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UNIVERSITY OF SOUTH FLORIDA

**Of Politics, Morality,
and Tobacco Regulation**

by

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Introduction

The production, consumption, and regulation of tobacco is presently the subject of much discussion and debate. While the issues surrounding tobacco have been debated for decades, much of the current attention on tobacco is due to the many proposals to regulate tobacco, the state and class action lawsuits pending against the tobacco industry, and the damaging tobacco company documents that have recently been made public. Most tobacco control proposals are intent on expanding the presence of government in the tobacco industry through increased regulation and taxation. A majority of the controversy over tobacco regulation focuses on the role of government in a capitalistic market. How much regulation is allowed by law, or required by morality; How much regulation is too much? Or when it comes to a product proven to cause death, such as tobacco, is it ethical to allow it on the market virtually unregulated, as it has been for decades? Where do we draw the line between fostering capitalism and promoting public health when the interests conflict with one another?

After tracing the history of governmental regulation of tobacco and the concurrent anti-tobacco movement, this thesis will emphasize the most significant aspects of the current proposals to increase the governmental regulation of tobacco products. As history and the facts present themselves, it becomes clear that the opposing sides in this controversy do not possess equally compelling arguments. However, the debate is not simply two-sided; there are many issues at hand, each of which intertwine with one's own subjective reality.

CHAPTER 1
THE CONTROVERSY SURROUNDING TOBACCO REGULATION

Tobacco is a purely American product in its origin, development, and domination of the world market. The history of tobacco in America is literally as old as America itself. In comparison, the history of the governmental regulation of tobacco is relatively short. The federal government is now considering seriously regulating the tobacco industry for the first time. 1998 could be remembered as the historic year that tobacco and nicotine fell under federal jurisdiction.

While the tobacco companies are not responsible for inventing smoking, they do depend on this dangerous behavior for their existence. The tobacco industry encourages people to risk their lives, for the sole objective of making their industry profitable. Tobacco company executives and stockholders have grown rich relying on the consumption of their deadly products by the 47.6 million people who currently smoke.¹

Tobacco regulation represents a moral dilemma that pits aggressive capitalism against the common welfare, often ranks money over public health, and emphasizes the need for prioritization of governmental responsibilities. Which is more important: promoting health or capitalism? In this case, are they mutually exclusive or is there room for compromise?

¹American Heart Association. Heart and Stroke Fact Sheet, Statistical Supplement, (1996).

While the growing and selling of tobacco obviously benefits certain people financially, it physically harms more people than it helps. All industries in a capitalistic market are forced to focus on their bottom line. However, for the tobacco industry, the bottom line is the direct result of producing the only product that when used as intended, has been proven to kill the consumer. Even though it is legal for the tobacco industry to profit from selling this legal product, an outstanding moral question remains; Is it ethical to profit from someone's death? By observing the tobacco industry's priorities, as well as the government's, a conclusion can be drawn that policies benefiting one industry's business goals often prevail over ones benefiting the common welfare. In this nation that prides itself in fostering individualism, competitiveness, and egotism, (self-interested, self-preservationist), the assumption that these types of policies are wrong, and they should be the reverse, is very controversial.

Tobacco remains legal because its use was widely diffused and smoking became an acceptable adult choice of behavior before the hazards of tobacco were well understood. While the controversy over the governmental regulation of tobacco seems to have only two sides, it includes many different issues, all of which revolve around the main question of the role of government in regulating industry, advancing public health, and promoting capitalism. Should those roles be active (regulatory) or passive (laissez-faire)?

A total prohibition on tobacco, while now scientifically justifiable, is politically

implausible, for a number of reasons, including the large number of current smokers, and the inevitable rise of an underground market. A legal, regulated market is much safer for consumers because it is easier to control access to and the content of tobacco products.

Some regard the regulation of smoking as an invasion of privacy by a paternalistic big brother. In this case, it is argued that the government is trying to make its citizens' choices for them; 'they think they know what's better for me than I do.' This paternalism argument assumes that the government is set out to protect smokers from themselves, but neglects to include the fact that the government is set out to protect others from tobacco smoke. The discovery of the dangers of Environmental Tobacco Smoke (ETS) changed the smoking issue into a public matter by including protection for nonsmokers.² Describing the tobacco regulation issue to be one of personal freedom (to have a pleasurable vice) versus the crazed preoccupation of health fanatics, some position tobacco regulation as a state's intrusion on the rights of citizens to perform a legal act and pose smoking as a civil and human right that anti-smoking advocates are out to abolish. However, such a civil right does not exist. There does exist a right to life, to breathe clean air. Thus, smoking regulation is not discrimination, as cigarette or pipe smoking is not an *innate* trait such as gender or race. It is a behavior that can be modified. The unfortunate reality is that most

² Even those who present the issue as a purely private matter are presuming that one's life choices do not affect others. Smoking causes much suffering from disease, which results in many family members and friends hurt by the individual's 'choice'. Smoking places an unfair emotional and financial burden on those who chose not to smoke.

smokers would eventually like to quit, but that 'choice' is denied them by the addictive qualities of tobacco products.

Freedom to do as one chooses, so long as others are not adversely affected, is the essence of each American's birthright. By some, smoking regulation is seen as an abridgment of this freedom. However, nonsmokers are affected by other people's smoke, whether or not they *impose* their preference on those who choose to smoke. Public health groups do not challenge the right of an adult to choose to smoke; it is where they can smoke that is the issue. Even though the nonsmokers are a majority, for the most part, they allow individuals the freedom to behave differently and tolerate those differences. This tolerance is an American virtue that smokers rely on. In a society where the majority rules, smokers, like other minorities, depend on the American values of individualism and freedom of choice.

Still others position the argument against tobacco regulation around social class. The prevalence of cigarette smoking is inversely related to social class. Statistically, nonsmokers are better educated, and generally hold a higher position in society. This argument declares that nonsmokers abuse this higher social class to impose unnecessary restrictions on the lower ranks of society as a simple sign of power. These people regard smoking regulation as discrimination against the lower class when in all actuality the restrictions are meant to save their lower-class lives.

The slippery-slope defense against governmental regulation of tobacco argues that once government starts regulating unhealthy behavior, it will never stop. This argument is countered by the fact that tobacco represents a different circumstance because there is no known safe dosage of tobacco. Moderation will prevent other 'health sins', such as alcohol and fatty food, from causing death. The addictive nature of nicotine compounds the health problem associated with tobacco because other dangerous vices are not addictive. This addiction makes it difficult, although not impossible, to quit harming oneself.

For obvious reasons, the tobacco industry supports this individual freedom of choice campaign. At the expense of their consumers' health, they champion their cause as a consumers rights issue, while their only concern is maintaining their profits. Tobacco companies say that smokers are informed and, need to be, in order to make this rational choice, but the companies are not the ones doing the informing. That burden is left to governments and health advocates. Nonetheless, the companies make use of public awareness as a defense. While public awareness is an important first step in any newly found danger to health, it holds especially true for the tobacco and health problem because the companies cloud the issue by denying the scientific studies.

Former Surgeon General C. Everett Koop stressed the urgent need for "an informed public that understands the political, social, and economic dimensions of this 20th century

plague." ³ Between 1981-89, he submitted a total of eight reports on smoking and health to Congress during his tenure as Surgeon General. His position mirrors that of most public health officials; the government does have some responsibility to ensure that those making the decision to smoke have the relevant facts needed to make an informed decision.

There are a few academics willing to exonerate tobacco and tobacco manufacturers. In Smoking and Society: Toward a More Balanced Assessment, Robert Tollison wants to prove that cigarettes do not cause cancer and that the real threat from tobacco arises from those who would like to restrict it one way or another. His libertarian argument is that overzealous crusaders endanger a free society. However tempting his argument may be, it is difficult to discredit the mountains of scientific studies establishing tobacco as the cause of heart disease and many cancers.

Regardless of the multitude of arguments against it, tobacco regulation remains constitutional. There is no stated right to smoke in the Constitution, as there is to bear arms.⁴ Tobacco regulation does not infringe on the First Amendment; it does not impair freedom of speech, assembly, or association as protected by the First Amendment. In searching for a solution to the controversy over governmental regulation of tobacco, there

³ C. Everett Koop. In foreword of Merchants of Death. (N.Y.: BeechTree Books, 1988).

⁴ The tobacco industry is sometimes compared to the gun industry because both products cause death, but the gun industry defense (there is 'right to bear arms' clause) cannot be used for tobacco.

must be some limits on the tobacco industry's freedom to deceive and harm its consumers. Citizens rely on their government to regulate industry. Tobacco is the perfect case for governmental intervention because even though it is highly addictive and deadly, it is consistently promoted as pleasurable. This paper discusses why the government's response to the tobacco health crisis has been so slow and how and why the recently proposed regulations are meant to increase its pace.

By 1950

cigarettes

sales

tobacco

sales

net

111 112 113 114 115 116 117 118 119 120

Chapter 2
THE TOBACCO CONTROL MOVEMENT:
The Birth of Tobacco Control

In the 1940s, the real health peril presented by tobacco use seemed trivial. Little hard evidence of the danger of tobacco use existed prior to the early 1950s, although preliminary studies began confirming the dangers as early as 1939.¹

By 1950, 50% of the adult population smoked.² Government hospitals even distributed cigarettes free to patients. Lung cancer went from a rare disorder to a raging epidemic between 1950 and 1970, from 18,000 cases to 110,000.³ The Department of Agriculture's tobacco division promoted the sales of U.S. tobacco abroad by distributing an expensive sales promotion film that stressed the virtues of cigarette smoking. It was available to all nations interested in importing U.S. tobacco products.

Throughout the 1950s, as studies multiplied on the manner and immensity of disease caused from smoking cigarettes, the role of government as guardian of public health was questioned. Today, it still remains a matter of public concern. Long after the scientific studies agreed on the issue, public debate still rages over the government's role and

¹ A. Lee Fritschler. Smoking and Politics. Policymakers and the Federal Bureaucracy. (Prentice-Hall, Inc: New Jersey, 1975) p.157.

² Philip J. Hilts. Smokescreen: The Truth Behind the Tobacco Industry Cover-up. (Reading, MA: Addison-Wesley Publishing Co., 1996) p.1.

³Hilts. p.3.

responsibilities. In principle, governments have a responsibility in the interests of public health. As chief defender of public health, governments ought to be the tobacco industry's adversary, but in practice government officials often act as its ally.⁴ The government's slow response to the mounting smoking studies of the 1950s was two-fold. Both the strength of the tobacco industry and the relative weakness of the public health interest groups contributed to the success of tobacco's influence on the early legislation regulating tobacco.

A consensus about the dangers of smoking began to emerge in the medical and public health community in 1957, when The National Cancer Institute, the National Heart Institute, the American Cancer Society, and the American Heart Association sponsored a report declaring cigarette smoking a causative factor in lung cancer. The report prompted Surgeon General LeRoy Burney to take the first official governmental position on the smoking and health issue: "The weight of the evidence is increasingly pointing in one direction that excessive smoking is one of the causative factors in lung cancer."⁵ Although mild, the statement marked the start of the government's concern with the issue.

⁴ As an example, consider the \$50 billion tax break for the industry that was slipped into the budget at the last minute. The settlement hasn't even been passed and legislators are finding loopholes in it. It is important to note, however, that when tobacco deals receive wide public exposure, political officials tend to disassociate themselves with tobacco and the deals are withdrawn. It seems the only way to keep tobacco deals from occurring is constant media exposure, which even the hardline anti-smoking advocates get sick of seeing.

⁵ Richard Kluger. *Ashes To Ashes*. (New York: Alfred A. Knopf, Inc, 1996) p.201.

At this early stage in the anti-tobacco campaign, the American Cancer Society, (ACS), emerged as the sole voice speaking out against the dangers of tobacco. The leaders of ACS were first became involved in the issue by urging doctors to take a more active role in discouraging their patients from smoking and started producing pamphlets and filmstrips for distribution in schools in hopes of smoking prevention through education. "We are all looking for a breakthrough in cancer," said Howard Taylor, Jr., a Columbia professor of obstetrics and gynecology, "We already have it-- through prevention we can control most of the lung cancer problem."⁶

The first governmental actions concerning smoking and health came in 1957 with committee hearings on the Federal Trade Commission's oversight of cigarette advertising. The hearings conducted by John A. Blatnik (D-Minn.), chairman of the Legal and Monetary Affairs Subcommittee of the Government Operations Committee, sought to redefine the responsibility of the FTC so it could enforce standards of truthfulness in advertising claims relating to the effectiveness of cigarette filters. The subcommittee's report sharply criticized the advertising practices of cigarette manufacturers despite Blatnik's admitted enjoyment of smoking: "The cigarette manufacturers have deceived the American public through their advertising of cigarettes."⁷ As punishment for its negative

⁶ Institute of Medicine. Growing up Tobacco-Free: Preventing Nicotine Addiction in Children and Youth. (Washington, D.C.: National Academy Press, 1994).

⁷ Fritschler. p.27.

findings, Blatnik's subcommittee was dissolved.⁸ It seems harsh that a committee could be abolished after a report finding; after all, why have research or reports if only one answer is acceptable?

In this troubling era of American history, which included domestic unrest, the civil rights movement, and the Vietnam War, the public conscience was consumed with other important issues. There was no distinct public health 'lobby', as cigarette smoking was not one of the 'hot' issues of the day. The Interagency Council on Smoking and Health, an organization formed in 1964 was the only national organization urging action on the issue. It consisted of both public and private organizations concerned with public health, including the ACS, ALA, and AHA, occupational and industrial groups, and government agencies. This group, although quite large, had very little political muscle.⁹ Even though their members may have agreed on the mission of tobacco regulation, they were not coordinated on one single public policy priority. They had neither the money, nor the power to challenge the well-organized tobacco interests. The only national organization effectively involved in combating the smoking problem, the American Cancer Society, declined to invest its high standing in the Interagency Council. It was not prepared to subordinate its leadership role. ACS director, Irving Rimer noted, "Nobody wanted to

⁸ Ibid., in footnote, she explains it was not the first and only time a subcommittee was punished for its reports. This was also mentioned in a variety of other sources.(Kluger.p.189).

⁹ Kluger. p.285.

cede the Interagency Council any power...It didn't do anything except publish a newsletter."¹⁰ This unwillingness to effectively unite forces and coordinate the movement is a common theme, which is present throughout the history of the tobacco control movement and is responsible for much of the movement's weakness.

Throughout the '60s and '70s, the drive to regulate cigarettes came not from Congress, which tobacco had well under control, but from the Federal Trade Commission (FTC), which is responsible for controlling unfair and deceptive practices in business. 1964 marked the official start of governmental regulation of tobacco when on January 11th, in a momentous news conference, Surgeon General Luther Terry issued the first highly advertised governmental report linking smoking to lung cancer. It was titled *Smoking and Health: A Report to the Surgeon General* because an advisory committee produced it after being appointed by the Surgeon General to investigate whether or not smoking causes cancer. The report was actually a review and summary of accumulated evidence that established the link between smoking and lung cancer from studies published in the early 1950s. At first considered a political success because it caused other agencies to take a closer look at tobacco, the highly publicized report failed to bring about any immediate or substantial remedies to the tobacco and health problem. It did create the beginning of the government's role in the anti-smoking movement and prompted many subsequent

¹⁰ Ibid.

studies and reports on the health hazards of tobacco.

The Surgeon General's report resulted in immediate questions concerning the government's responsibility in requiring cigarette manufacturers to inform consumers of the results of studies of the medical and scientific communities. A swift answer to that question came as the Federal Trade Commission (FTC) announced that it would issue rules governing the advertising and labeling of cigarettes. Within one week after the report was issued, the FTC prepared a regulation requiring a health warning to appear in cigarette advertising and on cigarette packages.

As a defense strategy, the tobacco industry accused the FTC of acting unconstitutionally. By questioning the FTC's authority to make policy involving a cigarette health warning, the industry stalled the implementation of the new rules, thereby insuring that federal court or Congress, but not the FTC, would make the final policy decision. The Congressional debate was centered in the Senate Commerce Committee, which exercised responsibility over the FTC. Earle Clements, the tobacco industry's chief lobbyist, persuaded the others in the industry that what they really wanted was a congressional bill that had at least the appearance of a health regulation, yet effectively dismantled the FTC's pending version and prevented, through the preemptive power of federal legislation, a multiplicity of

warning labels by state and local governments.¹¹

Congress was not receptive to the FTC's proposals for cigarette health warnings. Those profiting from tobacco advertising dollars were worried that the regulations might create a loss in revenue. The threat to advertisers encouraged others, such as the American Newspaper Association and the Advertising Federation of America, to join the tobacco people in opposition to the FTC's proposals. In 1965, the industry created the Cigarette Advertising and Promotion Code, a self-policing organization meant to avoid more serious governmental regulation. They agreed to change the tone of cigarette advertising by not advertising health claims relating to tar and nicotine yields. This was intended as a sign to Congress and the public that the industry was interested in regulating itself, and that the action of the FTC was an unnecessary obstacle to self-regulation. The two major goals of this voluntary code were to prohibit advertising to persons under 21 and to prohibit health claims in cigarette advertising. The code's stated purpose was to blunt the charge that the industry was massively seducing minors. When considering how serious the industry took this code, it should be noted that these efforts were confined to domestic business practices only and not applied in foreign markets.

Following the announcement of this code, Congress passed The Cigarette and Labeling

¹¹ Kluger. p.279.

Act in 1965, which transformed the voluntary restrictions into law, at the same time removing some of the power of the FTC. This act was actually a victory for the tobacco industry and did little to promote public health. Members of Congress wrote and promoted it in terms of protecting public health, but instead it effectively eliminated the power of the FTC in the cigarette advertising field and preempted state and local governments from passing stricter labeling laws. It passed with no opposition from the cigarette manufacturers, since their voluntary code already covered their legal requirements. The health warning label was to be required only on cigarette packages, becoming effective in 1966.

The passage of this act was a major victory for cigarette manufacturers and their allies. The tobacco industry needed some legislation from Congress, or the much more severe FTC rule would stand. The new law covered only half of the FTC's proposals. Eight years after that first Surgeon General's report on tobacco and the FTC announced its proposal, the whole policy was eventually adopted.¹²

The tobacco state legislators had powerful reasons to side with tobacco interests, namely their constituents' support. On the other hand, there were very few 'health' legislators.

¹² The requirement for inclusion of the health warnings in all print ads became effective in 1972 due to another voluntary 'compromise' by the cigarette manufacturers.

Those members who did champion the health cause had no substantial constituent interest to back them up. Because the anti-smoking forces were not nearly as well-organized or as well-funded as the cigarette interests, the first few successful tobacco control measures were a direct result of the efforts of specific individuals, such as John Banzhaf, III.

Banzhaf was an early pioneer in the legal battles for nonsmoker's rights. He founded the Action on Smoking and Health (ASH), financed entirely by volunteer contributions, to fight for federal tobacco regulation. In 1969, he persuaded the Federal Communications Commission (FCC) to apply the Fairness Doctrine to cigarette commercials. This proved to be one of the most significant events in the tobacco regulation controversy. The Fairness Doctrine required broadcasters to allot free time for opposing views on matters of public controversy dealt with on the air.

Congressional hearings in 1969 resulted in a total broadcast ban of tobacco advertising on radio and TV. The industry agreed to cease the ads in 1970, but Congress gave them an extension and made it effective in 1971. The cigarette manufacturers voluntarily agreed to the ban in order to prevent the airing of the effective anti-smoking advertisements. The ACS produced the majority of these advertisements that contributed to the general decline in smoking rates.¹³ Banzhaf, through ASH, was instrumental in the both the

¹³ An argument can be made that these ads did not 'cause' smoking rates to decline; other factors must be considered.

Discovering Environmental Tobacco Smoke (ETS)

Even though the first study of "public exposure to air pollution from tobacco smoke" came in the 1972 Surgeon General's Report, this threat to the tobacco industry did not officially begin until the dangers of exposure to Environmental Tobacco Smoke (ETS) were revealed in 1986 with the Surgeon General's Report, *The Health Consequences of Involuntary Smoking*. Surgeon General C. Everett Koop announced that "widespread exposure to ETS in the United States presents a serious and substantial public health impact."¹⁴ This report concluded that passive smoking caused lung cancer in nonsmokers.

ETS, sometimes called secondhand smoke, is the air pollution that results from the smoking of cigarettes. 'Passive' smoking is the involuntary inhaling of tobacco smoke by nonsmokers in a smoke-filled atmosphere. These nonsmokers inhale sidestream smoke-- smoke that is not drawn through the cigarette- and mainstream smoke-- smoke that is exhaled by the smoker. Sidestream smoke contains much higher percentages of tar, nicotine, and noxious gases than the smoke inhaled by a smoker. More than 4,000 chemicals, including at least 40 carcinogens, are contained in ETS. It can take as long as two days to eliminate nicotine from the body of a smoker; the process is even slower for

¹⁴ Surgeon General. "The Health Consequences of Involuntary Smoking." (U.S. Department of Health and Human Services, Public Health Services, Centers for Disease Control, Center for Chronic Disease Prevention and Health Promotion, Office of Smoking and Health. Washington D.C., 1986).

individuals who breathe sidestream smoke.¹⁵

ETS can result in aggravated asthmatic conditions, impaired blood circulation, bronchitis, and pneumonia. In addition, it poses additional health hazards for unborn and young children. Children exposed to secondhand smoke have increased risks of respiratory illnesses and infections, impaired development of lung function, and middle ear infections. Infants born to women who smoked during pregnancy are more likely to die of Sudden Infant Death syndrome (SIDS). Pregnant smokers experience more stillbirths, spontaneous abortions, premature births and low weight babies than nonsmoking mothers. Children born to mothers who smoked during pregnancy may have measurable deficiencies in physical growth, learning disabilities, birth defects, and chronic breathing difficulties.

In comparison, inhaled tobacco smoke does more damage to the smoker than secondhand smoke does to the nonsmoker; however, the active smoker accepts that damage voluntarily. Even though active cigarette smoking causes much more death and disease than involuntary smoking, ETS is still responsible for more than 53,000 deaths each year in the United States. That may be a relatively small number in comparison to the 434,000 Americans that die annually from active smoking, but by no means is it an insignificant

¹⁵ Surgeon General. "Reducing the Health Consequences of Smoking: 25 years of Progress." (U.S. Department of Health and Human Services, Public Health Services, Centers for Disease Control and Prevention. Washington D.C., 1989).

amount of suffering.¹⁶

As evidence of the dangers of ETS accumulated during the 1970s, a grassroots movement at the local level for nonsmokers rights emerged. But these opponents of tobacco could not match the tobacco companies in either wealth or political influence. To the industry, these groups were mainly an irritant, not feared enemies. While the public increasingly accepted the scientific consensus about tobacco use, the tobacco industry pooled its resources to fight any initiative intended to further the cause of public health groups. In both the social and political arenas, the cigarette makers were triumphant largely because they faced no organized opposition. The voices of protest were weak and scattered. A 1978 report by a national commission on tobacco and health policy called the anti-smoking effort, "minimal and symbolic" and noted that in relation to the size and scope of the problem, only a very small amount of the \$230 million raised annually by the three largest health voluntaries had gone to combat smoking.¹⁷ The disorganized array of health groups had neither the leadership nor financial means to coalesce into an effective lobbying organization. They were overwhelmed by the giant tobacco industry and its supporters from the early 1950s onward.

¹⁶ Centers for Disease Control and Prevention. "Cigarette Smoking- Attributable Potential Life Lost." Morbidity and Mortality Weekly Report. (1991), pp.62-71.

¹⁷ Kluger. p.465.

From the previous experience of the Sixties, the anti-smoking advocates learned not to wait for conclusive evidence before pursuing policies to prevent passive smoking from causing cancer in nonsmokers. Although the scientific evidence was relatively new regarding the magnitude of the health hazard from ETS, that did not stop the environmentally concerned anti-smoking advocates from going full-steam ahead with the issue. By framing the issue as a right of nonsmokers to breathe clean air, they shifted the tobacco regulation argument from a personal to a public matter. ETS gave the anti-smoking advocates more justification for governmental intervention and regulation because there was no 'individual choice' involved in the danger to nonsmokers. ETS has even become a factor in custody cases. Courts have ruled that nonsmoking parents provide a more suitable environment for children.

The anti-smoking groups initially focused their efforts on smoking in public places. The rationale behind this movement is that nonsmokers need to use public facilities and should not be exposed to a health risk while doing so. A significant side-effect of the no-smoking policies is the denormalization of tobacco use in American life. This promotes public health in two ways. First, smokers may smoke less often when smoking is restricted in certain places. Second, nonsmoking becomes the social norm, thus discouraging youths from beginning to smoke. Prohibiting tobacco use in public places, including the workplace, has proven to be an effective way of establishing a tobacco-free norm, eliminating ETS and decreasing overall tobacco consumption.

The other area of focus for anti-smoking groups is the workplace. The workplace is targeted because adults spend a significant portion of their waking hours at work. Daily exposure to tobacco smoke poses an unnecessary health risk, and therefore, elimination of tobacco smoke exposure leads to decreased employee health problems, increased productivity, and a safer work environment. As ETS remains on surface of the governmental regulation of tobacco controversy, a question arises about legal liability for permitting smoking in business buildings, such as private offices, restaurants and bars. ETS exposure is three to five times higher in restaurants than typical workplace exposure.¹⁸ Workers' Compensation has enabled both smokers and nonsmokers to recover damages encountered by employers' failure to regulate smoking in the workplace.¹⁹

The fundamental issue involved in regulating tobacco use shifts with the discovery of the dangers of ETS. No longer is it an issue of paternalism, or excessive governmental regulation versus individual freedom. Nonsmokers need protection from ETS because they chose not to smoke, but still encounter the risks associated with smoking. Clean Indoor Air Laws are ideal for dealing with this problem because they do not prohibit smokers from endangering themselves, but rather prohibit them from endangering others.

¹⁸ Michael Siegel. "Smoking and Restaurants: A Guide for Policy Makers. A Report from the University of California Preventative Medicine Residency Program," (1992).

¹⁹ Ibid.

The groups that initiated the attack on tobacco were relatively small grassroots organizations. Their campaigns lacked sufficient funds and were forced to rely entirely on the dedication of their volunteers. In California, the Group Against Smoking Pollution (GASP) pressed for local anti-smoking measures and tried to educate the public about the hazards of smoking and ETS. The public policy mission of the nonsmokers rights groups was to protect nonsmokers from the effects of tobacco smoke by restricting smoking in public places. There was initially wide public support for the anti-smoking initiatives, called Prop 5 and 10, until the tobacco industry spent millions to establish campaigns against the initiatives through front organizations, such as Californians for Common Sense and Californians Against Regulatory Excess (CARE). These organizations were funded solely by the tobacco companies in relation to their market share. Tobacco companies hid their connections to these campaigns. They maintained separate identities and disguised their direct affiliation with the tobacco industry. These groups were responsible for defeating the tobacco control initiatives. While these anti-smoking groups were not concerned with the economic impact of the smoking restrictions, the tobacco industry realized the potential loss of profit and spent \$6 million to defeat Prop 5 in 1978, more than twenty times what the GASP-led clean air coalition spent.²⁰ The initiative lost by 8% and the 1980 Prop 10 lost by 6%.²¹ In 1981, the coalition reorganized as Californians for

²⁰ Kluger. p.477.

²¹ Ibid.

Nonsmokers Rights (CNR).

It was not until 1983, in San Francisco, that the first truly restrictive rules against smoking in the workplace passed in a major metropolitan area. The measure, called Prop P, was designed to accommodate the wishes of both smokers and nonsmokers by calling for separate work areas for each. CNR regarded work places as more important than public places because of the length of exposure and voluntary nature of going to public places as compared to going to work. Once again the industry's front group, this time, San Franciscans Against Government Intrusion, argued that the measure would drive people apart. The industry barely missed buying another victory, as the law was upheld. The greater meaning in this non-smoking victory was that the tobacco companies could be beaten at the local level, where nonsmokers can rally together and pass legislation where the industry has less of an influence.

Five years later, in 1988, Prop 99 passed, raising the tax on cigarettes to highest level ever. It was used to educate citizens about the hazards of smoking and to help smokers quit. Tobacco spent more than 1 million to try to counter that campaign, but lost.²² Other Californian cities followed San Francisco's lead, but California was not the only battleground for the tobacco companies. In Dade County, Florida, the tobacco industry

²² Kluger. p.555.

established another committee with a name to hide the industry's involvement, Floridians Against Increased Regulation, which helped defeat another local anti-smoking effort. Most states have had at least one bout over local tobacco regulation.

The tobacco industry had access to levels of power in Congress, but the health organizations had none. Access is important because if a smoking control bill was filed by somebody without senior standing on a key committee, it would not go far. Because the tobacco interests exerted considerable influence within the traditional legislative system through members of Congress serving on committees or subcommittees immediately involved in tobacco politics, there was little hope for the successful initiation of new policy within Congress. Health and consumer advocates had to use other avenues. They depended heavily on the power of administrative agencies, such as the FTC and the FCC, and later the FDA, to make public policy in order to break the deadlock of the status quo maintained by the tobacco legislators.

When the national smoking control movement started materializing, it was not through these small and scattered, financially unstable grassroots campaigns, but through the three big voluntary health organizations, of which the American Cancer Society (ACS) was the largest and best financed. The ACS, along with the American Heart Association (AHA) and the American Lung Association (ALA), had size, organization, and a universally acknowledged mission to educate the public. What they lacked was political experience.

Since they rely on volunteer contributions, they must maintain a conservative approach to politics. In the beginning, they were cautious because their tax-exempt status could have been threatened if they lobbied extensively. When in 1976, federal lobbying laws changed to allow tax-exempt organizations to maintain adjunct arms for lobbying, the health voluntaries still were not that willing to merge their separate identities for the anti-tobacco cause.

Charles Le Maistre, a member of the Surgeon General's Advisory Committee on Smoking and Health, finally brought the anti-smoking advocates together on a national level at the 1981 National Conference on Smoking or Health, which drew representatives from 21 nationwide public health organizations and several hundred of the most knowledgeable and committed professionals in the anti-smoking field. He convinced the then ACS president, Lane Adams, that the smoking control movement would get nowhere unless it was lead by the public health community. The conference resulted in the formation of the Coalition on Smoking or Health, with the purpose of advancing federal tobacco regulation through legislation. Their task was to create political movement so that their agenda would finally get a serious hearing in Congress. There had never been a single piece of anti-smoking legislation passed that the industry did not in some way support. Within the first year of operation, one of the Coalition's priorities -an increase in the excise tax- actually passed. But once again, the companies used the legislation to their advantage by using the tax increase to cover up a price increase of their own resulting in even higher

profits.

Practically speaking, there was no *coordinated* national smoking-control movement. The organizations had their own agendas, member lists, and newsletters. The organizations involved in the Coalition on Smoking or Health worried about losing their separate identities. ANR was growing but lacked funding and a presence in Washington. AMA was not actively lobbying. One of the difficulties that plagued the health groups was the absence of agreement on just what they wanted Congress to do. They agreed only that cigarette smoking was harmful to health and that government should do something about it.

The anti-smoking movement has grown a great deal since the Sixties. It expanded in 1984, when Californians for Nonsmokers Rights, (CNR) extended its mission and changed its name to Americans for Nonsmokers Rights, (ANR). At the national level, the Advocacy Institute's Smoking Control Advocacy Resource Center (SCARC) plays a unique supporting role by bringing together diverse segments of the tobacco control movement. Its electronic communications network, SCARCNet, provides tobacco control advocates with timely, concise strategic resources and offers them the opportunity to discuss strategic questions and share advocacy successes and failures. The Advocacy Institute was created from foundation grants and private gifts for public interest causes, primarily anti-tobacco, trying to prompt action from federal lawmakers and regulators. This type of

supporting organization is not a "frontline" organization, instead these organizations support the efforts and coordinate advocacy groups. Currently, there are various other groups, across the nation, dedicated to the tobacco control movement.

The one powerful group that might have been expected to counter the tobacco industry earlier was the American Medical Association. The AMA, with its large number of physicians, was slow to join the anti-smoking campaign. Many felt that the AMA and its medical journals were downplaying the smoking issue due to a need for allies to face the rising tide of national sentiment favoring publicly financed health care for citizens over 65.²³ The AMA was opposed to Medicare and needed the votes of Senators from the tobacco states. They did not participate in the 1984 congressional hearings on the cigarette labeling bill, but did finally come around to protest tobacco at committee hearings. AMA doctors gave testimony in 1985 favoring making the federal cigarette sales tax permanent. And in 1985, the AMA supported the complete ban on the advertising and promotion of cigarettes when Mike Synar (D-Mass.) proposed a bill to eliminate all tobacco advertising and promotion. Mike Synar is known for promoting legislation calling for the banning of tobacco advertising or limiting it to tombstone advertising. The bills have never made it through the legislative process.

²³ Kluger, p.203.

Tobacco interests never lost a single legislative battle in Congress until 1983 when Congressman Henry Waxman (D-CA), chairman of the subcommittee on Health and the Environment, emerged as a forceful anti-tobacco politician by introducing the Smoking Prevention Act. He held hearings that focused on nicotine addiction and gave anti-smoking forces maximum exposure, stating that, "In a society where instant gratification was every consumer's right, and cigarettes were legal, cheap, and available everywhere, the public needed to be told on packages and in advertisements that they were also addictive."²⁴ Tobacco executives replied that smokers are aware of the dangers, but disregard the warnings and choose to smoke anyway. Waxman's reply was simple: if the industry thought the warning label useless, then it should be repealed, which is the last thing the industry wants because the warning label has become their chief shield against liability lawsuits.

The tobacco control bill that eventually emerged from Waxman's subcommittee included rotating warning labels on all packages and ads, disclosure of the quantity of carbon monoxide, as well as tar and nicotine yields, and required that a list of all ingredients be provided to Health and Human Services (HHS) officials. The tobacco manufacturers declared the list of ingredients privileged information, even though all other products have to disclose them. Congressman Al Gore (D-Tenn) brought the parties together for a

²⁴ Kluger, p.543.

settlement that finally passed in 1984. The bill marked the turning point of the industry's long hold on the federal legislative system. Its lobbyists were seen by a growing number of lawmakers as "duplicitous agents to the bitter end moguls and smoking was no longer an issue to embarrass everyone in Congress."²⁵

This did not mean that tobacco's influence in the legislative process was weakening. Congressman Waxman introduced the Tobacco Control and Health Protection Act in 1990 and the Smoke Free Environment Act of 1994, which would have saved an estimated 38,000 lives per year and more illnesses by banning smoking in all nonresidential sites in the nation, but both bills were delayed in the legislative process. In 1993, after five years of intensified research, the Environmental Protection Agency (EPA) released its risk assessment classifying ETS as Group A carcinogen, meaning that it causes at least one death per 100,000.²⁶ The report estimated that ETS caused 52,000 deaths each year. More specifically, the EPA concluded that each year between 3,000 and 4,000 nonsmoking adults die of lung cancer, and that 37-40,000 die from cardiovascular diseases as a result of breathing the sidestream smoke from others' cigarettes. The EPA report was featured in Congressional hearings, which resulted in the first successful national attempt at regulating ETS: smoking was banned on domestic airline flights.

²⁵ Kluger. p.548.

²⁶ Environmental Protection Agency. "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders." (Office of Health and Environmental Assessment, 1992).

According to Stanton A. Glantz, a professor of medicine at the University of California at San Francisco, the death toll annually from passive smoking is closer to 53,000.²⁷ This makes ETS the third major U.S. killer, after active smoking and alcohol.²⁸ Most recently, a new study by researchers at Harvard School of Public Health found that secondhand smoke doubles the risk of heart disease.²⁹ The 10-year study, which traced 32,000 healthy women who never smoked, found that regular exposure to secondhand smoke at home or at work almost doubled the risk of heart disease. Their results indicate that up to 50,000 Americans die of heart attacks from secondhand smoke each year. This new finding raises the estimated deaths from ETS much higher than the previously estimated 53,000.

Every governmental, scientific, or medical organization that has examined the issue has concluded that ETS causes cancer in nonsmokers. The tobacco industry and people with financial ties to the industry are the only ones that have publicly questioned this finding. Remaining consistent, the industry discredited the studies and reports and attacked the science just as they have throughout the history of tobacco regulation. (refer to the following section) One tool used to counter the reports was a smokers' rights campaign. The cigarette manufacturers used publications, such as Philip Morris Magazine, and

²⁷ S.A. Glantz and W.W. Parmley. "Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry." Circulation. (1991) p.1-12.

²⁸ Clark Heath, Jr. "The Evidence Accumulates: Cancer Risks from Environmental Tobacco Smoke." (World Smoking and Health, Summer 1990). pp 10-11.

²⁹ Smoke-Free Air. (Summer 1997) p.3.

newsletters such as *Smokers' Advocate* and *Choice* to recruit and "educate" smokers. In 1988, Philip Morris Magazine claimed it had 11 million nonpaying readers. Smokers were encouraged to become politically active by signing petitions, writing letters, making phone calls, and showing up as a group at meetings where smoking restrictions were being discussed.

There have not been many successes for the national or state anti-tobacco campaigns. Public health and tobacco control groups have won only marginally notable legislative victories in the past decade versus hundreds of defeats. However, in popular elections, the record is the reverse. In 1993, 214 local anti-tobacco ordinances passed and only 26 were defeated.³⁰ It has become a commonly understood fact that the closer the issues are to the voters themselves, the more tobacco loses; conversely, the more issues are handled out of sight and in committees, the more tobacco wins. This is why preemption is such an important issue. A preemption clause allows the tobacco industry to fight on one battlefield, preventing them from having to scatter their resources. In the 1965 labeling law, states were prohibited from regulating cigarette advertising by a preemption clause. At first it was temporary, but it was made permanent in 1971. This is an example of the federal government imposing on state power. This can have dire consequences, as this particular law suppressed potential product liability lawsuits. The most drastic action

³⁰ Hilts. p.177.

against the industry would be to repeal the preemption clauses, thus leaving the companies at the mercy of 50 state legislatures. It is much harder to comply with a patchwork of rules and regulations, and it would become much more expensive to market cigarettes.

Congress is still unwilling to impose new regulations on tobacco. Legislation is currently stalled on Capitol Hill that would strictly limit tobacco advertising and most tobacco promotional techniques.

Chapter 3
Tobacco's Influence:
The Legislative Branch

With the possible exception of the gun industry and its powerful National Rifle Association, the tobacco industry is unrivaled among American industries in its ability to stall effective public health policies while continuing to market its products that indisputably cause much injury and death.³¹ Despite the overwhelming scientific evidence against it, the industry manages to prevent effective governmental regulation through a combination of skilled legal, political, and public relations strategies designed to confuse the public by sustaining a controversy that should have been put to rest long ago. Insisting that the controversy still exists enables the industry to avoid having to take responsibility for the death and disease its products cause.

This tobacco industry "conspiracy" began on December 15, 1953, at the Plaza Hotel in New York City where a meeting of six tobacco company CEOs established the joint industry group known as the Tobacco Industry Resource Committee (TIRC).¹ On January 4, 1954, the industry stated publicly in a full-page promotion carried in more than 400 newspapers around the country that it was forming the committee in response to scientific reports to determine "truth"; however, in reality, it was formed with a public

¹ Hilts. p.1.

relations mission of preserving the status quo and maintaining the social acceptability of smoking. By creating the TIRC, the industry established its unwillingness to deal straightforwardly with society. Cigarette companies pledged in their "Frank Statement" that they would spend money on smoking and health research, but most importantly, the TIRC would serve the function of creating a controversy where none existed.

Representing tobacco companies and trade associations, the TIRC denied that smoking causes cancer; they considered the scientific evidence thus far to be inconclusive. Its mission was to prevent scientific and public health officials from effectively warning people of the health hazard associated with tobacco. The TIRC later changed its name to the Council for Tobacco Research (CTR), but retained its mission to fund biased research used in rebuttals to the mounting scientific health studies.²

In 1958, the tobacco industry formed the Tobacco Institute, funding it in proportion to each company's share of the market. The Tobacco Institute remains the industry's influential Washington, D.C.-based trade association lobbying on behalf of the major cigarette manufacturers in this country, as well as tobacco farmers, retailers, and factory

² Stanton A. Glantz. The Cigarette Papers. (L.A., CA: University of California Press, 1996) p.327.

Biased research methods included selecting grantees on the basis of their political or legal usefulness to the industry, result-oriented research distorts the scientific process, (only favorable research was funded, the researchers were not paid unless their data proved helpful to the industry), and fraud for the purposes of preventing disclosure of 'privileged' documents. (Using lawyers to decide which research is produced, so they could say the results are attorney/client privileged if the results are unfavorable to the industry) In 1992, the 3rd Circuit Court in *Haines v. Liggett Group, Inc.* ruled that there was deception surrounding the advertised function and operation of CTR.

workers. The Tobacco Institute developed and implemented a public relations campaign for tobacco. The industry used its economic and political power to curtail any regulatory action and enlisted the help of political, cultural, and ideological allies ranging from anti-government libertarians to labor unions and the ACLU. It became one of the most effective public relations programs in history. In 1979, Senator Edward Kennedy referred to the Tobacco Institute as, "Dollar for dollar, the most effective lobby on Capitol Hill."³

The cigarette companies worked together through this joint lobbying organization to contain any adverse political effects of health studies. They succeeded in withholding serious governmental restrictions by challenging the scientific case, confusing the public, and reassuring their customers that smoking was not harmful. Internal documents from a major tobacco company show that executives struggled over whether to disclose to the Surgeon General in 1963 what they knew about the hazards of cigarettes. In more than 100 documents, letters, and cables from the internal discussions among tobacco executives, they spoke of the hazards of cigarettes and stated plainly that nicotine is addictive. The tobacco executives chose to keep their research results secret and to pursue a legal and public relations strategy of admitting nothing.⁴ It is difficult to ascertain how much is actually spent on the institute's lobbying campaign. The industry has always been determined to survive and prosper, no matter what the cost in dollars, disease, or death.

³ Kluger. p.466.

⁴ Hilts. p.129.

The members of Congress representing tobacco states were in powerful positions in the early 1960s. In the Senate, nearly one-fourth of the committees were chaired by men from the six tobacco states: North Carolina, Georgia, Kentucky, Tennessee, South Carolina, and Virginia. A full one-third of the committees in the House were chaired by tobacco state congressmen.⁵ The chairmen from these states exerted extraordinary power on matters that came before their committees, which enabled them to protect the tobacco industry. On many bills, politicians do not have to answer for their votes at home because they help defeat bills at the committee level, where their votes do not get reported at home.⁶ Tobacco does well at this level because Congressmen, especially committee chairman, are susceptible to the effects of lobbying and campaign contributions, while they remain insulated from voters because few of their crucial committee actions are reported.

Lobbyists for the tobacco companies seek to keep the status quo, keeping governmental regulation at a minimum. Because it takes fewer people to defeat legislation than it does to pass it, the industry's job is easier than their opponents', where it takes many people cooperating to get new legislation passed. For this purpose, a handful of legislators totally dedicated to the tobacco issue, legislators who believe tobacco is their main job in political

⁵ Maurine B. Neuberger. Smokescreen: Tobacco and the Public Welfare. (Englewood Cliffs, NJ: Prentice-Hall, 1963) p.110.

⁶ If a bill makes it to a floor vote, then the votes may be reported by the media. But before a bill gets to the floor, it has to survive committee, and usually, subcommittee battles. Often one vote has the power to halt a bill before the public even know the bill existed. Or the chairman may never even put it on the calendar, if he/she doesn't want to.

life, can be extremely effective. These devoted representatives have enabled the tobacco industry to build a strong victory record. Tobacco interests have been successful in confining their issues to committees chaired by their supporters and measures that appear to be anti-tobacco, such as warning labels and advertising bans, were actually bills written by tobacco lobbyists to protect the industry from more serious regulation.

As the medical case against smoking accumulated, the tobacco industry became more devoted in its opposition. The industry scientists trivialized every new medical study and report by challenging, distorting, or minimizing the unfolding evidence against it. Ironically, the bad news about tobacco had the effect of keeping out competitors and allowing the six established manufacturers to dominate the American cigarette market totally, thus virtually ensuring their profitability.⁷

While tobacco is grown in only 51 of the 435 congressional districts, what could be known as the tobacco "coalition" directly includes everyone involved in the process of growing to consuming tobacco, such as farmers, manufacturers, distributors, and smokers.⁸ It also indirectly includes those who profit from the tobacco industry, such as advertising agencies, media, and retailers. The crucial link in the industry's survival is the

⁷ Currently named: American Brands, Inc.; Brown & Williamson (B.A.T Industries); Liggett Group, Inc.; Philip Morris, Inc.; RJR Nabisco, Inc.; U.S. Tobacco.

⁸ White. p.48.

smokers, so the industry works very hard to lobby against any governmental activity that might discourage smoking. The tobacco lobbying system includes the paid representatives of the tobacco growers, marketing organizations, cigarette manufacturers, and elected members of Congress representing tobacco constituents.

The 1979 Surgeon General's Report, *Smoking and Health*, provides insight into how the industry reacted to the mounting scientific evidence against it. This report established a complete consensus in the health and medical communities on the tobacco and health issue by putting an end to the scientific controversy. However, to keep the one-sided controversy open, the Tobacco Institute ran a series of advertisements after the release of the report that stated, "Smoking was not a grave health issue, but merely one of several equally acceptable social options, none of which required intervention by government into the lives of a sensible and civil people."⁹ The Tobacco Institute has challenged every single Surgeon General report since the first one in 1964 by producing advertisements and distributing pamphlets criticizing the health community.

These marketing, political, and public relations strategies continued to protect the industry throughout the '80s and early '90s. The tobacco industry used its significant economic clout to try to sway public opinion by manipulating corporations, the media, and

⁹ Kluger. p.469.

physicians.¹⁰ The industry influenced editorial decisions and persuaded key organizations and doctors to support their position by keeping the so-called controversy open. Movie and TV deals included placing tobacco products in a positive light, and the media was held to self-censorship concerning smoking and health in order to keep the large cigarette advertisers happy. The tobacco industry paid writers to attack the health reports, while disguising their connection to the industry. They ran deceitful advertisements, trying to persuade smokers that there was no evidence that smoking causes death.¹¹

Recently, diversification of tobacco companies has increased, and the expanded companies have changed their names, taking out the word "tobacco". One of the most strategic aspects of diversification is that of geographic expansion, wherein tobacco companies gain political and economic influence through acquisition of subsidiaries in non-tobacco growing states and counties. Executives of these seemingly disinterested and unrelated companies then take the lead in representing the business community in opposing legislative restrictions on tobacco.

The strategy and tactics the industry used to defend itself are based on its need to be perceived as a normal business, like any other business in capitalist America. However,

¹⁰ Glantz. 1996. p.354-363.

¹¹ Ibid. p.358.

unlike other businesses, the tobacco industry is the only industry that causes death when its products are used as directed and intended. In 1987, Timothy Finnegan, a lawyer for US Tobacco Co., warned corporate staff about the greatest danger for them: "The industry was safe as long as juries don't see us as merchants of death."¹² Allowing tobacco companies to be exempt from federal regulations and behave by a standard different from other businesses is unjustifiable.

While there has been a dramatic proliferation of smoking control laws since the EPA report of 1993, which range from simple (banning smoking on school buses) to comprehensive (restricting smoking in most public places, including restaurants and all workplaces), the policy debates that have erupted in local and state legislative arenas have proved that the tobacco industry has switched its political strategy of opposing all smoking control laws to pushing for laws that preempt local action and classify smokers as a protected class. Across the country, the tobacco industry is working to consolidate its power in state capitals because state legislatures provide a forum more conducive to working through political process by utilizing campaign contributions and well-placed lobbyists to influence public policy. The tobacco industry would prefer to use state political systems where citizens have less access to lawmakers, as opposed to localities where public opinion generates policy change more rapidly.

¹² White. p.87.

For the tobacco industry, the political battles over tobacco regulation are simply economic wars. Financial resources seem to be no problem for the tobacco industry. Victor Crawford, the Tobacco Institute lobbyist turned anti-smoking advocate, once admitted that, "Our resources were enormous. Money was simply no object."¹³ The industry uses its money to influence legislators, to outlitigate the plaintiffs that bring lawsuits against them, and to promote itself. Stephen Hilts uses a simile regarding the spending of industry money: "The companies have master strategists who are paid fantastic salaries to put out all media fires, like a professional killer."¹⁴

The tobacco companies are consistently among the top non-partisan campaign contributors at national and state levels. Cigarette PACs contributed a reported 2.5 million dollars directly to members of Congress in the 91-92 term.¹⁵ Common Cause calculated that the soft money and PAC contributions during the 1995-6 election cycle totaled \$9.9 million, nearly twice the industry's 1992 donations. 82% of 1996 members of Congress, including both Democrats and Republicans received tobacco PAC money.¹⁶ Concerned citizens, without access to disposable millions, are unable to form a strong enough campaign to oust tobacco representatives, especially in tobacco states where legislators

¹³ Hilts. p.184.

¹⁴ Hilts. p.52.

¹⁵ Kluger. p.683.

¹⁶"Spat over tobacco money spotlights big donors." USA Today.(July 10,1996).

are simply representing their tobacco farmers' interests.¹⁷

Because of its money and influence, the tobacco industry is regulated very little in relation to the misfortune it causes. In 1995, Vicki Kemper wrote for *Common Cause*, "Tobacco remains largely unregulated 31 years, 50,000 studies, and more than 10 million smoking-related deaths after the 1st Surgeon General's report certifying that smoking causes disease, not only because of the fabled power of the tobacco lobby, but also because of the other half of the equation, the lawmakers who take the money."¹⁸ Lawmakers have to be held accountable for their decisions both to accept tobacco money and to vote against anti-tobacco legislation. Political winds may be changing in Washington and state capitals as campaign finance reform emerges on the national agenda and the entire system of money for votes is put under a microscope.

When the stability of their whole industry is at stake, it is worth all the money they have, to try and save it. It took 26 years after the first Surgeon General's report on smoking and health for Philip Morris to admit in its 1990 annual report that cigarette smoking is a risk

¹⁷ While one may debate how much influence campaign contributions affect policy, a 10-19-94 *JAMA* article revealed a study (Glantz, Begay, and Moore et al) that describes a link between contributions and a legislator's public health efforts to discourage smoking. Money influences voting behavior more than party affiliation and even more than whether or not they are representing a tobacco state. However, one could argue that the tobacco industry gives money to those already on their side. Campaign financing problems are a major issue in America and affect many issues, not only tobacco. The problem is that big companies can afford to pay more than citizens, or nonprofits trying to benefit the common good. This is especially disturbing in the limitless amount of soft money. It is undeniable that the more money a candidate has, the better chance of winning.

¹⁸ Hilts. p.179

factor in the development of lung cancer and other diseases.¹⁹

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¹⁹ Philip Morris Annual Report, 1990.

The Smoke Ring

Besides tobacco's influence on the legislative branch, a main reason why governments have taken so little action against the product that has been responsible for the deaths of millions of its citizens is because governments are part of what Peter Taylor calls a "Smoke Ring". The Smoke Ring is the ring of political and economic interests that has protected the industry for the past few decades. Tobacco provides governments with a large and reliable source of revenue through taxes and provides thousands of jobs for the American economy. These economic factors encourage governments to ignore the activities of the tobacco industry. Politicians may invoke the "freedom of choice" defense for their inaction, but the real reason is more practical; they are on the side of the tobacco industry due to the large campaign contributions. When governments were faced with great environmental or occupational hazards to public health, such as asbestos, they took political action once they had identified the cause.

The more government relies on tax revenue, the less likely public officials will be to impose regulations discouraging sales. Currently, state governmental officials are dealing with this dilemma in settlement talks over the Medicaid Third-Party Liability Lawsuit. If the proposed agreement passes Congress, the companies will promise to pay the states a portion of their profits over the next few decades. This will make the states dependent upon cigarette sales maintaining current rates. A drastic decline in sales, while helping public health, will hurt federal, state, and local governments financially. Peter Taylor

describes this dilemma: "The battle to break the Smoke Ring is a battle between wealth and health. The tobacco companies and governments want to keep people smoking because of the wealth cigarettes create. The industry knows it will lose if the Smoke Ring is broken, if both governments and consumers are weaned from cigarettes."²⁰ Cigarettes, and the tobacco industry's political donations, are too important for elected politicians to give up; they need the money to win elections.

This has allowed the tobacco companies to become rich while challenging the world medical community. Despite the scientific evidence against them, the companies are very profitable and have a strong record of defending themselves against claims by injured smokers. In addition, they have the political potency equal to or greater than that of any other group in society.

Investing in tobacco stocks is yet another way in which governments are financially linked to the tobacco industry. While some states are beginning to liquidate their tobacco investments, tobacco stocks are among the most profitable on the market. A clear conflict of interest rests upon the governments in this nation, which are supposed to be protecting its citizens, but actually contribute to the tobacco problem by not strictly regulating it or

²⁰ Pete Taylor. The Smoke Ring: Tobacco, Money, and Multinational Politics. (N.Y.:Pantheon Books, 1984) p.274.

discouraging tobacco use. Governments cannot be expected to regulate tobacco when they rely on it for income.

Although the fact that tobacco use causes cancer has now been established beyond all doubt, the government continues to go through the motions of dealing with the tobacco problem. The Clinton administration is the first administration not completely influenced by tobacco money. Even though the Smoke Ring is not as powerful as it has been in previous administrations, it is far from disappearing. With the upcoming election in 2000, it could very well return to the way it was. In 1996, Republican presidential candidate, Bob Dole, stated in the last presidential debate that he did not believe nicotine is addictive. He related smoking to drinking milk. To many politicians, the common knowledge that nicotine is addictive can be easily forgotten with the acceptance of cash from the tobacco industry. In politics, money can invalidate science and buy ignorance.

Tobacco, Taxes, & the Economy

Tobacco is taxed by federal, state, and local governments. Historically, governments have levied taxes to generate revenues. Increasingly, however, taxation of tobacco products is being recognized as an effective strategy to discourage tobacco use and enhance public health. The health benefits of raising cigarette taxes is not theoretical, they are proven. Canada provides one of the clearest examples. Taxes were raised from 46 cents in 1980 to an average of \$3.27 in 1991. As a result, teen smoking in Canada has been reduced by approximately 60% since 1980, and total cigarette consumption is falling faster than any major industrialized nation in the world.²¹ In contrast, United States cigarette taxes have not even kept pace with inflation. Today, federal excise taxes on tobacco products are 24 cents per pack, which is much lower than they were before the release of the 1964 Surgeon General's report. In 1965, the tax share on the price of a package of cigarettes was just over 50%; in 1990 the percentage dropped to less than 25%. With the addition of state cigarette taxes, the average total tax on a pack of cigarettes is 56 cents, or approximately thirty percent of the retail price.²²

Increasing the cigarette excise tax would help achieve two goals in the financing of healthcare: It would help balance the costs of tobacco use on society by paying for *current*

²¹ Coalition on Smoking OR Health. Tobacco Taxes and Kids Fact Sheet. (1994).

²² Tax Foundation. Tax Features. (October 1993). vol.37.

healthcare costs directly attributed to tobacco use, and through ad campaigns help reduce tobacco consumption, especially among teenagers, thus preventing *future* health costs.

Even though some would argue that raising the tax encourages the Smoke Ring, it could be used to compensate governments for dollars spent on tobacco-related illnesses and for smoking education campaigns aimed at smoking prevention. It would work toward increasing public health by decreasing overall smoking rates. As smoking decreases, so will the tax revenue and, eventually, the healthcare costs to society.

Increasing cigarette taxes undoubtedly saves lives. Substantial increase in tobacco taxes will reduce cigarette smoking because the consumption of tobacco products is strongly related to their affordability, especially among young people where smoking habits are not firmly established yet. It is estimated that for every ten percent increase in the price of cigarettes there will be a four percent reduction in tobacco consumption.²³ Higher excise taxes on cigarettes would significantly reduce the number of youth who smoke and the likelihood that children would begin smoking because youth tobacco consumption is significantly more sensitive (three times as much) to price increases than adult consumption.²⁴ By preventing the onset of smoking by young people, tremendous strides

²³ E.M. Lewit, et al. "The Effects of Government Regulation on Teenage Smoking." Journal of Law and Economics, (1981) vol.24. p.545-569; Surgeon General. 1989.

²⁴ Frank J. Chaloupka and Michael Grossman. *Price, Tobacco Control Policies and Youth Smoking*. Presentation to the 71st annual conference of the Western Economic Association International (July 1, 1996): J. Wasserman et al. *The Effects of Excise Taxes and Regulation on Cigarette Smoking*. Journal of Health Economics,(1991) vol.10.: Lewit.

will be made in reducing the burden of addiction, disease, and death that tobacco use imposes on the health of Americans.

The level of public support for higher tobacco taxes tends to increase when the revenues from those taxes are earmarked for specific purposes, such as deficit reduction or health care financing.²⁵ Cigarette taxes provide an exceptional opportunity for government to simultaneously save lives and raise substantial revenues for priorities such as healthcare. A major increase in state and federal cigarette excise taxes will dramatically reduce tobacco consumption, raise billions of dollars for federal and state treasuries, and save millions of Americans from the turmoil tobacco use can cause.

Loss of tobacco-related jobs and the potential economic consequences of such jobs on the economy is one argument used to oppose increases in tobacco taxes. However, the economic impact of tobacco taxes is likely to be fairly small as a share of total economic activity. Of the 2.3 million jobs claimed by the Tobacco Institute to be dependent on tobacco, only 11% are directly involved in growing, warehousing, manufacturing, or wholesaling tobacco products.²⁶ The remaining 2 million jobs are in sectors of the economy that have no relation to tobacco, such as retailing and supplier jobs. Money not

²⁵ Surgeon General. "Preventing Tobacco Use Among Young People." (U.S. Department of Health and Human Services, Public Health Services, Centers for Disease Control and Prevention, Washington, D.C., 1994).

²⁶ Arthur Anderson and Co. "Tobacco Industry Employment: A Review of the Price Waterhouse Economic Impact Report and Tobacco Institute Estimate of Economic Losses from Increasing the Federal Excise Tax." (Los Angeles, CA: Arthur Anderson Economic Consulting, October 6, 1993).

spent on tobacco would not disappear from the economy, but would be redirected to other goods and services.

The anti-tax sentiment in Congress is currently the largest barrier to raising the cigarette excise tax. This can be overcome by educating the lawmakers on the benefits of raising the tax. Public opinion polls show that politicians should support the tax. It is one of the most popular taxes in America, since the majority of citizens would not pay a cent for the tax.

One unintended consequence of raising the tax is that it would financially hurt lower-income individuals most because it would be a regressive tax. The majority of smokers is less educated and has lower incomes, so, poor people would pay a higher percentage of their income for the tax than the rich and middle-class. This would place an unfair burden on the lower class because taxes are easier for upper-income individuals to pay. On the other hand, individuals with less income are also less likely to have personal health insurance, so the state picks up the health tab for these smokers disproportionately. If these taxes were specifically earmarked for the healthcare of smoking indigents, it would offset the regressive value of the tax. This one effect of raising the tax would be outweighed by the benefits to society of reducing youth, as well as overall, smoking rates. Thus, raising the tax is an important step in promoting health through smoking prevention.

Chapter 4

THE ROLE OF THE EXECUTIVE BRANCH

If the regulation of tobacco was left to Congress alone, tobacco politics would have continued as it was for years, possibly forever. Given tobacco's influence on the legislative branch, the role of the President in tobacco regulation cannot be overlooked. Presidents appoint cabinet members and heads of administrative agencies that have the potential to advance or curtail the efforts of tobacco control groups. Presidents also have the opportunity to encourage or discourage legislation or regulatory action or promote anti-tobacco messages. Throughout the history of the anti-smoking movement, much-needed tobacco regulation was prevented due to the role of the President and his administration, but the regulation that does exist resulted from actions of executive agencies like the Federal Trade Commission, the Federal Communication Commission, and the Food and Drug Administration.

In the 1960s, when one could say the controversy over tobacco regulation began, President Johnson helped the tobacco interests by ignoring the issue because he needed votes from the Southern representatives in order to implement his priority agenda, such as his anti-poverty programs. The public health problem presented by tobacco was downplayed by his administration, even as the initial Surgeon General report took on the tobacco issue. This inactivity is ironic given that this administration implemented healthcare programs for the poor.

healthcare programs for the poor.

Nixon's administration was no more eager to involve itself in the tobacco issue than its predecessors. By not preventing the passage of the broadcasting ban of cigarette ads in Congress, this administration passively helped the public health interests. Two Health, Education, and Welfare (HEW) anti-smoking advocates, Surgeon General Jesse Steinfeld and Daniel Horn, from the National Clearinghouse on Smoking and Health, served under Nixon. The National Clearinghouse on Smoking and Health operated as an information center alerting the public about the dangers of smoking. In 1971, Surgeon General Steinfeld composed the largest ever report calling attention to important new developments in smoking research. It was 488 pages of both old and new scientific studies.¹

President Carter tried to avoid most of the tobacco issue because he needed to maintain his political base, which coincided with tobacco country. However, Joseph Califano, Carter's secretary of HEW proved to be the first cabinet member committed to the anti-smoking cause. He developed an anti-tobacco program that "was by far the most vigorous of any ever proposed by a U.S. official of Cabinet rank." Declaring smoking a major cause

¹ Kluger. p.365.

of 320,000 deaths a year in the U.S., he labeled tobacco as "Public Enemy # 1."² Carter gave absolutely no political support to Califano on the tobacco issue and eventually asked him to resign before the 1980 election. In this administration, Carter's political ambitions hurt the unstable anti-tobacco movement.

As with most everything else in the Reagan era, governmental regulation of tobacco took the turn of laissez-faire policies. There were many setbacks for the anti-tobacco campaign under Reagan. Reagan, a former model for Liggett & Myers Tobacco Company, was openly pro-tobacco. His fundamental laissez-faire attitude hurt consumers while nourishing corporate America. He wrote a letter to Alexander Galloway, president of RJR, stating his support of tobacco and reassuring him that they had nothing to fear from his administration. He stated that his Cabinet would be much too busy to worry itself about tobacco.³ In this philosophy, unfettered capitalism and the financial well-being of a business was more important than anything, including the health of consumers.

Dr. Everett Koop was the sole voice within the Reagan administration to speak out forcefully on the smoking hazard. It could be said that he single-handedly reinvigorated the anti-smoking movement. In his 1982 Surgeon General Report, he declared the

² Kluger. p.436.

³ Kluger. p.537.

consequences of smoking to be the most important public health issue of our time and called cigarettes, "the chief, single avoidable cause of death in our society." ⁴

One step forward for the anti-tobacco cause came during the Bush administration when the 1993 EPA report on ETS was published. President Bush appointed Surgeon General Antonia Novello to succeed anti-smoking advocate C. Everett Koop. Her office produced the 1994 Surgeon General Report, *Preventing Tobacco Use Among Young People*, which explored the advertising and marketing of tobacco to the youth market, but for the most part, she steered clear of the tobacco issue because she did not want "not to disrespect her party." ⁵ Bush's HHS secretary did not propose any federal legislation regarding the tobacco issue, either. President Bush did appoint David Kessler to head the FDA, unknowing what consequences that action would have. The only other action that the Bush administration had concerning tobacco was its United States Trade Representative's promotion of it worldwide.

Most recently energizing the tobacco control movement, President Clinton became the first President to be openly anti-smoking. Even though his actions were not exactly swift and far sweeping, they were an improvement over any previous administration's public

⁴ Surgeon General. 1982.

⁵ Kluger. p. 714.

health efforts. This year, he ordered all federal workplaces to become smoke-free. Although it sounds significant, it was mostly a symbolic gesture because most places already were abiding by the indoor no-smoking code.

David Kessler, as FDA commissioner, became known as the outspoken anti-tobacco advocate of the Clinton administration when in 1994, he wrote to the Coalition on Smoking or Health declaring the FDA's intent to consider regulating the nicotine in cigarettes as a drug. This was significant because tobacco was always exempt from FDA regulation before. Kessler appeared before Waxman's subcommittee to address the issue of nicotine in cigarettes. A few weeks later, on April 14, 1994, the chief executive officers of the seven tobacco companies testified before the same congressional committee that nicotine and cigarettes are not addictive, no more harmful than coffee or Twinkies.

Internal industry documents from Brown & Williamson Tobacco Company later revealed that the executives lied under oath.⁶ Despite its public position on the tobacco and health issue, the documents proved that the industry was very aware of the causal link between smoking and cancer. Stanton A. Glantz, in "The Cigarette Papers," proves that tobacco companies have known for decades that cigarettes are lethal and addictive and has done

⁶ The documents that revealed deception arrived at Professor Glantz's office at the University of California- San Francisco. The Journal of American Medical Association published the documents which proved the industry's deception to the public.

everything in its power to suppress and deny that knowledge. For 30 years, they chose to protect their business interests over the public health by consistently denying any knowledge and by hiding any adverse scientific evidence from the government and the public. If the documents had been revealed earlier, the history of the tobacco control movement might have been completely different.

With the support of the first outright anti-smoking President, the Food and Drug Administration proposed regulations on cigarette sales and advertising in 1995. President Clinton announced the regulations at a press conference. He framed this historic outreach of federal jurisdiction as purely a public health initiative, a preventive program targeting impressionable teenagers. Teenagers became the focus of public health officials because they are starting to smoke in increasing numbers.

The proposed FDA regulations are by far the strictest regulations proposed on tobacco ever. Included in the regulations are a federal ban on the sale of cigarettes to anyone under 18, preempting the diverse state bans, the requirement of photo identification for tobacco purchases, the abolition of cigarette vending machines and mail order cigarettes, the prohibition of cigarette billboards within 1,000 feet of schools, the banning of sponsorship of sports and entertainment events, the banning of the sale or giveaway to youngsters of promotional merchandise, and a limitation of some ads in print media to a black and white text format. Most hurtful to the industry is the fact that if the FDA can prove it has

jurisdiction over regulating nicotine and cigarettes, it most certainly will lead to even more regulation. Now that the tobacco executives have been exposed to the public as deceptive businessmen, public opinion is turning against the industry. More than four out of five people agree with the proposed FDA policies.⁷

Every major piece of health legislation since 1964 has had a specific exemption for cigarettes. The 1995 FDA proposals were the first substantive rules ever proposed by the government on tobacco in America. The tobacco industry challenged the constitutionality of the proposals by taking the FDA to a federal court in North Carolina. The court ruled that the FDA did have regulatory power over cigarettes due to the fact that nicotine is a drug, and that cigarettes are therefore drug-delivery systems. However, the court further declared that the FDA does not have the jurisdiction over the advertising and marketing of cigarettes. Both sides of the ruling are currently on appeal and are expected to reach the Supreme Court.

⁷ Bruskin/Goldring Research Poll. Conducted for National Center for Tobacco-Free Kids. (August 1996).

Chapter 5

Youth Smoking Prevention

The purpose of the controversial FDA regulations is to reduce tobacco-related deaths by pursuing a prevention strategy aimed at reducing youth smoking. This ultimate goal of reducing the health toll associated with tobacco use is shared by all public health officials. The most expedient way to reach this goal would be to implement a comprehensive youth-centered prevention program. Because 90% of all smokers start as teenagers, cigarette smoking is labeled as a pediatric disease.¹ Considering that few adults initiate tobacco use, a tobacco control policy focused on youth prevention should be one of the highest public health priorities. The average teen smoker starts at age 13 and becomes a daily smoker by age 14 and 89% of persons who have ever tried a cigarette have done so by age 18.^{2,3}

The main components of such a public policy would have to include measures for preventing youth smoking. By reducing youth access to tobacco products, increasing the cost of tobacco, strengthening the social factors that discourage tobacco consumption, (smoke-free norms and anti-tobacco advertising), and erasing the factors that encourage

¹ Hilts. p.191

² Robert Woods Johnson Foundation. "Results of a National Household Survey to Assess Public Attitudes About Policy Alternatives for Limiting Minor's Access to Tobacco Products." Teenage Attitudes and Practices Survey II, (December 1994).

³ Surgeon General. 1994.

tobacco consumption, (free distribution and other marketing devices) the ultimate goal can be achieved.

The anti-smoking advocates' focus on prevention proves to be a difficult task because most young people who begin this destructive habit are motivated by pleasure or peer pressure, and are not fully aware of the addiction they are developing or the damage they are doing to their health. Thus, steps must be taken to improve youngsters' awareness of the long-term dangers of tobacco use. This can be accomplished by implementing a youth-centered educational campaign through middle and high school curriculum activities and advertising. It is harder for children to understand the long-term consequences of their actions because tobacco does not kill immediately. Not being able to perform daily functions, like walking or standing, due to emphysema and breathing problems, is incomprehensible for most youngsters.

Teens begin smoking without comprehending the addictive nature of nicotine. Less than 5% of smoking high school seniors think they will be smoking in five years, yet follow-up studies show 73% of those students are still smoking eight years later.⁴ The tobacco industry argues that smoking adults willingly accept the dangers associated with tobacco use. However, most adults start smoking in their early teens and become addicted before they are mature enough to accept the health risks. The best chance to break the smoking

⁴ Surgeon General. 1994.

cycle is to reach kids before they start smoking. Compounding the issue is the fact that cigarettes are nicknamed as the "gateway drug"; using cigarettes is the number one predictor of the use of other drugs. Youths between the ages of 12 and 18 who smoke are eight times as likely to use illicit drugs and eleven times as likely to drink heavily as non-smoking youths.⁵ Adults who started smoking as children are four times likelier to be *regular* users of an illicit drug.⁶ Clearly, preventing cigarette smoking in early teens may prevent later illegal drug use.

Reducing youth access to tobacco products must be an essential component of any coherent strategy to prevent nicotine addiction in children and youths, and thereby reducing the number of deaths from smoking-related diseases. Although selling tobacco to minors is illegal in every state, these laws are seldom enforced. Each day, 3,000 young people begin to smoke, (more than 1 million each year), and a third of them will eventually die due to their use of tobacco.⁷ The cigarette smoking rate among students are at their highest in 16 years and has increased from 27.5% in 1991 to 34.8% in 1995.⁸

⁵ U.S. Department of Health and Human Services. "Preliminary Estimates from the 1995 National Household Survey on Drug Abuse," (August 1996) p.23.

⁶ Center on Addiction and Substance Abuse at Columbia University. "Cigarettes, Alcohol, Marijuana: Gateways to Illicit Drug Use," (October 1994).

⁷ J.P.Pierce., M.C.Fiore, T.E.Movotny, et al. "Trends in Cigarette Smoking in the United States, Projections to the Year 2000." Journal of American Medical Association, (1989). vol.261. p.61-65.

⁸ Centers for Disease Control and Prevention. "Tobacco Use and Usual Source of Cigarettes Among High School Students - U.S. 1995." Morbidity and Mortality Weekly Report, (May 24, 1996) p.417.

Although tobacco use is strictly a learned behavior, cigarette smoking can also be described as a "contagious" behavior. The more time people spend around smokers, especially in their formative years, the more likely they will become smokers themselves. While contagious behavior may not be necessarily bad in itself, considering that cigarette smoking is dangerous to health and addictive, this contagion effect contributes heavily to the overall smoking problem. Experimenting with tobacco is attractive to children because of its association with adult behavior. Repeated messages reinforcing the positive attributes of tobacco use give youths the impression that tobacco use is pervasive, normative in many social contexts, and socially acceptable. They are encouraged to believe that tobacco consumption is a social norm among attractive, vital, successful people who seek to express their individuality, who enjoy life, and who are socially secure. The tobacco industry states that they do not market to children and that they do not encourage kids to smoke. Considering that many adult smokers die each year, the industry relies on the many new teenage "replacement" smokers to compensate for their consumer loss otherwise, they would eventually go out of business. Even though advertising does not cause children to smoke, it does undermine the efforts to create a tobacco-free norm by emphasizing that smoking is acceptable, even desirable, behavior. Research suggests that adolescents are more responsive than adults to advertisements because they are looking for self-identity.⁹

⁹ Michael Schudson. "Symbols and Smokers: Advertising, Health Messages, and Public Policy." In Rabin, Robert L., and Stephen D. Sugarman, Smoking Policy: Law, Politics, and Culture. (New York: Oxford University Press, 1993) p. 216.

Children often perceive tobacco use to be much more prevalent than it really is. They commonly overestimate the percentages of their peers and adults who use tobacco. This may be because pro-tobacco messages are everywhere. These pro-tobacco messages send a false impression about tobacco. They do not tell of addiction, disease, and death associated with tobacco use. The best way to counter these pro-tobacco messages is to have even more anti-tobacco messages in society. This was demonstrated in the Seventies when the anti-smoking ads required by the Fairness Doctrine caused a reduction in the teen smoking rate. Study findings "suggest that a nationwide, well-funded, anti-smoking campaign could effectively counter the effects of cigarette advertising in its currently permitted media forms."¹⁰ This leads one to believe that counter-advertising is effective and that the best strategy is not necessarily strict regulation of cigarette advertising, which is the most controversial of the proposed FDA regulations.

Few groups actually focus on tobacco prevention in youths; among the few are: Stop Teenage Addiction to Tobacco (STAT) and Students Coalition Against Tobacco (SCAT), which emphasize peer education. Eventually, all tobacco control policies, either directly or indirectly, affect youths. The efforts of community organizations, coalitions, and advocacy groups have been successful in improving public awareness of the problems of tobacco and the public has become more supportive of tobacco control efforts. However, strong

¹⁰ Surgeon General. 1994.

grassroots support for tobacco control policies at the local level is too often neutralized through powerful lobbying by the tobacco industry at the state level, resulting in weak state legislation that preempts more restrictive local measures.

Most Americans agree with the consensus that children should not smoke. Even the tobacco companies agree that smoking is an adult behavior. Where they differ is how to implement this prevention policy. Some say kids should not be punished for smoking or possessing tobacco; instead, they blame teen smoking on the tobacco industry's advertising and marketing techniques. Others feel that teen smoking prevention begins at home, or at school. These barriers have to be broken before the successful implementation of a youth-centered prevention policy.

Chapter 6 Commercial Speech and the First Amendment

The First Amendment to the Constitution includes protection for the freedom of speech and expression. Nevertheless, advertising has never been afforded the rights granted other forms of speech. Many, including most anti-tobacco advocates, regard commercial speech as different from other forms of speech. More specifically, tobacco foes regard tobacco advertising as false, deceptive, and misleading advertising which is illegal. While the Supreme Court decided that protection of speech has limits when the speech involves substantial public interest, like protecting the health of children, they have not yet ruled, on the constitutional validity of the anti-tobacco position. ¹

The Court has set a number of precedents regarding commercial speech. Under Chief Justice William Rehnquist, in the 1986 *Posadas de Puerto Rico Associates v. Tourism Co.* decision, the Supreme Court ruled that the tobacco industry's commercial speech rights may be suspended by government because government also has the power to banish the industry itself. ² The Court made it clear that commercial speech enjoys a kind of second-class protection. The Justices conclude that the framers of the Constitution originally intended free speech rights to protect political and social speech, not commercial speech

¹ Tobacco is not the only case in which commercial speech protection has limits. Restrictions are applied for prescription drugs, as well as stocks and bonds in the interest of consumer protection.

² 478 US 328. Posadas de Puerto Rico Associates v. Tourism Co. 1986.

used to sell products. Some would contend that this is not the case. Craig Smith, president of Freedom of Expression Foundation, argues that the framers, as men of commerce, included commercial speech as essential to life, liberty, and the pursuit of happiness.³

More recently, in the 1996 *Liquormart 44* decision, the Court protected commercial speech declaring it unconstitutional for government to ban truthful advertising. For closer understanding of what is considered constitutional, one must apply the four-part test of the 1980 *Central Hudson Gas* decision. The first and most important criterion is that the speech must "concern lawful activity" and "not be misleading." The rest of the criteria determine the degree of regulation that is acceptable: whether the governmental interest is substantial, whether it directly advances the governmental interest, and whether it is more extensive than is necessary to serve that interest.⁴ These criteria, especially the last, are very subjective. What is considered "more extensive than necessary" varies greatly among those who concern themselves with the issue.

Most anti-smoking advocates believe that tobacco advertising targets young people and influences their perception of smoking, thus provoking their desire to try tobacco. By using cartoon characters, the industry brings new young smokers into the tobacco market,

³ Craig Smith. "First Amendment Rights of Commercial Speakers." (Center for First Amendment Studies, California State University, 1997); Jonathan Emord. "Continued Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence." *Policy Analysis*. (September 23, 1991).

⁴ 116 S.Ct. 1495. *Central Hudson Gas v. Public Service Commission*. 1980.

replacing those that have died or quit. Because this advertising is aimed at children, it is number one on the anti-smoking advocates' desired list of restrictions on the industry. The 1994 Surgeon General's report, *Preventing Tobacco Use Among Young People*, focused on the impact tobacco advertising and promotional activities have on youth tobacco consumption. The report indicates that young people are an important market for the tobacco industry.

Tobacco sponsorship of sports represents one of the tobacco industry's most ironic promotion techniques. Tobacco use is anti-fitness, endurance, and performance, but is used to promote these qualities. Since disease and death from tobacco use are long-term processes, and cannot be seen as an immediate result of smoking, children are more apt to believe the false images in ads that portray actors or characters as healthful and athletic.

While ads may not cause minors to smoke, per se, they do contribute to the general perceptions of its' acceptability and counter the public health messages that tobacco is dangerous. However, the extent the role tobacco advertising plays in convincing new smokers to start smoking is difficult to assess. One cannot study the effect of advertising while holding all other variables constant. Reality suggests that its role is less direct. It simply sets the stage for the social acceptability of smoking.

Tobacco companies, however, insist that they advertise only to the current market of

smokers, trying to get them to switch brands. They state that cigarette promotion is not designed to increase overall use of cigarettes; it is instead intended only to affect market shares. Because of the overall decline in adult consumption, the tobacco companies are competing for shares of a shrinking domestic market by increasing expenditures for advertising and promotion. Collectively, the tobacco industry spends more than \$4.83 billion each year--\$13.2 million per day-- to advertise and promote tobacco products.⁵ This results in massive exposure to a wide array of pro-tobacco messages every day.

Besides encouraging smoking acceptability, tobacco advertising discourages effective dissemination of anti-tobacco messages. Since the broadcast ban of cigarette advertising, magazine advertising revenue from the tobacco industry increased by \$5.5 million per magazine per year.⁶ This major spending on print advertising directly inhibits printing of articles criticizing tobacco. Numerous studies prove that magazines that receive sizable revenues for advertising tobacco are less likely to run articles that discuss the negative aspects of tobacco use than magazines not dependent on tobacco industry revenue. Investigations have demonstrated that magazines that accept cigarette advertising--\$264.4 million worth in 1991-- show consistent patterns of self-censorship, as compared with

⁵ Federal Trade Commission. "Report to Congress for 1994, Pursuant to the Federal Cigarette Labeling and Advertising Act," 1993.

⁶ K.E. Warner and L.M. Goldenhar. "The Cigarette Advertising Broadcast Ban and Magazine Coverage of Smoking and Health." Journal of Public Health Policy, (1989) vol.10. p.32-42.

magazines that do not accept it.⁷ Given the diversity of tobacco companies into more legitimate businesses, such as General Foods, this censorship includes instances where tobacco is not necessarily the product being advertised. This self-censorship gives the public a distorted view of the dangers of smoking; they receive the positive promotional messages about tobacco, but no fact-based information.

The discussions on the First Amendment rights of the tobacco industry are far from final. A major portion of the 1995 proposed FDA regulations, now in the appeals process, restricts the promotion and advertising of tobacco. Many, including the ACLU, believe it is not constitutional to ban slogans, models, scenes, or colors. Banning or restricting tobacco advertising raises philosophical and pragmatic issues. Questions concerning freedom of speech and the rights of a legal industry top the list, but practical concerns involving the effect of the removal of tobacco money from the advertising and magazine industry need to be addressed while the debate of banning tobacco advertising continues. It should be remembered that the broadcast ban of tobacco advertising actually raised profits for the industry, and a full advertising ban could be expected to do the same, (if consumption did not immediately fall, which is highly unlikely due to the fact that most smokers smoke because they physically have to, not because they want to).

⁷ K.E. Warner, L.M. Goldenhar, and G.C. McLaughlin. "Cigarette Advertising and Magazine Coverage of the Hazards of Smoking: A Statistical Analysis." New England Journal of Medicine. (1992). vol. 326. p.305-309.

The ACLU defends tobacco interests in terms of the First Amendment. "The overarching guiding principle driving the ACLU is that government cannot carve out exceptions from the Amendment's protection of unwanted or hated speech," Ira Glasser says. "In a fair contest between medical facts and the tobacco industry's self-serving propaganda, the facts will win. That is the premise of the First Amendment."⁸ The only problem with this explanation is that it is not a fair contest. Everyday, the industry spends the equivalent of the entire annual federal budget on anti-tobacco education, prevention, and research.⁹ One solution is counter advertising, but that would only be effective with roughly equal amounts of money. Raising the anti-smoking education budget to the industry's level is impossible. While placing spending limits on advertisers also may inhibit free speech, once the alternatives are weighed, it proves to be a better option than banning advertising altogether.

Although anti-smoking advocates have their heart in the right place, an American citizen's right to free speech does not stop just because tobacco is a deadly product. Weighing the constitutional issues is a difficult task. Is there a hierarchy of speech, with some protected more than others? Is there any value at all in speech that promotes racism, sexism, or in the case of tobacco, disease and death? If such a hierarchy exists, then certainly

⁸ American Cancer Society. "Allies: The ACLU and Tobacco."

⁹ Visitor from the Past. Raven Radio Theater of the Air!, Nevada City, California.

pornography would not receive much First Amendment protection.

Americans are taught to let people speak and be heard, and then form an opinion of their own. In the battleground of ideas, the facts should win out over deception when they are given a fair chance. Striving for an educated constituency is more important than censoring tobacco advertising. Using youth-centered smoking prevention strategies would better prepare our future adults for dealing with life choices than simply prohibiting tobacco advertising. Teaching them how to recognize the deception would prevent the dissolution of one of our most valuable freedoms.

Chapter 7

The Role of the Judicial Branch

The legal system is a less than perfect arena for dealing with the important issue of smoking and health; instead of determining what is ethical or moral, it can only determine only what is legal or illegal. Utilizing the legal system can be very expensive. There are many delays, and the arbitrariness and the skill of lawyers often count for more than the righteousness of their cause.

The first group of lawsuits filed against the tobacco companies came in the mid-1950s after hazards of tobacco first became explicit. In this first wave of lawsuits, smokers sought recovery from the tobacco industry for smoking-related illnesses after the early evidence that cigarette smoking causes lung cancer surfaced. Lasted approximately ten years, this group of lawsuits were argued under 'breach of implied and express warranty', deceit, and negligence theories. By the early 1970s, the evidence of the health dangers of smoking had accumulated to the point of causing serious legal problems for the tobacco industry. The industry was being attacked on many fronts as it faced increasing government efforts to regulate it.

The second wave of lawsuits came in the mid-80s, when the industry had to contend with a new wave of product liability lawsuits. These lawsuits were brought forth under strict liability claims. To be successful, the plaintiffs had to prove the product was

'unreasonably' dangerous. If a plaintiff could prove that the tobacco industry was responsible for the death of a smoker by winning one lawsuit, the eventual liability of the industry might bankrupt it. Although very serious, this threat of product liability suits was weakened by the cigarette labeling act because it gave the industry the defense of the assumption of risk. The health warning label acted like a protective shield for the defense of the lawsuits. If consumers are made aware of the dangers by the warning label, and they still use the product, then they have no right to sue because by making an informed decision to smoke, they assume the risks associated with it. This argument is founded on the belief that the warning label adequately informs potential smokers of the real health dangers of tobacco use. Some may disagree with this assumption because the label is very broad and has relatively weak language; nonetheless, product liability suits have been important in encouraging other industries to act responsibly, for example, forcing automobile makers to make safer cars, and drug makers to test products carefully. But after more than hundreds of lawsuits until last year, the tobacco industry has never paid a penny to compensate a smoker.

These first and second waves of lawsuits involved single clients and relatively small amounts of money. Many of these first cases were dropped due to the depleted resources of the plaintiff. Misconduct by either side is cause for a mistrial. Most plaintiffs cannot afford a second trial, so in a mistrial tobacco wins. In one instance, the tobacco lawyers made depositions last for 292 days. The legal system is often not able to deal fairly with

clients that have such varying amount of resources. Tobacco companies are so rich and powerful that they can take advantage of all the rules. General Patton, R.J. Reynolds' attorney has admitted to the strategy of bankrupting the plaintiff.¹ This is blatant denial of substantive due process by taking advantage of a lack of sufficient money to fund a legal attack on the tobacco companies.

The 1990s brought the third wave of lawsuits and this time nicotine addiction was a large part of the trials. These lawsuits were a result of the 1988 Surgeon General's report that officially declared nicotine as addictive. Tobacco companies vehemently denied this scientific finding, but later, internal industry documents revealed that the addictive nature of nicotine was recognized by the industry in the early 1960s. This third wave of lawsuits also includes secondhand, or passive smoking, suits and state governments trying to recover billions of dollars spent on medical treatment for smokers' illnesses. In these cases, individual choice becomes a secondary issue, while it was a primary issue in the previous waves. The state complaints are based on the notion that the tobacco industry caused a health crisis and should now be responsible for paying for it, but none of these state cases have gone to trial because the industry has settled them out of court, making certain voluntary concessions in order to dismantle any potential future or pending lawsuits.

¹ Hilts. p.197.

The tobacco industry has been braced for this litigation since the early 1950s, and until last year they pursued a successful strategy of no settlements. There have not been any final court awards against the industry. This is a remarkable record, one that is probably unequaled in American law. Although they have precedent on their side, the companies are extremely vulnerable because they cannot afford to lose even one single case. Their recent willingness to settle the state lawsuits can be understood when it is realized that any negotiations typically favor the industry. A proposed "global" settlement, stalled for the time being in Congress, reaches an agreement for payment to the states and includes immunity against future lawsuits. While waiting for Congressional approval, the industry has had to settle individual state lawsuits.

The smallest of the tobacco companies, Liggett & Myers, was the first company to break the solid front of tobacco. This year, Liggett settled with all of the 22 states that had pending lawsuits. In the most significant part of the settlement, the company officials agreed to produce information and aid in pursuing the other tobacco companies in court. For the first time a tobacco company admitted that nicotine is addictive. But, even this hopeful turn for the anti-tobacco campaign was not motivated by public health concerns; instead Bennett LeBow, Chairman and CEO of Liggett Group, was trying to rescue his small company from a takeover by RJR.

Tobacco industry lawyers are working persistently to defend themselves against both

potential and pending lawsuits. Judges and juries are now presented with a landslide of important cases of different kinds, and they now have some reasonable access to the facts of scientific studies. Ultimately, the judicial branch of government will decide whether the tobacco companies are within the bounds of what is acceptable or not and whether certain governmental regulation of tobacco is justified and constitutional.

Conclusion

Cigarette smoking is the number one preventable cause of death in the United States. With someone in the world dying from a tobacco-related illness every thirteen seconds, the anti-tobacco movement cannot be pushed aside as liberal health fanatics imposing restrictions on individual rights. The movement is a serious campaign that is working to save lives and protect nonsmokers, with an emphasis on preventing tobacco's appeal to children.

While saving lives is a universal end, the proper means to achieve that end is a subject of debate. The anti-tobacco forces have paid a heavy price for their inability to agree on issues and for not appearing as a united front. On the other hand, the tobacco industry's main asset was its ability to maintain successfully a solid united front from the early Sixties until this year. Before the emergence of the anti-smoking movement, all legislation and regulatory action regarding tobacco took place on the national level. In contrast, the first few victories of the anti-tobacco cause were results of grassroots efforts. Recent political actions have given a burst to the tobacco control movement, but, in many areas, it still has not reached its ultimate potential by combining forces and coordinating the tobacco control movement federally, statewide, and locally. Most realize the importance of coordinating actions, but the practical matter of actually doing it on a daily basis despite personality differences or other obstacles is more difficult than it sounds.

The social unacceptability of tobacco use seems to be emerging as tobacco use has

emerged as the number one health problem of our time. The high level of compliance with public smoking restrictions reflects a widespread acceptance of the norm favoring smoke-free environments and their legitimacy. However, every twenty minutes, the tobacco industry spends more money to promote itself than the U.S. spends annually to prevent its use.¹ This emphasizes the need for an increase in pro-health, anti-tobacco messages. States greatly diversify in the amount of effort and money aimed at targeting young audiences with anti-tobacco advertisements or education campaigns. Being healthy and raising healthy children is much easier when healthy behavior is stressed as important and the pro-tobacco signals are countered with effective anti-tobacco messages.

Some well-intentioned activists are unable to agree on the focus of the solution to the tobacco problem. Some advocates insist that anti-tobacco efforts are a waste of time and money because those efforts would best help society by focusing on alcohol or illegal drug use, instead of tobacco. Typically, illegal drug or alcohol use is thought of as a more severe societal problem than tobacco use, and many advocates do not recognize tobacco use as the important problem that it is.

Tobacco use prevention needs to be considered as an important part of the solution for these advocates. The most obvious reason is the gateway drug factor. Preventing tobacco-

¹ Joe B. Tye. "Stop Teenage Addiction to Tobacco." Tobacco and Youth Reporter. (Springfield, MA, Autumn 1990) p.3.

use among young people will eventually help prevent them from abusing illegal drugs or alcohol, as tobacco use is the number one predictor of such behavior. Discouraging teen tobacco use helps the "anti-illegal drug or alcohol" cause, and does not compete with it. Another strong, but often overlooked, reason in support of tobacco control is that tobacco use kills more people each year than does illegal drug use; not only more than illegal drug and alcohol use, but more than car accidents, homicides, suicides, AIDS, and fires COMBINED!² Given the enormity of the problem, one would think that more would be done to prevent such disaster. Because one in five deaths in the US is attributable to tobacco use, reducing smoking would arguably have more impact on the nation's health than any other public health initiative. The urgency of this issue is great. This nation has a compelling interest in reducing the health burden of tobacco use.

In conclusion, society, as a whole, has an interest in discouraging tobacco use and supporting the efforts of people who are trying to stop using tobacco because the aggregate effects of tobacco-related health consequences affect everyone. Government, as appointed leaders of society, should, if not lead, then at least encourage the efforts of the medical and health communities, instead of putting up political roadblocks. Even though many anti-tobacco efforts can and do successfully proceed without governmental assistance, such as the educational promotion of health in schools and local communities

² U.S. Centers for Disease Control and Prevention (1988,1987,1990), National Center for Health Statistics (1988), National Safety Council(1989).

by non-profit health conscience organizations, some of the most important anti-tobacco goals can only be accomplished with governmental aid, and through implementing public health policies. Such policies include banning smoking in public places, such as restaurants, repealing preemption clauses in state clean indoor air laws thus allowing further local smoking restrictions, and cracking down on illegal youth access to tobacco products and marketing to young people.

There is public support for tobacco control measures. Whereas the majority of Americans once smoked, now fewer than three out of ten American adults smoke, and this ratio is continuing to decline. Because the nonsmoking majority has little sympathy for the 25-30% of their fellow citizens who continue to smoke, the anti-tobacco movement is succeeding on the local level.³ States are beginning to ban or rigidly confine smoking almost everywhere people congregate. By 1995, according to *Common Cause* magazine, more than 600 local jurisdictions joined in a patchwork of anti-smoking restrictions across America. With the latest developments in the tobacco lawsuits, and the aggressive FDA regulations on the horizon, greater federal oversight of tobacco and nicotine seems inevitable.⁴

³ Kluger, p.678.

⁴ Lawyers will continue to bring lawsuits against the tobacco industry until legislation is passed preventing future lawsuits. This explains the industry's willingness to reach the settlement currently stalled on Capitol Hill. If history repeats itself, this new legislation will not necessarily decrease tobacco use or benefit public health. Usually, when tobacco supports legislation, the regulations prove to be watered down or eventually backfire on tobacco control advocates. Soon Americans will know if it is a new era for anti-tobacco or the same old story.

Appendix A **International Focus**

According to the World Health Organization, as 1.1 billion people in the world smoke and 3 million of them die each year due to their use of tobacco, tobacco use is quickly replacing infectious disease and malnutrition as the leading cause of death worldwide.¹

Tobacco use is a worldwide epidemic, and every nation is confronted by a challenge similar to the one faced in the U.S. During the 1990s, in developed countries, tobacco will cause approximately 30% of all deaths among persons 35-69 years of age, making it the largest single cause of premature death in the developed world.²

Mostly responsible for this, the U.S. tobacco industry is second only to China in tobacco production and it exports more than three times as many cigarettes as does any other country in the world.³ Aggressive marketing by all international tobacco companies will require an aggressive response by public health officials in the developing world and in countries of Central and Eastern Europe and the former Soviet Union.

¹ Barbara Crossette. "Noncommunicable Diseases Seen As Growing Health Problem." New York Times, (September 16, 1996) p.A7; Doug Levy. "Tobacco Looms as Top Death Factor," USA Today, (September 16, 1996) p. D6.

² William V. Chandler. Banishing Tobacco. Worldwatch Paper 68. (Washington, D.C.: Worldwatch Institute, 1986) p.1274-5.

³ U.S. Department of Agriculture, Foreign Agricultural Service. "World Tobacco Situation." (Washington, D.C., 1992) (Doc.FT-8-92)

Missing from the proposed 'global' tobacco settlement that has reached the legislative branch of the U.S. federal government are the consequences of selling tobacco in foreign markets. While adult tobacco use rates are relatively flat or declining in the U.S., they are rising elsewhere, especially in developing countries. Approximately 85% of the annual three million tobacco-related deaths occur outside of the United States.⁴ It is unethical to pursue tobacco control measures domestically, fully knowing that as American tobacco consumption dwindles, efforts are intensifying in soliciting new tobacco markets abroad. It is difficult to ignore the fact that we are solving our public health problem by pushing it off onto other countries. As the United States finds solutions to the public health problem tobacco poses, efforts need to be made at helping foreign nations deal with the tobacco health crisis. Using any successful strategies developed and implemented in this nation, Americans should demand that tobacco products are responsibly marketed abroad. Public health messages about the dangers of tobacco use, as well as ETS, should be widely available. Even though some Americans greatly benefit financially from exported tobacco, it is not ethical to take advantage of less-advantaged people. In the name of free enterprise, the United States will be responsible for many smoking-related deaths in other nations. There is plenty of money to be made, but is benefiting from someone's death

⁴ World Health Organization. "A Consultation on Statistical Aspects of Tobacco-Related Mortality." (Geneva, 1989).

clean money? Are Americans that greedy? While it may be in the best interest of the United States to have all smokers worldwide smoke American brands, causing harm to another human being for one's own financial benefit is unconscionable.

Appendix B More can and should be done about ETS

While clean indoor air laws are now the norm, much more can and should be done to protect nonsmokers, including children, from ETS.

Restricting smoking outside may be a difficult position to justify, but some cities, states or counties have banned smoking on their properties. The town board of Carmel, a Californian community of 30,000 voted in favor of smoke-free beaches. Violators will be fined \$50 for smoking or discarding cigarette butts in the sand or in plant boxes bordering the beach. Each year, the Center for Marine Conservation finds that cigarette paraphernalia is the greatest source of beach litter. While it is not exactly a public health issue, littering cigarette butts is a great environmental problem, not to mention an eyesore to those who value nature and try to keep the environment safe.

The preemption clause should be removed from the state clean indoor air laws, allowing local communities to increase governmental regulation of tobacco use. In most states, the clean indoor air laws do not include restaurants or bars, where workers are involuntarily exposed to ETS. Scientific studies examining the economic impact of smoke-free restaurant legislation from New York, California, Colorado and Texas show that enactment of smoke-free restaurant ordinances has

not caused revenue loss and in fact has increased business by a minimum increase of 5% of meal receipts.¹ This is explained by the majority, nonsmokers, will patronize businesses more, if smoking is not allowed.

While most large corporations already have smoking policies in place, there is much room for improvement. Walt Disney World, which caters to families, should have a no-smoking policy to promote public health and demonstrate to children that smoking is an unacceptable behavior.

¹ S.A. Glantz et al. "The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales." American Journal of Public Health. (July 1994): MMWR, "Smoke-Free Ordinances," vol.44, 1995.

Appendix C
List of Surgeon General Reports: 1964-1994

- 1964 Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service
- 1967 The Health Consequences of Smoking : A Public Health Service Review
- 1968 The Health Consequences of Smoking: 1968 Supplement to the 1967 Public Health Service Review
- 1969 The Health Consequences of Smoking: 1969 Supplement to the 1967 Public Health Service Review
- 1971 The Health Consequences of Smoking: A Report of the Surgeon General
- 1972 The Health Consequences of Smoking: A Report of the Surgeon General
- 1973 The Health Consequences of Smoking, 1973
- 1974 The Health Consequences of Smoking, 1974
- 1975 The Health Consequences of Smoking, 1975
- 1976 The Health Consequences of Smoking: Selected chapters from 1971 through 1975 reports
- 1978 The Health Consequences of Smoking, 1977-1978.
- 1979 Smoking and Health: A report of the Surgeon General
- 1980 The Health Consequences of Smoking for Women: A Report of the Surgeon General
- 1981 The Health Consequences of Smoking- The Changing Cigarette: A report of the Surgeon General

- 1982 The Health Consequences of Smoking- Cancer: A Report of the Surgeon General.
- 1983 The Health Consequences of Smoking- Cardiovascular Disease: A Report of the Surgeon General.
- 1984 The Health Consequences of Smoking- Chronic Obstruction Lung Disease: A Report of the Surgeon General.
- 1985 The Health Consequences of Smoking- Cancer and Chronic Lung Disease in the Workplace: A Report of the Surgeon General.
- 1986 The Health Consequences of Involuntary Smoking: A Report of the Surgeon General
- 1988 The Health Consequences of Smoking- Nicotine Addiction: A Report of the Surgeon General
- 1989 Reducing the Health Consequences of Smoking- 25 Years of Progress: A Report of the Surgeon General
- 1990 The Health Benefits of Smoking Cessation: A Report of the Surgeon General
- 1992 Smoking in the Americas: A Report of the Surgeon General
- 1994 Preventing Tobacco Use Among Young People: A Report of the Surgeon General

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