
Advertising Bans

Administrative Decisions

or Matters of Principle?

John Gray

occasional papers

THE CENTRE FOR
INDEPENDENT
STUDIES

THE CENTRE FOR INDEPENDENT STUDIES

The Centre for Independent Studies in Australia and New Zealand is a non-profit independent economic and social research institute concerned with the principles underlying a free and open society. Much of the Centre's research is concerned with economics and in particular the role of the market and the price mechanism in registering individual preferences and allocating resources. Emphasis is placed on the potential role of voluntary processes in providing the services normally supplied by the compulsory methods of government.

An essential requirement for a healthy free society is that the development of ideas be unconstrained by fashion, orthodoxy or the 'politically possible' and that it takes place within society at large rather than being monopolised by the public sector or other dominant group. In encouraging competition in ideas, the Centre for Independent Studies:

- commissions and publishes research studies in a variety of formats
- sponsors conferences and seminars on topics of current and continuing public concern
- makes the results of its studies available to the general public.

The research work of the Centre is assisted by a Council of Advisers.

Membership of the Advisory Council includes:

Professor H.W. Arndt
Professor Ray Ball
Professor R.J. Blandy
Professor Geoffrey Brennan
Professor Lauchlan Chipman
Professor Kenneth Clements
Professor David Emanuel
Professor Malcolm Fisher
Professor R.M. Hartwell

Professor Warren Hogan
Professor Wolfgang Kasper
Professor Kenneth Minogue
Professor R.R. Officer
Professor Ross Parish
Professor C.G.F. Simkin
Professor Peter Swan
Professor Geoffrey de Q. Walker

The Centre is financed by sales of publications, and by voluntary subscriptions and contributions from individuals, organisations and companies.

Executive Director
Greg Lindsay

Editorial Director
Michael James

Orders for publications and subscription enquiries should be addressed to:

The Centre for Independent Studies

PO Box 92, St Leonards,
NSW 2065, Australia
Telephone (02) 438 4377
Fax (02) 439 7310

Post Box 5776, Wellesley St,
Auckland, New Zealand
Telephone (09) 307 0933
Fax (09) 307 0948

Advertising Bans

Administrative Decisions or Matters of Principle?

Advertising **Bans**

Administrative Decisions or Matters of Principle?

John Gray

THE CENTRE FOR
INDEPENDENT
STUDIES

1992

Published December 1992 by

The Centre for Independent Studies Limited

All Rights reserved.

Views expressed in the publications of the Centre for Independent Studies are those of the authors and do not necessarily reflect the views of the Centre's staff, Advisers, Trustees, Directors or officers.

National Library of Australia

Cataloguing-in-PublicationData:

Gray, John, 1948-

Advertising bans: administrative decisions or matters of principle?

Rev, ed.

Bibliography

ISBN 0 949769 83 5.

1. Advertising - Censorship - Australia. 2. Advertising - Censorship - New Zealand. 3. Advertising laws - Australia. 4. Advertising laws - New Zealand.
- I. Centre for Independent Studies (Australia).
- II. Title. (Series : CIS occasional papers ; no. 42)

323.440994

© 1991, 1992 Social Affairs Unit

Printed by Lindsay Yates & Partners

Contents

FOREWORD <i>by David Flint</i>	<i>vi</i>
ABOUT THE AUTHOR	<i>viii</i>
EDITORIAL NOTE	<i>viii</i>
CHAPTER 1	
THE THREAT TO FREEDOM OF COMMERCIAL SPEECH	
SOME RESTRAINTS ON COMMERCIAL EXPRESSION	2
MARKETS AS 'ENABLING DEVICES FOR CHOICE'	3
WHY MARKETS NEED ADVERTISING	4
THE PATERNALIST CRITIQUE OF ADVERTISING	5
CHAPTER 2	
THE CASE FOR FREEDOM OF EXPRESSION	
J.S. MILL AND THE PROPOSED ADVERTISING RESTRAINTS	6
MANIPULATIVE AND EMOTIVE ADVERTISING	7
THE UNMALLEABLE CONSUMER	9
ADVERTISING AND DIVERSE EXPRESSION	10
ADVERTISING PROHIBITIONISM HARMS THE CONSUMER	10
THE PARALLEL WITH POLITICAL SPEECH: HOBBS AND CENSORSHIP	11
LIBERAL DEMOCRACY AND CONSUMER SOVEREIGNTY	11
POLITICAL, RELIGIOUS, COMMERCIAL EXPRESSION NOT DISTINCT	13
CHAPTER 3	
ANTI-ADVERTISING AND THE NEW PURITANISM	14
HAYEK AND FREEDOM OF COMMERCIAL EXPRESSION	15
SHIFTING RESPONSIBILITIES TO THE STATE	16
THE DANGERS OF GOVERNMENTAL LINES	18
CHAPTER 4	
ADVERTISING PROHIBITIONISM, CENSORSHIP, AND THE DEFENCE OF FREEDOM	20
THE NEED FOR RESTRAINT IN ADVERTISING AND IN POLITICAL EXPRESSION	21
THE NEED FOR <i>MORE</i> ADVERTISING — IN EX-COMMUNIST COUNTRIES	22
THE SLIPPERY SLOPE TO THE LOSS OF FREEDOMS	22
REFERENCES	24

Foreword

John Gray's brilliantly succinct discussion of advertising bans, adapted for Australia and New Zealand by the Centre for Independent Studies, should be the subject of lively debate and discussion. Its timing could hardly be more appropriate. Justice John Toohey recently incurred the ire of some politicians by arguing, in a paper delivered in Darwin on 5 October 1992, that when the Australian people adopted their Constitution, they did not intend that the powers they had granted to the Commonwealth Parliament extended to an invasion of fundamental common-law liberties. Justice Toohey's comments should surprise no one. It is hard to believe that the Founding Fathers intended, for example, that Parliament should have the power to introduce slavery or impose torture as a form of punishment.

The context of Justice Toohey's remarks was supplied by the High Court's recent ruling on the Political Advertising and Industrial Relations Commission Cases. In essence, the Court ruled that there is a constitutionally implied freedom of communication, at least in relation to public affairs and political discussion. The two decisions are restricted to political free speech; this book is about commercial free speech. However, John Gray is at pains to argue against the distinction between the two. Indeed, this distinction seems to be a comparatively new development. Although no such distinction was expressly made in the First Amendment to the United States Constitution, the Supreme Court has in recent years granted less protection to commercial speech.

A clear demarcation between the two cannot always be made. Of course, some advertising will obviously be political. Australia's Political Advertising Ban Case demonstrates this. The seminal judgment of the US Supreme Court that established the 'public official' (subsequently 'public figure') defence in defamation, which has so liberated the American press, was itself based on an advertisement, one about civil rights (*New York Times Co. v. Sullivan* [1964] 376 US 254).

In discussing the difficulties of establishing such hierarchies of speech, John Gray poses the underlying question: *If* ordinary people are to be trusted with the selection of their rulers, why should they be denied freedom of commercial choice? Arguing that political and economic choices cannot be compartmentalised, he insists that liberal democracy and consumer sovereignty are intertwined. It is a fallacious belief, he says, that there is a distinct sphere of human life, that of economic order, in which what we want is security rather than freedom.

Freedom of lifestyle is as much threatened by restriction on commercial speech as by direct government control of our personal and cultural lives. Dr Gray warns that restrictions proposed by exponents of the new puritanism would shift the burden of responsibility from the individual to the state, thus imposing on the individual their own values, judgments, and concep

ADVERTISING BANS

tions of the good life. Lest it be feared that the alternative would be an open slather in advertising, it is generally accepted that, as with political speech, there have to be some restrictions. Dr Gray enunciates this clearly by stating that 'in advertising, no one questions the desirability of a regulatory framework for the restraint of the mendacious and the fraudulent or the necessity of prohibiting the advertisement of narcotics'.

This book is a reminder to us that well-intended measures to deal with problems in our society should always be open to judicial review to ensure that they do not unnecessarily encroach on our fundamental rights. The High Court has, in the past, protected Australians from the forced dissolution of the Communist Party, from wholesale nationalisations, and now from the political advertising ban and legislation that made criticism of the Industrial Relations Commission, justified or otherwise, an offence. The Court, by acting as a bulwark of liberty protecting us from excesses never intended by the Founding Fathers, is fulfilling its duty.

David Flint

About the Author

Dr John Gray is a Fellow of Jesus College, Oxford. His books include *Mill on Liberty: A Defence* (1983), *Hayek on Liberty* (1986), *Liberalism: Essays in Political Philosophy* (1989), *Limited Government: A Positive Agenda* (1989), and *The Moral Foundations of Market Institutions* (1992). His publications for the CIS include contributions to *Ideas about Freedom: A Discussion* (1986) and *Traditions of Liberalism* (1988).

Dr Gray undertook work on this paper during a period of residence as Stranahan Distinguished Research Fellow at the Social Philosophy and Policy Center, Bowling Green State University, Ohio, USA.

Editorial Note

Advertising Bans: Administrative Decisions or Matters of Principle? was originally published in 1991 by the Social Affairs Unit. The Centre for Independent Studies is grateful to the Social Affairs Unit for permission to publish this amended version, for which the CIS accepts full responsibility. Thanks are due also to Alan Dormer for supplying information on advertising bans in New Zealand.

The Social Affairs Unit (75 Davies Street, London W1Y 1FA) is a research and educational trust committed to the promotion of lively and wide-ranging debate on social affairs. Titles of related interest include Digby Anderson (ed.), *A Diet of Reason and Drinking to Your Health*; James McCormick & Digby Anderson, *Risk, Health and the Consumer, Health, Lifestyle and Environment* (produced in cooperation with the Manhattan Institute); and Mark Bentley & Mai Fyfield, *Advertising Bans: Consequences for Consumers*.

Chapter 1

The Threat to Freedom of Commercial Speech

One of the most characteristic features of our age is that, as artistic and cultural freedoms have expanded, freedom of commercial expression has tended to shrink. At the same time that playwrights, novelists and film-makers reject any restraint on their freedom to challenge established mores and beliefs, advertisers find themselves subject to ever more restrictive regulations regarding which products they may promote, and the conditions of their promotion. In the cultural sphere, the prevailing demand is for a freedom of expression that is wholly unfettered by traditional or popular moral standards. In regard to commercial expression, the conventional wisdom is very different, if not opposite: freedom in this sphere of human activity is to be restrained by paternalistic and moralistic criteria whose relevance to the arts would be at once denied. So it is that, as cultural freedom waxes, freedom of commercial expression wanes. It is to this paradox that the present paper is addressed.

The current trend of policy is genuinely paradoxical, because the same philosophical considerations which support freedom of expression in the arts enjoin freedom of commercial expression. To be sure, freedom of expression can in neither sphere ever be absolute or indefeasible; but it is the same human freedom that is at issue, nevertheless. Freedom of expression in the arts and freedom of expression in advertising are not two categorically different things, subject to different standards and having different justifications; they are the same freedom, exercised in different contexts, with the same justification. The philosophical reasonings which justify freedom of expression in culture and the arts apply with no less force to commercial speech and expression.

That this conclusion goes against the grain of current opinion tells us more about the spirit of the age than it does about the logic of the argument. It is distinctive of our age that the practical freedoms of the market are regarded as somehow less worthy than the imaginative and intellectual freedoms of the arts and the sciences, and so less in need of protection. For, to begin with, no sphere of 'purely practical', or 'merely economic' freedoms exists, or can be carved out. The freedoms we exercise in our everyday activities, and in the marketplace, are not a separate category of liberties, pale shadows of the liberties we exercise in the arts and in the life of the mind: they are, very often, the very same liberties, exercised in a different context. Further, current opinion neglects the fact that advertising itself embodies the intellectual and cultural freedoms — freedom of inquiry and of lifestyle — that are rightly protected from censorship and control in the arts. Accordingly, freedom of expression is not to be disaggregated into radically distinct spheres, with

some forms — such as freedom of commercial expression — being singled out for special restraint and regulation. On the view developed here, this is a mere prejudice, with nothing in philosophy to support it. On the contrary, though we recognise that freedom of expression can never be absolute, it is nonetheless indivisible: our freedom is as much threatened by unjustified restraint of commercial expression as it is by censorship of the arts.

Some Restraints on Commercial Expression

The conventional wisdom has a blind spot when it comes to threats to freedom of commercial expression. Cigarette advertising on radio and television has long been prohibited in Australia under the Broadcasting and Television Act 1976 (Cwth); federal regulation extended the ban to cover all forms of tobacco in 1989. The following year the prohibition was made almost complete; the Smoking and Tobacco Advertisements (Prohibition) Act banned tobacco advertising in the print media from 28 December 1990. Finally, on 1 April 1992 a ban was announced on new contracts for tobacco sponsorship of sport; a complete ban on advertising through sponsorship would come into effect at the end of 1995. As well, legislation was foreshadowed to ban all remaining non-sponsorship tobacco advertising (other than point-of-sale advertising) from 1 July 1993. Meanwhile in New Zealand, the Smokefree Environments Act 1990 prohibits the advertising of tobacco products in print and electronic media produced in New Zealand; point-of-sale advertising is to be banned from 1995.

Restrictions on freedom of commercial expression are beginning to spread to products other than tobacco. In the European Community, the Social, Health and Family Committee of the Council of Europe's Parliamentary Assembly passed a report in May 1990 calling on the Council of Ministers to enact a total ban on all advertising of alcohol. Again, Britain's Broadcasting Directive of 1989 prohibits the advertisement of prescription medicines on television. Within the European Community, analogous proposals are under consideration by working groups of the Council of Europe. None of these proposed restrictions on freedom of commercial expression has been perceived by opinion formers as constituting a significant threat to freedom.

It has yet to be grasped that these proposals involve the same curtailment of individual choice, and the same limitation of freedom of information, that is rightly condemned by defenders of free expression in other spheres of social life. It is curious that critics of moralistic censorship of the arts, and opponents of paternalistic interference in personal life, should fail to recognise these encroachments on freedom, when they come in the form of restraints on advertising. It will be my argument, in fact, that those who seek to impose burdensome restrictions on commercial expression on the ground that people need protection from the opportunities for choice that it creates, are deploying the same authoritarian and illiberal arguments used by reactionaries and censors

against freedom of religious, political and artistic expression since at least the 17th century. The case for freedom of religious, political and artistic expression is all of a piece with that for freedom of commercial expression. Those who deny the importance of free commercial expression, whether they know it or not, commit themselves to devaluing free expression as such.

The slippery slope from bans on commercial expression to bans on political expression has been illustrated in Australia, where, almost a year after the prohibition on tobacco advertising in the print media came into force, the federal government legislated to restrict political advertising in the electronic media during election campaigns. The Political Broadcasts and Political Disclosures Act 1991 restricted political advertising in federal and State election campaigns to the few daily minutes of free time that commercial television stations and ABC radio and television were required to make available; in the case of local government, the ban was total and operated for 33 days before elections and by-elections. These restrictions were widely opposed and in 1992 were successfully challenged in the High Court, which ruled that the Australian Constitution contained an implied guarantee of free political speech. In contrast, the ban on tobacco advertising has been generally accepted; and its affinity with the restrictions on political advertising has gone unremarked.

Markets as 'Enabling Devices for Choice'

The indispensable functions of advertising in market economies are easily demonstrable. It is, perhaps, the most important function of the market process that it economises on the scarcest resource of all — human knowledge — by embodying in prices otherwise unobtainable information about preferences and relative scarcities. The conception of the market, dominant in mainstream economic theory, as an institution for the allocation of scarce resources to competing ends, fails to capture the most important function of market institutions and processes. Available resources and preferences as to their uses are known to no one: information about them is scattered about in society, in millions of heads, often in the form of skills and entrepreneurial insights that are not easily articulated. The role of the market, at its most fundamental, is to act as a discovery procedure for relative scarcities and preferences, otherwise knowable to no one in their complexity and entirety, which are then embodied in prices. The price of a good in the free market enables producers and consumers to make their decisions without engaging in the impossible task of collating all the dispersed knowledge that is expressed in the good's price (information that is easily dated, and whose ephemeral character is reflected in price changes).

Without market pricing, neither consumers nor producers will be able to make a rational allocation of the resources at their disposal. It is the achievement of economists of the Austrian School, such as von Mises and

Hayek,¹ to have grasped that successful central planning of the economy is an epistemic impossibility, in that it presupposes on the part of the central planning board knowledge it cannot possibly possess. This is an insight, even now not fully absorbed by mainstream economic theory, that the collapse of the communist regimes, together with the revelations of *glasnost* about the ruin of the Soviet economy, have dramatically corroborated.

Both theory and practice point to a conception of the market economy as the necessary condition of prosperity in the modern world. At the same time, the epistemic function of the market in putting to use information that cannot be subject to central collection points to it having a deeper role than sheer wealth creation. By presenting consumers and producers with prices that reflect the ever changing scarcities and preferences throughout an economy known in its totality to no one, markets act as enabling devices for choice. Without the constraints and opportunities disclosed by market prices, neither producer nor consumer can make anything resembling a rational choice in their economic lives: they will have to make a leap in the dark, or else make do with what comes their way.

Why Markets Need Advertising

It is only when we have seen the role of markets as epistemic devices for facilitating choice that we can come to appreciate the indispensable functions of advertising in a free economy. For, though it is essential to rational decision-making in the economy, market pricing of goods is far from sufficient as an enabling device for choice. It leaves the consumer ignorant of the distinctive qualities of the product and thereby of its comparative standing in respect of competing products. The case for freedom in advertising is here a direct application of the argument for free markets that appeals to their functions in engendering and rendering available for use information that would otherwise not exist, or which would be wasted. Without advertising, the epistemic role of the market is inevitably compromised and diminished. It is in this way that one of the principal functions of advertising is to be found: its function as a facilitator of choice among a range of products of whose distinctive features the consumer is otherwise unavoidably ignorant.

Advertising, together with market research and related activities, acts as a vital intermediary between producer and consumer. If market pricing encapsulates in a single signal a range of information that would without it be irretrievably dispersed, and so unavailable for use in decision-making, the indispensable complement to market pricing is provided by advertising, which focuses on the qualities of the product itself. Indeed, in the absence of advertising, the consumer would inevitably remain ignorant, not only of many of the features of specific products, but also (and perhaps even more

1. I have examined these Austrian arguments for the epistemic functions of market institutions in Gray, 1986:34–41, and Gray, 1989a:173–5.

significantly) of the range of products that are available. In providing this link between producer and consumer, advertising is inherently choice-enhancing. By enlarging the consumer's knowledge of the products available to him, it enlarges the options open to him and so enriches his freedom.

The evidence of both theory and history suggest that, in the modern world, only the institutions of the free market can foster wealth creation and promote prosperity. Only these institutions permit the knowledge that is scattered throughout society to be put to rational use via the price mechanism. Yet the ethical standing of the market does not, in the end, depend on its delivering the goods in terms of material prosperity (vital as that is). The ethical standing of the market rests instead on its contribution to individual freedom through the enhancement of choice. Among the institutions that go towards making a functioning market economy, advertising is one of the most important and most neglected. Without the information supplied by advertising, consumer choice is impoverished. And, insofar as advertising is subject to ever more stringent regulation and restriction, consumer choice is progressively curtailed.

The Paternalist Critique of Advertising

As against these arguments, a case is made by critics of advertising that its contribution to consumer choice and so to individual freedom may be superficial or even delusive. According to such critics, advertising is rarely purely informative, but rather emotive: it does not appeal to the reason, but instead works upon the passions. With respect to some products — alcohol and tobacco products, for example — advertising tends, they say, to promote habits of consumption that are injurious to the health, and so detrimental to the best interests, of the consumer. In these areas, if not also in others, freedom of commercial expression should therefore be curtailed. More radically, some critics of advertising maintain that it has the tendency to implant wants where they did not hitherto exist. The burden of all these criticisms is that the contribution made to individual freedom by advertising is illusory or else exaggerated, and its ethical standing correspondingly weak.

Such arguments, if they had any force, would also tell against the traditional case for freedom of expression in religious, political and cultural spheres. They are, in essence, paternalist arguments, which deny that most people are sufficiently mature to make responsible choices based on an unrestricted access to relevant information. Such arguments have been deployed by illiberal thinkers throughout the ages. It has always been the aim of defenders of freedom to show that the fears expressed in these arguments are baseless or inflated. It is the goal of the classical defences of freedom of expression to show that it strengthens, rather than weakens, individual responsibility, and that it is an essential, not an accidental, aspect of individual freedom itself. It is to a classical statement of this argument for freedom of expression, and to its latterday implications for commercial expression, that I now turn.

Chapter 2

The Case for Freedom of Expression

In his celebrated essay *On Liberty*,² J. S. Mill advances four arguments in favour of freedom of expression. First, he maintains, to suppress any opinion as certainly false is to assume our own infallibility: for all we know the opinion that has been silenced may be true. Second, though the opinion silenced may be an error, it may, and often does, contain a grain of truth; and, given that the prevalent opinion on any subject is rarely or never the whole truth about it, it is only by allowing such part-truths as contenders in the collision of opinions that the rest of the truth will emerge. Third, even if the conventional wisdom on any subject were the whole truth about it, it will not be the subject of rational belief unless it is assented to after a contestation by rival views. And, fourth, and lastly, even a wholly true doctrine will be held as a lifeless dogma, unless it is maintained in its vitality by criticism and contestation.

These arguments of Mill's are part and parcel of his general argument for individual liberty.³ This may be summarised, briefly, in the thesis that the conditions of human well-being are many and varied; they can be discovered, or provisionally identified, only by a process of trial and error; and for this last purpose a regime of individual liberty is indispensable. Accordingly, Mill wishes to restrict the coercive authority of law to conduct which is demonstrably harmful to others, or which has a tendency so to be. In particular, Mill rejects legislation which seeks to impose on people moral standards they do not themselves avow, or which removes from them responsibility for behaviour which risks harming them. Such moralist or paternalist legislation, Mill maintains, denies people the responsibility over themselves, without which they cannot develop as free men and women.

J. S. Mill and the Proposed Advertising Restraints

There is much that is faulty in Mill's argument, and so much that can be improved upon.⁴ Nevertheless, it has a direct relevance to current debate about freedom of commercial expression.⁵ Consider proposed restrictions on (and, indeed, the proposed prohibition of) the advertising of tobacco products. Such proposals run afoul of Mill's seminal statement of the case for

2. For a new edition of this essay of Mill's, see Mill, 1991.

3. I have examined Mill's argument for liberty in Gray, 1983.

4. I have criticised Mill's argument in Gray, 1989a: ch. 12, and Gray, 1991.

5. The relevance of his argument for freedom of expression to commercial expression is not noted by Mill, and might indeed be denied by him. On the inconsistencies of Mill's argument, see Gray, 1989a: ch. 12.

free expression at every point. First, they are based on assessments of the health ~~risks~~ of smoking that remain controversial, and in respect of which there is bound always to be a significant margin of error and uncertainty. If, as some recent research suggests,⁶ the link between cigarette smoking and lung cancer is less than conclusive, a ban on tobacco advertising that is based on such a link may in fact be injurious to the health of smokers, in that it may cause them to neglect other aspects of their lifestyles (such as overall consumption of fat) which may be more directly implicated in cancer. In any case, the Millian point remains: a ban on tobacco advertisements presupposes that we have the final truth on the health effects of smoking, when in truth we do not. This is a particularly important point, given the political fact that, once a ban on tobacco advertising is imposed, it becomes an accepted feature of the regulatory environment, and so is very difficult to rescind, even if the balance of the evidence shifts.

Second, they transfer the responsibility for making an assessment of the risks from the responsible individual to the state. Implicitly, they thereby deny the capacity of the individual to make a reasonable evaluation of the relevant risks on the basis of the information that unrestricted expression would make available. This is an implication with far reaching consequences for freedom of expression in other, non-commercial spheres of social life.

And third, they deny to the individual the freedom to trade off risks for other benefits — a freedom still (for the moment, at any rate) accorded to us when we choose to engage in dangerous sports, for example. Restrictive or prohibitionist policies on the advertising of tobacco products, arguably, are grossly illiberal, in that they deny our standing as free, responsible individuals capable of making our own choices, and tend to effect a progressive collectivisation of decision-making and of responsibility in which the sphere of individual liberty is ever more reduced.

Manipulative and Emotive Advertising

Most generally, the arguments for and against freedom of commercial expression are all applications of the argument for and against freedom of expression in the arts, the sciences, and political life. They are arguments about freedom of expression *tout court*. Consider the argument that advertising appeals to the emotions, not to the reason, and is never purely informative. Is not this true, and notably true, of religious and political speech? Neither political speech nor religious speech is a species of abstract argumentation, a dry reasoning that at no point engages our interests and emotions. On the contrary, both religious and political speech are directed to our interests and passions, and have as their aim to make a real difference

6. The low rates of lung cancer in Japan, where tobacco smoking is common, together with the low fat intake there, suggest that the link between smoking and lung cancer is more complex than is often supposed. My point here, however, is not to advance any substantive view, but simply to observe that the evidences may be less unequivocal than many anti-smoking advocates allow.

in our practical lives. As such, both religious and political speech are inherently hazardous, their impact on our lives highly unpredictable, and their ultimate consequences unknowable. Yet, except in limiting cases, we do not see these inherent risks and dangers of freedom of religious and political speech as reasons for restricting it: we see them as the price we cannot avoid paying for freedom of expression.

Nor do we see religious and political speech as defective approximations to an ideal of purely informative discourse. We see them for what they are — exercises in practical reasoning having definite purposes and characteristics, which do not pretend to be other than they are. The practical character of religious and political expression, which is shared by advertising, is one that is not easily transcended, and does not, in any case, constitute a flaw in advertising that stands in need of remedy. The expressive activities of many consumer and advocacy groups can scarcely be termed purely informative, reflecting as they often do perspectives on the world and value-judgments that are distinctive, controversial and not always explicitly avowed. Considered as an activity, advertising, in fact, compares favourably with many other forms of expression whose practical purposes and character are often denied or concealed, in that it makes no secret of its objective of making a profit for the producer by securing a greater market share for his product. The general point to be made here, however, is that if its practical character were to be invoked as a reason for restricting commercial expression, then the same restrictions could justifiably be imposed on religious and on political expression.

Consider the arguments deployed against religious toleration by its opponents in the 16th and 17th centuries. Toleration of deviation from religious orthodoxy would, it was said, only allow the unscrupulous to tempt the weak down the path of error. In respect of religious belief — surely one of the most fundamental among anyone's commitments — most people were simply too feeble-minded, too prone to manipulation, to be trusted. Leaving them open to a cacophony of competing communions and their rivalrous prophets would only overload their capacities for thought and choice and plummet them into hopeless confusion. The picture of human nature animating these prognostications is that (at least as far as the great average of the species is concerned) human intelligence is too frail a thing to be relied upon unchecked in matters as important as religion. It is, for this reason, in the best interests of most of us, if freedom of religious expression is curtailed. A very similar picture of ordinary human nature animates much of the contemporary movement to restrict advertising. In it, the robustness and shrewdness of the consumer is denied or underrated, and he is represented as a flux of malleable whims, wide open to manipulation and exploitation. Accordingly, it is averred, advertising can implant desires where none existed before, it can induce addictions or generate compulsive habits, and it can undermine the common sense of

the average consumer. By flooding him with opportunities for choice, and by working on his irrational appetites, advertising reduces the independence of the individual (in this fashionable view) by corroding the rationality of his choices. It is therefore in the consumer's best interest that advertising freedoms be curtailed.

It is obvious that this argument cuts against one of the most basic premises of the Millian position, and of liberalism itself — that, except in limiting cases it is typically the individual, and not any political or bureaucratic authority, that is the best judge of his interests. In a Millian perspective, the danger against which we should guard is that of transferring responsibility for choice from individuals in all their innumerable diversity to a handful of regulators that will probably be dominated by a conventional wisdom that is itself a tissue of half-truths and fashionable errors. We are on firmer ground if we follow Mill by allowing the host of individuals to make their own trials and errors, to listen to and assess the diversity of views on the risks and benefits of alcohol (say), and then to make their own responsible choices.

The Unmalleable Consumer

The picture of human nature which animated the critics of freedom of religious expression was defective: it did not allow for the possibility, in most parts of Europe now an historic achievement for several centuries, that freedom of religious expression would yield, not chaos or civil strife, but instead peaceful toleration. The vision expressed in Milton's *Areopagitica*, in which the liberty of unlicensed printing is defended against censorship by invoking the preconditions of the unfettered search for truth by responsible individuals, idealistic as it doubtless then seemed, turned out to be closer to reality in historic practice. Likewise, the hopes expressed in John Locke's *Letter on Toleration* were better founded (in this respect at least) than the fears animating Hobbes's *Leviathan*.

The view of the ordinary consumer that animates much current criticism of advertising is analogously defective. Take the claim that advertising engenders wants in consumers that did not hitherto exist. At one level, this is a truism that cannot be denied, since without advertising the consumer could not know, and so could not have a preference among the span of products available to him. Again, the fact that a want or a preference is acquired is by itself no argument against it. On the contrary, nearly all the wants and preferences of a civilised human being are acquired via education and upbringing: no one is born delighting in Bach, or consumed by a passion for brass rubbing. A human being without acquired wants, if such there could be, would lack most, if not all, of the characteristics whereby we recognise him as such: for being human is something we learn how to be, not something we are born with. And, in opening up possibilities of choice and suggesting to the individual tastes and activities he might not otherwise come across and learn

to enjoy, advertising is no different from any of the other institutions of education and civilisation. So, if advertising does engender new wants and preferences, it is only thereby contributing to a process of character-formation that goes on all the time, in schools, families and peer groups.

In fact, however, all the evidence suggests that advertising, typically or in general, assists people to find out what they want from a product, rather than implants in them a want for it. All the evidence, for one thing, is that advertising can affect the market share a company can command over a product, but not the size of the market for the product itself. The idea that advertising has any significant role in engendering alcohol abuse, say, seems especially remote from reality, given the endemic alcoholism that is evident in countries (such as the communist regimes) in which virtually all alcohol advertising is already prohibited. In short, all the evidence tells against the conception of the consumer as an infinitely malleable creature whose wants are fabrications of advertising, and in favour of a view of him or her as an active seeker after products that best satisfy preferences that have for the most part long been formed.

Advertising and Diverse Expression

With respect to alcohol as to tobacco, a ban on advertising violates another of Mill's main tenets, and one of his chief arguments for freedom of expression — the thesis that, since no one is likely to be in possession of the whole truth about anything, it is in everyone's interest that a diversity of viewpoints be expounded. A ban on the advertisement of any product makes it much harder for the consumer to compare the merits of its different brands. Also, it does nothing to enable the consumer to make his own decision about the risks and benefits of the product. Prohibition is likely, in fact, to leave the market for the product more or less as it was, with the only difference being that the consumer will likely be less well informed than before.

Advertising Prohibitionism Harms the Consumer

Prohibitionism in advertising carries with it all the disadvantages and self-defeating effects it has in other areas of policy. In general, like many forms of paternalism, it does nothing to educate the citizen, or to promote in him the capacities for responsible choice. (Indeed, if anything, prohibitionism seems to be based on the assumption that the citizen will never acquire these capacities.) In advertising, as we have seen, prohibitionist policies can only leave the consumer worse off — more ignorant, and so less capable of responsible choice, than before. There is once again a parallel between freedom of commercial expression and freedom of religious discourse. Countries in which the latter has been curtailed have not been especially noteworthy for the absence in them of civil strife or destructive competition among religious sects. The opposite is true: countries practising freedom of religious discourse have on the whole enjoyed peaceful coexistence of religious communions based on mutual toleration. Restraints on religious

discourse, as on advertising, are premised on a view of the incorrigible immaturity of the mass of mankind which much historical evidence controverts. It is difficult to see the rationale of such policies.

The Parallel with Political Speech: Hobbes and Censorship

Instead of the analogy of religious speech, let us look at that of political speech. Once again, a powerful case was made against freedom of political speech in the early modern period. Thomas Hobbes, for example, thought that according to the sovereign an unrestricted authority to restrict or abolish political (and religious) speech was an indispensable condition of civil peace. Freedom of political speech, for Hobbes, meant freedom for the demagogue, the flatterer and deceiver of the mob, the exploiter of division and the enemy of civil concord. Writing as he did, in a period of civil wars and religious conflicts, Hobbes's pessimism about the consequences of freedom of political speech is understandable. Hobbes was nevertheless thoroughly mistaken in his view that only the sovereign's discretionary authority to abridge freedom of political speech can preserve the civil peace. The evidences of history are that the stablest and most peaceful of polities are liberal democracies in which freedom of political speech has become institutionalised. Like contemporary critics of advertising, Hobbes underestimated the maturity of the populace — and exaggerated the wisdom of the ruler (or regulator).

It is, perhaps, in the case of political speech that the paradox of the conventional wisdom about advertising is most transparently revealed. The basis of free speech in political life, its fundamental philosophical foundation, is in the belief that it is through the medium of unfettered public discourse that citizens are best able to select their rulers and assess their policies. This is, at any rate, the cornerstone of the theory of liberal democracy. It is not supposed, in this view, that politicians will always tell the truth, nor that their statements will typically be purely informative in character. Indeed, it is taken for granted that they will often appeal to the emotions and the interests. It is thought, however, that the ordinary voter has sufficient common sense and practical wisdom to be able to sift the good from the bad in political discourse, and not to be deceived by its most mendacious practitioners — even though they are not subject to regulations requiring that every cost and risk of their policies that is known or suspected be specified by them in advance. Oddly enough, the evidence throughout most of the democratic world supports the view that, notwithstanding its inherent dangers, freedom of political speech has worked well in delivering governments that at least satisfy minimal standards of decency and competence.

Liberal Democracy and Consumer Sovereignty

The critic of advertising may legitimately be asked the rhetorical question: if ordinary people are to be trusted with the selection of their rulers, why should they be denied the freedom of commercial expression in respect of the commodities they buy in the marketplace? Surely the choice of one's ruler is

at least as weighty a choice as those we make in the marketplace — perhaps the weightiest and most fateful we make as citizens. Here the analogy between democratic choice in political life and consumer choice in the marketplace is surely a strong one. We need not endorse entirely the economic analysis of political life, pioneered by Schumpeter (1943), to perceive the striking affinities between democratic public choice and consumer choice. For Schumpeter, public choice in a democracy was *akin* to economic choice in the marketplace, in that politicians could illuminatingly be *theorised* as entrepreneurs, their policies as products, their parties as companies, their manifestos as advertising, and their voters as consumers. This is, perhaps, an excessively simplistic account of political life. It is, nevertheless, valuable in illuminating the common features of democracy and freedom of political speech on the one hand, and the market and advertising on the other. It points, also, to their common justification. The ethical justification of democracy, on this account, was that it permitted the peaceful selection and deposition of ruling elites by the mechanism of political competition for votes.

The analogy of popular democratic sovereignty with consumer sovereignty is, at this point, neither contrived nor unduly metaphorical. In both the political arena and in the marketplace, ordinary people are, in contemporary liberal democracies, entrusted with ultimate responsibility for the way they live. In both cases, they exercise sovereignty via an institution that acts as a filter device in selecting out products which fail to meet their requirements. If, in economic life, the filter of last resort is *bankruptcy* resulting from an inadequate market for a firm's products, then in democratic political life the prospect or reality of defeat in a general election acts as the ultimate selective mechanism — and, thereby, as a standing constraint on the kinds of policies parties may implement and advocate.

To be sure, in neither the public choice of democratic politics, nor the consumer choice of the market, is popular sovereignty ever absolute: there are policies that democratic governments are inhibited from pursuing, by the terms of a written constitution or (as in the case of the United Kingdom) by immemorial precedent, just as there are products (child pornography or very addictive narcotics) whose dissemination in a free market is rightly prohibited. But in both areas, it is in the sovereignty of the people, acting individually or collectively, that the ethical standing of the institution is found. If markets are justified as enabling devices for individual choice, then democracy is defended as the enabling device for collective choice. It is in the ultimate and intrinsic worth of choice that both market freedoms and democratic freedoms are in the end grounded.

The analogy between freedom of commercial speech and freedom of political discourse goes closer yet. In any modern state, political or democratic freedom is restricted or rendered nugatory insofar as freedom of *political* speech is absent or compromised. Again, in a liberal democracy, freedom of political discourse is compromised in the absence of freedom of information.

If politicians and citizens are denied access to information regarding governmental policy, then their exercise of the freedom of political speech is constrained, even if there is no explicit law that restricts it. (I do not mean here to endorse the untrammelled freedom of information protected in the United States, since there are, in my view, weighty interests in national security that will always require protection and which may justify curbs on freedom of information; but, aside from noting that freedom of information may have to be traded off against other political goods, I cannot pursue the point here.)

Liberty of political discourse presupposes, as one of its necessary conditions, freedom of information. The same is true of the economic freedoms whose embodiment we find in the market economy. Unless producers can advertise the distinctive features of their products, consumers will be restricted in their knowledge of them to information about their prices. And, when regulation of advertising falls short of prohibition, but nevertheless imposes on advertisers onerous restrictions not imposed on practitioners of other forms of expression, consumers will be unjustifiably impoverished in the range of information available to them. Just because it is justified in the end as a facilitator of choice, the free market presupposes, for its effective functioning, freedom of commercial expression.

Political, Religious, Commercial Expression Not Distinct

The burden of this entire argument, so far, is that political, religious and commercial expression are, each of them, merely instances of communicative freedom. They are not radically discrepant activities, to which wholly divergent standards may properly apply. None of them is an exercise in pure information-provision — always supposing (what there may be good philosophical reasons for doubting) that there is or can be such a thing. They are practical engagements, having different objectives, but the same impact on human interests and well-being, and the same grounding in human choice and responsibility. Each species of communicative freedom has costs and risks; but in no case can freedom be hazard-free. In each case there is the certainty that errors will be made, and mistakes committed. But again, in each species of communicative freedom there is a presumption that the selective pressures of competition will ensure that errors are not forever repeated, but will be rectified, costs will not be prohibitive of the further exercise of free choice, and people will be mature enough, on the whole, to spot the shoddy and the mendacious. In the domain of religious and political expression, these error-correction mechanisms have worked tolerably well, and the gloomy prognostications of reactionary critics of free expression have not been borne out by the evidences of history. For all these reasons, it is incongruous in the extreme that commercial expression should, in our time, be burdened by restrictions which contemporary opinion would reject immediately, if they were to be proposed for religious and political discourse. It is to the explanation of this puzzling incongruity that we next turn.

Chapter 3

Anti-Advertising and the New Puritanism

It is tempting to interpret the contemporary hostility to commercial expression as merely another symptom of the anti-capitalist mentality so prevalent among opinion-formers. There is no doubt that such an interpretation contains more than a grain of truth. Contemporary opinion has long been formed by an intelligentsia that does not understand how the market process can coordinate human activities without the benefit of repeated intervention by planners and bureaucrats (such as themselves) and whose experience of the market has had as its main effect on them the abiding conviction that they are under-rewarded in it. Much current opposition to advertising can, then, entirely properly, be accounted for by the visceral anti-capitalist mentality of our opinion-formers,

It would be an error to think of this as the whole explanation. For there is evident in the approach to advertising adopted by its critics a fallacy that has bedevilled much recent policy debate, and the persistent influence of which bodes ill for freedom of commercial expression. The fallacy is that there is a distinct sphere of human life, that of the economic order, in which what we want is security, not freedom. On the view — rarely stated explicitly, but tacitly present in much current thought and discourse — the sphere of individual freedom is that of intellectual inquiry and personal lifestyle. Economic life is perceived as an inherently unimportant preliminary to this sphere of freedom, not a part of it. The worth of market freedoms, if it is acknowledged at all, is seen as entirely instrumental — it is that of providing the material basis of freedom in other spheres of life. By comparison with intellectual, cultural and personal freedoms, accordingly, the freedoms of the market are (on this view of them) second-rate affairs, whose value consists principally in their contribution to other, loftier liberties.

The fallacy in this piece of conventional wisdom is that it neglects the intellectual, cultural and moral freedoms that are implicated in the freedoms of the market, and thereby misses the indivisibility of freedom itself. The conventional wisdom on advertising, in particular, misses the vital point that the freedom of lifestyle — *liberté de mœurs*, as de Tocqueville called it — is as much threatened by restrictions on commercial speech that embody controversial value-judgments and conceptions of the good life as it is by direct governmental authoritarian intervention in personal and cultural life. The fallacy presupposed by this last point is that there is a sphere of purely economic relations that can be mapped out, and in respect of which individual freedom is dispensable or irrelevant. The egregiousness of such a view has been well criticised by Hayek (1944:66-7), who asks rhetorically:

If [economic] planning really did free us from the less important cares and so made it easier to render our existence one of plain living and high thinking, who would wish to belittle such an ideal? If our economic activities really concerned only the inferior or even more sordid activities of life, of course, we ought to endeavour by all means to find a way to relieve ourselves from the excessive care for material ends, and, leaving them to be cared for by some piece of utilitarian machinery, set our minds free for the higher things of life.

This prospect is, however, an illusion, Hayek goes on:

Unfortunately the assurance people derive from the belief that the power which is exercised over economic life is a power over matters of secondary importance only, and which makes them take lightly the threat to the freedom of our economic pursuits, is altogether unwarranted. It is largely a consequence of the erroneous belief that there are purely economic ends separate from the other ends of life. Yet apart from the pathological case of the miser, there is no such thing. The ultimate ends of the activities of reasonable beings are never economic. . . . If we strive for money it is because it offers us the widest choice in enjoying the fruits of our efforts.

Hayek and Freedom of Commercial Expression

Hayek's argument here has direct relevance to commercial speech and expression. The freedoms involved in such expression are not a somehow inferior class of freedoms, whose role (if any) is to contribute to higher freedoms of inquiry and lifestyle; they are those very freedoms, in the context of the marketplace. Policies which restrict or prohibit the advertising of alcohol or tobacco are, in essence, no different from policies which restrict or prohibit the availability of the products themselves: they are paternalist interventions in personal lifestyle that differ from outright prohibitionism only in degree. This very obvious truth is concealed by the ruling fallacy that, because these restrictions are imposed in the 'economic' domain of the market, they are therefore necessarily lesser abridgments of choice than direct violation of personal liberty. They may be so, if they leave intact the freedom to acquire the product at issue: they are nevertheless restraints on liberty, which if imposed in other areas of life — in respect of sexual mores, for example — would at once be repudiated by liberal opinion. It does not seem to have occurred to the opinion-formers that restraints on freedom of choice in these latter areas may one day be imposed by way of restrictions on advertising.

The cognitive blind-spot in conventional opinion that allows the

similarity of these forms of restraint on individual choice to go unperceived derives, in all likelihood, from the error criticised by Hayek — the error that there is a domain of social life, hived off from and independent of the rest of our activities, in which 'merely economic' activity takes place. This ruling error of our age neglects the truth that we remain in the marketplace what we are in every other area of our lives — free agents in pursuit of their goals. This ruling illusion expresses a yet deeper error — the error that intellectual and cultural freedoms can be dissociated from practical liberties. All recent experience tells against this conventional belief. As we know from the evidences emerging from the communist countries, guarantees of freedom of scientific inquiry are worth little if all laboratories are owned or controlled by the state. Similarly, artistic freedom will be negligible, if printing houses, the production of paper, and the ownership of playhouses are all in government hands. In reality, every intellectual or cultural freedom has, as one of its essential foundations, a corresponding freedom in the market. The practical liberties of the market are, in fact, essential ingredients in our standing as free men and women: the choice of a place of abode, of an occupation, of the clothes we wear, the food we eat, and the balance of work and leisure in our lives — all these choices made in the market are as much expressions of our freedom as our decision to marry and have children (or not), or to enter (or leave) a religious communion. No Chinese wall separates the economic from the moral or the cultural aspects of our lives. Our freedom is diminished whenever choice is made harder or more burdensome in any sphere of our lives. In all cases, our standing as autonomous choosers who are part-authors of our lives is inevitably diminished.

Shifting Responsibilities to the State

We have seen that a characteristic paradox of our age is found in the contrasting approaches to moral judgment as they are evident in relation to advertising and to other areas of social life. In the arts and in cultural life, in social work and in the policies that are devised which have an impact on sexual life, the worst sin in the eyes of current opinion is to be judgmental — to impose, so to speak, one's own moral perspective on the lives of others. In respect of restraints on advertising, no objection is made by fashionable opinion when specific and often contestable value-judgments are embodied in restrictions on commercial expression. It may be that a life without tobacco or alcohol or food additives is, in some sense, a better life than one in which these are consumed, a longer life and one that is at less risk of certain degenerative diseases; or it may be that a life ruled by a passion for prudence, a life that eschews pleasure whenever pleasure appears to threaten longevity, is a lesser form of life than one in which, after due reflection, we choose to enjoy ourselves and take our chances.

It is not easy to see how such a question is rationally decidable. What

is clear is that different people will, after much thought, come to divergent answers to this and similar questions, such that the proper role of governmental regulation should be to assure access to relevant information rather than to govern the eventual choices of individuals. In practice, recent years have witnessed the capture of the regulatory bodies of advertising by exponents of the new puritanism — the puritanism that bases itself on considerations of health and prudence rather than of right and wrong. There may be a good deal that can be said for (and a lot against) this new puritanism. Yet its kinship with older, less fashionable puritanical movements seeking to mould individual choices by paternalistic and moralistic restraints on liberty should not be in any doubt.

What has gone unnoticed in this manifest capture of regulatory bodies by exponents of the new puritanism is the shift in the locus of moral life that it entails. With the older puritanism, in some at least of its forms, the goal was to motivate people by persuasion and example to adopt a life not devoted to pleasure but to the virtues. By curtailing the individual's knowledge of the range and variety of products available to him, the new puritanism in its incursions into advertising regulation shifts the locus of responsibility from the individual to the state and its organs of authority. This is no small thing, since it effects a displacement of the moral life into the political (and the bureaucratic) realms. Now it is not here being argued that the state ought, or even can be, entirely neutral in respect of the virtue and lifestyle of its citizens: such a radical, libertarian or neo-liberal view, is plainly indefensible, if only because a liberal civil society depends in the end for its stability and its very existence on the presence within it of important virtues — virtues such as tolerance, the sense of fair play and civic responsibility.⁷ In any recognisably liberal view, however, government can do little by itself to nurture the virtues, which is a task best left to the intermediary institutions — families, churches and voluntary associations in which people are formed as responsible choosers.

The displacement of moral responsibility that occurs when regulatory agencies impose on advertisers constraints reflecting a distinctive (and often distinctly controversial) moral viewpoint, such as the new puritanism, in effect shifts the locus of moral education from the individual and the intermediary institutions to the state. As well as solidifying in regulatory policy a moral perspective (and a reading of the relevant empirical evidences) that may well prove to be ephemeral, such a shift involves the loss of all the advantages of the informal moral education given by intermediary social institutions — their diversity, subtlety and flexibility, for example. We are then not far from the situation in which the regulatory agencies usurp the formative role of these intermediary institutions, and attempt to impose upon advertising a function alien to its role in the free

7. I argue for the inevitable non-neutrality of the state in respect of these virtues in Gray, 1991, and Gray, 1989b:73–4.

market economy: to turn it from an institution that facilitates or enhances choice to one that shapes or moulds it.

It is not denied at any point in the present argument that influencing human behaviour through advertising is a legitimate activity. On the contrary, what is argued is that, if it is legitimate to influence human behaviour through political and religious discourse and expression, then influencing behaviour through advertising is similarly, and not less, legitimate. The boundaries between advertising and other forms of expression are in any case not fixed or impermeable. Religious advertising is likely to be a more prominent form of expression in future in Britain and (though controls of various sorts are doubtless appropriate) no one, presumably, contests its legitimacy. We can envisage the growth of a new species of advertising, emerging from the example of religious advertising — a species of advertising, not aimed at profit, whose product is conversion to a belief, or the adoption of a form of life. (We have already many examples of advertising on behalf of charities, whose desirability no one questions.) Such advocacy advertising, as we may call it, is surely a wholly proper dimension of communicative or expressive freedom in a liberal society.

The Dangers of Governmental Lines

Advocacy advertising is important in the argument for commercial expression because it shows that the case for freedom in advertising does not depend, in the end, on the contribution (massive and underestimated though it undoubtedly is) of advertising to the functioning of the market economy, but instead on the value of freedom of communication or expression itself. As the example of religious advertising demonstrates, there is nothing categorically different in the activities of delivering a sermon and advertising the Gospel on television: they have everything in common except that one of them occurs in a medium in which it must be paid for. They are, in fact, the very same activity, conducted in different media. All the Millian arguments for freedom of expression that apply in the one carry over in the other. This is a truth that the likely growth of advocacy advertising can only further illuminate.

What is illegitimate, then, is not the attempt to influence belief and behaviour through advertising, since there is nothing which fundamentally distinguishes such activity in advertising from the same activity conducted through other media. The illegitimacy is in the hobbling or curtailing of advertising freedom by advocacy groups which seek to influence or control belief and behaviour, not on the level playing field of competitive communication, but instead by capturing regulatory bodies or prohibiting advertisements of certain types or products. It is clearly entirely legitimate for advocacy groups to purchase advertising venues in which they expound upon the role of teetotalism, vegetarianism, or smoke-free

environments in healthy living. Equally, advocacy groups are entirely within their rights, if they use advertising to propagate the virtues of organic farming, the dangers of nuclear power, or the need to protect endangered species of plants and animals. All such activity is a healthy feature of the free society. The danger comes, not from advocacy advertising, but from restrictions on advertising that have the same goals as some of the advocacy groups, but dare not say their names, and who pursue these goals via restrictive regulation and prohibition rather than by persuasive communications.

Chapter 4

Advertising Prohibitionism, Censorship, and the Defence of Freedom

The case against prohibitionist policies in the regulation of advertising is the case against all distortion by censorship of freedom of communication. Nothing in the argument turns, or ought to turn, on the status of advertising as commercial expression. It is as an instance of freedom of expression itself that advertising merits protection from paternalist and prohibitionist intervention. The argument for this result is the simple one that has been reiterated throughout this paper — the argument that there is nothing in advertising that distinguishes it from other communicative and expressive activities. The freedoms which they enjoy, and in the exercise of which they are protected, ought also to be respected in the case of advertising. On the view presented here, free expression is a tree with many branches but a single root — the root being respect for freedom itself. In every branch of free expression, communicative freedom is protected because we respect people as the free agents they are. Critics of advertising have yet to produce any argument which can point to features distinctive of advertising in respect of which it may rightly be denied the freedoms accorded to other forms of expression.

As a digression, it may be noted that according advertising the freedom conferred on other forms of expression would have as one of its side effects, most likely, an increase in comparative or rivalrous advertising in which the merits of different brands of similar products are explicitly weighed. Comparative advertising of this sort is clearly akin to the dialectical exchange of argument and counter-argument envisaged in Mill's defence of freedom of inquiry: it is, indeed, a version of the latter. Comparative advertising, as a consequence of unrestricted freedom of commercial expression, would seem by far the surest guarantor of consumer interests and consumer choice. It is a signal disadvantage of prohibitionist policy in advertising that it necessarily prohibits comparative advertising when it proscribes advertisement of the product itself.

The boundaries between advertising and other forms of expression that existing legislation (and, even more, proposed legislation) sanctifies are plainly artificial. They do not reflect significant qualitative distinctions among the various forms of expression. In particular, they give no reason for singling out commercial expression for special restriction or regulation. Nor is this surprising: for advertising contains within itself many of the elements of other communicative activities and is for that reason entitled to the protections and privileges these other forms of expression enjoy.

Just as the boundaries between advertising and other forms of expression are permeable rather than fixed, indeterminate rather than definite, so within advertising, a wide variety of modes of expression is encompassed. Advertising may have the character of an argument, in which the merits of the product on offer are systematically set out in comparison with others. In this sort of comparative advertising, notwithstanding its practical aims, commercial expression comes closest to the limiting case of purely informative discourse that is often (and always wrongly) held up as its ideal type. At the other extreme, advertising may suggest how a product may contribute to the consumer's quality of life, in ways he or she had not hitherto grasped. Here advertising is closer to the arts in opening up novel perspectives on our lives and so enriching the possibilities we find in them. (It is noteworthy, in passing, that some advertising is itself distinguished as being a work of art in its own right — a fact that seems to have eluded the contemporary lumpenintelligentsia, otherwise so lax in its judgment as to what constitutes art.)

In between these two poles, advertising spans a host of communicative and expressive activities, in many combinations and mixtures. But in this it is no different from expression in other social contexts, having other goals. It is true, as Wittgenstein (1989) has taught us, that language is not one thing — a means whereby we mirror or represent the world, say — but indefinitely many things: it is as various in its forms as the activities in which we use it. How much more diverse in its forms is expression, in which we communicate with each other via images as well as words. Thus, a film may begin as propaganda, having definite political objectives, yet (as with some of the films made in Britain during the Second World War) contain much that is poetic or lyrical. Or a discourse may belong to the genre of sermon, having the practical goal of conversion or confirmation in faith, and yet have value for anyone who enjoys the splendour of the English language. Or Hobbes's *Leviathan* may fail in its project in political philosophy, and remain as one of the greatest masterpieces of English literature. And so on.

The Need for Restraint in Advertising and in Political Expression

The fact is that our expressive activities are conducted in a potpourri of forms and modes, not clearly distinguished from one another, often overlapping and so usually highly complex. In all of its indefinite variety we acknowledge the need for regulation and restraint. We may use our freedom of expression to criticise the defence policy of our country, but not by disclosing official secrets. We may exercise freedom of the press by engaging in scurrilous journalism, but we will be restrained if we use our freedom to commit libel. A television program may explore the limits of our imaginative experience, but be rightly restrained if it contains excesses of violence or sexuality. And, in advertising, no one questions the desirability

of a regulatory framework for the restraint of the mendacious and the fraudulent or the necessity of prohibiting the advertisement of narcotics. Each of the indefinitely many modes of communication and expression is, then, properly subject to restraints — restraints without which its rationale or justification would become questionable. What is indefensible is the imposition on any mode of expression of restraints and prohibitions which its practice does not justify and which would be rejected out of hand in others.

It is tempting to see in prohibitionist and restrictive policy toward advertising an attack on the very legitimacy of this mode of expression. It is difficult, otherwise, to account for the incongruities in the treatment of free expression in advertising and in other spheres of life. The task of the philosopher is not to attempt to prescribe policy in any substantive way, but rather to uncover the maxims on which it is based. The task of the philosopher in this matter is to illuminate the many incongruities in current opinion and policy regarding advertising. He will have discharged his task if he has succeeded in showing that there is nothing in advertising which distinguishes it from many other legitimate forms of freedom of expression, and so nothing in it which justifies the illiberal framework of regulation that is currently being envisaged in Australia, New Zealand, Britain and the European Community.

The Need for *More* Advertising — in Ex-Communist Countries

Finally, it is to be hoped that the newly emergent post-communist societies of Central and Eastern Europe will not succumb to the temptation to emulate the restrictionist policies in respect of advertising that are currently proposed or in place in Australasia and Western Europe. Contemporary Western models, in this as in other respects, are ones that the post-communist societies should treat with reserve or even suspicion. They should in particular be alert to the danger of a bias against market institutions that animates much recent legislation and regulation in Western Europe. Among other things, they should not follow Western Europe in neglecting the role of advertising in the market economy and in freedom of expression: its role as an indispensable aspect of a free society. They should understand in short that freedom in advertising deserves recognition as a vital part of individual freedom in any liberal civil society.

The Slippery Slope to the Loss of Freedoms

Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident and mild. It would be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood: it is

well content that people should rejoice, provided they think of nothing but rejoicing. For their happiness such a government willingly labours, but it chooses to be the sole agent and the only arbiter of that happiness; it provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances; what remains, but to spare them all care of thinking and all the trouble of living?

(A. de Tocqueville)

Advertising is, in the end, only freedom of expression in one of its aspects. Like many other modes of expression, it aims to evoke emotions as well as to impart information, it has an impact on human choices and interests that goes beyond the acquisition of knowledge and it may alter human behaviour. It has these attributes in common with political, religious and cultural discourse and expression. If advertising has risks or costs, it shares them with every other significant mode of freedom or expression.

The economic justification of advertising freedom is in its role as an indispensable component of the free market. At bottom, the market is an institution that generates, and makes available to us, information we would otherwise lack, but without which we cannot make rational decisions as producers and consumers. Advertising is an essential dimension of the institution of the market considered as an epistemic device. The economic justification of advertising is not, however, the most fundamental one. Advertising freedom is justified in that, just like other forms of free expression but in this instance one situated in the market place, it operates as a facilitator and enhancer of choice. It is in its role as an enabling device for individual choice that the ethical standing of advertising rests.

The argument for freedom in advertising is all of a piece with the argument for freedom of expression. Current moves in Australasia, Britain and the European Community to restrict freedom of commercial expression, and to prohibit certain forms of it, are dangerous because the philosophy that underlies them is hostile to freedom of expression itself. Since, as David Hume wisely remarked, freedom of any kind is rarely lost all at once, we should beware lest, in letting those restraints on advertising freedom go through on the nod, we let slip a vital dimension of our freedom of expression. It will be a misfortune if, in failing to see the unity of freedom of expression in all its varieties, including advertising, we come to accept restraints on our freedom of commercial expression which we would never tolerate in any other sphere of life.

References

- Gray, J. (1983), *Mill on liberty: A Defence*, Routledge & Kegan Paul, London.
- (1986), *Hayek on Liberty*, Basil Blackwell, Oxford, 2nd edition.
- (1989a), *Liberalisms: Essays in Political Philosophy*, Routledge, London.
- (1989b), *Limited Government: A Positive Agenda*, Institute of Economic Affairs, London.
- (1991), *A conservative disposition: individualism, the free market and the common life*, Centre for Policy Studies, London.
- Hayek, F. (1944), *The Road to Serfdom*, Routledge & Kegan Paul, London.
- Mill, J. (1991), *Four Essays*, Oxford University Press, Oxford (ed. J. Gray).
- Schumpeter, J. (1943), *Capitalism, Socialism and Democracy*, Allen & Unwin, London.
- Wittgenstein, L. (1989), *Philosophical Investigations*, Basil Blackwell, Oxford (remarks 65 and 92).

Selected CIS Occasional Papers

		A\$	NZ\$*
<i>The Crisis in Law</i> by Norman Barry (1989) ISBN 0 949769 46 0	[OP23]	\$3.95	\$5.95
<i>The Ethics of Economic Freedom</i> by Herbert Giersch (1989) ISBN 0 949769 48 7	[OP24]	\$3.95	\$5.95
<i>The Egalitarian Concelt: False and True Equalities</i> by Kenneth Minogue (1989) ISBN 0 949769 50 9	[OP25]	\$4.95	\$6.95
<i>The Education Monopoly Problem</i> by Edwin G. West (1989) ISBN 0 949769 51 7	[OP26]	\$4.95	\$6.95
<i>Economic Control or Economic Development?</i> by Peter Bauer (1990) ISBN 0 949769 53 3	[OP27]	\$3.95	\$5.95
<i>Population Growth: Curse or Blessing?</i> by Peter Bauer (1990) ISBN 0 949769 55 X	[OP28]	\$3.95	\$5.95
<i>Socialism is Dead But Leviathan Lives On</i> by James Buchanan (1990) ISBN 0 949769 57 6	[OP30]	\$3.95	\$5.95
<i>Reflections on Privatisation</i> by Roderick Deane (1991) ISBN 0 949769 63 0	[OP32]	\$4.95	\$6.95
<i>The Fraternal Concelt: Individualist versus Collectivist Ideas of Community</i> by Chandran Kukathas (1991) ISBN 0 949769 63 0	[OP33]	\$4.95	\$6.95
<i>Dismantling Socialism: A Preliminary Report</i> by Václav Klaus (1991) ISBN 0 949769 69 X	[OP35]	\$3.95	\$5.95
<i>Liberating Labour: The Case for Freedom of Contract in Labour Relations</i> by Richard A. Epstein (1991) ISBN 0 949769 70 3	[OP36]	\$3.95	\$5.95
<i>Equalising People: Why Social Justice Threatens Liberty</i> by David G. Green (1991) ISBN 0 949769 73 8	[OP37]	\$9.95	\$13.95
<i>From Welfare State to Welfare Society</i> by Michael James (1992) ISBN 0 949769 77 0	[OP38]	\$5.95	\$8.95
<i>Freedom, Tradition, Conservatism</i> by Frank S. Meyer (1992) ISBN 0 949769 78 9	[OP39]	\$3.95	\$5.95
<i>How Much Justice Does a Society Need?</i> by Kenneth R. Minogue (1992) ISBN 0 949769 80 0	[OP40]	\$3.95	\$5.95
<i>Why I Am Not a Conservative</i> by F.A. Hayek (1992) ISBN 0 949769 82 7	[OP41]	\$3.95	\$5.95
<i>Advertising Bans: Administrative Decisions or Matters of Principle?</i> by John Gray (1992) ISBN 0 949769 83 5	[OP42]	\$4.95	\$6.95
<i>Welfare States and the Problem of the Common</i> by David Thomson [1992] ISBN 0 949769 85 1	[OP43]	\$4.95	\$6.95

Prices are in Australian dollars and New Zealand dollars (*including GST) as shown and are subject to change without notice.

Please include 10% of your total order for postage & packing (min. 80c, max. \$5.00)

Advertising Bans

Administrative Decisions or Matters of Principle?

John Gray

Whereas in modern times artistic and cultural freedoms have expanded, freedom of commercial expression has tended to shrink. Many supporters of advertising bans invoke paternalistic and moralistic criteria that they would never dream of applying to artistic endeavour.

In this Occasional Paper, John Gray argues that the paradox reflects the fallacious belief that the economic sphere of life requires security rather than freedom. But liberal democracy and consumer sovereignty are based on the same principles. Current moves in Australia, New Zealand and elsewhere to restrict freedom of commercial expression are dangerous because the philosophy that underlies them is hostile to freedom of expression itself. The Australian government's recent attempt to prohibit some kinds of political advertisements, though unsuccessful, illustrates the dangers of allowing exceptions to the general principle that speech should be free.

Dr John Gray is a Fellow of Jesus College, Oxford. His books include *Hayek on Liberty* (1986), *Limited Government: A Positive Agenda* (1989), and *The Moral Foundations of Market Institutions* (1992). His publications for the CIS include contributions to *Ideas about Freedom: A Discussion* (1986) and *Traditions of Liberalism* (1988).