

No Butts About It. Smokers Must Pay for Their Pleasure

Recently smokers have been made to feel unwelcomed in many public places.¹ At first glance, it would appear that smokers deserve public sympathy not popular scorn. For in addition to the “traditional” smokers maladies of cancer cardiovascular disease and respiratory system disease,² smoking has recently been linked to impaired vision,³ old age retinal degeneration,⁴ reduced fertility⁵ early menopause⁶ and even hearing loss.⁷

Viewed in a vacuum, such persons are a lamentable lot. Yet, smokers do not live in a vacuum; and, as a result, society is measurably worse off.⁸ This Note attempts to calculate smokers social, medical and financial impact upon society and to put a price upon their habit.

The Tobacco Institute has maintained that “in the free marketplace, business has an unrestrained right to market products. Smokers have a right to personal choice in the matter of social custom, free of regulation.”⁹ This Note extends such self-serving libertarianism to its natural conclusion. If an individual has the right to purchase cigarettes, then he also bears the obligation of paying for his pleasure.

This Note will also examine the true cost of a smoker’s habit by considering, and (where possible) pricing, the impact of his fumes on others. Although it is assumed that the smoker has the “right”

1. *Nonsmokers Win Major Legislative Victories*, ASH SMOKING AND HEALTH REVIEW 1 (July 1985) (detailing new anti-smoking laws in Florida, Idaho, Maine, New Jersey, New Mexico and Washington and cities of Honolulu and Los Angeles). [hereinafter ASH]. See also N.Y. Times, Feb. 7 1987, at 1, col. 1.

2. OFFICE OF TECHNOLOGY ASSESSMENT SMOKING-RELATED DEATHS AND FINANCIAL COSTS (staff memorandum 1985) 1 [hereinafter OTA].

3. 12 AM. JUR. PROOF OF FACTS SUPP 78-9 (1986) [hereinafter AM. JUR. POF] *citing* Nat’l Safety Council Trades and Services Sector Newsletter.

4. *Id.* at 79, *citing* MED. TRIBUNE, p. 16 (Sept. 1, 1976).

5. HARV. MED. SCHOOL HEALTH LETTER, Vol. X, No. 12, 3 (Oct. 1985).

6. Lundquist and Bengtsson, *Menopausal Age in Relation to Smoking*, 205 Acta Med. Scandinavia 73 (Jan. 1979).

7. AM. JUR. POF, *supra* note 3, at 79 (summarizing study by researchers at Women Medical College of Pennsylvania which indicated hearing loss among smoking men above age fifty).

8. OTA, *supra* note 2, at 1.

9. 7 TOBACCO OBSERVER No. 1 (February 1982).

to subject his own body to various smoking-related maladies, one must look beyond the smoker's own lungs. The health care services which the smoker demands of society will, however be included among the external costs, or externalities (costs borne by society but not the manufacturer), considered.

I. BACKGROUND

In response to a request from the Subcommittee on Health of the House Ways and Means Committee, the Office of Technology Assessment (OTA) developed estimates of the smoking-related direct health care costs borne by the government and the indirect costs of productivity losses (measured in wages lost due to smoking-related premature death and illness).¹⁰ In September 1985, after a review of numerous prior studies,¹¹ the OTA announced the annual financial toll (middle estimate) to be \$65 billion, or roughly \$2.17 per pack of cigarettes sold.¹²

Although an astonishing figure, \$65 billion is, by the Office's own admission, an inadequate estimation of smokers' annual financial imposition upon society.¹³ In assessing medical costs, the OTA focused on only three major categories of smoking-related disease¹⁴—cancers (arising only at those sites most clearly linked with smoking),¹⁵ cardiovascular disease (including heart disease and strokes)¹⁶ and chronic obstructive lung disease (including emphysema and chronic bronchitis).¹⁷ Governmental costs of caring for only those over sixty-five years old were included.¹⁸ The study also explicitly excluded the costs associated with the apparently smoking-related diseases of cirrhosis and ulcers; the higher rate of miscarriages and underweight live births to smoking parents; the higher incidence of respiratory illness in children of smokers; the lives lost (about 2500 a year) and property damage caused by fires linked to cigarettes; air pollution (and conse-

10. OTA, *supra* note 2, at 5, 12.

11. *Id.* at 9, 14.

12. *Id.* at 1, 5.

13. *Id.* at 5.

14. *Id.* at 1.

15. *Id.* at 22.

16. *Id.* at 29.

17. *Id.* at 33.

18. *Id.* at 4, 51.

quent ventilation requirements)¹⁹ arising from smokers fumes; and the impact, both physiological and psychological, of tobacco smoke upon nonsmokers.²⁰

Nevertheless, using the OTA figures as a starting point, one can attempt to determine the actual price of a pack of cigarettes. An excise tax is then considered as a governmental means toward societal reimbursement of the cigarette's true cost.

Such a tax would serve several purposes. It would allow the government to collect directly some of the money it has spent to provide extra services (e.g. Medicaid, Medicare)²¹ required to combat smoking's effects on users and nonusers alike. A higher price per pack would discourage consumption.²² A stiff tax might also alert smokers to their impact upon others.

Unfortunately any tax revenue raised would probably not directly compensate those affected by others' fumes. Nonetheless, any extra funds generated by a higher excise tax might reduce all taxpayers' bills, and so indirectly benefit the entire public.

II. MEDICAL COSTS

It is estimated that in 1982 there were 314,000 smoking-related deaths arising from cancer, cardiovascular disease and chronic obstructive lung disease.²³ That toll represents sixteen percent of all deaths arising from those three causes.²⁴ The OTA estimates that in 1985 the U.S. health care system will spend between \$12 and \$35 billion (middle estimate of \$22 billion) to treat smoking-related diseases.²⁵ While much of that cost is borne privately, the U.S. government does pay substantial amounts for smokers' care. Estimated Medicare costs for such treatment (only of those over 65) range from \$1.7 to \$5.4 billion, while comparable Medicaid costs (both state and federal) amount to \$.3 to \$1.1 billion.²⁶ The middle estimate of the 1985 federal tab (excluding state contribu-

19. The National Academy of Sciences has concluded that ventilation rates must be increased as much as five-fold to maintain acceptable indoor air quality in the presence of smokers. *'Other People's Smoke': Round Two*, N.Y. Times, March 15, 1987 § 3 (Business), at 12. See also *infra* text accompanying notes 89-91.

20. OTA, *supra* note 2, at 22.

21. *Id.* at 4.

22. See *infra* text accompanying notes 192-200.

23. OTA, *supra* note 2, at 2.

24. *Id.* at 2.

25. *Id.* at 3.

26. *Id.* at 4, 52-3.

tions to Medicaid)²⁷ for treatment of smoking-related disease (among those over age 65) is \$4.2 billion, or nearly twenty per cent of the middle estimate of both public and private spending.²⁸ The federal health care cost alone is equivalent to fourteen cents for each pack of cigarettes sold.²⁹

III. PREGNANCY

Smoking also takes its toll upon those not yet born. Babies born to mothers who smoke during pregnancy weigh an average seven ounces less than those born to comparable nonsmoking women.³⁰ The smoker's newborn may also suffer deficiencies in early physical growth and emotional development.³¹ Babies born to cigarette smokers are more likely to have neurological disorders, psychological abnormalities and lower intelligence scores.³²

According to the 1980 U.S. Surgeon General's Report, women who smoke also suffer a seventy percent higher risk of spontaneous abortion and a twenty-five percent higher rate of perinatal deaths.³³ These harmful effects may stem from a variety of factors, including the smoking mother's underlying constitution; poor nutrition;³⁴ nicotine's effect of raising fetal blood pressure while slowing heart rate;³⁵ and the deprivation of oxygen to the fetus (from the buildup of carboxyhemoglobin³⁶ in the mother's and fetus's blood).³⁷

Because cigarette smoke contains mutagens which eventually produce changes in spermatozoa, the newborn is also harmed by

27 *Id.* at 53.

28 *Id.* at 3, 52-3. The middle estimate of total health care costs (both public and private) for treating smoking-related diseases is \$22 billion, or 72 cents per pack sold in the U.S. *Id.* at 3, 55.

29 *Id.* The federal health care cost is dwarfed by smokers' lost productivity costs of \$27 to \$61 billion per year, or middle estimate of \$1.45 per pack. *Id.* at 5, 55. See *infra* text accompanying notes 49-52.

30. PUBLIC HEALTH SERVICE, OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, Pub. No. (PHS) 80-50150, SMOKING, TOBACCO & HEALTH, A FACT BOOK 16 (1981) [hereinafter FACT BOOK].

31. *Id.*

32. J. HENNINGFIELD, NICOTINE: AN OLD-FASHIONED ADDICTION 56 (1985).

33. *Id.* at 57

34. R. J. SHEPHARD, THE RISKS OF PASSIVE SMOKING 135 (1982).

35. *Id.* at 139.

36. Carboxyhemoglobin, the product of carbon monoxide and the blood's hemoglobin, reduces the amount of hemoglobin available to carry needed oxygen to cells. *Id.*

37. *Id.* at 137-8.

paternal smoking. The infant mortality rate is significantly higher for fathers smoking more than ten cigarettes a day³⁸

The ill effects of parental smoking upon the newborn have become so prevalent as to warrant their own clinical description, Fetal Tobacco Syndrome.³⁹

There is apparently little data on the expense involved in caring for these unfortunate babies. While there is evidence of greater health troubles among growing children in smoking families,⁴⁰ the problems involved are linked to the overall effect of smoking upon bystanders (discussed *infra*).⁴¹

IV BUSINESS COSTS

Employee smoking results in at least three sources of economic loss—wages lost by the employee because of added illness during his lifetime;⁴² future earnings lost because of premature death;⁴³ and expense to the employer including added absenteeism, higher health insurance costs and greater (smoking and nonsmoking) employee medical costs.⁴⁴ While two of those losses in income are borne by the smoker and his dependents, the third is suffered by his employer

A. *Employees costs*

Employees' losses are great. For example, the smokers rate of absenteeism exceeds that of nonsmokers by thirty-three to forty-five percent, with particularly high rates among the 17-44 age group.⁴⁵ Men who smoke forty cigarettes a day are absent from work almost twice as often as their fellow nonsmokers.⁴⁶ It has been estimated that the extra illness experienced by cigarette smokers results in nearly 150 million additional days in bed annually. This, in turn, creates 81 million "excess" days of job absenteeism for smoking employees.⁴⁷

38. 47 MOD. MED. 14 (January 15-30, 1979).

39. HARVARD MEDICAL SCHOOL HEALTH LETTER, *supra* note 5, at 3.

40. SHEPHARD, *supra* note 34, at 140.

41. See text *infra* at *Air Pollution and Passive Smoking*.

42. FACT BOOK, *supra* note 30, at 15.

43. OTA, *supra* note 2, at 53-54.

44. Weis, *Can you afford to hire smokers?*, PERSONNEL ADMINISTRATOR, 71 (May, 1982).

45. Kristein, *The Economics of Health Promotion at the Worksite*, 9 HEALTH EDUC. Q. 27, 29 (Fall, 1982).

46. Weis, *supra* note 44, at 72.

47. Kristein, *supra* note 45, at 29.

If absences were conservatively valued at \$40 per day smokers would lose roughly \$3.2 billion in income annually.⁴⁸ If smokers are paid despite their absence, the burden is merely shifted to employers. Either way there is a loss.

In assessing the national reduction in earnings, one must look at not only wages lost during smoking-related illness, but also "future earnings lost due to premature death."⁴⁹ The 1985 OTA estimate of the sum of those lost earnings (arising only from the three diseases considered) ranges from \$27 to \$61 billion, with a middle estimate of \$43 billion (or \$1.45 per pack of cigarettes sold in the U.S.) annually.⁵⁰ Aware of the true pricelessness of life,⁵¹ the OTA emphasizes that the \$43 billion represents "the value of livelihood, not of life."⁵²

Even if one views the \$3.2 billion in wages lost annually by employees during their smoking lifetime as a "collective choice" to forego a certain amount of income in pursuit of the pleasures of smoking,⁵³ the remaining \$40 billion loss in annual income will most likely fall on the deceased smokers' dependents. While it may be difficult to calculate the amount of direct public assistance received by a family whose wage-earner has succumbed to a smoking illness,⁵⁴ the \$40 billion is not merely a smoker's "personal" sacrifice. Whether through increased public assistance, reduced family (and consequently national) savings or consumption, the annual \$40 billion in lost earnings is felt by all. A smoker's early death results in a calculable economic loss to society and an incalculable loss to his family.

B. *Employers' losses*

A worker's lost wages reveal only one side of smoking's business toll. Employers also suffer. Even if one allows employers to withhold wages for days missed (since our earlier calculations as-

48. *Id.*

49. OTA, *supra* note 2, at 11-12.

50. *Id.* at 55.

51. The OTA estimates that 1.2 million life-years are lost annually before age 65. *Id.* at 46. On a more personal level, a male nonsmoker, alive at 35, has a fifteen percent chance of dying before age 65; a male smoker bears a thirty percent (i.e. double) risk. *Id.* at 48.

52. *Id.* at 53.

53. For a discussion of smoking's attraction, see note 74 *infra*.

54. See A. & B. BRODY, LEGAL RIGHTS OF NONSMOKERS 52 (1977).

sume that the loss in earnings will be borne by the ill worker), the costs to the employer run far beyond absenteeism.⁵⁵

The largest employer cost arises from the "smoking ritual"—lighting, puffing and staring.⁵⁶ The typical smoking break consumes anywhere from eight minutes per day to perhaps thirty minutes an hour.⁵⁷ Using a conservative estimate of thirty-five minutes a day and assuming an employer return of \$100 per eight hour day per employee, then the equivalent of 18.2 days or \$1,820 is lost per smoker per year.⁵⁸

The employer also faces higher insurance costs. Most companies offer health care insurance at large discounts to employees and their families. Typical employer insurance costs (in 1980 dollars) are increased per average smoker per year by \$204 for health,⁵⁹ \$10 for fire, \$40 for workmen's compensation and accidents, and at least \$20 for life and early disability insurance. Since most employee health policies include all four types of coverage, the employer bears an average increased insurance cost of \$275 per smoker per year.⁶⁰

The employer must also suffer the costs of the smoker's adverse effect upon nonsmoking co-workers' health and morale. Using a recent study indicating that nonsmokers working near smokers suffer only one-fifth the damage to the lungs' small airways as that incurred by their puffing neighbors,⁶¹ one can begin to determine the excess costs arising from smokers' impact upon nonsmoking employees. Multiplying the employer's relevant excess costs per smoking employee (e.g. excluding time lost due to smoking breaks) by one-fifth and then doubling that figure (since two of every three workers are nonsmokers), the nonsmoker cost may be placed at \$486 per year.⁶² In addition to affecting non-

55. Even if the money withheld from the absent full-time worker were used to hire temporary employee, the productivity of an unaccustomed replacement would probably be less than the everyday worker's.

56. Weis, *supra* note 44, at 73.

57. *Id.*

58. *Id.*

59. Heavy smokers use the nation's health care system at least fifty percent more than do nonsmokers. *Id.*

60. Krstein, *supra* note 45, at 29-30.

61. Weis, *supra* note 44, at 75, citing White, *Small Airways Dysfunction in Non-smokers Chronically Exposed to Tobacco Smoke*, *NEW ENG. J. MED.* 302: 720-3 (1980).

62. Weis, *supra* note 44, at 75-6.

smoker health, a smokey workplace takes an unquantifiable, but substantial, toll on employee morale and co-worker relations.⁶³

Even office furnishings and plant and equipment do not escape the smoker's reach. While smoke particulates launch an air attack on walls, windows and expensive precision machinery cigarette butts and burns mount a ground assault on such office staples as carpets, drapes and furniture. One study has found employer's annual maintenance and replacement costs to exceed \$1000 per smoker⁶⁴

Excluding smokers' medical care costs and earnings lost to premature death (both accounted for previously)⁶⁵ and the unquantifiable impact on employee morale, the final tally for the unfortunate employer is \$1820 for time consumed by the smoking habit; \$486 in nonsmokers' lost earnings and increased medical care due to passive smoking; \$275 in increased insurance costs; and \$1000 in replacement and maintenance costs of furnishings and equipment. The business loses nearly \$3600 per smoker per year⁶⁶

If seventy-five percent of the fifty million smokers in the U.S.⁶⁷ are employed at average salaries of \$20,000 per year (equivalent to \$80 a day in wages or about \$100 a day in productivity⁶⁸), the annual cost of smokers to employers would be \$135 billion (.75 x 50 million smokers x \$3600 per smoker). Just as smokers' lost wages reach beyond smokers' own pocketbooks, so too do employer expenses become part of the cost of doing business. Because of the smoking habits of one-third of the American workforce,⁶⁹ all Americans might spend an extra \$135 billion on their goods and services. There is no need for all to pay for the smokey corridors, cigarette butts and extra medical bills of a relative few

63. *Id.* at 76.

64. *Id.* at 73-4.

65. See *supra* text accompanying notes 42-54.

66. Cf. Weis, *supra* note 44, at 77

67. OTA, *supra* note 2, at 6.

68. Weis, *supra* note 44, at 72.

69. *Id.* at 75.

V AIR POLLUTION AND PASSIVE SMOKING

The 1972 Surgeon General's Report was the first in the series to recognize the possible ill effects of tobacco smoke upon non-smokers, a phenomenon known as "passive smoking."⁷⁰

In addition to harming the smoker cigarettes have several external effects. Tobacco fumes, much like those of a car exhaust pipe or factory chimney have a primary impact upon the environment.⁷¹ There is also growing evidence that the smoke secondarily affects others by promoting discomfort and even major illness.⁷²

A. *Air pollution*

It is perhaps impossible to put a price upon the environment. Nonetheless, one can dissect the components of cigarette smoke and estimate the cost of "clearing the air"

Tobacco pollution is not only chemically related to factory emissions, but routinely occurs at far higher levels indoors than does factory smoke or auto exhaust outdoors.⁷³ Unlike a car or a factory which yield various public benefits, a cigarette "produces" nothing except the smoker's pleasure. While the pedestrian may object to auto pollution, it is unlikely that he has never ridden in a car while a neighbor may object to an adjacent factory it is unlikely that he has never enjoyed the products produced at that facility. Only cigarettes present a uniquely personal, even selfish, satisfaction.⁷⁴ Cigarette manufacturers and their consuming public should bear the costs of their environmental damage.

When a cigarette is smoked, the air becomes contaminated by both mainstream and sidestream smoke.⁷⁵ Mainstream smoke consists of the fumes inhaled by the smoker upon puffing; sidestream smoke emerges between puffs from the cigarette's burning cone and mouthpiece.⁷⁶ The tobacco smoke released

70. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH 117-35 (1972) [hereinafter 1972 REPORT].

71. J. REPAC, RISKS OF PASSIVE SMOKING (Working Paper, Center for Philosophy and Public Policy, Univ. of Md.) 4 (1983).

72. 1972 REPORT, *supra* note 70, at 130-31.

73. REPAC, *supra* note 71 at 3.

74. See R. WINTER, THE SCIENTIFIC CASE AGAINST SMOKING 1-9 (1980), discussing why people smoke.

75. SHEPHARD, *supra* note 34, at 34-5.

76. *Id.*

into the atmosphere consists of all the sidestream as well as that portion of the mainstream smoke which is later expelled.⁷⁷ The actual amount of pollution to which nonsmokers are exposed depends upon the amount of smoke produced, the depth of inhalation, the available ventilation, the proximity of the smoker and the volume of the room.⁷⁸

Unfortunately the level of pollutants in the sidestream often far exceeds that of the mainstream smoke.⁷⁹ A number of studies, including the 1972 Surgeon General's Report, have found that uninhaled (i.e. sidestream) smoke contains greater concentrations of "tar" (defined as the "aggregate of particulate matter in cigarette smoke after subtracting nicotine and moisture"⁸⁰), nicotine, carbon monoxide, nitrogen oxides, naphthalene, ammonia and nitrosamines (to name but a few).⁸¹

Further although a cigarette may appear small and innocuous, the amount of pollutants emitted are far from trivial. Nitrogen dioxide levels of .5 parts per million (p.p.m.) for one hour are considered dangerous;⁸² cigarette smoke contains 250 p.p.m.⁸³ Long-term hydrogen cyanide exposure at levels above 10 p.p.m. is deemed dangerous; cigarette smoke contains 1600 p.p.m.⁸⁴ The threshold limit for industrial exposure to nicotine is .5 mg/m³ (American Conference of Government Industrial Hygienists, 1974); several studies of second-hand smoke have revealed levels from 4 to .6 mg/m³ (although levels decreased substantially with adequate ventilation).⁸⁵ The EPA has set limits on carbon monoxide (CO) exposure of 9 p.p.m. for eight hours and 35 p.p.m. for one hour⁸⁶ While CO levels vary widely with available ventilation,⁸⁷ researchers have found that smoking seven cigarettes in one hour—even in a ventilated room—creates CO levels of 20 p.p.m., and 90 p.p.m. in the seat next to the smoker⁸⁸

77. 1972 REPORT, *supra* note 70, at 122.

78. *Id.*

79. SHEPHARD, *supra* note 34, at 37.

80. 1972 REPORT, *supra* note 70, at 142.

81. SHEPHARD, *supra* note 34, at 33.

82. AM. LUNG ASS'N., YOUR HEALTH AND AIR POLLUTION 23 (1980) [hereinafter AIR POLLUTION].

83. AM. LUNG ASS'N., SECOND-HAND SMOKE 4 (1982).

84. *Id.*

85. SHEPHARD, *supra* note 34, at 42-3; 1972 REPORT, *supra* note 70, at 123.

86. AIR POLLUTION, *supra* note 82, at 23.

87. SHEPHARD, *supra* note 34, at 38-39.

88. SECOND-HAND SMOKE, *supra* note 83, at 4.

While there appears to be little evidence on tobacco smoke's long-term effect upon the environment (and consequently little means of calculating an environmental cost), there are more easily calculable short-term expenses. The excess energy required to rid the air of tobacco pollutants can be calculated from the difference between the normal minimum ventilatory requirement (4 m³/min per person) and that required to avoid an excess accumulation of cigarette smoke.⁸⁹ Given an extreme situation of a room occupied by six smokers and one nonsmoker the excess energy requirement might range from 2 kilowatts to over 4 kilowatts, depending on the outside temperature.⁹⁰ In view of the need to limit people's exposure to cigarette by-products, a continuous expenditure of up to 7 k per smoker should be borne by the polluters themselves.⁹¹

B. *The health impact of cigarette smoke's pollution (passive smoking)*

Prior to 1972, it was widely believed that smoking was the smoker's problem. In that year the American College of Chest Physicians issued a statement that cigarette smoke is harmful "to the health of the individual who does NOT smoke but who inhales the hazardous constituents in the air produced by the smoker"⁹²

Smoking affects both the comfort and health of those nearby. The 1979 Surgeon General's Report reveals that eighty percent of those who have never smoked (about 77 million people) report that it is "annoying to be near a person who is smoking cigarettes."⁹³ (By contrast, only five percent of smokers report any discomfort from others' smoke.)⁹⁴

The degree of "annoyance" varies with the sensitivity of the individual to tobacco smoke. Smoke sensitivity may result in such

89. SHEPHARD, *supra* note 34, at 123.

90. *Id.*

91. *Id.* at 124. The National Academy of Sciences has also recognized the need for greater ventilation in the presence of smokers. See *supra* note 19.

A portion of the cigarette excise could be earmarked toward the purchase of adequate ventilation systems.

92. A. & B. BRODY, *supra* note 54, at 14. 1972 was also the year in which the U.S. Surgeon General recognized the passive smoking problem. See *supra* text accompanying note 70.

93. REPACE, *supra* note 71, at 2, quoting PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH (1979) [hereinafter 1979 REPORT].

94. *Id.* at 3.

symptoms as itching, tearing, burning, or swelling of the eyes; sneezing, running, itching or dryness of nasal airways; headache, coughing, wheezing, sore throat, hoarseness, nausea, or dizziness.⁹⁵ Further while only a small portion of the population is hypersensitive, the allergic and the nonallergic all suffer such symptoms, with differences only in frequency of complaint.⁹⁶

While short-term reaction to tobacco smoke may cause discomfort, longer-term exposure may result in serious illness and even reduce nonsmokers lives. Although it may be tempting for smokers to discredit others' "reactions" as merely the imagined results of preconceived anti-smoking biases,⁹⁷ there is mounting support for the physiological effects of passive smoking. In 1978, the New England Journal of Medicine reported that passive smoking causes an increase in the heart rate, systolic and diastolic blood pressure, and venous carboxyhemoglobin, as well as decreased heart rate and systolic blood pressure at angina.⁹⁸ These effects appeared in both ventilated and unventilated rooms, but with greater effect in confined areas.⁹⁹

In 1980, the Journal reported that a ten-year study of over 2000 persons had concluded that long-term exposure to indoor tobacco smoke in the workplace had the same impact on the healthy nonsmoker as smoking one to ten cigarettes a day¹⁰⁰

That conclusion is in accord with a number of recent studies which suggest that the long-term effects of passive smoking are taking years off nonsmokers' lives. An Asian study completed in 1981, which followed a total of 91,450 nonsmoking Japanese wives over a fourteen year period found that women whose husbands smoked suffered an increased rate of lung cancer of 8 cases per 100,000 people (over forty years old, the age group at risk).¹⁰¹ A later U.S. study estimates a similar rate of increase in lung cancer in passively smoking Americans. Calculated over all age groups, the estimated annual toll is an excess 3700 lung cancer deaths per 100 million U.S. residents per year¹⁰² That figure may however be too high. A prominent British epidemiologist

95. *Id.* See also SHEPHARD, *supra* note 34, at 83, 90.

96. REPACE, *supra* note 71, at 2-3.

97. SHEPHARD, *supra* note 34, at 91.

98. ARONOW, *Effect of Passive Smoking on Angina Pectoris*, 299 NEW ENG. J. MED. 21 (1978).

99. *Id.*

100. White, *supra* note 61.

101. REPACE, *supra* note 71, at 15. See also SHEPHARD, *supra* note 34, at 96.

102. REPACE, *supra* note 71, at 15.

estimates that BOPS—breathing other people's smoke—causes early death in about 2000 Americans each year¹⁰³

Whether one accepts the British, American or Japanese statistics, the unfortunate reality is that, as a result of others' habits, nonsmokers are suffering not only immediate discomfort but also the possibility of future life-threatening disease.

Because it is difficult to quantify annoyance (and nonsmoker health effects have already been tallied in *Business Costs*)¹⁰⁴ the costs of passive smoking will not be separately tallied.

VI. FIRES

In comparison with the more complex issues of medical, business and pollution costs, something as simple as fire is easily overlooked. Nonetheless, burning cigarettes cause fires which claim an estimated 2500 lives per year¹⁰⁵

About 800,000 cigarettes are smoked per minute in the U.S.¹⁰⁶ With an estimated one in two million cigarettes starting a fire,¹⁰⁷ a smoker's puffs result in flames once every three minutes. National Fire Protection Association (NFPA) statistics indicate that 56% of all fatal residential fires arise from smoking.¹⁰⁸ As early as 1974, the NFPA reported that smoking caused 121,600 fires and \$136.3 million in property damage.¹⁰⁹

As is typical, rather than falling on smokers alone, the associated expenses burden the entire public. Without even considering the unnecessary loss in human life, society pays higher property insurance premiums and taxes (to support larger fire departments and replenish fire-torn public lands).¹¹⁰

VII. GOVERNMENT PRICE SUPPORTS

In addition to supporting the consequences of smoking, Americans have seen their tax dollars ensure the continued profitability of the habit's source, the tobacco crop. Since the early 1930's, the U.S. government has operated programs which reduce the

103. *Id.* at 5.

104. See *Business Costs*, *supra*, text accompanying notes 42-52.

105. OTA, *supra* note 2, at 22.

106. A. & B. BRODY, *supra* note 54, at 49.

107. *Id.* at 49.

108. *Id.*

109. *Id.*

110. *Id.* at 51.

risks to growers from seasonal and cyclical price fluctuations.¹¹¹ The Agricultural Adjustment Act of 1938,¹¹² which authorized marketing quotas and imposed penalties on those who exceeded their allotments, remains the prototype of the current tobacco program.¹¹³ Upon a two-thirds agreement by tobacco growers in favor of a particular quota, farmers receive price supports of up to 90 percent for their crop.¹¹⁴

The Commercial Credit Corporation (CCC) grants producer owned cooperative associations loans sufficient to purchase the necessary amounts of tobacco from growers at the price support level.¹¹⁵ If an eligible grower receives a bid lower than the government support level, the cooperative association purchases the tobacco from the farmer at the higher rate.¹¹⁶ The tobacco received by the association becomes the collateral and means of repayment of the CCC loans.¹¹⁷ The association arranges for receiving, redrying, packing, storing and the eventual selling of the tobacco.¹¹⁸

Prior to 1982, if the sales proceeds from the collateral tobacco were insufficient to repay the CCC loan, the Treasury absorbed the losses. (Any profits on the sale were returned to the growers.)¹¹⁹ Since the beginning of the program in the 1930's, realized losses on resale have been about \$66 million in principal; an estimated \$157 million in interest has been written off.¹²⁰

With the advent of the "No-Net-Cost-Tobacco Program"¹²¹ in 1982, producers are required to contribute to a fund to assure that the loan program operates at no net governmental cost (other than administrative expenses).¹²² Currently if the association's sales proceeds are insufficient to repay the loans, the growers' own contributions are applied to the unpaid balance.¹²³

111. U.S. DEP'T OF AGRICULTURE, TOBACCO: BACKGROUND FOR 1985 LEGISLATION 22 (1985) [hereinafter BACKGROUND].

112. Agricultural Adjustment Act of 1938, 7 U.S.C. § 1281 (1938).

113. BACKGROUND, *supra* note 111, at 22.

114. *Id.*

115. *Id.* at 13.

116. *Id.* at 23.

117. *Id.* at 13.

118. *Id.* at 23.

119. *Id.*

120. *Id.* at 26.

121. No-Net-Cost Tobacco Program, Pub. L. No. 97-218 (1982).

122. *Id.* at 23-4.

123. *Id.* at 13.

While one may still question the Government's involvement in the tobacco industry¹²⁴ the annual taxpayer cost of \$15 million in administrative expenses¹²⁵ is relatively insignificant when compared to the billion-dollar health care, productivity and pollution costs.

VIII. WHO PAYS?

With costs so pervasive, it seems fair to ask who is paying the bill. One could argue that "[g]overnment programs, taxation, and the health insurance and medical care systems set up [such] an extensive network of subsidies between those who use services and those who contribute to them,"¹²⁶ that it is impossible to allocate the costs of smoking borne specifically by nonsmokers.

Nevertheless, a recent study prepared for the U.S. Department of Health and Human Services estimated (using 1980 figures) that smokers, either directly or through their share of insurance and tax payments, pay only 38% of smoking's social costs.¹²⁷ That would leave well over \$120 billion (62% of over \$200 billion¹²⁸ in medical and business costs alone) on the shoulders of 170 million nonsmokers. By that tally every nonsmoking American, young and old, pays over \$600 a year for the privilege of living with smokers.

Ultimately whether one believes that the costs can be mathematically apportioned is only of secondary importance. There will always remain the billions of dollars spent by the many to support the habit of a relative few¹²⁹ Simple logic and fairness dictate that an activity with no external benefits should impose no external costs. In addition to economic justifications, the price of cigarettes must be raised to alert smokers to the damage (and consequent costs) they create.

124. *Id.* at 28.

125. *Id.* at 26.

126. OTA, *supra* note 2, at 56.

127. *Id.*

128. \$65 billion (OTA middle estimate) in health care and lost productivity (OTA, *supra* note 2, at 4) plus \$135 billion in employer costs (excluding lost productivity). See *supra*, text accompanying note 68.

129. Only about 50 million, or less than one-fourth of, Americans smoke. *Id.* at 6.

IX. A PROPOSED SOLUTION

Given the extensive negative impact of cigarettes, it is tempting to contemplate their elimination. Such a "one-step" solution, however would most likely fail. A habit so deeply engrained in American society¹³⁰ cannot be uprooted overnight.

Similarly while separate smoking areas or even the complete ban of smoking in public may protect nonsmokers' lungs,¹³¹ such measures do little to recoup amounts lost through smoker health care, decreased smoker productivity fires and long-term air pollution.

To replenish the losses incurred by society and simultaneously discourage smoking, the past history and proposed future of the excise tax is now considered.

X. EXCISE TAX

A. History

As early as 1794, tobacco was the object of American taxation.¹³² While initially repealed because of public outcry a federal tobacco tax has been levied since the Civil War¹³³ A federal excise tax was first imposed on cigarettes in 1864 and has since been levied continuously¹³⁴ Today every state, as well as some localities, impose an additional tax on cigarettes.¹³⁵

Even eighteenth century *laissez faire* thinkers, who generally opposed government intervention in the marketplace, were comfortable with tobacco taxes. Two hundred years before the Surgeon General released his 1964 Report, the staunch market advocate Adam Smith wrote,

[sugar rum and] tobacco, are commodities which are nowhere necessities of life, which have become objects of almost universal consumption, and which are therefore extremely proper subjects of taxation.¹³⁶

130. See, e.g., HENNINGFIELD, *supra* note 32, at 22 30.

131. Several recent studies (including the 1986 U.S. Surgeon General' Report and 1986 study by the National Academy of Science) express growing concern about the passive smoking problem. Otten, *Movement to Restrict Smoking in Public Places May Gain Momentum as U.S. Releases New Data*, Wall St. J. Oct. 14, 1986, at 68, col. 6.

132. G. DORON, *THE SMOKING PARADOX* 6 (1979).

133. *Id.*

134. See also TOBACCO TAX COUNCIL, *CIGARETTE TAXES IN THE UNITED STATES* 17 (1956) [hereinafter 1956 TTC].

135. G. DORON, *supra* note 132, at 6. See also Wall St. J., Sept. 24, 1985, § 2 at 1, col. 1.

136. A. SMITH, *WEALTH OF NATIONS* 889 (Modern Library, 1937).

Yet, although tobacco has been the incessant victim of excises, the historical tax rates have been rather inconsistent. Beginning with an average rate of 0.8 cents per pack (of twenty cigarettes) in 1864, the federal tax jumped haphazardly between one and ten cents over the next eighty years, before settling at eight cents in 1951.¹³⁷ There it remained until a further eight cent increase in 1983.¹³⁸ Even with that boost, a current federal excise of sixteen cents remains incomprehensibly low when compared to an 1867 rate of ten cents per pack.¹³⁹

Looking at recent tax policies, one might believe that the federal and state governments have actually sought to encourage cigarette smoking. The 1983 federal doubling was the first rate hike in over thirty years. As a percentage of the price of cigarettes, today's sixteen cent rate is 16% as compared to the former eight cent excise comprising 40% of a pack's price thirty years ago.¹⁴⁰ As a percentage of federal revenues, the excise has, over the same period, declined from 3.1% to 0.7%.¹⁴¹

This is in sharp contrast to the early history of the tax. Between the end of the Civil War and the outbreak of World War I (i.e., prior to the institution of the federal income and profits tax), tobacco taxes provided the second highest source of internal revenues to the federal government.¹⁴² While the 1985 federal bite of \$4.6 billion on sales of roughly 30 billion packs¹⁴³ may seem large, it is dwarfed by both inflation¹⁴⁴ and per-pack impact of 1956 federal revenues of \$2.1 billion on two-thirds as many sales.¹⁴⁵ When compared to a twenty-fold increase in federal tobacco proceeds between 1915 and 1956,¹⁴⁶ the mere doubling of federal cigarette revenues in the past thirty years is insignificant.

State tobacco taxes have fared little better. Because most have increased gradually, state taxes, have, over the last decade, fallen

137. 1956 TTC, *supra* note 134, at 17.

138. TOBACCO INSTITUTE, THE TAX BURDEN ON TOBACCO 148 (Vol. 20, 1985).

139. *Id.*

140. DONALDSON, LUFKIN AND JENRETTE, SMOKE SIGNALS, 7 (1985) [hereinafter DLJ].

141. *Id.*

142. 1956 TTC, *supra* note 134, at 8-9.

143. OTA, *supra* note 2, at 6. See also *Smokers Ills Cost Billions, U.S. Says*, N.Y. Times, Sept. 16, 1985, § 1 at 11, col. 6.

144. The (consumer) purchasing power of the dollar fell by roughly 75% between 1956 and 1984. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986 (106th ed.) 468 [hereinafter STATISTICAL ABSTRACT].

145. 1956 TTC, *supra* note 134, at 9.

146. *Id.*

from 25% to 15% of a pack's price.¹⁴⁷ Although state and local tobacco revenues have risen noticeably from \$557 million in 1956¹⁴⁸ to \$4.4 billion in 1985,¹⁴⁹ the percentage increase is negligible when compared to a fifty-fold rise in the equivalent (twenty-seven year) prior period.¹⁵⁰ Further some states now feel constrained to forego tobacco tax hikes in light of the recent federal rise.¹⁵¹

When put together the failures of both federal and state taxes to maintain their earlier rapid rises have helped to make cigarettes a bargain. When compared to an increase in the median family income by a factor of six over the past thirty years,¹⁵² average cigarette prices have risen less than five-fold, from 22.7 cents per pack in 1954¹⁵³ to \$1.05 per pack in 1985.¹⁵⁴ This can be traced, in part, to a drop in the combined federal and state rates from 48.7% of a pack's price in 1954 (peaking at 51.4% in 1965)¹⁵⁵ to 30.8% in 1985.¹⁵⁶ While even an excise of thirty per cent is surely burdensome to a typical product's sales, cigarettes are not an ordinary item. Combined 1985 state and federal revenues of \$9 billion¹⁵⁷ fail to compensate society for losses suffered through cigarette consumption.

Significantly higher rates of excise must be considered.

XI. A NEW FEDERAL EXCISE

Because of bootlegging problems (i.e., the smuggling of cheap cigarettes from low-tax to high-tax states),¹⁵⁸ the source of any great increase in the excise tax must be the federal government.

147. DLJ, *supra* note 140, at 7.

148. 1956 TTC, *supra* note 134, at 3.

149. TOBACCO INSTITUTE, *supra* note 138, at 1.

150. 1956 TTC, *supra* note 134, at 32-3. The dramatic rise is partially the result of seven-fold increase in the number of states taxing tobacco.

151. Wall St. J., Sept. 24, 1985, § 2 at 1, col. 6.

152. From 1955 to 1984, median American family income rose from \$4,418 to \$26,433 per year. STATISTICAL ABSTRACT, *supra* note 144, at 450.

153. TOBACCO INSTITUTE, *supra* note 138, at 63.

154. *Id.* at 94. Although cigarettes have kept pace with the consumer price index (CPI) rise of roughly four-fold (for all items) over the 1955 to 1984 period, STATISTICAL ABSTRACT, *supra* note 144, at 477 pack price has failed to match the increase by factor of six in the cost of medical care over the same period. *Id.*

155. FACT BOOK, *supra* note 30 at 34.

156. TOBACCO INSTITUTE, *supra* note 138, at 94.

157. *Id.* at 1.

158. In 1985, the retail price of twenty cigarettes (excluding municipal taxes) varied from 83.7 cents in North Carolina to \$1.25 in Washington. *Id.* at vii.

With a large federal tax, bootlegging, based on discrepancies in local tax rates, becomes unprofitable. For example, suppose the federal excise were raised to \$2.50 per pack, North Carolina's excise remained at two cents per pack and, just hours away Florida's tax continued to be twenty-one cents.¹⁵⁹ There would then be little incentive to exploit the difference between North Carolina cigarettes selling at roughly \$3 per pack (including federal and state taxes) and Florida packs selling at perhaps \$3.20. The return of ten or fifteen cents on a three dollar investment is inadequate. This contrasts to the present sizeable percentage return of perhaps thirty cents on bootlegged eighty-five cent North Carolina or ninety cent Virginia cigarettes.¹⁶⁰

A. *Constitutionality*

Assuming that one could overcome the powerful tobacco lobby¹⁶¹ and muster sufficient Congressional support for a new federal excise of \$2.50 or more,¹⁶² the tobacco industry's next assault would probably be waged in the courts. While Congress's taxing power has, in the past fifty years, gained judicial support,¹⁶³ an excise of perhaps five or ten times the manufacturer's base price (perhaps fifty cents a pack),¹⁶⁴ might raise old questions about the distinction between a "tax" and a "penalty"¹⁶⁵

1. The Excise Power

The U.S. Constitution provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the

159. Wall St. J., Sept. 24, 1985, § 2 at 1, col. 6.

160. Similar exporting incentives exist between low-tax Virginia (2.5 cent state tax per pack) and nearby high-tax New Jersey (25 cents per pack). *Id.* See also TOBACCO INSTITUTE, *supra* note 138, at viii, 94.

When there is difference in the tax rates of neighboring states, the low tax state consistently shows higher per-capita cigarette consumption. G. DORON, *supra* note 132, at 62.

161. For an examination of tobacco companies' influence in the U.S. and abroad, see P TAYLOR, *THE SMOKE RING* (1984).

162. At 1984 levels of consumption (30 billion packs per year), OTA, *supra* note 2, at 6, tax of \$3 per pack would yield \$90 billion in federal revenue.

163. Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 464 (1976).

164. L.F. ROTHSCHILD, UNTERBERG, TOWBIN, INC., *INDUSTRY RESEARCH: WHERE TOBACCO FINDS ITS GROWTH* 5 (Feb. 19, 1987).

165. *Id.* at 464-65.

common Defense and general Welfare of the United States.¹⁶⁶

While the most obvious purpose of taxation is to raise revenue, it is impossible for Congress to levy a tax which does not have social and economic consequences.¹⁶⁷ A tax is a burden. Because Congress can choose the extent and objects—persons, goods, transactions—of that burden, the legislature unavoidably conducts social policy as it raises revenue.¹⁶⁸

In the past, this has led some, notably the subjects of “excessive” taxes, to argue that Congress has not simply taxed, but rather penalized, them. Because the power to tax can be wielded as “the power to destroy”¹⁶⁹ the courts, largely in the early half of this century have grappled with the difference between a constitutionally authorized “tax” and an unconstitutional “penalty” or attempt to use taxation to regulate in an area beyond Congress’s enumerated powers. Tobacco companies could well argue that a large increase in the excise tax is merely an attempt to penalize smokers and the entire cigarette industry

2. The Courts Interpretation

Upon examination of the successive judicial interpretations of the excise power such an industry argument would likely fail. Other more innocuous, industries have been the objects of harsh, yet constitutional, federal taxes.

In 1902, Congress, under pressure from a forceful dairy industry crippled the oleomargarine industry by imposing a prohibitive tax of ten cents per pound on the dairy substitute.¹⁷⁰ In 1904, the U.S. Supreme Court, in *McCray v. United States*,¹⁷¹ upheld the tax, explaining, “[O]n their face [the acts] levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of [federal] power”¹⁷² The Court’s doctrine of “objective constitutionality” was apparently bolstered by four considerations: a general presumption of constitutionality attends all statutes; the rate of lawful taxation rests

166. U.S. CONST., art. I, § 8, cl. 1.

167. Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 757 (1934).

168. *Id.*

169. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

170. Act of May 9, 1902, 32 Stat. 193.

171. *McCray v. United States*, 195 U.S. 27 59 (1904).

172. Cushman, *supra* note 167 at 775.

solely in the discretion of Congress; Congress has virtually unlimited discretion in choosing the objects of taxation; and finally it is not within the judiciary's power to probe Congressional motives in enacting legislation.¹⁷³

In the next several decades, however the Court imposed greater restraint upon Congress's taxing authority. Both the Child Labor Tax of 1919¹⁷⁴ and the Future Trading Act of 1921¹⁷⁵ were held unconstitutional, as penalties, by the Supreme Court on the same day.¹⁷⁶

In 1919, in an obvious effort to curtail the employment of minors, Congress enacted a tax of ten percent upon the net incomes of establishments employing children in violation of the Child Labor law. In 1921, Congress imposed a tax of twenty cents a bushel on grain futures contracts contrary to certain Congressional standards. While Congress may use a regulatory or even destructive tax to accomplish anything within its delegated powers, the Court found that the federal government had, in both instances, used a "tax" to overstep its regulatory bounds.¹⁷⁷ Further the Child Labor tax had been imposed irrespective of the number of children employed. Since the tax did not vary with the numbers of its supposed object, the Court viewed it not to be a true revenue-raising measure.¹⁷⁸

Notwithstanding the Congressional setbacks of the 1920's, heavy tax burdens alone have not since been deemed unconstitutional. In upholding a tax of \$200 a year on firearms dealers, the Court, in 1937 reaffirmed the principle that "Congress may select the subjects of taxation [including] the imposition of excise taxes upon the doing of business."¹⁷⁹ Rejecting petitioner's argument that the tax was merely a penalty intended to suppress traffic in firearms, the *Sonzinsky* Court declared, "Inquiry into the hidden motives which may move Congress to exercise a power

173. *Id.* at 776.

174. Act of Feb. 24, 1919, 40 Stat. 1057

175. Act of Aug. 24, 1921, 42 Stat. 187

176. *Cushman*, *supra* note 167 at 778, *citing*, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (invalidating the Child Labor Tax); *Hill v. Wallace*, 259 U.S. 44 (1922) (invalidating Future Trading Act).

177. *Id.*

178. *Id.*

179. *United States v. Sonzinsky*, 300 U.S. 506, 512 (1937).

constitutionally conferred upon it is beyond the competency of courts."¹⁸⁰

In later years, the Court has grown increasingly supportive of the federal tax power. In upholding a tax of \$100 per ounce (Sect. 2590 Int. Rev. Code) on certain sales of marijuana, the Court stressed, "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitively deters the activities taxed."¹⁸¹

Just as the legislature, in the 1930's, openly¹⁸² sought to deter the illicit marijuana trade, so too may Congress, in a 1980's excise increase, confess a desire to discourage cigarette smoking. (The difference between marijuana's illegality and smoking's acceptability is of no consequence.)¹⁸³

The federal tax power received a further boost from the 1953 *Kahriger* decision.¹⁸⁴ In upholding an occupational tax of \$50 a year on persons engaged in the business of accepting wagers, the Court declared,

It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare. The remedy for excessive taxation is in the hands of Congress, not the courts.¹⁸⁵

The *Kahriger* Court may well have provided the best summation of the tax/penalty distinction with the observation, "Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power."¹⁸⁶

Viewed against current and historical standards, a tax which might increase the price of cigarettes by a factor of two or even ten should receive judicial approval. Since the excise is simply an attempt to recoup societal losses emanating from a single, identifiable source, the tax has a "rational foundation."¹⁸⁷ It is beyond the courts' power to question any "collateral regulatory purpose

180. *Id.* at 513-4.

181. *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

182. S. REP. NO. 900, 75th Cong., 1st Sess. 3 (1937).

183. The *Sanchez* tax was not based on criminal conduct. *Sanchez*, 340 U.S. at 45.

184. *United States v. Kahriger*, 345 U.S. 22 (1953), *overruled on other grounds*, *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

185. *Kahriger*, 345 U.S. at 28.

186. *Id.* at 31. Thirty years later, this remains the accepted view. *Rockefeller v. United States*, 572 F. Supp. 9, 13 (E.D. Ark. 1982), *aff'd*, 718 F.2d 290 (8th Cir.), *cert. denied*, 466 U.S. 962 (1984).

187. *Sanchez*, 340 U.S. at 45.

and effect."¹⁸⁸ Further any attempt to argue that an increased excise would result in the demise of the tobacco industry is silenced by the Court's 1973 observation,

Even if [a] tax should destroy a business, it would not be made invalid upon that ground alone. Those who enter a business take that risk.¹⁸⁹

3. No Denial of Due Process

The Court has also rejected the argument that the Fifth (or Fourteenth) Amendment Due Process Clause imposes limitations on Congress's (or the States') taxing power.¹⁹⁰ Denying the claim that "a particular tax [may be] so unreasonably high and unduly burdensome as to deny due process," the same 1973 Court decision reaffirmed the now familiar principle that "a tax is [not] unconstitutional because it renders a business unprofitable."¹⁹¹

B. *Impact of a new federal excise tax increase*

Once the legislative and judicial hurdles have been passed, an excise increase would, by most measures,¹⁹² reduce cigarette consumption. Recent American experience illustrates the potential effect. In 1983, upon a 21% jump in retail prices, largely the result of increased federal (from eight to sixteen cents) and state taxes, cigarettes sales dropped by \$4 billion, or roughly 5% both the largest absolute and percentage fall on record.¹⁹³ Such a drop is even more impressive when examined against an increasing adult population and record-level industry advertising (\$2.6 billion in 1983).¹⁹⁴ It is estimated that a return to an eight cent federal rate would prompt one million youngsters between twelve and fifteen to begin or fail to quit smoking.¹⁹⁵

Such recent U.S. statistics are in agreement with prior American and foreign trends. In 1970, smoking dipped by 3.3% in fourteen states where taxes rose; in the same year cigarette sales

188. *Id.*

189. *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 374 (1973).

190. *Id.* at 373.

191. *Id.*

192. For example, despite successive tax increases in England in the 1960's, cigarette sales rose. P. Buchholz, *Legal Aspects of The Control of Tobacco*, 4 *LEGAL MED. Q.* 21 (1980).

193. *BACKGROUND*, *supra* note 111, at 7-11.

194. *Cigarette Tax To Drop If You Don't Act*, *ASH*, *supra* note 1, at 12.

195. *Id.*

jumped 2.6% in states with no excise increase.¹⁹⁶ Abroad, a 20% hike in the West German rate coincided with a decrease in sales.¹⁹⁷

These empirical results are also in accord with economists' estimates of cigarettes' price elasticity (i.e., the variation of sales with price fluctuations). Most studies have shown an elasticity of only 0.4 to 0.7% among the entire adult population (i.e., for every 1% increase in real prices, consumption drops by 4 to 7%).¹⁹⁸ More narrow studies show an elasticity of .89 for ages 20-25 and 1.4 for ages 12-17.¹⁹⁹ Since few people begin smoking after age twenty-one, a higher tax would more severely impact future sales than the present market.²⁰⁰

Using the economists' figures, a pack price of \$3, about a 200% increase over present prices, might reduce consumption overall by perhaps eighty percent. Although elasticity would probably decrease as prices rose (i.e., successively greater excises would be needed to completely eradicate the habit), sharply higher taxes could "blow away" the smoking industry.

XII. BUT WHAT ARE THE CHANCES?

While it is easy to plug various excise scenarios into elasticity equations, one must inevitably confront the difficulties of the political process. Happily the reality of increased cigarette taxes may not be too remote.

In 1985, one to two Congressional bills seeking to raise the federal tax were introduced each month.²⁰¹ The proposed excises ranged from twenty-four to forty cents per pack, and most bills sought to earmark at least some of the funds for Medicare.²⁰²

Raising the cigarette tax is even becoming the politically expedient choice for lawmakers. In a 1984 Time Magazine pre-election survey on steps desired to reduce the budget deficit, 77% of all respondents favored an increase in tobacco taxes—far higher

196. A. & B. BRODY, *supra* note 54, at 68. This simply serves as further evidence of the need for a tax increase at the federal, not state, level. See *supra* text accompanying notes 158-160.

197. Buchholz, *supra* note 192, at 21.

198. DLJ *supra* note 140, at 8.

199. *Id.*

200. *Id.*

201. *Id.* at 7

202. *Id.*

than the number for defense cuts or greater business taxes.²⁰³ In 1985, when the federal tax was slated to drop from sixteen to eight cents, a Gallup Poll revealed that seventy-five percent of taxpayers opposed the decrease.²⁰⁴ Although the tobacco lobby retains clout, legislators may eventually be forced to respond to their constituencies.

Even if a steep excise rise reduced sales to such a degree as to decrease overall tobacco tax revenues, legislators need not worry. The increased excise merely replenishes funds depleted by tobacco's consumption. Such costs fall with each unsold pack of cigarettes.

Since the essence of this heavy excise is revenue-compensating, not revenue-raising, the government, and society have finally achieved a no-lose situation. If cigarette sales remain strong, society receives its deserved compensation; if sales should tumble, the revenue loss is balanced by an improved quality of life for both smokers and nonsmokers. As this Note has attempted to show that quality is quantifiable.

Les Nelkin

203. *Voters Say Raise Cigarette Taxes*, ASH SMOKING AND HEALTH REVIEW (May 1984).

204. ASH, *supra* note 1, at 12, discussing Gallup Poll released by Heart Savers Association.

