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SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL, by W. Kip Viscusi.
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In **SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL**, Harvard Law professor and economist Kip Viscusi mostly argues that public policy towards smoking was just fine before the lawyers and the tobacco control activists got involved. But, according to Viscusi, those efforts have made things worse.

Viscusi admits that he is a hired gun for the tobacco industry, serving as a witness and a consultant on its behalf in a variety of venues. Yet he insists that the analysis he presents in this book is objective academic scholarship and not advocacy. Indeed, he is rather petulant towards his paymasters, accusing them of making a colossal mistake by settling the lawsuits that had been brought against them by state attorneys general from across the nation. Readers will be left with the impression that Viscusi and the local lawyers with whom he was working were itching to whip the states in court, but that, in his view, foolish leaders in the corporate headquarters caved in when they should not have done so.

Since many of Viscusi's claims are so completely at odds with what is taken as a matter of faith in the public health community, some description of his position will help capture its breath-taking nature. First, Viscusi argues that virtually everyone knows that cigarettes are very dangerous, and that indeed, most people, including most smokers, over-estimate their dangers. On this basis, the warnings that now appear on cigarette packages and advertisements are useless and unnecessary. (I note in passing that, although Viscusi finds cigarettes to be considerably less dangerous than many other experts have, he would almost surely assert that people will appreciate the dangers of smoking even at the higher levels of risk typically presented in the public health literature.)

Second, Viscusi asserts that people who smoke basically enjoy it so much that, in return for this pleasure, they quite willingly run the risk of early disease and death. Of course, some of those who wind up with lung cancer or other fatal diseases will, in hindsight, regret their choice. But Viscusi leaves the clear implication that this is just tough luck that people need to live (or die) with the consequences of their voluntary decisions. On this basis, Viscusi would certainly find objectionable the recent rash of successful individual lawsuits brought by smokers against the tobacco companies.

In response to the evidence that perhaps two in three smokers say they would like to quit, Viscusi's position is that those smokers don't really mean what they say that we should ignore those statements which, after all, might well be made just to please, or to get rid of, the interviewer. Rather, according to Viscusi, people who really want to quit smoking simply do so. In Viscusi's view, smoking is no more addictive than is opera going or patronizing hair salons. He anchors his position in the evidence that people respond to price increases for tobacco products just like they do to price increases for lots of other goods and services that no

one would suggest are addictions. Of course, he concedes that quitting smoking can be difficult, but so is giving up many pleasures that might carry dangers, like eating chocolate or driving a car.

Third, it is basically silly for non-smokers to try to get smokers to stop smoking, and what's more, some of the methods being used to promote cessation are unfair and/or ineffective. As Viscusi sees it, before recent changes in tobacco policy, there was a kind of win-win situation. Smokers got their pleasures, and then they had the grace to die early. Non-smokers, on balance, saved social costs as a result (especially from saved Social Security payments and saved nursing home costs.) Promoting cessation, therefore, is not only inappropriately paternalistic, but also it squanders a golden egg.

Fourth, Viscusi trots out the usual tobacco company objections to research recognized by the EPA and other government agencies concerning the harms of second-hand smoke. He naturally prefers, in any event, to rely on market pressures, rather than regulation, to protect those who object to environmental tobacco smoke. e.g., they should simply not work for employers who allow smoking at the workplace and not patronize restaurants or theaters that permit smoking on their premises.

Despite these positions, Viscusi describes an increase in teen smoking as *alarming* and terms the slightly less bad long-term prospect for teen smoking as *less bleak* (p. 177). Yet, if smoking is not addictive, if people can quit when they want, and if smokers get so much pleasure from cigarettes, just what is wrong with teen smoking anyway? Kids who smoke for a couple of years and quit probably have few lasting health risks. Is it that Viscusi just wants to deny kids pleasures, like those who oppose teen dancing or those who worry about the effects of music lyrics?

Since he doesn't say, it is hard to resist the conclusion that Viscusi opposes youth smoking simply because that is the position of the tobacco industry. Regardless of their actual objectives, tobacco companies are now officially against youth smoking. They have had to adopt this position, of course, because the public is so strongly against youth smoking, and big tobacco seems desperate to rid itself of the *pariah industry* label that now attaches to it in many quarters. It would be much better to be thought of like the beer industry, which claims to discourage both youth drinking and irresponsible adult drinking, and which seems generally free from the wrath of the public.

It is perhaps worth emphasizing that the notion of smoking as an addiction is not inconsistent with evidence that the consumption of cigarettes is responsive to price changes. When the price of tobacco products goes up, some hooked smokers simply switch to less expensive non-premium brands, and some others satisfy their craving for nicotine by smoking fewer cigarettes each day in a more careful manner (such as smoking all the way down to the end of each cigarette, or inhaling more deeply), or by switching to a higher nicotine brand. These are all examples of addicted smokers *making do* in the face of higher prices.

Higher cigarette costs also discourage some people from taking up smoking and deter others from making the shift from occasional *social smoker* or *experimenter* to become regular smokers. But these responses to higher prices occur among people not addicted in the first place. This is not to deny that price increases can also lead a small number of heavy smokers to quit entirely. Yet, the point remains that a very large share of addicted smokers will simply continue their prior behavior, bearing the higher cost by diverting their spending from something else. Many of these will try to quit, perhaps telling themselves that the higher price is yet another reason to make the attempt. But nearly all will fail.

In any event, the arguments Viscusi advances here in favor of tobacco industry positions are hardly new. Indeed, Viscusi himself has made most of these same arguments before. Merely repeating them in a book published by a respected university press is unlikely to change many minds. Perhaps more interesting, then, is

Viscusi's take on litigation against the tobacco companies. After all, his subtitle is *A Postmortem on the Tobacco Deal*. However, Viscusi's analysis is unfortunately superficial.

The industry sought initially to reach a global settlement with the states, with Congress, and with anti-tobacco activists, because that deal would not only have ended the pending lawsuits that had been brought by state attorneys general, but also because it would have put a large damper on both individual and class action liability lawsuits. Moreover, for a time it appeared to many people on all sides of the smoking debate that this global settlement would become law. Not only had the lead state attorneys general signed on, and not only was the deal supported by a key leader in the tobacco control community, but the bill that set out the settlement was to be shepherded through Congress by the highly regarded Senator John McCain.

Alas, from the tobacco company viewpoint, the deal was undermined when other anti-tobacco leaders and their Democratic party political allies got greedy and demanded not only much stronger regulatory provisions and larger annual payments to the states, but also the elimination of the curbs on tobacco litigation that were contained in the original deal and so vital to the industry. With the Clinton Administration largely sitting on the sidelines, once the global settlement was converted into a largely one-way set of controls, the tobacco companies walked away and their Republican friends scuttled the McCain bill. Whether this failure to achieve considerable federal regulation of tobacco resulted in a net loss for the public health is disputed. But Viscusi has not offered convincing arguments that, from its viewpoint, the industry was foolish to start down what, in the end, turned out to be a dead-end road. If nothing else, it should be recalled that the industry had perennially enjoyed considerable Congressional success, some in the name of tobacco control. Indeed, in the 1960s the industry obtained a uniform and mild warning on cigarette ads and packages that pre-empted stronger state and local warnings.

Moreover, Viscusi does not sufficiently examine the industry's alternatives. When the global settlement finally failed, big tobacco had already settled cases with the states of Mississippi, Texas, Florida and Minnesota. An easy explanation for these early settlements is that they were entered into to show that the industry was serious about a global agreement. But there are other factors relevant to these state settlements as well. For example, it was important for the industry to get the Mississippi lawyers (whose case was scheduled to be tried first of all the states) to focus on negotiating the global resolution, rather than on battling the industry in court. Florida's case was important to settle because that state had recently passed a very dramatic law that essentially pre-determined that the industry was going to be liable to the state. Minnesota's case was also important to settle because the attorney general there, with substantial help from talented private counsel, was actually waging a fierce war in court before a pro-plaintiff judge and seemed headed for a substantial victory. Moreover, discovery in the Minnesota case was yielding formerly secret industry documents that could significantly jeopardize subsequent cases. Indeed, a big loss in Minnesota likely would have prompted a change in the terms of the global agreement to the considerable detriment of the defendant corporations. In short, Viscusi's position, which seems to be that all of these state cases were winnable with tenacious lawyering, seems naive.

This is not to argue that the formal legal foundation underlying the states' cases was rock solid. Indeed, lawyers in many states appeared to sense early on that the initial legal theory behind the Mississippi case might well be a loser. Mississippi's claim, simply put, was that the industry had misbehaved and that Mississippi had paid a hefty tobacco-related health care bill for low income smokers. The connection between these two points was not self-evident, however; nor was the conclusion that making the connection automatically entitled the state to reimbursement for those health care costs. The legal theory that some saw as connecting the two was a claim of unjust enrichment, but this was surely a novel and highly uncertain

use of that branch of the law. As a result, as the litigation spread to other states, other legal theories were asserted. These included claims of violations of state consumer protection laws, violations of antitrust laws, violations of sales to minors laws, bold tort law theories that viewed the state as the direct victim of tobacco company wrongdoing, and so on. Alas, Viscusi offers no analysis of the merits of such theories.

Whatever the legal precedent for such claims, it seems that the tobacco companies had good reason to worry. As noted above, the way the Minnesota trial was going before it was settled surely spelled trouble. Moreover, secret documents and other evidence of unflattering industry behavior were being disclosed at that time, not only through the state litigation, but also because of leaks to tobacco control activists and the media. As a result, industry activities became the subject of many news stories, and such intense press scrutiny was not enhancing its standing with the public (and, in turn, with potential jurors). Indeed, because the state attorney general cases pitted home-state prosecutors against typically out of state corporations with increasingly damaged reputations, it is not enough merely to note that the technical legal bases of these lawsuits were uncertain.

Furthermore, having settled with four states in anticipation of a global settlement, the industry was in something of an awkward position when that deal failed. To reject further settlements and to fight cases in 40-some states would tax the industry's legal sources and risk additional, highly damaging trials like the one in Minnesota. Instead, entering into a Master Settlement Agreement (MSA) with all of the remaining states, industry leaders were able to achieve certain benefits. To be sure, under the terms of the MSA the tobacco companies agreed to pay out huge financial sums to the states for the indefinite future. But Viscusi is correct to emphasize that these payments have been set up to function as much like a tobacco tax as possible. That, of course, means that the burden of those payments largely falls on smokers, and not on tobacco company shareholders. Furthermore, although advertising and other controls agreed to in the MSA have placed limitations on the tobacco companies, these provisions also help to block entry of potential new competitors in the cigarette market and to guarantee continued market domination for the two U.S. giants, Philip Morris and R J Reynolds.

Viscusi is also critical of the payment arrangements of the MSA. He suggests that there is only one fair basis on which to allocate the overall industry payment to the individual states. That is to tie it to the state's net burden of the social costs attributable to smoking. Using his theory, Viscusi complains that state shares were improperly set, and he seems especially upset that the three leading tobacco producing states (North Carolina, Kentucky and Virginia) seem short changed.

But, there is no reason to conclude that Viscusi's criterion is the only fair basis for dividing the pie. For example, many would find it neither surprising nor unreasonable if those attorneys general who fought the hardest and uncovered the best evidence would win greater shares for their states, especially as compared with those states whose leaders opposed the litigation or merely jumped on the bandwagon at the very last minute. So, too, it would seem altogether appropriate to many people if the attorneys general decided to allocate the total pie by using gross statistics such as state population, or smoking population, or share of tobacco sales.

The MSA itself is silent on the criteria that were used in striking the deal, and Viscusi does not appear to have investigated what the attorneys general actually did. However, I have learned quite a bit about the allocation process as a result of three interviews I conducted in January, 2003 -- with (1) Jeffrey Modisett, the former Indiana Attorney General, who led the attorneys general effort to determine how to divide the settlement money, (2) Scott Chinn, the Corporation Counsel for the City of Indianapolis, who worked with Modisett on the project, and (3) Sue Ellen Wooldridge, who now works for the Department of the Interior and who, at the time of the MSA, was a special assistant attorney general for the state of California and who played a key role in the final allocation.

It appears that two main data sets were used in allocating the MSA funds among the states, and both were rooted in scholarly research. Modisett's subcommittee initially produced several alternative allocation formulas from which the attorneys general were asked to choose, some of which were based upon factors like population share, share of smokers, etc. But the group decided instead to give a 50% weighting to each state's smoking attributable Medicaid costs as determined in a study carried out by a consulting group called Berkeley Economic Research Associates (BERA) (see Miller, James, Ernst, and Collin 1997) and a 50% weighting to each state's total smoking-related health care costs, with this data drawn from reports of the Centers for Disease Control (CDC). The justification put forward among the attorneys general for using BERA data was that many states had been seeking Medicaid cost reimbursement as a remedy for the alleged tobacco company misconduct, regardless of the legal theory behind their case. But some states objected that relying entirely upon this approach would favor states that had been extra generous or especially inefficient in their Medicaid programs. Giving 50% weighting to the CDC data tended to temper the objections to the BERA data set. The CDC data also tended to rank the states in terms of a mix of population and smoking population, criteria that some of the attorneys general favored using.

To this basic allocation schedule, certain adjustments were made for what are probably best seen as political factors necessary to get the deal done. California, for example, objected that the proposed allocation would give more money to New York than California, and California argued in part that this would penalize California for doing a better job with its smoking control program. Hence adjustments were made to assure that California got an ever so slightly larger share than New York. Then a group of smaller states and Puerto Rico complained about special circumstances they faced fixed costs of setting up smoking control programs and unique health care funding arrangements in Puerto Rico. Hence small adjustments were made to increase the shares of those parties. Finally, some last minute very minor tweaking of the allocation table was done in somewhat of an ad hoc manner under the leadership of the Colorado attorney general.

Ironically, according to Viscusi's theory and his data, Indiana is the state that is most unfairly treated in the allocation of the MSA money among the states. This might suggest that Indiana's Modisett was extraordinarily selfless. Yet, both Modisett and Chinn believe that Indiana got at least its fair share.

The explanation for this discrepancy appears to lie in a deep divide between what the attorneys general thought was a fair way to divide the settlement dollars and what Viscusi believes. Viscusi's numbers are substantially driven by the tobacco tax rates in the various states, and the reason his table shows North Carolina, Virginia, Kentucky, and Indiana as especially under-compensated is that all of them had quite low tobacco excise taxes at the time. For Viscusi's net social costs to the state necessarily implies subtracting from smoking-related Medicaid costs what the state already was collecting from smokers by way of tobacco tax revenues. This implies that the states that had gone easiest on smokers (to the benefit of the tobacco companies) were especially deserving of the MSA proceeds. But apparently not one of the attorneys general saw the matter that way. As they saw it, a state was not harmed less by the misconduct of the tobacco companies simply because the state had taxed smokers more.

It should also be noted that in addition to the main MSA fund, which is scheduled to provide a national total of about \$9 billion a year once fully phased in, the MSA also created a smaller fund of about \$850 million a year. The MSA provides that this smaller fund is to be divided among the states as determined by a group of attorneys general, based importantly upon the contribution of each state to the litigation effort. I have not yet seen reports of how these moneys have actually been allocated.

Viscusi also notes, as many tobacco control activists have lamented, that little of the money that the states have obtained from the MSA has actually gone either to pay for tobacco-related medical costs or to fund

tobacco control programs. Yet, even on Viscusi's view of the legal theory underlying the case, it is not at all obvious why the money should be spent in those ways.

What we have witnessed in practice is not terribly surprising. Although the CDC, President Clinton, and others recommended spending money on preventing children from smoking, on children's health, and on other such programs, most states have generally spent their MSA money more or less as they would spend the proceeds of any new tax on cigarettes. That is, they have used it mostly for whatever are the highest priority matters for state spending generally, such as schools, roads, hospitals, or law enforcement. Only a small number of states have set aside modest sums for public health efforts on behalf of tobacco control as the CDC urged.

Viscusi further argues that the considerable smoking-related litigation the industry now faces has been stimulated by the MSA, but he has not convincingly made the case. For one thing, many advocates believe that the few individual lawsuits that have been won by plaintiffs have been helped enormously by the documents *involuntarily* obtained from the industry in the Minnesota state case. Hence, in hindsight, Viscusi may have the industry's error backwards. That is, maybe the industry's mistake was not settling with Minnesota even sooner. Indeed, had the industry fought more state cases as Viscusi had hoped, it is possible that even more incriminating documents would have been unearthed.

As of this writing, plaintiffs have won large damage awards (including huge punitive awards) at the trial level in six individual smoker cases (in California, Oregon and Kansas). Viscusi offers no convincing evidence that these cases would have been decided otherwise absent the MSA. He merely speculates that publicity about the MSA has caused jurors and judges to be willing to impose high levels of punitive damages.

It should also be emphasized that none of these decisions has yet been upheld by the relevant highest appeals court, and hence no money has yet been paid out by the defendants. Whether these cases turn out to be the front edge of a tidal wave remains to be seen. In Florida, there are two important additional developments. One class action on behalf of smokers remains alive, and a jury has awarded the class billions in punitive damages. A series of second hand smoke cases on behalf of flight attendants is also moving ahead in Florida, and although the industry won the first trial, the plaintiff won a substantial award in the second case. How these cases ultimately play out is uncertain. But again there is no convincing proof that the victories won so far in Florida were the result of the MSA.

Moreover, it is important to appreciate that the industry has continued to prevail in most litigation against it. This includes lawsuits by insurers and foreign nations based loosely on the state attorney general cases, class actions on behalf of smokers seeking medical monitoring, class actions seeking the reimbursement of the cost of cigarettes, lawsuits by Canada and the EU asserting industry participation in tobacco smuggling, and other individual tort claims brought both by smokers and by alleged victims of second-hand smoke. Also, the prognosis for the federal government's RICO case against the industry is cloudy.

In short, it appears that the industry could have best protected itself against the most serious litigation threat it now faces that of enormous punitive damages had it actually succeeded with the global settlement. Having failed at that effort, it seems more likely that the die was actually cast years ago. Indeed, based on Viscusi's data, the industry's major mistake was probably made in the 1950s, or at least in 1964 when the Surgeon General issued his famous report on the dangers of smoking. Rather than to deny, both then and for so many years after, that smoking was dangerous, the industry should have promptly acknowledged those dangers dangers that Viscusi says the public largely understood anyway. The industry also should have conceded the scientific findings on addiction even before they were announced by the Surgeon General, and earlier on it should have voluntarily adopted practices designed to control youth smoking. Those admissions and behaviors would have gone a long way to diffuse the jury anger that is

apparent in cases where individual plaintiffs have been awarded damages. But, of course, those imagined industry actions might, at some point, have yielded much tougher federal regulation of tobacco than we now have, and they would have risked a loss of sales and profits that company executives at the time were probably altogether unwilling to chance. After all, by now, when the price for those denials may have to be paid, the bosses who were then in charge are mostly long gone.

In the end, Viscusi is clearly right about one thing. It would be better if cigarettes were not dangerous. He wants the FDA and the industry to work together to find a way to make cigarettes safer. Notice that this is not the same as making a safe cigarette. Viscusi's position in this book will likely be dismissed by those public health officials who have not already written him off as in the industry's pocket. This is because Viscusi continues to insist that so-called low tar and low nicotine cigarettes are safer, even though almost everyone in the tobacco control field has been long convinced that they are not. Indeed, in the view of some, these light cigarettes are actually more dangerous, because, as they see it, the introduction of filtered light cigarettes has meant and will mean millions of deaths to people who have been fooled people who would not be smokers at all had they known better.

A similar dilemma now confronts many in the tobacco control field as they think about what public policy should be towards alternative nicotine replacement devices generally. If these non-cigarette products are safe (or even merely decidedly safer than existing cigarettes), and if smokers who would have otherwise remained heavy smokers were to switch to these devices, that would be a public health gain. But if such devices aren't really much safer, and if people are encouraged to start using them instead of quitting outright, or, even worse, to start smoking cigarettes because of the availability of these devices, that would be bad from the public health perspective.

Of course, in the details, one could have very different views of the specific devices. For example, the nicotine patch or gum might be more promising from the public health perspective than are cigarettes made with cloves or lettuce. But what about something like nicotine water? Is drinking this product a good way to help smokers break their habit, or will it simply allow them to drink their nicotine on occasions when smoking is not allowed (such as on airplane flights or other no smoking zones)?

Even more challenging is the suggestion by some that the government should encourage smokers to switch to an alternate tobacco substitute, like American chewing tobacco or Swedish snus. But these products are also dangerous, albeit considerably less so than cigarettes. Would government endorsement encourage people to use them who would not otherwise use tobacco at all?

Viscusi wants the FDA to get involved with this issue by conducting studies and then providing useful warning information about the relative risks of various products. In contrast to the rest of his book, here he urges a new regulatory initiative. Disappointingly, he only discusses differential risks of tobacco-company produced cigarettes and pseudo-cigarettes (like the R.J. Reynolds product Premier that looked like a cigarette and contained a bit of tobacco and a fair amount of nicotine, but did not burn). His credibility on this score would have been enhanced considerably had he also discussed the role of the FDA with respect to nicotine replacement products made by competitors of the tobacco companies.

In any event, from the public health perspective, simply providing information will never suffice as the government's role when, as at present, most adult smokers began their habit at a young age. This means that the response of children to various potential regulatory efforts is significant. From this perspective, the most important impact of the MSA has been to raise the price of cigarettes, something to which teens seem to be especially sensitive. For Viscusi, by contrast, the main way to deal with youth smoking is not through higher taxes, or changes in tobacco industry marketing behaviors, or government funded anti-tobacco

advertising efforts. Rather, it is to rely upon parents to better control their children.

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