

BAN MENTHOL CIGARETTES? NO SO FAST!

The Victims of Contraband Cigarettes: Disproportionally Young and African American

The FDA has issued an Advance Notice of Proposed Rulemaking (ANPRM) as a first step toward regulating or banning menthol cigarettes. While presumably well intentioned, the agency and anti-smoking NGOs who support further regulation and, indeed, a ban on menthol cigarettes have failed to adequately consider the serious unintended and counterproductive consequences of an expanded contraband market. As described and set forth below, there is a pervasive contraband cigarette market under current law fueled by increasing cigarette taxes. The implications of an outright ban on menthol cigarettes would be to create an even more lucrative black market and significantly worsen the situation.

The victims of contraband cigarettes are numerous and diverse. Everyone who smokes extraordinarily toxic counterfeit cigarettes is a victim as is every underage person who illegally purchases cigarettes from a contraband vendor. Cities and states are victims of the massive lost tax revenues. Mark Quinsey and Patrick Azimkar of The British 38th Regiment Royal Engineers whose murders were funded by cigarette trafficking are also victims of the trade.

While the victims of trafficking in counterfeit and other contraband cigarettes under existing laws, are numerous, taken as a whole, they have clear demographic characteristics. As article in Tobacco Control made clear, the young are particularly victimized by the availability of contraband cigarettes, the article stated that “illicit cigarettes...constituted a substantial proportion (~43%) of all cigarettes smoked among Ontario high school daily smokers...”¹

In addition to harming younger people, the contraband cigarette trade also disproportionately impacts lower income and non-white citizens. An article published in the *American Journal of Public Health* (AJPH) which analyzed the contraband cigarette trade in New York City summarized its results by stating:

*A large tax increase led to what focus group participants described as a pervasive illegal cigarette market in a low-income minority community.*²

The Shelley article in AJPH also explained that,

*Purchases of untaxed cigarettes from another person were more common among Blacks compared with all other ethnic groups and were clustered in low-income neighborhoods (NYC Department of Health and Mental Hygiene, unpublished data, 2003).*³

¹ Russell C. Callaghan, Scott Veldhuizen, et al., “Contraband cigarette consumption among adolescent daily smokers in Ontario, Canada,” *Tobacco Control*, published October 21, 2010 in advance of print.

² Donna Shelley, MD, MPH, M. Jennifer Cantrell, MPA, et al., (2007) “The \$5 Man: The Underground Economic Response to a Large Cigarette Tax Increase in New York City,” *American Journal of Public Health*, Vol. 97, No. 8, pp. 1483-1488, Abstract.

³ *Ibid.*, p. 1483.

While smokers that were interviewed as part of the Shelley study cited the lower price of illicit cigarettes as an attraction for choosing to buy contraband cigarettes, they also highlighted the fact their economic status was the reason the contraband dealers were in their neighborhood. As one woman explained,

“We’re thankful for the \$5 man. Everyone is happy that the fare is gonna go back down. We’re happy that we found the man on 125th Street that says Newport \$5. We don’t care that the cops are standing right there and he’s doin’ something illegal. It’s not very important down on 86th Street, Central Park West. That’s because they got a lot of money.”
*(Female smoker, 18–24 years)*⁴

The study’s subjects were also keenly aware of the racial aspects of the illegal sale of cigarettes and the role that race, economic status and discrimination play in causing African Americans to smoke and in the availability of contraband tobacco:

“I sometimes wonder if someone is pushing cigarettes in Harlem because you can go outside of Harlem and you don’t see, you don’t hear. But in these streets of Harlem, someone is walking around saying, ‘cigarettes \$5.’” *(Female smoker, ≥50 years)*⁵

“I need this to calm down and that plays a big role in the life of a Black man of course, there’s a lot of things that’s put to us that stresses us out and we run to these packs.” *(Male smoker, 25–49 years)*

“It’s stressful living in Harlem especially with the economy now. You can find a pack of cigarettes before you can find a job.” *(Female smoker, 18–24 years)*

“Ya know, we’re poor and this [smoking] is the way we get over a lot of things.” *(Female smoker, 18–24 years)*⁶

The study also provides a street level view of the same point an ATF official made, that cigarette “smuggling is as lucrative or more lucrative than smuggling drugs....”⁷

“The profit is unbearable. You know, I watch guys today in Harlem. Bought cars [with the money they made] selling cigarettes. Buy vans and

⁴ Ibid., p. 1485.

⁵ Ibid., p. 1486.

⁶ Ibid.

⁷ Kris Van Cleave, “Only on 7: Undercover Maryland investigators close in on a suspected smuggler,” November 9, 2012, available at <http://www.wjla.com/articles/2012/11/only-on-7-undercover-maryland-investigators-close-in-on-a-suspected-smuggler--81899.html>.

jeeps [with the money they made] selling cigarettes.” (Male smoker, 25–49 years)⁸

One of the ways in which street level contraband dealers increase the availability of cigarettes is by breaking up packs of smuggled cigarettes and selling them individually. The term for such cigarettes is “loosies” for loose cigarettes. The availability of illegal loose cigarettes allows people to buy one or two cigarettes at a time rather than spending the much larger sum that would be needed to buy an entire pack.

“It’s been about 4 months since I stopped buying packs. I buy loose cigarettes.” (Female nonsmoker, 25–49 years)⁹

The *New York Times* ran a profile on an African American contraband cigarette vendor, Lonnie Warner. In 2011. Mr. Warner, who is better known as “Lonnie Loosie” because he specializes in the sale of loose cigarettes, buys smuggled menthol cigarettes for a little over \$50/carton and “then resells them for 75 cents each, two for \$1 or \$8 for a pack (\$7 for friends).”¹⁰

According to Mr. Warner, “he and each of his two partners took home \$120 to \$150 a day, profit made from selling about 2,000 cigarettes, mostly two at a time. Each transaction is a misdemeanor offense.” Thus, the illicit cigarette vendors discussed in the story are engaging in nearly 1,000 illegal cigarette transactions a day.

With crime comes punishment. Mr. Warner is frequently arrested. He “recalls being arrested 15 times, generally on the charge of selling untaxed tobacco.” Punishment “usually means a few days in jail on Rikers Island, or a week of community service, some of it spent sweeping cigarette butts.”

There are three key lessons to be learned from the story of Lonnie Loosie:

1. ***Availability of Loose Cigarettes Undermines Smoking Cessation Efforts.*** The article quotes Mr. Warner explaining how people who have the stated intention of quitting smoking have their intent undermined by the availability of single cigarettes.

In his time, Mr. Warner has learned a lot about smokers’ habits. He sometimes hears from customers who explain to him they are quitting as they buy two final loosies.

“A lot of them believe they are quitting,” he said, “but they come back every day.”¹¹

⁸ Shelley (2007), p. 1486.

⁹ Ibid., p. 1485.

¹⁰ Joseph Goldstein, “A Cigarette for 75 Cents, 2 for \$1: The Brisk, Shady Sale of ‘Loosies’,” *New York Times*, April 4, 2011.

¹¹ Ibid.

2. ***Cigarette Restrictions Increase the Black Market.*** Tax policies which effectively restrict lawful cigarette purchases to relatively upper income smokers have spurred the growth in the contraband cigarette market. As Mr. Warner explains,

“The tax went up, and we started selling 10 times as much,” Mr. Warner said. “Bloomberg thinks he’s stopping people from smoking. He’s just turning them onto loosies.”¹²

Thus, efforts to weaponize poverty, *i.e.*, policies that use a low income population segment’s economic status as the fulcrum in an attempt to alter behavior, can and do backfire.

3. ***Limited Economic Opportunities for Disadvantaged Citizens Also Spur the Black Market.*** As Mr. Williams explains, one of the reasons why he sells contraband cigarettes, despite his frequent arrests, is that he has few other opportunities.

After his release from a 13-year sentence in 2006, Mr. Warner tried to find steady work in New York, but was invariably rebuffed — because of his felony status, he suspects. When he considers his options for making a living, he sees few besides selling loosies.

“I’m sorry that it’s come to this, but this is what it’s come to,” he said.¹³

The specific issue of limited economic opportunities for disadvantaged citizens and the larger issues of racism and the daily burdens associated with in living in a disadvantaged community are crucial to understanding both the contraband cigarette market and the prevalence of smoking among African Americans. Moreover, any fair assessment of the victims of the illegal trafficking in any contraband item, whether untaxed cigarettes or narcotics, needs to recognize the fact that it is disproportionately African Americans who go to prison. As one the participants in the Shelley (2007) study explained,

“It creates more of a way for the lot of us in jail too because for them raising the price and forcing us now to go across state line. They know what’s going on and they’ll catch you knowing we have a big demand for this, and they lock you up or they catch guys on the street and they grab them and put them in jail, and the most people they’re grabbing and putting in jail are people of color.” (Male smoker, 25–49 years)¹⁴

The statement by the study participant that “the most people they’re grabbing and putting in jail are people of color” is based on fact. The Fair Sentencing Act was passed by Congress and

¹² Ibid.

¹³ Ibid.

¹⁴ Shelley (2007), p. 1486.

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signed into law in 2010 because of the extreme racial disparities in punishment for African Americans who sold cocaine in the form most common in lower income communities compared with the punishment for whites holding the same quantity of the drug in the form most common in upper income environments.

*While a person found with five grams of crack cocaine faced a five-year mandatory minimum prison sentence, a person holding powder cocaine could receive the same sentence only if he or she held five hundred grams. Similarly, those carrying ten grams of crack cocaine faced a ten-year mandatory sentence, while possession of one thousand grams of powder cocaine was required for the same sentence to be imposed.*¹⁵

The racial disparity in sentencing occurred even though a 1997 study “examined the addictive nature of both crack and powder cocaine and concluded that one was no more addictive than the other.”¹⁶

Moreover, the racial disparity in sentencing for the sale of contraband items is not unique to cocaine. As National Public Radio noted in a discussion of the Fair Sentencing Act,

*In New York and California, state data analyses suggest blacks are much more likely to be arrested for marijuana violations than whites, and census data show a stark reality: African-Americans make up about 12 percent of the U.S. population - and about 44 percent of America’s prison inmates.*¹⁷

An article in Time Magazine, discussing a study published in the *Archives in General Psychiatry* based on the federal 2005 to 2008 National Survey on Drug Use and Health datasets, explained that

*Black youth are arrested for drug crimes at a rate ten times higher than that of whites. But new research shows that young African Americans are actually less likely to use drugs and less likely to develop substance use disorders, compared to whites, Native Americans, Hispanics and people of mixed race.*¹⁸

The racial imbalance in persons serving time for substance offenses is also illustrated by the most recent statistics from the Department of Justice’s Bureau of Justice Statistics regarding

¹⁵ See, Fair Sentencing Act entry in Wikipedia, http://en.wikipedia.org/wiki/Fair_Sentencing_Act.

¹⁶ Ibid.

¹⁷ National Public Radio, “Black Men’s Jail Time Hits Entire Communities,” August 23, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=129379700>.

¹⁸ Maia Szalavitz, “Study: Whites More Likely to Abuse Drugs Than Blacks,” Time, November 7, 2011, available at <http://healthland.time.com/2011/11/07/study-whites-more-likely-to-abuse-drugs-than-blacks/>.

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“sentenced prisoners under state jurisdiction...” Among prisoners sentenced for “drugs” a category that includes “trafficking, possession, and other drug offenses” 46% were Black and only 28% were White.¹⁹

Thus, there is a sharp racial divergence between the people who commit substance-related crimes and those who go to prison for the offenses – a fact which needs to inform federal development of substance-related legal policies.

Will Menthol Smokers be the New Contraband Victims?

The US Food and Drug Administration (FDA) is considering banning menthol-flavor cigarettes. The FDA was directed to undertake the review of menthol cigarettes by the Family Smoking Prevention and Tobacco Control Act. The Act, however, also required the Secretary of the Department of Health and Human Services to

consider all other information submitted in connection with a proposed standard, including information concerning the countervailing effects of the tobacco product standard on the health of adolescent tobacco users, adult tobacco users, or nontobacco users, such as the creation of a significant demand for contraband or other tobacco products that do not meet the requirements of this chapter and the significance of such demand. (Public Law 111-31, §907(b)(2)) [Emphasis added]

Advising the FDA on the menthol issue was a Tobacco Products Scientific Advisory Committee (TPSAC) authorized by the Tobacco Control Act. After reviewing evidence presented to the committee at a series of public meeting, the TPSAC said in their final report that:

- ***TPSAC acknowledges that the potential for contraband menthol cigarettes exists, should FDA choose to implement a ban or take some other policy action that restricts availability of menthol cigarettes.***²⁰

The TPSAC did not, however, reach any conclusions regarding the size and scope of a contraband market for menthol cigarettes. Instead, the committee stated that they were “not constituted to carry out analyses of the potential for and impact of a black market for menthol cigarettes” and “concluded that FDA would need to assess the potential for contraband menthol cigarettes as required by the Act.”²¹

¹⁹ E. Ann Carson, Ph.D., and William J. Sabol, Ph.D., U.S. Department of Justice, Office of Justice Programs Bureau of Justice Statistics, “Prisoners in 2011,” December 2012, NCJ 239808, Table 9.

²⁰ TPSAC, “Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations,” p. 227, available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf>

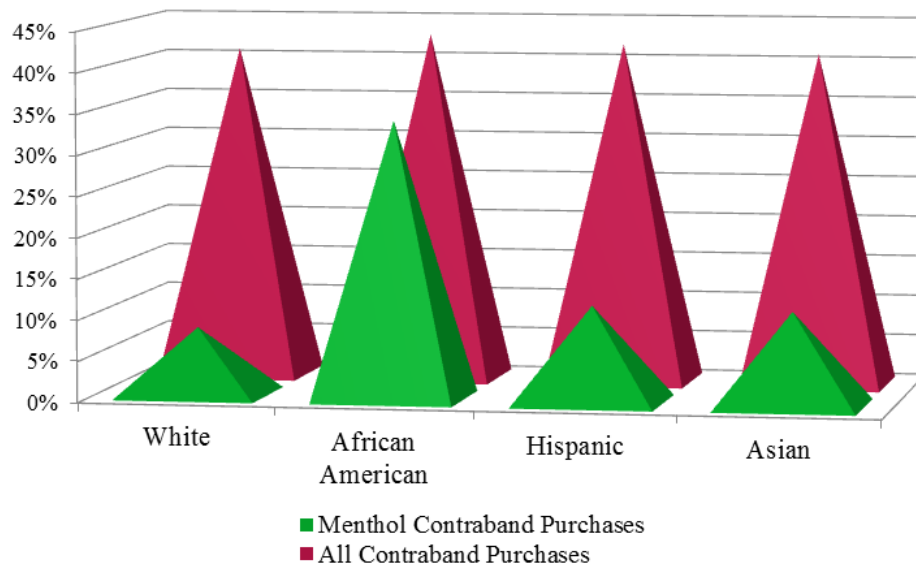
²¹ Ibid., p.225.

The Center for Regulatory Effectiveness' (CRE's) Monograph²² developed an estimate of the increase in the contraband market resulting from a ban on menthol cigarettes based on federal and state government data and the peer reviewed literature. Because menthol cigarettes are often preferred by African Americans and younger smokers – the same communities already disproportionately targeted by contraband tobacco sales organizations, CRE estimated that African American neighborhoods would be the focal point of contraband sales organizations in event of a menthol ban.

CRE found that, even though whites, Asians, Hispanics and African Americans currently purchase contraband tobacco at about the same rate, African Americans are most likely to purchase contraband menthol cigarettes as illustrated in Figure 3 (appearing as Figure 13 in the Monograph).

Share of Adult Male Smokers Who Have Purchased Contraband Cigarettes

Comparison of all Contraband Purchases to Menthol Contraband Purchases

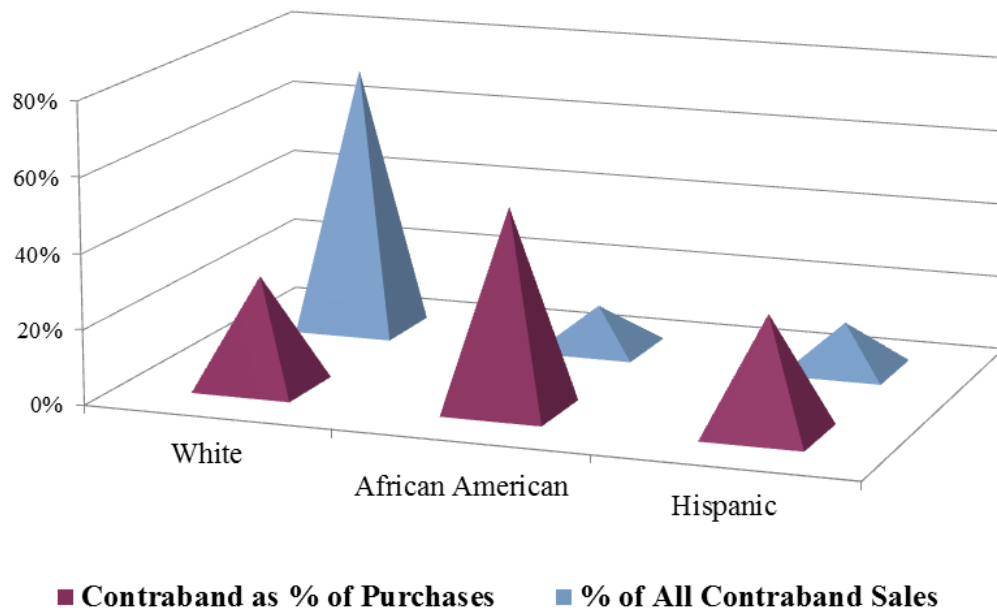


Source: CRE based on Taylor (2005), NSDUH, Census Bureau Current Population Survey

²² Center for Regulatory Effectiveness, "An Inquiry into the Nature, Causes and Impacts of Contraband Cigarettes," January 2011, available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM243625.pdf>.

CRE projected that, if there were a menthol ban, African Americans would disproportionately purchase contraband tobacco even though whites would be, by far, the primary purchaser of illicit cigarettes as illustrated in Figure 4 (appearing as Figure 17 in the Monograph).

A Menthol Ban Would Disproportionately Impact African American Smokers



Source: CRE

Counterfeit and other contraband tobacco needs to be subjected to increased law enforcement attention at all levels of government. As President Obama stated in the Executive Order about transnational criminal organizations that traffic in illegal cigarettes, drugs, weapons and humans, they “constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States...” An increase in the contraband cigarette trade resulting from a menthol cigarette ban, however, would mean that the social burden of those enhanced law enforcement efforts would be experienced predominantly in lower income, largely minority communities.

According to data from HHS/CDC presented to the TPSAC, adult white menthol smokers outnumber adult African American menthol smokers by 1.8:1. Among underage menthol smokers, whites outnumber African Americans by 4.7:1.²³ Experience with illegal substances

²³ Ralph S. Caraballo, PhD, MPH, “Menthol and Demographics,” HHS/Centers for Disease Control and Prevention, March 30, 2010, *available at*

strongly suggests, however, that those who are subjected to law enforcement actions for contraband tobacco in event of a menthol ban would not be predominately white. This is particularly true given the relative lack of access in disadvantaged communities to tobacco cessation programs and other social support services.

In short, a ban would mean that a large and lucrative market will exist for a product which could be legally manufactured or sold. These are the same conditions which gave rise to the prohibition era crime wave.

The concerns regarding the impact of a potential menthol ban go far beyond law enforcement issues. As was explained above, in event of a ban on legal menthol cigarettes, contraband tobacco dealers will be even more prevalent in African American communities and will enjoy even larger financial rewards.

The likely impacts of a menthol ban would include:

- More criminals selling cigarettes to children – contraband dealers don't adhere to age restrictions.
- More contraband cigarettes with extreme levels of lead, cadmium and other toxics as well as potentially higher levels of nicotine.
- More street level hawking aka advertising, of cigarettes. As a participant in the Shelley (2007) study explained,

“How could we all forget the biggest advertisement going now when you pass the corner on the street (mimics people selling cigarettes). That's the new advertisement, the people who sell them.” (Female nonsmoker, >50 years)²⁴

- More cigarettes sold as singles, aka loosies, increasing their affordability and undercutting the deterrent effect of higher cigarette taxes.
- More money going to organized criminal groups to finance other criminal activities.
- More African American youth profiled, arrested, prosecuted, and jailed for selling contraband menthol cigarettes in their communities.
- More money laundering activities.

<http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM207153.pdf>.

²⁴ Shelley (2007), p. 1486.

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In short, the bad guys ranging from Los Zetas to Hezbollah would be the beneficiaries of a ban on menthol cigarettes. Everyone else would lose.