

LETTERS

The Hidden Costs of Individualism

To the editor:

Professor [David] Cole insightfully parses the Constitutional law arguments of limiting advertisements ("Muzzling Joe Camel," May 6, 1996, Page 22). However, his analysis is limited to carefully defined boundaries—as is the analysis of almost everyone involved in this debate. Outside these boundaries lie other considerations; two are especially significant. For no matter how bright the minds that address this issue, no matter how earnestly the search for a solution, we will not arrive at a satisfactory solution unless we address these other considerations.

The first such consideration concerns the present business climate—a climate virtually ignored by legal analysis. Recent lawsuits, public discussion, and condemnation by government officials of the tobacco industry's less-seemly marketing ploys is striking for its failure to appreciate the role marketing plays in our economy. Certainly, the industry manipulates the weaknesses in human nature in whatever way it can to increase sales—yes, including downplaying the addictive nature of nicotine and targeting youth. Our brand of free enterprise both encourages and rewards such aggressive behavior; such a ploy is normally thought of as shrewd marketing. Nevertheless, the recent concern with the negative externalities of the tobacco industry is overdue. But much of the criticism and lawsuits miss the point that the problem is advertisement, not addiction. Thus, Professor Cole's conclusion—regulate the industry in the areas of taxation, etc., not advertisement—is unworkable.

Those advocating governmental interference with the free market must first understand the extreme importance advertisement plays in our economy. Then they will see that the only efficient way of reducing tobacco industry negative externalities is through the regulation of advertisements. For the most likely reason any young man begins to smoke is that he was lead to it by a marketing scheme. Witness the ubiquitous "Marlboro Man" posters in any Third World country and the accom-

panying volume of tobacco sales. The most important aspect of any business enterprise is now marketing. With mass consumer goods, the advertisement aspect of marketing trumps any other factor. The ploy of downplaying nicotine's addictiveness is incredibly minor compared with the influence of advertisements.

(Generally, the self-righteous indignation and call for governmental interference by many who normally can only extol the virtues of free enterprise and who benefit the most from it is puzzling at best, disingenuous at worst. Where were these legislators when these companies, through cunning insights into weaknesses of human nature, began to artfully promote their wares?)

The second consideration is of the philosophical underpinnings of the debate. We must recognize that we are children of the enlightenment. That every word spoken on this issue is profoundly colored by enlightenment philosophy only becomes evident by stepping out of this premise, at least for a moment. The two outstanding features of enlightenment philosophy are positivism and individualism. Legal positivism dominates our thoughts as lawyers. Thus, to us who habitually consider only the quantifiable, the importance advertising plays in our economy let alone the significance of this fact will go unnoticed. To us, advertising generates great volumes of sales, so the smart investor invests in such companies and the smart legal analyst simply takes this phenomenon for granted—offering nary a word or reflection on the wider implications of a marketplace dominated by advertising.

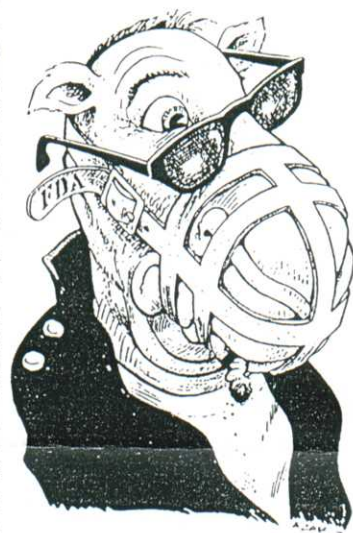
Why should we? The other aspect of the enlightenment—individualism—views each participant in the marketplace as an inherently autonomous unit relating to others through a series of contracts and ultimately the "social contract." Such a view allows neither little consideration of the overall direction of the economy nor much sympathy for those negatively affected by a particular marketing practice. Instead of the pre-enlightenment emphasis on the public good, our broader analysis comprises only a vague reference to the invisible hand sorting it all out for us; typically, we condemn any broader concern as "paternalistic."

Consequently, it is only when a particularly harsh externality of a market force breaks into the public conscience—presently, marketing tobacco to children—do we feel obliged to condemn it. At this point, we split into two camps—conservatives and liberals—although both camps are set squarely in the enlightenment. The conservative emphasizes justice—giving one his due—and thus looks warily on any interference with the market participants' contracts. Why should not the marketers be rewarded for their hard work and superior tactics? As far as freedom of speech, this is the argument Professor Cole advances.

The liberal emphasizes compassion for the suffering of others. His solution—equally rooted in individualism—is to turn to big government for a solution. (The common individualistic view of both explains how easily Professor Cole can switch from a conservative view as far as freedom of speech to a liberal view as far

as advocating raising taxes, etc.) Naked individualism has reduced the landscape of society to individuals linked together by myriads of contracts. Consequently, in such a landscape the only arbitrator left of these contracts is the state. Lesser institutions—families, trade associations—have long been eviscerated of any vitality by centuries of individualistic jurisprudence. They are no longer up to protecting their members from excessive market forces—when they even still exist.

At this point, we can see that both the conservative and the liberal view is the cause of the problem, not a solution. The conservative's invisible hand does not reach all negative externalities of the market, and the liberal's welfare state soon becomes bloated, responsive, and susceptible to political manipulations. No, the answer is to return to a traditional philosophical system, which grants much more autonomy to any number of smaller institutions. Thus, strong family units—close to their members and so much more aware of individual weaknesses—will deftly curb to some extent the targeting of their children, both within the family and through associations of families. And strong trade associations will for the same reasons be able to deftly curb the practices of their members. And they will decide on the restrictions with an eye to the public good, instead of the positivistic preoccupation with the greatest profit margin that freedom of contract and press "entitles" any individual participant to.



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