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FLAVORED TOBACCO PRODUCT BANS AND BLACK MARKETS

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INTRODUCTION

In 2019, eight states issued emergency rules to temporarily ban the sale of flavored e-cigarettes or “vape” products, and more than 70 jurisdictions already restrict the sale of menthol cigarettes.¹ One of those states, Massachusetts, replaced its temporary ban with a permanent one on all flavored tobacco products except those sold and consumed at licensed smoking bars.² New Jersey became the first state to issue a permanent and complete prohibition on any flavored e-cigarette.³ At the federal level, the Food and Drug Administration recently banned all cartridge-based, flavored e-cigarettes except for menthol, which demonstrates the bipartisan nature of the anti-tobacco movement.⁴

Restrictions on both combustible menthol cigarettes and flavored e-cigarettes encompass a range of policies that include limiting sales of products to licensed tobacco retailers or smoking bars; prohibiting the sale of products within a certain distance of a school or youth-oriented facility; or outright banning the sale of such products. Prohibition advocates argue that menthol cigarettes mask the harshness of cigarette smoke thereby increasing the likelihood that minors will initiate smoking,⁵ and likewise that flavored e-cigarettes have facilitated the rise in teen vaping.⁶ They

also warn that vaping, which is of uncertain health implications, could serve as a gateway to smoking combustibles and even marijuana.⁷ And finally, they point to the tobacco industry’s history of insidious marketing to Black smokers, in particular, as a contributing factor to the high levels of smoking that persist in these communities.⁸

On the other hand, skeptics of prohibition caution that swift and total bans would not meaningfully reduce smoking or vaping rates, as many consumers would switch to legal, more dangerous tobacco products or would pursue their preferred products in illicit markets.⁹ Ban opponents also maintain that shifting products to an underground economy would impose serious social costs by introducing consumers to unregulated and thus more dangerous products, by reducing tax revenues from state and local governments, by funding the activities of criminal organizations, and by increasing tensions between law enforcement and communities historically wary of police.¹⁰ The latter concern also exacerbates the existing problem of disproportionately criminalizing communities of color, as these smokers tend to consume menthols at increased rates.¹¹ It also risks reallocating finite policing resources away from more-pressing public safety threats.¹²

In response, proponents of bans maintain that any potential illicit activity would be negligible, pointing to evidence that many current smokers exhibit strong willingness to quit and that the tobacco industry has overemphasized the potential scope of black markets.¹³ They also stress that many proposals do not criminalize purchase, use or possession (PUP), and that penalties for illegal sales are targeted toward retailers and not individuals on street corners in poor communities.¹⁴

In light of this competing information, the following sections will summarize recent research on illicit markets for tobacco products, as well as those for drugs, to understand the unique properties of the former while drawing on relevant lessons from drug prohibition. The final sections will highlight the existing research on prohibition and illicit tobacco products and list policy recommendations for those seeking to reduce smoking and youth vaping, while minimizing the costs of criminal enforcement.

RESEARCH REVIEW

Illicit Cigarettes

Currently, the United States has the third-largest illegal cigarette market in the world—behind China and Russia—in terms of absolute number of cigarettes traded. Their share of the overall market in the United States is estimated to be between 8 and 21 percent.¹⁵ The most common methods of illicit supply include bootlegging (legal purchasing in low-tax jurisdictions for transport and resale in high-tax areas);

smuggling (diverting untaxed products destined for export or trafficking in untaxed products from abroad); and counterfeiting.¹⁶ Bootlegging currently constitutes the most common method of supply in the United States due to the low barriers to entry and the minimal skills required to take legal products from one state to another.¹⁷ In China, Australia, the European Union and some Latin American countries, where enforcement is stricter or barriers to entry are transnational and therefore more cumbersome, well-connected criminal groups fill the supply gaps.¹⁸

Anti-ban activists contend that large-scale criminal enterprises stand to benefit from prohibition—much as they did from alcohol and drug prohibition—because they have the infrastructure to absorb the risks of the illicit market and accrue its revenues.¹⁹ Indeed, some anecdotal evidence shows that outfits such as the Irish Republican Army, the Taliban and Mexican cartels are involved in the supply of illegal cigarettes, though little empirical analysis exists to demonstrate the degree of that involvement and, as noted previously, the methods of supply vary by country.²⁰

E-cigarettes

Fears that vaping will act as a “gateway” to increase smoking among young people have fueled support for stricter regulation of vaping products.²¹ However, more recent studies suggest that such data may have been skewed by external factors. For example, one notes that “the baseline waves of these longitudinal studies were conducted in locations and at times when there were no age restrictions on sales of vaping products” and concludes that, “in such a regulatory context, it is not surprising that young people may have tried the product with less restrictions first.”²²

In fact, the study notes that more current data “has not shown an increase in youth smoking since the increase in vaping in the USA or UK,” and that, youth smoking, as defined by an individual having smoked in the past 30 days, has actually declined from six to four percent among middle school students and from 21.8 to 13.8 percent among high school students in the United States.²³ These figures render doubtful the notion that vaping is causing minors to smoke. Evidence from the United States similarly casts doubt on any gateway effect.²⁴

Due to the recency of flavor ban laws, it is impossible to measure their efficacy. An example from Australia, however, which has perhaps the most stringent laws on e-cigarettes, may be instructive. The supply of nicotine-containing e-cigarettes in Australia is illegal, as is the possession or use of nicotine in e-cigarettes—flavored or unflavored—without medical approval. Penalties for illicit activity are steep, with fines up to \$45,000 and some states stipulate prison terms up to two years.²⁵ Despite these legal barriers, however, the use

of e-cigarettes has *increased* in recent years.²⁶ And, while the percentage of vapers consuming illicitly is unclear, anecdotal reports of “thriving black markets,” along with the fact that acquiring a prescription represents a fairly rigid obstacle to access imply that a significant share of vape consumption is illicit.²⁷

Illicit Drug Markets

It must be noted first that important differences exist between illicit drug markets and illicit tobacco markets. For instance, stamping out illicit drug markets has been a high priority for law enforcement while this has not been true for illicit cigarettes.²⁸ Still, a large body of research on the black market in drugs can inform the debate on illicit tobacco products, and help policy analysts predict outcomes from various levels of restrictions on supply and increases in enforcement. For example, a 2006 study on black markets suggests that prices of illegal drugs increase with stronger levels of enforcement.²⁹ This is because the risk of apprehension and punishment drives prices up to compensate traffickers. Higher prices can reduce demand for drugs, but they also signal substantial potential profits to traffickers who operate on a large enough scale and are able to reduce competition and successfully avoid punishment.

Advocates of prohibition claim that banning drugs has reduced rates of use and addiction. Indeed, as Becker notes, “basic economics does imply that, under given conditions, higher prices for a good leads to reduced demand for that good.”³⁰ But the magnitude of the reduction in demand depends on several conditions, including: the availability of substitutes for the good and the elasticity of demand and supply. With respect to the latter condition, elasticity refers to the responsiveness of demand or supply to changes in price of a particular good. For example, for goods that are highly inelastic, demand will not change in response to price changes—which is to say consumers will seek these goods regardless of how expensive or inexpensive they become. Unsurprisingly, given the addictive nature of nicotine, combustible cigarettes are highly inelastic because smokers are compelled to seek them out irrespective of price or legality.

However, if close substitutes, such as vapes, are legally and widely available, consumers are more likely to turn to them rather than to illicit suppliers. In light of this, to ban vaping outright or to restrict particular flavors that former or transitioning smokers use merely reduces the availability of close substitutes to combustible cigarettes, turning smokers toward black markets for more available or cheaper products. And enforcement against these illegal markets that spring up in response to inelastic demand “are very costly and can be disastrous.”³¹ Moreover, another study shows that even if supply is elastic, enforcement of a ban nevertheless leads to increased violence in the illicit marketplace if

demand stays the same.³² In other words, enforcement of any ban is likely to lead to violence.

Indeed, one systematic review of the effect on violence of increased drug-ban enforcement revealed that 93 percent of studies under analysis found a positive association.³³ These findings are relevant to the debate around menthol cigarettes, as a review of the research on cigarettes in general found they are highly inelastic, and menthol cigarettes—which are less studied in terms of elasticity—exhibit high demand inelasticity as well.³⁴ Put differently, consumers will likely seek out menthol cigarettes regardless of price changes caused by prohibition and strong enforcement. Thus, given that these products feature highly inelastic demand and few substitutes, policymakers can safely assume that the aggressive enforcement necessary to meaningfully root out illicit activity would likely lead to higher prices and significant violence in the marketplace.

The current difference in levels of violence between illicit markets in drugs and tobacco products is likely owed to the relatively lenient penalties for illicit tobacco trafficking.³⁵ However, as the aforementioned research demonstrates, the tradeoffs between violence from enforcement and reductions in consumption are significant. Given the low percentage of smokers who would permanently quit in the event of a ban, the costs of this enforcement are likely to outweigh its benefits. And while individuals do consume more of a legal good than they would of that same good under a ban, methods exist to moderate such consumption, such as excise taxes.³⁶ In fact, the aforementioned 2006 study of black markets concludes that “[s]ince the major costs of the drug war are the costs of the crime associated with drug trafficking, the costs to society would be greatly reduced even if overall drug consumption increased somewhat.”³⁷ This suggests that legalization, along with moderate excise taxes, could reduce consumption, while also minimizing the harmful—and more costly—effects of black market activity. The difficulty for policymakers, then, is to find tax rates that are high enough (though not necessarily equal across states) to dissuade consumption, but low enough to dissuade a turn to illicit activity.

POLICY IMPLICATIONS AND RECOMMENDATIONS

Despite the relative ambiguity surrounding the efficacy of nuanced tobacco policies, one thing is abundantly clear: combustible cigarettes are hazardous and a large body of evidence suggests that e-cigarettes are a safer alternative. For example, according to Public Health England and the National Academy of Sciences—two of the world’s leading public health bodies—e-cigarettes are 95 percent safer than combustible ones.³⁸ Another study found that they could save up to 6 million lives by the year 2100, if only 10 percent of current smokers switch to e-cigarettes over the next decade.³⁹

Efficacy and Unintended Consequences

Moreover, a newly released study suggests that, to the extent that vaping serves as a gateway at all, it actually leads people away from smoking rather than toward it.⁴⁰ And, even in the event that a provable, negative gateway effect did exist, the benefits of vaping as a safer alternative for adult smokers likely outweighs it.⁴¹ Therefore, almost any proposal that seeks to reduce legal access to e-cigarette or vape products for adults is of dubious social benefit.

Indeed, despite people’s best intentions, quitting smoking is often easier said than done. For example, a 2019 study of the effects of a menthol cigarette ban in Ontario found that, while over 60 percent of menthol smokers attempted to quit in response to the ban, only 20 to 24 percent were successful a year later.⁴² As a practical matter, when these people ultimately fail to quit, their preference is to turn to safer, legal substitutes. For example, recent surveys find that between 12 and 15 percent of menthol smokers say they would switch to menthol e-cigarettes if menthol cigarettes were banned.⁴³ This would be a positive step in promoting better health outcomes. However, if these safer alternatives are also banned, the consequences become more significant. After all, this means that in the event of a ban on menthol cigarettes *and* e-cigarettes, these same individuals may have no other option than illicit products—whether combustible or e-cigarettes—or they will simply continue smoking more-dangerous non-menthol cigarettes.

Practical Implications of Black Market Enforcement

While research on the costs of ban enforcement in terms of marketplace violence is widespread, the claim that prohibition will target only retailers and not low-level street dealers is undercut by preexisting penalties for illicit tobacco sales. Some bills provide that penalties will be administered by a public health body and will only apply to licensed vendors. For example, to address a potential uptick in hostile law enforcement interactions with communities of color, the recent federal bill banning flavored tobacco products places enforcement responsibility on the FDA, and contains a clause precluding state and federal law enforcement from using the statute to arrest or refer individuals for prosecution.⁴⁴ However, law enforcement could simply use the other two federal statutes that impose criminal sanctions for illicit tobacco sales.⁴⁵

Similarly, many states already have laws on the books to penalize illicit sales of tobacco and e-cigarette products with incarceration and steep fines.⁴⁶ And, one study found that 45 states had enacted at least one purchase, use or possession law by 2006, despite anti-tobacco advocates’ efforts to the contrary.⁴⁷ Unless policymakers reduce or eliminate these penalties, future and existing proposals that call for

administrative, rather than criminal, penalties will be futile. Given this reality and considering lessons from the drug war, criminal justice reform advocates should be skeptical that enforcement will not fall, at least to some extent, on lower-level street dealers.⁴⁸

In light of this, policymakers should eschew incarceration as a penalty for illicit sales and instead rely on fines and civil penalties. But even this approach imposes criminal justice costs. An emerging body of literature on the criminal justice effects even of “fines and fees” suggests that such monetary penalties generally still lead to criminal justice involvement for low-level offenders.⁴⁹ And when this is the case, it often disproportionately involves people of color. With respect to a menthol cigarette ban, a review of the 50 cities with the highest percentage of revenue coming from fines and fees found a direct relationship between a high African-American population.⁵⁰ Given that African Americans disproportionately smoke menthol cigarettes and that illicit sellers tend to distribute to buyers of their own race,⁵¹ any penalties on illicit sales would likely have a disparate impact in these communities, which merely exacerbates an existing criminal justice problem.

Finally, while many prohibition proposals do not explicitly list incarceration as a direct penalty for illicit activity, policy debates must acknowledge that this trend could change. Policy advocates, lawmakers and voters should consider the prospect that future state or local laws may use more carceral measures. On this point, Peter Reuter, a professor and senior economist at the RAND Corporation poignantly remarks:

No proposal would ban possession or consumption [...] However, the history of prohibition suggests caution; these are not static phenomena. If the proposal is unsuccessful (however judged) in its milder form, the political temptation to make it more comprehensive, in this case by criminalising unauthorised possession, may be difficult to resist. After all, these proposals are not merely technocratic measures but the very stuff of mass politics, creating new constituencies and interests.⁵²

Unfortunately, recent headlines have reinforced Reuter’s predictions. For example, reports from Texas detail students being subjected to jail time and felony charges when after school officials merely claimed they could not discern whether the students’ vape pens contained marijuana.⁵³ Likewise, a bill in Michigan that bans flavored e-cigarettes originally included a provision penalizing “intent to distribute” with incarceration.⁵⁴

These examples should not stoke fear that a “war on cigarettes and vaping” similar in scope to the drug war is imminent. This seems unlikely. However, it is true that the use of

criminal sanctions to deter undesirable behavior is a long-standing policymaking tool. Yet, policymakers and advocates concerned with the negative outcomes associated with overly punitive justice policies often neglect this possibility in the context of tobacco control. For these reasons, an outright ban of menthol cigarettes combined with a ban on flavored vape products, particularly menthol or mint flavors, would be the most harmful policy, as it would most likely lead to an illicit market and potential criminal sanctions.

However, this does not mean policymakers lack options. Raising the age to legally purchase tobacco to 21 will likely reduce youth consumption. Going forward, policymakers could also raise excise taxes in jurisdictions with particularly high tobacco use, impose mandatory listing of vape juice ingredients, ban sales within certain distances of schools or allow sales only in certain types of stores, such as those primarily selling tobacco. And perhaps most importantly, e-cigarette bans should not be included or proposed alongside menthol cigarette restrictions, as these products could serve as a safer alternative for those looking to quit combustible menthols.

Put simply, the likelihood of illicit activity grows as policies increasingly restrict legal access, and lawmakers will have to balance these concerns. Prudent policy would err on the side of caution, as it is politically easier to ratchet up restrictions and penalties than it is to repeal them.

CONCLUSION

Any public policy proposal must strike a balance between the relevant social costs and benefits. In the case of a menthol cigarette ban, such a policy may be beneficial if it results in a significant number of smokers quitting or switching, and has negligible illicit market or criminal justice implications. Accordingly, to the extent that some smokers may switch to menthol e-cigarettes in response to a ban on combustible menthols, public health could benefit. However, advocates often argue for banning both menthol combustibles and flavored e-cigarettes. With no safer, legal alternative to turn to, such a ban likely would not meaningfully reduce the number of smokers and may also lead to significant illicit market activity and criminal justice involvement. And, the evidence on illicit markets suggests the latter is more likely. Lawmakers should therefore exhibit the utmost caution when considering e-cigarette prohibition.

ABOUT THE AUTHOR

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