



Smoke

AND

M I R R O R S

BY JACOB SULLUM

In the banquet room of a Mexican restaurant in Southern California, a man and a woman each light a cigarette after finishing their meal. A diner sitting next to the couple picks up a menu and begins to wave it ostentatiously, as if to clear away the smoke. The couple ignore him for a while, although his message is clear. When he persists, they glare at him. But then a funny thing happens. They get up and walk to the back of the room, where they stand for the rest of the evening.

The entire altercation is conducted in silence, but the hostility is palpable. Both the couple and the man who objects to their smoking are indignant. Yet they do not ask the manager whether smoking is permitted in the banquet room. Neither do they try to reach a compromise by redirecting the smoke or rearranging seats. Instead, the smokers simply give in.

The episode is particularly striking because it takes place at a meeting of a libertarian supper club. These are people who might argue about whether your neighbor would violate your rights by keeping a nuclear warhead in his garage. Yet confronted by a much more practical controversy, they are struck mute.

Tobacco smoke seems to have a peculiar ability to obscure issues. Perhaps no other personal habit generates as much acrimony as smoking, and the conflict has resulted in measures that go far beyond banishing smokers to the back of the room. Government limits the marketing and advertising of tobacco, taxes its sale, and regulates its use. A vocal antismoking movement, including legislators and public-health officials as well as private advocacy groups, is pushing for further antitobacco measures, including a ban on advertising, higher excise taxes, and the prohibition of smoking in "public places."

Some recent signs of the movement's success:

- Last year, Congress banned smoking on virtually all domestic airline flights.
- Last fall, San Luis Obispo, California, became the first municipality in the country to adopt a comprehensive ban on smoking in businesses.
- In New York City last October, the city council passed a ban on cigarette vending machines, exempting bars only.
- The latest plan to reduce the federal deficit raises the excise tax on cigarettes to 24 cents a pack, a 50-percent increase. This is probably the least controversial element of the budget package.
- In California, the state is using \$28.6 million from a 25-cent-a-pack increase in the cigarette tax to fund an advertising campaign that depicts smokers as inconsiderate slobs and cigarette manufacturers as gleeful murderers. In effect, the government is forcing smokers and tobacco companies to pay

for their own vilification.

The antismoking movement draws its strength from its ability to portray smoking as a threat to everyone. Although some activists, especially in the national health organizations, stress the impact of tobacco use on smokers, most justify restrictive measures by citing the alleged effects of smoking on the general population.

"We're not trying to protect the smoker from himself," says Ahron Leichtman, president of Citizens Against Tobacco Smoke, one of the main groups that lobbied for the airline smoking ban. "We're trying to protect the nonsmoker from the smoker."

John Banzhaf, executive director of Action on Smoking and

Health, says he is mainly concerned with making sure that smokers bear all the costs of their behavior. Although ASH supports restrictions on advertising, he says, "it does not mean we're paternalistic."

Activists who genuinely adhere to this position are fooling themselves and misleading others in the process. The antismoking movement is, in fact, profoundly paternalistic. It does not trust people to make their own choices about smoking—neither whether to do it nor whether to tolerate it. Under the guise of protecting public health and guarding the rights of nonsmokers, antitobacco activists seek to impose their careful habits on those who are less rational, less educated, and less health-conscious.

The movement's paternalism is clearest when activists talk about cigarette advertising: They say the government must protect consumers, especially members of "vulnerable"

groups, from the influence of such messages. In the campaign against smoking, freedom of speech is a mere hindrance.

The Coalition on Smoking OR Health, a joint project of the American Heart Association and the American Lung Association, favors a complete ban on tobacco advertising, which Rep. Mike Synar (D-Okla.) has also proposed. ASH's Banzhaf, who filed the FTC complaint that led to the 1971 ban on TV commercials for cigarettes, favors restricting ads to "tombstone" messages—text only. A bill authored by Rep. Henry Waxman (D-Calif.) would allow pictures of the product but no other illustrations. It would also prohibit tobacco companies from sponsoring athletic, musical, or artistic events.

Banzhaf, a law professor at George Washington University, believes such restrictions—even a complete ban—would hold up in court, given precedents in other industries. He cites the heavy restrictions on the advertising of prescription drugs and of stocks and bonds. He notes that the Supreme Court has

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repeatedly held that "commercial speech" receives only limited protection under the First Amendment. Furthermore, in a 1986 case upholding Puerto Rico's authority to ban casino advertising, the Court declared that if the government has the power to prohibit an activity, it also has the "lesser power" to prohibit advertising of the activity.

The commercial/noncommercial distinction opens a dangerous loophole in the First Amendment. In the May 1990 *Virginia Law Review*, Alex Kozinski, a federal judge on the Ninth Circuit Court of Appeals, argues that it's impossible to come up with a definition of commercial speech that makes sense in light of the Supreme Court's decisions. The two properties that supposedly underlie the distinction—durability and objectivity—are no more characteristic of what has been called commercial speech than of fully protected speech. Even if they were, the relevance of these characteristics is not clear.

Furthermore, some messages, such as movies and "advertisements," blend advertising with other forms of speech.

Kozinski argues persuasively that there is no coherent, constitutionally plausible way to protect art, journalism, and scientific debate without also protecting the kinds of speech the Court has labeled commercial. The commercial-speech doctrine, he writes, "gives government a powerful weapon to suppress or control speech by classifying it as merely commercial. If you think carefully enough, you can find a commercial aspect to almost any first amendment case."

First Amendment issues aside, it's not clear what the point of further restricting or banning tobacco advertising would be. Antismoking activists object to the use of fun, healthy, sexy, and youthful imagery in cigarette ads. "You could make a very good argument that advertising of tobacco products is in fact misleading, that the images and the kind of messages they contain are contrary to what the product does," says Scott Ballin, head of the Coalition on Smoking OR Health.

By this standard, virtually all advertising is misleading. After all, *Sure* doesn't actually make you confident and secure; *Closeup* doesn't really attract members of the opposite sex; and *Dr. Pepper* doesn't truly enable you to hit a home run or shoot a perfect game of pool. Most people take such implicit messages with a grain of salt.

But Banzhaf and other activists worry that not everyone does. "The Federal Trade Commission has long recognized that the true test of whether an ad is deceptive is not the above-average consumer—you and me," he says. "It is not even the average consumer, but in many cases the most vulnerable person." In the rhetoric of the antismoking movement, "vulnerable" consumers seem to include most of the population. At one time or other, activists and public-health officials have objected

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to advertising that appeals to women, minorities, the poor, the young, and the undereducated.

Last year, R.J. Reynolds canceled plans to market Uptown cigarettes, a brand aimed at blacks, after sharp criticism from Secretary of Health and Human Services Louis Sullivan. Later, commentators roundly denounced the company after it announced plans for Dakota, a brand aimed at young, working-class women. Early last year in Chicago and New York City, anti-smoking vandals went on whitewashing sprees in black neighborhoods, defacing cigarette billboards.

"I don't think there's an objection to niche marketing as such," Banzhaf says. "The objection is to picking the most vulnerable segments of society and trying to take advantage of their vulnerabilities. I don't think anybody would object if Philip Morris came out tomorrow with a cigarette they

wanted to market to doctors or university professors or magazine writers."

A tone of conspiratorial elitism creeps into Banzhaf's comments as he explains why certain groups are more susceptible to cigarette advertising than others. He repeatedly distinguishes between people like him and me—"university professors or magazine writers"—and those "vulnerable segments."

"People with less education find it more difficult to understand how things can be proven from a statistical point of view," he says. "It's more difficult for them to perceive that activities that they're engaging in every day which don't hurt—like smoking or overeating—can in fact be very dangerous.... Secondly, we know that they have much more difficulty taking the next step—that is, the leap from understanding generally that there is a danger to personalizing it....[And] the poor seem to be less subject to beneficial social pressures to do things which are healthy."

It's easy to get caught up in these observations from social psychology—there is even research to prove them!—while forgetting the proposed application. Although each of these generalizations may be true in some sense, it's clearly not the case that you need courses in statistics and epidemiology—or a college education, for that matter—to understand that smoking can be bad for you, any more than you need a degree in nutritional science to know that you should eat your vegetables.

But antismoking activists have an almost mystical faith in the power of advertising to recruit new smokers by glossing over all that nasty stuff about lung cancer and heart disease. "It's very difficult to prove that advertising has an effect," Ballin says, "but everybody knows that it does, [although] people don't want to admit that it has an effect on them."

In response, tobacco companies claim they don't want to

encourage smoking. This is odd, to say the least. They're on firmer ground, however, when they argue that advertising has little impact on smoking. Tobacco Institute spokesperson Brennan Dawson notes that cigarette consumption has been declining by 2 percent to 3 percent annually in recent years. Tobacco is a "mature product," she says, so advertising focuses on reinforcing brand loyalty and convincing smokers of other brands to switch. "You pass a point where you can't go out there and encourage overall consumption of the product—it wouldn't be cost-effective."

Thomas Schelling, director of Harvard's Institute for the Study of Smoking Behavior and Policy for six years and now a professor of economics and public policy at the University of Maryland, tends to agree. "I've never seen a genuine study of the subject," he says. "Most of the discussion I hear—even the serious discussion—is about as profound as someone saying, 'If I were a teenage black girl, that ad would make me smoke.' I just find it altogether unpersuasive....I've been very skeptical that advertising is important in either getting people to smoke or keeping people smoking. It's primarily brand competition." Therefore, the main effect of an ad ban would be to freeze market shares, preventing new and possibly safer brands from gaining acceptance.

Given the dearth of evidence, the campaign against cigarette advertising seems to have little to do with reducing smoking. "I think it's partly that the people in the antismoking movement really despise cigarette companies and despise the advertising companies" that work for them, Schelling says. "They are offended by what the enemy is doing rather than evaluating its effectiveness."

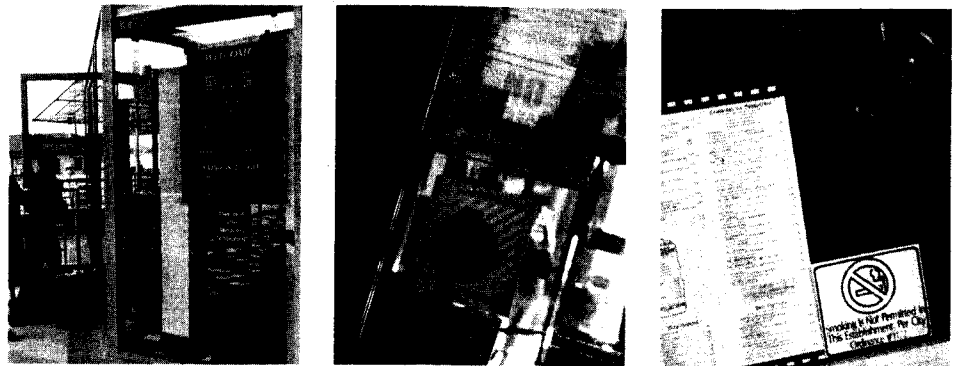
Similarly, the arguments for taxing tobacco are based on emotion more than fact. The idea of a "sin tax" has broad appeal, particularly among those who do not enjoy the sin in question. To justify such an extremely regressive levy, however, advocates of higher excise taxes must appeal to more than the nonsmoking majority's visceral disapproval of tobacco use. They have to argue that the cost of smoking to nonsmokers goes beyond the pain of moral or aesthetic revulsion.

Banzhaf, who thinks the tax on a pack of cigarettes should be about \$2.75, says that "the total cost of smoking to the American society" is somewhere between \$50 billion and \$100 billion a year. As the range of estimates suggests, these numbers are very soft. They are supposed to include the costs of lost productivity, smoking-related fires, and extra medical care. But no attempt is made to distinguish costs borne by smokers and costs borne by others voluntarily from costs imposed on others.

Even if you accept the sloppy reasoning behind such "social cost" calculations, it appears that smokers are already paying their way. A 1989 study by the Rand Corp. found that the state and federal excise taxes on cigarettes—which, together with sales taxes, represent 25 percent to 55 percent of the retail

price—are sufficient to cover the net costs of smoking. The researchers noted that smokers tend to die early, thereby reducing the need for nursing-home care and demands on Social Security and pension funds.

Superficially, the arguments for restricting smoking in businesses open to the public seem stronger than the arguments for banning advertising or raising excise taxes. Leichtman, president of CATS, would like to see smoking prohibited everywhere except in residences. "The problem of nonsmokers being forced to breathe second-hand smoke should not be treated as a mere nuisance to be resolved by good



L.A., LEFT, still leaves restaurant-tours some leeway to set smoking rules. San Luis Obispo, CENTER & RIGHT, bans smoking in all businesses.

manners, courtesy, and restraint," he writes in *USA Today*. "It should be treated as a severe threat to life and health, requiring government action."

The idea that tobacco smoke is not just an annoyance, but a hazard as well, rests on evidence concerning the effects of "involuntary smoking." The term itself is misleading, since it implies both that a nonsmoker's exposure is analogous to a smoker's and that the nonsmoker has no choice in the matter. It conjures up the image of a person being tied down and compelled to smoke a pack of Camels.

Yet breathing environmental tobacco smoke (ETS) is quite different from smoking. The chemicals in the smoke are diluted by the surrounding air, and a bystander neither inhales them as deeply nor retains them as long as a smoker. This distinction is often lost in the warnings of antismoking activists.

"We know that tobacco smoke causes disease and can kill you," Ballin says. "It makes sense that a person who doesn't smoke cigarettes, who's sitting next to a smoker and inhaling the smoke, is also at some risk." But many substances that are toxic at certain concentrations—vitamin A, for example—are benign or even healthy at others. So this "common-sense" approach will not do.

The actual evidence on environmental tobacco smoke is considerably less solid than antismoking activists make it out to be but more convincing than the tobacco industry might like you to think. To put the question into perspective, consider that

there have been thousands of studies on the effects of smoking. By contrast, only 25 have looked at the consequences of ETS exposure.

Of these, six have found that exposure to ETS can increase the risk of disease in nonsmokers—primarily lung cancer in the spouses of smokers. The results of the other studies were either negative or statistically insignificant. (The Environmental Protection Agency has attempted to derive significant findings from these data, but it's not clear whether the aggregated studies' populations were comparable.) In 1986, then-Surgeon General C. Everett Koop concluded that "involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers."

Yet the detailed discussion in the surgeon general's report has a more cautious tone, citing shortcomings in the research. The studies may not have controlled for all the relevant variables. Socioeconomic status and indoor pollutants, for example, are both associated with lung cancer. Furthermore, some of the subjects may have been misidentified as nonsmokers, since the researchers relied on questionnaires to classify them. Because the spouses of smokers are more likely to be smokers themselves, misidentification of even a small percentage of the subjects would have been enough to skew the results.

The only study to find an increased risk for children raised in homes with smokers was reported in *The New England Journal of Medicine* last year. The study compared the childhood exposure of 191 lung-cancer patients to that of 191 people without lung cancer who had never smoked. Yet although the lung-cancer patients were classified as "nonsmokers," they explicitly included former smokers.

Even if we take the link between lung cancer and spousal smoking to be established, we should keep the possible risk in perspective. Being married to a smoker may raise your likelihood of developing lung cancer, but this likelihood for nonsmokers is very small to begin with.

It's also important to recognize what the research does not show. Beware of claims that ETS kills thousands of Americans each year. At the Seventh World Conference on Tobacco and Health last April, for example, a researcher estimated that secondary smoke each year causes 34,900 additional

deaths from heart disease and 12,600 additional deaths from cancer in the United States.

Yet a link between ETS and heart disease has never been demonstrated. In Koop's words: "Further studies on the relationship between involuntary smoking and cardiovascular disease are needed in order to determine whether involuntary smoking increases the risk of cardiovascular disease." An international symposium at McGill University reached a similar conclusion in November 1989. Furthermore, estimates of additional cancer deaths are purely hypothetical, since none of the ETS studies have measured actual exposure to secondary smoke.

Even if they had, it isn't clear that the results would be representative of the average American's exposure or that the dose-response relationships derived from the studies would apply to the general population. Koop again: "...more data on the dose and distribution of ETS exposure in the population are needed in order to accurately estimate the magnitude of risk." So the additional-death figures are about as reliable as Mitch Snyder's estimate of the homeless population.

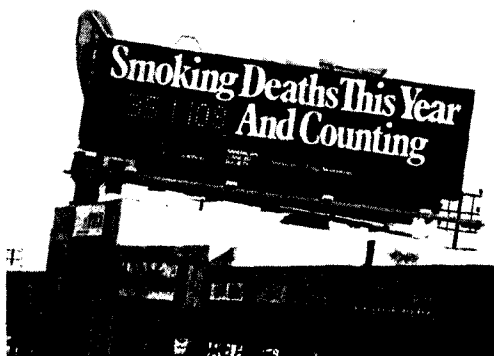
Although almost all of the evidence on the effects of secondary smoke relates to long-term exposure in the home, the research has been used to justify laws restricting or banning smoking in businesses. At least 44 states and hundreds of cities and counties have adopted such laws. Yet there is very little reason to believe that ETS exposure in the workplace is hazardous. And despite the impression given by antismoking activists, there is *no evidence* that casual, short-term exposure such as that encountered in a restaurant or on an airplane poses a risk to nonsmokers.

In any case, nonsmokers can always choose not to patronize those businesses that allow smoking. While the owner of the property has a right to establish rules for smoking, the customer has a right to go elsewhere. In addition to revealing the fallacy of "involuntary" exposure to smoke, consumer choice is crucial to the economic argument against government-imposed smoking regulations.

Restaurateurs, retailers, airlines, and innkeepers stay in business by accommodating their customers. If there is a demand for smoke-free dining, shopping, flying, or lodging, someone can make money by providing it. On the other hand, smokers also eat, buy things, go places, and stay in hotels, so businesses have an economic incentive to take their desires into account as well.

Similarly, businesses must compete for employees, and one way to attract and keep them is by providing them with the sort of work environment they want. In a free market, the smoking policies established by businesses will therefore reflect the preferences of consumers and em-

California has added cigarette-tax-funded messages, TOP, to private anti-smoking ads, BOTTOM.



ployees.

Leichtman accepts this argument, at least in part. "The marketplace does work," he says. But he argues that the tobacco industry has "brainwashed" restaurateurs into thinking they will lose business if they ban smoking and blinded them to the fact that they are already losing business by permitting smoking. Thus, he says, restaurateurs in Beverly Hills were deluded when they complained that they lost customers to competitors in Los Angeles after the city council enacted a restaurant smoking ban in 1987. (Los Angeles and San Francisco have considered similar ordinances.)

In addition to tricking restaurateurs into acting against their own interests, Leichtman says, the tobacco industry pressures businesses to allow smoking by threatening "economic boycotts." He cites Philip Morris's attempts to rally smokers against businesses that ban smoking. But aren't nonsmokers equally free to protest?

Maybe, Leichtman says, but they don't. "Very few people actually speak up about tobacco smoke, because they are just too plain timid," he says. "They don't want to be ostracized for doing so. The bottom line is they just don't complain." But given that nonsmokers outnumber smokers by nearly three to one, it's far more plausible that they don't complain because smoke simply doesn't bother them as much or as often as it bothers Leichtman.

Not every nonsmoker, after all, is an antismoker. Many nonsmokers would prefer a smoke-free environment if the government provided it to them without charge, at the expense of businesspeople and smokers. Relatively few, however, would be willing to pay for the privilege through higher prices or the effort (and perhaps embarrassment) of complaining or taking their business elsewhere.

"I'm the sort of guy who would pay a surcharge, if I had to, for a nonsmoking environment," concedes Leichtman, who says he's allergic to tobacco smoke. "I shouldn't have to." Why not? Ultimately, Leichtman retreats to the public-protection argument. "The owner of this building would not be permitted to have asbestos fibers falling from the ceiling....It stands to reason that the air should be relatively safe."

But tobacco smoke differs from asbestos fibers and other pollutants in several crucial ways. It is the byproduct of an activity that some customers (or employees) wish to engage in, and its presence is conspicuous and well-known. By entering a business that allows smoking, you consent to be exposed to tobacco smoke, just as you consent to be subjected to loud music by entering a dance club or attending a rock concert.

While loud music is not his cup of tea, Leichtman concedes that government has no business banning it. But he insists that tobacco smoke is different. He's right: Even relatively brief exposure to loud music is known to damage hearing, but no one has shown that casual exposure to tobacco smoke is harmful.

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Clearly, though, the spread of antismoking ordinances throughout the nation is not merely the product of complaints by a few supersensitive individuals. Tobacco smoke in confined spaces has always been annoying, but tolerance for it has waned in this country with the spread of information about the dangers of smoking and the associated decline in the percentage of the population that smokes. This shift has changed the assumptions underlying relations between smokers and nonsmokers.

It's no longer safe to assume, in a home or a business, that the owner will not object if you light a cigarette. The onus is now on the smoker to find out what the rules are. It's still reasonable to expect diners to understand that they run the risk of exposure to tobacco smoke when they eat out. But as smoking becomes less and less common, restaurateurs may have to post signs to that

effect in order to secure informed consent.

Customers should recognize that smoking policy is not simply an either/or proposition. Restaurateurs, for example, may choose from a wide range of ground rules, including a complete ban on smoking, separate seating, qualified permission (say, if no one objects), and prohibition (or tolerance) of complaints about smoke. Generally, of course, they will try to accommodate both smokers and nonsmokers.

None of this, however, changes the basic principle that the owner has the final say. Too often, confrontations between smokers and nonsmokers are based on irreconcilable assumptions: Smokers feel they have every right to enjoy their cigarettes, while annoyed bystanders are equally certain they are entitled to a smoke-free environment. The only way to make sense of these conflicting claims is by reference to property rights. Otherwise, the majority will simply impose a solution, which is what the antismoking movement advocates.

If you don't smoke, this prospect may not trouble you very much. You may be glad to be rid of tobacco smoke on airplanes and in restaurants, in stores and hotels, no matter how this state of affairs came about. For that matter, you may not care if you never see a tobacco ad again or if the cost of cigarettes goes up. Furthermore, you may be a clean-living, sensible person who can't imagine how any of your habits could possibly offend others enough to prompt government interference. But you never know.

As James M. Buchanan has noted, using the state's power to control your neighbor's annoying habits is a risky business. "Let those who would use the political process to impose their preferences on the behavior of others be wary of the threat to their own liberties," he writes. "The liberties of some cannot readily be restricted without limiting the liberties of all." ■

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