

Book Note

Blowing Smoke

Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris, by Richard Kluger.[†] New York: Alfred A. Knopf, 1996. Pp. Xix, 807. \$35.00.

I

1996 was a difficult year for the tobacco industry. First, Brown and Williamson, the nation's third largest cigarette manufacturer, lost a \$750,000 lawsuit,¹ the industry's first defeat in a products liability case.² Next, the Clinton administration decided to launch an administrative attack on the tobacco industry under the auspices of the Food and Drug Administration (FDA),³ and finally, Al Gore made the issue the cornerstone of his highly personal speech to the Democratic National Convention in Chicago.⁴

As if they did not have enough to worry about, the tobacco companies also must contend with three recently-released books critically examining the industry's past behavior.⁵ Of the three, Richard Kluger's *Ashes to Ashes* is the best-written. It is also the most ambitious. Like the author's previous, well-regarded works,⁶ *Ashes* is a weighty tome, with almost 800 pages of narrative. Kluger gives a comprehensive historical review of the tobacco industry from colonial times to the present, focusing on key individuals and marketing efforts. Intermittently, he gives a chronological account of the scientific community's emerging awareness of the dangers of smoking, the federal government's lack of regulatory response in the face of increasingly compelling evidence, and the resulting grassroots anti-smoking campaign

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1. See Mark Tran, *Tobacco Firm Loses Cancer Suit*, GUARDIAN, Aug. 10 1996, at 16 (describing jury verdict against Brown and Williamson for "misleading smoker into thinking that smoking was safe.").

2. See Mark Curriden, *A Fortress Up in Smoke: Plaintiffs Pierce Tobacco Armor with New Evidence*, A.B.A.J., Oct. 1996, at 30; *The Tobacco Industry: Time to Cough Up?*, THE ECONOMIST, Aug. 17, 1996, at 54.

3. See Sandra Ward, *Kessler's Victory: Battling Teen Smoking, FDA to Regulate Cigarettes*, BARRON'S, Aug. 26, 1996, at 13.

4. See Jeannine Aversa, *Day 4 at the Convention: Lighting a Tobacco Fire*, ORANGE COUNTY REGISTER, Aug. 29, 1996, at A3.

5. The two books other than Kluger's are PHILIP J. HILTS, *SMOKE SCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* (1996) and STANTON GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

6. Kluger's previous publications include *SIMPLE JUSTICE: A HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976) and *THE PAPER: THE LIFE AND DEATH OF THE NEW YORK HERALD TRIBUNE* (1986).

that continues unabated. Easy to read and filled with intriguing information, the work is largely successful as a historical effort.

As a foundation for effective government regulation, however, Kluger's book is disappointing. Admittedly, the author's purpose is not to draft legislation but to tell a historical narrative; the regulatory suggestions at the end (pp. 761-63) seem to be presented almost as an afterthought, and are in many ways more sparse than those outlined in Kluger's April 7 article in *The New York Times Magazine*.⁷ Still, Kluger does not really defend his regulatory proposals; in fact, the historical background he presents often contradicts his policy suggestions. In light of the Clinton administration's regulatory actions, a discussion of the intellectual underpinnings of tobacco regulation is both timely and relevant. Given the size of the industry and the number of smokers, however, any regulatory efforts need to be well-thought out, not flippant. This Book Note will first summarize Kluger's work and will then scrutinize his regulatory proposals.

II

Early in his book, Kluger dispels any myths that tobacco's harmful qualities were discovered only recently. For instance, as early as 1604, Britain's King James I wrote *A Counter-Blaste to Tobacco*, in which he called smoking "a custom loathsome to the eye, hateful to the nose, harmful to the brain, [and] dangerous to the lung" (p. 15). In the early part of this century, *Harper's Weekly* and *Education* magazine both ran articles outlining possible dangers of smoking (pp. 39-40). Prominent Americans such as Thomas Edison, Henry Ford, and Booker T. Washington denounced the cigarette (pp. 66-67). In 1918, Frederick J. Pack published a book-length study on the effect of cigarettes on health, *Tobacco and Human Efficiency*, which found that cigarettes inflicted injury "almost directly proportional to the area reached by the poisonous fumes" (p. 67). Thus, long before the Surgeon General's landmark 1964 report, the public suspected that repeated inhalation of cigarette smoke was harmful to one's health.⁸

In addition, Kluger shows that people have long been aware of tobacco's addictive qualities. Columbus' men took up the natives' pastime, and when he implored them to stop, he found that "it was not within their power to refrain from indulging in the habit" (p. 9). And in the nineteenth century, Ralph Waldo Emerson asserted that "the habit once established gives rise to more or less craving for this form of indulgence" (p. 38).

Indeed, tobacco has been under attack ever since it was introduced to the European settlers (pp. 10, 38-39, 62). While early assaults lacked "scientific

7. See Richard Kluger, *A Peace Plan for the Cigarette Wars*, N.Y. TIMES, April 7, 1996, § 6 (Magazine), at 28-35, 50, 54.

8. See *id.* at 28.

coherence” and were often “couched largely in moral, xenophobic, and economic terms” (pp. 14-15), anti-smoking pronouncements were often vigorous. They were also successful in influencing governments to take action. Whatever government policy the United States ultimately adopts in the future, it is certain to be mild in comparison to the historical examples Kluger cites:

King James I of England raised the import duty on tobacco brought in Spanish galleons by 4,000 percent, the papacy banned smoking in its basilicas, and the czar of all the Russias exiled users of the illicit substance to Siberia. Deeper into the seventeenth century, more rigorous measures were employed: the Mogul emperor of Hindustan ordered smokers’ lips split; in China, traffickers in tobacco were executed; and in Turkey . . . tobacco [users] were made an example of by having a pipe driven through their noses, either immediately before or after their beheading.

(p. 10). In the United States, too, anti-tobacco forces had early success in turning government against smoking: Congress helped to finance the Spanish-American War by increasing the cigarette tax 200%, and Iowa, Tennessee, and North Dakota had outlawed the sale of cigarettes by the turn of the century (p. 39).

Eventually, however, cigarette smoking took root, having been spurred on in particular by World War I.⁹ By mid-century, nearly half of all adults smoked; on average, each American smoked ten cigarettes a day (p. 132). Pushing the habit were aggressive entrepreneurs building corporate empires—first Buck Duke, who put together the American Tobacco trust (pp. 21-26, 30-34, 41-48),¹⁰ and later R. J. Reynolds, who built his provincial North Carolina company into the world’s largest tobacco company (pp. 27-29, 35-37, 48-49, 54-58). Kluger’s journalistic style is at its best when depicting these individuals and developing their personalities. His words bring to life these “founding fathers” of the industry, as well as Joe Cullman III (p. 170) and Hamish Maxwell (p. 535), the later builders of today’s

9. Kluger explains why cigarette consumption skyrocketed when the nation was at war: Any lingering notions of the unmanliness of cigarette smoking were blown away by the First World War. Pipes and cigars were manifestly unmanageable in the battle lines, and chewing tobacco was a menace to sanitation. Cigarettes were no bother, small insult to the nostrils in close quarters, and a perceived aid to vigilance, and so quickly became the universal emblem of the camaraderie of mortal combat, the consummate male activity. . . . Organizations like the Red Cross and the Young Men’s Christian Association that before the war had opposed the propagation of cigarettes among the nation’s young manhood did their best now to supply them liberally.

(p. 63).

10. Duke got a jump on the competition when he took a risk on the Bonsack cigarette machine, which mechanized the cigarette manufacturing process (p. 22). The machine cut Duke’s costs by more than fifty percent (p. 23).

leading cigarette-maker, Philip Morris. Despite his disdain for the product they sold, Kluger generally maintains his objectivity when presenting these cigarette manufacturers. He notes that characterizing the cigarette-makers "as knowing charlatans, as unconscionable purveyors of a wicked product, would amount to unfair revisionist history" (p. 105).

No less colorful are Kluger's portrayals of the anti-smoking crusaders, from Ernst Wynder, the driving force behind much of the early scientific research on smoking (p. 134), to C. Everett Koop, Reagan's irrepressible Surgeon General (pp. 505-06). Kluger's summary of the scientific evidence against smoking goes over the details of each experiment with painstaking care, and well before the end the verdict is clear. It is interesting to note, however, that Kluger finds the evidence against secondhand or environmental tobacco smoke (ETS) to be far less compelling (pp. 493-505).¹¹ Thus, he concludes that the Surgeon General's 1986 report on the dangers of secondhand smoke "was misleading, if not disingenuous in the extreme" (p. 502). Kluger cites scientific authorities saying that Koop himself admitted in private to overstating his case "in order to win the public's attention" (p. 503).

Kluger is also generally critical of the many tort liability suits against tobacco companies. With the exception of the famous *Cipollone* case (pp. 650-76),¹² his treatment of tort claims is rather cursory and, in light of recent events, dated. Kluger notes, however, that Comment i of the *Restatement of Torts* explicitly exempts cigarettes from product liability, since the product's danger "is contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics" (p. 640). Kluger is skeptical of "new evidence" that cigarette manufacturers "had done research on the addictive nature of nicotine and had neither disclosed it to the public nor warned against the addicting potency, [since] many similar findings by investigators outside the industry had long since been made and published" (p. 760). In Kluger's view, the liability suits being pursued by several states seeking compensation for the purported public costs of treating smoking's ill effects are also questionable (p. 760). Credible studies have estimated such costs to be no more than thirty-three cents per pack,¹³ and the average smoker was paying fifty-two cents in federal and state excise taxes in 1994 (pp. 736-7).¹⁴

11. The studies have been plagued with methodological flaws. The ETS findings generally assumed a linear relationship between dosage and effect, had control problems, lacked statistical significance, or showed a fairly insubstantial increase in disease from a very small base (pp. 493-501).

12. See generally *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

13. At least one study found that cigarette smoking actually *saved* the public twenty-three cents per pack (p. 737).

14. The federal ad valorem tax is 24 cents per pack (p. 761). The average state tax, then, is 28 cents. Note that although the state tax, in isolation, is less than the 33-cent estimated social cost per pack, that estimated cost per pack includes expenses incurred by both the federal government and state governments.

III

Kluger views government regulation of tobacco as a pragmatic compromise between tobacco companies and anti-tobacco forces (p. 761). He contends that despite “all the legal brainpower [the industry’s] money could hire, the tobacco manufacturers had to face the likelihood, perhaps the certainty, that someday some jury—and sooner probably than later—would reach a verdict against the industry that would, upon final appeal, be sustained” (p. 761).¹⁵ Kluger thus argues that the government and the manufacturers should reach an agreement, and that the “linchpin of such an agreement—indeed, the only inducement that might bring the industry to the bargaining table—would be a blanket (and retroactive) exemption by Congress from all personal injury claims by smokers against the cigarette manufacturers (except those suits involving contaminated ingredients)” (p. 761). Kluger presumes that in exchange for the liability exemption, tobacco companies might be willing to accept regulation by the FDA.

Kluger outlines an eight-point plan for regulating the industry.¹⁶ His plan is markedly similar to the Clinton/Kessler plan.¹⁷ It involves increased excise taxes, a gradual reduction in tar and nicotine content, prominent display of tar and nicotine yields and more informative warning labels on cigarette packages, black and white “tombstone” format advertisements, an end to cigarette vending machines and sales to minors, elimination of the federal crop support program for tobacco, a new Office on Smoking and Health within the U.S. Public Health Service, and restricted smoking in all public places (pp. 761-63).

Although Kluger explains how the FDA would assert jurisdiction by characterizing cigarettes as drugs intended to affect the body by acting as a nicotine delivery system (p. 758),¹⁸ he offers little theoretical rationale as to why cigarettes should be regulated. Of course, his book offers convincing evidence that consuming cigarettes on a regular basis significantly increases one’s risk of premature death. But the book also documents how people have widely understood tobacco’s ill-health effects for many years, as well as its addicting qualities. Since Kluger casts suspicion on the scientific evidence

15. Indeed, the recent victory against Brown and Williamson may prove Kluger’s predictions of imminent defeat in a liability case correct, though that case is still in the process of appeal. See *Judge Denies Tobacco Company Request for New Trial*, FLA. TODAY, Nov. 16, 1996, at B7.

16. He condenses his plan to five points in his *New York Times Magazine* article. See *supra* note 7.

17. See, e.g., Richard Lacayo, *Put Out the Butt, Junior Will Tough New Regulations Aimed at Teen Smoking Stand Up? Not if the Tobacco Industry Can Help It*, TIME, Sept. 2, 1996, at 51.

18. For a discussion of the regulatory efforts, see generally Susan H. Carchman, *Should the FDA Regulate Nicotine-Containing Cigarettes? Has the Agency Established a Legal Basis and, If Not, Should Congress Grant It?*, 51 FOOD & DRUG L.J. 85 (1996); Michael Whatley, Note, *The FDA v. Joe Camel: An Analysis of the FDA’s Attempt To Regulate Tobacco and Tobacco Products Under the Federal Food, Drug and Cosmetic Act*, 22 J. LEGIS. 121 (1996).

against ETS, secondhand smoke would seem to offer little credible rationale for sweeping regulations, apart from public space restrictions to accommodate voter preferences. Because he casts doubt on the proposition that smoking costs the public more than the government collects through excise taxes, Kluger cannot rationalize new smoking regulations based on unaccounted-for social costs. Without proven third party effects, and with full consumer information, the rationale underlying Kluger's proposals must rest on a paternalistic role for the state: the government should prevent individuals from doing harm to themselves, even if individuals are fully informed about the probable outcomes of their decisions.

While paternalism for adults might not have broad support, the Clinton administration's focus on children seems more compelling, especially given tobacco's addictive qualities. Since "youngsters [do] not grasp the hazards involved" (p. 699), the argument goes, the government must intervene. Many of Kluger's (and Clinton's) proposals fit well under the "children" rationale—eliminating vending machines and otherwise restricting sales would deny youths the easy access to tobacco they currently enjoy, more warning labels would help teens to be better informed, eliminating distinctive advertising and promotions would protect youngsters from being unwittingly "seduced," and increasing the excise tax would have a greater deterrent effect on teenagers picking up the habit than on adults who are already hooked and have more financial resources. Nevertheless, many aspects of the proposed regulations are disconcerting; indeed, some of the historical details Kluger presents, and his assessments of the evidence, seem to undercut his own proposals.

Perhaps the most troubling regulatory proposal posited by Kluger, and the Clinton administration, is the effort to deter cigarette consumption by regulating speech.¹⁹ Mandating warning labels is defensible on the grounds that consumers might not be fully informed of the risks of cigarettes. Banning distinguishing advertising and restricting promotions, however, might infringe on tobacco companies' speech under the Supreme Court's current commercial speech doctrine.²⁰ Such restrictions also impede proper market functioning by erecting a barrier to new entrants. Currently successful companies want to protect their market share and regulations that raise the cost of market entry may benefit such established companies in the end. Consumers would seem to be the ultimate losers in a governmentally protected oligopoly. They would be paying higher prices than they otherwise would pay in a more competitive market. Therefore, regulating tobacco advertising exclusively on grounds of sensationalism or unrelatedness seems

19. For a fuller discussion of the free speech implications of proposed tobacco regulations, see generally Mark R. Ludwikowski, Comment, *Proposed Government Regulation of Tobacco Advertising Uses Teens To Disguise First Amendment Violations*, 4 COMMLAW CONSPECTUS 105 (1996).

20. See generally *44 Liquormart, Inc., v. Rhode Island*, 116 S. Ct. 1495 (1996) (striking down as unconstitutional Rhode Island's restrictions on truthful price advertising of liquor).

inequitable when the advertising of many other consumer products includes such practices.

Indeed, Kluger's advertising proposal is particularly perplexing given that he estimates the controversial "Joe Camel" campaign, when "measured not by the notoriety it aroused but by its effect on sales," had limited effectiveness (pp. 702-03). If adolescent smoking is caused primarily by peer pressure, parental influence, and "partaking of the forbidden fruit" (p. xvi), rather than by manufacturers' advertising, efforts to curb cigarette advertising might prove to be a costly effort, setting a dangerous precedent, with little real effect.²¹

Given his previous assessments, Kluger's proposal to reduce tar and nicotine levels to 5.0 and 0.5 milligrams, respectively, is also surprising. Earlier in the book, Kluger offers compelling evidence that existing reduced tar cigarettes—with tar and nicotine yields less than those that Kluger is proposing as a mandatory minimum—do not reduce overall tar and nicotine intake, since smokers "compensate" by smoking more cigarettes, inhaling more deeply, and smoking them farther down toward the filter (pp. 452-53). Thus, Kluger's proposal to reduce tar and nicotine levels, given his own assessment of the evidence, would not really make smoking "safer". Ironically, tobacco companies might profit by selling more cigarettes.

The proposal to limit tar and nicotine levels might reduce overall consumption, however, if existing smokers did not like the new cigarettes and decided to quit smoking altogether. Such reduced-tar cigarettes have existed on the market for years, but have not proved especially popular. Yet assuming that demand would fall overlooks an unintended, yet potentially devastating side effect: the establishment of a black market for high-tar cigarettes. Without further comment, Kluger acknowledges that such regulations "might invite the creation of a black market for stronger cigarettes, [but] these would officially be classified as illicit drugs, and efforts to police their sale would be preferable to not trying to reduce dangerously high dosages" (p. 762). As mentioned above, Kluger's previous evidence suggests that his proposed low-tar cigarettes would result in the consumption of "dangerously high" levels of tar and nicotine, so his choice of words is confusing. Moreover, the possibility that the change in tar and nicotine yield could reduce smokers' pleasure enough, or increase prices enough, to create a black market, deserves far more careful treatment than Kluger offers, in light of the huge costs and questionable efficacy of our current "war on drugs".²²

21. If adolescent smoking is indeed motivated in part by teens' perception of cigarettes as a "forbidden fruit," restrictions on smoking might paradoxically *increase* teen consumption.

22. See generally Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235 (1997) (arguing that our nation's "War on Drugs" has failed); *The War on Drugs Is Lost*, NAT'L REV., Feb. 12, 1996.

Another problem with Kluger's proposals, which he fails to address, is their regressive distributive effect. The burden of increased cigarette excise taxes falls disproportionately on those least able to pay. Furthermore, because smoking is addictive, consumer demand is price inelastic. It is highly questionable, therefore, that higher cigarette prices would significantly depress cigarette consumption (cigarettes are already highly taxed). Of course, such taxes would generate public revenues, and they would probably be somewhat effective in deterring teen usage, but Kluger needs to measure these effects against the unmentioned distributive effects.

Even Kluger's proposal to restrict smoking "in all locations where the public congregates" lacks a firm basis. Though such a regulation might be appropriate for government buildings, its application to all public spaces seems overbroad. Since Kluger does not find the evidence for discernible health effects of secondhand smoke to be compelling, the only defense of such restrictions comes from the personal preferences of the public. Given this reality, a market determination of such decisions seems more appropriate than a governmentally mandated one. If the public wants no-smoking sections or no-smoking restaurants, those serving the customer base should be happy to oblige, although the market would allow room for smoking establishments accommodating a different segment of the population.

Finally, Kluger gives no reason why the *federal* government should be involved in many of these regulatory proposals. Public space decisions certainly seem more appropriately made on the local level. State governments also seem better able to make decisions on vending machines although a federal role could be posited on the grounds that children from border counties could obtain cigarettes across state lines. Regardless, Kluger's failure to contemplate questions of federalism is a significant defect.

Kluger's inability to articulate a coherent rationale for his proposed regulations perhaps stems from a lack of objectivity on the subject. Though his treatment of the industry and the evidence is far more balanced than most, and he is tolerant of the industry leaders, Kluger is clearly no fan of tobacco. His opening words to the book are, "Tobacco is a hard plant to love" (p. 3). Perhaps so, but Kluger's closeness to his subject sometimes obscures dispassionate thinking. He expounds in his foreword about how man has "ingeniously crafted fresh forms of misery" just as he has "generated creature comforts and pleasures on a scale undreamed of by our forebears":

We have generated vile effluents with our life-enhancing technology, fouling soil, waters, and skies in ways only beginning to be understood. We have fashioned doomsday weaponry. We have promoted mindless tribal hatreds into genocide and rationalized it in the name of profane statecraft. And worst of all, if we are to credit

the number of fatalities as calculated by public-health authorities, twentieth-century man has embraced the cigarette and paid dearly for it.

(p. xi). Whatever the estimated numbers of deaths resulting therefrom, smoking cigarettes can hardly be classified as “worse” than this century’s wars and genocide. Kluger’s inflammatory statement displays a serious lack of judgment: After so many years working on this project, he is perhaps too close to the subject. Such a statement undermines Kluger’s objectivity and makes his opposition to smoking appear a moralistic, paternalistic crusade.

—James Copland IV

