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Smoking, progressive liberalism, and the law

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SMOKING, PROGRESSIVE LIBERALISM, AND THE LAW

ABSTRACT: *In his dissection of the 1998 tobacco settlements, W. Kip Viscusi provides a window on how the ostensibly liberal public philosophy behind the modern American regulatory state betrays its foundational commitments. Animated by a moralizing concern with preventing harm to self, and a leftist antagonism towards corporate capitalism, "progressive liberalism" at first foundered in its war against the tobacco industry in the face of traditional liberal counterarguments about individual autonomy, knowledge of risk, and choice. Only when progressive liberals translated their paternalist impulses into science-centered arguments about ignorance and addiction, which involve barriers to autonomous choice and harm to others, did they succeed in turning the legal and regulatory tide against smoking. This dynamic raises questions about the future of individual autonomy in a science-centered, progressive-liberal modern polity.*

"The habit of smoking is disgusting to sight, repulsive to smell, dangerous to the brain, noxious to the lung, spreading its fumes around the smoker as foul as those that come from Hell." So pronounced James I in 1604. Since then, numerous ambitious and successful political leaders—including Louis XIV, Napoleon, and Adolph Hitler—have concluded

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that smoking sapped the strength of a rising people, and crusaded fervently against it.

In 1898, the Supreme Court of Tennessee, in upholding the constitutionality of a law banning the sale of cigarettes in the state, confidently asserted that cigarettes are "wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. . . . Beyond question, their every tendency is toward the impairment of physical health and mental vigor." That court added that the character of cigarettes "is so well and so generally known . . . that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become generally known" (*Austin* v. *State* 1898). Likewise, long before the current campaign against "Big Tobacco," many Americans knowingly referred to cigarettes as "coffin nails" and "cancer sticks" (Klein 1993, 11–12, 63; Goodin 1989, 8, 20–21). A 1954 Gallup Poll showed that an astonishing 90 percent of Americans were aware of a scientific study by the American Cancer Society demonstrating a link between cigarette smoking and lung cancer. In 1957, the U.S. surgeon general testified before Congress that public awareness of the risks of smoking was high. In 1966, a top official of the American Medical Association asserted in the same forum that requiring warning labels on cigarettes was not likely to have any great effect, as "the health hazards of excessive smoking have been well-publicized for more than ten years and are common knowledge" (Viscusi 2002, 140).

To be sure, as W. Kip Viscusi reports in *Smoke-Filled Rooms* (University of Chicago Press, 2002), a book on the 1998 settlements reached between the major tobacco companies and the states attorneys general, our knowledge of smoking's harms has advanced over the years. But what leaps out from Viscusi's study of the risks, knowledge of the risks, and regulatory policy concerning cigarette smoking—notwithstanding the Matterhorn of evasions of the tobacco companies (which Viscusi chooses not to discuss; see Kluger 1996 and Goodin 1989, 16–20)—is how little dispute there has been over the basic scientific facts concerning the health effects of smoking. The story here, for the most part, is not one of "junk science" fooling people or of a "battle of the experts" duking it out in court (Huber 1991; Foster and Huber 1997, 17). It is rather the story of people continuing to smoke, known dangers be damned (see Feinberg [1971] 1983; Daniels 1985, 156–58). *Smoke-Filled Rooms* provides an illuminating window on how

paternalistically inclined political activists and policy makers conscripted the physical and social sciences to construct an alternative plot-line to the tobacco story—one focused on individual ignorance, addiction, and social harm—with the aim of suppressing personal liberty in favor of professionally administered public health.

Thus, so far as cigarettes are concerned, there are really two stories seeking public legitimation. The plot, tone, and, ultimately, the moral of each story is deeply rooted in the storyteller's political ethos. Viscusi's ethos—which I will call "traditional liberalism"—is liberal and individualist. He believes that the proper role of government is to provide self-directing, independent people with the best information about the risks of cigarette smoking so that they can, in turn, make informed choices and live as they see fit. In contrast, the ethos of the modern regulatory state, which is supported by cadres of public-health advocates purporting to speak for a broader "public interest," stems from a new form of liberalism (which some may choose not to call liberalism at all)[1] adulterated by a curious (but, by now, familiar) admixture of old-time moralism, leftist anti-corporatism, and a fixation on administering what it conceives to be autonomy's preconditions. Like Viscusi's, this ethos places an ostensibly high value on the informed choices of individuals. But, unlike Viscusi, progressive liberals are driven to identify certain choices as irrational and perverse. Clearly disturbed by the prospect of individuals doing themselves harm by smoking, and animated by a palpable moralism, this progressive liberalism alights on the processes by which consumer capitalism has allegedly destroyed the conditions of autonomy so as to argue for the state's intervention. Along the way, it characteristically goes to enormous lengths to translate its concern with harm to self into an argument about harm to others.

At one time, the irrationalities and perversities involved in activities such as smoking would have been addressed in the language of religion and morals. It is one of the peculiarities of paternalism in the modern liberal state that its charges of perversion are described in rationalist, consequentialist terms, with scientific evidence adduced for its conclusions. Viscusi's book is a case study in the strange and willful ways the progressive-liberal regime engages science and anti-capitalism to shrink the sphere of individual autonomy while eschewing the moral arguments that had long served as the touchstones of paternalism.

Science has been drafted in the service of the paternalist itch in two distinct areas of the tobacco wars. The first involves people's knowledge

of the dangers of smoking. If people choose wrongly, modern liberalism assumes that they must be doing so because they are either misinformed or enslaved (that is, addicted). Seeing that others continue to make the bad choices they avoid making, progressive liberals are characteristically preoccupied with the promise of education to save the misguided (as are all liberals, including Viscusi; see Douglas 1985, 31–32). Given the extent and availability of data on smoking's ill effects, progressives conclude that if people continue to smoke, there must have been some contamination of their education—with the agent of contamination being, predictably enough, corporate capitalism, acting through cover-ups, propaganda, conspiracies, and lies. It is hardly mere happenstance that the only successful wave of the crusade against smoking is the most recent one, which has focused relentlessly on the misinformation campaigns and informational stonewalling of the tobacco companies (see, e.g., Mann 1999; www.thetruth.com; Haltom and McCann 2004, ch. 7).

Progressives' second willful use of science is aimed at demonstrating the ostensible damage done by smoking. For most of the second half of the twentieth century, smokers' lawsuits against tobacco companies foundered on the traditional liberal grounds that individuals knew and assumed the risks of their actions (Jacobson and Warner 1999; Haltom and McCann 2004, ch. 7). One of the central principles of liberalism, identified at least as far back as the 1850s by John Stuart Mill, is that individuals should be free to make choices about their lives that affect only them, "directly, and in the first instance," without interference from the state. This is the case even if others "think our conduct foolish, perverse, or wrong," and even if our conduct runs counter to what others judge to be our "physical or moral good."

At the same time, however, Mill's "harm principle" also stipulates that it is one of the state's proper roles to regulate actions that, in their consequences, spill beyond individual agents and inflict harm on others (Mill [1859] 1975, 15, 17, 18). One of the most notable aspects of the current wave of the anti-tobacco campaign—including the recent tobacco settlements—is that it has shifted what lawyers call "the theory of the case" from the first part of Mill's harm principle (which had torpedoed one lawsuit against the tobacco industry after another) to the second. The states now argue that the injuries done by smoking to smokers cause identifiable and calculable injuries to others, including society as a whole (such as through increased Medicaid costs). In this way, the second half of Mill's harm principle swallows the first.

Knowledge of Risk

Despite centuries during which the ill effects of smoking on smokers' health have been widely understood, first due to common experience and later to meticulous, well-publicized scientific studies, it is an article of faith for many progressive liberals that the only reason people continue to smoke is that they are either misinformed or uneducated about the dangers of smoking; or that, once informed of these dangers, they are helplessly enslaved by an "addiction," and have lost all power to act on their knowledge as autonomous, self-determining individuals.

Why this faith? At a deep level, liberalism has long been ambivalent about people harming themselves, or risking harm for what privileged analysts have decided is no good (i.e., no rational) reason.

The modern science of government begins with the will to safety and bodily health. In contrast to the political science of the ancients, such as Plato and Aristotle, who launched their quest for the best political life by inquiring into the nature of the good, such modern writers as Machiavelli, Hobbes, and Locke began empirically, asking simply *what is* (Strauss 1953). For Hobbes, the first fact, from which all else would follow, was the corporeal equality of man: no man was so much weaker than any other that he could not kill him in his sleep, with the aim of making himself master of other men's "persons, wives, children, and cattell." The purpose of the social contract was to bring the "warre . . . of every man against every man" to a close, halting the killing, or the continual threat of it. The passage out of the state of war made it possible for the first time for individuals to pursue in relative safety their individual and collective ends (Hobbes [1651] 1968, ch. 13). Locke's more benign version of the same process (he characterizes the position of man before government as a "state of nature" rather than a state of war and, unlike Hobbes, evinces a foundational liberal concern for individual rights) similarly begins with the imperative of physical security and safety (Locke [1690] 1979, ch. 2). In the subsequent development and refinement of liberal thought, it was usually held that matters of the good were to be left largely to individuals to define and pursue according to their own lights. This was the "low but solid ground" upon which the modern liberal outlook was built (Strauss 1953, 246–47).

As liberalism is a philosophy of safety and self-perservation, risk-taking has long had an ambiguous place in liberal thought (see, e.g.,

Nozick 1974, 73–78). Traditional forms of liberal theory, devoted to replacing anarchy with government and to justifying the rule of law, were risk-averse only in their fundamentals. Some influential modern variants, in a somewhat natural extension of these fundamentals, have broadened the scope of liberalism's concern for safety into a risk-averse public philosophy preoccupied with the formulation of an aggressively interventionist state that works to guarantee what progressive theorists have agreed are the preconditions of autonomy—a process helped immeasurably by the leftist conviction that many ills, including self-inflicted ones, can be traced in one way or another to capitalism and its agents.

Modern progressive liberals stand manifestly ill at ease in the company of many human types—like the entrepreneurial businessman and others—who promote, celebrate, engage in, reward, and profit from daring and passionate risk-courting (or gambling) and bold and creative individualism. Clearly, important forms of liberalism (particularly liberal capitalism) and other paradigms with deep roots in the West consider such risk-taking to be socially productive, heroic, or romantically attractive (e.g., De Quincy 1985; Douglas 1985, 6, 43–44; Friedman 1962; Homer 1938; Klein 1993; Schumpeter 1976, 82–85). But progressive liberals tend to find the choice to smoke, its array of sensual and social pleasures, and its deliberate courting of death to be perverse, incomprehensible, and alien (Klein 1993; Douglas 1985, 75). "The proverbial visitor from a distant planet," anti-tobacco crusader Richard Kluger tellingly opines, "would find no earthling custom more pointless or puzzling than the swallowing of tobacco smoke followed by its billowy emission and accompanying odor" (Kluger 1996, xiii).

Smokers in some respects do hail from a different planet than progressive liberals. Smokers consider themselves above-average risk takers, and the evidence bears them out. Male smokers are 16 percent less likely to use their seatbelts than male non-smokers. The gap for women is 13 percent (Viscusi 2002, 169–70; Viscusi and Hersch 1990; Viscusi and Hersch 1998; Viscusi and Hersch 2001). Smokers are significantly less likely to monitor their blood pressure and floss their teeth than non-smokers. They are, moreover, more likely to take risks and suffer accidents at work and home. These data on the disposition of smokers toward risk in general makes it possible, if not likely, that, far from being a canard concocted by the tobacco companies, as is commonly alleged (see e.g. Haltom and McCann 2004, ch. 7), it may simply be a fact that smokers know the risks of smoking and choose to smoke nonetheless.

But do they in fact understand the gravity of this particular form of risk-taking? Influential studies of the perceived risks of smoking have taken as their yardstick the differences in risks perceived by smokers and non-smokers. These studies have found that smokers see smoking as less risky than non-smokers do. This result has then been interpreted—without any comparison to the *actual risks* of smoking as determined by epidemiological studies—as evidence that smokers have been deprived of crucial information concerning the dangers of smoking.

Viscusi's yardstick for answering the question is different. He examines the accuracy of people's risk perception—that is, he compares their perception of the risk with the actual risk. He finds that both smokers and non-smokers overestimate the life-expectancy loss and lung cancer risk caused by smoking. The risk perceptions of smokers, however, are consistently more accurate. The perceived health risks of secondhand smoke to non-smokers, who see this danger as about half as great as the perceived risks to smokers themselves, are "off the charts, by any reasonable standard," when compared to the best measurements of the actual risks. "I found," Viscusi reports drolly, "that if people understood the lung cancer risk of smoking accurately as opposed to overestimating it, the societal smoking rate would increase by 6.5–7.5 percent" (Viscusi 2002, 120, 154–64).

To the outside observer, what is most striking in the juxtaposition of Viscusi's studies with others he presents in his book is how the latter group of studies smuggles progressive liberalism into its ostensibly value-neutral science (see also Jasanoff 1990, 3–4, 6). Strictly speaking, for example, there is nothing inaccurate in comparing the risk assessments of smokers and non-smokers: it is "good science" in a narrow sense, at least. But the decision that this comparison is the appropriate one, and the assumption that its results are telling, make sense only if one is already wedded to the view that if only people knew the true risk of smoking, they would choose not to smoke at all. This unwarranted view may be an artifact of the highly inaccurate risk calculations of those harboring a paternalist impulse, who may systematically exaggerate the risks of smoking. If so, those who design and cite the studies may, in fact, be consistently less rational than the smokers themselves. Perfectly accurate scientific data can be meaningless or misleading if not read in the context of other relevant data. The decision to isolate certain findings, to have them "speak for themselves," is an ideological decision, whether consciously taken or not.

Many of the most illuminating (and humorous) moments in Viscusi's

analysis arise from his willingness to place survey data adduced by reform-minded, paternalistically inclined scientists on stage alongside research in other, seemingly unrelated but revealing areas. A case in point is the data Viscusi provides on the general public's belief (as assessed by the Gallup Poll) that "smoking is one of the causes of lung cancer." The proportion believing this was already over 50 percent by the late 1940s, over 60 percent by 1970, over 80 percent by 1980, and around 98 percent by 1999. Viscusi reports that, by comparison, in 1999, only 55 percent could identify Jerry Seinfeld as the star of the hit sitcom "Seinfeld," and only 79 percent were aware that the earth revolves around the sun. "Viewed in these terms," Viscusi (2000, 143) writes, "the smoking awareness figures are quite impressive." To the extent that the general public knows anything, it certainly knows the risks of smoking.

But perhaps certain especially vulnerable subsets of the population remain in the dark. What about the children? Viscusi shows that, when it comes to risk perceptions concerning smoking, young people, far from being unaware that smoking is dangerous, are actually more closely attuned to the risks of smoking than those in any other age group. Surveys taken between 1991 and 2000 measuring the relative risk assessments of young people showed that between 69 and 73 percent of twelfth-graders judged smoking a pack or more of cigarettes a day as a "great risk" to their health. Only 48 percent viewed smoking crack cocaine as posing as great a risk or a greater one (Viscusi 2002, 186).

Yet progressive liberals insist that if young people were truly aware of the dangers, they would never light up. This conviction leads ineluctably to the conclusion that a young person's decision to smoke must be due to ignorance, deception, or enticement. One prominent argument is that the young are seduced by "master manipulators" and "marketing Svengalis" (Kluger 1996, xii) who depict "a fantasyland populated by heroically taciturn cowboys, sportive camels, and an array of young lovers, auto racers, and assorted bon vivants all vibrantly alive with pleasure" (Goodin 1989, 20).

A full response to such charges would amount to a book in itself. But Viscusi helpfully reports that the rise in youth smoking in 1993 bears no relationship to the introduction of Joe Camel in 1988, and that young people continued to smoke Marlboros over Camels by a wide margin. The retirement of Joe Camel, moreover, had no notable effects on levels of youth smoking (Viscusi 2002, 184).[2]

This does not mean, however, that the young (or the rest of us) are

not impressionable or deterable. What did have a significant effect on teen smoking was whether smoking was permitted at home. Studies have shown that teenagers who live in households where smoking is not allowed smoke only one-third to one-half as much as those who live in households where it is (Hersch 1998; Viscusi 2002, 187). Charging American parents with "crimes against humanity" (Kluger 1996, xvii) for permitting their children to smoke in the house, however, is a less attractive political strategy for modern liberals than taking on Joe Camel and the machinations of corporate capitalists.

A final argument made by progressive liberals turns on how knowledge of risk affects actual decision making. Psychologists have identified the ways in which cognitive effects such as "wishful thinking," "anchoring," and "time discounting" lead to irrational decision making. Wishful thinking leads one to think one can get away with behavior that one knows will harm others if they try it. Anchoring leads people to base their understanding of actual harms on their own experience to date. Thus, unless and until smoking harms an individual, that individual is unlikely to take seriously its potential to do so. Similarly, time discounting leads people to underestimate the reality of threats that are likely to come home to roost only in the long term, as with most threats from cigarettes (such as lung cancer and heart disease) (Goodin 1989, 21–23).

Viscusi does not so much as mention these challenges to individual rationality. Yet he is coauthor of a book on decision making in tort cases that argues that these cognitive problems necessitate removing punitive damages determinations from the province of civil juries (Sunstein et al. 2002; Kersch 2003). It would seem that even staunch advocates of individual autonomy do not dispute that individuals may reason poorly, even when well informed.

Progressives go from there to the conclusion that individuals should not be allowed to choose when their choices are dependent upon poor reasoning. A proper rejoinder to this conclusion would of necessity be a political one. It would emphasize the serious consequences for liberty if government became too eager to override individuals' claim that they know what they are doing, on the ground that they are laboring under the effects of scientifically demonstrable cognitive defects.

All the evidence indicates that smokers know the risks. Studies that attempt to gainsay their knowledge have been unpersuasive. And efforts to dismiss their knowledge through recourse to cognitive psychology are highly paternalistic (if not totalitarian) in their implications.

Of course, it is possible to be fully aware of the dangers of smoking, to continue to smoke, and yet for that "choice" to be no real choice at all. Such would be the case if smoking were an addiction, a behavior which, despite one's intentions, one is simply unable to stop (Goodin 1989, 25–30). It turns out, however, that just as was the case for knowledge of the risk, a moralizing, leftist paternalist ideology has infused scientific studies purporting to show the "addictive" nature of smoking.

For many years, Viscusi reminds us, smoking was referred to by the U.S. government not as an addiction but as a "habit." The switch to the term "addiction" by the U.S. Surgeon General's office in 1988 did not precede, but in fact was coincident with, the decision to launch a political campaign against it. At the time the Surgeon General made this decision, cigarettes were actually less habit-forming than ever. Levels of nicotene—the ostensibly addictive ingredient in cigarettes—had been declining relatively consistently for a long period prior to the 1980s. The government's decision to characterize increasingly safe and decreasingly habit-forming cigarettes as addictive was part of its effort to push the public to identify cigarette smoking with other stigmatized "addictions" plaguing American society, like cocaine and heroin, and to dissociate it from an array of unhealthful, but less serious, bad habits—like not getting any exercise, nibbling one's fingernails, and overeating fatty foods. The government seems to have largely succeeded in this regard (Kersh and Morone 2002; Viscusi 2002, 167).

How "addictive" is smoking? One measure, Viscusi explains, is to compare the price elasticity of demand for cigarettes (or the decline in the number of cigarettes purchased for each unit increase in their price) with that of other products.

If any substances are addictive, heroin and crack cocaine are. Addicts will do anything—abandon their families and homes, beg, steal, and kill—to get their next fix. The elasticity of demand for heroin and crack cocaine is thus very low; its price barely affects the amount consumed. The price elasticity of demand for cigarettes, by contrast, is about −.4 to −.6. That is comparable to the price elasticity of demand for other consumer products that no one (except jocularly) refers to as addictive—such as jewelry, watches, stationery, newspapers, and magazines. The demand for theatre and opera, toys, and legal services is actually less elastic than that for cigarettes, suggesting that people are "no

more addicted to cigarettes than they are to lawyers or the opera" (Viscusi 2002, 172).

The effect on demand of a unit price increase for cigarettes, as for other products, is greater for lower-income consumers and smaller for those with higher incomes. But when people want to cut back on their smoking, most are perfectly capable of doing so, and do so routinely (Viscusi 2002, 168–72; see also Goodin 1989, 96–97; Tollison and Wagner 1988, 39).

But what of those surveys that report that nearly 70 percent of smokers would like to quit? Progressive liberals interpret such surveys as signs that cigarette smokers are slaves to their addiction. Viscusi considers them alongside similar surveys revealing that comparable numbers of people would like to leave their jobs or spouses, or to move out of L.A. "Ultimately," Viscusi (2002, 173) concludes, "such quit-intention attitudinal questions tell us very little except that people are not generally pleased with all the attributes of cigarettes." This may be overstated. As Robert Goodin (1989, 98–99) has argued, "At least sometimes, what a person says is a better indicator of the true state of his mind than what he does. Such would be the case if he were physically restrained, in a way that rendered him simply unable to do what he said he wanted to do." Viscusi might have reported, as is almost certainly the case, that at least some people are chemically addicted to nicotene in the way that others are to heroin or crack cocaine (ibid., 26). Nonetheless, the old "habit" label probably fairly captures the essence of smoking for most people.

Harm to Society

Until quite recently, tobacco companies were consistently able to skirt liability for smoking's harms with the assertion that smokers knew the risks and were fully capable of quitting. In the first two waves of tobacco lawsuits, anti-smoking advocates and plaintiffs' lawyers did their best to challenge these assertions. In the first wave (1954–1973), suits by individuals seeking damages on the grounds of tobacco-company negligence predominated. In the second (1983–1992), plaintiffs anchored their case in the products-liability claim that cigarettes were dangerous (hence, defective) and injurious consumer products that should be held to a standard of strict liability. They were butting their heads against a wall. The tobacco companies suffered not a single loss in these first two

waves of lawsuits (Derthick 2002, 27–33). Progressive-liberal scholars, in accordance with their anti-corporate convictions, attributed these victories in part to the sheer wealth, power, and tenacity of Big Tobacco's legal defense teams—the nefarious "Scorched Earth, Wall of Flesh" (i.e., of lawyers) (Haltom and McCann 2004).

But critics also blamed the dexterity with which the Wall of Flesh played upon the ideological predisposition of the American people—and, hence, American juries—to invoke the ethics of liberal individualism: to invoke, that is, personal choice and individual responsibility (see, e.g., Haltom and McCann 2004). Given the stranglehold of the "ideology" of personal responsibility in American life, a creed brilliantly manipulated by fat-cat lawyers for Big Tobacco, anti-smoking forces didn't stand a chance.

Faced with a long string of losses, however, anti-smoking paternalists regrouped. Beginning in 1994, with a newfound sensitivity to the ideological environment, they launched a third wave of lawsuits that deliberately shifted the terms of the argument (Haltom and McCann 2004; Jacobson and Warner 1999, 775–77). Putting aside the type of claim that left them most vulnerable to charges of paternalism, the anti-smoking forces decided to focus less on harm to self and more on harm to others. Recall that even Mill, the consummate liberal individualist, considered it perfectly acceptable for society to coercively prevent people from, or punish them for, harming others (see e.g. Goodin 1989, 64). In these third-wave lawsuits, non-smokers (such as flight attendants and restaurant workers) and state governments sued the tobacco companies for injuries, whether physical or economic, that they allegedly suffered on account of the decisions made by other people to smoke.

This new tactic succeeded. For the first time, the tobacco companies suffered a succession of losses, eventually prompting them to accede to a massive settlement agreement (MSA) reached with the states' attorneys general (Derthick 2002, ch. 9). Once modern liberals worked with the grain of traditional liberalism instead of against it, pursuing paternalist ends under the "pretense" (Mill [1859] 1975, 101) of non-paternalist means, victory was at long last theirs.

These recent victories, however, turn out to be anchored in scientific findings, and calculations of social harm, that are every bit as dubious as the junk science wafting from the Tobacco Institute (which had doggedly claimed that the jury was still out on the link between cigarette smoking and disease). Viscusi recounts how, when pressed by paternalistically inclined progressive liberals to go after second-hand

smoke in the workplace despite the absence of evidence about its harm, federal regulators massaged and manipulated the data. Lacking reliable knowledge of the effects of second-hand smoke, they simply extrapolated from the effects of first-hand smoke, assuming both a linear dose-response relationship and no safe level of exposure (Viscusi 2002, 103). In other cases, the regulators just suppressed unwelcome evidence. In still others they altered their regular standards to arrive at predetermined results. In one particularly egregious case, a federal court invalidated an EPA risk assessment of the dangers of lung cancer posed by second-hand smoke because the agency refused to cite scientific studies that did not fit its regulatory theory; altered the usual confidence intervals for its statistical tests; and failed to take account of potential intervening causes of injury, such as living in polluted areas or with a spouse who smokes (Viscusi 2002, 106–9).

Now traveling in the sheep's clothing of social harms, the progressive liberals hit the jackpot in a case that, by agreement with the tobacco companies, was never tested in court. That case involved lawsuits brought by state attorneys general alleging financial injury to the public from individuals' decisions to smoke. In their suits, the states, in high dudgeon, alleged that the medical and pension bills resulting from smoking-related injuries constituted a major drain on the public treasuries. For this reason, the smoking that was abetted and encouraged by the defendants—the tobacco companies, not the smokers themselves—caused harm not only to smokers but to everyone else.

The evidence for these allegations was extraordinarily shaky. It was so dubious, in fact, that federal officials who were no friends of the tobacco industry advisedly passed up an opportunity to bring a similar lawsuit themselves. When asked why the Clinton Justice Department had refrained from bringing a parallel federal suit, Viscusi recounts an official's reply that the money saved by Social Security due to smokers' early deaths may well have outweighed the "social costs" of caring for them before they died. In this context, a federal lawsuit would have had the effect of broadcasting the huge net-cost savings, undermining the states' lawsuits (Viscusi 2002, 99).

Viscusi's assessment of the actual social harms of smoking is limited to the class of harms alleged in these state lawsuits.[3] Cigarette smoking, he acknowledges, leads to higher health-insurance costs, including those stemming from government obligations under Medicaid and other health-insurance programs. It also affects nursing home and pension expenditures, and an array of other items. But, as Viscusi emphasizes, cal-

culating the *net* financial injury (the relevant concern when determining damage awards) in these lawsuits was thwarted by the states' insistence that it is acceptable to take account of the financial costs of smoking, but morally reprehensible to calculate the financial benefits. In assessing the net economic damages, the states refused to adjust their health-care cost estimates to account for the reduced life expectancy of smokers. They claimed, that is, that they were entitled to collect for years of health-care costs of people they stipulated were ill from smoking but who, in fact, were dead.

When Viscusi (in an early working paper) undertook a full cost-benefit analysis that corrected these calculations, the State of Mississippi, one of the plaintiffs, characterized him as having produced a "ghoulish . . . perverse and depraved argument" that is "utterly repugnant to a civilized society" and lacking in "basic human decency." "Seeking a credit for a purported economic benefit for early death," the state added, "is akin to robbing the graves of the Mississippi smokers who died from tobacco-related illnesses" (Viscusi 2002, 87).

Viscusi (2002, 87) asks, "If the states truly believe that the cigarette companies are 'merchants of death,' one wonders why they have not banned cigarettes" altogether. The answer is that the states themselves have long reaped financial benefits from the "merchants of death" by collecting excise taxes on cigarettes. The states, Viscusi points out, omitted these benefits, too, from their lawsuits. In a series of intricate calculations that seem both careful and conservative, Viscusi perseveres to calculate the real economic costs to the states of cigarette smoking, and then subtract both the cost savings to them due to the reduced life expectancy of smokers and the amount of costs previously recouped through excise taxes on cigarettes. The results vary by state. Nonetheless, he reports, "in every instance the excise tax level roughly equals or exceeds the medical care cost per pack" (ibid., 97). Given their current tax levels, in other words, states, just like tobacco companies, receive a net profit from cigarette sales.

It is, of course, possible for experts to dispute Viscusi's calculations (see Goodin 1989, 37–38). But the actual behavior of the states in the aftermath of the settlement of these cases seems to bear him out. The $243 billion the states corralled out of the tobacco companies, Viscusi (2002, 55) writes, was "almost all profit." This was immediately evident when the states used the windfall from these settlements not to offset the alleged hit to their health-care systems, but rather to balance their budgets without raising taxes, reduce crowding in public schools, pro-

vide college scholarships, build roads and bridges, improve jails, provide wheelchair access for sidewalks, and build parks in poor neighborhoods. A large portion of California's take of $300 million went to pay for legal fees defending abuse claims against the Los Angeles Police Department. Connecticut used the money to provide AIDS testing for newborns and establish a Child Advocates Office. North Dakota used it for flood-control projects (ibid., 55–57).

Viscusi does not tell us whether, given the fungibility of state funds, this failure to earmark tobacco payments for health-care expenses is a common modus operandi for states, even when financial injury is undisputed. But, in light of his earlier cost-benefit analyses of the financial impact of smoking on the public purse, his argument here is entirely plausible.

Science, Culture, and Regulation

What are we to make of the various uses to which science has been put in these cases? For one thing, it is clear that a particular political ethos comes first, and that science is used to reach conclusions that are justified by that ethos. It is clear, moreover, that, so far as smoking is concerned, in a liberal polity, scientific evidence alleging harm to others is likely to go much farther (whether accurate or not) than evidence of harm to self.

But what if we have reached a point in the sciences where it is possible to deconstruct that distinction? Mill, who wrote in a liberal individualist spirit, foresaw this temptation, and warned against paternalist attempts to govern harms to self under the guise of regulating harms to others. He classified these moves as appeals to "social rights," and argued that once one moved beyond "direct" harms to particular individuals, those appeals essentially asserted "the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular violates my social right, and entitles me to demand from the legislature the removal of the grievance." Mill ([1859] 1975, 110) aptly concluded that "so monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify." No one thinking about freedom in good faith, Mill suggested, would dare head down this road.

But as Theodore Lowi (1986, 217–18) has observed, "the new welfare

ethics" of the modern liberal state has done just that. "Under some conditions," he writes, " any and all conduct can produce harmful consequences. This means that liberalism has a tendency, *unless self-consciously restrained*, to spread toward the entire society and all conducts of all individuals" (emphasis added). Once the modern, progressive-liberal spirit infused the outlook of policymakers, its "inherently yeasty quality" ensured that "everything became good [for the state] to do, because all injuries and dependencies, regardless of source or cost, became 'social costs.'"

Mill ([1859] 1975, 118, 121) recognized that finding the right spirit in which to assign the costs in a particular case, either to society or the individual, is not easy. A particular controversy will often "lie on the boundary line between two principles [the liberty of the individual versus the promotion of the 'public weal'], and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides." These are therefore "the most difficult and complicated questions in the art of government" (ibid., 139). Nevertheless, there seems to be a palpable divergence in spirit between liberal individualists like Mill, who are preoccupied with preserving freedom in a "direct" sense, and progressive liberals who are preoccupied with formulating and administering freedom's subtle preconditions. The antismoking crusaders clearly fall into the latter category. Where they first pursued their paternalism undisguised, they are now using the language of social harm to reach the same ends by more effective means.

Progressive liberals proceed in law and politics by presenting narratives, in a familiarly liberal vocabulary, about what it is that they are doing. The scientific evidence they adduce is both shaped by and deployed through these narratives. Such evidence, in regulatory policy as elsewhere, is a social phenomenon that comes to life only as part of a story (see Kuhn 1996; Jasanoff 1995). This does not entail the more flighty postmodern claim, exposed by the Sokal hoax, that all of science (including not just its discovery procedures but what is thereby discovered) is "socially constructed." It means simply that scientists divide an immensely complex world into a part that contains facts and questions that appear interesting and relevant to them and a part that, in light of their research interests, seems irrelevant. Starting with the conviction that certain problems are important—and, hence, that others are not—researchers collect data and perform experiments. Studies that don't speak to these problems are ignored or not undertaken at all. Careers

devoted to them are either ignored or mocked, and they founder (Kuhn 1996, 4, 16).

The production and uses of legal evidence at trial are socially determined in a similar way. This does not mean that "law" does not exist, any more than the narrative dimension of science means that the law of gravity doesn't exist. The most crucial decision a trial lawyer makes in preparing for trial involves developing a "theory of the case," or a story through which he evokes some of the understandings and prejudices of the surrounding culture and ignores others, appealing to the jury in a manner that is designed to be compelling. To be sure, the pre-existing evidence will help the lawyer shape the story. But the story, in a mutually constitutive process, will also aid him in his choice of what evidence to gather and to produce at trial. The rules of evidence permit a lawyer to introduce facts that are relevant to telling his story. They exclude as irrelevant the introduction of other data. As such, cases, too, have paradigms, although, as Kuhn (1996) himself notes, legal paradigms are more frequently and publicly contested than the paradigms of the physical sciences (cf. Jasanoff 1995, 8–11).

Paradigms and stories involving injury are central to tort cases, just as, in a more diffuse sense, they are central to liberalism itself. Allegations involving injury are not simply questions of physical causation. They imply ethical stories involving responsibility and blame. For this reason, to see the latest study that is on everyone's lips as the breakthrough that will finally allow us to look objectively at "real causes" and assign "real blame" is to be drawn to a mirage. "News that is going to be accepted as true information," anthropologist Mary Douglas (1992, 7–10, 19) has observed, "has to be wearing a badge of loyalty to the particular political regimes which the person supports; the rest is suspect, deliberately censored or unconsciously ignored."

The meanings of words are transformed by political regimes, typically under conditions far less extreme than those Orwell described. In a culture infused with the liberal-individualist spirit, people tended to associate the word "risk" with the value-neutral term "probability." Today, however, as progressive liberalism has become more influential, "the word risk . . . means *danger*; high risk means a lot of *danger*. . . . The word has been preempted to mean *bad risks*." The language of risk is more attractive to us today than the language of danger, Douglas (1992, 25) argues, because it entails "the aura of science . . . [and] the pretension of a possible precise calculation." This mirage serves to distract us from what is really going on, which, Douglas (1992, 24) reminds us, is

"political talk about . . . undesirable outcomes." "A risk," she writes, "is not only the probability of an event but also the probable magnitude of its outcome, and everything depends on the value that is set on the outcome. The evaluation is a political, aesthetic, and moral matter" (ibid., 31).

In a liberal-individualist spirit, traditional American jurisprudence assumed a constitutionally limited state; it therefore tended to assign blame in light of considerations of individual rather than state responsibility. Legal doctrine involving civil injury (or tort)—including doctrines about determining harm to others, establishing proximate causation, considering whether the injury could have been prevented, and asking who should have prevented it—elicited evidence, scientific and otherwise, that was legible in the terms set by a liberal-individualist ethos. By contrast, Continental European "police states," which operated in a paternalist spirit (whether liberal or not), assumed a constitutionally unlimited government, and tended to take on harm reduction as the responsibility of the centralized administrative bureaucracy. Whatever regulatory measures the state asserted were necessary to advance the public good were a prerogative of its (unlimited) sovereignty.[4]

Consistent with its anti-centralist and liberal-individualist spirit, the United States long rejected the Continental police-state model in favor of a "police-powers" approach that permitted state governments (and not the central government) to impose regulations on behalf of injured individuals only upon proof of demonstrable harm to the public health, safety, and morals. In a telling departure from the police-state model, judges, armed with state and national constitutions, had the final word on whether an alleged harm was real or a subterfuge—that is, an excuse for either special-interest power grabs, or for impermissible paternalism (Gillman 1993). In the United States, "the interventions were presumed to be closely tailored to proven harms; and the courts retained the prerogative of invalidating them should they stray too far from this nexus" (Morag-Levine 2003, 71–73). The chief situation in which proof of harm was not required in the United States involved morals laws, in which the injuries caused by blasphemy, for example, were simply presumed as a matter of moral (and, often, religious) consensus (ibid., 73; Novak 1996, 66–67).

Around the turn of the twentieth century, the builders of the modern American liberal state—who were serious students of European administration—began touting the efficiencies of the police-state ethic

and working to transplant it onto American soil. For the first time, the national government asserted that it, too, had police powers. And the courts, subject to the same intellectual currents, went along, although never as fully as some progressives would have liked. The police-state ethic was superimposed on traditional liberal individualism, creating a kind of ideological palimpsest. Proof of harm was still required to empower an authority to remedy or prevent an injury. But there was a new disposition, in assessing causes and blame, to emphasize the systemic interconnectivity of individual actions, with the aim of protecting the sort of "social rights" from which Mill had recoiled (Haskell 2000; *West Coast Hotel* v. *Parrish*, 1937). So long as one was willing to follow such chains of causation, the nexus could be quite attenuated. Modern social science was, to a significant extent, created to aid the state in tracing out these chains, and hence to legitimize major state initiatives designed to prevent social harms (Haskell 2000). As such, social science was supposed to serve as an alternative to traditional liberal individualism. Its disposition toward constitutional government itself was vexed, when not hostile.

Viscusi's study demonstrates that regulatory policy concerning tobacco in the liberal United States, whether announced by the Surgeon General, the Food and Drug Administration, Congress, the states, or the courts, is a confused amalgam of individualism, paternalism, and moralism. Contending ethical stories are slugging it out at every level of government, and in every sort of governing institution. Traditional moralism—which required no proof of harm—is a strong influence (Morone 2003). Traces of liberal individualism, which requires calculable proof of harm, remain strong, too. Fortunately for paternalists, the ethic of the modern liberal welfare state permits such proof to come in the form of evidence of indirect harms produced by elaborately extended causal chains.

Viscusi shows how the scientific evidence adduced by the anti-tobacco forces in this ongoing struggle is crafted to serve a distinct ethical story concerning blame that, by the lights of another narrative—say, Viscusi's—seems irrelevant. In this fashion, certain forms of evidence are ruled out of bounds a priori. Studies that either yielded or promised to yield evidence contrary to the theory of the case against tobacco were either suppressed or never undertaken. Taken together, these narrative practices demonstrate that the underlying thrust of the antismoking argument is, simply put, an a-priori determination to stamp out smoking.

Since, even today—perhaps only because of our instructive experience with Prohibition at the height of early twentieth-century state-building—it is too nakedly paternalistic to propose a national ban on the production, sale, and smoking of cigarettes, the anti-smoking forces, working within the culture they've got, choose to churn out a seemingly endless succession of scientific studies showing that people have been misled about the harms of smoking and that smoking causes measurable financial harms to society as a whole. Even when these studies are accurate in a narrow sense, they often do not prove the propositions they are enlisted to support. Sometimes, as with the net financial cost of smoking-related injury, the ethical story about the chain of injury leading to social harm is so spellbinding that the transparent inaccuracy of the calculations is simply brushed aside as morally irrelevant.

Sensible Public Policy on Tobacco

This oddly conflicted ethics, this tug-of-war between liberal individualism and a morally infused, anticorporate progressive liberalism, has suffused the evasive and obfuscatory politics of tobacco regulation in very concrete ways. Playing to the various ethical stories involving risk, injury, and social harm in courtrooms and public debates, both sides have fudged, dissembled, and deceived with "scientific" precision. The tobacco companies distorted the science of the harms of smoking (even though everyone knew better), just as the anti-smoking forces distorted the science of people's knowledge of the risks of smoking.

The $243 billion MSA (along with the side agreements reached with four additional states) is nearly a Platonic embodiment of these evasions. Under its terms, the tobacco companies that were party to the settlement were prohibited from targeting youth in their marketing campaigns. Severe restrictions were placed on their ability to sponsor public events. Outdoor advertising of cigarettes was banned, as were paid product placements and brand-name merchandising. The companies were forced to disband the Tobacco Institute and the Council for Tobacco Research and to sharply limit their political lobbying campaigns. The cigarette industry was forced to provide $250 million over ten years to pay for a new foundation that would try to reduce youth smoking. A more general fund of $1.45 billion was set up to educate the general public about the dangers of smoking. A new tax on ciga-

rettes, paid by the companies agreeing to this settlement directly to the states, was imposed to offset the financial losses the states ostensibly suffered due to the choices made by their citizens. For initiating the suit, and negotiating these terms, the private trial lawyers who brought the cases for the states were paid at rates estimated at $100,000 to $200,000 an hour. The total payments dictated by the MSA, which are to continue in perpetuity, add up to half a billion dollars a year (Derthick 2002, 163–203).

The MSA is premised on the false assumption that people smoke because they are addicts or because they do not understand that smoking is dangerous. It pays the states for net economic damages that they never incurred. In so doing, it provides them with an ongoing revenue stream available for a broad array of uses without the distasteful necessity of raising taxes. This revenue stream is provided by smokers, the bulk of whom have low incomes. Since it is derived from cigarette sales, it gives the states a vested interest in encouraging the future sale of cigarettes (Viscusi 2002, 57).

The advertising restrictions imposed by the settlements work to lock in current brand preferences. Moreover, they discourage any competition between the tobacco companies based on the relative safety of different brands of cigarettes. The taxing mechanism similarly disregards considerations of relative safety (Viscusi 2002, 38–40).

The gargantuan legal fees handed over to private tort lawyers effectively subsidize their activities in this area—the agreement does not preclude future private lawsuits—and in whatever others they choose to pursue (such as the latest campaign against "Big Food"). The magnitude of the settlement itself is likely to serve as a point of reference, or "anchor," in the future, encouraging juries in similar tort suits to "to think in billions rather than millions" (Jasanoff 1995, 13; Viscusi 2002, 58). In the process, the settlement energizes the agents and mechanisms of paternalism. Finally, the very opaqueness of the process by which the terms of this agreement were hashed out means that it contributes little to the future rationality of the regulatory regime (Viscusi 2002, 59). Something was done, but nothing was learned. It is quite possible that this is precisely why it worked.

Statist, modern, progressive liberalism, which incorporates vestiges of earlier, less risk-averse liberalisms, prizes risk-taking in the service of socially desirable outcomes, but, perhaps even without limit, endeavors to eliminate risk-taking that seems either socially harmful or simply gratuitous. Cigarette smoking is a natural target for such an adulterated

liberalism. This liberalism operates on the faith (despite all historical evidence) that it is normal and rational for human beings to avoid risks the only benefit of which is sensual, aesthetic, or social pleasure (Douglas 1992, 41; Jasanoff 1995, 13).

People know that smoking is dangerous. But they like to do it. And, for that reason, they do it despite the risks. How to deal with that? All of the weirdness of the tobacco wars ultimately comes back to that central question: what is to be done with people who willfully risk their well-being?

Sheila Jasanoff (1990, 7), a leading student of the relationship between science and the law, has noted that by now it has become "widely recognized that the questions regulators need to ask of science cannot in many instances be adequately answered by science." Tolerating smoking, put simply, "cuts against the managerial preferences of the nation's scientific and technological elite" (Jasanoff 1995, 13).

In earlier times, tobacco's opponents, when they could, would have simply called smoking immoral and unproductive, and banned it outright. The proofs of the laboratory sciences and the causal chains identified by the social sciences would have been utterly unnecessary. Today's moralists, though, associate "moral" righteousness with the religious Right (whom they despise as, amongst other things, premodern and antiprogressive). Given the American experience with Prohibition, they avoid calling for a national ban on cigarette smoking. These days, they fight their war by filing tort suits.

Such suits require the parties to address questions of risk and blame through the logic of liberalism, anchored in questions of individual responsibility, and to address harm in the language of scientific causation and proof. At the same time, since at least the public-interest law revolution of the 1960s and 1970s, lawyers, judges, and juries have been predisposed to use these ostensibly individualized suits as vehicles for implementing regulatory regimes that have implications well beyond the interests of the litigating parties (Chayes 1976; Feeley and Rubin 1998). "The question of acceptable standards of risk," Mary Douglas (1985, 82) has observed, "is part of the question of acceptable standards of living and acceptable standards of morality and decency. . . . There is no way of talking seriously about the risk aspect while evading the task of analyzing the cultural system in which the other standards are formed."

Given advances in medical and social science, it is often relatively easy to demonstrate how a harm to oneself harms others. It is also rela-

tively easy to demonstrate that people act irrationally. Under these conditions, unless regulators and judges both acknowledge the potential seductions of paternalism, and, like Ulysses to the mast, self-consciously restrain themselves, the tendency of the state will be to become increasingly invasive. More significantly, perhaps, it will be able to do so with new, technical defenses that hide the fact that it is acting paternalistically. Neither principles (such as Mill's harm principle) nor scientific knowledge will avail in stanching this trend. Either can be variously interpreted and ignored. Indeed, it is more likely that science and principles will be bred to feed the maw of paternalism.

Liberal principles and modern science conduce to human freedom only if they are applied, as John Stuart Mill applied them, in a spirit suffused by a deep belief in and practical commitment to human liberty. With the tobacco settlements, as in the war against smoking more generally, those informed by that spirit have lost yet another round. And the long march toward paternalist managerialism continues.

NOTES

1. Some will object to my decision to use the word "liberalism" in my "progressive liberalism" label. I believe it is an open question whether the liberal strands in this admixture outweigh its anti-liberal ones. I use the term both because I am interested in the substantive interaction between these strands, and because, in contemporary political parlance, people with these views are commonly referred to either as "liberals" or (increasingly, and perhaps more accurately) "progressives."
2. Viscusi does not discuss one possibility that would undercut his broader claim: Perhaps Joe Camel was simply a failure, and young people continued to be more impressed, as in olden days, by the cowboy than the camel.
3. This is fair, given the focus of his book, but it hardly addresses the full class of social harms that a legislator, regulator, or theorist not involved in a tort suit might see fit to consider.
4. As Michael Foucault said, "The police includes everything" (quoted in Novak 1996, 14).

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