

The War on Drugs: Is It Time to Surrender?

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Two decades after the doomed and undeclared war in Vietnam, America has declared itself at war with drugs. Recent polls have blasted illegal drugs as public enemy number one; in an era of budget retrenchments and hands-off government, the crusade against drugs has become a central priority for federal action and funding. All told, expenditures on all aspects of drug enforcement, from drug eradication in foreign countries to imprisonment of drug users and dealers in the United States, totaled in 1987 over ten billion dollars. Convicted drug offenders crowd our prisons: nationwide in 1987, 750,000 people were arrested for violating drug laws, and many faced stiff mandatory sentences. Drug “czar” William Bennett has called for capital punishment for drug dealers and remarked that “morally” he doesn’t “have any problem” with beheading as the method of execution. In unison schoolchildren shout “Just say no!” and everyone knows what it is they’re saying no to. Even legal drug use — the consumption of alcohol and tobacco — is declining steadily, as we strive toward the goal of drug-free schools, drug-free neighborhoods, a drug-free America.

Yet few think this is a war we are winning. Despite accelerated enforcement efforts, the black market in cocaine has grown to record size. Crack, the most lethal cocaine derivative, was all but unheard of five years ago; today 15 percent of infants born in the nation’s capitol suffer brain damage from exposure to crack in the womb. Drug-related murder rates soar; drug-related

violence holds our inner cities hostage to fear; drug-related civil war rages in Colombia. Is the drug war one we can possibly win?

Indeed, the drug war itself has come to be more deadly than the enemy it is waged against. The greatest costs are incurred, it can be claimed, not by drugs per se, but as a direct or indirect by-product of their criminalization. While 90 percent of Americans appear to be opposed to the legalization of drugs, decriminalization measures are gaining support across the political spectrum; advocates of legalization range from conservative William F. Buckley to the liberal, black mayor of Baltimore, Kurt Schmoke.

Are there moral considerations that tell in favor of legalization? Can we draw parallels between how we treat legal drugs such as tobacco and alcohol and how we should treat illegal drugs such as heroin, marijuana, and cocaine? Should we legalize drugs as a way of respecting individual autonomy against government paternalism, or as a way of showing compassion to the victims of addiction? Most important, do the consequences of legalization promise to be less terrible than those we now face?

The Argument from Consistency

A first argument offered for legalization is that currently illegal drugs are in no relevant way morally different from the most popular legal drugs — alcohol and tobacco — and so consistency demands that if beer and cigarettes are legal, marijuana, heroin, and cocaine should be legal as well. There is certainly nothing particularly distinctive, nothing inherently worse, about the drugs that through historical accident happen to find themselves on the “illegal” list. After all, narcotics were legal in this country only a century ago, with a wide choice of hypodermic kits available for purchase from the Sears, Roebuck Catalog. Many doctors at the turn of the century prescribed opium as a treatment for alcoholism, viewing opiate addiction as the lesser of two evils. And cocaine, of course, gave its name to Coca-Cola, of which it was long an ingredient.

If anything, illegal drugs are far less harmful than the legal ones. The federal data for 1985 documented 2177 deaths from the most popular illicit drugs: heroin, cocaine (including crack), PCP, and marijuana. Diseases related to alcohol and tobacco, on the other hand, kill close to half a million Americans every year. No illegal drug is more clearly linked to drug-induced violence than alcohol; nicotine and alcohol are both powerfully addictive. Ethan A. Nadelman, assistant professor of politics and public affairs at Princeton University, suggests that “if degrees of immorality were measured by the levels of harm caused by one’s products, the ‘traffickers’ in tobacco and alcohol would be vilified as the most evil of all substance purveyors.”

But parallels between legal and illegal drugs can cut both ways. While Prohibition produced a level of crime and gang violence eerily prescient of today’s drug-related crime and violence, it also slashed alcohol consumption in half, with all the attendant benefits to

human health and family stability. Legal drugs may take a greater toll on health and happiness precisely as a result of their legality — and so of their widespread use and cultural entrenchment. Sue Rusche, director of the National Drug Information Center of Families in Action, claims that “illegal drugs kill fewer people only because fewer people use them.” Why on earth, one might ask, would we want to encourage the use of cocaine and heroin on a par with today’s levels of smoking and drinking?

But in any case, the argument from consistency is a weak one. Robert Fullinwider, research scholar at the Institute for Philosophy and Public Policy, regards the argument that if we tolerate alcohol and tobacco, we are somehow logically bound to tolerate crack in the same way, as the kind of foolish consistency that is the hobgoblin of small minds. We make our laws not only on the basis of logic, but of history; we have an entrenched cultural history with some drugs that we need not repeat with others. Thus Fullinwider, who is inclined toward drug legalization, notes that we could treat cocaine and heroin, if legalized, very differently from alcohol and tobacco. It would be insane, for example, to allow advertising of such drugs; we needn’t permit a whole new array of billboards extolling their pleasures.

“If degrees of immorality were measured by the levels of harm caused by one’s products, the ‘traffickers’ in tobacco and alcohol would be vilified as the most evil of all substance purveyors.”

The Argument Against Paternalism

A second argument against criminal penalties for drug use is essentially an argument against the exercise of state power to coerce citizens’ private and personal choices regarding what they do with their own “free” time. Steven Wisotsky, professor of law at Nova University, argues that “zero tolerance” of drug use is simply an inappropriate goal for a liberal society. “The overwhelming majority of incidents of drug use,” Wisotsky claims, “are without lasting personal or societal consequence, just as the overwhelming majority of drinking causes no harm to the drinker or to society.” For Wisotsky, “The... goal of a drug-free America, except for children, is both ridiculous — as absurd as a liquor-free America — and wrong in principle. This is not a fundamentalist Ayatollah land after all. A democratic society must respect the decisions made by its adult citizens, even those perceived to be foolish or risky.”

David A. J. Richards, in his book *Sex, Drugs, Death, and the Law*, also argues that we must respect “the

individual's ability to determine, evaluate, and revise the meaning of his or her own life." Drug experience, Richards suggests, "is merely one means by which the already existing interests of the person may be explored or realized." While it may seem strange to claim that the drug addict is voluntarily pursuing his or her own possibly quite reasonable goals, Richards sees the whole concept of addiction as complex and highly confused: talk of "addiction" conflates the *physiological* features of tolerance (the progressive need for higher doses of a drug to secure the same effect) and physical dependence (the incidence of withdrawal symptoms when drug use is stopped), with the *psychological* centrality of the drug in the user's system of ends, and, most important, with a *moral* judgment that drug use is intrinsically degrading or debasing. These features have no necessary connection to one another. Moreover, the moral condemnation of certain drug use as drug "abuse," according to Richards, involves importing middle-class values into judgments about others' lifestyle choices. He writes, "The psychological centrality of drug use for many young addicts in the United States may, from the perspective of their own circumstances, not unreasonably organize their lives and ends."

But it hardly takes a set of stuffy "middle-class values" to argue that involvement with a highly addictive drug such as crack counts as a form of slavery. The insatiable craving for crack leads people to neglect and abuse their children, to live in unspeakable filth and foulness, to commit any crime to service one all-encompassing obsession. No crack mother, it is safe to say, views crack addiction as a future she would choose for her children. John Kaplan, professor of law at Stanford University, observes that the anti-paternalistic principle of letting each person decide for himself "seems singularly inappropriate when it is applied to a habit-forming psychoactive drug that alters the user's perspective as to postponement of gratification and his desire for the drug itself." Kaplan cites research showing that cocaine scores by far the highest "pleasure" score in laboratory experiments on drug use and is also the most "reinforcing" of drugs known to man: in animal studies, monkeys, if permitted, will perform a given task again and again to gain a reward of cocaine, neglecting food or rest until they die of debilitation.

The anti-paternalistic argument for legalization of drugs is most persuasive for benign and non-addictive drugs like marijuana — but marijuana is the least of our drug problems today. When the drugs to be legalized are dangerous and highly addictive drugs like crack, the argument fails. If paternalism is justifiable anywhere, it is justifiable here. Paternalistic prohibitions against highly addictive drugs are legitimate in principle; the central issue, as we shall see shortly, is how they work in practice.

The Argument for Compassion

By contrast, a third argument for the legalization of

drugs starts from a very different assumption: that drug abuse is a serious health problem, a condition to be addressed with compassionate medical aid rather than stigmatizing criminal sanctions. While the argument against paternalism downplays the addictiveness of many drugs, the argument from compassion fastens on this as its starting point. As Baltimore's Mayor Schmoke, a leading advocate of this position, argues, "Addiction is a disease, and whether we want to admit it or not, addicts need medical care." Decriminalization, for Schmoke, is a means of reassigning responsibility for the epidemic of drug abuse away from the overburdened criminal justice system to the public health system, where it properly belongs.

Given the fundamental nature of drug addiction, Schmoke points out that "we cannot hope to solve addiction through punishment... Even after prolonged periods of incarceration, during which they have no physical access to heroin, most addicts are still defeated by their physical dependence and return to drugs... The sad truth is that heroin and morphine addiction is, for most users, a lifetime affliction that is impervious to any punishment that the criminal justice system could reasonably mete out."

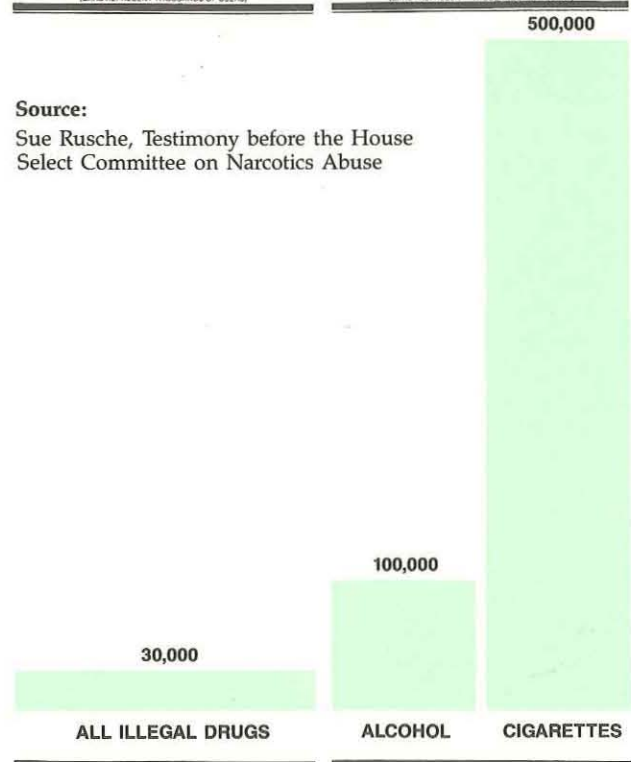
While the anti-paternalism argument would justify a relatively free market in drugs on the analogy to current arrangements for alcohol and tobacco, the argument from addiction would point to a prescription system as we have today for tranquilizers and other drugs under the control of the medical establishment.

NUMBER OF AMERICANS KILLED BY ILLEGAL DRUGS

(BARS REPRESENT THOUSANDS OF DEATHS)

NUMBER OF AMERICANS KILLED BY LEGAL DRUGS

(BARS REPRESENT THOUSANDS OF DEATHS)



Source:

Sue Rusche, Testimony before the House
Select Committee on Narcotics Abuse

A prescription system, however, would fail to eradicate the worst problems accompanying the criminalization of drug use, for it is likely we would continue to see a booming black market in the controlled substances.

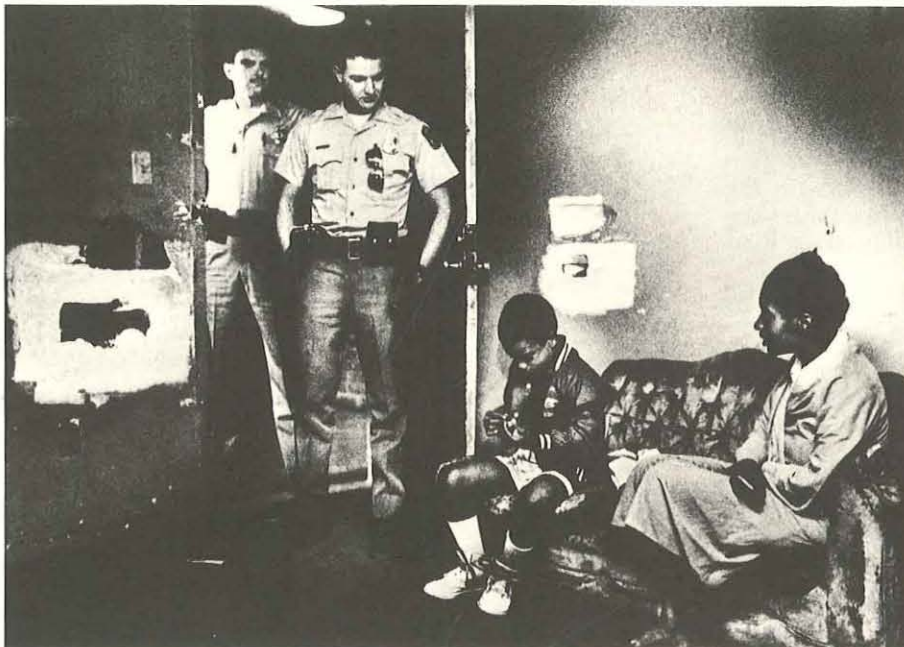
The Argument from Consequences

However tolerant and compassionate our attitudes and policies may be toward drug users, we may take a very different and far dimmer view of drug pushers. How can we sanction the terrible harms wrought by those who purvey drugs such as crack and PCP to children and to other vulnerable groups? By taking steps toward legalizing drugs it seems that we implicitly condone and legitimate a market in misery.

on drugs and benefits from any intensification of it. At best, increased enforcement simply boosts the black market price of drugs, encouraging more drug suppliers to supply more drugs. The publicized conviction of a drug dealer, by instantly creating a vacancy in the lucrative drug market, has the same effect as hanging up a help-wanted sign saying, 'Drug dealer needed — \$5,000 a week to start — exciting work.'

Given this kind of financial incentive to deal in illegal drugs (an industry boasting an estimated \$200 billion in annual sales), Fullinwider suggests that no criminal sanction can work to dissuade the dealer. The necessary cost-benefit calculations are easily performed: given that the rewards are enormous and certain, no

Dudley M. Brooks, *The Washington Post*



Six-year-old Dooney Waters lives in a Maryland crack house with his mother, who described herself in a Washington Post series as 'a slave to cocaine.'

But the most powerful and persuasive argument for the legalization of drugs is simply that however morally distasteful legalization of crack and PCP might intrinsically be, in practical terms the alternative is far worse. A sane policy analysis must consider not only the harm caused by using illegal drugs, but also the harm caused by the measures we take against them. The war on drugs is turning out to be a holocaust for our inner cities, and on these grounds it is unconscionable not to surrender.

In the first place, the war on drugs creates all-but irresistible financial incentives for drug dealers. Black market prices of heroin and cocaine are about a hundred times greater than their pharmaceutical prices: on one estimate, for example, \$625 worth of coca leaves has a street value in the United States of \$560,000. Such hyper-inflated prices mean hyper-inflated profits. As James Ostrowski, former chairman of the New York County Lawyers Association Committee on Law Reform, explains, "Failure [of the war on drugs] is guaranteed because the black market thrives on the war

penalty, even Bennett's favorite beheading, can act as a countervailing consideration, unless the penalty can be made equally certain. And it cannot, even if all the resources of all our police forces and all our courts were to be devoted exclusively to the war on drugs.

Furthermore, the circumstances of criminalization worsen the consequences of the drugs themselves on users. As drug interdiction efforts have increased, drug traffickers have turned to smuggling purer forms of their product; for example, the average purity of cocaine has soared. More potent law enforcement leads to the development of more potent drugs. Schmoke is one who argues that "crack is almost entirely a result of prohibition." Illegal drugs keep getting stronger, even as legal drugs are becoming weaker, with health pressures for low-tar cigarettes, light beer, and wine coolers. There is no Food and Drug Administration regulating the content and purity of illegal drugs, so users buy drugs of uncertain strength, adulterated with various poisons. The illegal status of drugs hastens the spread of AIDS by posing obstacles to needle exchange

programs; it inhibits drug users from seeking needed medical attention.

The most serious negative consequence threatened by decriminalization of drugs is a possible increase in use. Opponents of legalization argue that drug-prohibition laws succeed in deterring many people from trying drugs and reduce their availability. But while the lessons of Prohibition lend some support for worries about increased drug use following the repeal of drug laws, decriminalization of marijuana by about a dozen states in the 1970s did not lead to increases in marijuana consumption; in the Netherlands, which decriminalized pot during the 1970s, consumption has actually declined significantly. Culture seems more important than law in determining patterns of drug use. One may doubt that most Americans would inject cocaine or heroin into their veins even if given the chance to do so legally. And, finally, usage could double or triple without tipping the balance in favor of any escalation in the war on drugs, given the scale of the devastation from that war.

One last danger of the war on drugs, and in some ways the most troubling, is the threat that it poses to our civil rights. In a state of war, ordinary protections of civil liberties may give way to an all-out effort to combat the enemy. The same is true in the war on drugs. Wisotsky expresses concern about what he sees as two dangerous and related phenomena: "(1) the government's sustained attack, motivated by the imperatives of drug enforcement, on traditional protections afforded to criminal defendants under the Bill of Rights [such as more permissive use of illegally seized evidence, relaxation of search and seizure requirements, and draconian mandatory sentences], and (2) the gradual but perceptible rise of "Big

Brotherism" against the public at large in the form of drug testing, investigative detention, eavesdropping, surveillance, monitoring, and other intrusive enforcement methods." He concludes, "Since the early 1980s, the prevailing attitude, both within government and in the broader society, has been that the crackdown on drugs is so imperative that extraordinary measures are justified. The end has come to justify the means. The result is that Americans have significantly less freedom than they did only five or six years ago" — all in the waging of a war we cannot win.

Conclusion

Whatever the strength of any other arguments for the legalization of drugs, a sober cost-benefit analysis that pays heed to the terrible costs brought by our national war on drugs seems to support some degree of decriminalization. In the end, the best war on drugs may be to revive and overhaul our old war on poverty: to take the resources and energy marshaled in the war on drugs and direct them instead to programs designed to combat the entrenched hopelessness that makes drug use and abuse so tragically appealing.

The sources quoted in this article are: Ethan A. Nadelman, "The Case for Legalization," *The Public Interest*, vol. 92 (1988); Sue Rusche, testimony before the House Select Committee on Narcotics Abuse and Control, September 29, 1988; Robert Fullinwider, interview; Steven Wisotsky, testimony before the House Select Committee; David A. J. Richards, *Sex, Drugs, Death, and the Law* (Totowa, N.J.: Rowman and Littlefield, 1982); John Kaplan, "Taking Drugs Seriously," *The Public Interest*, vol. 92 (1988); Kurt Schmoke, testimony before the House Select Committee; and James Ostrowski, "Thinking about Drug Legalization," *Cato Institute Policy Analysis*, No. 121 (May 25, 1989).

Nuclear Waste Storage: Your Backyard or Mine?

Nearly forty years after the United States began producing nuclear waste as a by-product of generating nuclear power, we still have not succeeded in disposing of any of it. Thousands of metric tons of high-level radioactive waste now crowd temporary storage facilities near the reactors that produce them. For twenty-five years the problem was virtually ignored, leading former South Carolina governor Richard Riley to remark, "There is a basic law of nuclear waste often overlooked: all waste remains where it is first put."

The issue became politically salient around 1975, and after much debate, Congress passed the Nuclear Waste

Policy Act in 1982. The NWPA called for a site to be opened in a Western state by 1993 and a second site in the East by 2003; it also provided for extensive public involvement in the site selection process and even allowed local authorities a veto power over the selection of a site. However, the reasonable provisions of this law soon came unhinged. Thus, in 1986, President Reagan selected three candidate sites — in Washington, Nevada, and Texas — from those already studied by the Department of Energy, and he canceled plans to find a second site in the East. After further political maneuvering, the House of Representatives was left to

select one site from the president's list. It may be a coincidence that the Speaker of the House at the time was from Texas and the majority leader from Washington, but the Yucca Mountain site in Nevada was chosen. Nevada was offered \$10 million per year in compensation (rising to \$20 million per year after the site opened), on condition that it forgo the right to disapprove the site.

Nevada actually received an amount greater than that from the federal government, and it used these funds to conduct technical research on the characteristics of the site as well as research on the attendant social and economic impacts. The risks involved include eventual leaks, which might contaminate water supplies, and accidents while transporting wastes to the site. But Nevada's research also suggested that areas surrounding the site, including perhaps Las Vegas, would be economically stigmatized by a nuclear waste repository. Opposition to the site increased, and many Nevadans no doubt felt that they had not been treated equitably by decision-makers in Washington. Nevada spent some of its federal funds on lobbyists, hoping to persuade Congress to accept a different site. This annoyed some senators, who in 1986 reduced the federal funds given to the state. Then Nevada passed a referendum attempting to ban the site from the state, and the Senate responded by cutting federal funds to Nevada further in 1989, greatly hampering the state's ability to conduct its research. It is now certain that a waste site will not open in Nevada before the turn of the century, and it is far from clear that one will ever open there. Could this situation have been avoided?

When it comes to the siting of a nuclear waste repository, it is fairly easy to find reasons why somebody else's backyard is geographically, technologically, politically, and morally preferable to one's own. Nobody is thrilled at the prospect of a nuclear waste dump in his neighborhood; few communities would consider one a source of civic pride. But the wastes must be disposed of somehow and somewhere. In an ideal world, we could parcel out the risks of nuclear waste storage equally, so that we would each face the same chance of possible harm. But in our world, these risks must be distributed unequally. Those who live near the chosen sites are going to bear the risks, and if any harms eventuate, they will suffer the harms as well. How, then, should we decide: your backyard or mine?

Finding a Fair Procedure

In situations where we cannot distribute risks or harms *equally*, we can at least try to distribute them *fairly*. The procedures we use to assign such harms and risks will make a great deal of difference to how we feel about the ultimate distribution of outcomes. We might think it fair, even if unequal.

We can make a distinction between two different ways of appraising decision-making procedures. We can judge them on their tendency to produce the best outcome, where we have some independent way of

assessing outcomes. Or we can judge them on their intrinsic merits: with intrinsically valuable procedures, whatever outcome results is *ipso facto* the best.

What are we looking for in a procedure for selecting a nuclear waste site? The political and social issues have become so dominant that no one seriously maintains that the site should be picked solely for its geological properties. A purely scientific procedure thus appears to be unsatisfactory, even if it identifies the "best" site in terms of the sheer physical safety of storage. The risks involved in transporting wastes, along with other problems, rule out selecting a densely populated site, even if its geological features are ideal. Nor would it be socially acceptable to pick a site in a sparsely populated area, if the state in which this is located does not appear to benefit proportionately to other states from nuclear power. (Salt domes in Mississippi were eliminated from consideration for this reason.)

The reasons for not picking a site solely on grounds of geological fitness are generally described as matters of equity, even though a criterion of geological fitness would not obviously rely on any morally suspect consideration that discriminates against any particular population. If determining the site by geological criteria is unsatisfactory, therefore, this indicates that the procedures for site selection must be evaluated in part on their intrinsic merits, on their fairness, not simply on their instrumental value for picking an ideal physical location. Perhaps it shows something about the special nature of nuclear wastes that the procedure for picking a safe site must also satisfy political and democratic criteria. But the selection process cannot be evaluated strictly on intrinsic grounds of equity, either. We would not accept pure democracy here, e.g., by using a random selection process which gives everyone an equal chance of avoiding proximity to a site, or by giving everyone an equal voice in opposing the site, which would in effect place it in the most sparsely populated area, regardless of geological suitability.

We have not yet found a procedure that is ideally equitable, reasonable, and socially acceptable.

Geology, demography, and democracy are all relevant to the process of site selection. The procedure will have to be justified on scientific, political, and moral grounds. It is not obvious in advance that these criteria are simultaneously satisfiable. We have not yet found a procedure that is ideally equitable, reasonable, and socially acceptable.

Compensation for Risks

A fair procedure is one possible way to satisfy equity demands where harms, and the risk of harm, cannot



Aerial view of the Yucca Mountain study site

be distributed equally. Compensation provides an alternative possibility for realizing equity. Given the difficulties of determining a fair procedure for siting a nuclear waste repository, the possibility of offering compensation for those risks takes on major importance, for when harms are offset by benefits this mitigates the need to distribute the risk of harm fairly.

How does a benefit compensate for a harm? The benefit must do two things: first, it must at least equal the harm in amount; and, second, it must *offset* the harm, so that the affected party is restored to something like a status quo ante. Attempts to compensate may fail if either condition is not met.

Some losses are so great that no amount of benefits can restore the balance. Death is one such loss, for the victim certainly, and perhaps also for the victim's family and loved ones. Other harms, especially mass disasters that create losses on a vast scale, may similarly exceed an individual's, a firm's, or even a society's ability to compensate. This is an important problem for many of today's risky technologies, and certainly for nuclear power.

Other losses may be difficult to compensate not because of the amount of harm suffered but because of the nature of the harm. Benefits do not necessarily "fall short," but they are inappropriate in a different way: they fail to offset the harm. The money offered might easily equal or exceed the economic value of, for example, a family heirloom, but its loss would not thus be offset.

These considerations are relevant to the selection of a nuclear waste repository site, for the choice may have profound impacts on local communities and their ways of life. The populations of these communities must bear some increased risk to their health and lives which the expected economic benefits of disposal activity might not be able to compensate. These people may also face

fear and stigmatization, which we might have to compensate in different ways.

The economic impacts themselves might not be completely positive. Small rural towns, for example, may be converted to larger urban centers. The local economies may thrive, but the population's sense of its own identity — how people see themselves and their communities — may be altered forever. If it is necessary to compensate communities or individuals for siting a nuclear waste repository in their midst, then we need to ask what kind of values are threatened and whether the benefits in the compensatory package offered offset the nature as well as the level of the losses.

One way we might proceed in figuring out the appropriate kind and degree of compensation is to offer the affected parties some package of risks, harms, and benefits, and see if they accept it. Their consent determines whether compensation has been made, we might argue, for they will consent only if they regard our offer as making them ultimately better off.

While this method is frequently adequate, it can fail for several reasons. People may simply refuse to consent, especially if they see their losses as important and irreplaceable. Requiring explicit consent from all affected citizens may thus give each a veto power over public policy. Or the affected parties, such as future generations, may not be able to consent, yet it may be necessary nonetheless to impose risks or losses on them. If the parties lack the relevant information, or if they cannot process it rationally, as may well be the case with complex technological risks, then their consent can fail to be fully informed.

People may also be taken advantage of in ways we would consider morally unacceptable. It is generally beneficial to offer jobs to the unemployed, but people in need might accept an employment package even if the job was unnecessarily risky or other parts of the

package were extremely harmful. Consent does not justify obvious exploitation. A depressed community will naturally have a greater incentive to bid for hazardous land uses if these bring needed benefits, but we must be wary of exploiting its needs.

Compensation packages must be designed in cooperation with affected communities, but local acceptance of an offer may not be sufficient to determine that fair and adequate compensation has been made. We have to evaluate the package directly and the conditions under which it is found acceptable. We need, therefore, to determine independently whether the consent is informed and free and whether the benefits are appropriate. If we are imposing particular health risks, for example, compensation might aim explicitly at reducing the overall level of health risks in other ways, through providing subsidized health plans, building hospitals and health care centers, and so on. Similar benefits are generally more likely to offset a harm than dissimilar benefits. But determining what counts as fair and adequate compensation may prove to be as thorny and intractable as determining what counts as a fair procedure for assigning risk.

Intergenerational Equity

Intergenerational equity is clearly one of the most important moral issues involved in selecting a permanent repository site for nuclear wastes. We seem to have a moral consensus that the costs of nuclear power should be borne by the generations that benefit most directly from it and that we do have a moral responsibility to protect future generations.

These concerns bear on a key decision regarding storage of nuclear wastes. We can store the wastes in a retrievable manner, or we can store them "permanently." Permanent storage generally has higher expected costs to our generation than retrievable storage, but although retrievable storage is probably less expensive today, it imposes some maintenance costs on future generations. The consensus we are assuming about our intergenerational duties might forbid this intergenerational transfer of costs, and in fact permanent storage appears to be the policy with the greatest current political support.

But retrievable storage also reduces an important risk to future generations, for if something does go wrong with a site, and radioactive material begins to escape into the biosphere, it will be far less costly to correct this problem if the wastes are stored retrievably. So the choice is between an alternative that is more expensive today and imposes a very high-cost risk on the future, or one that is less expensive today, imposing some maintenance costs on future generations but also eliminating the extremely costly risk.

Two normative considerations seem to be relevant. The first is an issue of fairness. It seems only fair that the present generation should be required to bear the higher costs, since we are the ones receiving the benefits. It is far from clear, however, how the benefits and their distribution should be measured. This issue

arises in justice between generations and also among different populations in the same generation.

Should the benefits of nuclear power be seen as restricted to the less expensive electricity directly generated from nuclear power? Or should we also include these more widely shared benefits: the lower indirect costs of electricity that result from the contribution of nuclear power to the nation's energy supply; the lower costs of products made from this cheaper electricity, which may be purchased far from the site of the original power plant; whatever technological insights gained from developing nuclear power which may prove beneficial, especially to future generations, and so on? It is far from easy to draw boundaries, either geographical or temporal, around the beneficiaries of this, or indeed any other, technology. The farther those benefits extend in time and space, the weaker the moral case for allocating the costs narrowly.

The second consideration is one of rationality. We can try to reach a decision here by asking what a reasonable individual living some time in the future would want for herself and would want us to decide if we were deciding on her behalf. It might seem more reasonable to bear some certain, fairly modest, costs in order to reduce the chance of a far more costly accident. This, at any rate, is the standard justification for buying insurance. Arguing from either the fairness of allocating costs or the rationality of paying to avoid risks, normative considerations would seem to favor retrievable storage, contrary to prevailing popular beliefs.

Conclusion

Nuclear power seems to be enjoying some resurgence in popularity today, in the wake of concerns about the consequences of burning fossil fuels on global warming. This new awareness, however, does not address any of the problems that have plagued nuclear power in the past; at best, some people are beginning to think it may be less unacceptable than the alternatives. But this gives us greater reason to find socially acceptable solutions to nuclear power's traditional problems, beginning with disposing of the radioactive wastes we have already produced. We need to formulate — and then stick to — fair procedures for selecting a site; we must be willing to bear the costs of disposal, which will include carefully designed compensation packages to adversely affected communities; and, I have argued, we should rethink the wisdom of "permanent" disposal and seriously consider monitored retrievable storage instead. That would reduce the costs of accidents in the future and — who knows? — we may yet find a socially beneficial use for all that radioactive material. If nuclear power can regain popularity after decades of mismanagement and Chernobyl-like accidents, then anything is possible.

— Douglas MacLean

This article was based on research Douglas MacLean conducted while he was a consultant to the Equity Task Force of the Nevada Nuclear Waste Project office.

Confronting the Insurance Crisis

The insurance industry confronts an antagonistic public. California voters, who pay high insurance premiums and suspect that insurers are gouging them, passed an initiative that limits the right of an insurer to choose the price at which it can offer to sell a policy. According to the president of the National Insurance Consumer Organization, "more than 40 consumer organizations, from well-known national groups to small state-oriented groups, are seeking changes in insurance laws and regulations" based on the California initiative. In one form or another, then, the California initiative threatens to spread across the nation.

The California incident cannot be understood simply in terms of a desire among voters for cheaper insurance. Voters have fastened upon the insurance industry and not on other businesses that sell expensive products. Consumers believe that insurance premiums are *unfairly* expensive.

Insurers, on the other hand, maintain that inefficiencies in the tort system rather than their own greed best explain increases in premiums. To defend this view, they invoke the work of social scientists who have compiled evidence of inefficiency and waste in the tort system. They then argue that the tort system must be reformed.

Evidence of inefficiency or waste, however, does not in itself justify changes in regulations that govern tort and insurance. The public tolerates some inefficiency where the alternative would be to sacrifice concern with moral decency and rights, and it apparently regards the tort system as a device for vindicating the individual's right not to be unfairly harmed. Proposals for tort reform must, therefore, square with the public goals and values that underlie the tort system.

However important these goals and values may be, the approach most states now take in aiding accident victims, an approach which relies heavily upon the tort system, grows more expensive each year. Until recently, stable and hence inconspicuous insurance premiums have hidden the costs of the American response to accidents, but as insurance prices soar, we can no longer avoid social decisions about how to pay for these costs. If Americans continue to endorse the tort system as the primary vehicle for protection against accident costs, then insurance premiums — which ultimately pay for that protection — will increase. On the other hand, if we find that this system is not an appealing way to provide the kind of protection we want, then it is time to consider mechanisms that are less expensive and more efficient than those found in the current tort system.

The Tort System as a Compensation Device

The public blames a variety of social woes — including corporate bankruptcies, the refusal of municipalities to provide needed services, and the withdrawal of useful pharmaceuticals from the market — on escalating tort and insurance costs. Certainly one cannot deny that the prospect of tort liability has a chilling effect on the provision of many goods and services—especially the products of modern technology, including pharmaceuticals, chemicals, and nuclear power. Why does the tort system seem to hound these products?

One explanation stems from the nature of the products involved. While many of these products improve health and contribute to social welfare, they also expose a few individuals to increased risk. Use of a vaccine, for example, might decrease the incidence of a particular disease and thus diminish morbidity, but in a few instances the vaccine might itself cause serious side-effects. The vaccine might produce a net benefit in lives saved, then, but cause paralysis, disfigurement, or death to some who would have been better off without the vaccine.

When jurors are asked whether the manufacturer of such a vaccine should be liable for the harm it does, their sympathies tend to lie with those who suffer, and juries therefore may find against manufacturers. As the law stands, however, a manufacturer may be liable for a harm only if it was negligent or its product was defective. While legal scholars still debate the precise interpretation of negligence, strict liability, and other standards of liability in tort cases, most commentators agree that these standards ultimately imply a cost-benefit test: decisions about manufacturer liability require weighing the social costs and benefits of the manufacturer's product or conduct.

Juries, however, seem reluctant to weigh costs against benefits. The reasons for this reluctance are various. First, a jury may be moved by compassion or sympathy for the injured party, and thus put the interest of that individual before those of society as a whole. Second, juries may not be sensible to the riskiness of life — they may suppose that for every harm that anyone suffers, someone else must be responsible and should pay to make the victim whole. Third, juries may look for "deep pockets," neglecting to consider that money drawn from insurance comes from individuals. Finally, society, whether expressing itself in jury decisions or in statutes, is willing to spend far more to prevent "artificial" than "naturally" occurring hazards, thus buying much less safety than it might at the same cost.

Jury bias against man-made risk creates a disincentive for the production of risky but socially useful technologies, and it prompts manufacturers to withdraw some useful products from the market. It may also cause insurance prices to escalate, along with the price of insured products. Some commentators maintain that to avoid the impact of these jury biases, we should take decisions about product liability out of the hands of juries and turn these over to regulatory agencies, which are better equipped to engage in "unbiased" cost-benefit analysis.

Clearly this suggestion makes most sense on the assumption that the aim of the tort system is to create incentives that encourage manufacturers to sell only products whose social benefits exceed their costs — including the costs of accidents. But one might, instead, believe that the goal of tort law is to compensate victims or to redistribute risk or to redistribute wealth. What one counts as an attractive tort reform depends on what one regards as the proper goal of the tort system.

In any case, juries act on their preference that the tort system be used as a device for compensating accident victims. Unless those of us who wish to improve the tort system learn to accommodate or work around the

jury preference for compensation, we risk the prospect that jurors will use the tort system to serve aims that it cannot efficiently serve.

Assessing the Tort System as a Compensation Device

No matter how attractive one may find the compensation function of the tort system, one must take seriously strong reasons against social reliance on tort as a device for paying all claims for compensation. One reason, already noted, is that the threat of paying such compensation may serve to discourage manufacturers and others from engaging in socially valuable but risky activity.

Tort actions are now so expensive, moreover, and involve so many transaction costs that any good they achieve is bound to be vastly overpriced. Successful tort claimants get merely 30 to 40 percent of the money that enters the tort system. The rest goes to pay administrative costs, including legal fees, court costs, and the salaries of insurance company employees who devote their time to seeing claims through the legal process. As a vehicle of compensation the tort system compares poorly with one of its main competitors, first-party insurance, in which 70 to 80 percent of money that



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Dear Ned,
Boy, am I steamed!
About 3 days ago,
I sent Acme Pencils
11¢, and I never
got my pencil/. What
should I do?

Steamed-up Guy



Dear Ned,
Recently, while I
was sharpening an
Acme pencil, the
point simply fell
out. Any advice?

Hot Under
the Collar



Dear Ned,
Soon after I received
my Acme pencil (11¢),
it rolled off the desk
and onto the floor.
Upon retrieving it, I
hit my head on the
desk. Can I hold
Acme responsible?

Boiling Mad

N. Chant

Dear Steamed,
Sue them for
everything they've got.

Ned

Dear Hot,
Drop everything
you're doing and sue,
sue, sue.

Ned

Dear Boiling,
This is what's known
as an open-and-shut case.
If you don't sue them,
I will.

Ned

enters the system eventually goes to accident victims.

Typically, money paid for "pain and suffering" constitutes the largest portion of an accident victim's tort recovery. When the tort system requires payment for pain and suffering, the potential tortfeasor then in effect purchases insurance (or self-insures) to protect himself from the prospect of paying these kinds of damages. The cost of this insurance passes on to consumers through higher product prices. Yet it seems doubtful that people think that insurance against pain and suffering would be worth buying. In fact, there exists no demand for first-party insurance against pain and suffering. Thus, in paying the price of a product that includes a judicially imposed premium for insurance against pain and suffering, consumers are compelled to purchase insurance that few would purchase freely. This adds another reason to believe that the tort system, as it currently exists, requires the public to spend money on items it does not want to buy. While the idea of the tort system as a device for vindicating common law rights against "pain and suffering" may express admirable sentiments, it is an open question whether these are sentiments that we can afford to vindicate in so inefficient a way.

The tort system, of course, ignores the enormous number of accident victims who have no good prospects for recovery in court. But there may seem to be no morally relevant difference between a person who suffers an illness through exposure to natural elements in the environment and a person who suffers that same illness when it is caused by human activity: both are equally needy and may deserve our help. Through the tort system, we apparently express a social preference in favor of those whose injuries or illnesses have been caused by human activity. From the perspective of the accident victim, this seems arbitrary. Why should he be penalized because nature or chance, rather than a human being, caused his illness or injury?

In response to the charge that the tort system perversely fastens upon the misery of those whose accidents were caused by human activity, one may say that the system's sole function is to take money from those who wrongly cause harm and then give it to victims of that harm, and that this function bears no relevance to the scope of social duty to provide aid in other circumstances. On this view, tort law is a matter of correcting a moral imbalance between a tort victim and his injurer, and nothing more.

Proponents of the "corrective justice" interpretation of the tort system must recognize, however, that funds will exist to pay legitimate claims only if society does not preempt the tort system by providing, e.g., through a mandatory insurance scheme, aid to victims of accident or illness regardless of causation issues. Adoption of such a scheme would express a social judgment that the interests of victims of natural accidents and the interests of tort victims are equally worth protecting. It remains an open question whether such preemption would compromise the rights of tort victims as they are conceived under the "corrective justice" approach.

Alternative Approaches to Compensation

Many commentators suggest, as a way to cut through the Gordian knot, that society institute a broad no-fault approach to insurance and tort reform. In two well-known instances, attempts have been made to supplant or supplement tort law through insurance schemes that pay for injuries regardless of fault: workers' compensation and no-fault auto accident programs. In each instance, the prospective accident victim makes a mandatory trade, in which he forgoes the common law right to damages and, in exchange, receives the right to prompt recovery of economic loss, along with payment of his attorney's fees. The victim then receives relief from the common law requirement that he prove that his accident was someone else's fault. The virtue of no-fault, at least in theory, is that it provides the important compensation benefits that we associate with the tort system, but avoids the enormous transaction costs and unpredictability of the tort system. It is time seriously to consider whether the morally legitimate aims of the tort system could be well served by reshaping that system so that it more closely resembles a no-fault regime.

It is time seriously to consider whether the morally legitimate aims of the tort system could be well served by reshaping that system so that it more closely resembles a no-fault regime.

In many jurisdictions no-fault auto compensation programs have succeeded in providing quicker and more certain coverage than that provided through traditional tort liability systems. Nobody, however, regards no-fault as a complete success. Too often, no-fault represents an unstable legislative compromise. Many no-fault programs, for example, limit an accident victim's common law rights only minimally; "add on" programs of this sort, of course, increase insurance costs rather than lower them. And many no-fault programs deprive the accident victim of any meaningful recovery.

Strong arguments can be made that workers' compensation programs provide payment that is both cheaper and better than compensation provided through comparable components of the traditional tort system. Inadequacies in workers' compensation awards, however, apparently contribute to the recent explosion in product liability suits. Injured employees, dissatisfied with the puny recovery available from their employers for on-the-job injuries, look elsewhere — that is, to those who manufacture the products they use at work — to get compensation for their injuries. Legislators and judges, who sympathize with the plight of industrial accident victims, see little reason to limit

"end runs" around the workers' compensation system.

Whatever the merits and shortcomings of no-fault regimes, one might suspect that they do not have a rosy future. In the recent California election, a no-fault initiative was decisively defeated, and in legislatures, momentum for no-fault plans has virtually disappeared. The current political unpopularity of no-fault may be a short-term consequence of poorly designed no-fault systems and voter anger at insurers: often the public regards no-fault proposals as mere reductions

in accident victims' rights, i.e., nothing more than a boon for insurers and business.

Nevertheless, as the tort and insurance crises worsen, the possibility of defensible and workable no-fault programs must be taken seriously. A huge variety of no-fault plans exists. A careful analysis of the ways such plans can be structured, coupled with attention to the ethical and social goals they must serve, may show no-fault to be a plausible alternative to the present impasse.

— Alan Strudler

Is Advertising Manipulative?

One common charge brought against advertising is that it is manipulative: even when it is not outright fraudulent, it works on us somehow sneakily and inexorably, getting us to want what somebody else wants us to want, persuading us to buy what somebody else wants us to buy. But surely other people try to get us to want things all the time and exercise all different kinds of persuasive — not to mention coercive — power over us. What in particular is meant by the charge of manipulation, so that people are bothered when they feel they've been its victim? It is not easy to specify exactly what makes some sorts of advertising cross the line from morally acceptable persuasion to morally suspect manipulation. The charge of manipulation, we shall see, can be used to carry several quite different accusations, which may or may not be validly addressed to advertising.

Manipulation as Covert Persuasion

Sometimes we mean by "manipulation" any attempt at persuasion that is in some way covert, where the person doing the persuading wants to hide from its targets the fact that that is indeed what he intends. The manipulator doesn't lie about any actual facts about the external state of the world; instead he deceives others about the internal state of his own desires and intentions. A classic example here is Tom Sawyer's persuading his friends to take on his chore of whitewashing Aunt Polly's fence by pretending that he himself thinks whitewashing is glorious fun.

We might object to attempts at covert persuasion on two grounds. First, they might lead people to make substantively worse decisions and to take substantively worse actions than they would otherwise have done. Certain exceptions aside, covert processes in general are not as reliable as open attempts at persuasion. The suspicion will be ever present that if the program

someone is selling were so wonderful, she wouldn't have to resort to covert tricks to sell it. As often as not, one thinks, this suspicion will be well founded.

A second worry about covert persuasion is that it may make us feel that we have been led to undertake some action less than voluntarily. Tom's friends wouldn't have whitewashed the fence if they had known he wanted them to do it; they could claim, therefore, to have been misled about some crucial feature of the circumstances and so to have failed to give their full informed consent to the enterprise. But whether we think covert persuasion makes us act involuntarily depends on whether we think other people have an obligation to exercise persuasion overtly. If they've done nothing wrong by hiding their intentions from us, we can't complain that they've violated our autonomy in the process.

Do we want to condemn the deception involved in covert persuasion? One might think, after all, that deception about one's own desires and intentions is a more acceptable species of deception than deception about some external fact of the matter; we are not dealing here with the bold-faced lie. My own desires and intentions are paradigmatic of the private; isn't it my business whether or not I want to make them public?

Whether covert persuasion counts as morally wrong will depend in the end on the extent to which we think one has an obligation to be open and straightforward with others, on the degree to which transparency is expected in human relationships. The answer will vary according to the kind of relationship in question — intimate, friendly, business, frankly adversarial — and the presuppositions and assumptions that govern that kind of relationship.

Relatively little advertising counts as manipulative in this first sense. For one thing, most adults recognize advertisements for what they are: usually straight-

forward — indeed, blatant — attempts by manufacturers to persuade consumers to buy their products. (Many children, however, do not, raising special worries about advertising targeted at such a vulnerable audience.) For another, in commercial settings one would presumably have fairly minimal obligations to broadcast one's intentions to others. But if we are worried about advertising that deliberately and successfully conceals its persuasive intentions, we can take steps to address certain problematic practices.

Certainly some ads try to manipulate by dressing themselves up as something other than advertising, for example, by disguising themselves as magazine feature articles (a ploy undertaken frequently with travel ads) or as journalistic essays (a favorite advertising strategy for Mobil, which buys space for its ads on newspaper op-ed pages). Presumably readers apply more relaxed standards of scrutiny to straight reporting and opinion pieces than to advertising, a fact the advertiser hopes to turn to his own use. Here it seems reasonable to require explicit labeling of advertisements as such.

A related advertising technique involves disguising the commercial intent behind a message by feigning intimacy with the audience or invoking the consumer's genuine loyalties. This approaches the ridiculous in computer-personalized direct-mail appeals that mention the recipient's name a dozen times on a page. Celebrity endorsements belong in this category as well, for to the extent that viewers like and trust celebrities, they feel that these admired figures wouldn't be endorsing a product just to make money. We feel betrayed when we find out that Olympic champions don't endorse Wheaties out of a missionary zeal to share their training secrets with us, their fans — and indeed don't really eat Wheaties for breakfast at all. And would that nice, fatherly Bill Cosby say he liked Pepsi if it wasn't really truly his favorite soft drink? The proper remedy here would seem to be heightened educative measures to raise the level of consumer savvy.

Manipulation as Appeal to Emotion

A second account of manipulation starts with the idea not of covert persuasion, but of emotional persuasion, persuasion involving not deception, but distraction by powerful feeling. The charge of manipulation is leveled against an attempt to persuade someone to believe or do something that appeals to her emotion rather than to her reason.

It's difficult to make out a case, however, that emotion-based persuasion is any less likely to produce true beliefs and good desires than purportedly rational persuasion. Suppose, for example, that I'm trying to understand the problem of homelessness in America. I could study sociological data on the causes of homelessness and the demographic profile of this population. But I could also go to see a film that vividly portrays the day-to-day life of a family living in a squalid city shelter. That the latter appeals directly to my emotions, to my heart rather than my head, shouldn't make it count as manipulative in any moral-

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ly troubling way. In fact, it may very well be a superior vehicle for persuasion.

There is always the danger, of course, that emotion-based appeals can lead us astray or be invoked to distort the real and relevant issues. "Anecdotal evidence" may tug at our heartstrings while nonetheless putting forward a false and distorting view of the broader reality. But so-called rational arguments can mislead us in just the same way. They, too, can be partial and incomplete. Consider the ease with which one can lie with statistics and make numbers seem to say anything one wants them to say. Both rational and non-rational persuasion, then, can be legitimate means of influence and both can be manipulative.

Advertising uses both reason-based and emotional persuasion to capture its customers. That it tends to rely on emotion-based persuasion cannot in itself be used to mount a case against it. We have to judge advertising here by asking whether it uses image-oriented or informational ads to lead us to buy a product that we for whatever reason *shouldn't* buy.

It certainly seems that advertising can lead us to favor a product which there is no good reason to favor. For many categories of products, no objective difference exists among brands. One advertiser noted of beer brands, for example, that "The many competitive



brands are virtually identical in terms of taste, colour, and alcohol delivery, and after two or three pints even an expert couldn't tell them apart."

Two points can be made here. First, the kind of subjective difference introduced by advertising itself may well count as a legitimate reason to buy something. An advertising campaign can give a product an "aura" that it is not bizarre to consider in making a purchase. As Eric Clark notes in his recent book *The Want Makers*, in some cases the image that helps to sell the product now *is* the product. If Coke and Pepsi taste the same and cost the same and work in the same way to quench thirst, this doesn't make them the same if their image is different, for, Clark says, "Pepsi-Cola, like its arch rival Coca-Cola, is primarily its image."

Second, it's one thing to act without a good reason for acting where we are otherwise indifferent between two choices; it's quite another thing to act in the face of good reasons against so doing. After all, like Buridan's ass, standing thirsty in front of the pop machine, we have to buy *something*. Why not, on the basis of its advertising, buy a Pepsi? It's far more worrisome when advertising leads us to favor, not a virtually identical product, but an inferior product (or an equivalent product at a higher price — priced to cover its advertising costs!), or, worse still, a dangerous product, such as cigarettes.

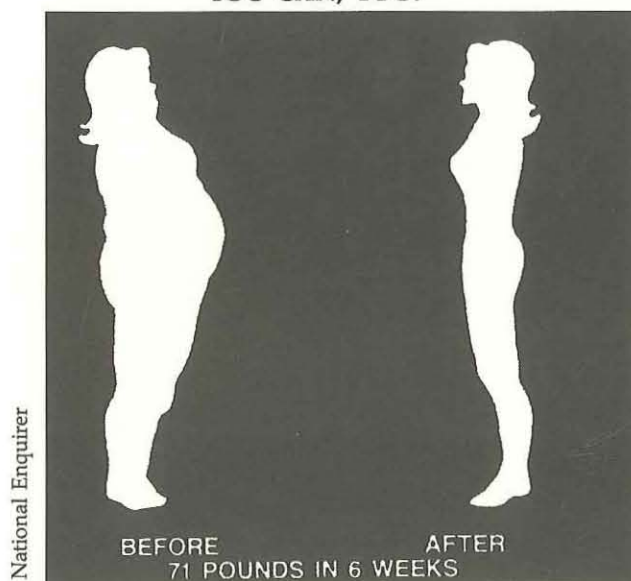
Manipulation as Playing on a Weakness

A third sense of manipulation involves playing not on emotions generally but on certain emotions or emotional states: for example, fear, lust, greed, sorrow, loneliness. Manipulation can involve playing on another's weakness, taking advantage of some kind of power one has over another. Numerous charges of manipulation, in this sense, have been brought against advertising for the extent to which it exploits the fears and anxieties of consumers, as well as their ignorance and gullibility.

It is not easy, however, to make out the idea of manipulation as playing on a weakness in some meaningfully narrow and specific way. How do you get anybody to do anything except by finding some button to push, some lever to operate? As an advertiser, how would I get anyone to buy anything without appealing to some want, some need, some hope, some longing, some lack that my product is claimed to remedy? We can hardly condemn any and all profiting from others' weaknesses. Surely what's wrong is not that I profit from a product designed to help others lose weight, correct bald spots, cure impotence, and so on; objections should arise only if I make an excess profit, more than I would on a product for which the need is not so desperate. Even here it's hard to know what counts as excess benefit without looking at what people are actually willing to pay for a product that speaks to their heart's yearnings.

At least some of what bothers us about advertising based on fears and vulnerabilities is that the products so advertised are often worthless. The weight-loss nostrum is not going to make pounds melt off in hours, nor is the special scalp cream going to regrow a full head of hair, nor is the aphrodisiac going to cure sexual impotence. But if we had a product that did indeed give

**"I LOST 71 POUNDS EATING OVER
3000 CALORIES A DAY...
YOU CAN, TOO."**



reliable results in weight loss, hair growth, and sexual potency, and these were advertised without undue exaggeration, our objections would be much diminished. Can an advertiser dwell on the misery of obesity, baldness, impotence? The answer here seems to be that whether or not she does this is immaterial. We don't need advertising to tell us that we don't want to be fat or bald or impotent. We knew that already. While advertising can contribute to a culture in which thinness, youth, and sexual prowess are made into fetishes, the desires to be thin and young and sexually attractive are more powerful than any advertising. We were searching for the fountain of youth long before there was a Madison Avenue.

Other ads, however, don't play on already existing needs and fears; they are charged with creating new ones. It has been suggested that concerns, say, with body odor and bad breath have been manufactured to a large extent by advertisers. We otherwise might have been content just to smell the way human beings smell. I myself doubt this: I think I would notice — and mind — body odor even if I hadn't been exposed to commercial after commercial for Sure, Ban, Right Guard, and the like. But it's safe to say that until advertisements for Wisk, no one ever dreaded the taunting jeer of

"Ring around the collar!" In any case, it seems that the creation of new fears to be played upon is morally worse than playing upon existing fears.

Conclusions

The charge of manipulation can mean many things. Here we have examined three: manipulation as covert persuasion, manipulation as persuasion based on emotion rather than reason, and manipulation as playing on another's weakness. Although much advertising does not seem to be subject to moral criticism on these grounds, it certainly can be manipulative in all three of these senses: we will want to be on our guard against advertising that conceals its persuasive intent, advertising that misleads through specious emotion-based or rational argument, and advertising that seeks to create and then to exploit consumer fears and weaknesses. Of course, this list does not exhaust the possibilities for moral and aesthetic objections to advertising — one might argue, for example, that it is a kind of cultural pollution, or that it contributes to the creation of a crassly materialistic culture. Here I have only sought to understand one common objection more clearly.

— Claudia Mills

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