Legal Backgrounder

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# FREE SPEECH RIGHTS TRUMP GOALS OF ANTI-ALCOHOL ACTIVISTS

by

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The headline over the Associated Press article seemed familiar: "**Physicians Call for New Limits on Booze Commercials**." The article itself revealed that the American Medical Association (AMA) was calling on television broadcasters to ban all alcoholic beverage commercials before 10:00 p.m., citing studies that underage drinking harms children and adolescents more than it does adults. Just eight days before, *The Wall Street Journal* (December 18, 2002) reported that "a new anti-alcohol watchdog group" had launched "a crusade" (*The Journal*'s term) "to limit the placement of beer and other alcohol commercials on television airwaves."

Coincidence? Probably not. The new crusading "watchdog" is the Center on Alcohol Marketing and Youth (CAMY) formed earlier in 2002 at Georgetown University which boasts as an adviser Dr. David A. Kessler, former Commissioner of the Food and Drug Administration and currently Dean of Yale University School of Medicine. Dr. Kessler, a pediatrician, will be remembered for his strong support for the FDA's proposed curbs on cigarette and other tobacco product advertising as part of an FDA effort to regulate the manufacture and marketing of cigarettes as "nicotine delivery devices." That effort was struck down by the Supreme Court of the United States in *Food & Drug Adm'n v. Brown & Williamson*, 529 U.S. 120 (2000). Unresolved in the determination was the lesser included — but vital — question of whether the First Amendment was a barrier to FDA regulation of advertising, in all forms of media, for cigarettes and other types of tobacco products.

While the Supreme Court did not take the opportunity to rule on the interplay between government regulatory authority and the advertising rights of marketers of tobacco products in *Brown & Williamson*, in 2001 the Court did speak directly to similar issues in *Lorillard v. Reilly*, 533 U.S. 525 (2001) a decision which, among other things, struck down restrictions promulgated by the Massachusetts Attorney General on outdoor and point of sale advertising of smokeless tobacco and cigars. Because the Court also held the Massachusetts restrictions on cigarette advertising pre-empted by federal law, it did not reach similar First Amendment issues about this attempt to ban or otherwise

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restrict the advertising of cigarettes in order to keep such ads away from the underage population of Massachusetts.

Notwithstanding the very clear lessons in First Amendment jurisprudence taught by *Lorillard*, discussed below, and several other Supreme Court cases overturning restrictions on alcohol beverage and gambling advertising, it appears highly likely that CAMY and the AMA are sounding the trumpets in a new battle to limit the exposure of Americans to alcohol beverage advertising on TV. While their press releases now call for self-regulation by TV broadcast and cable networks, there is little likelihood — and rightly so — that the TV industry will respond favorably to such calls as those of the AMA to self-censor by "channeling" alcohol beverage advertising on TV to the post-10:00 p.m. and early morning hours, as though it were "adult" programming with sexual content.

The same can be said for Dr. Kessler's recent suggestion to a *Wall Street Journal* interviewer that alcohol marketers should restrict their TV advertising to programs "where underage viewers make up no more than 15% of the audience." (According to CAMY, and there is no reason to dispute this, the 15% figure is the percentage of the TV viewing population, ages 12 through 20, in the United States. The same age group's representation in the total U.S. population determined by the 2000 Census is 15.6%.)

While there is no question that underage drinking requires the attention and best efforts of our society to reduce the harm it causes, inevitably, seemingly well-intentioned goals like those of CAMY, Dr. Kessler, and the AMA will lead to proposals that government must use its police power to limit the exposure of minors to TV advertising of alcohol beverages. But the existence of an activity that should be curbed, such as drinking by minors, does not mean that government is free to impose draconian restraints on speech to achieve that end — especially speech intended for adult consumers who engage in that activity legally. If there is one principle that has emerged clearly in the last decade from *Lorillard* and the Supreme Court's other commercial speech cases, it is that censorship by government cannot be a first step in efforts to eliminate or reduce the perceived harm — indeed, it cannot be a step at all so long as there are reasonably available alternatives with little or no impact on speech that can effectively achieve the goal that society favors.

In *Lorillard*, the Supreme Court found that Massachusetts had not carefully calculated the burdens on speech imposed by its regulations which reached and eliminated outdoor advertising of smokeless tobacco and cigars in substantial areas of the state — perhaps as much as 87% to 91% as contended by the advertisers. Consider then the potential impact of Dr. Kessler's suggestion that alcohol beverage advertising be eliminated from TV programs with a youthful audience of more than 15%. What if that were to be converted from a suggestion to a government restriction? Even though 84% of a program's audience were adults, those adults would be denied the advertiser's message and the advertiser a very substantial adult audience. Dr. Kessler's prescription, turned into a government restriction, would be an overbroad, prophylactic measure severely impacting an adult audience, not the careful calculation of risks and benefits — the narrow tailoring — that the First Amendment requires.

Next, consider the AMA's suggestion that alcohol advertising be channeled into time slots after 10:00 p.m. into the early morning hours. If that were to be imposed by government fiat, how much of the adult TV audience would be lost by the denial of daytime (particularly daytime sports) and prime

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time to alcohol beverage advertisers? Perhaps the demographics measurers of the TV industry will supply precise data one day — but can anyone doubt that the loss of adult viewers will be very substantial?

*Lorillard* drew heavily upon other Supreme Court precedents in the area of indecent materials which have made it clear that expression intended for adults may not be banned by an unnecessarily broad suppression of such speech by government in order to protect children. These precedents included *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in which the Court cited *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983) and its famous statement that "the level of discourse reaching a mail box simply cannot be limited to that which would be suitable for a sand box," as well as the statement in *Butler v. Michigan*, 352 U.S. 380 (1957) that the "adult population . . . [cannot be reduced] to reading only what is fit for children." Now the TV "box" is within the censorship gun-sights of another group of advocates for children and the "sand box" may once again be right around the corner.

Any advocate of government control of alcohol beverage advertising for the purpose of protecting minors also should carefully examine the Supreme Court's decision last term in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), which struck down on First Amendment grounds several provisions of the Child Pornography Prevention Act of 1996 (CPPA), including one which criminalized pornography produced using "virtual children" (created by computers) whose images "appear to be" engaged in sexual activity.

In affirming a Ninth Circuit decision which reversed a U.S. District Court ruling that upheld the statute as a content-neutral restriction designed to protect children and society from the "secondary effects" of the child pornography industry, the Supreme Court (with two dissents) rejected the government's effort to justify control of sexual imagery because of its indirect effects — such as evil thoughts possibly generated in viewers and fears about actions that might follow from such thoughts. While the case had many facets, the majority opinion by Justice Kennedy is a powerful expression — drawing on *Butler*, *Reno* and *Sable Communications v. FCC*, 492 U.S. 115 (1989) — of the severe limitations placed on government efforts to ban expression in order to alleviate perceived social problems involving children: "The Government cannot ban speech fit for adults *simply because it may fall into the hands of children."* (emphasis supplied)

The lesson for would-be censors of alcohol advertising should be clear: instead of advocating unconstitutional methods of thought control, retool your efforts to reduce the harm caused by underage drinking by focusing on alternatives which have proved to be effective, such as more and better law enforcement and educational efforts directed at minors and their parents. And here is a thought for CAMY, Dr. Kessler and the AMA: how about working *with* — instead of against — the alcohol beverage industry which is at least as — and quite possibly more — eager than you are to solve this problem?

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