137</sup> *Id.* at 3.

<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.* at 3, 15.

<sup>140</sup> *UK Fashion Retailers Failing to Commit to Reduce Environmental Impact*, PARLIAMENT (Jan. 31, 2019), <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/sustainable-fashion-interim-report-published-17-19/> [https://perma.cc/32UU-F29C].

<sup>141</sup> See Remy et al., *supra* note 9.

<sup>142</sup> See INTERIM REPORT, *supra* note 152, at 3, 5–6.



UK.<sup>143</sup> Furthermore, the sustainability issues involving a luxury brand such as Burberry are vastly different from those of a fast-fashion online retailer such as ASOS. Clumping them together in a single report does not provide unique solutions tailored to their business, but rather an overly generalized, unhelpful approach to the issue at hand. The report noted that the survey was sent out in the fall of 2018 and the interim report was presented in January 2019.<sup>144</sup> This is hardly enough time for brands to gather the data necessary and respond regarding their sustainability practices. The overall tone of the report seemed condescending rather than educational and instructive, especially regarding those brands which chose not to engage.<sup>145</sup> The survey is described as voluntary, but, given the way that those who did not participate were treated, it seems it was more like an ultimatum.<sup>146</sup> Moreover, Creagh's aforementioned Twitter post about Burberry is another example of an ineffective method of engaging with fashion brands on the issue because it absolutely lacked nuance about the industry, just like the voluntary survey.<sup>147</sup>

Although Creagh's actions are well-intended, her report shows a lack of understanding regarding how the fashion industry functions.<sup>148</sup> This survey is a first step in gathering information and creating a baseline.<sup>149</sup> Much of the information presented was new to Parliament, but not to the fashion industry itself.<sup>150</sup> The report is an over-simplification of the challenge of tackling environmental issues within fashion.<sup>151</sup> The report also addresses labor and pay,

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<sup>143</sup> Statista.com conducted a study from 2008–2018 on the number of clothing manufacturers in the United Kingdom and determined there were “3,951 enterprises manufacturing wearing apparel in the UK.” Tugba Sabanoglu, *Number of Enterprises for the Manufacture of Wearing Apparel in the United Kingdom (UK) from 2008 to 2018*, STATISTA, <https://www.statista.com/statistics/290323/manufacture-of-wearing-apparel-clothing-number-of-enterprises-in-the-united-kingdom-uk/> [https://perma.cc/B3R8-4S24].

<sup>144</sup> See INTERIM REPORT, *supra* note 152, at 3.

<sup>145</sup> See *id.* at 3.

<sup>146</sup> See, e.g., *id.*, at 9–10 (calling out various retailers and assuming they are absolving themselves of sustainability responsibilities).

<sup>147</sup> Compare Creagh, *supra* note 41, with INTERIM REPORT, *supra* note 152, at 6.

<sup>148</sup> See INTERIM REPORT, *supra* note 152, at 3.

<sup>149</sup> See *id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

which is related to manufacturing, but is a separate issue deserving of its own report, and should be not tacked onto a report regarding environmental and waste practices.<sup>152</sup> The following month, in February 2019, the Environmental Audit Committee published *Fixing Fashion: Clothing Consumption and Sustainability*.<sup>153</sup> This report provided a more in-depth discussion on the issues related to fashion's impact on the environment, but an action plan to implement the information presented needs to be further developed.<sup>154</sup> In contrast to Creagh's work, the French *Roadmap to a Circular Economy* report sets a standard for other countries to follow.<sup>155</sup> It presents a holistic approach to addressing environmental and waste issues, is user-friendly and inviting to read, and strikes a balance between education, regulation, and inspiration for change.

The former U.K. Environment Secretary, Michael Gove, developed extended “‘producer responsibility’ schemes for textiles” which concentrated the burden on the brand as a solution to combat textile waste.<sup>156</sup> Gove's plan proposed a pence (penny) tax to be charged on each garment sold in the UK.<sup>157</sup> The Environmental Audit Committee estimated that this would bring in thirty-five million pounds, which would fund “re-shortening centers and recycling centers to divert clothing from landfill and incineration.”<sup>158</sup> Unfortunately, in June of 2019, the government rejected this tax.<sup>159</sup> However, a new Extended Producer Scheme is being developed. The following questions should be considered when amending the

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<sup>152</sup> *Id.* at 10. Labor and pay were beyond the scope of this Note. The author does not think the solutions go together.

<sup>153</sup> ENVTL. AUDIT COMMITTEE, HOUSE OF COMMONS, HC 1952 (UK), *FIXING FASHION: CLOTHING CONSUMPTION AND SUSTAINABILITY* (2019), <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1952/1952.pdf> [<https://perma.cc/6WF9-HM6L>].

<sup>154</sup> *See generally id.*

<sup>155</sup> Compare INTERIM REPORT, *supra* note 152, with *Roadmap for the Circular Economy*, *supra* note 139, at 3, 7–9.

<sup>156</sup> Ben Webster, *Tax on All Clothing to Cut Fashion Waste*, *TIMES* (Feb. 18, 2019, 12:01 AM), <https://www.thetimes.co.uk/article/tax-on-all-clothing-to-cut-fashion-waste-shf00hmxw> [<https://perma.cc/7UC5-BYA3>]; *see also* Roberts, *supra* note 124.

<sup>157</sup> *See* Roberts, *supra* note 124.

<sup>158</sup> House of Commons Committees, *Sustainable Fashion—Report Launch*, *YOUTUBE* (Feb. 22 2019), [https://www.youtube.com/watch?time\\_continue=55&v=6OqvVBnf17M](https://www.youtube.com/watch?time_continue=55&v=6OqvVBnf17M) [<https://perma.cc/MC5Q-KZ6U>].

<sup>159</sup> *See* Roberts, *supra* note 124.

proposal: Will the charge ultimately be passed on to the consumer in the price of the garment? Will the funds collected actually solve the textile waste problem? Is current recycling technology advanced enough to separate synthetic fibers and if so, what will the second life of that fiber be? A further analysis of recycling practices will be addressed later in the Note.

### 3. French Waste Laws

On February 3, 2018, Nathalie Beauval posted a photo to Facebook of slashed clothing tied to a security gate of the French boutique Celio.<sup>160</sup> The post originated from a small northern city in France and went viral with over 24,500 shares.<sup>161</sup> Two days later, Celio responded via Twitter that “the clothes were already unwearable because of holes, tears and stains, and it was company policy to destroy them.”<sup>162</sup> Although this was the company’s policy, it did not justify the practice in the public eye nor calm the negative press that followed shortly after this revelation.<sup>163</sup> In her Facebook post, Beauval noted the lack of clothing for the homeless in the frigid winter temperatures.<sup>164</sup>

Prior to this social media storm, however, the French Prime Minister, Edouard Philippe, and the Secretary of State for the Ecological Transition, Brune Poirson,<sup>165</sup> began working on a *Roadmap*

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<sup>160</sup> See Nathalie Beauval, FACEBOOK (Feb. 8, 2018), <https://www.facebook.com/nbeauval/posts/10156029822929666> [<https://perma.cc/B6EB-LYCD>]; see also Alice Cuddy, *French Store Sparks Outrage for Tearing Up, Discarding Unsold Clothes*, EURONEWS (May 1, 2019), <https://www.euronews.com/2018/02/08/french-store-sparks-outrage-for-tearing-up-discarding-unsold-clothes> [<https://perma.cc/EZP7-WVTV>].

<sup>161</sup> Beauval, *supra* note 135.

<sup>162</sup> Cuddy, *supra* note 135. This is just one of the many cases in France of fashion brands destroying their unsold goods. See also Celio\* (@celio), TWITTER (Feb. 5, 2018), [https://twitter.com/celio/status/960516344293810176?ref\\_src=twsrc%5Etfw%7Ctwtcamp%5Etweetembed%7Ctwtterm%5E960516344293810176&ref\\_url=https%3A%2F%2Fwww.euronews.com%2F2018%2F02%2F08%2Ffrench-store-sparks-outrage-for-tearing-up-discarding-unsold-clothes](https://twitter.com/celio/status/960516344293810176?ref_src=twsrc%5Etfw%7Ctwtcamp%5Etweetembed%7Ctwtterm%5E960516344293810176&ref_url=https%3A%2F%2Fwww.euronews.com%2F2018%2F02%2F08%2Ffrench-store-sparks-outrage-for-tearing-up-discarding-unsold-clothes) [<https://perma.cc/7ZAP-XKM4>]; see Cuddy, *supra* note 135.

<sup>163</sup> Cuddy, *supra* note 135.

<sup>164</sup> See Beauval, *supra* note 135; see also Spaen, *supra* note 125; Cuddy, *supra* note 135.

<sup>165</sup> Poirson said she became interested in eradicating the destruction of merchandise after watching “an undercover reporter television report that showed new merchandise, including brand new diapers and unopened Lego sets, flagged for destruction by Amazon.” Mimosa Spencer, *France Prepares Law to Ban Destroying Unsold Clothing*, WOMEN’S WEAR DAILY (Apr. 22, 2019), <https://wwd.com/business-news/business-features/france->

for the *Circular Economy* in October 2017 to eliminate wasteful practices such as the one described above.<sup>166</sup> In the roadmap, fifty measures are laid out across four sections: (1) “Better Production,” (2) “Better Consumption,” (3) “Better Waste Management,” and (4) “Mobilize all Actors.”<sup>167</sup> Measure 15 within the Better Consumption” section of the roadmap seeks, “[b]y 2019, [to] promote the main principles of the fight against food waste for the textile sector,”<sup>168</sup> so as “to ensure that unsold materials in this sector are not thrown away or destroyed.”<sup>169</sup> The Measure is mirrored after the 2016 French law “The Fight Against Food Waste,” which made it illegal for grocery stores to throw away or intentionally render (nearly expired) food inedible (i.e., pouring bleach on food).<sup>170</sup>

The *Roadmap for the Circular Economy* served as the framework for a new bill titled “For a Circular Economy and Better Waste Management.”<sup>171</sup> Article 5 of the new bill plans to add article L.541-15-9, which would legislate that “textile industry participants . . . have to, in order of priority, reemploy, reuse or recycle unsold items.”<sup>172</sup> On January 8, 2020, the Repporteurs appointed by La Commission Mixte Partaire (the committee charged with finding a

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prepares-law-to-ban-destroying-unsold-clothes-1203112885/ [https://perma.cc/37GU-49HC].

<sup>166</sup> *Roadmap for the Circular Economy*, MINISTÈRE DE LA TRANSITION ÉCOLOGIQUE ET SOLIDAIRE [MINISTRY OF ECOLOGICAL & SOLIDARITY TRANSITION] 3 (June 2018), <https://www.ecologique-solidaire.gouv.fr/sites/default/files/FREC%20anglais.pdf> [https://perma.cc/EUR4-FPG2].

<sup>167</sup> *Id.* at 7–9.

<sup>168</sup> *Id.* at 7.

<sup>169</sup> *Id.* at 20. *The New York Times* noted that the destruction of unsold consumer products is “a practice that currently results in the disposal of new goods worth 800 million euros, or more than \$900 million, in [France] each year.” Palko Karasz, *France to End Disposal of \$900 Million in Unsold Goods Each Year*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/world/europe/france-unsold-products.html?module=inline> [https://perma.cc/X5GY-2VT6].

<sup>170</sup> Loi 2016–138 du 11 février 2016 relative à la lutte contre le gaspillage alimentaire [Law 2016–138 of February 11, 2016 Relating to the Fight Against Food Waste], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 12, 2016.

<sup>171</sup> Projet de loi relatif à la lutte contre le gaspillage et à l’économie circulaire [Draft Law on the Fight Against Waste and the Circular Economy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], (TREP1902395L), L. 541-9-1.

<sup>172</sup> *Id.*; see also *Circular Economy and Waste: Analysis of the Draft Law*, *supra* note 45.

resolution between the National Assembly and the Senate when there is a disagreement between their bills<sup>173</sup>) submitted their reports responding to the proposed revisions to the bill.<sup>174</sup> The final bill is expected to be presented in front of parliament soon.<sup>175</sup> French brands would no longer be able to slash or destroy unsold clothing, but would have the option to recycle or donate the items to homeless shelters.<sup>176</sup> The bill is supported by Emmaus, a French charity that aims to end homelessness.<sup>177</sup> Emmaus hopes the bill will serve the dual purpose of reducing waste and clothing the homeless.<sup>178</sup> Victoria Berezna of the *Business of Fashion* noted that it is “likely that luxury brands will consider alternative recycling methods, rather than donating unsold clothing, to avoid brand dilution.”<sup>179</sup> Meanwhile, fast-fashion companies can utilize either option, since they are not concerned with their trademark being devalued nor the flooding of the market with large quantities of their product.

#### 4. Shareholder Lawsuits

As seen with the release of Burberry’s annual report, a shareholder did not agree with the brand’s incineration of unsold goods.<sup>180</sup> Although Burberry has been reporting this practice for five years, previous shareholders either did not notice, or did not take

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<sup>173</sup> See *La Commission Mixte Paritaire, SÉNAT* [FRENCH SENATE], <http://www.senat.fr/role/fiche/cmp.html> [<https://perma.cc/Q6AR-EW7T>].

<sup>174</sup> See *Lutte Contre le Gaspillage et Économie Circulaire* [Fight Against Waste and Circular Economy], ASSEMBLÉE NATIONALE [French National Assembly], [http://www.assemblee-nationale.fr/dyn/15/dossiers/lutte\\_gaspillage\\_economie\\_circulaire](http://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_gaspillage_economie_circulaire) [<https://perma.cc/W2LE-UPKM>].

<sup>175</sup> See *id.*

<sup>176</sup> *Id.*

<sup>177</sup> See Spaen, *supra* note 125.

<sup>178</sup> See *id.*

<sup>179</sup> Victoria Berezna, *What Should French Fashion Do with Its Unsold Clothing?*, BUS. FASHION (May 18, 2018, 5:29 AM), <https://www.businessoffashion.com/articles/news-bites/what-should-french-fashion-do-with-its-unsold-clothing> [<https://perma.cc/93UC-RB3J>].

<sup>180</sup> See *Burberry Annual Report FY 2017–2018*, *supra* note 28; see also Cox, *supra* note 20; Ellson, *supra* note 30 (stating that this single line in the 200-page report outraged shareholders who “[asked] why the unsold products were not offered to the company’s private investors”).

issue with, the practice.<sup>181</sup> This instance did not result in a shareholder's lawsuit, but that is not to say one will not arise relating to reckless overproduction and corporate waste in the future. Shareholders could argue that this practice intentionally reduces the value of the company and diminishes the dividends that they should reasonably receive. However, public companies must consider not only how they are communicating to their shareholders, but also to the general public. Typically, the average consumer and reporter have no interest in reading a 200-page annual report, but now that the public is more knowledgeable about this practice and where to find the information, it does not take much to use the "find" function and search for the keyword "destroy." Therefore, if a public company plans on disclosing that they destroy unsold items in their annual SEC report, they should be prepared with a justification satisfactory to both shareholders and the public alike that substantiates these practices. Moreover, the SEC could make it mandatory for publicly traded companies to disclose destroyed or incinerated goods in their annual reports.

### *B. Reuse Solutions*

Government regulation is not the sole solution to the problem of waste. Most brands genuinely want to "do the right thing," but need direction on where to begin. There is not a one-size-fits-all solution, and the problem requires specific fixes that work best for each brand. Strategizing on how to give garments and fibers a second life can reduce waste, create a more efficient manufacturing system, and provide a financial benefit. This Note contemplates several methods: first is donation, which is rather straightforward and can be easily implemented; second is upcycling materials into new items; third is purchasing unsold fabric from manufacturers; and last is recycling.

#### 1. Donation

When CBP destroys seized counterfeit goods, the agency is met with a similar problem experienced by brands that destroy their

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<sup>181</sup> See Ellson, *supra* note 30.

unsold goods. The public frowns upon the destruction of finished products when such items can be donated to a good cause.<sup>182</sup> After Hurricane Katrina, U.S. Customs donated seized items to disaster relief charities, such as The Red Cross.<sup>183</sup> Unfortunately, they neglected to notify the trademark owners and failed to de-trademark the items before handing them out.<sup>184</sup> Although well-intentioned, this charitable action could harm the trademark owners and prove to be counterproductive if people sell the counterfeit items, which places them back into the market.<sup>185</sup> Susan Scafidi, Founder and Director of the Fashion Law Institute, noted: “The companies that make the real deals have no control over the copies’ quality or safety. Perhaps even worse, they have no control over the channels of distribution. Very few corporations have spent millions in advertising only to be associated with shelter chic.”<sup>186</sup> This oversight resulted in an amendment to the *Trafficking in Counterfeit Goods or Services* law.<sup>187</sup>

However, donation could be a solution for the brands themselves, perhaps by working with charities through a third party such as His Church, which rebrands counterfeit clothing for brands such

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<sup>182</sup> See Iraggi, *supra* note 35.

<sup>183</sup> See *What Happens to the Billions of Dollars of Counterfeits Seized Every Year?*, FASHION L. (Jan. 23, 2019), <https://www.thefashionlaw.com/home/what-happens-to-the-billions-of-dollars-of-counterfeits-seized-every-year> [<https://perma.cc/V5D9-7REG>].

<sup>184</sup> See *id.* Article 46 of the TRIPS Agreement states: “In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.” Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

<sup>185</sup> “Lastly, the U.S. argued that ‘nothing appears to prevent public welfare organizations from selling the infringing goods they receive [through donation], thus moving these goods back into commerce.’ Katrina Rae Montanaro, “*Shelter Chic*”: *Can the U.S. Make It Work?*, 42 VAND. J. TRANSNAT’L L. 1663, 1681–82 (2009), <https://www.vanderbilt.edu/wp-content/uploads/sites/78/Montanaro-final-cr.pdf> [<https://perma.cc/C29R-GHVX>] (quoting Executive Summary of the First Written Submission of the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, para. 49, WT/DS362/R (Jan. 26, 2009)).

<sup>186</sup> Susan Scafidi, *Katrina Pounds Trademarks*, LEGAL TIMES (Oct. 10, 2005), <http://www.counterfeitchic.com/Articles/Legal%20Times%20final.pdf> [<https://perma.cc/XP7T-RYDQ>].

<sup>187</sup> See Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181, 120 Stat. 285 (codified at 18 U.S.C. § 2320 *et seq.* (2006)).

as Tommy Hilfiger.<sup>188</sup> They could sort, repackage, and stamp the goods with the charity's logo.<sup>189</sup> The third party's involvement would remove the charity's knowledge regarding the source of the goods, thus lowering the possibility that the goods' recipients will have the desire to resell it based on the value of the trademark.<sup>190</sup> Law scholar Kristina Rae Montanaro points out that Sean P. Diddy Combs and Jay Z donated garments from their clothing lines to Katrina victims.<sup>191</sup> However, this would not work for certain items that are immediately recognized by hallmarks associated with certain brands, such as the quilting and chain in Chanel's 2.55 bag, the LV monogram in Louis Vuitton's Speedy bag, or the Tartan plaid lining of Burberry's trench coat.

## 2. Upcycling

Another large source of waste is the fragments that remain after fabric is cut when creating a design.<sup>192</sup> Luxury brands have the benefit of working with superior quality materials that can be upcycled into new products. Hermès is known for being particularly meticulous in their selection of fabrics.<sup>193</sup> If a material does not meet their satisfaction, it will not be used for staple products, such as the Birkin bag, to maintain their high standard.<sup>194</sup> In 2010, they debuted Petit h, a collection of small accessories that utilized the scraps from their silk and leather goods.<sup>195</sup> In-house artists created playful,

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<sup>188</sup> Emma Jane Kirby, *His Church: Charity Re-Uses Donated Counterfeit Clothes*, BBC (Dec. 7, 2011), <https://www.bbc.com/news/uk-16058275> [<https://perma.cc/L92J-KC4N>].

<sup>189</sup> See Montanaro, *supra* note 179, at 1685 (“[The Red Cross] delivers donated goods in its own packaging.”).

<sup>190</sup> See *id.* at 1686.

<sup>191</sup> *Id.* at 1700.

<sup>192</sup> *Leather, A Precious Material*, HERMÈS, <https://www.hermes.com/us/en/story/135601-leather-precious-material/> (last visited Jan. 16, 2020).

<sup>193</sup> See *Hermès Annual Report*, *supra* note 89, at 87.

<sup>194</sup> See *id.*

<sup>195</sup> See Katarina Israel, *Upcycling on Bond Street? Oui, Says Hermès with Its Petit h Exhibition*, WALLPAPER (Nov. 20, 2013), <https://www.wallpaper.com/fashion/upcycling-on-bond-street-oui-says-herms-with-its-petit-h-exhibition> [<https://perma.cc/G9Q3-8DV4>].



quirky, one-of-a-kind items in the spirit of Hermès.<sup>196</sup> The development of the collection is described as “[a]n object born of existing materials, the latter breathing life into the former. This creation in reverse results from a unique creative approach based on surprise and transience.”<sup>197</sup> Objects include a hippopotamus shoe charm, a donkey keyring, a silk and leather cuff, and silk shoelaces.<sup>198</sup> By keeping this production in-house, Hermès maintained full control of the upcycling process, the marketing of the product, and the reputation of the brand.<sup>199</sup>

While the media was quick to criticize Burberry for its incineration practices, they failed to mention the positive environmental initiatives in which the company was engaged. The corporation’s annual report points to leather as a “significant waste stream for the luxury fashion industry,” even where patterns are designed to prevent as much waste as possible.<sup>200</sup> To combat the problem of leather waste, in 2017, Burberry signed a five-year contract with the non-profit Elvis & Kresse.<sup>201</sup> During that period, Burberry donated 120 tons of leather scraps that were hand woven into new leather bags, rugs, pouffes, or tapestries.<sup>202</sup> The sales from the upcycled pieces were donated to charities that supported artisans. Upcycling is an ideal solution for luxury brands, but not necessarily a practical one for fast fashion because of the inferior quality of the material. This means that it would cost more to upcycle those products than the original retail cost.

### 3. Unused Fabric

Fabric is often wasted throughout the design process from developing a garment sample to the final manufacturing. Timo Rissanen, Assistant Professor of Fashion Design and Sustainability at Parsons School of Design, explains that a “mill throw[s] out

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<sup>196</sup> *Petit h Creation in Reverse*, HERMÈS, <https://www.hermes.com/us/en/story/155321-petit-h-event/> [https://perma.cc/7H3N-E27P].

<sup>197</sup> *Id.*

<sup>198</sup> *See Petit h*, HERMÈS, <https://www.hermes.com/us/en/petit-h/#> (last visited Jan. 16, 2020).

<sup>199</sup> *See Hermès Annual Report*, *supra* note 89, at 27.

<sup>200</sup> *Burberry Annual Report FY 2017–2018*, *supra* note 28, at 47.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

material because of a designer making changes too late.”<sup>203</sup> The brand is often unaware of the waste that occurs in this process because the manufacturer is overseas and out of sight. Stephanie Benedetto, CEO and Co-Founder of Queen of Raw, became aware of the void between deadstock fabric sitting in warehouses and the demand for fabric.<sup>204</sup> In 2018, she developed an online marketplace that connects suppliers of unused fabric to end users through blockchain technology.<sup>205</sup> Benedetto elaborated on the process:

An enterprise customer like an H&M, any of their vendors or suppliers in their supply chain, can verify data from an app on their phone, tell us what they’re doing with those fabrics. And for example, if they received 100,000 yards of fabric, but they only use 50,000 yards . . . they can click a button and an alert occurs, and now we know that there is a waste of fabric sitting at that location.<sup>206</sup>

The fabric can then be sold on the Queen of Raw’s marketplace and shipped to a designer to use in their latest collection.<sup>207</sup> The mood board tool pairs designers’ inspirations with fabric available on the marketplace.<sup>208</sup> Currently there are 100 companies that sell to the marketplace and 100,000 users ranging from fast-fashion to luxury brands around the world, including Australia, Asia, Europe, and Africa.<sup>209</sup> The next phase for Queen of Raw is the development of a second blockchain application;<sup>210</sup> *Materia MX*, set to launch in 2020, is a subscription-based blockchain system that allows brands

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<sup>203</sup> *Id.*

<sup>204</sup> Interview with Stephanie Benedetto, Founder & CEO of Queen of Raw (Nov. 7, 2019).

<sup>205</sup> *About Us*, QUEEN RAW, <https://www.queenofraw.com/about-us> [<https://perma.cc/L8VL-ZNY9>].

<sup>206</sup> Peter O’Dowd, *How One CEO Is Reducing Waste in the Fashion Industry*, WBUR, (May 24, 2019), <https://www.wbur.org/hereandnow/2019/05/24/fashion-industry-waste> [<https://perma.cc/WRA5-9QJ>].

<sup>207</sup> *See About Us*, *supra* note 199.

<sup>208</sup> Interview with Stephanie Benedetto, *supra* note 198.

<sup>209</sup> *Id.*

<sup>210</sup> *See Liz Brody, The Fashion Industry Is Insanely Wasteful. Can Blockchain Fix It?*, ENTREPRENEUR (Apr. 17, 2019), <https://www.entrepreneur.com/article/331229> [<https://perma.cc/RVQ2-52BM>].

to access a customized supply chain management system.<sup>211</sup> The technology allows the identification of waste in not only fabric, but also water, chemicals, and dollars.<sup>212</sup>

#### 4. Recycling

Recycling is a universal method that can be utilized by both luxury and fast-fashion companies. In 2016, Jessica Schreiber started FABSCRAP, a fashion recycling non-profit that collects unwanted textiles from over 255 fashion brands in New York City.<sup>213</sup> Schreiber had the idea for FABSCRAP while working at the Department of Sanitation as a Senior Manager in the Bureau of Recycling and Sustainability.<sup>214</sup> Fashion brands would call and ask where they could recycle unwanted fabrics from their studio.<sup>215</sup> She had to tell them that there wasn't currently a service that catered to that need.<sup>216</sup> After seeing a desire for the fashion industry to be more sustainable, she opened FABSCRAP.<sup>217</sup> Each day, FABSCRAP picks up an average of forty bags of fabric waste from brands, equal to roughly 2,000 pounds.<sup>218</sup> Volunteers help sort the scraps into bins of 100% wool, 100% cotton, 100% polyester, and spandex.<sup>219</sup> With the exception of spandex, the fabrics are recycled or resold at a discount if they are longer than a yard.<sup>220</sup> Brands have the option of placing proprietary fabrics into separate black bags.<sup>221</sup> These are

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<sup>211</sup> *See id.*

<sup>212</sup> *See id.*

<sup>213</sup> *See The FABSCRAP 2018 Annual Report*, FABSCRAP, <https://static1.squarespace.com/static/56aff2e3d51cd44dd1c364ee/t/5d1e0eb9cedf7500010b844d/1562250941468/FABSCRAP-2018-ANNUALREPORT.pdf> [<https://perma.cc/W9PV-QT7E>].

<sup>214</sup> *See* Laura Parker, *Meet the Millennial in Charge of Recycling New York's Fashion Waste*, FORBES (Dec. 25, 2018), <https://www.forbes.com/sites/lauraannaparker/2018/12/25/meet-the-millennials-in-charge-of-recycling-new-yorks-fashion-waste/#1be0926161b2> [<https://perma.cc/LT7T-HETX>]; *see also* *About Us*, FABSCRAP, <https://fabscrap.org/about> [<https://perma.cc/ZYX3-ZS6W>].

<sup>215</sup> Interview with Jessica Schreiber, *supra* note 16.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Parker, *supra* note 208.

<sup>219</sup> *See About Us*, *supra* note 208.

<sup>220</sup> Interview with Jessica Schreiber, *supra* note 16.

<sup>221</sup> *See About Us*, *supra* note 208.

sorted by FABSCRAP employees, shredded, and used as insulation to avoid infringement of their intellectual property.<sup>222</sup>

At the end of each year FABSCRAP sends an impact report to each brand using their service, listing the amount of CO<sub>2</sub> saved, the equivalent number of trees planted, how many pounds of scrap fabric FABSCRAP picked up, and a percentage breakdown of what was recycled, reused, and went to a landfill.<sup>223</sup> The report can be used as a marketing tool to show the steps that a brand is taking to be more responsible about its waste.<sup>224</sup> Screiber noted, “We give them a nice social media-friendly comparison—like you’ve recycled enough to plant this many trees . . . they love that.”<sup>225</sup> In the two years that they have been in operation, Fabscrap has collected 234,175 pounds of unwanted textiles.<sup>226</sup> From that, 1,719 tons of CO<sub>2</sub> was recovered, the equivalent of 40,395 trees were planted. Fifty-two percent of fabric was recycled, forty-five percent was reused, and three percent went to a landfill.<sup>227</sup> These numbers provide an inspiring outlook for the future of reducing the amount of fabrics that end up in a landfill.

Recycling fabric has become more complex with the introduction of mixed and synthetic fibers. Natural fibers such as cotton, wool, and silk are easier to recycle than synthetic fibers such as polyester and spandex.<sup>228</sup> Synthetic fibers present a problem when blended with other fibers, as the resulting product is currently

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<sup>222</sup> *See id.*

<sup>223</sup> *See The FABSCRAP 2018 Annual Report, supra note 207.*

<sup>224</sup> *See id.*

<sup>225</sup> Parker, *supra* note 208.

<sup>226</sup> *See The FABSCRAP 2018 Annual Report, supra note 207.*

<sup>227</sup> *See id.*

<sup>228</sup> Alden Wicker of *Newsweek* discusses the challenges of recycling textiles: “[U]nlike banana peels, you can’t compost old clothes, even if they’re made of natural materials.” Wicker, *supra* note 13.

“Natural fibers go through a lot of unnatural processes on their way to becoming clothing,” says Jason Kibbey, CEO of the Sustainable Apparel Coalition. “They’ve been bleached, dyed, printed on, scoured in chemical baths.” . . . Meanwhile, synthetic fibers, like polyester, nylon, and acrylic, have the same environmental drawbacks, and because they are essentially a type of plastic made of petroleum, they will take hundreds of years, if not a thousand, to biodegrade.

*Id.*

not recyclable.<sup>229</sup> For example, spandex is a popular synthetic fabric because of the stretch it provides, and has become prevalent not only in athleisure, but also in practically every style of jeans.<sup>230</sup> From an environmental standpoint, the prevalence of spandex is problematic because it is not yet recyclable.<sup>231</sup> Some companies have begun working on the recycling of other blends.<sup>232</sup> For example, in 2015 the H&M Foundation and Kering partnered with British firm Worn Again on a project to separate cotton/polyester blends and recycle them into new fabrics without compromising the quality.<sup>233</sup> The patented technology is in the testing phase at H&M and Kering's Puma brand.<sup>234</sup> Recycled fibers of a superior quality are still in the development stages.<sup>235</sup> The industry must recognize that the use of recycled fibers is still years away from being a commercially viable option.<sup>236</sup> Inditex, Zara's parent company, is working closely with the fiber company Lenzing to develop Refibra, a new type of fiber

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<sup>229</sup> "The issue with spandex is that the rubber in the fabric melts in the shredding machines that make insulation (shoddy) from recycled fabrics. The melted rubber jams the machine parts." Interview with Kira Craft, Professor at the Fashion Institute of Technology, School of Graduate Studies (May 19, 2019).

<sup>230</sup> See, e.g., Katya Foreman, *Jean Genie: The Denim Evolution*, BBC (Apr. 1, 2015), <http://www.bbc.com/culture/story/20150401-jean-genie-the-denim-evolution> [<https://perma.cc/3N8X-82ME>].

<sup>231</sup> See Interview with Kira Craft, *supra* note 223.

<sup>232</sup> Madewell rewards its customers with a \$20 gift certificate for donating their denim and turns the shredded denim into insulation for Habitat for Humanity. See, e.g., *Do Well Initiatives*, MADEWELL, <https://www.madewell.com/do-well-initiatives.html> [<https://perma.cc/AF5L-AKSL>].

<sup>233</sup> See *Worn Again Joins Forces with H&M, Kering to Create Circular Resource Model for Textiles*, SUSTAINABLE BRANDS (Apr. 2, 2015, 4:00 PM), <https://sustainablebrands.com/read/product-service-design-innovation/worn-again-joins-forces-with-h-m-kering-to-create-circular-resource-model-for-textiles> [<https://perma.cc/HS4U-2PSH>].

<sup>234</sup> *Id.*

<sup>235</sup> Paul Dillinger of Levi's Product Innovation team noted:

It is really hard work to make a garment from all like materials such that at the end of its life it can go into a single material recycling system and come out the other side as a viable alternative to a first-generation material on the front end. It's damn near impossible and the technologies are underfunded and are not mature enough for us to say that we can credibly do it.

Larissa Gomes, *Levi's on the Risks of a Circular Economy*, INNOVATORS PODCAST (Apr. 2, 2019), <https://thecurrentdaily.com/2019/04/04/levis-on-the-risks-of-the-circular-economy/> [<https://perma.cc/4QWQ-FFGL>].

<sup>236</sup> *Id.*

using its recycled cotton cast-offs.<sup>237</sup> Inditex is also working in collaboration with research institutions around the world, such as the Massachusetts Institute of Technology, Vigo University (Spain), and Clermont (France) to transform recycled garments into new textiles.<sup>238</sup> While these are remarkable steps toward removing textiles from landfills, recycling spandex blends has yet to be seen.

Many brands, such as H&M, are introducing take-back programs with claims that they are recycling the old goods to create new ones. As stated on its blog, “H&M will recycle [used clothes] and create new textile fiber[s], and in return you get vouchers to use at H&M. Everybody wins!”<sup>239</sup> This gives the impression that the t-shirt going into the take-back bin is being used to regenerate a new t-shirt, but as noted above, some mixed fibers cannot be recycled. The Ellen MacArthur Foundation estimates that only one percent of used clothing is recycled to generate new clothing.<sup>240</sup> H&M’s take-back program not only leads to misinformation about what can and cannot be recycled, but fuels more consumption, because the consumer will likely purchase another item once they are already at the store.<sup>241</sup>

For Days is a relatively new brand that produces and recycles 100% organic cotton t-shirt and sweaters.<sup>242</sup> Customers purchase a subscription based on the number of items they would like, and when they are ready to swap the items, they mail it back to the company and a new item is shipped back to them for the low price of eight dollars.<sup>243</sup> The returned items are then recycled and used to create new ones.<sup>244</sup> This business model is expected to have promising results and serves as a superior example of closed-loop

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<sup>237</sup> See Chua, *supra* note 6.

<sup>238</sup> See *Collect, Reuse, Recycle*, INDITEX, <https://www.inditex.com/en/our-commitment-to-the-environment/closing-the-loop/collect-reuse-recycle> [https://perma.cc/JB3B-HYUB].

<sup>239</sup> See Wicker, *supra* note 13.

<sup>240</sup> #WearNext, *supra* note 14.

<sup>241</sup> See Faustine Binet et al., *Fast Fashion and Sustainable Consumption*, in *FAST FASHION, FASHION BRANDS & SUSTAINABLE CONSUMPTION* 32 (Subramanian Senthilkannan Muthu ed., 2019).

<sup>242</sup> FOR DAYS, <http://fordays.com> [https://perma.cc/9858-S7W2].

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

manufacturing for other corporations to follow.<sup>245</sup> It is important to mention that the products are made from 100% organic cotton and not blended, which allows them to be regenerated into new products.<sup>246</sup>

Today, many companies are attempting to close the loop<sup>247</sup> of the supply chain. Recycling is just one aspect of a complex system. When considering how and what parts to implement, a company should consider the scope of what can effectively be achieved. For instance, it is more effective to make small changes that can be tracked. Paul Dillinger, Head of Product Innovation at Levi's, carefully considers how to implement sustainable practices within the brand.<sup>248</sup> Instead of tackling the challenge of sustainability as a whole, he breaks it into digestible initiatives that challenge design teams to rethink how they work, while emphasizing their talents.<sup>249</sup> He told his design teams, "whenever you have a choice to do something, do the right thing."<sup>250</sup> When asked about his view regarding brands implementing a circular economy,<sup>251</sup> he passionately stated:

I believe that a lot of the buzz around an optimistic presentation of a circular economy is actually people's excitement about not having to be guilty about over consumption anymore[;] it has nothing to do with actual unlocking of credible circular industrial ecologies because a credible industrial ecology

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<sup>245</sup> "Under a closed-loop system, businesses reuse the same materials over and over again to create new products for purchase. It's a way to conserve natural resources and divert waste from the landfill." Kristin Hunt, *What's a Closed Loop System?*, GREEN MATTERS (May 2019), <https://www.greenmatters.com/business/2018/08/15/Z16xhYS/closed-loop-system-sustainability-production> [<https://perma.cc/J746-R4Q8>].

<sup>246</sup> See FOR DAYS, *supra* note 236.

<sup>247</sup> See Hunt, *supra* note 239.

<sup>248</sup> See Gomes, *supra* note 229.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> The Ellen MacArthur Foundation defines circular economy as "[a] framework for an economy that is restorative and regenerative by design. . . . It entails gradually decoupling economic activity from the consumption of finite resources, and designing waste out of the system." *What Is a Circular Economy?*, ELLEN MACARTHUR FOUND., <https://www.ellenmacarthurfoundation.org/circular-economy/concept> [<https://perma.cc/V64P-2WJN>].

is going to be far too difficult to operate in to continue producing in the levels we are producing. One of them is a corporate compliance officer selling a new shiny penny to a board of directors in the C-suite, and the other one is a studious and scientific approach to really tackling a real challenge.<sup>252</sup>

Considering Dillinger’s point, fast-fashion brands cannot look only to solving the synthetic recycling problem; they must also reduce the quantities they produce in order to become truly sustainable. Brands must have a genuine desire to improve their design and production systems, otherwise their claims of reducing their environmental impact will continue to be seen merely as “green-washing,” a superficial marketing tool.<sup>253</sup>

### *C. Readjusting Manufacturing Practices*

Manufacturing is an integral part of the fashion system. While certain aspects of the supply chain have improved over the past century, there is still more work needed before a system that satisfactorily reduces the impact on the environment is in place. Moreover, rethinking production methods will ultimately result in more efficient and profitable industry.<sup>254</sup> Yet, uniformly integrating more environmentally conscious systems throughout a company’s supply chain is a daunting task. Inditex has developed a vertical manufacturing system that controls all aspects—design, manufacturing, logistics & data management, and retail—of creating and selling a garment.<sup>255</sup> This enables Inditex to easily monitor their full supply chain and quickly adopt to changes in the market.<sup>256</sup> Forbes acknowledged the efficiency in this system, which allows Inditex to have a competitive edge, by noting that “[i]n contrast to Zara’s situation, our newly collected data shows that most supply chain organizations are finding it difficult, if not impossible, to see and

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<sup>252</sup> Gomes, *supra* note 229.

<sup>253</sup> See Chua, *supra* note 6, and accompanying text.

<sup>254</sup> See *What Is a Circular Economy?*, *supra* note 245.

<sup>255</sup> See *Inditex, King of Fast Fashion*, *supra* note 52.

<sup>256</sup> See Kevin O’Marah, *Zara Uses Supply Chain to Win Again*, FORBES (Mar. 9, 2016), <https://www.forbes.com/sites/kevinomarah/2016/03/09/zara-uses-supply-chain-to-win-again/#2cfcfdad1256> [<https://perma.cc/VS79-XRVC>].



understand demand and to know what problems lie in wait upstream in the supply chain.”<sup>257</sup> Inditex is able to seamlessly modernize their manufacturing process to make them more environmentally conscious—unlike H&M’s manufacturing, which is located throughout the world—since they own the entire supply chain.<sup>258</sup>

At the retail level, sales associates within each store use Personal Data Assistant technology to gather information about their customers’ preferences and tastes.<sup>259</sup> This information guides the orders placed with the distribution center to customize the delivery and avoid deadstock.<sup>260</sup> Chanel has utilized a similar technique: a spokesperson has noted that “[its] strategy of [producing] collections only when [it] receives orders from [its] buyers cuts down considerably on unsold stock. It is also currently thinking about the best way of recycling unsold items.”<sup>261</sup> An additional suggestion that aligns with this initiative would be to partially manufacture staple items. Using the Chanel 2.55 bag as an example, the individual elements of the bag can be produced and, when the demand for the bag increases, the parts of the bag can be assembled. This will strike a balance between losing out of sales due to backlog and overproducing which results in excess inventory and possibly eventual incineration.

Before the popularity of streetwear product drops, Inditex developed the idea of “flexible collections.”<sup>262</sup> Instead of manufacturing the traditional four collections a year, they release shorter runs of collections more frequently. This reduces the amount of

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<sup>257</sup> *Id.*

<sup>258</sup> See Melissa Parietti, *H&M vs. Zara vs. Uniqlo: What’s the Difference?*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/articles/markets/120215/hm-vs-zara-vs-uniqlo-comparing-business-models.asp> [<https://perma.cc/4LGF-M6NR>].

<sup>259</sup> See *Inditex Logistics*, INDITEX (Oct. 16, 2014), [https://www.youtube.com/watch?time\\_continue=121&v=iKUmOsmh-Gs](https://www.youtube.com/watch?time_continue=121&v=iKUmOsmh-Gs) [<https://perma.cc/8XNC-JHVS>].

<sup>260</sup> *See id.*

<sup>261</sup> Berezhna, *supra* note 151.

<sup>262</sup> “The concept of regularly drip-feeding product in limited quantities was pioneered in Japan by the likes of Hiroshi Fujiwara and popularised by streetwear brands like Supreme, Palace and Nike, which have adopted the system at retail and online.” Christopher Morency, *Is Luxury’s Love Affair with ‘Drops’ More Than Marketing?*, BUS. FASHION (Aug. 9, 2018, 5:25 AM), <https://www.businessoffashion.com/articles/professional/is-luxurys-love-affair-with-supreme-style-drops-more-than-marketing-moncler-burberry-off-white-celine> [<https://perma.cc/ZF69-9RUV>].

overstock and the need to rely on a single collection to recoup that season's sales. Luxury brands could split their collections into segments and release them throughout the season. This would create excitement and reasons for customers to visit the store.

#### D. Technology Solutions

The integration of technology and human expertise presents new cutting-edge solutions for reducing waste and overstock. CLO3D is software that allows designers to create digital garments from the pattern to a three-dimensional representation of the garment.<sup>263</sup> Brands such as Louis Vuitton, Nike, and Macy's are utilizing this technology during the sample-making process to add changes digitally from the various design teams and manufacturer.<sup>264</sup> This allows designers and related parties to see the changes instantly without waiting for the physical sample to be sent from the manufacturer.<sup>265</sup> It also reduces fabric waste generated within a design studio and the carbon footprint from shipping samples back and forth.<sup>266</sup>

Heuritech is a French start-up that uses artificial intelligence ("AI") to analyze fashion trends on Instagram.<sup>267</sup> Their tagline—"Predict more accurately. Produce more sustainably. Profit exponentially."—presents an ideal solution to the unpredictability of trends and overproduction.<sup>268</sup> Millions of images on Instagram are evaluated based on color, pattern, texture, shape, detail, brand, style, and model.<sup>269</sup> Their team of AI experts recognized that most

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<sup>263</sup> A pattern in this context is defined as "a hard paper on which different component of garments of a particular style are sketched according to the measurement of the garments." *Pattern*, DEFINE TEXTILE, <http://www.definetextile.com/2013/07/pattern.html> [https://perma.cc/QE4R-MFJY]; See *Why CLO*, CLO3D, <https://www.clo3d.com/explore/whyclo> [https://perma.cc/3HQV-25FR].

<sup>264</sup> *Business Clients*, CLO3D, [https://www.clo3d.com/business/business\\_clients](https://www.clo3d.com/business/business_clients) [https://perma.cc/8PSD-NJB4].

<sup>265</sup> See *Features*, CLO3D, <https://www.clo3d.com/explore/features> [https://perma.cc/V7NU-NV43].

<sup>266</sup> See Alexa Tietjen, *How Can Technology Save Fashion? CLO Virtual Fashion Has the Answer*, WOMEN'S WEAR DAILY (June 13, 2018), <https://www.clo3d.com/company/newsdetail/93> [https://perma.cc/BTA7-9E7V].

<sup>267</sup> *Homepage*, HEURITECH, <https://www.heuritech.com/> [https://perma.cc/U696-67E4].

<sup>268</sup> *Id.*

<sup>269</sup> See *id.*

products are not correctly tagged with keywords, which results in eighty percent of products being undetected by scanning tools.<sup>270</sup> They decided to incorporate image recognition software that captures the vast number of visuals shared on social media platforms such as Instagram.<sup>271</sup> Since Instagram is a predominantly visual platform, users often post an image without caption or else without tagging the brand or other important details. That luxury brands such as Dior, Prada, and Louis Vuitton have utilized this technology proves that Heuritech's business model is useful to the fashion industry.<sup>272</sup>

Two of Heuritech's case studies can be directly applied as solutions to fashion's waste problem. The first was for a fast-fashion regional retail manager interested in gathering data on the trend cycles of a trench coat.<sup>273</sup> Heuritech analyzed images of trench coats in the specific geographic area and detected a slow decline in the Instagram posts of that style.<sup>274</sup> The retail manager reduced the number of SKUs from six to three that were put into production.<sup>275</sup> In the end, the prediction was correct and resulted in financial savings for the brand on SKUs that would inevitably have become deadstock.<sup>276</sup>

The second case study involved deciding which runway accessories to put into production.<sup>277</sup> An anonymous luxury brand asked Heuritech to examine eight accessories that the brand was considering placing in their retail stores.<sup>278</sup> They analyzed a total of 5,000 Instagram posts and noticed that 800 influencers had engaged

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<sup>270</sup> See *Case Study: How Did Our Client Predict the Success of Its New Accessories Right After Its Fashion Show?* HEURITECH, <https://cdn2.hubspot.net/hubfs/4352661/Case%20study/Case%20study%20Fashion%20Show.pdf> [https://perma.cc/HKM3-2SLM] [hereinafter *Case Study: How Did Our Client*].

<sup>271</sup> See *id.*

<sup>272</sup> See *Homepage*, *supra* note 261.

<sup>273</sup> See *Case Study: How Did a Regional Merchandiser Adjust His Buy to Avoid Overstock on a Declining Trend Thanks to Heuritech?*, HEURITECH, <https://cdn2.hubspot.net/hubfs/4352661/Case%20study/Case%20study%20Plaid%20Coats.pdf> [https://perma.cc/H28L-9FCH].

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> See *id.*

<sup>277</sup> See *Case Study: How Did Our Client*, *supra* note 264.

<sup>278</sup> See *id.*

with the brand within twelve hours after the runway show.<sup>279</sup> The level of engagement with the accessory was studied: was the product zoomed in on, or was the complete look shown?<sup>280</sup> Such an analysis helped confirm the brand team's intuition regarding which bags would be most desirable to the market.<sup>281</sup>

#### *E. Crisis Management Solutions*

In the age of social media call-out culture, properly navigating a crisis is essential.<sup>282</sup> Chris Giglio, President of HL Strategic Solutions, specializes in reputational management for fashion brands.<sup>283</sup> He has worked with companies to develop thoughtful strategies to avoid being in the headlines for destroying their unsold goods.<sup>284</sup> When interviewed about this topic, he recommended that “going forward, brands need to preempt crises by examining how they function as an organization, as well as the methods used to create products and images. But they also need to be ready to respond quickly and effectively when mistakes happen.”<sup>285</sup> In Burberry's case there was a disconnect between the shareholders and the executives. In Giglio's opinion, the first step in preventing a public relations crisis is to create a nuanced policy regarding the process of disposing of excess inventory.<sup>286</sup> The plan should be realistic as to how the brand and supply chain operates.<sup>287</sup>

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<sup>279</sup> *See id.*

<sup>280</sup> *See id.*

<sup>281</sup> *See id.*

<sup>282</sup> *See* Michael Bérubé, *The Way We Review Now*, 133 PUBLICATIONS MOD. LANGUAGE ASS'N AM. 132 (2018).

<sup>283</sup> *Team Bio Chris Giglio*, HL STRATEGIC SOLUTIONS, <https://www.hlgrp.com/team-bio-steve> [<https://perma.cc/2CRH-BPET>].

<sup>284</sup> One example Giglio disclosed was disposing of airline uniforms. For security purposes, the airline had to destroy the uniforms because the uniforms posed a security risk, such as if someone were to masquerade as an airline attendant or employee. This concern was especially important post 9/11. Today another potential solution could be to shred the uniform and use it for insulation similar to the initiatives set forward by Madewell and FABSCRAP. Interview with Chris Giglio, President, HL Strategic Solutions, (Apr. 25, 2019).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

These policies are often the foundation of corporate social responsibility programs.<sup>288</sup> To develop this strategy, the various teams affected by the issue of destroying unsold goods should meet to identify the options that they have for disposing of unsold goods.<sup>289</sup> Giglio noted that the public will be more sympathetic and reasonable if a brand shows they are taking the initiative to reduce what is destroyed.<sup>290</sup> Specific examples should be provided addressing where the brand would be best to donate, recycle, upcycle, or destroy their unsold stock.<sup>291</sup> In Giglio's experience, brands have the perception that everything can be recycled.<sup>292</sup>

Research should be conducted into the logistics of each category and how it can be applied to the specific brand.<sup>293</sup> After the plan is in place, the next step is to communicate this plan to the public.<sup>294</sup> The internal policy and any public message should be as closely aligned as possible. Giglio observed, "[p]eople will be reasonable, if they think you are being reasonable. People get angry when they think companies are being rash in their decision making."<sup>295</sup> The policy should be easily accessible on the brand's website and user-friendly.<sup>296</sup> A brand should not bury their policy of how they dispose of goods in the legal text of their webpage. Instead, they should be transparent about their practices. Madewell, a clothing retailer, provides a good example of how to create an engaging story around the brand's ethics, initiatives, and manufacturing practices.<sup>297</sup> It is important for a brand to be honest in their message; it is okay for a

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<sup>288</sup> See Patsy Perry, John Fernie & Steve Wood, *The International Fashion Supply Chain and Corporate Social Responsibility*, in LOGISTICS AND RETAIL MANAGEMENT: EMERGING ISSUES AND NEW CHALLENGES IN THE RETAIL SUPPLY CHAIN, 12–14 (John Fernie & Leigh Sparks eds., 2014).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> The Do Well Initiatives section of the website features engaging content about the values and ethics around the brands. It features photographs and content about the various initiatives and practices such as Fair-Trade manufacturing, denim recycling, and sustainable packaging. This is a great example of how to be transparent and educate the consumer in an accessible manner. See *Do Well Initiatives*, *supra* note 226.

brand to say it is a complicated issue for which they are trying to find an adequate solution. The customer will respect the brand if they feel that a genuine effort at solving the problem is attempted.

It is a luxury brand's fiduciary duty to protect its mark, but they can still take solid steps toward protecting the environment and acting in the public interest. By implementing a proactive approach, the brand could be praised for their efforts, rather than vilified. In the case that a brand does find themselves in a crisis, Giglio says, "Don't fear the scrutiny, see it as an opportunity."<sup>298</sup> He recommended that a brand first be quick to reach their customer; second, that the brand be genuine in their message and take responsibility; and third, that a brand stay consistent in their messaging.<sup>299</sup> This will aid in successfully navigating the treacherous social media waters.<sup>300</sup>

#### CONCLUSION

While it has been a common practice for brands to destroy unsold goods, societal norms have changed, and consumers and shareholders no longer accept the practice. Most brands do not consider the detrimental effect that an exposé on incinerating unsold goods might have on their reputation until it is too late. At any moment, a brand's vulnerability can be uncovered. Therefore, given these large risks, it is no longer an option for brands to ignore this issue. As the profile of the future consumer is changing, brands must take a proactive approach in modernizing their practices or risk becoming irrelevant in the eyes of the consumer. It is advised that brands contemplate the solutions presented in this discourse and develop a specific, actionable strategy. A brand should consider what impact they can make in the next six months, in the next year, and five years out, as opposed to making broad sweeping goals. While the implementation of sustainable practices can be overwhelming, a first step can be to identify the waste created during the design process. For the remaining waste, upcycled and recycled options can then be explored. AI applications serve as a sophisticated

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<sup>298</sup> See Interview with Chris Giglio, *supra* note 278.

<sup>299</sup> See *id.*

<sup>300</sup> See *id.*

tool to identify consumer demand for a product after it is shown on the runway.<sup>301</sup> Overall, brands can have the greatest impact by producing less and making more thoughtful design decisions.

Fashion consumers have an extraordinary power to effect change in the industry by demanding a higher standard of ethics and transparency from the brands from which they purchase. Moreover, they too can aid in the effort to reduce waste by rethinking their consumption habits. A consumer should consider the afterlife of the items they purchase and ask themselves: Is that spandex legging worth rotting in a landfill for the next one thousand years?

Meanwhile, media outlets play a large role in shaping and influencing the conversation around fashion waste. This Note urges journalists to look beyond the flashy tagline and dig deeper into the genuine challenges of implementing practices to eliminate the incineration of unsold goods. To date, no one has followed up with Burberry or H&M to inquire about the progress of executing their strategies since their earlier negative press exposure.

Lastly, to government and lawmakers, this Note points out that the negative impact that the fashion industry has on the environment has been recognized, but what actions have these governments and lawmakers taken to hold brands legally accountable? Although an effort to pass laws related to the disposal of textile waste is underway, the lack of enforcement on the ground undermines the notion that there are legislative and regulatory solutions to this complicated problem. France is currently leading the way in unifying government agencies to support common goals of protecting the environment and hopefully other countries, including the United States, will follow suit. The burning question remains: Is the fashion industry a top priority for governments or will it continue to go under-regulated?

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<sup>301</sup> See *supra* Section III.D.