

## Tobacco Use and Personal Responsibility

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*Both my daughters smoke. This fact annoys me greatly, not only because of the damage they are knowingly doing to themselves but also because it underscores the apparently insurmountable difficulties all of us have in trying to minimise the enormous health effect of this chronic self-poisoning. Why do intelligent, well-informed people like my daughters not give up this habit? (Belkin 2006)*

### **Introduction**

This quotation is a cry from the heart by a physician who sees the damage caused by smoking every day. Yet, tobacco stays on top. I remember an old photo, circa 1900, of a grizzled farmer standing by his outhouse with a crudely lettered protest sign that read, “No government is going to tell me where to shit.” Here was a true son of the American soil, a pioneer feeding his family, a king in his castle, furious that some anonymous bureaucrats would interfere with his inalienable rights to do what he would on his own property.

We may find the farmer’s complaint risible, but the same fight has been waged in the past decades as government, in service to public health, or public health agencies using the coercive instruments of government have increasingly limited what individuals can do with their own lives and behaviors. (In American jurisprudence, corporations are also considered to be individuals.) Until now, the protestors for individual rights have been in

retreat. They have had to accept fluoridation of drinking water, compulsory vaccination for school children, speed limits, compulsory use of motor cycle helmets and seat belts in vehicles, and government limits on the use, emission, and dumping of certain harmful chemicals. These changes have occurred as the public health definition of the levels of acceptable harm “de minimis” (Fiksel 1985) caused by an external agency has become increasingly stringent. A bitter debate continues between agents promoting individual (and corporate) rights and public health activists about how far government should or can go to protect the public’s health from individual “choices” of risk. Nowhere has this debate been bitterer than with respect to the use of tobacco.

This chapter first traces the philosophical underpinnings of personal responsibility and freedom from government interference in private affairs as they have developed in Anglo-American traditions. The enunciation of such perspectives with respect to smoking rights are examined; these perspectives range from those of principle-driven libertarians to those of individuals who are opposed to appropriation by the tobacco industry and its paid or volunteer allies. Broadly drawn, from the libertarian perspective, the battle is against “public health tyranny” (Sullum 2005). From an activist public health point of view, the “precautionary principle” must hold with regard to government “anticipatory action” against toxic substances even in “absence of scientific certainty” (Wingspread 1998).

The tobacco industry’s main mantra in defending smoking and smokers has been “adult choice...personal responsibility”; the individual bears the risk in using the hazardous

product made by the industry, and courtesy to non-smokers takes care of the rest. This chapter shows that choice and responsibility must be understood in the context of the individual's addiction to nicotine and the industry's role in maximizing the potential for addiction. Since the vast majority of adult smokers tried their first cigarette before graduating from high school (USDHHS 1994), "choice" is also analyzed in terms of how adolescents are induced to begin regular smoking by making smoking palatable before addiction kicks in; by advertising sex, glamour, and adventure to peers just at the legal age; and by the influence of mass media. Failure to inform is also discussed in terms of limiting "choice." This chapter also describes the tobacco industry's use of "personal responsibility" arguments, especially to encourage people to choose to smoke putatively less harmful "light" and "mild" cigarettes. These arguments have been made in the largely successful defense in lawsuits against plaintiffs alleging harm.

Finally, this chapter discusses the implications for global public health policy in the 21st century in light of the known and projected morbidity and mortality from smoking.

Public health policy often alternates between "harm elimination" and "harm reduction" with much debate about the costs, benefits, and practicality of either. The Framework Convention on Tobacco Control of the World Health Organization (WHO 2003) forms the basis for this discussion, which must lead to the ultimate question: Should the sale of tobacco for private corporate profit be banned altogether?

## The Anglo-American Heritage of Personal Liberty

Americans take pride in their heritage, beginning with the Magna Charta and its influence on the Declaration of Independence and Constitution in protecting individuals from arbitrary powers of government and followed by the emancipation of slaves, the right of universal suffrage, the right to own property and conduct business, freedom of thought and speech, civil rights, and a vibrant dislike of taxation. These liberties were won only after bitter struggles. Americans, above all, have inherited a frontier sense of self-sufficiency. The prophet of self-sufficiency was Ralph Waldo Emerson (1802–1883), who wrote,

*Whoso would be a man must be a nonconformist. He who would gather immortal palms must not be hindered by the name of goodness, but must explore if it be goodness. Nothing is at last sacred but the integrity of your own mind. Absolve you to yourself, and you shall have the suffrage of the world* (Emerson 1841).

Philip Morris's recent campaign for Virginia Slims directed to women of color co-opted Emerson's high-minded call in its tagline, "Find Your Voice" (Philip Morris 2000).

Independence of mind and action was codified in the 19th century, the great age of mercantilism, by Emerson's contemporary, the Englishman John Stuart Mill (1806–1873). His manifesto, *On Liberty*, is like both the Old and New Testament for libertarians. The best summary of his philosophy comes in the opening chapter:

*That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign (Mill 1869a).*

The phrase “prevent harm to others” relates to the great debate over whether secondhand smoke is truly a “toxic air contaminant” (State of California 2005a) or merely an avoidable nuisance, like body odor. Three decades ago, consultants to the tobacco industry advised that the industry had to try to disprove harm: “*The strategic and long run antidote to the passive smoking issue is, as we see it, developing and widely publicizing clear-cut, credible medical evidence that passive smoking is not harmful to the non-smoker’s health* (Roper Organization 1978).

Public health activists advocate increasing taxes on cigarettes as a means to reduce the prevalence of smoking, particularly among the poor and the young. Mill, in contrast, argued that to tax something just to make it more onerous to obtain is a form of prohibition, and thus unacceptable:

*To tax stimulants for the sole purpose of making them more difficult to be obtained, is a measure differing only in degree from their entire prohibition.... Every increase of cost is a prohibition, to those whose means do not come up to the augmented price; and to those who do, it is a penalty laid on them for gratifying a particular taste. Their choice of pleasures, and their mode of expending their income, after satisfying their legal and moral obligations to the State and to individuals, are their own concern, and must rest with their own judgment (Mill 1869b).*

However, Mill made a subtle allowance for taxation, or the need of government to raise revenue. Moreover, he suggested that stimulants such as alcohol (and in our day, tobacco) *can* be specifically targeted precisely because, “beyond a very moderate quantity,” they are injurious to the individual:

*[I]t must be remembered that taxation for fiscal purposes is absolutely inevitable.... It is hence the duty of the State to consider, in the imposition of taxes, what commodities the consumers can best spare; and à fortiori, to select in preference those of which it deems the use, beyond a very moderate quantity, to be positively injurious. Taxation, therefore, of stimulants, up to the point which produces the largest amount of revenue...is not only admissible, but to be approved of (Mill 1869b). [Emphasis added.]*

The use of a tax scheme to advance social policy is well accepted by virtually all governments; the taxation of tobacco to reduce its use should be no different.

The other interesting exception Mill allowed for government interference with personal behavior is when that behavior causes social harm and abrogation of social duties:

*If, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated, and might be justly punished; but it is for the breach of duty to his family or creditors, not for the extravagance (Mill 1869).*

Thus, a man who spends a large portion of his income on alcohol, drugs, or tobacco instead of to support and feed his family may be “justly punished.” When in certain countries expenditures on tobacco crowd out spending on food for children (Efroymson et al. 2001) (De Beyer, Lovelace, and Yurekli 2001), governments would be justified in severely limiting marketing of and access to tobacco in every way possible, particularly since the transnational tobacco industry now most aggressively targets developing nations to sell its wares (Saouna 2005).

## **The Tobacco Industry Usurps the Ideal of Personal Liberty**

### ***Evidence from Tobacco Industry Documents***

Polluting oneself is one thing. Fouling the air with an environmental poison is another. Only over the past few years has “anticipatory action” been taken to curtail smoking in public spaces by a growing number of governments (national, state, and local) in light of increasing evidence that secondhand smoke is an environmental poison. There is pressure to extend the bans on smoking in apartment dwellings, cars carrying children, and homes with foster children. These bans are invoked in policies toward adoptions and battles over child custody. The furious farmer described earlier would have been even more incensed if he had been told he could not smoke in his favorite saloon or café, at the post office, or in his one-horse shay when carrying grandchildren. He believed that how he conducted his life was his personal responsibility.

The tobacco industry and its allies (paid or volunteer) have for decades defended the right to market tobacco to people to use as they will, and they have attacked by means fair and foul any attempt to limit those rights, such as bans on public smoking. The defense and attack come under the twin umbrellas of personal responsibility (“choice”) and non-interference with personal behavior. Because secondhand smoke may be considered “harm to others,” most of the intensity of the defense and attack has come against the scientific findings with respect to harm from passive smoking. The stakes, in terms of profit, are too high not to. As early as 1978, the polling firm, the Roper Organization, warned the Tobacco Institute (the U.S. industry’s propaganda arm) about the growing pressure to segregate smokers:

*What the smoker does to himself may be his business, but what the smoker does to the non-smoker is quite a different matter.... Nearly six out of ten believe that smoking is hazardous to the non-smoker's health.... More than two-thirds of non-smokers believe it, nearly half of all smokers believe it. This we see as the most dangerous development to the viability of the tobacco industry that has yet occurred (Roper Organization 1978).*

The battle was no less imperative in 1994, when the Philip Morris vice-president of corporate affairs, Ellen Merlo, revealed what was at stake with the growing pressure to ban smoking in public spaces:

*If smokers can't smoke on the way to work, at work, in stores, banks, restaurants, malls and other public places, they are going to smoke less. A large percentage of them are going to quit. In short, cigarette purchases will be drastically reduced and volume declines will accelerate (Merlo 1994).*

The underlying motive was (and is) profit. However, in 1988, at about the time of a pending decision in a major lawsuit, a press release by a public relations firm representing Philip Morris drew rhetorically on the American concept of rights:

*It is a question fundamental to the American system of rights and justice: where does the responsibility of a company, or society at large, end and individual responsibility begin? More specifically, should we allow a person who makes a*

*free and informed lifestyle choice to engage in an activity involving well-known risks to shift responsibility to others for the possible adverse consequences of his decision? The question is frequently framed in the context of product liability lawsuits and is epitomized in the cases brought by smokers or their families against cigarette manufacturers (Scanlon and Hirsch 1998).*

An internal memo outlining the public relations “pitch” combined attacks on government regulation (“The increasingly paternalistic government is leading to a ‘nanny state’”), with a patriotic appeal to choice and freedom (“Personal choice is intrinsic to rights guaranteed by the Constitution....Freedom of choice carries with it personal responsibility”), the First Amendment (“designed to protect controversial speech, including commercial speech”), and attacks on “junk science” and “frivolous lawsuits” (Anonymous 2002).

A four-pronged public relations strategy to combat lawsuits and, one expects, to influence the jury pool as well, was laid out as early as 1987. It revealed more than it intended: *PROTECT OUR WEAK FLANKS –Advertising –Casualty [sic <sup>1</sup>] –Ingredients – Misconduct...REPEAT OUR STRENGTHS –Personal responsibility –Free and informed choice...BECOME RESPECTED SOURCES [of information]...MOLD LONG VIEWS- Tort reform (Anonymous 1987).*

In 1991, a confidential memo from R.J. Reynolds Tobacco Company posed the ultimate defense of smoking, placing the entire burden on the individual smoker and taking no

responsibility for the consequences of the manufacture, design, or marketing of the product:

*Cigarette smoking is not an addiction. It is a habit -- just like drinking coffee, eating chocolate, or engaging in any other desired activity. A decision to smoke or to stop smoking is a matter of personal responsibility. If a person decides to quit, it only takes commitment and willpower. There are many 'Stop Smoking' clinics and programs available – and many of these are available without any charge (Anonymous 1991).*

### ***Surrogate Pleaders***

Philip Morris and other tobacco companies also used ostensibly independent organizations to make the case for personal liberty and non-interference by government. One such group is the Washington Legal Foundation (WLF), endowed for many years by Philip Morris in amounts of a quarter of a million dollars or more (Anonymous 1998a) (Anonymous 1998b) (Anonymous 1999). Every other month, WLF purchases space in *The New York Times* to promote its libertarian messages in an op-ed column by its chairman, Daniel J. Popeo. The column is called “In All Fairness.”<sup>2</sup> The column for April 15, 2002 (see Appendix I), contains remarkable claims and innuendos.

In six punchy paragraphs, Popeo defends his corporate sponsors without ever having to name them, all in the guise of asserting American freedoms and free enterprise. Phantom

threats to liberty are conjured, even a threat to weekend barbecues at home – the “slippery slope” argument. Those “paternalistic activists” who would regulate big consumer corporations that sell food and tobacco are called “food police...prohibitionists...nannies,” and compared to the Taliban (in less polite screeds they are also called “health Nazis”). Pompeo predictably attacks taxation, bureaucratic regulation, and “massive” lawsuits by injured plaintiffs, singling out these measures to raise the alarm to the threat of a fascist state in the making.

An established and principled defender of American liberty, especially of the freedoms guaranteed under the First Amendment, is the American Civil Liberties Union (ACLU). Here too, the corrupting influence of tobacco industry money may have left its mark, as the ACLU fought any infringement on the tobacco industry’s right to advertise (citing the freedom of speech) and other limitations on marketing; it also opposed bans on public smoking, allegedly only after receiving tobacco industry grants (Tobacco Freedom 1996) (Mintz 1998). The ACLU also stands against discrimination in hiring smokers; it says this is an issue of privacy, not smoking (Maltby 1991a), but its efforts in opposing this discrimination are undertaken in coordination with and with support from Philip Morris (Maltby 1991b). The ACLU avers that its position on the First Amendment is absolutist and that donations from the tobacco industry have no influence on that position (Glasser 1993). A complete review of the organization and its many-faceted campaigns may be seen at the Wikipedia website (Anonymous n.d.) The latest industry grant to the ACLU on record appears to have been made in 1999 (Comes 1998). According to grant

information from a private research firm, the ACLU has not received tobacco industry funding since 1998 (Capital Research 2006).

Philip Morris was not reluctant to set up its own front organization to defend smokers' rights. This organization, called the American Smokers Alliance, was "dedicated to the principles of individual liberty, equality and self determination" (Daragan 1991).

Another such group was The Advancement of Sound Science Coalition, which sought to define all evidence of the harm from secondhand smoke as "junk science" (Hirschhorn and Bialous 2001).

A more colorful organization is FORCES International ("Powered by reason, driven by passion"). Without tobacco industry funding, it claims to represent the interests of smokers who want to smoke and fight any infringement on their inherent rights to do so anywhere. In order to sustain this position, FORCES must challenge every piece of evidence of the harms caused by secondhand smoke and even of the evidence that smoking causes disease, dismissing such research as "junk science."<sup>3</sup> A quote from a quasi-scholarly article linked from the organization's website (FORCES 2006) is illustrative:

*[O]f the 'long list of diseases,' no one single etiological causality can be proven for active smoking. There are strong statistical links between active smoking and lung cancer.... But there is a fundamental difference between attribution and proof.... That fundamental distinction has been shamefully blurred for public*

*consumption by 'public health' in its crusade against smokers and the tobacco industry... (FORCES 2001).*

From these contrarian voices, we realize that a powerful “denial industry” is at work protecting the interests of big corporations: food, tobacco, and chemical and energy companies in particular. In the denial of climate warming, for instance, we meet many of the same think tanks, public relations firms, and freelancers funded by the tobacco industry (Monbiot 2006) (Hirschhorn and Bialous 2001).

### **Informed Decisions? Awareness of Risk?**

#### ***The Tobacco Industry Acknowledges “Risk”***

The outré position of FORCES had already been abandoned by the tobacco industry itself in the attempt to convince the public that smokers’ decisions were, in fact, informed: “We make a product that is inherently risky. There is no safe cigarette. We know that. And we know that no other product or activity puts its users at greater risk of contracting lung cancer and other diseases” (Greenberg 1999). This new stance has been persuasive to judges in lawsuits brought by smokers (Danne 2006), and in its current public formulation, Philip Morris USA certifies that it agrees with the overwhelming evidence that smoking causes serious diseases; the word “death” is never used (Philip Morris 2006a).

With regard to secondhand smoke, ostensibly for its own legal and public relations requirements, Philip Morris edges ever closer to acknowledging the evidence, even using that term, which is preferred by anti-tobacco activists to “environmental tobacco smoke” (Philip Morris 2006b) .

Recently, Philip Morris has omitted the iconic word “choice.” For instance, the Philip Morris USA website simply declares that it markets responsibly “to adults who smoke” (Philip Morris 2006c). According to the tobacco industry documents, which are now available on the Internet through 2004, the last time someone at Philip Morris used the term “adult choice” was in 2000 (Berlind 2001). The Lorillard Tobacco Company last proclaimed in 2001 that, “At Lorillard, our position is clear – smoking is an adult choice, and kids should not smoke” (Malito 2001). British American Tobacco (BAT) sidles up to the concept by describing the tactile and social pleasures of smoking to imply choice, but without resorting to the actual word itself (British American Tobacco 2006a).

BAT, however, introduces an important new angle to the concept of “choice”: *an informed decision* by adults to smoke. BAT insists that it only sells to adults who have already decided to smoke, and that smoking is only for such adults who are aware of the risks (British American Tobacco 2006b). Awareness of the risk is now possible, in the lexicon of the BAT and Philip Morris, because of their newly proclaimed candor about smoking, which is part of corporate social responsibility: a strategy to win friends, influence legislators, and sway juries — particularly in light of the damning revelations from tobacco industry documents (Hirschhorn 2004).

### ***The Role of Addiction***

In 1980, Paul Knopick, editor of the US Tobacco Institute's newsletter, referring to the view of the major law firm representing the tobacco industry, Shook, Hardy & Bacon, said that, "[T]he entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted' " (Knopick 1980). The lawyers' concern, also heard by Brown and Williamson whistle-blower Jeffrey Wigand (Margolies 2006), has figured in most of the lawsuits against the industry. Given what was found in tobacco industry documents, the tobacco companies had to find a way to concede that smoking was dangerous and addictive, yet still present it as a matter of choice. In the run-up to the public acceptance of these facts by Philip Morris in 2000, an internal memo laid out the communications strategy:

*Does addiction 'negate' personal choice and responsibility? We don't believe it does.... Once someone is addicted to something, the only way for them to quit, if that is what they want to do, is to take responsibility for breaking the addiction. Shouldn't we also communicate that smokers can quit if they want to? As every public health website does? (Anonymous 2000) [Emphasis added.]*

This strategy also played out in the courtroom as industry lawyers argued that the main barrier to quitting was a lack of will or choice, not addiction (Henningfield and Zeller

2006). That is, the smoker can now choose to stay addicted or choose not to, an irony-proof argument! From a public health and biologic perspective, however, addiction impairs choice. From the industry's view, the burden of responsibility is placed squarely on the user, not the producer of the addicting product.

Consider, however, that two thirds or more of all smokers want to quit but find it difficult or are unable; 90% of smokers queried in four countries said they wished they had never started (CDC 2000) (American Legacy Foundation 2003) (Fong, Hammond, and Laux 2004).

Why is it so hard to quit “if...they want to?” The role of nicotine as the principal addicting agent in tobacco is now well understood (Benowitz 1996) (Balfour 2004) (Maskos et al. 2005) (DiFranza and Wellman 2005) (Tiffany et al. 2004), as is the chemical and physical engineering of the cigarette to maximize delivery of nicotine to the brain, both in speed and quantity (Hurt and Robertson 1998), and to make the drug easier to inhale, of major consequence to first-time smokers (Connolly 2004) (Talhout, Opperhuizen, and van Amsterdam 2006). Any “decision” to become addicted is hardly an informed one, since none of this information has ever been made available to the public except through the court-ordered revelations in the tobacco industry documents – and those documents are not broadcast widely. Moreover, the industry has always considered ingredients and design as proprietary secrets, and unlike laws on food labeling, there is currently no way for government to require that those secrets be made accessible to the public (Gray 2006).

Experts in addiction rate nicotine higher in causing dependence than the so-called hard drugs such as cocaine and heroin, and they rate it much greater than marijuana or caffeine (Hilts 1994). One third to one half of all persons addicted to heroin, cocaine, or alcohol say that the urge to smoke is at least as great as the urge to use their primary substance. There is evidence that nicotine in cigarettes is being used as a form of self-medication for mental distress: 34 to 44% of all the cigarettes smoked in the United States are smoked by persons with psychiatric disorders (Lasser et al. 2000) (Grant et al.). This may, charitably, be called “personal choice and responsibility,” but it appears as a rather forlorn choice, one with long-term negative consequences.

We might find the industry’s new candor a good sign until we read what Japan Tobacco International (JTI) has to say about addiction on its website. JTI, the world’s third-largest commercial manufacturer of tobacco — thus no minor player — has acquired all of RJ Reynolds’ international brands, including Camel, Salem, Winston, and 47 others (as well as fifth-ranked Gallaher), but it has specifically not acquired the legal liability that RJ Reynolds faces in the United States. JTI, grudgingly acknowledging that cigarette smoking is addictive (“as the term...is commonly used today”), refuses any comparison of tobacco with hard drugs and insists that since quitting is not easy, one should give “careful thought” before taking up smoking (JTI 2006). BAT, while acknowledging that “many smokers find it hard to quit”, still insists that “there seems to be more to smoking than just nicotine.” Indeed, “Smoking embodies a considerable amount of ritual involving many of the senses. A smoker will often describe pleasure from the feel of a

cigarette in the hand, and from the taste, sight and smell of the smoke. Also, especially in social settings, smoking involves a ‘sharing’ experience with other smokers” (British American Tobacco 2009d).

“Careful thought” is not what is in an adolescent’s mind when he, or more likely she, begins to smoke. Approximately 90% of adults who smoke began before the age of 21 years (American Lung Association 2003). There may be debate regarding the degree to which tobacco industry advertising – with its emphasis on attractiveness, adventure, glamour, and thinness – or the use of promotional trinkets, coupons, and clothing “cause” adolescents to first try smoking (USDHHS 2001) (DiFranza, Wellman, and Sargent 2006) or how much influence movies depicting smoking have on adolescents and young adults (Charlesworth and Glantz 2005) (Sargent JD 2006) (Sargent JD and Hanewinkel R 2009). However, there is no doubt that adolescents become dependent on and crave cigarettes after a relatively short time of experimenting with smoking (O’Laughlin et al. 2003).

We may say that advertising and promotion invite adolescents to try smoking, and nicotine fixes their need to smoke. Helmut Wakeham, vice president for research and development at Philip Morris, recognized this pattern decades ago. He wrote,

*Smoking a cigarette for the beginner is a symbolic act. The smoker is telling his world, “This is the kind of person I am... I am no longer my mother’s child, I am tough, I’m an adventuress, I’m not a square.” .... [T]he primary motivation for*

*smoking is to obtain the pharmacological effect of smoking.... As the force from the psychosocial symbolism subsides, the pharmacological effect takes over to sustain the habit* (Wakeham 1969).

### ***Others Who Are Unable to Make an “Informed Choice”***

Among people who are unable to make an “informed choice,” first, perhaps above all, are children — from the yet-to-be born to pre-adolescents who are passively exposed to adults’ cigarette smoke, whether in the womb or in the closed spaces of homes, cars, and even schools. As with active smoking, the effects range broadly: preterm birth and low birth weight, impaired lung function, sudden infant death, asthma, otitis, possible neurobehavioral damage, later-life obesity in daughters of smokers, and an increased susceptibility to smoking in adolescence (DiFranza, Aligne, and Weitzman 2004) (Davies and Moore 2006). As one study on in vitro fertilization shows, the effect of maternal smoking on the fetus can appear as early as the first six weeks, even before the woman realizes she is pregnant (Winter et al. 2002).

How should public policy makers and government respond to such instances? For instance, a single cigarette smoked in a closed-in space of a car produces carbon monoxide and dangerous levels of respirable suspended particles that are smaller than 2.5 microns in diameter (Rees and Connolly 2006) (Edwards, Wilson, and Pierse 2006). Would such behavior amount to a form of child neglect, comparable to not using required child carriers or seatbelts, and punishable by at least a fine? Several US states have

passed legislation banning smoking in cars when children are present; others are considering such (Jarvie and Malone 2008). Should a child suffering with life-threatening asthma be removed from a home as long as his or her parents insist on smoking indoors? Would such removal rather have a perverse impact on children's well-being? These questions frame the fiercest debate about how far the state can intrude on personal liberties and responsibility in the name of public health. As with the old farmer defending his right to defecate on his own soil, perhaps information and public education will eventually, for good or ill, change behaviors and attitudes toward such intrusions.

Perhaps, however, information and education alone may not influence behavior, and laws and rules will be more effective in changing people's attitudes. If tobacco smoke is known to be an air pollutant and a class A carcinogen (State of California 2005b), then legislation is justified against smoking in an automobile with children or in bars, restaurants, casinos, hotels, and so on. This legislation does not differ from that which bans or limits emissions of other airborne and waterborne toxins. The tobacco industry's proposals to separate smokers from non-smokers and provide ventilation are inadequate measures (Repace, Hyde, and Brugge 2006).

A second group of people who are unable to make an "informed choice" about inhaling cigarette smoke are non-smokers who are married to spouses who smoke or who work in offices, factories, restaurants, cafes, or bars where smoking is permitted. The majority of these non-smokers are women, especially in Eastern Europe and industrializing nations. In Vietnam for instance, where only 4% of women smoke as compared with more than

70% of men, a woman wishing to marry has little choice but to be passively exposed to smoke. As one woman said, “If you hate cigarette smoke, you will still have to marry a man who’s heavily addicted to tobacco.... If you’re afraid of tobacco then you’ll have to live alone. It will be very depressing” (Kaufman and Nichter 2001). Much of the impetus behind bans on smoking in the workplace comes from evidence that non-smoking workers are harmed by secondhand smoke (USDHHS 2006). Such persons often are forced to choose either not to work or to be exposed to smoke in order to keep a job.

Is it just, however, for private companies to refuse to hire employees who smoke either off grounds or in their own homes, or to fire those who refuse to quit? There is an increasing trend toward this kind of discrimination, justified on the grounds of health care costs incurred by the employer. Such action leads to the concern that other groups, also unprotected by legislation, will be similarly singled out – obese persons, for instance (Siegel 2006).

A third and very large group of those who are unable to make a rational choice on the basis of complete information are smokers who smoke “light,” “ultra-light,” or “mild” cigarettes in the expectation that they may, somehow, be less damaging. In an iconic advertisement from the 1970s, a worried smoker says, “With all the talk about smoking, I decided I’d either quit or smoke True. I smoke True” (Advertisement 1975). This vain hope has been exploited by the tobacco industry, which knew differently decades ago. Smokers of the leading brand of “light” cigarettes are woefully misinformed about their nature (Cummings et al. 2004). In brief, tobacco companies introduced brands of

cigarettes in the 1960s and 1970s in response to the concerns smokers were showing about “tar” and its relationship to cancer. The cigarettes were designed to dilute smoke in order to fool the Federal Trade Commission’s smoking machines into measuring lower levels of tar and nicotine. However, as the industry knew, human smokers compensated by either covering up the filter air holes with their lips or by inhaling more vigorously and more often, adjusting their smoking pattern to get the amount of nicotine their brains called for. Compensation guaranteed that smokers would inhale the same amount of toxins as those contained in a regular cigarette (Djordjevic et al. 1995). “Light” cigarettes surely postponed or prevented many smokers from quitting altogether (Kozlowski, Goldber, and Yost 1998). This risk persists with the next generation of “potentially reduced exposure products” (PREPs) that promise fewer carcinogens. Smokers exposed to advertisements for PREPs already believe they promise better health and safety (Hamilton et al. 2004).

In fact, smokers’ knowledge about the health effects of smoking generally is seriously inadequate. Thus, smoking cannot qualify as an “informed choice,” whether due to smokers’ denial or to years of obfuscation by the tobacco industry coupled with misleading advertising and aggressive promotion. Only 4% of smokers have ever gone to company websites where information about smoking and health is given; less than 20% have ever received a mailing from a tobacco company about the health effects of smoking. In contrast, more than half have received promotions for gifts or discount coupons (Cummings, Hyland, and Giovino 2004). It may be shown, in fact, that

whatever “information” the tobacco industry does provide has little objective value and is demonstrably incomplete or inaccurate (Balbach, Smith, and Malone 2006).

Nonetheless, most juries and judges in lawsuits against the industry have decided, in keeping with the Western devotion to personal responsibility, that the aggrieved smoker ought to have known enough to have quit smoking and that the industry should not be held liable for misinformation or deception. A report in *The Wall Street Journal* celebrated the tobacco company’s successes in court:

*Today a pugnacious defense strategy is starting to pay off for the tobacco giant. The number of smoking lawsuits pending against Altria [Philip Morris] dropped to 273 as of May 2, down about 60% since late 1998.... Only 30 new cases were filed against Philip Morris last year (O’Connell 2005).*

William Ohlemeyer, vice president of litigation and associate general counsel of Altria, declared after one of many Philip Morris’s court victories: “The jury understood that [the plaintiff] was aware of the risks of smoking, made an informed decision to smoke and was legally responsible for that decision” (Tovar 2001). The key phrase, “legally responsible” illustrates that what we understand as public health experts is not necessarily what is accepted by our legal system.

The legal system does not tolerate fraud, however. Current lawsuits with respect to “light” cigarettes target fraudulent advertising and promotion. In the U.S. Department of

Justice lawsuit against the industry, Federal District Judge Gladys Kessler found it guilty of racketeering, declaring in her verdict that the case was

*about an industry, and in particular these defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health-care system. Defendants have known many of these facts for at least 50 years or more.... For approximately forty years, Defendants publicly, vehemently, and repeatedly denied the addictiveness of smoking and nicotine's central role in smoking. They made these denials out of fear that public acknowledgment of what was so well documented and widely accepted internally within their corporate offices and scientific laboratories could result in governmental (i.e., FDA) regulation, adverse liability judgments from addicted smokers suffering the adverse health effects of smoking, loss of social acceptability of smoking, and the ultimate loss of corporate profits (The United States of America 2006).*

Unfortunately, an appeals court had earlier encumbered Judge Kessler from visiting any financial penalties on the companies. Nonetheless, her verdict and recent rulings from the supreme courts of two states pave the way for many new lawsuits: In Massachusetts, the court rejected the “personal responsibility” defense, and in Florida, the court averred that individual plaintiffs would no longer have to prove industry negligence, fraud, or the manufacturing of a dangerous and addictive product (Sweda 2006). In the first of about

eight thousand cases filed, an award was made to a deceased plaintiff's widow in the amount of eight million dollars (Anonymous 2009). The matter of "personal responsibility," in the industry's view, has always been more legal than philosophic, and the legal tide is turning against the tobacco companies.

### **The World Health Organization Framework Convention on Tobacco Control**

For decades, attempts to control the use of tobacco have been conducted locally rather than globally, whereas coordination between the various anti-tobacco nongovernmental organizations (NGOs), scientists, and public health activists has been weak and limited. At the same time, powerful tobacco companies have conducted marketing and sales across all borders; although they have competed vigorously with one another, they have coordinated political, scientific, and public relations strategies to defend their business against tobacco control, by all means fair or foul. The extent of their conspiracy was revealed only after the court-ordered release of internal documents of the tobacco industry, a result of major lawsuits against the industry in the United States (Francey and Chapman 2000) (Committee of Experts 2000).

Under the leadership of former Director General Gro Harlem Brundtland, the World Health Organization (WHO) for the first time invoked its right as a United Nations agency to bring forward an international treaty to be negotiated and ratified by its member nations. This treaty is called the Framework Convention on Tobacco Control (FCTC). An umbrella group of 250 NGOs from 90 countries, the Framework Convention

Alliance, played a vital auxiliary role in prodding their governments to create a robust and explicit text and then to ensure ratification. As of this writing (December 2009), 183 nations have signed the treaty, signifying intention to ratify, and 168 have become parties to the treaty who represent 86% of the world's population (Framework Convention Alliance 2009). The United States has signed but is unlikely to ratify.

The FCTC explicitly determines that the public's health is the top priority and that tobacco use and exposure to smoke constitutes an epidemic that adversely affects health, economies, the environment, and the family. The treaty places clear blame for the epidemic on the tobacco industry and its allies, and it establishes mechanisms to monitor the tobacco industry's attempts to subvert tobacco control in any nation. Case studies in Thailand, Guatemala, and Nigeria show that such subversion is ongoing (Corporate Accountability International 2005).

The foreword of the FCTC outlines the entire enterprise:

*The WHO FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health.... The WHO FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, including trade liberalization and direct foreign investment. Other factors such as global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit*

*cigarettes have also contributed to the explosive increase in tobacco use (WHO FCTC 2006).*

The core provisions of the treaty are price and tax measures to reduce the demand for tobacco and non-price measures to reduce the demand for tobacco. These non-price measures include protection from exposure to tobacco smoke; regulation of the contents of tobacco products and tobacco product disclosures; and packaging and labeling of tobacco products. They also cover education, communication, training, and public awareness; tobacco advertising, promotion, and sponsorship; demand reduction measures concerning tobacco dependence and cessation; and sales to and by minors.

Article 19 of the FCTC breaks new ground for an international treaty in obligating the parties to develop legal and judicial mechanisms to make tobacco companies criminally and civilly liable for compensation and to assist one another in such legal proceedings.

Whereas the FCTC's provisos are universal – any tobacco control activist would recognize them and how they apply – the response of BAT to the FCTC clearly signals its intent to undermine the treaty's provisions within each individual country by insisting that each country is different, no approach fits all, and that BAT wants to be included in each country's deliberations as a significant stakeholder (British American Tobacco 2006c).

## **Conclusion**

The tobacco industry may find its allies not just among smokers or among libertarians and contrarians, but among ordinary citizens whose view of tobacco control lacks the ardor of public health activists. A series of structured conversations (focus groups) conducted with Australian smokers and non-smokers by the editor of *Tobacco Control* “discovered that arguments that seem self-evident to tobacco control advocates were not so for participants, whose general support for tobacco control was frequently qualified” (Carter and Chapman 2006). Efficacy, justice, feasibility, and fairness were the participants’ principal concerns. The study indicates that optimal tobacco control is a complex undertaking and likely to take several more decades to be realized, even at the cost of millions of lives annually.

The strongest tobacco control programs have decreased the prevalence of smoking by adults, where not otherwise limited by tradition or poverty, to about 12 to 15% (Mackay, Eriksen, and Shafey 2006) (CDC 2006). Further reductions probably will require proportionately far greater efforts and cost in terms of legislation, education, and treatment. Some theorists have proposed that tobacco use will remain high for decades – 1 billion smokers in the world today, with the industry making every effort to increase that number – unless the profit motive is removed altogether. This removal would

essentially reduce the role of the tobacco industry to being suppliers to state-run monopolies and all profits would be turned back to protect the public's health through treatment, education, and research (Lieberman 2003) (Callard, Thompson, and Collishaw 2005) (Borland 2003). Even if we accept the devil in the details (Lieberman 2006), we cannot be optimistic that such schemes will soon come to pass, perhaps not until hundreds of millions more lives have been lost. In the long run, however, the man-made tobacco epidemic will come to an end, to the immense benefit of individual and public health.

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Footnotes:

1. A revealing slip: ‘causality’ was meant, the idea that cigarettes cause disease;

“*casualty*” fits fine, however.

2. A history of the term ‘junk science’ may be found at

[http://en.wikipedia.org/wiki/Junk\\_science](http://en.wikipedia.org/wiki/Junk_science). It was co-opted by the tobacco industry to

impugn evidence about the harm of secondhand smoke.

3. PDFs of the columns back to 1998 may be seen at

<http://www.wlf.org/Communicating/inallfairness.asp> .

*Appendix I*

*Advertisement, essay by Daniel J. Popeo, Chairman, Washington Legal Foundation, published on the New York Times op-ed page, April 15, 2002.*

“Eating Away at Our Freedoms.”

Thanks in large part to U.S. military might, the Afghan people are enjoying basic freedoms, no longer living in fear of the Taliban’s ruthless virtue and vice ministry. Meanwhile, back in America, the media is filled with stories echoing the views of the food police ideologues who want to dictate what Americans choose to eat and drink. These professional activists are part of a well-organized New Prohibitionist movement devoted to controlling basic decisions in our everyday lives.

Paternalistic activists claim to be working on behalf of public health. However, upon closer examination, their efforts follow a script perfected after decades of anti-free enterprise campaigns. Here’s how it goes: first, they seize upon a contemporary health obsession – in this case “excessive” alcohol or food consumption. Next, rather than enabling individuals to make informed choices, activists demonize the usual scapegoat – American business – with alarmist rhetoric and junk social science. Then, the products they don’t like, such as beverages containing sugar, caffeine, or alcohol; fast foods; and even milk, are singled out for punitive consumer taxes and regulation.

The restrictions championed by know-it-all consumer activists couldn't be any more *anti-consumer*. New sin taxes will only punish consumers, many of them lower-income, with higher prices and fewer choices. A recently proposed state soda tax, for example, could cost Californians up to \$500 million a year. And activists' support for policies like advertising restrictions or an outright ban on certain foods assumes that Americans are incapable of managing their own lives.

No doubt, the crusade to create a nanny state faces daunting challenges. Don't the food police understand that consumer freedom is at the core of American democracy? Americans will mightily resist anyone who tells them they can't purchase and enjoy their morning dose of Starbucks caffeine; a hot dog, beer, and fries at the ballpark; or a steak at the weekend barbecue.

But these days, professional activists don't need public support for their misguided ideas. Instead of seeking change through the democratic process, they can draw upon their long-standing alliances with unaccountable regulators and plaintiffs' lawyers. A sympathetic government agency is certainly capable of prescribing far-reaching consumer controls over our choices. And opportunistic lawyers, perhaps teaming up with state attorneys general, can file massive lawsuits that empower a single judge to impose new regulations and taxes. Will our favorite foods soon join tobacco and other legal products as the next target of anti-democratic regulation by litigation?

Every time government is allowed to dictate fundamental choices to consumers, we drift further towards an insidious culture of control, where *all* our freedoms are exposed to attack. Isn't that a high price to pay simply to satisfy an ideological agenda?

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