Should Cigarette Advertising Be Banned?

by Douglas J. Den Uyl and Tibor R. Machan

The American Medical Association has recently called for a ban on the advertising and promotion of all tobacco products. A new wave of debate on Constitutional questions and on the nature of advertising is sure to follow and, indeed, has already begun. We intend to sidestep the "public policy" approach and focus instead on what is less discussed: basic moral and political values.

We consider the main values embodied by our Constitution to be basic moral values as well. Central among these values are liberty, limited government, and natural or human rights. We also take it that these values are not subject to majority rule. This point was clearly expressed by the U.S. Supreme Court when it stated in *West Virginia State Board of Education* v. *Barnette* (1943) that

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Our particular issue is commercial speech and its deserved protection under the First Amendment. Tobacco advertising is a clear though controversial example of the principles we wish to address.

Virtually all attacks on liberty, including the liberty to express various viewpoints, ideas, theories, beliefs, appeals, requests, and so forth rest upon a basic moral error. This is the error of confusing basic rights with what is morally or ethically right.

The recent attempt to ban commercial speech about tobacco products is one of the purer examples of this error. If we assume, for the sake of argument only, that it would be right for people to stop smoking, we have, as yet, said absolutely nothing about the rights of the case. It may turn out that forcing people to quit smoking, restricting their access to tobacco products or information about such products, violates their rights. The paradox here is that in the pursuit of what is right, one may do what is morally wrong!

The reason for the paradox is that the particular way in which the "good" (or right thing) in question is pursued may conflict with another good that takes priority. All social moral principles are not created equal. Some are more fundamental than others. What is characteristic of rights is that, almost by definition, they are foundational or basic. Other social values must give way to them in cases of conflict. We can see this in everyday speech. It makes perfect sense to say, "It may not be right for someone to do (or believe) this, but he or she has every right to do so."

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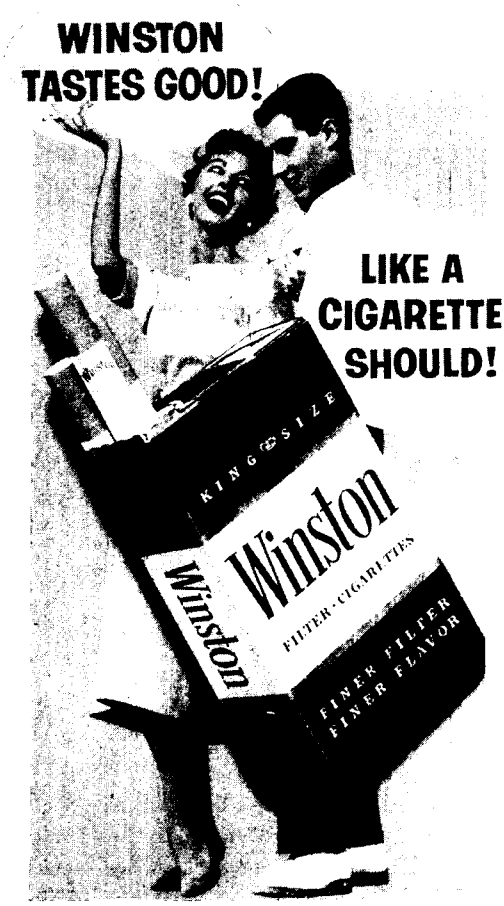

When this ad appeared, the loudest protest came from grammarians, not regulators.

But what rights do we have? Some rights seem to be dictated by common sense. The "right" not to be harmed seems to be one of these rights. If this is a right, shouldn't tobacco products or information about such products be restricted or banned?

Unfortunately, common sense is not always accurate. There is in fact no basic "right not to be harmed." The reason for this is twofold: People can voluntarily undertake risks, and people can have their rights violated without being harmed. In the first case, people voluntarily pursue dangerous activities all the time. They take on dangerous jobs, pursue dangerous sports, drive cars, and so on. What we expect in such situations is that the people involved have some conception of the risks they are undertaking—not that they be free from harm. In the second case, if the government restricts my freedom to speak on behalf of a cause I do not believe in, I have not been harmed, but my rights have been violated. In the end, then, rights and harms are not necessarily connected.

In a similar vein, rights and government have no necessary connection with each other. Some people mistakenly believe that rights are what the government allows us to do. But if this were true, it would make no sense to say that governments can violate people's rights, something they in fact do quite often. Since, as the Declaration of Independence so clearly notes, we are "endowed . . . with certain unalienable rights," we can possess rights that were not given to us by government and which government cannot legitimately take away. The first ten Amendments were designed to protect us from government infringement of rights we were said to possess "by nature."

Basic Rights

The Amendment that concerns us here is the First; but the principle behind all of them is the same: People have basic rights independent of governments. This principle further enforces our claim that a fundamental error occurs when one confuses rights with what is right. For what one discovers about basic rights is that they represent liberties, and liberty implies the possibility of *choosing* a "wrong" course of action as much as a "right" one. This point is clearly evident in freedom of speech cases where many wrongheaded causes and ideas are allowed to have their say with the same degree of legitimacy as those that are closer to the truth. Our basic rights, therefore, must be understood as essentially liberties; and these liberties are given political expression through Constitutional guarantees against government interference.

The main remaining issue here is whether people can have their liberties restricted in the name of "paternalism"—using the power of government to protect us from ourselves. But in a free society, if paternalism has a place at all, it would arise only in cases where information about alternatives was lacking. But clearly such is not the case with tobacco products and their use.

Of course, we are not arguing or conceding that smoking is the "wrong" that must be protected by our distinction. Whether someone's smoking qualifies as wrong conduct is certainly not a simple matter to decide. Even if in some cases it is clearly wrong to smoke, there can be many others when it is not. Yet some certainly regard smoking in this way; and it is useful to recognize that even if one concedes the point about the "wrongfulness" of smoking, no foundation has yet been laid for waiving basic rights or Constitutional protections.

In a recent case, the Federal Trade Commission (FTC) charged the R. J. Reynolds Tobacco Company with running a false and misleading advertisement ("Of Cigarettes and Science") on the health effects of cigarette smoking. The FTC believed the advertisement to be deceptive because R. J. Reynolds had interpreted a government study on the causes of heart disease in a way that was not detrimental to smoking. The FTC lost the case because the judge ruled that the advertisement qualified as noncommercial speech, since no prices, brands, or products were mentioned. Had prices, brands, or products been mentioned, the FTC would have had the power to regulate the advertisement under the limited First Amendment protections granted to commercial speech.

The question arises, however, as to why R. J. Reynolds would not enjoy full First Amendment protection even if it had mentioned its own products?

In the last few years, the courts have given commercial speech secondary status with respect to First Amendment protection. Although the courts clearly protect the right to advertise, they nevertheless subject advertisers and producers to the myriad of government regulations.

The secondary status of commercial speech is the inevitable result of trying to reconcile free speech with a regulated economy. But this reconciliation is conceptually unstable. It assumes, on the one hand, that economic activities can be divorced from communication and information about such activities. Since these two cannot be separated, the right to free speech is compromised in an attempt to retain the government's power to regulate voluntary economic transactions. On the other hand, the reconciliation assumes that the right of free speech applies to some categories of speech and not others. Commercial speech needs to be wrenched from other forms of speech to make this argument fly, yet no logical and legal ground can be found for this in the U.S. Constitution.

"Private" vs. "Public" Speech

The main way of trying to separate commercial from noncommercial speech is to argue that the latter is "public" speech while the former is "private" because it serves some private interest. This distinction is used to argue that the court has gone too far in allowing First Amendment protection of commercial speech. The First Amendment, these critics claim, was meant to cover cases of public speech, not private. They would agree with us that it is incoherent to grant commercial speech only partial protection; but their solution is to afford commercial speech no First Amendment protection at all!

The distinction between public and private speech is simply not viable. In the first place, it is typical for those who object to First Amendment protection of commercial speech also to fail to object to government regulation of the economy. But if economic matters were purely private, the government could have no "public" interest in regulation, and it is the supposed public interest of government in economic regulation that refutes the claim that commercial speech is a purely private affair.

In addition, those who speak are seldom, if ever, as disinterested as the concept of "public" speech would lead us to believe. Groups which have causes to advance in the name of the "public interest" have at stake precisely the same things as corporations do in their advertisements: organizational growth, jobs, visibility, competitive advantage (relative to other groups with a cause), and the like. Individuals, too, seldom make disinterested public pronouncements, especially on controversial issues of public policy (e.g., taxes and zoning changes). If the First Amendment is not designed to protect self-interested speech, there is precious little that it does protect.

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Finally, speech, by its very nature, is public, since it is communication. And advertising is most certainly public, because it is addressed not to particular individuals, but to unknown members of the public. We should abandon the distinction between private and public speech and accord commercial speech the same full First Amendment protection given to all speech.

Does it now follow that advertisers can make any false or fraudulent claim they wish about their products? The answer here is no, because there is a significant moral difference between making a promise and expressing a belief. The informational components of advertisements can plausibly be construed as an initial statement of terms between seller and buyer. This is why it is legitimate to hold advertisers accountable to some degree for the truth of their ads. Expressions of belief, on the other hand, do not function like promises, because no one is called upon to deliver a good according to stated terms. No one has the right to defraud another. But to say that hardly justifies intrusive governmental regulation of commercial speech.

If the R. J. Reynolds advertisement had included accurate product information, the ad could not be held morally and legally culpable. The court should have ruled in Reynolds' favor, even if they had included product information as part of the advertisement. The court's attempt to dodge the issue by calling the Reynolds advertisement "noncommercial" may have been convenient, but it leaves commercial speech vulnerable to attack by foes of liberty.

In this respect, the court has strayed even wider of the mark in its recent ruling in *Posadas,* a case that arose in Puerto Rico in which once again the court distinguished between commercial and other types of speech, a distinction that is inexcusable despite the specious claim that the "original intent" of the First Amendment was to cover only political speech. In fact, however, the precise *meaning* of the First Amendment concerns any kind of speech whatever, and a law must be interpreted to mean what it says—legislative intentions are too diffuse and varied for us to be guided by them.

It is true that the First Amendment does not unequivocally grant protection to commercial

speech, but that is irrelevant—it certainly does not bar such protection either, just as it does not bar protection for religious, philosophical, ideological, poetical, or any other special kind of speech.

If this is not sufficient, as it should be, we should also recall here the Ninth Amendment which says that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This Constitutional provision can only be understood as wisely extending protection to many matters not explicitly mentioned or foreseen by the Founders. So when the First Amendment is coupled with the Ninth, one must assume that commercial speech is still speech and hence Constitutionally protected. When we also add to all this that the Fourteenth Amendment requires that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws," it becomes clear that a ban on any kind of honest advertising would constitute a form of discrimination against people in business vis-à-vis other professions, activities, and forms of speech. In short, the principles embedded in the Constitution clearly favor the argument for full Constitutional protection of commercial speech.

Nevertheless, the argument persists and is a simple one: Cigarettes are "lethal" products while the images conveyed by cigarette ads in no way convey this danger—indeed the opposite message is conveyed. The consumer is therefore deceived into believing that cigarette smoking is acceptable, attractive, or without risks and hazards. This argument, however, is nothing but a version of the old shibboleth that advertising itself is inherently deceptive.

Advertisements are said to be inherently deceptive because they "selectively emphasize" certain features of a product to make the product appear more attractive. Since this technique ignores or de-emphasizes other features, the consumer is deceived. The moral conclusion many draw is that since advertising is deceptive, and deception is morally wrong, advertising is morally wrong.

But the case for "generic deception" depends upon there being something wrong with presenting something in a positive light and upon the likelihood that people are unaware of the type of message being delivered. Neither condition can be satisfied.

There is nothing wrong with presenting something in its most attractive light. We do this all the time. On our resumés we do not list the jobs we lost or the failures we had. In our personal grooming we take care to look attractive and hide our "flaws." As to the nature of the message, what is generic to advertising is precisely the effort to present something in its most attractive light. Since attractive presentation of information is virtually what we mean by an advertisement, it is nonsensical to claim generic deception when one confronts an advertisement. Selective emphasis does not violate the canon of truthfulness *per se,* because the basic truth conveyed by advertising is that when you see it you expect to see the item portrayed in its best light. And surely there are (some) attractive people who use tobacco products.

After examining basic moral and Constitutional values, one is forced to conclude that the tobacco industry is on the side of principle in its opposition to the AMA. It is obvious that banning or restricting commercial speech about tobacco products ignores basic rights and liberties and opens the door to further coercive control of speech.

What is perhaps less obvious is the damage already done. That Congress and the media could take a proposal like the AMA's seriously, and indeed that well-educated medical professionals could be so completely ignorant of the meaning of liberty, signifies a national crisis of understanding of our own heritage of political liberty. Furthermore, the *ad hoc* attitudes of the present Court concerning commercial speech offer little hope that this crisis will be remedied from this quarter.

Yet in the end, what disturbs us most is how insulting all this is. Despite continual subjection to claims about the evils of tobacco, we are being told that we are too incompetent to make up our own minds about these products. The damage that has already been done is reflected in the fact that we take such insults on a daily basis. Let us reverse the trend and identify the insult as just that. It is a first, but necessary, step in preventing the world from filling up with fools. □

The Ancient Suicide of the West

by Nicholas Davidson

I. Interpreting the Decline of Rome

The fall of the Roman Empire remains one of the great unsolved riddles of history.[1] Rome rose from obscurity to dominate the ancient world until it became practically synonymous with civilization itself. Yet a few centuries later its terrified survivors, decimated by disease, famine, and infertility, eagerly laid their necks beneath the swords of barbarian conquerors. Why?

Edward Gibbon, who set out to solve this riddle at the time of the American Revolution, had yet to find any but the vaguest of answers by the end of the six volumes of his great work, *The History of the Decline and Fall of the Roman Empire*. By answering the riddle of the fall of Rome, Gibbon hoped to discover whether modern European civilization might be threatened by a similar fate. Precisely because the riddle remains unsolved, Gibbon's *History* remains the standard work in its area—a unique situation in the field of history, where obsolescence overtakes most works within a few years of publication.

Despite his high reputation, Gibbon was something of a plodder, and his work is full of repetition and the sacrifice of concept to narration: a touchstone of English usage in its few inspired moments, a valuable source even today, but scarcely a model of analytical clarity. At the end of his study of the fall of Rome, Gibbon concluded that modern civilization, unlike Rome, was too complex to fall, without adequately specifying what the conditions for that complexity might be.

Gibbon's vagueness has inspired a seemingly endless stream of alternate explanations. After reviewing the same general evidence, scholars have come to the most diffuse and frequently the most farfetched conclusions.

A classic example is F. W. Walbank's account of the decline of Rome, *The Awful Revolution*. While his narrative is elegantly constructed and factually reliable, his conclusions are less convincing. Walbank argues that the lessons of the decline can guide us in the present. "Having learnt the lessons of that 'awful revolution', we can more advantageously devote our passions and our energies to the amelioration of what is wrong in our own society." What are these "lessons," according to Walbank? He describes in detail the coercive economic actions of the Roman state and then concludes that "private enterprise, left to itself, was proving unequal to the task of feeding the civilian population." The fall of Rome is attributed to insufficient government planning. We must, he writes, "attempt to plan the resources of modern society for the whole of its peoples." Every misguided state action that hastened the fall of Rome—family policy, industrial policy, wage and price controls—is trotted out by such supremely accomplished scholars as Walbank as a remedy for modern ills.[2]

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