

The Word "Dog" Never Bit Anyone — the Tobacco Advertising Ban and Freedom of Expression

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Tobacco is a harmful product. Smoking causes suffering, disease and death. But clear evidence of the dangers of using tobacco was discovered only after smoking had become popular and thus difficult to restrict. Yet difficult or not, it may be thought appropriate for the government to take action to discourage smoking. Rather than some outright ban on smoking, many people favour an advertising ban. Advertising prohibitions are increasingly popular tools in the fight to reduce tobacco consumption worldwide.² Banning advertising is perceived to be less restrictive and yet to offer a real chance of helping.

In 1990, the government banned virtually all advertising, promotion and sponsorship³ of tobacco products in the Smoke-free Environments Act. Although tobacco is the first product to be singled out for such comprehensive treatment in New Zealand, the desire to discourage consumption of harmful products and services underlies other voluntary and involuntary advertising restrictions, for example the restriction on advertising breast milk substitutes. The increasing popularity of advertising bans has led to calls that they be applied to new areas, such as foods high in saturated fat. As I will argue below, the justifications offered for banning tobacco product advertisements apply equally well to a variety of other legal goods and services. So although this article focuses on tobacco as the product at the forefront of government advertising restrictions, the reasoning applies equally well to all similar advertising bans.

The effectiveness of advertising bans at dampening demand for target products and services is unclear at present. The tobacco legislation is based on the 1989 Toxic Substances Board report *Health or Tobacco: An end to tobacco advertising and promotion*.⁴ The report claimed that an advertising ban would be extremely effective, but its methodology and conclusions have been criticised. New Zealand statistician Peter Mullins has stated that the "report did not prove that tobacco

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² Countries which have passed legislation restricting tobacco advertising include Canada and Australia. See, e.g., Tobacco Products Control Act R.S.C. 1985, c. 14 (4th Supp.) [Canada] and Advertising Prohibition Act 1992 [Australia]. The Canadian Supreme Court recently struck down the Canadian legislation as inconsistent with the Charter's protection of freedom of expression. See "Ban on Cigarette Ads Rejected by Top Court" *Toronto Star* 22 September 1995. In August of 1995 American President Bill Clinton announced a new campaign to further restrict tobacco advertising in the U.S. through regulations. See "Clinton, tobacco industry clash" *Otago Daily Times* 12 August 1995 p. 6.

³ Promotion and sponsorship, for example of sporting or cultural events, are forms of advertising. Use of the term "advertisement" in this article should be read as including promotion and sponsorship.

⁴ Toxic Substances Board, *Health or Tobacco: An end to tobacco advertising and promotion* (Dept. of Health: Wellington 1989) [hereafter *Health or Tobacco*].

advertising bans worked," and that the report's methodology was faulty.⁵ A Canadian court found that the report contained "serious methodological errors and a lack of scientific rigour which renders it for all intents and purposes devoid of any probative value."⁶ Although it is far from certainly the case, for the purposes of this article I am willing to assume that restricting advertising will reduce the level of smoking in New Zealand. My thesis is that tobacco product advertisements should be permitted *even if* they help persuade people to smoke.

While the government's intentions are laudable, I will argue that banning the advertising of tobacco or any other legal product in order to discourage consumption is an impermissible infringement on freedom of expression. This conclusion is bolstered by the recent decision of the Canadian Supreme Court that the freedom of expression guarantee in the Charter of Rights and Freedoms was infringed by the prohibition on tobacco advertising.⁷ Part I of this article analyses the ways in which the ban on tobacco product advertisements violates freedom of expression. Freedom of expression is pragmatically as well as philosophically justified. Tobacco smoking is harmful, yet denial of protection to commercial speech is harmful also — prohibiting speech concerning tobacco affects the health and economic interests of smokers; it silences individual pro-smoking expression even where there is no profit motive involved; it forecloses public debate on the desirability of smoking, which debate serves as a democratic limit on the actions of government; it encourages passivity and naivety on the part of the public; and it conflicts with the faith placed in the people in a democratic society by suggesting that they are unable to make informed, rational decisions. Neither the harm of smoking nor popular support for an advertising ban justifies restricting freedom of expression. Promoting anti-smoking expression as a weapon against smoking would be more consistent with rights than prohibiting advertising.

In order to maximize individual freedom, measures to combat smoking which do not infringe rights should be exhausted before the government turns to measures which do infringe fundamental rights such as freedom of expression. Part II demonstrates that the government has failed to do this, and has instead placed media restrictions at the forefront of its strategy. Some alternatives to an ad ban which are consistent with rights apparently have been overlooked by the government, others have been given insufficient or delayed consideration. Viewed in its proper context, censoring speech is not truly the least restrictive alternative in the campaign against smoking. Part III argues that the precedent set by the tobacco ad ban could justify advertising restrictions on a variety of other legal products and services, thereby magnifying the negative impact on freedom of expression.

⁵ "Tobacco legislation report 'discredited'" *Otago Daily Times* 20 August 1991.

⁶ *RJR-MacDonald Inc v Attorney General of Canada* 82 D.L.R.(4th) 449, 513 (1991).

⁷ See "Ban on Cigarette Ads Rejected by Top Court" *Toronto Star* 22 September 1995. Unfortunately, the text of this decision was not available at the time this article went to press.

I. Prohibiting the advertisement of tobacco products violates freedom of expression.

Freedom of expression serves many useful functions. It enables a democracy to function properly. It facilitates individual self-actualization and fulfillment. It advances the search for truth through the marketplace of ideas. And it provides a forum for protest and opinion which enhances the advancement and stability of society.⁸ As will be explained below, all of these functions are compromised, in greater or lesser degree, by the present legislation. Long regarded as an important consideration to be kept in mind by the legislature and the courts, freedom of expression is starting to play a more significant role given its recognition in the New Zealand Bill of Rights Act 1990. The Act cannot invalidate the Smoke-free Environments Act or any other legislation. Nevertheless, its provisions are very relevant to a consideration of the merits of tobacco advertising because the provisions of the Bill of Rights Act are an embodiment of the government's conception of freedom of expression.

Section 14 of the Bill of Rights Act provides that "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." The conflict between section 14 of the Bill of Rights Act and the Smoke-free Environments Act 1990 is immediately apparent — the freedom to receive and impart information about tobacco products is severely restricted. The Smoke-free Environments Act places a near total ban on all forms of tobacco advertising and promotion.⁹ Along with traditional advertising, the Act prohibits tobacco company sponsorship of sporting and cultural events, and more novel forms of advertising such as paying filmmakers to ensure that characters in movies are smokers. The purpose of this advertising ban is to discourage consumption, thus it is distinct from advertising regulations seeking to ensure such things as accuracy, good taste, or that the most appropriate audience is reached. The following sections discuss the many ways in which this conflict between the Act and freedom of expression has real consequences for smokers and for the general public.

A. The advertising ban has practical negative consequences for members of the public.

Considerations of freedom of expression, as expressed in section 14 of the Bill of Rights Act, apply in the commercial sphere as well as the political. Advertising affects people's day to day lives — in many cases, more so than does political expression. Smokers have a clear interest in knowing where they can purchase tobacco products and how much they will be charged for them. The only permissible way to uncover this information under the Act is by individually contacting possible retailers in person (and, perhaps, by phone¹⁰). No notice

⁸ See T. Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale Law Journal* 877 (1963).

⁹ The Act exempts certain point-of-sale advertisements, most overseas publications and films, and a few international sporting events.

¹⁰ The Smoke-free Environments Act prohibits distributing by any means or bringing to the notice of the public of New Zealand in any manner any words or pictures that notify the availability or promote the sale of any tobacco product. See sections 2,

that tobacco products are offered for sale at a particular retail establishment may be displayed outside.¹¹ Widespread price comparison and taking advantage of "sales" will be extremely difficult and time-consuming under this regime, and this difficulty will affect the economic well-being of smokers.

Potentially more important than financial considerations, promotional information on health aspects of various tobacco products is also restricted. Tar and nicotine levels must be specified on packs, but comparative advertising — for example, praising a particular brand as being lowest in tar and nicotine — is prohibited. Cigarettes having new improved filters or other safety features cannot be touted. It may be that for those people already addicted, high nicotine/low tar cigarettes are better than low nicotine/low tar cigarettes (if smokers switching from higher nicotine brands increase the number of cigarettes smoked to maintain nicotine dosage), but research promoting high nicotine brands on this (or any other) ground cannot be disseminated.

The Toxic Substances Board discounted this risk by arguing that switching to "safer" cigarettes is an inferior alternative to quitting.¹² But the fact remains that some people are unwilling or unable to quit smoking, and decreased risk is important to them. The Board also argued that the government could publicise or mandate any efficacious new safety features, but this is extremely unlikely to happen quickly, if at all (high tar cigarettes are still legal in New Zealand, for example, despite being considered to be more harmful per cigarette smoked than low tar cigarettes). By contrast, the profit motive ensures that manufacturers will act very quickly to publicize any new safety features.

In addition to practical financial and health impacts on smokers, the Act interferes with freedom of expression by prohibiting individual expression and debate on the merits of smoking. A pro-smoking statement is an "advertisement" even if there is no profit motive.¹³ No member of the public may endorse smoking or a particular brand of cigarette any more than a manufacturer can. New Zealand authors including fictional characters in stories who say "I need a smoke" and then light up, theoretically run the risk of being considered to be promoting smoking in contravention of the Act. Similarly, no one should state that those adults who wish to smoke should continue to do so, as this can be interpreted as promoting smoking.

22(1). There is an exception in section 23 providing for certain notices at the point-of-sale. Arguably, responding to a specific question asked over the telephone is not bringing the availability of the product to the notice of the public.

¹¹ See section 23(1)(b). The sole exception is a retailer's name or trade name (e.g. "Joe Smith Tobacconist") which indicates that tobacco is for sale but which does not include a trade mark or tobacco company name, and if that trade name is displayed on the exterior of the retailer's place of business more than twice, each display must be accompanied by a health message. Smoke-free Environments Regulations (No. 2) 1990 s. 4(2).

¹² *Health or Tobacco* at p. 72.

¹³ Tobacco product advertisements are defined in s. 2 of the Act to mean "any words, whether written, printed, or spoken, including on film, video recording, or other medium, broadcast or telecast, and any pictorial representation, design, or device, used to encourage the use or notify the availability or promote the sale of any tobacco product or to promote smoking behaviour; . . . [emphasis added]"

B. Advertising bans are philosophically inconsistent with the premise of a rational public which underlies respect for freedom of expression.

The effects of advertising bans go beyond the tobacco area. One of the greatest risks inherent in prohibiting any speech thought to have negative effects is that it may engender a false sense of security by the public. A common perception is that the government has “sanitized” the media and removed all harmful messages. Critical scrutiny of the media by the public diminishes in such a situation, and powers of judgement atrophy. The resulting naivety is dangerous. A better approach is for everyone to have a healthy scepticism about what they read, see and hear, including tobacco advertisements.

Parliament may have contemplated many exceptions to the principle of free expression when enacting the Bill of Rights Act. Yet the speech involved here fits into none of the traditional limitations. It does not advocate or facilitate crime. It does not reveal national secrets. It does not invade personal privacy. It is restricted irrespective of whether it is false or misleading. Prior to the Smoke-free Environments Act, the content of tobacco advertisements was severely restricted.¹⁴ The Toxic Substances Board seems to have had no quarrel with these tobacco advertisements on any ground other than their (perceived) effectiveness. Here, free expression does not conflict with any other individual right (as does pretrial publicity, for example, which may conflict with the accused’s right to a fair trial), but rather is a victim of paternalism. The advertisements’ sole failing was that they may have convinced some people to exercise a legal option — to smoke. The Board’s emphasis is on the *persuasiveness* of the advertisements.¹⁵ Yet this objection is antithetical to the respect for the individual which underlies many of the reasons for giving protection to freedom of expression in the first place. The concepts of individual self-fulfillment and the marketplace of ideas presuppose an adult’s ability to weigh different messages and to decide rationally. Surely freedom of expression is not meant to extend only to ineffective speech.

The Bill of Rights Act does not supercede legislation such as the Smoke-free Environments Act, but measuring the Act against the Bill of Rights provides confirmation of the extent to which Parliament has abrogated civil rights by prohibiting tobacco advertising. The substantive protections in the Bill of Rights Act must be read together with section 5. That section provides that “the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The limit on freedom of expression imposed by the Smoke-free Environments Act — a total prohibition on advocacy of a legal product — is not one which seems easily justified in a free and democratic society. In a free and democratic society, the utmost faith is placed in the judgement of

¹⁴ Tobacco advertising had been regulated heavily to remove romance, sex, glamour, sport, success and photos of people (except hand and forearm). Prior to the Smoke-free Environments Act, New Zealand tobacco advertisements consisted mostly of brand name logo, basic product information, health warnings and advertising slogans. In the words of the Toxic Substances Board, “content is not the main problem.” *Health or Tobacco* at p. 111.

¹⁵ See, e.g., *Health or Tobacco* at pp. 31, 105.

the members of the public: they are given the responsibility for electing the government. Viewing people as needing protection from dangerous pro-smoking messages because of the paternalistic belief that they are unable to make a rational decision is incompatible with the faith placed in public judgement in a democracy. In a democracy people are given information and left to make up their own minds, with the risk that some of them might not like what others decide. People do not always behave as many of us would like. There is often a trade-off between protecting civil liberties and short-term pragmatic benefits.¹⁶ If freedom were only extended to speech which could be shown to be unpersuasive and ineffectual, it would be a farce.

Restricting tobacco product advertising has another less obvious but extremely important impact on freedom of expression. The justification for the advertising restrictions stated in section 21(a) of the Act is "to reduce the social approval of tobacco use . . ." Here the government is saying explicitly that the aim is to change thoughts and attitudes. Section 13 of the Bill of Rights Act provides that "everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions *without interference*." Of course, the government is entitled to attempt to correct harmful attitudes, *but not by silencing all opposing viewpoints*. Government education campaigns become propaganda and exercises in thought control if opposing views are censored out of a fear of their persuasiveness. Foregoing a ban on advertising does not render the government powerless to act to discourage smoking; there are other effective means of dealing with the problem of smoking which respect individual rights, as will be discussed below. Commenting on protection for freedom of expression in the U.S. Constitution, Justice Blackmun of the United States Supreme Court has stated:

"I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product. Even though 'commercial' speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a *covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.*

. . ."¹⁷

The government has a tremendous amount of power. It has the authority to ban products, and the ability effectively to silence opposition. Making use of this ability to silence other viewpoints is pragmatically as well as philosophically wrong. The government can err, and whether the members of the public believe that it has done so in the case of tobacco is irrelevant to the principle at stake. If discussion of the desirability of any illegal or officially discouraged product is

¹⁶ Allowing the police to search houses randomly without any suspicion would no doubt uncover more crime, for example, but it is a step too repugnant to the rights of citizens to be secure in their homes to be permissible.

¹⁷ *Central Hudson Gas & Electric Corp. v Public Service Commission of New York*, 447 U.S. 557, 574-75 (1980) (Blackmun, J. concurring) [emphasis added].

permitted, it provides an avenue through which the minority can attempt to persuade the government of the error of its ways.¹⁸ A silenced opposition is unable to solicit the necessary public support. Thus to prohibit debate is to inhibit democratic checks on the exercise of government power.

The tobacco ad ban infringes freedom of expression, with many practical and philosophical negative consequences. The next section examines the government's justification for restricting expression.

C. Neither the harm of smoking nor popular support for an ad ban justifies restricting freedom of expression.

The short section in the Toxic Substances Board report addressing the free speech issue implies that the magnitude of the health risks from smoking justifies media restrictions.¹⁹ The magnitude of harm caused by a legal product is not a good criterion for deciding when to prohibit advertising. Tobacco advertising does not itself cause cancer — at best, it has an indirect effect by influencing people's smoking behaviour. Tobacco advertising may be persuasive, but it does not overbear people's rational faculties and force them to conform. To the extent that there is an intermediate step — consideration and judgement by the prospective smoker — the harm really stems from that individual's decision. People who are encouraged to commit lawless acts by friends and decide to do so are not forgiven by the criminal law. They are expected to resist inappropriate persuasion. The responsibility for an individual's actions rests primarily on that individual. If smoking is an appropriate choice,²⁰ people should remain free to receive and consider differing opinions²¹, including a pro-smoking viewpoint. While tobacco will continue to be harmful, the disease and death its use entails will be a consequence of the government's decision to allow individual choice in this area, rather than a consequence of tobacco advertising *per se*.

¹⁸ This was recognized implicitly in *Re "New Zealand Green"* (1978) 2 NZAR 48. The Indecent Publications Tribunal decided *not* to censor a book which it described as part propaganda advocating a change in laws restricting the use of marijuana — an illegal product.

¹⁹ *Id.* at p. 30-31.

²⁰ Arguably, consenting adults should have the freedom to smoke harmful substances should they choose to do so. Respect for self-determination and individual autonomy supports this result, but it is recognized in only a limited fashion in the present system. Adults are not given the right to choose to smoke marijuana, for example, or to choose to forego wearing a seat belt when driving a car. In its report, the Toxic Substances Board endorsed the "essential and elementary" goal of New Zealand being a society by the year 2000 in which "adults are free to choose to smoke or not, without persuasion to smoke." *Health or Tobacco* at p. 105. To the Board, a simple sign saying "cigarettes for sale" constitutes persuasion to smoke. In truth, the Act's restrictions go beyond merely removing persuasion.

²¹ Prohibiting speech while maintaining access to the harmful product by the public results in decision-making through public ignorance rather than informed judgements, and may do little to cure the underlying harm caused by the product. If a freedom to choose to smoke by adults continues to be recognized, it must be supported by a free exchange of information and the possibility of debate. What good would having an election be if the voters were not informed where they could cast a ballot? Would they

In arguing that the greater the harm, the greater the need to censor, the Board overlooks the question of whether there are alternate strategies, comparable to advertising bans in effectiveness, but less restrictive of individual rights. This argument is discussed in more detail below. By definition, an advertising ban cannot be the strategy of last resort for a legal product such as tobacco. The government always has the option of restricting the availability of the product. While the harmfulness of a legal product is not a good test of whether freedom of expression should be overridden, it may be an appropriate test for deciding whether to make that product illegal. The greater the harm, the greater the need to pursue effective action. If there are any doubts about the effectiveness of an advertising ban, as there are with respect to tobacco, the magnitude of the harm suggests the need for resort to more direct strategies.

A further justification for limiting freedom of expression which was advanced implicitly in the Toxic Substances Board's report is popular opinion. The Board suggested that there was popular support for a tobacco advertising ban. Assuming for the purposes of argument that this is correct,²² it still is not a persuasive justification. The general public (and the medical community) often fail to appreciate the value of intangibles such as freedom of speech without further education. To the extent that there is public support for the tobacco advertising ban, I would suggest that fuller discussion of the free expression issues will ultimately erode it. Even if I am wrong, however, and the majority firmly support the advertising ban, that support does not justify it. As Madam Justice Beverley McLachlin wrote for the majority in overturning the Canadian tobacco advertising prohibition, the task of ensuring that rights are not overridden by government is a difficult one that "may require the courts to confront the tide of popular public opinion."²³ Majorities are notoriously hard on the rights of minorities. If majority public opinion is sufficient to override rights, advertising restrictions will be likely to fall most heavily on products and services used by various minority groups. Civil liberties such as freedom of expression are of special importance to minorities, because minority groups lack the majority support which would facilitate political influence and democratic remedies.

The tobacco advertising ban infringes freedom of expression, with many practical and philosophical negative consequences. But recognising the rights of smokers and others to freedom of expression does not relegate the government to a powerless position wherein it must remain inactive while thousands of New Zealanders adopt a harmful lifestyle. The following section discusses the importance of anti-smoking expression to counter the pro-smoking messages in advertising.

be able to make an intelligent choice between candidates if they were given no information about their positions, and were unable to solicit and debate the opinions of others? Similarly, a genuine right to choose to smoke is illusory without this information.

²² Even the surveys quoted by the Board show no such consensus with respect to sports promotion. In the 1988 AGB poll 47% said that tobacco sponsorship should be banned and 52% said it should not. See *Health or Tobacco* at p. 107.

²³ "Ban on Cigarette Ads Rejected by Top Court" *Toronto Star* 22 September 1995.

D. Promoting anti-smoking expression as a weapon against smoking would be more consistent with rights than prohibiting advertising.

Classic exponents of freedom of speech have argued that the best way to persuade people of the truth of a proposition (for example, that people should not smoke) is to advocate it and let the “marketplace of ideas” operate, rather than prohibiting publication of opposing viewpoints. John Milton, author of *Paradise Lost*, wrote in 1644: “And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?”²⁴ In 1859, John Stuart Mill argued that censorship, even of false opinions, results in harm to society by denying it the fuller understanding of truth which follows truth’s conflict with error.²⁵ Justice Brandeis of the U.S. Supreme Court once said: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”²⁶ Belief in this basic philosophy undermines the fear that truth needs the government to intervene on its behalf.

Anti-smoking messages need not be as frequent as pro-smoking advertisements to be successful: success in the marketplace of ideas depends on a message’s persuasiveness, not on the sheer number of times it is repeated. Basic information warning of the risks of smoking is carried on tobacco advertisements and cigarette packs. An effective non-smoking campaign does not need to focus on the health effects of smoking — information which is already widely known — but on providing non-smoking role models and counterbalancing the messages in pro-smoking advertising and promotion. More memorable and persuasive anti-smoking messages are being developed all the time. A *Frontline* programme on tobacco advertising showed a number of interesting examples, including a graphic depiction of a fishhook emerging from a cigarette and piercing the smoker’s lip, and a cigarette pack dripping with blood being pulled from a body during an autopsy. Overseas campaigns have used slogans such as “kissing a smoker is like licking a dirty ashtray” to create negative imagery to counteract positive imagery from tobacco advertising.

Non-smoking messages need not be carried by the mass media to be effective. The cost of school smoking education programmes, for example, is minimal. The *Frontline* programme on tobacco advertising included footage of a schoolteacher showing students various cigarette advertisements and discussing the subtle messages and encouragements to smoke they contained. The purpose of such education is to “inoculate” the children against the type of persuasion attempted by the ads. Such an approach not only counteracts advertising in a way consistent with free speech, it teaches children important skills of evaluation which will help them in other areas.

²⁴ J. Milton, *Areopagitica — A Speech for the Liberty of Unlicensed Printing* (1644), quoted in G. Gunther, *Constitutional Law* (Foundation Press: Mineola, New York, 11th ed. 1985) p. 978.

²⁵ J. S. Mill, *On Liberty* (D. Spitz ed., WW Norton & Co: New York 1975) p. 18.

²⁶ *Whitney v California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

Counter-advertising will require some funds, but need not be prohibitively expensive. Current taxes on tobacco products bring in a very large sum of money. Non-smoking celebrities might be willing to donate their time, and public donations could be solicited (in a non-smoking telethon or other format) as well. Community involvement would be more likely to make the campaign successful, irrespective of the amount of money raised. But even if expensive, a campaign of anti-tobacco advertising and education is the superior approach. The public's rights should not be guaranteed only to the extent that doing so imposes no costs on the government.

Some may claim that the marketplace of ideas has "failed" because people are still taking up smoking, but the immediate success of government messages aimed at discouraging smoking cannot be the standard for evaluating the efficacy of a free speech approach. The anti-smoking message is being heard; it is *not* being "drowned out." It would be difficult to find a single eight-year-old child who does not know that smoking is harmful to health. Presenting both sides enables people to make up their own minds, but does not guarantee that they will choose a particular outcome. And just as more speech will not be perfectly effective in preventing new smokers from becoming addicted, neither will an advertising ban.

The tobacco advertising ban conflicts with freedom of expression. The next section considers the ad ban in the context of other anti-smoking options, and argues that the government's reliance on advertising restrictions has resulted in insufficient attention being given to alternatives which conflict to a lesser extent with individual rights. To attack tobacco use in a way consistent with principles of free expression, government should encourage *more* speech, not less.

II. The government has failed to give proper consideration to alternatives to advertising prohibitions which are less restrictive of individual rights.

The government has a number of strategies open to it in its campaign to combat the harms of smoking. Some of these strategies, namely advertising bans, conflict with fundamental rights; others, such as the anti-smoking expression discussed above, do not. Where there are multiple options, measures which conflict with rights should not be considered unless it is clear that the available options which are consistent with rights will not be efficacious. If this is done, rights such as freedom of expression will not be infringed unless it is truly necessary. If other remedies exist which would be no less effective than an ad ban, but which would have less of an impact (if any) on individual rights, these superior alternatives may well be overlooked if the government focuses narrowly on the harm of smoking and the advertising ban proposal. Legislation which infringes individual rights cannot be justified until all reasonable alternative strategies have been considered. There must also be adequate evidence of the efficacy of the proposed action which will conflict with rights. If there is insufficient evidence of efficacy, there is the prospect of infringing fundamental rights such as free expression with no corresponding benefit to public health. And there is the further prospect of being lulled into a false sense of security that the problem has been dealt with, sapping the motivation to take other, possibly more effective, steps to deal with the great harms caused by smoking.

The Toxic Substances Board has disclaimed any *need* to establish the effectiveness of ad bans.²⁷ Nevertheless it claimed to have demonstrated the effectiveness of ad bans, but it did so using flawed methodology which invalidated the conclusions. Neither has there been adequate exploration of options which are consistent with rights prior to implementation of advertising restrictions. In contrast to the approach of preferring rights consistent options in order to restrict individual rights as little as is necessary, while at the same time advancing governmental objectives, the government has emphasized restrictions on speech instead of restrictions on smoking.²⁸ The media have been the major target of the government's anti-smoking campaign for three decades. Voluntary agreements with the industry to restrict various types of advertisements were used for years.²⁹ Cigarette advertising was removed from television and radio in 1963, and from cinema and billboards in 1973.³⁰ It is quite clear that media restrictions have been at the forefront of the government's anti-smoking strategy. By contrast, warnings on cigarette packs were not required until 1974. Further restrictions were placed on advertising in 1979, and an anti-smoking campaign on television was launched the same year. Smoking intervention teacher kits were issued to schools in 1982.

Some alternatives to an ad ban have not been considered at all, for example, non-speech regulation of smoking. Members of Parliament debated whether tobacco should be made illegal.³¹ It was recognised that the very real effects of current smokers' addiction justified continued access to tobacco for adults. But this factor only holds for present smokers. Intermediate steps such as foreclosing access by the general public to tobacco have not been considered. Tobacco could be made available to existing smokers through prescription in maintenance programmes designed to spare those already addicted from withdrawal problems, for example, while ensuring that there will be no legal way to become addicted to tobacco.³²

²⁷ It has stated that it does not need to prove that tobacco promotion causes young people to begin smoking, and that an advertising ban is justified even if there is no certainty that it will result in an immediate decline in tobacco use. *Health or Tobacco* at p. 109. Neither did Canada have proof of the efficacy of an advertising ban before acting. The Quebec Superior Court and the Court of Appeals disagreed over the impact of this lack of evidence. See *RJR-MacDonald Inc v Attorney General of Canada* 82 D.L.R.(4th) 449 (1991) and *RJR-MacDonald Inc. v Attorney-General of Canada*, 102 D.L.R.(4th) 289 (1993).

²⁸ *E.g. Health or Tobacco* at p. xix.

²⁹ Although these and subsequent restrictions were voluntary, they substituted for legislative restrictions. For example, the 17 July 1985 agreement between the Minister of Health and the tobacco companies recited "Provided that the spirit and the letter of this Agreement are observed, the Agreement is intended to be in lieu of further legislative or regulatory restrictions on the marketing of cigarettes while the Agreement is current." Recommended Controls on Tobacco Products for Smoking Under the Toxic Substances Act 1979, Report to the Minister of Health from the Toxic Substances Board, July 1989 Appendix I p. 7.

³⁰ *Health or Tobacco* at p. 104.

³¹ See, e.g., *Parliamentary Debates (Hansard)* Introduction of the Smoke-free Environments Bill (17 May 1990) p. 1640-41.

³² A "black market" may develop, but it will be no worse than the black market for marijuana and other illegal drugs under the present system.

Other alternatives to an ad ban have been discarded too quickly. The Toxic Substances Board considered the option of health advertising to counter the effects of tobacco advertising in its report, for example, but rejected it as being “extremely expensive, perhaps prohibitively so” and dependent on funding upon which the Board could not rely.³³ It took this position notwithstanding its belief that anti-smoking ads can have more credibility and impact than cigarette ads.³⁴ As has been argued above, promotion of anti-smoking messages need not be very expensive. Even if it were, however, neither the necessity of expending a reasonable sum of money, nor the burden of administering a scheme, should override fundamental rights. To decide otherwise is to make monetary and administrative considerations superior to rights. Accomplishing governmental objectives without infringing rights will often entail at least a minimal expense or inconvenience.

Yet other alternatives are only now beginning to get the attention they deserve. Age restrictions on purchasing tobacco are a prime example. In its report the Toxic Substances Board emphasized its concern about the susceptibility of young people to cigarette advertising. Protection of children is a worthy aim, but denying them access to tobacco would deal with this concern at least as effectively as does banning advertisements. A ban on tobacco advertising enhances the “forbidden fruit” allure of cigarettes while doing nothing to limit young people’s access to them. Despite the obvious merits of an age restriction, the Toxic Substances Board did not recommend banning tobacco sales to children under the age of sixteen until 1986³⁵ — twenty-three years after the first advertising restrictions — and the age limit did not go into effect until 1988. Jenny Shipley recently announced her intention to increase the legal age for buying tobacco to 18³⁶, but this has yet to be implemented. Not only has the government been slow to put in place restrictions on children’s ability to purchase tobacco products, but it has been slow to enforce them. Only recently are there signs that age limits are starting to be enforced aggressively.³⁷ Advertising restrictions may have created a false sense of security that the smoking problem was being dealt with which resulted in or contributed to the government’s failure to take stronger action against smoking. Undue reliance has been placed on using advertising restrictions to discourage smoking, and this focus on the media may have diminished the government’s motivation to take other remedial action.

If fundamental rights will be infringed by legislation, special care must be taken to justify it by presenting reasonable evidence of its likely effectiveness, and establishing its superiority when compared with all other reasonable alternatives. Not only has the government failed to do this prior to enacting the Smoke-free Environments Act, it has also set a precedent which may have equally

³³ *Health or Tobacco* at p. 111.

³⁴ *Health or Tobacco* at p. 36.

³⁵ Recommended Controls on Tobacco Products for Smoking under the Toxic Substances Act 1979, Report to the Minister of Health from the TSB, July 1986, p. 1.

³⁶ “Minimum Cigarette Buying Age to Be Raised to 18” *Otago Daily Times* 25 September 1995 p. 1.

³⁷ See “Australian anti-smoking campaigner in Dunedin” *Otago Daily Times* 5 March 1994 p. 5 and “Cigarette operation” *Otago Daily Times* 23 August 1995 p. 9.

objectionable effects on other products and services, as is discussed in the next section.

III. Advertising of other products and services is at risk of future prohibition following the tobacco precedent.

The justifications for prohibiting tobacco advertisements apply equally well to other products and services. As demonstrated above, the government's approach has been to focus almost exclusively on whether smoking is harmful. Having established that it is, advertising restrictions have been perceived to be justified. Tobacco undeniably does great harm, but so do other legal products and services. Quantifying harm is difficult and subjective.³⁸ Depending on the factors to be included and their relative weight, for example, it is not necessarily clear that tobacco is more harmful than alcohol. The consumption of alcohol is associated with health harms, violence and automobile accidents. Other legal products are harmful also. A high dietary intake of saturated fat is linked to coronary heart disease, and coronary heart disease causes 44% of all deaths in New Zealand according to the National Heart Foundation.³⁹ Compulsive gambling leads to financial ruin and destroys families. Babies fed artificial breast milk are more likely to die from cot death and other diseases. Coffee is an addictive stimulant which exacerbates many health problems. Even if tobacco could be demonstrated to be more harmful than other products, why should that matter? Free expression aside, there seems to be little justification for banning the advertising of a product that kills 4000 people per year, but not of a product that kills *only* 30 people per year.

There is no valid distinction between tobacco and other products justifying this differential treatment. The Toxic Substances Board contended otherwise with respect to the advertising of alcoholic beverages. It noted that unlike tobacco, "abuse or misuse of alcohol" is necessary to "achieve a fatal result".⁴⁰ It did not justify its emphasis on fatality as a proper standard. Why should a distinction be drawn between products causing physical illness, pain, disfigurement, lack of function or emotional or economic ruin on the one hand, and death on the other? Throughout its report, the Board focuses on illness and other harms caused by smoking as well as on death, belying any indication to the effect that they believe fatality to be the essential criterion. Further, the suggestion that alcohol is dangerous only if misused conflicts with the belief of many people in New Zealand that even moderate consumption of alcohol is harmful for religious or other reasons. Consumption of small amounts of alcohol may be harmful also for recovering alcoholics, for any people predisposed genetically towards alcoholism, and for people with particular medical conditions.

³⁸ No harm is universal, not even smoking — 1 in 3 heavy smokers on average dies before age 85 of diseases caused by smoking, so 2 of 3 either survive or die for a different reason. *Health or Tobacco* at p. 10. Estimates of probability need to be factored into the harm equation. Not only physical harm must be included, but also economic, emotional, and other harms, and any positive features of the product need to be taken into account.

³⁹ "Cardiologist wants 'fat tax'" *Otago Daily Times* 7 October 1993 p. 11.

⁴⁰ *Health or Tobacco* at p. 30.

The purported distinction between alcohol and tobacco begs the real question. Does it matter whether a product *can* be used safely if it *is not* being used safely? The proper issue must be whether advertising encourages *harmful* use of alcohol. If it transpires that alcohol advertisements induce overindulgence with resulting harms, possibly including violence or drink driving, then any health benefits to moderate consumption will not be determinative. Besides, just as any overindulgence will not be a universal effect from advertising or promotion of alcohol, tobacco advertisements will not have a detrimental effect on *everyone* seeing them, as only certain people decide to smoke. In each case the harm falls only on some members of the audience.

If an advertising ban is considered to be only a minor infringement of freedom of expression and easily justified by the perceived harm of a product, other fringe groups might step forward with new candidates for advertising restrictions. This possibility is not far-fetched. Some products are already subject to advertising restrictions designed to decrease consumption, such as artificial breast milk, and advertising restrictions on others have been advocated. For example, cardiologist Dr Richard Talbot has advocated a mass strategy for persuading people to change their diet away from foods high in saturated fat (such as dairy products, high-fat mince and sausages) which would include advertising bans as well as education and special taxes.⁴¹ Gambling has been the subject of advertising restrictions amounting to a ban in other jurisdictions.⁴² A list of legal products and services which at least some segments of the public would like to discourage includes: war toys, guns, products for hunters, hazardous sports gear, boxing competitions, beauty contests, cosmetic surgery, weight reducing dietary supplements, tranquilizers, meat, eggs from battery hens, artificial food additives, homeopathic and alternative medical care providers, sexually explicit materials, massage parlors, gay discos, gay sex manuals, birth control, and abortion providers. In each case there is at least a plausible argument that the product or service causes societal harm that outweighs the legitimate interests of advertisers in promoting it.

Banning the advertising of these things will clearly be detrimental to those segments of society which disagree with the groups seeking to discourage their use. It would be difficult to underestimate the malign impact on society of placing advertising bans on anything which a vocal segment of the public believe to be harmful. As Alexander Hamilton once wrote in another context: "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."⁴³ Tobacco advertising sets such a precedent which is likely at least to lead to campaigns for further censorship. If campaigns for future censorship are not successful, it will be because of the idiosyncrasies of the members of the government, rather than the objective application of neutral principles which convincingly distinguish tobacco from other products. Lawmaking, especially in an area of fundamental freedoms

⁴¹ "Cardiologist wants 'fat tax'" *Otago Daily Times* 7 October 1993 p. 11.

⁴² See, e.g., 18 U.S.C. s. 1304 [United States].

⁴³ *United States v Brown*, 381 U.S. 437, 444; 14 L.Ed.2d 484, 489 (1965).

such as expression, should not be an *ad hoc* response to the whims of the day. Successful or not, the atmosphere will increasingly be one of interventionist government scrutiny of the media.

Conclusion

Banning expression may be perceived as a minimally restrictive and therefore acceptable approach to discouraging smoking. But in fact it is inferior to other options. Free speech has special importance, and restricting it should be the last option to be considered, rather than the strategy of choice as it has been under the present system.