

## INTRODUCTION

### THE PRICE OF A SOUL: AT WHAT COST CAN THE TOBACCO ISSUE BE RESOLVED?

*"It is not the sale of my soul that troubles me: I have sold it too often to care about that. . . . I have sold it for an income. I have sold it to escape being imprisoned for refusing to pay taxes for hangmen's ropes and unjust wars and things that I abhor. What is all human conduct but the daily and hourly sale of our souls for trifles? What I am now selling it for is neither money nor position nor comfort, but for reality and for power."<sup>1</sup>*

The University of Maryland School of Law hosted a symposium on April 24, 1998, the topic of which was "Up in Smoke: Coming to Terms with the Legacy of Tobacco." The forum provided an opportunity for the airing of polar views regarding the means and ramifications of the control of use of tobacco products. The breadth of "discussion reinforced the fact that a remedy for tobacco related illnesses is not as close as was hoped in [the] June of 1997 [settlement crafted by the States' Attorneys General]. . . . Political ambition, financial interest, and self-protection have controlled much of the discussion related to settlement with the tobacco industry. At the end of the day it was clear that the economics of this battle may result in claiming many more victims beyond those afflicted with smoking related diseases."<sup>2</sup> The civility of the discussion encouraged a more reasoned consideration of both the impacts of the use and prohibition of tobacco. The articles in this volume expand upon the arguments presented at the symposium and warrant a full reading for the benefit of a more educated discussion of the complex issue of tobacco regulation.

Tobacco, that truly American product of farms stretching from New England through South America, is as entrenched in our system of commodities as our multitude of moralities. Not by happenstance is it coupled with alcohol and firearms in its regulation by government

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1. BERNARD SHAW, *MAJOR BARBARA* 149 (Penguin Books 1982) (1957).

2. Maureen O'Doherty, *The Ward, Kershaw & Minton Environmental Symposium: "Up in Smoke: Coming to Terms with the Legacy of Tobacco,"* ENV'T'L LAW AT MARYLAND (University of Maryland School of Law), Winter-Spring 1998 No. 7, at 6 (1998).

and condemnation by religions.<sup>3</sup> In our somewhat deluded contemporary reassertion that we have “certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”<sup>4</sup> we have failed to identify whose interpretation of those rights best suits our contemporary needs. In 1776 fifty-six men had the courage to commit high treason and “mutually pledge to each other [their] Lives, . . . Fortunes . . . and . . . sacred Honor”<sup>5</sup> by penning their signatures to the Declaration of Independence. These men envisioned a “new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>6</sup> Two hundred and twenty-two years later, this “new Government” cannot seem to grapple with the complex, yet less than treasonous issues related to tobacco. “Safety and Happiness” are not so clearly defined in a society whose safety and happiness depends on the health of its economy.

Tobacco is native to the Americas and is a member of the nightshade family (genus *Nicotiana*).<sup>7</sup> In a recent exhibit entitled, “DRY DRUNK: The Culture of Tobacco in 17th and 18th Century Europe” at the New York Public Library, the art clarified the moral association of tobacco with alcohol.

By the early 17th century, the curious practice of inhaling its smoke had become a popular leisure activity. It was not until the latter part of that century, however, that the verb “to smoke” came into use; before then, one “drank” tobacco smoke, generally through a pipe. This activity was described as titillating to the senses in a way analogous to the imbibing of alcohol, and it shared many associations with drunkenness. A first-time tobacco “drinker” had to grow accustomed to the taste, as with alcohol, and the practice tended to be zealously abused like, and often in conjunction with, its liquid counterpart. Image after image of drunken stumbling, vomiting, undisciplined behavior, and dazed reverie as a result of drinking and smoking attest to this connection.<sup>8</sup>

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3. See *Bureau of Alcohol, Tobacco & Firearms Home Page* (visited Oct. 20, 1998) <<http://www.atf.treas.gov/about/hist/hist.htm>>.

4. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5. *Id.* at para. 32.

6. *Id.* at para. 2.

7. See THE AMERICAN HERITAGE DICTIONARY 1350 (1981).

8. Elizabeth Wyckoff, DRY DRUNK: The Culture of Tobacco in 17th and 18th Century Europe, Introduction. Exhibit at New York Public Library (Sept. 20, 1997- Jan. 3, 1998) (unpublished manuscript, on file with author).

As with its counterparts, alcohol and firearms, tobacco use was viewed differently depending on who was using it. “Every reasonable man (and woman) is a potential scoundrel and a potential good citizen. What a man is depends on his character; but what he does, and what we think of what he does, depends on his circumstances.”<sup>9</sup>

In spite of the harsh words of James I<sup>10</sup> a century earlier, the upper classes of 18th-century England indulged themselves heartily in tobacco, reveling in the thick, luscious clouds of smoke. The gentleman’s club was the locus par excellence for manly conversation and relaxation, aided by consumption of a good glass of beer or punch and a fine, long, slow-burning pipeful of tobacco. This gentlemanly practice was also on the receiving end of much languid smoky satire, making it that much more memorable.<sup>11</sup>

In contrast, those not of the privileged class were characterized more stereotypically as vice-ridden louts.

Tobacco, with its mind-dulling narcotic capacities, was ideally suited to such representations of the peasant, in which his/her character ranges from naive, earthy simpleton to diligent worker to aggressive brute. Not unlike the breakfast beer soup that predated coffee as a morning drink, tobacco was, in a sense, a way of keeping the lower classes in their place — a class in a perpetual state of drunkenness poses little threat. Along the same lines, the peasant represented a means to criticize tobacco use as a dirty and unsophisticated custom, but at the same time to justify further commerce in tobacco and its related products.<sup>12</sup>

This representation is current in many of the arguments heard in both public and private fora — it is the “lower” class which exemplifies the depravity in the use of alcohol, tobacco, and firearms. In the basest of discussions, however, the wink and nod suggest that today, as in the 17th and 18th centuries, these are cheap tools to keep these classes in their place.

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9. BERNARD SHAW, *supra* note 1, at 35.

10. CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS* 247 (1998). “King James I issues ‘A Counterblaste to Tobacco,’ calling [drinking tobacco] ‘a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs.’ He increases the import tax on tobacco by 4,000 percent.” *Id.*

11. Wyckoff, *supra* note 8, at *The Culture of Smoke: High Life*.

12. *Id.* at *The Culture of Smoke: Low Life*.

In the colonies, once tobacco was deemed a pleasure and source of idleness, the Puritans lathered up their moral outrage and imposed regulation.<sup>13</sup> In “The First General Letter of April 17, 1629” (hereinafter, “First Letter”) the New England company prohibited the Massachusetts Colony settlers from planting tobacco except in small quantities for medicinal use.<sup>14</sup> The Puritans, steadfastly fond of tobacco, ignored the laws which followed the First Letter.<sup>15</sup> The authorities repealed these laws which were primarily based on moral arguments, only to reinstate new ones in 1638, one of which was designed for the prevention of fires.<sup>16</sup> As with the generations before and after them, the “Puritans never lacked generosity to the influential and powerful.”<sup>17</sup>

Indirectly, in this law they gave the masters the full privilege of smoking as much as they pleased. But if servants or workmen smoked in or anywhere near a house, barn, or other building, or in the fields or forests, the master was empowered to deduct from their wages the amount of the prescribed fine and turn it into the town treasury.<sup>18</sup>

Plymouth Colony followed in kind with more specific laws which restricted who and where one could smoke and finally, the general importation of tobacco into the Colony.<sup>19</sup>

Connecticut took advantage of the fertile lands along the Connecticut River and, far from restricting the use of tobacco, encouraged the production of local product by instituting what amounted to the first protective tariff in the New World.<sup>20</sup> The tariff was used to control the import of Virginia tobacco.<sup>21</sup> By 1647, “[t]he ministers and church elders decided that it was time to do some salutary regulating. . . . No person under twenty years of age, nor any other person unaccustomed to its use was to use any tobacco unless he had a physician’s certificate and a license from the court.”<sup>22</sup> At some

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13. See GUSTAVUS MYERS, *YE OLDEN BLUE LAWS* 10-11 (The Century Company 1921).

14. *See id.*

15. *See id.* at 12.

16. *See id.* at 12-13.

17. *Id.* at 13-14.

18. *Id.*

19. *See id.* at 17.

20. *See id.* at 19-20.

21. *See id.*

22. *Id.*

period between 1647 and 1987, Connecticut lowered the age to sixteen<sup>23</sup> and raised it in 1987 to eighteen.<sup>24</sup>

Following its success in the passage of Liquor Prohibition<sup>25</sup> in 1919, the National Women's Christian Temperance Union turned its attention to the abolition of the use of tobacco.<sup>26</sup> The propaganda of the day, while humorously quaint in its pronouncement, was perhaps more prescient than even its proponents could understand.

Tobacco not only robs life, but it hinders advancement. Nicotine is not only an enemy to life, scholarship and attainment, but it is hostile to nearly every avenue of thought. Tobacco robs families of food and other necessities. The cigarette fiend will steal money from his mother's purse, rob his father's till or pawn books from the family library in order to secure cigarettes. The tobacco sot will buy tobacco to feed his degraded appetite while the bread bin is depleted, the sugar bowl empty, the milk supply inadequate, the cookie jar desolate and the children suffer for sweets.<sup>27</sup>

Repressive morality in the guise of laws demonstrates that restrictions of what one may deem to be part of his/her unalienable rights serve only to entice the individual to find illicit means to Happiness. What the National Women's Christian Temperance Union failed to achieve through constitutional ban, many states and municipalities have attempted to effect through statutory mandate and ordinance primarily directed to protecting youth.<sup>28</sup>

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23. See 1987 Conn. Acts 87-374, § 2 (Reg. Sess.).

24. See *id.*

25. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

26. MYERS, *supra* note 13, at 24-25.

27. *Id.* at 26.

28. See, e.g., BALTIMORE, MD. ORDINANCES, art. 30, ch. 10, sec. 10.0-1 (1995 Supp.) (The Baltimore billboard ordinance was the first of its kind to survive a constitutional speech challenge. The Chicago Ordinance, which was rendered invalid, used the language from the Preamble as a foundation, although it abbreviated references to legal and medical authorities.); KY. REV. STAT. ANN. § 438.047 (Michie 1996) (billboard ordinance within 500 feet of schools); 1997 MINN. LAWS 121.175 (a)(1) (prohibition of advertising on school buses); TEX. HEALTH & SAFETY CODE ANN. § 161.122 (West 1998); VT. STAT. ANN. tit. 18 §§ 1001-1008 (1991) (youth access to tobacco products). BRANFORD, CT. BRANFORD HIGH SCHOOL SMOKING POLICY (1998). "Students possessing tobacco or other smoking paraphernalia in school will receive a Saturday detention. Students observed smoking or knowingly in the presence of someone smoking will receive the following consequences: 1st offense — Saturday detention and a required parent conference; 2nd offense — Saturday detention, a required parent conference and a school fine of \$25.00; 3rd offense — A school suspension for 3-5 days, a required parent conference and a school fine of \$50.00." *But see*, e.g., CHICAGO, ILL. ORDINANCES, § 5.17 (1997) (invalidated because of pre-emption by the

Following years of disappointing results in product liability and personal injury cases against big tobacco,<sup>29</sup> States' Attorneys General followed the drumbeat of Mississippi Attorney General Michael Lewis by filing suits for recovery of Medicaid expenditures related to illnesses caused by smoking.<sup>30</sup> Provoked by the States' Medicaid suits and the release of incriminating documents by whistleblower, Jeffrey Wigand from Brown & Williamson<sup>31</sup> and a paralegal, Merrell Williams from the law firm of Wyatt, Tarrant & Combs which represented the interests of Brown & Williamson,<sup>32</sup> the CEOs of Big Tobacco determined that it was time to enter into settlement discussions with the Attorneys General. Following a blown opportunity for settlement in 1996,<sup>33</sup> the central players revived effort towards settlement in 1997. Included in the group of Attorneys General and tobacco companies were the attorneys representing a class of individuals with tobacco related injuries, known as the "Castano Group."<sup>34</sup>

Months of heated discussions among the players ended on June 20, 1997 with a document known as "The Settlement."<sup>35</sup> An April 1997 ruling in a district court in North Carolina determined that Congress had intended that the FDA had the authority to regulate tobacco.<sup>36</sup> This ruling was a blow to the industry prior to settlement and accounts for provision of the broad scope of regulatory authority afforded the FDA. At this writing, the Fourth Circuit has reversed the decision in *Coyne Beahm, Inc.* finding that all of the FDA's regulation

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Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341). See *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 12 F.Supp.2d 844 (N.D.Ill. 1998), *appealed* (7th Cir. Aug. 28, 1998); SEYMOUR, CT, ORDINANCES, ch. 11, § 11-23 (invalidated by referendum, Aug. 19, 1998).

29. See, e.g., *Pritchard v. Liggett & Myers*, 134 F.Supp. 829 (1955) (first products liability suit against tobacco industry but withdrawn before judgment in 1966); *Green v. American Tobacco Co.*, 304 F.2d 70 (1962). (First successful product liability litigation against tobacco industry finding cigarettes caused cancer that lead to death. The jury did not award money damages because they found that American Tobacco lacked knowledge that cigarette smoking caused cancer.)

30. See CARRICK, *supra* note 10, at 265-317 (giving a detailed description of the 1997 Settlement Agreement between the States' Attorneys General and the Tobacco Industry).

31. See *id.* at 111-14.

32. See *id.* at 37-39.

33. See *id.* at 71-72.

34. See *id.* at 73-74.

35. See *id.* at 225-34.

36. *Coyne Beahm, Inc. v. Food and Drug Admin.*, 966 F.Supp. 1374 (M.D.N.C. 1997), *rev'd Brown & Williamson Tobacco Corp. v. FDA*, 1998 WL 473320 (4th Cir. 1998). The FDA expected to request rehearing, *en banc* — will revise after request.

of tobacco products were invalid.<sup>37</sup> The Settlement had to be approved by Congress which produced no palatable legislation.<sup>38</sup> With the decision in *Brown & Williamson*, Congress is now faced with the double responsibility of considering legislation which confers authority on the FDA to regulate tobacco and then draft a reasonable law which addresses the health and economic concerns of all of those involved.<sup>39</sup>

The Fourth Circuit decision highlights the crux of the problem related to the regulation of tobacco, even if Congress confers on the FDA the authority to do so. The evidence from both an “independent” scientific community and through the tobacco industry’s own studies presents the fact that smoking is both addictive and harmful to one’s health.<sup>40</sup> How does an agency argue that a substance is a hazard and at the same time merely restrict the public’s access to that hazard. Can the government micromanage the public’s exposure by limiting numbers of cigarettes as if they are analyzing parts per billion? Is an agency willing to commit economic treason by prohibiting the use of all tobacco products?

The American Lung Association and American Cancer Society purport to want a total ban on tobacco products for the protection of health.<sup>41</sup> Both groups, however, have a vested interest in any Congressional legislation related to tobacco because certain funds will be earmarked for research and/or education. The irony is that these public interest groups, along with all other potential beneficiaries of the tobacco “fine” windfall are fully dependent on Americans continuing to smoke in order to fund the billions of dollars expected from the tobacco industry. In the long haul, the government will necessarily revert to restrictions similar to those of George III during the colonial period by making sure its citizens follow the path of the current “greater good.” “Although framed in terms of public health, the anti-tobacco movement, by its nature, is a political movement. It ulti-

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37. *Brown & Williamson Tobacco Corp. v. Food and Drug Admin.*, 1998 WL 473320 (4th Cir. 1998).

38. See Sandra Torry, *Cancer Society Ads Hit Back at Tobacco Industry Media Campaign*, THE WASH. POST, Sept. 17, 1998, at A7.

39. See generally, *Brown & Williamson Tobacco Corp. v. Food and Drug Admin.*, 1998 WL 473320 (4<sup>th</sup> Cir. 1998).

40. See Richard L. Cupp, Jr., *A Morality Play’s Third Act: Revisiting Addiction, Fraud and Consumer Choice in “Third Wave” Tobacco Litigation*, 46 KAN. L. REV. 465, 482-84 (1998).

41. See *Tobacco Settlement, 1998: Congressional Testimony Before the Comm. on Judiciary of the U.S. Senate*, 105<sup>th</sup> Cong. (1998) (testimony of John R. Garrison, CEO and Managing Director of the Am. Lung Assoc.).

mately requires some degree of government intervention, for no other method can effectively limit, against their will, how much people smoke."<sup>42</sup>

Four articles which are the products of the 1998 University of Maryland School of Law's Ward, Kershaw and Minton Symposium address the June 1997 Settlement. Adam S. Levy's article, *Announced to Trowned: A Journalist's Comments on the Demise of the Tobacco Settlement*, capsulizes the history and characters which shaped the historic settlement between the tobacco industry and the State Attorneys General. He argues that politics and the failure to find a champion in Congress or the White House were the two crucial factors which destroyed the ratification of the settlement.

Donald W. Garner's article, *Tobacco Wars and the New Minority*, first examines the inability of the government to settle with or regulate the tobacco industry. After examining the special interests that led to the downfall of these attempts, the analysis turns to the fairness of taxing smokers to pay for programs that have little to do with public health or the social costs that are engendered by smoking. Finally, a solution is proposed which would punish the tobacco companies for luring teens to smoke, but would not punish adult smokers.

David A. Hyman's article, *Tobacco Litigation's Third Wave: Has Justice Gone Up In Smoke?*, focuses on two distinct issues: the extent to which the State Medicaid programs actually suffered are attributable to tobacco use, and the pediatricizing of tobacco policy. He points out that the proper measure of damages is the incremental medical cost attributable to smoking and not the total medical costs incurred by smokers. He also explores the implications of treating tobacco control as a campaign to save the children when only 2% of smokers are teenagers—meaning that a tax on tobacco to decrease underage smoking misses its intended target 98% of the time.

Finally, Robert A. Levy's article, *Tobacco Wars: Will the Rule of Law Survive?*, criticizes the legal and equitable theories underlying the Medicaid recovery suits. Levy argues that states suing tobacco companies have abandoned traditional tort law, retroactively, and disregarded time-honored principles of individual liberty and personal responsibility. As a result, Levy contends, the industry was effectively coerced into joining the proposed national settlement, even though

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42. JAMES T. BENNET & THOMAS J. DiLORENZO, *CANCER SCAM: DIVERSION OF FEDERAL CANCER FUNDS TO POLITICS* 36 (Transaction Publishers 1998).

both it and the McCain bill, which replaced it, are destructive as a matter of public policy and unconstitutional as a matter of law. Levy examines the implications of tobacco legislation for commercial speech, due process, federalism, the non-delegation doctrine, and litigants' right of access to the courts. He also addresses the government's regulatory authority under the Commerce Clause and the Taxing and Spending Clause.

Following the symposium articles are two student notes by Erin Myers and Kelly Reeves. Ms. Myers' article, *The Manipulation of Public Opinion by the Tobacco Industry: Past, Present, and Future*, examines the fraudulent tactics utilized by the industry in swaying public opinion from the 1950s through today. The author explains that as evidence of tobacco industry fraud became public knowledge, contempt for the industry was elevated to an all-time high. The result of this shift in public opinion is an increase in the likelihood of the industry's downfall.

Ms. Reeves' article, *Medicaid Recipients Denied Coverage for Smoking Cessation Pharmacotherapy* examines the federal law that permits States to avoid providing Medicaid coverage for smoking cessation drugs, illustrates the ultimate cost savings to the Medicaid program and Medicaid recipients of covering smoking cessation drugs, and proposes changes to federal law. The issue concludes with extracts from the McCain Bill, the June 20, 1997, Proposed Settlement, and the Tobacco Settlement of November 1998.

The articles provide a multi-view history of tobacco litigation, negotiation and legislation, most of which have been dismal failures. Each author challenges Congress, the States and Health Care Professionals to re-examine the foundations laid by the June 1997 Settlement and the McCain bill and answer the difficult questions which are removed from knee-jerk response.

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