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Leading the Conversation: Leadership in a Democratic Society

A Leadership Case Study of Tobacco and its Regulation

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Approach and Methodology

In an effort to discover how private sector leadership can affect public policy outcomes, I have undertaken a review of the use and regulation of tobacco in the United States. My sources are limited¹ and not original. I did teach the recent FDA rulemaking proceeding on tobacco in a course at Penn Law School two years ago. David Kessler addressed my class and described how he personally interacted with President Clinton to gain his support the FDA rule (which of course led to the tobacco settlement now before Congress). Other than that, I am no expert. And as a former smoker, who saw what emphysema can do to family members, I am not just an academic observer. But as a student of public policy, I am fascinated by how the approach to tobacco has evolved in a relatively short time. What is remarkable is how far we have come in recognizing the public health consequences of tobacco use and (as importantly) how much this is due to a small number of individuals from the private and public sectors, as opposed to a coordinated and sustained legislative/executive effort.

I will first summarize the history of tobacco use and its health consequences and highlight significant events that produced leaders who have made a difference, whether positive or negative. Given the enormous economic force that tobacco has become, it is all the more surprising that its ultimate control by public officials could have happened at all, let alone so quickly. Remaining issues have to do with how Congress and the President will legislate the tobacco settlement. Even after the legal issues are resolved, the moral and ethical issues of tobacco promotion and sales (even if no longer to minors) remain lively in the United States and unaddressed concerning consumption

¹ My sources include Richard Kluger, *Ashes To Ashes* (1997) an extensive study of the subject; Michael Schudson, *A Historical Review Of Anti-Smoking Activity In The United States 1880-1994*, an unpublished chapter prepared for the 1996 Surgeon General's report; Solomon Katz, *Secular Morality, A Chapter In Contemporary Perspectives On Morality And Public Health* 298-319 (1994); the FCC 1996 Rulemaking Report On Tobacco Regulation; and various newspaper articles and some telephone interviews with knowledgeable participants.



abroad. I will close by speculating on how individual leaders managed to emerge in tobacco reform and try to identify their leadership characteristics.

A Brief Review of the Tobacco Story to 1964

The surprising thing about the history of tobacco in Western Society is not so much how pervasive its presence has been, but how controversial its use has been. As Schudson records, James I published an anti-tobacco tract in 1604 which even emphasized what today we would call the dangers of secondary smoke. But moral objections, even then, were overcome by profit motives. By 1607 the Virginia company had landed in Jamestown with the goal of producing tobacco profits for the English crown. Throughout the 18th century tobacco use was encouraged. But even as a pervasive consumer good, it still retained a “faintly immoral” reputation. It always had friends in high places, however. Thomas Jefferson was a proponent of its use and saw profits for government in its taxation and distribution. This position is reminiscent of what is happening today with tobacco taxes being used as the source of regulatory capital.

With the advent of the cigarette in the 19th century, tobacco became even more widely used. The mechanization of cigarette production, the brain child of James Buchanan Duke and his American Tobacco Company, dropped the cost of producing a cigarette dramatically in the decade between 1880 and 1890. In effect, “Buck” Duke, whose statue with a cigar in hand presides proudly over the Duke campus to this day, was among the first real “leaders” of the tobacco movement. As the Henry Ford of tobacco production, he made the product vastly more available and affordable.

Schudson’s paper also documents the growth of the anti-tobacco movement in the 19th century, lead by the Seventh Day Adventists and leaders like Dr. John Harvey Kellogg. The Women’s Christian Temperance Union (WCTU) actively opposed tobacco along with liquor, and successfully supported state legislation to prohibit tobacco sales to minors. (State laws prohibiting sales to minors have been on the books since the 1880s.)



At the beginning of the 20th century the WCTU and other anti-tobacco advocates were very active, even in the face of American Tobacco's mass production achievements that were enhanced by its cartel-like economic power. The tobacco trust was one of Teddy Roosevelt's early antitrust targets and breaking its hold on cigarette production ironically ensured greater production at lower prices.

A watershed period in the early anti-tobacco movement occurred during World War I. Over the objection of many private sector leaders, the government included cigarettes in soldiers' rations when they went overseas. General John Pershing was reported to have said: "You ask me what we need to win this war. I answer tobacco, as much as bullets." (Schudson p. 10) This effort created a set of veteran consumers who returned from the war to lead the charge against anti-tobacco legislation.

In the 1920s cigarette usage spread as women turned to cigarettes for the first time (emboldened perhaps by the passage of the 16th Amendment extending them the right to vote). Schudson reports that cigarette consumption per capita "was remarkably steady from 1913 to 1945, rising when the real income per capita rose, falling when real income fell." During this period the sales of big tobacco companies grew. They benefitted from a reaction against the moral arguments of anti-tobacco activists. The medical evidence against tobacco was slow to form. The medical profession, was largely supportive of the public perception that moderate smoking was not hazardous to health. (A notable exception was Dr. Alton Ochsner who suggested a connection between cigarette smoking and lung cancer in the 1930s and 1940s.) During War II cigarette use was reinforced among the military, which once again became the largest distributor of "free" cigarettes.

In the 1950s, more research emerged from Ochsner and others that connected smoking to lung cancer. A Readers Digest article entitled "Cancer By The Carton" led to a temporary decline in cigarette use. (It was temporary because cigarette manufacturers responded by extensively promoting the "safe" filter-tip cigarette.) The American Cancer Society adopted a resolution in 1954 recognizing an association between smoking and lung cancer and in 1958 the Consumers Union supported this research. During this period, the Federal

Trade Commission challenged as false and misleading cigarette advertising that made health claims and the Public Health Service also made statements connecting the risk of cancer to tobacco.

When President Kennedy took office in 1961, representatives of leading anti-cancer groups urged the creation of a commission to study the connection between cancer and smoking. This was done under the leadership of the Surgeon General, Luther Terry. Incredibly Schudson reports that during this period “the American Medical Association remained silent on the issue.”

In sum, from 1607 to 1964 the tobacco story shows an addictive product producing loyalty but also controversy. The economic power of tobacco coupled with consumer needs and desires served to expand tobacco use. Not surprisingly the role of government (especially the military) was if anything counterproductive to public health needs. Leadership on the health issue was predominantly private and often quixotic or aberrational. Still, a regulatory direction was emerging and the stage was set for responsible government intervention.

The Period from 1964 to 1995

It is difficult to overestimate the impact of the 1964 Surgeon General’s report on the tobacco health debate. If there is a “social moment” this was it. Virtually all that has transpired in the 30 plus years since that report derives from it. And its effect was not merely aspirational; its impact can be measured. Tobacco consumption in the United States has been cut in half since that time.² Of course that decline did not occur instantly. It is a cumulative change that benefitted from the salient actions taken in the wake of the Surgeon General’s report. The report united the executive branch of government behind anti-smoking efforts and converted tobacco into an overarching public health issue.³

²See N.Y. Times, *New Cancer Cases are Dropping...*, March 13, 1998, p A1-A14 (cautioning that the “recent rise in smoking among teenagers” could reverse that trend).

³It is important to distinguish the executive branch (and its administrative agencies) from the Congress during this time. As will be shown Congress was more susceptible to tobacco company

The social change that occurred in tobacco use during this 30-year period is truly phenomenal. Measures of the effect of government actions, are often problematic. Consider that during this same period, other government programs with more modest and less controversial goals have foundered; for example, the effort to save lives by installing seat belts or air bags in cars is still not fully resolved after 30 years, ⁴ while tobacco is on the verge of virtually unanimously embraced legislative control.

The tobacco regulation effort, during this period, is replete with examples of effective leaders, public and private. First in time is Luther Terry the Surgeon General responsible for the 1964 report. Given the extent to which this report succeeded, General Terry deserves primacy of recognition. Other government officials also reacted proactively. Michael Pertschuk as chair of the Federal Trade Commission quickly joined in the fray. By proposing health warning labels on cigarettes, the FTC had a measurable effect on consumption, even though its jurisdiction was preempted by a tobacco industry legislative alternatives in 1965 which produced watered down warning labels. On the other side, tobacco state politicians had success in stemming the reformist tide.⁵ The medical establishment was of little help. The AMA failed to endorse the Surgeon General's report.

In the private sector a few academic lawyers stood out. John Banzhaf at George Washington and Richard Daynard at Northeastern led efforts on behalf of the public interest community. Banzhaf forced the FCC to provide time for anti-cigarette advertisements and Daynard helped research and support tort suits by the private bar. But the immediate impact of the 1964 report was softened by the Vietnam War. Just as with World Wars I and II, the military essentially supported tobacco as a drug of choice (while marijuana was

(and grower) interests than were agencies like the Surgeon General and Health and Human Services that had a public health mission.

⁴ See Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* (1990) (documenting legislative and bureaucratic inability to resolve the auto safety issue).

⁵ For example, Congress reversed by legislation a non-smoking ban on airlines initiated by the Civil Aeronautics Board and tobacco growers won agricultural subsidies. While there were many industry controlled politicians, some like Warren Magnusen in the Senate and Henry Waxman in the House fought back. (Pertschuk had been Magnusen's legislative assistant.)



accepted as a necessary evil). Nonetheless by 1975, the Army banned cigarettes from K rations.

By the 1980's the reform momentum could not be rolled back. Non-smokers' rights legislation was enacted in many states and insurance companies began to offer non-smoker rated policies. Perhaps the biggest event of the decade was the arrival of C. Everett Koop as Surgeon General. In 1982, he issued a report on the problems of second hand smoke that soon led to restrictions on smoking in public buildings and facilities. In 1987, smoking was forbidden on domestic air trips and, by 1990, the ban was made applicable to all flights. Koop was the ideal exponent of the anti-smokers' message. A grandfatherly figure with an old testament presence, he exuded absolute integrity and a fearless devotion to health. He was the Platonic version of the Surgeon General. Many probably think he still is the Surgeon General.

Surely tobacco companies were not going quietly. They continued to deny liability and won all litigation. Big tobacco was the leading contributor to political campaigns and this bought legislative support. But anti-smoking legislation had adherents in both parties. Some republicans stood tall (such as Senator Hatch who sponsored legislation on warning labels) and some liberals ducked (such as President Carter, who considered Secretary Califano's crusade against tobacco an enormous political liability).

By the 1990's, tobacco companies were losing their grip on the legislative process. President Clinton and Vice-President Gore felt emboldened to warn against the health consequences of tobacco use on the eve of the campaign. The opposition became increasingly powerless although Senator Dole provided some light moments during the 1996 campaign by stating that tobacco was no more addictive than cookies and milk. His statement was ridiculed. The tide had clearly shifted and tobacco was on the run. It was soon to become a rout.

From the FDA Rule, to the Tobacco Suits, to Legislation

If the pace of tobacco reform during the thirty-year period following the 1964 report was quick, in the last two years it has broken the sound barrier. The three most dramatic events include: the FDA rulemaking proceeding; the tort suits brought by state attorneys' general; and the tobacco legislation before Congress, which involved the testimony of tobacco CEOs.

David Kessler was the Bush administration pediatrician/lawyer who was re-appointed by President Clinton to head the FDA. As an independent spirit with a penchant for controversy, he turned out to be in the right place at the right time. The FDA rulemaking proceeding posed a dilemma for the FDA and the Clinton administration. If tobacco was regulated as a drug it would have to be determined to be safe and effective, which it could not be, but to ban cigarettes would create an impossible regulatory and legal outcome. Therefore, the approach Kessler chose was to label the cigarette a nicotine delivery-device and regulate its use rather than ban it. The regulation was directed at children who constituted to the most susceptible group of potential users.

Kessler could research and draft the rule, but he could not announce it without administration support. Slipping into the White House one afternoon in 1996, Kessler spoke for several hours to President Clinton in the course of convincing him that the rule was the right thing to do. (Rare, of course, is the agency rule that gets direct presidential approval, although all such acts are "executive" in nature.) Clinton embraced the rule as his own and announced in a press conference that the protection of children through regulation of cigarette advertising was the goal of the rule. The rule (even in draft form) immediately precipitated industry legal challenges that are still working their way through the courts.



By now, the tobacco companies had a carton full of troubles. Their CEOs testified before Congress that they believed nicotine was not addictive, even as internal documents were being leaked or produced in litigation that showed the companies knew the opposite to be true. A grand jury is considering perjury indictments. But even if no indictments are forthcoming, the damage to the industry's credibility has been massive and irretrievable.⁶⁶

The tobacco class actions filed earlier grew in scope. State attorney generals, led by Mike Moore of Mississippi, joined with private plaintiffs' lawyers to produce tort actions in 40 states for recovery of Medicaid payments and other medical costs. It is these actions that led to the remarkable \$368 billion settlement agreement that the lawyers negotiated in 1997. Settlements of this magnitude are unknown in our court system. The tobacco companies, who so long successfully stonewalled on liability, suddenly reversed course and surrendered to the seemingly inevitable forces of law and politics.

These settlements are now before Congress and legislation enforcing them is being crafted. By its own description of the settlement (see N.Y. Times advertisement March 17, 1998), the companies expect to limit class action lawsuits and future punitive damages awards in return for mega billion settlements. They also agree voluntarily to restrict advertising to young people which, absent agreement, could be defended on First Amendment grounds.

It is by no means clear at this reading what legislation, if any, will emerge. What is clear, however, is who the political winners are. The republicans who initially labeled (via Newt Gingrich) David Kessler a "thug" and "bully" are now ceding to Drs. Kessler and Koop virtual veto power over the impending legislation.⁷ It is clear also who the enemy is. Even with all their PAC money, the NY Times had this to say about the tobacco industry: "Now the

⁶⁶ There are few acts of leadership among the tobacco CEO's worth noting, although the new head of Phillip Morris, Australian Geoffrey Bible, is presenting the industry's "kinder and gentler" image of Capital Hill to good effect. See *National Law Journal*, *Phillip Morris CEO Tries To Have It Both Ways*, Mar. 16, 1998, A22.

tobacco industry has little more support in Congress than the Mafia and being on the wrong side of the smoking issue would be like being on the wrong side of the Communism.”⁸ For an industry that long held Congress at bay, if not enthralled, this is a stunning ending to its era of political influence.

The Lessons for Leadership--Creation of a Secular Morality

The tobacco experience in American society is uniquely positioned to demonstrate lessons in leadership. The movement against tobacco use has largely been inspired by private individuals and groups, with government playing, until recently, a largely reactive role.⁹ Initially, the main opponents were morally and religiously connected, the WCTU being a prime example. Opposition to this approach came largely from smokers who reflected our libertarian traditions of freedom and tolerance. Morality alone was clearly not sufficient to ban tobacco any more than it was able to ban liquor (the Prohibition era stands as testimony there).

But when the morality issue became connected to public health, the stakes changed. Solomon Katz refers to “the secular morality” movement as one which turned the tide on tobacco. For Katz “the secular moral code, expressed in the context of health” speaks in terms of the traditional Judea-Christian ethic, but relies on “proscriptive behaviors associated with the health and fitness movement.” (Katz, p. 298). Thus one would expect not only tobacco but environmental issues such as global warming, clean air, etc., to also draw strength from this new morality.

⁷ The NY Times recently reported about Kessler and Koop that “their public standing is so high.... that Senator McCain said that no tobacco legislation could move forward without their stamp of approval.” March 11, 1998, p. A16.

⁸ Id.

⁹ It should not be forgotten that states had in earlier times regulated and even tried to ban cigarettes. But these efforts were episodic and largely ineffective. Without leadership at the federal level, the states could hardly be expected to control a product that has interstate characteristics.

The concept is keyed to a public knowledge of risk, demonstrated through the science of epidemiology. The more the public can be made aware of “objective” health factors in their lives, the more rational and compelling is the possibility of reform. The tobacco story changed dramatically after the 1964 Surgeon General’s report for this reason. Secular morality relies for its text upon scientific studies and this invites new leaders to emerge, even if they are not seeking the limelight.

The leaders in the tobacco story began with private groups like the WCTU, but soon give way to scientists like Dr. Alton Ochsner and Luther Terry, who were supported both by government and groups like the American Cancer Society. Today groups like the Campaign for Tobacco-Free Kids (under the leadership of Bill Novelli) have picked up the scientific and demographic case for tobacco regulation.

Clearly, however, the key individuals have been Everett Koop and David Kessler, who as medical doctors have combined personal commitment with scientific credibility to seize the high ground. Their current status as veto holders in the tobacco legislation is a function of this scientific and moral stature. In their case, knowledge is power and this is likely to be the case with others in the future. Both individuals are intense, single-minded and seemingly unshakable in their resolve. At times they may appear arrogant if not obsessed, but their mission orientation inspires support. They define a new kind of leader, armed with information as well as zeal, who can emerge from the shadows or laboratories to galvanize public action.

Other leaders of note include (surprisingly) lawyers, some of whom are not well-known. Surely law professors like John Banzhaf and Richard Daynard deserve much credit for they fought against a largely reluctant political and regulatory process early on. Their efforts are worthy, yet they seem to have been substantially ignored in terms of credit for “scholarly achievement” by the legal academic community. (Perhaps we have our own re-balancing of purpose and mission to do here.) Certainly members of the plaintiffs’ bar who took on tobacco with their own funds and state attorney generals’ (like Mike Moore of Mississippi) deserve mention for good lawyering as well. In this

case self-interest in the form of large or even astronomical legal fees need not be inconsistent with the public interest.

As far as political figures go, the Clinton/Gore team deserves credit for embracing the issue when many preferred for it to go away. Presidential leadership surely made a difference in the tobacco story. Indeed, Clinton's victory is that tobacco regulation no longer remains an issue with which his opponents are willing to disagree.

The Lessons that Remain—Moral and Otherwise

Tobacco regulation is a fascinating study of the limits as well as powers of the political process. Since there are still 47 million smokers in the United States (and use is picking up among children and women) ¹⁰ this is not a problem with an obvious solution. To ban tobacco would not only interfere with freedom of choice but would be pointless. The social costs of creating another illegal market (like drugs) are incalculable. We currently have a drug enforcement policy that manages the fate of some 15 illegal users, adding 40 plus million more would hardly improve respect for law. Yet failure to ban a product that kills over 400,000 Americans a year clearly has a cynical side. It is, after all, tobacco taxes leveled on smokers that will be used to fight the problem. And if they are raised too high, a black market will result just as if tobacco had been banned. ¹¹ Calibrating the level of a product tax to yield sufficient revenue without creating an impossible regulatory enforcement burden is a delicate task indeed.

¹⁰ Center for Disease statistics for 1995 show that 24.9% of adult Americans smoke. The CDC states that the goal of reducing smoking below 15% of the adult population by 2000 will not be attained. *CDC Weekly Report*, vol. 46, Dec. 26. 1997.

¹¹ On March 31, 1998, Senator McCain announced a bill that had Senate Committee support. It would raise the tobacco settlement from \$368 to \$500 billion partially by placing a \$1.10 tax on cigarettes. A tobacco spokesman warned that this tax would create "a massive contraband market." See *Senate is Offered Sweeping Measure to Fight Smoking*, March 31, 1998, at 1, 20.



And once we conclude that tobacco is a killer, how can we justify its production abroad? Do we have a responsibility not to produce a deadly product? Perhaps our thriving arms export business provides an unsettling rebuttal. Over time these issues are bound to raise more public policy considerations that will require more good leaders to resolve. A lesson of tobacco is that for a long time government got it wrong. Without a vital scientific community we would be far from where we are today. As risk regulation becomes the rule in our society,¹² we are going to be making more and more choices for each other. From this perspective, the idea of secular morality appears to have a bright future.

Let me add a concluding comment on the whole idea of secular morality. Michael Schudson's memorandum of January 8, 1998 set out some questions for our case studies to consider which I have tried to address in this paper. Michael suggests that leadership operates in a climate of distrust. Certainly the story of how tobacco avoided regulatory control for many years suggests that there could be a distrust of government process. However, since we are dealing with a product that once was used by over half the adults in America, it was not always unclear which way the "public" would have wanted the regulatory pressure to go. (Who would have wanted to deny G.I.s their battlefield ration of Camels or Luckys?) Today, however, it seems clearer that health based leadership is being embraced by the public (putting aside whether children are ignoring the message).

One use of secular morality is to fight the climate of distrust. If public policy positions are taken on the basis of scientific studies rather than purely personal moral codes, it may well produce more confidence in the basis for public decisionmaking and reduce the level of distrust.

As to the importance of leadership, the tobacco story gives a powerfully positive answer. Leadership in this context benefitted from communication to the degree that contrary arguments were simply driven out by scientific findings. Even if the public is suspicious generally of leaders (Michael's hypothesis),

¹² See for example Justice Stephen Breyer's work entitled *Breaking the Vicious Circle--Toward*



leaders like Koop and Kessler dispel that conclusion in the tobacco context. Indeed even the President looks good in this context.