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February 3, 2014

Ms. Amy Pitter,
Chair
Illegal Tobacco Commission
Massachusetts Department of Revenue
PO Box 7010,
Boston, MA 02204
pittera@dor.state.ma.us

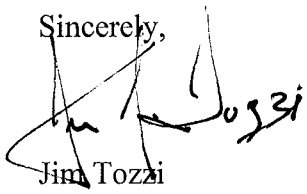
Dear Commissioner Pitter:

Attached please find a written submission to the Illegal Tobacco Commission from The Center for Regulatory Effectiveness (CRE). I am writing to request that our submission, an in-depth analysis of the health and social harms from the global trade in illicit tobacco, be 1) distributed to all Members of the Commission and 2) placed in the Commission's online docket of Commission Resources.[1] CRE's comments have already been provided to the US Food and Drug Administration in response to the request for public comments on an Advance Notice of Proposed Rulemaking.[2]

CRE is a nationally recognized regulatory watchdog. To this end we have an Interactive Public Docket (IPD) devoted to Counterfeit cigarettes, please see http://www.thecre.com/cc/ The IPD is updated daily and is read by regulators and law enforcement groups throughout the world. If there is any of your material you wish to be posted on the IPD, please advise me.

By way of background, CRE is a regulatory watchdog established by former senior career officials from the White House Office of Management and Budget. For more information about CRE, please see http://www.thecre.com/oira/?page_id=8.

Sincerely,



Jim Tozzi
Member, Board of Advisors

Attachment: *Weaponizing Poverty*

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1 http://www.mass.gov/dor/tax-professionals/news-and-reports/illegal-tobacco-commission/commission-resources/.

2 See, FDA, Menthol in Cigarettes, Tobacco Products; Request for Comments, https://www.federalregister.gov/articles/2013/07/24/2013-17805/menthol-in-cigarettes-tobacco-products-request-for-comments.

Before the
United State Food and Drug Administration

WEAPONIZING POVERTY

In the Matter of	)	
	)	
Menthol in Cigarettes, Tobacco Products;	)	
Request for Comments	)	
21 CFR Part 1140	)	Docket No. FDA–2013–N–0521
Advance Notice of Proposed Rulemaking	)	
	)	

September 2013

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WEAPONIZING POVERTY

...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.[1]

In accordance with the statutory charge to the FDA contained in the Tobacco Control Act,[2] the agency's Advance Notice of Proposed Rulemaking (ANPRM) asks two questions which recognize the potential for substantial negative externalities from a ban on menthol-flavored cigarettes:

> *If menthol cigarettes could no longer be legally sold, is there evidence that illicit trade in menthol cigarettes would become a significant problem? If so what would be the impact of any such illicit trade on public health? How would any such illicit trade compare to the existing illicit trade in cigarettes?*

And,

> *What additional information and research beyond that described in the evaluation is there on the potential impact of sale and distribution restrictions of menthol cigarettes on specific subpopulations, such as those based on racial, ethnic, socioeconomic status, and sexuality/gender identity?*

Answers to the above two questions are integral to agency determinations regarding the impact a ban on menthol cigarettes would have on:

1. Tobacco traffickers who provide contraband cigarettes to children;
2. The illegal production, importation and distribution of highly toxic bootleg cigarettes; and
3. Financial opportunities available to criminal syndicates and terrorist organizations that use profits from tobacco trafficking to finance:
    - Narcotics trafficking;
    - Human smuggling; and
    - The murder of United States citizens.

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[1] Center for Regulatory Effectiveness, *Counterfeit Products, Genuine Harm: How Intellectual Property Theft Fuels Organized Crime While Undermining American Communities*, Washington, DC: January 2013, p. 27, attached as Appendix 4 of these comments.

[2] Pub. Law 111-31, §907(b)(2).

Some of CTP's greatest challenges during post-comment phase of the agency's regulatory process[3] will be in developing substantive, quality[4] answers to the questions posed in the ANPRM about the potential for unintended consequences of well-intentioned policy objectives.

To assist the FDA with understanding the issue of unintended consequences, a copy of Robert Merton's landmark 1936 *American Sociological Review* article, "The Unanticipated Consequences of Purposive Social Action," is attached as Appendix 1 of these comments. In the article, Dr. Merton concludes:

> *We may maintain, however, even at this preliminary juncture, that no blanket statement categorically affirming or denying the practical feasibility of all social planning is warranted. Before we may indulge in such generalizations, we must examine and classify the types of social action and organization with reference to the elements here discussed and then refer our generalizations to these essentially different types. If the present analysis has served to set the problem, if only in its most paramount aspects, and to direct attention toward the need for a systematic and objective study of the elements involved in the development of unanticipated consequences of purposive social action, the treatment of which has for much too long been consigned to the realm of theology and speculative philosophy, then it has achieved its avowed purpose.*[5] [Emphasis added]

The Center for Tobacco Products (CTP) would benefit from obtaining specialized expertise from a wide range of federal agencies and offices. Because other operating components within FDA are among those who have such specialized expertise, the Center for Regulatory Effectiveness (CRE) is sending copies of these comments to:

- ***Deputy Commissioner, FDA's Office of Medical Products and Tobacco***. CTP will require expertise on the health effects of counterfeit and other illegally manufactured cigarettes; multiple studies have demonstrated that these contraband cigarettes are far more toxic than legally made products. The Deputy Commissioner and his staff should prove particularly helpful during CTP's deliberative process because the Office is responsible for providing "high-level coordination and leadership across the centers for drug, biologics, medical devices, and tobacco products."

- ***Director, FDA's Office of Counter-Terrorism and Emergency Coordination (OCTEC)***. The organizations which distribute contraband tobacco in the US include multiple groups on the State

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[3] See, OIRA Watch, "The Social Media and Public Participation in Rulemaking: 1.0," available at http://www.thecre.com/oira/?p=2175.

[4] See, http://thecre.com/post/.

[5] Robert K. Merton, "The Unanticipated Consequences of Purposive Social Action," *American Sociological Review*, Volume 1, Issue 6 (Dec., 1936), 894-904, p. 904.

Department's list of Foreign Terrorist Organizations (FTOs).[6] OCTEC's responsibilities include the "coordination of emergency activities involving CDER regulated products." Since the same terrorist organizations which traffic in tobacco also traffic in counterfeit pharmaceuticals,[7] CTP coordinate with OCTEC so that FDA can prepare for the financially strengthened presence of FTOs in the counterfeit pharmaceutical channels.

- ***Associate Commissioner, Office of International Regulatory Affairs***. As discussed below, the "good government" laws which regulate the regulatory process require international coordination of health and safety standards. FDA has demonstrated leadership excellence in international regulatory coordination.

In addition to expertise within the FDA, CTP officials would also benefit from obtaining data from federal law enforcement officials, and from the law enforcement services of allied nations, during the agency's post-comment process in considering the potential for the "illicit trade in menthol cigarettes" to "become a significant problem."

Meet Basel Ramadan

Basel Ramadan is currently a guest of the State of New York where he and his immediate associates await trial on charges related to tobacco trafficking. The New York Attorney General's press release explained that Mr. Ramadan's band of cigarette traffickers laundered over $55 million in illegal proceeds from contraband tobacco and "generated more than $10 million in profits from their illegal activities."[8]

The opening paragraphs of the *New York Times* article reporting on the New York Police Department's work in uncovering the traffickers explains why the tobacco traffickers are a matter of national concern,

> *One of the men had once lived in the same Brooklyn building as the personal secretary of a senior Hamas member, the authorities said. Another was something of a father figure to the terrorist who fatally shot at a van full of yeshiva students on the Brooklyn Bridge. And a third is said to have once received an investment*

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[6] See, http://www.state.gov/j/ct/rls/other/des/123085.htm.

[7] See, Brian D. Finlay, "Counterfeit Drugs and National Security," The Stimson Center, February 2011, *available at* http://www.stimson.org/images/uploads/research-pdfs/Full_-_Counterfeit_Drugs_and_National_Security.pdf.

[8] Attorney General Eric T. Schneiderman, "A.G. Schneiderman & NYPD Commissioner Kelly Announce Take Down Of Massive Eastern Seaboard Unstamped Cigarette Trafficking Enterprise," May 16, 2013, available at http://www.ag.ny.gov/press-release/ag-schneiderman-nypd-commissioner-kelly-announce-take-down-massive-eastern-seaboard.

> *from Omar Abdel Rahman, the so-called blind sheik, who is now serving a life sentence for a terrorism plot.*
>
> *Over the years, these three men each came under the scrutiny of the New York Police Department's Intelligence Division, which runs counterterrorism investigations. On Thursday, they were charged along with 13 other men — not on terrorism-related charges, but as defendants in a more commonplace conspiracy: trafficking in untaxed cigarettes.*[9]

CRE is introducing Basel Ramadan to the FDA in these comments because, if the agency were to implement the contemplated ban on menthol cigarettes, they would be introducing Mr. Ramadan's "friends," *i.e.*, fellow tobacco traffickers, to neighborhoods everywhere.

Mr. Ramadan's fellow tobacco traffickers are an incredibly diverse and quite brutally violent assortment of people and organizations. For example, organizations trafficking in tobacco include:

- Los Zetas, the notorious drug cartel which also deals in counterfeit cigarettes;[10] and
- FARC, the Columbian-based Marxist/narcoterrorist insurgency group. As Center for Public Integrity, a nonpartisan, nonprofit investigative news organization, explained

> *Anyone trafficking drugs from Colombia to the United States is at least tangentially involved in smuggling cigarettes from the United States to Colombia, authorities say. Traditional drug cartels, left-wing guerrilla groups, and the equally brutal right-wing paramilitary groups jostle for market share. The players and brands have changed over the years, but investigators say the market remains the same.*
>
> *The primary transit points for the cigarette black market run through Aruba and Panama. Panama customs authorities confirmed in April a seizure of cigarettes belonging to FARC, but could not provide details pending an ongoing investigation.*[11]

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[9] Joseph Goldstein, "16 Accused of Smuggling Cigarettes Worth Millions," *New York Times*, May 16, 2013 *available at* http://www.nytimes.com/2013/05/17/nyregion/16-accused-of-smuggling-cigarettes-worth-millions.html?_r=0.

[10] National Intellectual Property Rights Coordination Center, "Intellectual Property Rights Violations: A Report on Threats to United States Interests at Home and Abroad," November 2011, p. 36.

[11] Kate Willson, "Terrorism and tobacco: Extremists, insurgents turn to cigarette smuggling," Center for Public Integrity, June 29, 2009, *available at* http://www.publicintegrity.org/2009/06/29/6338/terrorism-and-tobacco.

The reference to "transit points for the cigarette black market" in the Caribbean and Central America is particularly relevant in helping determine whether, if there were a ban on legal menthol production, whether there likely be a sufficiently large supply of contraband menthol cigarettes in the US as to constitute a significant problem.

Think the Supply of Contraband Menthol Cigarettes Can be Stopped by Regulation? Think again.

The Royal Canadian Mounted Police (RCMP) recently reported ten illegal cigarette manufacturing plants on Native American lands in New York. The RCMP also reports an additional fifty (!) illegal cigarette manufacturing plants on the Canadian side of the border. The Honorable Vernon White who represents Ontario in the Canadian Senate and who has served extensively in law enforcement leadership stated in a Senate debate on proposed tobacco control legislation that

> *The RCMP estimates that there are approximately 50 contraband manufacturers operating on First Nations territories in Quebec and Ontario. There are an additional 10 manufacturers on the American side of the Akwesasne Mohawk territory, which is uniquely located at the confluence of borders between Ontario, Quebec and New York State, giving rise to jurisdictional and legal challenges between federal, provincial and state laws.*
>
> *Organized crime networks are exploiting First Nations communities and taking advantage of the jurisdictional and politically sensitive relationship between those communities, governments and enforcement agencies.*
>
> *The 2012 National Threat Assessment on Organized and Serious Crime prepared by the Criminal Intelligence Service Canada has identified 58 organized crime groups that are involved in the contraband tobacco trade throughout Canada, 35 of which are currently operating in Central Canada. These criminal networks re-invest profits from the manufacture and distribution of contraband tobacco into other forms of criminality, including the trafficking of illicit drugs, firearms and human smuggling. Furthermore, the RCMP reports that violence and intimidation tactics continue to be associated with the contraband tobacco trade.*[12]
> [Emphasis added]

The evidence from Canadian law enforcement strongly suggests that it is very easy for criminals to establish and operate illegal cigarette manufacturing facilities most anywhere. Canadian law enforcement

[12] Hon. Vernon White, Debates of the Senate (Hansard), 1st Session, 41st Parliament, Volume 148, Issue 145, Tuesday, March 19, 2013 *available at* http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/145db_2013-03-19-e.htm.

regularly report seizures of cigarette production machinery and many tons of loose tobacco. For example, in late June of this year, the Canada Border Services Agency (CBSA) reported the seizure of 10,570 kilograms or close to 12 tons of tobacco, at a border crossing with New York State.[13] Below are two photos of the contraband tobacco. The pictures illustrate that relative ease with which tons of tobacco can be shipped.

[13] Canada Border Services Agency, "CBSA seizes 10,570 kg of loose tobacco at St-Bernard-de-Lacolle border crossing," June 27, 2013, *available at* http://www.cbsa-asfc.gc.ca/media/prosecutions-poursuites/que/2013-06-27-eng.html.

The June seizure of tons of loose tobacco used in the illegal manufacture of cigarettes is not to be confused with the seizure on January 16th of this year of 13,200 kilos of loose tobacco by CBSA at the border with Niagra Falls. This seizure of over 14 tons of loose tobacco was most notable for being the second largest seizure of loose tobacco that day at the Canadian border near Niagra Falls. Canadian authorities also seized an even larger shipment of 13,464 kilos of loose tobacco the same day at Peace Bridge.[14]

To place the quantity of contraband tobacco seized in a single day this year at the US-Canadian border in context, according to the National Cancer Institute, there is less than one gram in a cigarette.[15]

It is important to note that the illicit tobacco shipments seized at the Canadian border were headed into Canada from the US. Those same trucks, and many, many more like them, could have very easily and without any international border crossings deliver their cargo to illicit cigarette manufacturing facilities hidden in warehouses, self-storage facilities, garages, basements and countless other places in neighborhoods throughout America.

From the standpoint of tobacco traffickers, the primary difference between large-scale cultivation of tobacco for illegal sale and the large-scale growing, processing and distribution of marijuana is two-fold:

1. Contraband tobacco sales carry lower legal penalties than growing/trafficking in marijuana; and

2. The profits are higher. A recent report by the Virginia State Crime Commission noted that "The profit margins on black market cigarettes are now greater than for cocaine, heroin, or illegal firearms."[16]

In brief, narcotics cartels will find illegally manufacturing, distribution and selling banned tobacco products on a large scale in the US to be far easier, less risky and more profitable to than their currently dominant lines of work.

It is important to note that even aside from current and potential illicit cigarette production in North America, there is the massive illicit cigarette production capability in the Tri-Border area of South America where Brazil, Argentina and Paraguay meet.

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[14] Canada Border Services Agency, "CBSA officers seize $3.4 million in loose tobacco," January 23, 2013 *available at* http://www.cbsa-asfc.gc.ca/media/prosecutions-poursuites/nffe/2013-01-23-eng.html.

[15] See, http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars.

[16] Virginia State Crime Commission, Senate Document No. 5, "Illegal Cigarette Trafficking," 2013 available at http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/SD52013/$file/SD5.pdf.

A Center for Public Integrity investigative project reported that Paraguay is "a top producer of contraband tobacco " and that "Industry sources say manufacturing cigarettes in Paraguay today is cheaper than in China — the top producer of contraband smokes — while the quality of the product is far superior." The Center for Public Integrity article, "Smuggling made easy," began by explaining that

> *Last September, Guaíra made headlines across Brazil when 15 people were murdered at a makeshift riverside warehouse. The killings were the result of a vendetta among drug smugglers and, officials here say, they weren't all that unusual. Just 150 miles north from the notorious Tri-Border Area, where Brazil, Paraguay and Argentina meet, Guaíra is today a major weapons and drugs corridor in the region. But no product, police say, is more widely smuggled through this city, and more profitable to smugglers, than Paraguayan cigarettes.*
>
> *Dozens of motor boats crammed with tobacco cross the Paraná River daily from the neighboring Paraguayan city of Salto del Guairá. The smugglers feed an illicit trade that injects billions of cigarettes into Sao Paulo, Rio de Janeiro, and other large Brazilian cities, where the cheap, untaxed Paraguayan sticks account for 20 percent of the entire cigarette market. Guaíra sits at the heart of this trade, a strategic gateway and a place where many residents — up to half its population, locals say — rely directly or indirectly on smuggling for their livelihood. A few reap millions from the illicit trade. Guaíra's most famous criminal son, Roque Fabiano Silveira, made a fortune and a name, trafficking Paraguayan cigarettes thousands of miles away.*[17]

The article goes on to explain that the illicit cigarette factories "range from sprawling, state-of-the-art manufacturing plants that boast cutting-edge technology to miniature "mobile" factories — also called submarines — which are assembled inside of trucks." Not surprisingly, the article also explains that

> *the global illicit cigarette trade today involves an array of crime syndicates which, much like the Silveira network, rob governments of billions of dollars in much-needed tax money, fuel organized crime, and help spread addiction by placing cheap cigarettes in the world's black markets.*[18]

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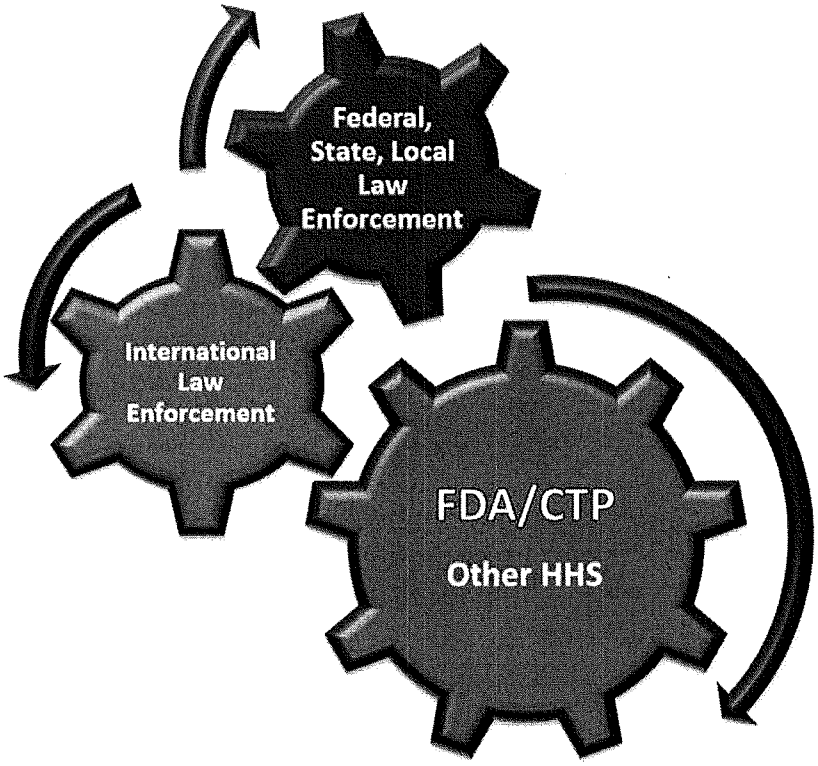
[17] By Marina Walker Guevara, Mabel Rehnfeldt, Marcelo Soares, "Smuggling made easy – Landlocked Paraguay emerges as a top producer of contraband tobacco," Center for Public Integrity, available at http://www.publicintegrity.org/2009/06/29/6343/smuggling-made-easy.

[18] Ibid.

International Cooperation is Essential

Contraband tobacco is a global problem that afflicts a great many countries. Solutions will also need to be internationally-minded. In particular, health and law enforcement agencies need to work together in a coordinated manner while also coordinating their policy and enforcement work with their foreign counterparts as illustrated below.



As the graphic above illustrates, FDA will need to coordinate domestically with other federal agencies as a prerequisite for effective international coordination. The need for interagency coordination of regulatory activities with international impacts was GAO's conclusion in an August 2013 report, *International Regulatory Cooperation: Agency Efforts Could Benefit from Increased Collaboration and Interagency Guidance*,

> *Ultimately it is clear that international regulatory cooperation requires interagency coordination. No one U.S. agency has the expertise or processes to effectively conduct these activities. Not only must regulatory agencies collaborate*

> *with other U.S. agencies, but they need to effectively collaborate with their foreign counterparts and affected nonfederal stakeholders.*[19]

It is important to note that GAO recognized that FDA demonstrated a clear, keen recognition of the importance of international regulatory cooperation. For example, GAO reported,

> *FDA officials said that international regulatory cooperation and harmonization has public health benefits, promotes regulatory efficiency, and both also have indirect competitiveness advantages for companies. FDA officials said that public health regulatory and competitiveness goals are often complementary: by upholding and enforcing scientifically valid standards, public health is protected and promoted....*[20]

FDA's international regulatory coordination work has also received positive remarks from the Administrative Conference of the United States (ACUS) which has over 20 years experience in researching the issue. ACUS' most recent report on international regulatory coordination explained that

> *Building on the success of that pilot, the FDA is now pursuing a similar project with European regulators for site inspections of clinical trials. These cooperative approaches, which show potential for cost savings without diminishing regulatory effectiveness, might be expanded to other agency settings for further cost-saving effects.*[21]

Nonetheless, GAO reported that, overall, federal agencies needed to improve their international regulatory cooperation work. In the report GAO concluded that

> *Our work at agencies engaged in regulatory cooperation efforts shows there are opportunities to augment existing guidance and mechanisms that could further promote and improve international regulatory outcomes. For example, U.S.*

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[19] US General Accountability Office, Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives, "International Regulatory Cooperation: Agency Efforts Could Benefit from Increased Collaboration and Interagency Guidance," August 2013, GAO-13-588, p. 33.

[20] Ibid., pp. 12-13.

[21] Administrative Conference Recommendation 2011-6, International Regulatory Cooperation, Adopted December 8, 2011 available at http://www.acus.gov/sites/default/files/documents/Recommendation%202011-6%20%28International%20Regulatory%20Cooperation%29.pdf. ACUS' International Regulatory Cooperation home page is available here, http://www.acus.gov/research-projects/international-regulatory-cooperation .

> *regulatory agency officials emphasized the benefits of sharing information on lessons learned and best practices with their peers. However, they believe the current processes are designed for top-level collaboration and do not sufficiently address the day-to-day implementation of international regulatory cooperation. U.S. agencies and nonfederal stakeholders also noted the importance of stakeholder input in the success of international regulatory cooperation. Yet it is challenging for stakeholders to stay apprised of agencies' activities and therefore provide input to agencies. Key next steps could focus on identifying tools to measure outcomes as well as to document savings from more efficient use of government resources. In an environment of constrained resources it is even more important for agencies to share knowledge on the effective implementation of international regulatory cooperation.*[22] [Emphasis added]

Executive Order 13609 – Promoting International Regulatory Cooperation

President Obama recognized the importance to international regulation cooperation to agency effectiveness in his 2012 Executive Order requiring agencies participation in international regulatory cooperation activities. OIRA Administrator Sunstein in discussing the Order, explained that the "new Executive Order will promote American exports, economic growth, and job creation by helping to eliminate unnecessary regulatory differences between the United States and other countries and by making sure that we do not create new ones."[23]

CRE calls FDA's attention to one specific provision of the Agency Responsibilities section of EO which is particularly relevant to the FDA's ongoing work on menthol,

> *for significant regulations that the agency identifies as having significant international impacts, consider, to the extent feasible, appropriate, and consistent with law, any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory cooperation council work plan.*[24]

Specifically, FDA should identify the menthol regulatory process, now underway with publication of the ANPRM, as an action which could have "significant international impacts" including in third-countries which serve as transfer points for tobacco traffickers.

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[22] Ibid., pp. 33-34.

[23] Cass Sunstein, "Reducing Red Tape: Regulatory Reform Goes International," May 1, 2012 available at http://www.whitehouse.gov/blog/2012/05/01/reducing-red-tape-regulatory-reform-goes-international.

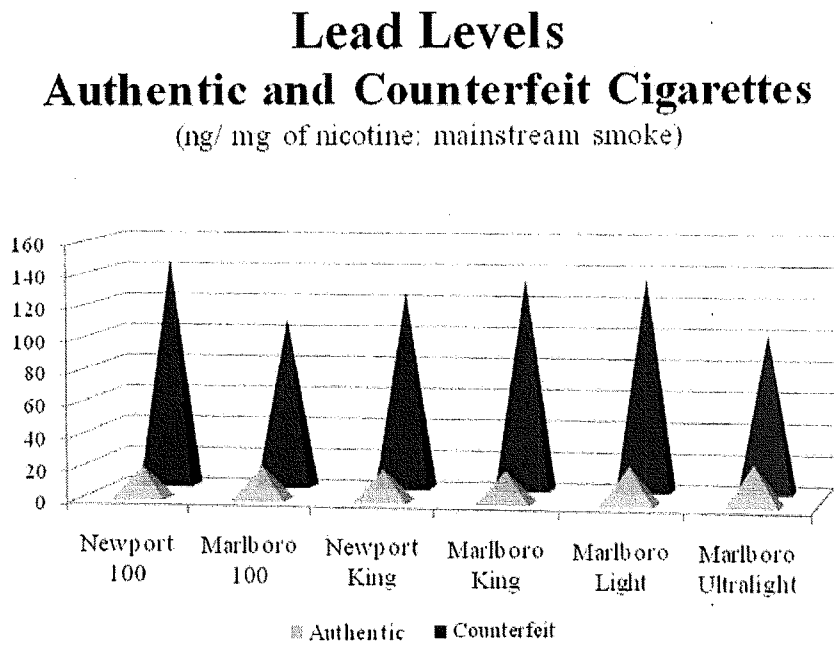
[24] Executive Order 13609 of May 1, 2012, Section 3(d).

An example of a relevant foreign tobacco-related governmental proceeding underway that FDA should consider following is a formal Inquiry into tobacco smuggling that was opened by the House of Commons.[25]

CRE is among that participants in the UK inquiry into tobacco trafficking. Per routine procedure, our comments remain under Parliamentary seal at this time and thus are not included here. CRE does, however, strongly encourage FDA to consult with the UK law enforcement and political authorities and to closely review the Select Committee's findings.

Contraband Cigarettes – Even More Toxic Than Imagined

In announcing the UK's tobacco smuggling Inquiry, the Right Honorable Keith Vaz noted that tobacco smuggling is a significant threat to public health.[26] The MP is correct. Even aside from the fact that contraband dealers are a significant source of tobacco for underage smokers (detailed in Appendix 3), there is that fact that illegally made cigarettes are far more toxic than legal products. By way of brief example, the following chart from CRE's Monograph, based on data from the Centers for Disease Control and Prevention (CDC), illustrates the differences in lead levels between legally made and illicitly produced cigarettes. Readers are encouraged to review Appendix 3 in detail for additional health data.



Source: Pappas (2007), Figure 4

[25] See, http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/130723-tobacco-new-inquiry/.

[26] See, http://www.bbc.co.uk/news/uk-politics-23451386.

How Bad Is the Flood of Contraband Tobacco Going to Be? A Quantitative Estimate

CRE has developed a quantitative estimate of the increase in the US contraband tobacco market which would occur in event of a menthol ban. CRE's illicit menthol cigarette sales estimates were developed though a detailed, transparent methodology based on US and UK government data and on peer reviewed studies.

The CRE Monograph containing the contraband market projections and methodology, *An Inquiry into the Nature, Causes and Impact of Contraband Cigarettes*, is available on our Counterfeit Cigarette website for public comment[27] and is also attached as Appendix 3 of these comments. A summary of CRE's quantitative findings are found in the conclusion to this section found on the next page. Below is an explanation of why the black market size matters.

Contraband Tobacco Undermines Smoking Cessation

Growth in the illicit tobacco market undermines our national smoking cessation goals. An inverse relationship between contraband tobacco and smoking cessation was demonstrated in a recent study published in the Canadian Medical Association Journal (CMAJ). The following is from the study's Abstract.

> ***RESULTS****: Compared with people who smoked premium or discount cigarettes, people who reported usually smoking contraband cigarettes at baseline were heavier smokers, perceived greater addiction, identified more barriers to quitting and were more likely to have used pharmacotherapy for smoking cessation. People who smoked contraband cigarettes were less likely to report a period of 30-day cessation during the subsequent 6 months (adjusted relative risk [RR] 0.23, 95% confidence interval [CI] 0.09-0.61) and 1 year (adjusted RR 0.30, 95% CI 0.14-0.61), but they did not differ significantly from other people who smoked regarding attempts to quit (at 6 mo, adjusted RR 0.74, 95% CI 0.43-1.20) or long-term cessation (adjusted RR 0.24, 95% CI 0.04-1.34).*
>
> ***INTERPRETATION****: Smoking contraband cigarettes was negatively associated with short-term smoking cessation. Access to contraband tobacco may therefore undermine public health efforts to reduce the use of tobacco at the population level.*[28] [Emphasis added]

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[27] See, http://www.thecre.com/ccsf/?p=165.

[28] Graham C. Mecredy, Lori M. Diemert, Russell C. Callaghan, and Joanna E. Cohen, "Association between use of contraband tobacco and smoking cessation outcomes: a population-based cohort study," CMAJ. 2013 April 16; 185(7): E287–E294, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3626826/.

Conclusions from the CRE Monograph are also included below and constitute our response to the ANPRM's question regarding the illicit trade in menthol cigarettes. These conclusions will be following by a single recommendation to the FDA regarding the impact of their policy options on tobacco trafficking.

CRE's methodology in estimating the size and direction of the illicit market in menthol cigarettes included demographic data concerning ethnicity of the victims of contraband tobacco. Thus, CRE's conclusions about the illicit tobacco trade form a natural lead-in to our response to FDA/CTP's question regarding "the potential impact of sale and distribution restrictions of menthol cigarettes on specific subpopulations, such as those based on racial, ethnic, socioeconomic status, and sexuality/gender identity."

CRE's Answer to FDA/CTP's Question: The Illicit Market in Menthol Cigarettes

- The share of Americans who purchase contraband cigarettes does not vary much by ethnicity.
- CRE conservatively estimates that if a menthol ban were imposed, the contraband market for menthol cigarettes would increase by about 45%.
- One sociological impact of a menthol ban would be to change the demographics of the contraband market. CRE estimates that, in event of a menthol ban, a majority of the cigarettes purchased by African American smokers would be contraband although whites would purchase over 70% of all contraband cigarettes.

CRE's Recommendation to FDA/CTP: The Illicit Market in Menthol Cigarettes

- ***FDA should coordinate its tobacco control policies with governments in Latin America and the Carribean since these countries would likely to bear a cruel, unfair share of the burden from an American-fueled rush for banned contraband menthol cigarettes.***

Weaponizing Poverty – The Impact of a Menthol Ban on American Cities

Because a higher proportion of African Americans prefer menthol cigarettes compared with other groups, African Americans overall will be more affected, for good and/or ill, by the FDA's decision.

More specifically, if menthol cigarettes are criminalized, a disproportionate share of African Americans will be victimized by the global contraband trafficking networks.

A paper which focuses on the expected impact a menthol ban would have on African Americans, *Ban Menthol Cigarettes? Not So Fast So Fast! The Victims of Contraband Cigarettes: Disproportionally Young and African American,* is attached as Appendix 2 to these comments.

The *Victims of Contraband* paper includes analysis of a paper published in the American Journal of Public Health, *the $5 Man: The Underground Economic Response to a Large Cigarette Tax Increase in New York City*. The AJPH paper explains 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....*[29]

Thus, federal policy officials can reasonably anticipate African Americans will disproportionately become the focus of anti-trafficking law enforcement investigations and arrests.

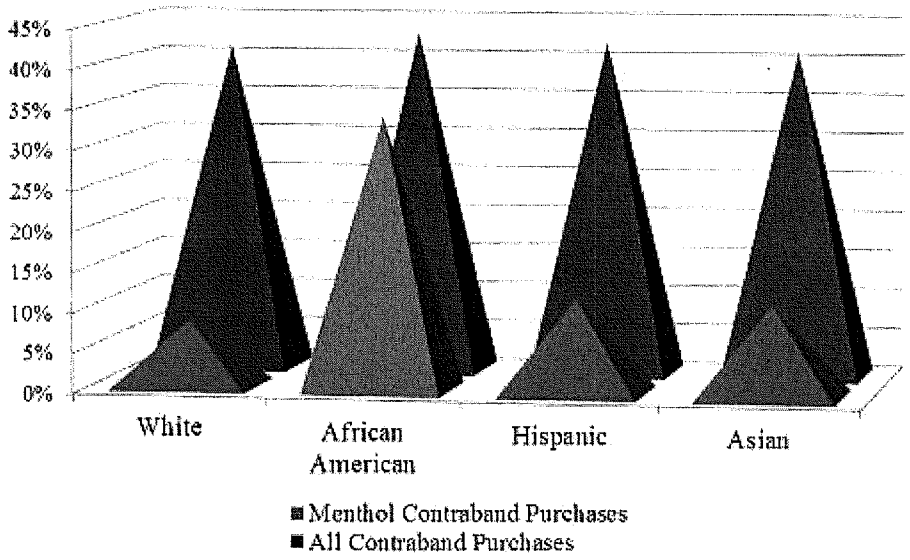
The paper in Appendix 2 also cited CRE charts found in our Monograph (Appendix 3) illustrating the impact of a menthol ban by ethnic/racial group. These two charts are reprinted below.

[continued next page]

[29] 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,p. 1483.

Share of Adult Male Smokers Who Have Purchased Contraband Cigarettes

Comparison of all Contraband Purchases to Menthol Contraband Purchases



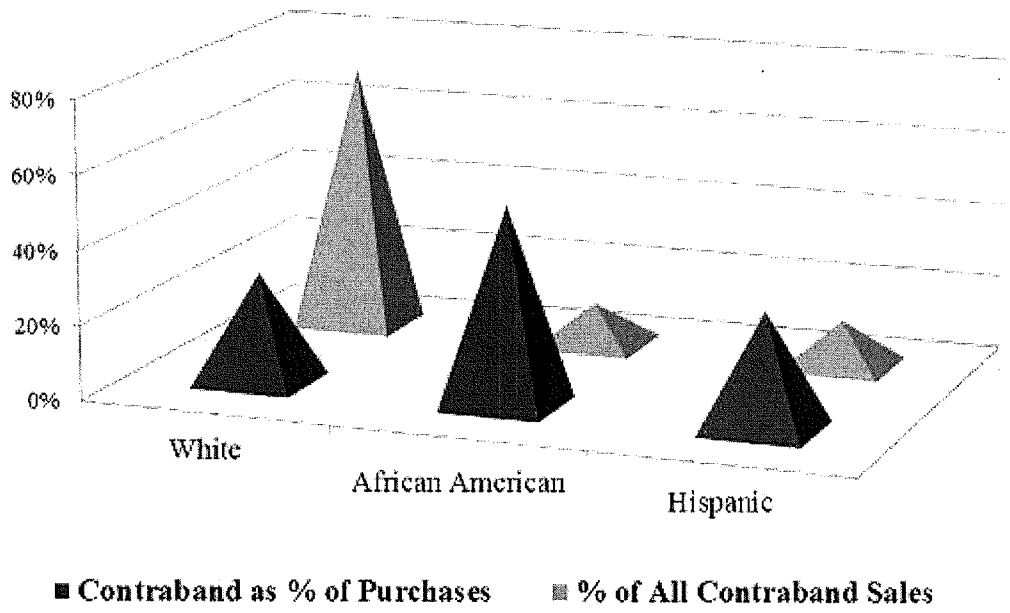
Source: CRE based on Taylor (2005), NSDUH, Census Bureau Current Population Survey

The chart above illustrates that even though ethnicity does not affect whether someone buys contraband cigarettes, ethnicity does strongly co-vary who currently buys contraband menthol cigarettes.

The chart on the next page illustrates that in event of a menthol ban, white smokers would be the dominant purchasers of contraband cigarettes. The chart, however also illustrates that a disproportionately high share of African Americans would purchase illegal cigarettes.

[continued next page]

A Menthol Ban Would Disproportionately Impact African American Smokers



Source: CRE

Conclusions from the *Victims of Contraband* paper found in Appendix 2 are also included below and these conclusions constitute our response to the ANPRM's question regarding the impact of a menthol cigarette ban would have on specific subgroups. CRE's conclusions will be following by a single recommendation to the FDA regarding the impact of their policy options on tobacco trafficking.

[continued next page]

CRE's Answer to FDA/CTP's Question: Effects of a Menthol Ban on Specific Populations

- More criminals selling cigarettes to children living in urban neighborhoods– contraband dealers don't adhere to age restrictions.
- More contraband cigarettes with extreme levels of lead, cadmium and other toxins as well as potentially higher levels of nicotine.
- More street level hawking aka advertising, of cigarettes.
- 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.

CRE's Recommendation to FDA/CTP: Effects of a Menthol Ban on Specific Populations

- ***FDA's tobacco control policies should be informed by the demonstrated fact that there is a sharp racial divergence between the people who commit substance-related crimes and those who go to prison for the offenses.***

CRE Conclusions & Recommendations

The Illicit Market in Menthol Cigarettes

CRE's Conclusions

- Contraband cigarette purchase rates do not vary much by ethnicity.
- In event of a menthol ban, the contraband market for menthol cigarettes is estimated to increase by about 45%.
- In event of a menthol ban, a majority of the cigarettes purchased by African American smokers would be contraband although whites would purchase over 70% of all contraband cigarettes.

CRE's Recommendation

- FDA should coordinate its tobacco control policies with Latin America and Carribean nations since these countries would bear a cruel, unfair share of the burden from an American-fueled rush for banned menthol cigarettes.

The Countervailing Effects of a Menthol Ban

CRE's Conclusions

A ban on menthol cigarettes would mean:

- More criminals selling cigarettes to children.
- More illegal cigarettes with extreme levels of heavy metals and other toxins.
- More African American youth profiled, arrested, prosecuted, and jailed for selling contraband menthol cigarettes in their communities.

Nota Bene

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 tobacco control policies.

APPENDIX 1

THE UNANTICIPATED CONSEQUENCES OF PURPOSIVE SOCIAL ACTION

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I

IN SOME ONE of its numerous forms, the problem of the unanticipated consequences of purposive action has been treated by virtually every substantial contributor to the long history of social thought.[1] The diversity of context[2] and variety of terms[3] by which this problem has been known, however, have tended to obscure the definite continuity in its consideration. In fact, this diversity of context—ranging from theology to technology—has been so pronounced that not only has the substantial identity of the problem been overlooked, but no systematic, scientific analysis of it has as yet been effected. The failure to subject this problem to such thorough-going investigation has perhaps been due in part to its having been linked historically with transcendental and ethical considerations. Obviously, the ready solution provided by ascribing uncontemplated consequences of action to the inscrutable will of God or Providence or Fate precludes, in the mind of the believer, any need for scientific analysis. Whatever the actual reasons, the fact remains that though the process has been widely recognized and its importance equally appreciated, it still awaits a systematic treatment.

Although the phrase, unanticipated consequences of purposive social action, is in a measure self-explanatory, the setting of the prob-

[1] Some of the modern theorists, though their contributions are by no means of equal importance, are: Machiavelli, Vico, Adam Smith (and some later classical economists), Marx, Engels, Wundt, Pareto, Max Weber, Graham Wallas, Cooley, Sorokin, Gini, Chapin, von Schelting.

[2] This problem has been related to such heterogeneous subjects as: the problem of evil (theodicy), moral responsibility, free will, predestination, deism, teleology, fatalism, logical, illogical and non-logical behavior, social prediction, planning and control, social cycles, the pleasure- and reality principles and historical "accidents."

[3] Some of the terms by which the whole or certain aspects of this process have been known are: Providence (immanent or transcendental), Moira, *Paradoxie der Folgen*, *Schicksal*, social forces, heterogony of ends, immanent causation, dialectical movement, principle of emergence and creative synthesis. The present writer hopes to devote a monograph now in preparation to the history and analysis of this problem. The vast scope and manifold implications of the problem necessitate my being elliptical at times in the present brief exposition. For the same reason of limitation of space, I have had to eliminate most of the concrete material upon which the discussion is based.

lem demands further specification. In the first place, the greater part of this paper deals with isolated purposive acts rather than with their integration into a coherent system of action (though some reference will be made to the latter). This limitation is prescribed by expediency, for a treatment of systems of action would introduce further complications. Furthermore, *unforeseen* consequences should not be identified with consequences which are necessarily undesirable (from the standpoint of the actor). For though these results are unintended, they are not upon their occurrence always deemed axiologically negative. In short, undesired effects are not always undesirable effects. The intended and anticipated outcomes of purposive action, however, are always, in the very nature of the case, relatively desirable to the actor, though they may seem axiologically negative to an outside observer. This is true even in the polar instance where the intended result is "the lesser of two evils" or in such cases as suicide, ascetic mortification and self torture which, in given situations, are deemed desirable relative to other possible alternatives.

Rigorously speaking, the *consequences* of purposive action are limited to those elements in the resulting situation which are exclusively the outcome of the action, i.e., those elements which would not have occurred had the action not taken place. Concretely, however, the consequences result from the interplay of the action and the objective situation, the conditions of action.[4] We will be primarily concerned with the sum-total results of action under certain conditions. This still involves the problem of causal imputation (of which more later) though to be a less pressing degree than consequences in the rigorous sense. These sum-total or concrete consequences may be differentiated into (a) consequences to the actor (s), (b) consequences to other persons mediated through (1) the social structure, (2) the culture and (3) the civilization.[5]

In considering *purposive* action, we are concerned with "conduct" as distinct from "behavior," that is, with action which involves motives and consequently a choice between various alternatives.[6] For

[4] Cf. Frank H. Knight, *Risk, Uncertainty and Profit*, Boston and New York, Houghton Mifflin Co., 1921, pp. 201–2. Professor Knight's doctoral dissertation represents by far the most searching treatment of certain phases of this problem that I have yet seen.

[5] For the distinction between society, culture and civilization, see Alfred Weber, "Prinzipielles zur Kultursoziologie: Gesellschaftsprozess, Civilisationsprozess und Kulturbewegung," *Archiv für Sozialwissenschaft und Sozialpolitik*, 47, 1920, 1–49; R. K. Merton, "Civilization and Culture," *Sociology and Social Research* 21, 1936, 103–113. (Cf. foregoing article, definition 19. Ed.)

[6] Knight, *op. cit.*, p. 52.

the time being, we will take purposes as given, so that any theories which "reduce" purpose to conditioned reflexes or tropisms, which assert that motives are simply compounded of instinctual drives and the experiential shaping of these drives, may be considered as irrelevant. Psychological considerations of the source or origin of motives, though they are undoubtedly important for a more complete understanding of the mechanisms involved in the development of unexpected consequences of conduct, will thus be ignored.

Moreover, it is not assumed that in fact social action always involves clear-cut, explicit purpose. It may well be that such awareness of purpose is unusual, that the aim of action is more often than not nebulous and hazy. This is certainly the case with habitual action which, though it may originally have been induced by conscious purpose, is characteristically performed without such awareness. The significance of such habitual action will be discussed later.

Above all, it must not be inferred that purposive action implies "rationality" of human action (that persons always use the objectively most adequate means for the attainment of their end).[7] In fact, part of the present analysis is devoted to the determination of those elements which account for concrete deviations from rationality of action. Moreover, rationality and irrationality are not to be identified with the success and failure of action, respectively. For in a situation where the number of *possible* actions for attaining a given end is severely limited, one acts rationally by selecting the means which, on the basis of the available evidence, has the greatest probability of attaining this goal and yet the goal may actually *not* be attained.[8] Contrariwise, an end may be attained by action which, on the basis of the knowledge available to the actor, is irrational (as in the case of "hunches").

Turning now to *action*, we may differentiate this into two types: (a) unorganized and (b) formally organized. The first refers to actions of individuals considered distributively out of which may grow the second when like-minded individuals form an association in order to achieve a common purpose. Unanticipated consequences may, of course, follow both types of action, though the second type would seem to afford a better opportunity for sociological analysis since the very process of formal organization ordinarily involves an explicit statement of purpose and procedure.

[7] Max Weber, *Wirtschaft und Gesellschaft*, Tübingen, J. C. B. Mohr, 1925, pp. 3 ff.

[8] See J. Bertrand, *Calcul des probabilités*, Paris, 1889, pp. 90 ff.; J. M. Keynes, *A Treatise on Probability*, London, The Macmillan Co., 1921, Chap. XXVI.

Before turning to the actual analysis of the problem it is advisable to indicate two methodological pitfalls which are, moreover, common to all sociological investigations of purposive action. The first involves the problem of causal imputation, the problem of ascertaining the extent to which "consequences" may justifiably be attributed to certain actions. For example, to what extent has the recent increase in economic production in this country been due to governmental measures? To what extent may the spread of organized crime be attributed to prohibition? This ever-present difficulty of causal imputation must be solved for every empirical case which is studied.

The second problem is that of ascertaining the actual purposes of a given action. There is the difficulty, for instance, of discriminating between rationalization and truth in those cases where apparently unintended consequences are *post facto* declared to have been intended.[9] Rationalizations may occur in connection with nation-wide social planning just as in the classical instance of the horseman who, on being thrown from his steed, declared that he was "simply dismounting." This difficulty, though not completely obviated, is significantly reduced in cases of organized group action since the circumstance of organized action customarily demands explicit (though not always "true") statements of goal and procedure. Furthermore, it is easily possible to exaggerate this difficulty since in many, if indeed not in most, cases, the observer's own experience and knowledge of the situation enables him to arrive at a ready solution. Ultimately, the final test is this: does the juxtaposition of the overt action, our general knowledge of the actor(s) and the specific situation and the inferred or avowed purpose "make sense," is there between these, as Weber puts it, a "verständliche Sinnzusammenhang?" If the analyst self-consciously subjects these elements to such probing, there is substantial probability that his conclusion in respect to purpose is not too far afield in the majority of instances. The evidence available will vary in different cases and the probable error of the imputation of purpose will likewise vary.

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[9] This introduces the problem of "chance," which will be treated in another connection. It should be realized that the aim of an action and the circumstances which actually ensue may coincide without the latter being a consequence of the action. Moreover, the longer the interval of time between the action and the circumstances in view, the greater the probability (in the absence of contrary evidence) that these circumstances have happened "by chance." Lastly, if this interval is greatly extended, the probability that the desired circumstances will occur fortuitously may increase until virtually the point of certainty. This reasoning is perhaps applicable to the case of governmental action "restoring prosperity." Compare V. Pareto, *Traité de sociologie générale*, Paris, Payot, 1917, II, par. 1977.

It must be freely admitted at this junction that these problems have not been further treated in the ensuing discussion, but despite the absence of any further explicit treatment, the limitations set by these methodological difficulties are implicitly recognized throughout.

Lastly, it may be urged that a frequent source of misunderstanding will be eliminated at the outset if it is realized that the factors involved in unanticipated consequences are—precisely, factors, and that none of these serves by itself to explain any concrete case.

II

The most obvious limitation to a correct anticipation of consequences of action is provided by the existing state of knowledge. The extent of this limitation may be best appreciated by assuming the simplest case where this lack of adequate knowledge is the *sole* barrier to a correct anticipation.[10] Obviously, a very large number of concrete reasons for inadequate knowledge may be found, but it is also possible to summarize several classes of factors which are most important.

The first class derives from the type of knowledge—usually, perhaps exclusively—attained in the sciences of human behavior. Properly speaking, the social scientist almost invariably finds stochastic (conjectural) associations and not, as in most fields of the physical sciences, functional associations.[11] This is to say, in the study of human behavior, there is found a set of different values of one variable associated with each value of the other variable(s), or in less formal language, the set of consequences of any repeated act is not

[10] Most previous discussions of unanticipated consequences limit the explanation of unanticipated consequences to this one factor of ignorance. Such a view either reduces itself to a sheer tautology or exaggerates the rôle of but one of many factors. In the first instance, the argument runs in this fashion: "if we had only known enough, we could have anticipated the consequences which, as it happens, were unforeseen." The apparent fallacy in this *post mortem* argument rests in the word "enough" which is implicitly taken to mean "enough knowledge to foresee" the consequences of our action. It is then no difficult matter to uphold the contention which then reads in effect: "if we had known, we would have known." This viewpoint is basic to several schools of educational theory, just as it was to Comte's dictum, *savoir pour prevoir, prevoir pour pouvoir.* This intellectualist stand has gained credence partly because of its implicit optimism and because of the indubitable fact that sheer ignorance does actually account for the occurrence of some unforeseen consequences *in some cases.*

[11] Cf. A. A. Tschuprow, *Grundbegriffe und Grundprobleme der Korrelationstheorie*, Leipzig, B. G. Teubner, 1925, pp. 20 ff., where he introduces the term "stochastic." It is apparent, of course, that stochastic associations are obtained because we have not ascertained, or having ascertained, have not controlled the other variables in the situation which influence the final result. Thus, stochastic associations are not inherent in social knowledge but derive from our present lack of experimental control.

constant but there is a range of consequences, *any one of which may follow the act in any given case.* In some instances, we may have sufficient knowledge of the limits of the range of possible consequences, and even adequate knowledge for ascertaining the statistical (empirical) probabilities of the various possible sets of consequences, but it is impossible to predict with certainty the results in any particular case. Our classifications of acts and situations never involve completely homogeneous categories nor even categories whose approximate degree of homogeneity is sufficient for the prediction of particular events.[12] We have here the paradox that whereas past experience[13] is the sole guide to our expectations on the assumption that certain past, present and future acts are sufficiently alike to be grouped in the same category, these experiences are in fact different. To the extent that these differences are pertinent to the outcome of the action and appropriate corrections for these differences are not adopted, the actual results will differ from the expected. As Poincaré has put it, "... small differences in the initial conditions produce very great ones in the final phenomena. ... Prediction becomes impossible, and we have the fortuitous phenomenon."[14]

However, deviations from the usual consequences of an act may be anticipated by the actor who recognizes in the given situation some differences from previous similar situations. But, insofar as these differences can themselves not be subsumed under general rules, the direction and extent of these deviations cannot be anticipated.[15] It is clear, then, that the partial knowledge in the light of which action is commonly carried on permits a varying range of unexpected outcomes of conduct.

Although no formula for the exact *amount* of knowledge necessary for foreknowledge is presented, one may say in general that consequences are fortuitous when an exact knowledge of many details and facts (as distinct from general principles) is needed for even a highly approximate prediction. In other words, "chance conse-

[12] A classification into completely homogeneous categories would, of course, lead to functional associations and would hence permit of perfectly successful prediction, but the aspects of social action which are of practical importance are too varied and numerous to permit such homogeneous classification.

[13] *A priori* calculations of probability are manifestly irrelevant to specific social acts.

[14] Henri Poincaré, *Calcul des probabilités*, Paris, 1912, p. 2.

[15] The actor's awareness of his ignorance and its implications is perhaps most acute in the type of conduct which Thomas and Znaniecki attribute to the wish for "new experience." This is the case where unforeseen consequences actually constitute the purpose of action, but there is always the tacit assumption that these consequences will be desirable. The nebulous purpose in this class of action is satisfaction.

quences" are those which are occasioned by the interplay of forces and circumstances which are so complex and numerous that prediction of them is quite beyond our reach. This area of consequences should perhaps be distinguished from that of "ignorance," since it is related not to the knowledge actually in hand but to certain knowledge which can conceivably be obtained.[16]

The importance of ignorance as a factor is enhanced by the fact that the exigencies of practical life frequently compel us to act with some confidence even though it is manifest that the information on which we base our action is not complete. We usually act, as Knight has properly observed, not on the basis of scientific knowledge, but opinion and estimate. Thus, situations which demand (or what is for our purposes tantamount to the same thing, appear to the actor to demand) immediate action of some sort, will usually involve ignorance of certain aspects of the situation and will bring about unexpected results.

Moreover, even when immediate action is not exacted, there is the *economic* problem of distributing our fundamental resources, time and energy. Time and energy are scarce means and economic behavior is concerned with the rational allocation of these means among alternative wants, only one of which is the anticipation of consequences of action.[17] In our present economic order, it is manifestly uneconomic behavior to concern ourselves with attempts to obtain knowledge for predicting the outcomes of action to such an extent that we have practically no time or energy for other pursuits. An economy of social engineers is no more conceivable or practicable than an economy of laundrymen. It is the fault of the extreme anti-noetic activists who promote the idea of action above all else to exaggerate this limit and to claim (in effect) that virtually no time or energy be devoted to the acquisition of knowledge. On the other hand, the grain of truth in the anti-intellectualist position is, as was just observed, that there are not only decided economic limits to the

[16] Cf. Keynes, *op. cit.*, p. 295. This distinction corresponds to that made by Keynes between "subjective chance" (broadly, ignorance) and "objective chance" (where even additional wide knowledge of general principles would not suffice for foreseeing the consequences of a particular act). Much the same distinction appears in the works of Poincaré and Venn, among others.

[17] Cf. Knight, *op. cit.*, p. 348. The reasoning is also applicable to cases where the occupation of certain individuals (e.g., social engineers and scientists) is devoted solely to such efforts, since then it is simply a question of the distribution of the resources of society. Furthermore, there is the practical problem of the communicability of knowledge so obtained, since it may be of a very complex order and the effort of persons other than social engineers to assimilate such knowledge leads us back to the same problem of distribution of our resources.

advisability of not acting until all or as much as possible uncertainty is eliminated, but also psychological limits since excessive "forethought" of this kind precludes any action at all.

A second major factor of unexpected consequences of conduct, which is perhaps as pervasive as ignorance, is error. Error may intrude itself, of course, in any phase of purposive action: we may err in our appraisal of the present situation, in our inference from this to the future objective situation, in our selection of a course of action, or finally in the execution of the action chosen. A common fallacy is frequently involved in the too-ready assumption that actions which have in the past led to the desired outcome will continue to do so. This assumption is often fixed in the mechanism of habit and it there finds pragmatic justification, for habitual action does in fact often, even usually, meet with success. But precisely because habit is a mode of activity which has previously led to the attainment of certain ends, it tends to become automatic and undeliberative through continued repetition so that the actor fails to recognize that procedures which have been successful *in certain circumstances* need not be so *under any and all conditions*.[18] Just as rigidities in social organization often balk and block the satisfaction of new wants, so rigidities in individual behavior may block the satisfaction of old wants in a changing social environment.

Error may also be involved in instances where the actor attends to only one or some of the pertinent aspects of the situation which influence the outcome of the action. This may range from the case of simple neglect (lack of systematic thoroughness in examining the situation) to pathological obsession where there is a determined refusal or inability to consider certain elements of the problem. This last type has been extensively dealt with in the psychiatric literature. In cases of wish-fulfilment, emotional involvements lead to a distortion of the objective situation and of the probable future course of events; such action predicated upon "imaginary" conditions must inevitably evoke unexpected consequences.

The third general type of factor, the "imperious immediacy of interest," refers to instances where the actor's paramount concern with the foreseen immediate consequences excludes the consideration of further or other consequences of the same act. The most prom-

[18] Similar fallacies in the field of thought have been variously designated as "the philosophical fallacy" (Dewey), the "principle of limits" (Sorokin, Bridgman) and, with a somewhat different emphasis, "the fallacy of misplaced concreteness" (Whitehead).

inent elements in such immediacy of interest may range from physiological needs to basic cultural values. Thus, Vico's imaginative example of the "origin of the family" which derived from the practice of men carrying their mates into caves to satisfy their sex drive out of the sight of God might serve as a somewhat fantastic illustration of the first. The doctrine of classical economics according to which the individual endeavoring to employ his capital where most profitable to him and thus tending to render the annual revenue of society as great as possible is, to quote Adam Smith, led "by an invisible hand to promote an end which was no part of his intention," may serve as an example of economic interest leading to this sequence.

However, after the acute analysis by Max Weber, it goes without saying that action motivated by interest is not antithetical to an exhaustive investigation of the conditions and means of successful action. On the contrary, it would seem that interest, if it is to be satisfied, demands such objective analysis of situation and instrumentality, as is assumed to be characteristic of *hominis oeconomici*. But it is equally undeniable that intense interest does in fact often tend to preclude such analysis precisely because strong concern with the satisfaction of the immediate interest is a psychological generator of emotional bias, with consequent lopsidedness or failure to engage in the required calculations. It is as much a fallacious assumption to hold that interested action in fact necessarily entails a rational calculation of the elements in the situation[19] as to deny rationality any and all influence over such conduct. Moreover, action in which this element of immediacy of interest is involved may be rational in terms of the values basic to that interest but irrational in terms of the life organization of the individual. Rational, in the sense that it is an action which may be expected to lead to the attainment of the specific goal; irrational, in the sense that it may defeat the pursuit or attainment of other values which are not, at the moment, paramount but which none the less form an integral part of the individual's scale of values. Thus, precisely because a particular action is not carried out in a psychological or social vacuum, its effects will ramify into other spheres of value and interest. For example, the practice of birth control for "economic reasons" influences the age-compo-

[19] This assumption is tenable only in a normative sense. It is indubitable that such calculation, within the limits specified in our previous discussion, *should* be made if the probability of satisfying the interest is to be at a maximum. The error lies in confusing norm with actuality.

sition and size of sibships with profound consequences of a psychological and social character.

Superficially similar to the factor of immediacy of interest, but differing from it in a highly significant theoretical sense, is that of basic values. This refers to instances where there is no consideration of further consequences because of the felt necessity of certain action enjoined by certain fundamental values. The classical analysis of the influence of this factor is Weber's study of the Protestant ethic and the spirit of capitalism. He has properly generalized this case, saying that active asceticism paradoxically leads to its own decline through the accumulation of wealth and possessions entailed by decreased consumption and intense productive activity.

This process contributes much to the dynamic of social and cultural change, as has been recognized with varying degrees of accuracy and cogency, by Hegel, Marx, Wundt and many others. The empirical observation is incontestable: activities oriented toward certain values release processes which so react as to change the very scale of values which precipitated them. This process may in part be due to the fact that when a system of basic values enjoins certain *specific* actions, adherents are not concerned with the objective consequences of these actions but only with the subjective satisfaction of duty well performed. Or, action in accordance with a dominant set of values tends to be focussed upon that particular value-area. But with the complex interaction which constitutes society, action ramifies, its consequences are not restricted to the specific area in which they were initially intended to center, they occur in interrelated fields explicitly ignored at the time of action. Yet it is because these fields are in fact interrelated that the further consequences in adjacent areas tend to *react* upon the fundamental value-system. It is this usually unlooked-for reaction which constitutes a most important element in the process of secularization, of the transformation or breakdown of basic value-systems. Here is the essential paradox of social action—the "realization" of values may lead to their renunciation. We may paraphrase Goethe and speak of "Die Kraft, die stets das Gute will, und stets das Böse schafft."

There is one other circumstance, peculiar to human conduct, which stands in the way of successful social prediction and planning. Public predictions of future social developments are frequently not sustained precisely because the prediction has become a new element in the concrete situation, thus tending to change the initial course

of developments. This is not true of prediction in fields which do not pertain to human conduct. Thus, the prediction of the return of Halley's comet does not in any way influence the orbit of that comet; but, to take a concrete social example, Marx's prediction of the progressive concentration of wealth and increasing misery of the masses did influence the very process predicted. For at least one of the consequences of socialist preaching in the nineteenth century was the spread of organization of labor, which, made conscious of its unfavorable bargaining position in cases of individual contract, organized to enjoy the advantages of collective bargaining, thus slowing up, if not eliminating, the developments which Marx had predicted.[20]

Thus, to the extent that the predictions of social scientists are made public and action proceeds with full cognizance of these predictions, the "other-things-being-equal" condition tacitly assumed in all forecasting is not fulfilled. Other things will not be equal just because the scientist has introduced a new "other thing"— his prediction. This contingency may often account for social movements developing in utterly unanticipated directions and it hence assumes considerable importance for social planning.

The foregoing discussion represents no more than the briefest exposition of the major elements involved in one fundamental social process. It would take us too far afield, and certainly beyond the compass of this paper, to examine exhaustively the implications of this analysis for social prediction, control and planning. We may maintain, however, even at this preliminary juncture, that no blanket statement categorically affirming or denying the practical feasibility of *all* social planning is warranted. Before we may indulge in such generalizations, we must examine and classify the *types* of social action and organization with reference to the elements here discussed and then refer our generalizations to these essentially different types. If the present analysis has served to set the problem, if only in its most paramount aspects, and to direct attention toward the need for a systematic and objective study of the elements involved in the development of unanticipated consequences of purposive social action, the treatment of which has for much too long been consigned to the realm of theology and speculative philosophy, then it has achieved its avowed purpose.

[20] Corrado Gini, *Prime linee di patologia economica*, Milan, A. Giuffrè, 1935, pp. 72–75. John Venn uses the picturesque term "suicidal prophecies" to refer to this process and properly observes that it represents a class of considerations which have been much neglected by the various sciences of human conduct. See his *Logic of Chance*, London, 1888, pp. 225–6.

APPENDIX 2

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]

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[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*

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[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]

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[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

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[12] Ibid.

[13] Ibid.

[14] Shelley (2007), p. 1486.

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

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[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/.

"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]

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[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

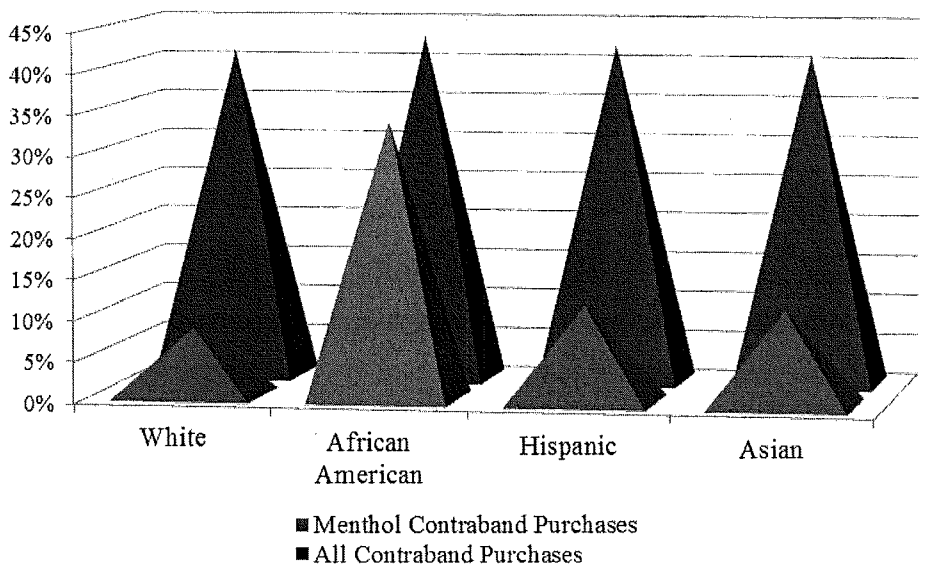
[21] Ibid., p.225.

The Center for Regulatory Effectiveness' (CRE's) Monograph[22] 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

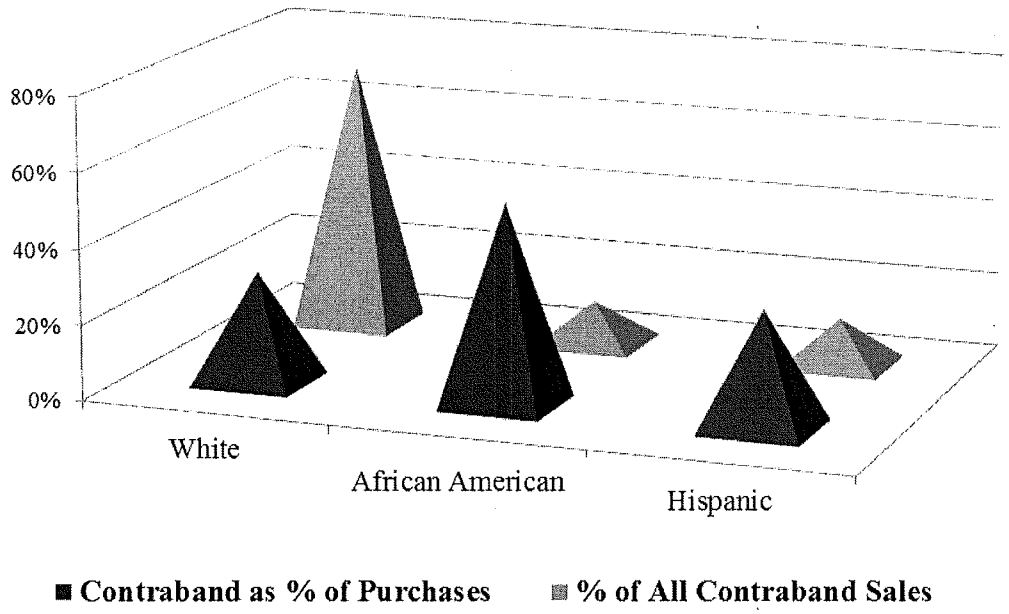


Source: CRE based on Taylor (2005), NSDUH, Census Bureau Current Population Survey

[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.

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

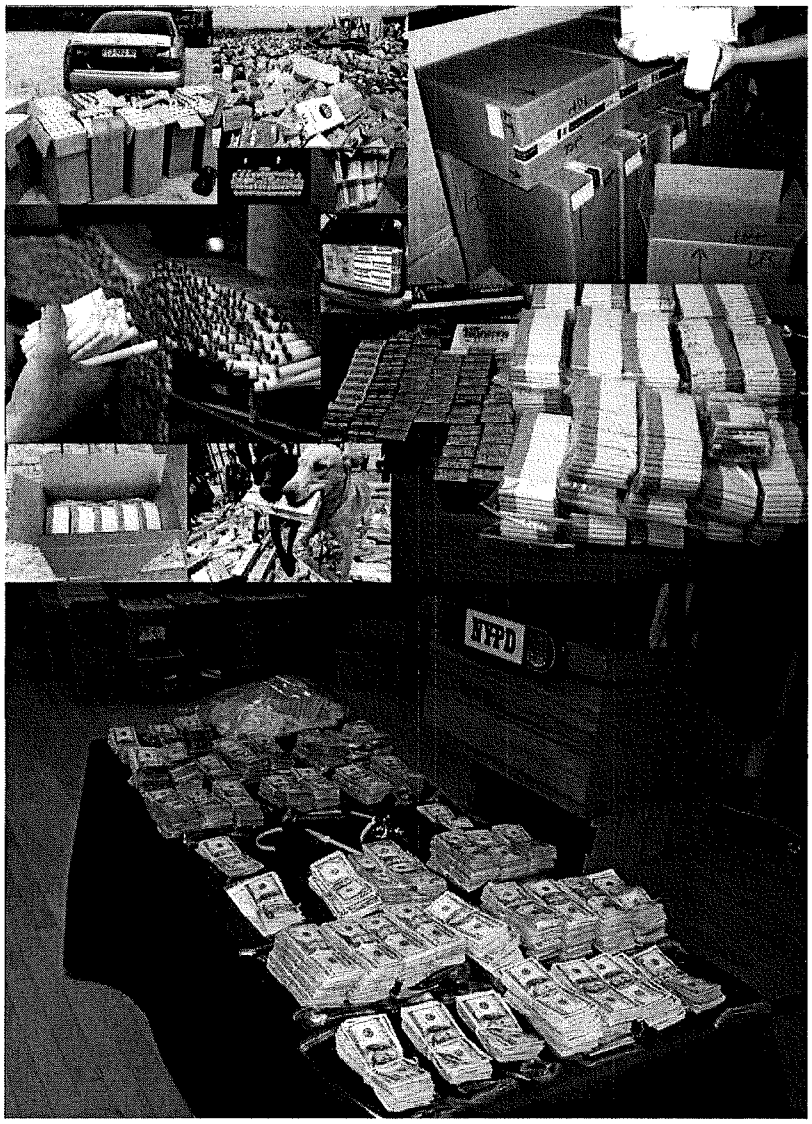
[24] Shelley (2007), p. 1486.

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.

APPENDIX 3

CRE MONOGRAPH

An Inquiry into the Nature, Causes and Impacts of Contraband Cigarettes



January 2011

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An Inquiry into the Nature, Causes and Impacts of Contraband Cigarettes

ABSTRACT

The US Food and Drug Administration (FDA) is contemplating a ban on menthol-flavored cigarettes. Prior to reaching a preliminary decision, the agency and their independent science advisory panel are required to consider the "countervailing" effects a ban would have on smokers and non-smokers, including the creation of significant demand for contraband cigarettes. This monograph addresses the potential negative effects of a menthol ban by analyzing three facets of the contraband cigarette issue: 1) the nature of contraband cigarettes including consideration of how they may materially differ from legal products, such as by containing higher levels of heavy metals and other contaminants; 2) factors influencing the size of the contraband market and an estimation of how it would respond to a menthol ban; and 3) a discussion of the impacts of contraband cigarettes on society. Academic literature, findings by US government and foreign government agencies, and accounts from major media publications serve as the databases for the analyses. The monograph concludes that a ban on menthol-flavored cigarettes would significantly inflate the market for contraband cigarettes, many of which present even higher health risks than legally-made products. The increased health hazards from illicit cigarettes disproportionately impact underage and African American smokers.

I. Introduction and Plan of Work

The scope of this study was set by the mandate in the Family Smoking Prevention and Tobacco Control Act (Act) which requires 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))

The Act also states, specific to menthol, that

> *Immediately upon the establishment of the Tobacco Products Scientific Advisory Committee under section 917(a), the Secretary shall refer to the Committee for report and recommendation, under section 917(c)(4), the issue of the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities. In its review, the Tobacco Products Scientific Advisory Committee shall address the considerations listed in subsections (a)(3)(B)(i) and (b).* (Public Law 111-31, §907(e)(1))

It is the last sentence, the directive to the TPSAC to address the considerations in §907(b), that requires the committee to consider the contraband issue with respect to a possible menthol ban.

Based on the statutory text, the Center for Regulatory Effectiveness (CRE) sees three discrete issues that need to analyzed. For the purposes of the report we will integrate the issue of the "creation of a significant demand for contraband" into the other issues cited in the statute rather than viewing the demand for contraband as a stand-alone matter. Therefore, this monograph will analyze whether a ban on menthol-flavored cigarettes would lead to a significant increase in the contraband cigarette market that would adversely effect:

1) The health of adolescent tobacco users;

2) The health of adult tobacco users; and

3) Non-smokers.

The meaning of the term "significant" will be discussed in Section III. We can say at this point, however, that a significant increase in the demand for contraband tobacco should be understood in terms of a significant impact on the lives of smokers and non-smokers rather than as an abstract numerical concept. We should also understand that adverse impacts on the lives of smokers and non-smokers can and should be integrated into a concept of an increased demand for contraband tobacco that harms the communities in which we live.

Understanding the nature of contraband cigarettes is a prerequisite to analyzing the three issues described above. Specifically, the term "contraband cigarette" needs to be defined and it needs to be determined whether at least some contraband cigarettes are materially different than other cigarettes. Once these preliminary issues are addressed, it will be possible to analyze how a possible ban on menthol-flavored cigarettes would affect the contraband market and how any changes in the market would potentially affect smokers and non-smokers. Thus, the Nature section of the monograph focuses on characterizing contraband cigarettes from a legal and substantive perspective.

The Causes section of the monograph analyzes the trade in contraband cigarettes. Based on academic literature concerning contraband cigarette markets in the US and other countries, this paper will

estimate the current size of the domestic contraband market and develop estimates of what impact a menthol flavoring ban would have on the US contraband market.

The final analytic section, Impacts, will consider whether there would be harmful effects from a menthol ban directly relevant to the FDA's and the TPSAC's statutory charge. Thus, although contraband-related revenue losses are of keen interest to federal, state and local government fiscal authorities, they are not among the issues specified in statue to be considered by FDA and TPSAC. The Impacts section, therefore, focuses on the issues that the agency and advisory panel are required to consider, a ban's expected impact on underage smokers, adults smokers and non-smokers.

Each analytic section is followed by *In Review*, a summary of key section conclusions in a bullet-point format.

This paper also includes a Conclusions section that pulls together and distills the analytic determinations developed in the paper. The Recommendations section provides policy guidance to the TPSAC and FDA consistent with the goals of the Act.

II. The Nature of Contraband Cigarettes

The term "contraband cigarettes" is defined in statute as meaning "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found...." [18 U.S.C. § 2341(2)] The law creates several exemptions from this definition such as for "a manufacturer of tobacco products or as an export warehouse proprietor" possessing the required permit under the Internal Revenue Code and for "a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes."

Since the statutory definition of contraband cigarettes is based on tax evasion, for the purposes of this paper, we can say that contraband cigarettes are cigarettes on which all required taxes have not been paid in the jurisdiction in which they are sold. Because the "street level" tobacco trade often deals in packs or even single cigarettes ("loosies") rather than in 10,000 stick quantities, for the purposes of this paper, <u>all cigarettes which have not been fully taxed according to the requirements of the jurisdiction in which they are sold are defined as "contraband."</u>

Potential sources of contraband cigarettes include: 1) cigarettes that have been illegally transported from one state/tribal jurisdiction to another location (usually from a lower or no tax area to a higher tax jurisdiction); 2) cigarettes that have been illegally imported into the United States; 3) cigarettes illegally made from domestic tobacco which has not been taxed in accordance with federal, state and

local requirements for tobacco products; and 4) cigarettes made from illegally imported hand-rolling tobacco.[1]

Since a contemplated ban on menthol-flavored cigarettes would be nationwide, the illegal interstate transit of otherwise legal cigarettes would not be an issue for the contraband market. Thus, the contraband market for menthol-favored cigarettes would consist of name-brand cigarettes illegally brought into the US, unbranded cigarettes either illegally brought into the US or illegally manufactured in the US, and counterfeit cigarettes, *i.e.*, cigarettes which bear the name and markings of a branded product but were not manufactured by the indicated company or their licensee. From a broader perspective, there are two types of contraband cigarettes:

- Legally made cigarettes that have not been taxed in the jurisdiction in which they are sold; and

- Illegally manufactured cigarettes.

The second category, cigarettes which have been made illegally, is of particular importance for understanding the effect of a menthol ban since these cigarettes which have the potential to present greater health hazards to smokers than legally made products.

Counterfeit cigarettes are already an important law enforcement issue. The Justice Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) states on their Tobacco Diversion Fact Sheet that the "trade of counterfeit tobacco products is also a rapidly growing global problem."[2] The ATF also indicates that the nature of counterfeit cigarettes are different than legitimate name brand cigarettes and that "consumers do not know what ingredients are used to manufacturer these cigarettes." It is therefore necessary to understand the nature of counterfeit cigarettes, specifically whether they substantively differ from legitimate products, in order to be able to analyze their impact later in this paper.

The published literature and research findings reported by governments indicates that counterfeit cigarettes are materially different from the branded products they imitate. Counterfeit cigarettes are significantly different than legitimate products in three ways:

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[1] Although not currently considered a major concern in the United States, illegal importation of hand-rolling tobacco occurs on a large-scale basis in the United Kingdom. See, account of smugglers jailed for illegal imports of "more 15 million counterfeit cigarettes and nearly 2.5 tonnes of hand rolling tobacco from China, in just 14 months," Emma Stone, "Gang jailed over major cigarette smuggling ring in Coventry," *Coventry Telegraph*, July 7, 2009, and smugglers being sentenced for illegal imports including "11 million cigarettes, five tonnes of hand-rolling tobacco" Mike Brooke, "£6m smugglers jailed 20 years after East End warehouse raid" *East London Advertiser*, 23 February, 2010.

[2] Bureau of Alcohol, Tobacco, Firearms and Explosives, "Fact Sheet, ATF Tobacco Diversion" found at http://www.atf.gov/publications/factsheets/factsheet-tobacco-diversion.html.

- Level of metals present;
- Levels of tar/nicotine/carbon monoxide; and
- Presence of miscellaneous contaminants.

The Nature of Metals in Counterfeit Cigarettes

Researchers from the Centers for Disease Control and Prevention's (CDC's) National Center for Environmental Health found that levels of cadmium, thallium and lead in mainstream smoke "were far greater for counterfeit than the authentic brands, in some cases by an order of magnitude."[3] The authors also note that "toxic metals and metalloids constitute one of the more understudied major carcinogenic chemical classes in tobacco smoke."[4]

To measure the levels of metal particulates in mainstream smoke of a particular type of cigarette (genuine Marlboro 100s, counterfeit Newport King, etc.) "[f]ive cigarettes were smoked per QFP [quartz filter pad] under FTC smoking conditions (35-mL puff volume, 2-s puff, and 60-s puff intervals)."

In addition to presenting the data on metal particulate levels in mainstream smoke on a per-cigarette basis, the study also normalized the values for nicotine levels based on the assumption "that individuals smoke a particular brand in such a manner to achieve a target nicotine dose by varying how they smoke, *i.e.*, by changing average puff volume, puff frequency, and/or inhalation depth, smoke residence time, etc."[5]

Although other metals were of interest, the analysis was limited to lead, cadmium and thallium because the "high metal background in the smoke collection materials" excluded additional analysis. The counterfeit cigarettes used in the study were confiscated by the Department of Homeland Security (DHS), the Federal Bureau of Investigation (FBI), and the Bureau of Immigration and Customs Enforcement (ICE). The authentic branded cigarettes were purchased in the Atlanta metropolitan area.

The following charts, based on Pappas (2007), illustrates the level of cadmium, thallium and lead in nanograms (ng) per milligram of nicotine in mainstream smoke. The values for counterfeit cigarettes are the mean of the counterfeit cigarettes of each cigarettes type.

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[3] R.S. Pappas, G.M. Polzin, et al., "Cadmium, lead, and thallium in smoke particulate from counterfeit cigarettes compared to authentic US brands," Food and Chemical Toxicology, Vol. 2. Issue 2, February 2007, Abstract.

[4] Ibid., pp. 202-203.

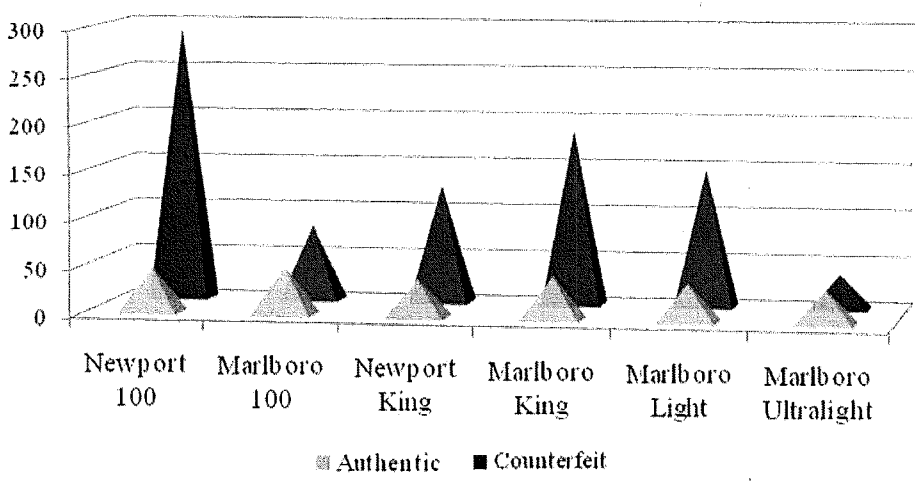
[5] Ibid., p. 205.

Figure 1

Cadmium Levels

Authentic and Counterfeit Cigarettes

(ng/ mg of nicotine: mainstream smoke)



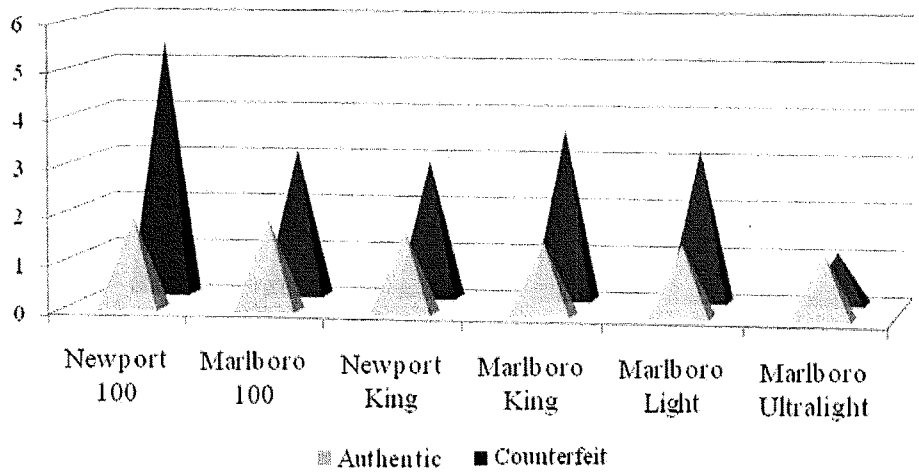
Source: Pappas (2007), Figure 3

Figure 2

Thallium Levels

Authentic and Counterfeit Cigarettes

(ng/ mg of nicotine: mainstream smoke)



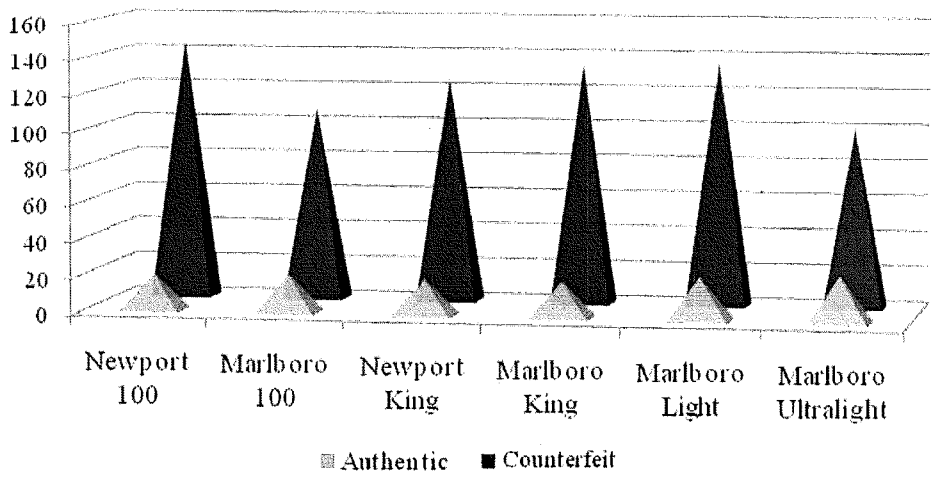
Source: Pappas (2007), Table 1

Figure 3

Lead Levels

Authentic and Counterfeit Cigarettes

(ng/ mg of nicotine: mainstream smoke)



Source: Pappas (2007), Figure 4

The authors caution that the "study examined a convenience sample of counterfeit cigarettes that were available from ongoing law enforcement activities. This small sample cannot be used to draw general conclusions about counterfeit cigarettes." Thus, Pappas (2007) cannot be used as the basis for a statistical extrapolation of its results to the universe of counterfeit cigarettes. The authors do note, however, that Stephens (2005) also found that counterfeit cigarettes "had significantly higher heavy metals content in their tobacco compared to their genuine equivalents."

The Stephens (2005) paper "Source and Health Implications of High Toxic Metal Concentrations in Illicit Tobacco Products" compared the levels of "10 representative 'heavy metals'" in counterfeit cigarettes with their genuine counterparts. The ten metals analyzed were; cadmium, lead, arsenic, nickel, chromium, tin, zinc, iron, manganese and copper. Instead of measuring the levels of metals found in mainstream smoke, Stephens (2005) measured the concentrations of the metals in the tobacco and reported the results in milligrams per kilogram.

The counterfeit samples were provided "by U.K. HM Customs & Excise in the form of one or two packs of 20 cigarettes for eight purported brands among the best-selling brands currently available in the U.K. Some 47 samples of counterfeits were obtained between September 2002 and January 2004." The genuine cigarettes were obtained from reliable retailers in the same time frame.

With respect to cadmium, arsenic and lead, the study found "the counterfeits have markedly higher concentrations of these elements. This is particularly significant as all three elements are known to be carried to varying degrees by the smoke phase released on tobacco combustion."[6]

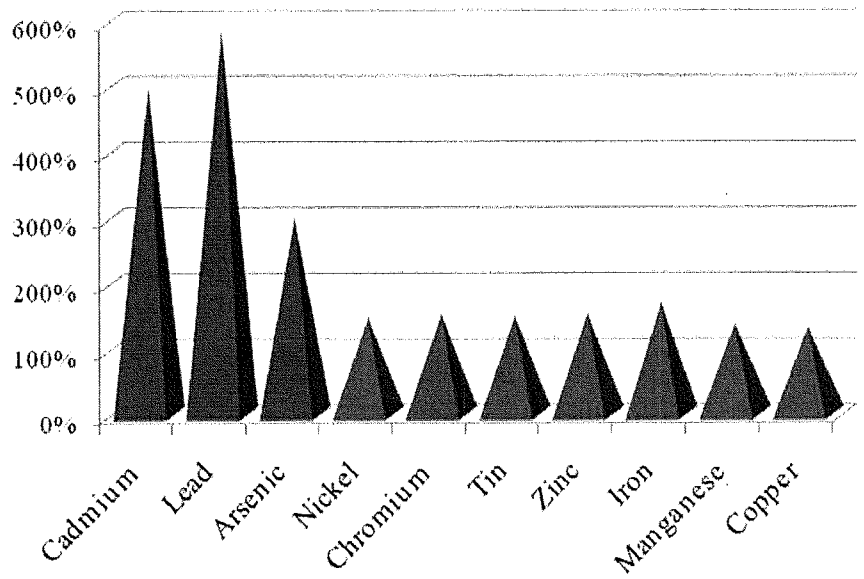
The mean concentrations for all ten metals were higher in the counterfeit cigarettes than their genuine counterparts. The fertilizers used in growing the tobacco for the counterfeit cigarettes were thought by the authors to be the source of the higher metal concentrations, deliberate contamination was not suspected.

Figure 4 illustrates the ratio of metals in counterfeit cigarettes compared with their genuine counterparts. The data is from the mean values for the concentration of each metal for counterfeit and genuine cigarettes reported by Stephens (2005).

Figure 4

Higher Metal Concentrations in Counterfeit Cigarettes (UK)

Metal Concentrations in Counterfeit Cigarettes as a Percentage of their Concentration in Authentic Product (mg/kg)



Source: Stephens, et al (2005), Figure 1

[6] Stephens, et al. (2005) p. 480, note omitted.

A 2009 paper by researchers at the New York State Department of Health also found higher levels of metals in counterfeit cigarettes. The paper, "Trace Metals Analysis of Legal and Counterfeit Cigarette Tobacco Samples Using Inductively Coupled Plasma Mass Spectrometry and Cold Vapor Atomic Absorption Spectrometry" analyzed 17 metals in counterfeit cigarettes and their genuine counterparts. The counterfeit and genuine-brand cigarettes were provided by the New York State Department of Taxation and Finance.

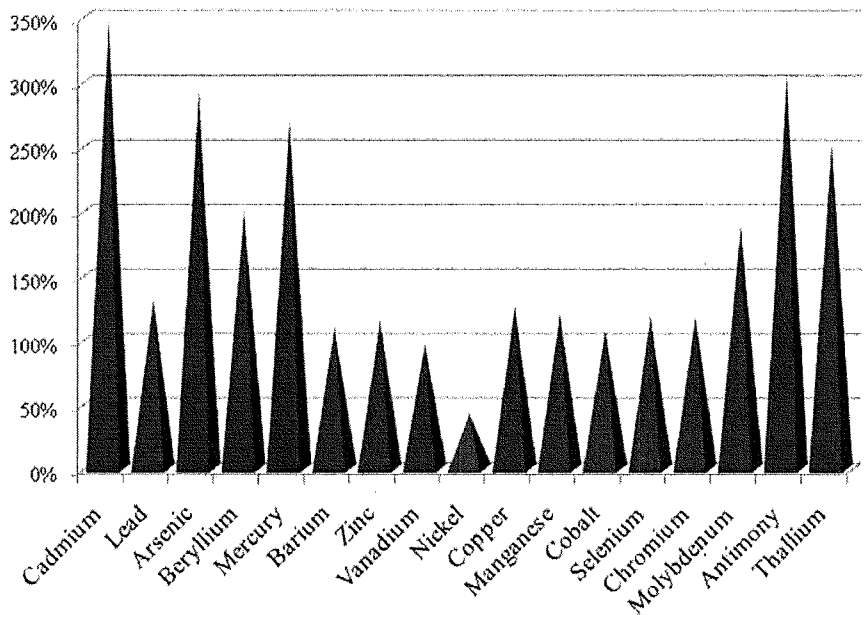
The study concluded that nine of the 17 metals analyzed, including mercury, lead, cadmium, arsenic and beryllium, "were significantly higher in counterfeit cigarette samples than in genuine-brand cigarette samples."

Figure 5, using the methodology explained by Swami (2009), illustrates the ratio of metals in counterfeit cigarettes compared with their genuine-brand counterparts. The data is from the mean values for the concentration of each metal for counterfeit and genuine cigarettes expressed in ì g per cigarette.

Figure 5

Many Toxic Metals Are in Higher Concentrations in Counterfeit Cigarettes (NY)

Metal Concentrations in Counterfeit Cigarettes as a Percentage of their Concentration in Legal Product (µg per cigarette)



Source: Swami, et al (2009), Table 8B

Although the three studies used different analytic methodologies and different samples of counterfeit cigarettes, seized in different years in two different countries, they produced remarkably consistent results. The two metals which were analyzed in all three studies, cadmium, an IARC Group I carcinogen, and lead, a Group IIA carcinogen, were higher in counterfeit cigarettes compared with legal product in each study. Moreover, with the exception of nickel, all metals which were analyzed in at any two of the studies were consistently higher in counterfeit cigarettes. The conclusion, therefore, is that counterfeit cigarettes contain higher levels of heavy metals, including cadmium and lead, than their legal counterparts.

Although potential health issues will be discussed in a later section, it should be noted here that even though legitimate cigarettes contain lower levels of various substances than counterfeits, they cannot be characterized in any manner as being "safe." The profound health hazards associated with genuine-brand cigarettes is not in question.

The Nature of Tar/Nicotine/CO Levels in Counterfeit Cigarettes

There have been indications from the federal government that counterfeit cigarettes have higher levels of tar, nicotine and carbon monoxide (CO) than non-counterfeit cigarettes. Specifically, the ATF has stated that "it has been reported that counterfeit cigarettes had 75 percent more tar, 28 percent more nicotine and about 63 percent more carbon monoxide than genuine cigarettes."[7] Although the ATF report points to an area that deserves exploration, it is presented in anecdotal form and does not indicate the source of the information.

Pappas (2007) did provide specific nicotine data for counterfeit and non-counterfeit cigarettes. The authors found that some "nicotine delivery levels in the counterfeit cigarettes were not consistent with the authentic labeled brand variety."[8] It was this discrepancy that resulted in the authors deciding to normalize metal delivery with mainstream smoke nicotine delivery.

Overall, the study found that nicotine "deliveries from 17 out of 21 of the counterfeit cigarettes were higher than those of the comparable authentic brands; four had lower nicotine deliveries. All of the counterfeit Marlboro Light and Marlboro Ultralight cigarettes had higher nicotine deliveries than the authentic brands. In fact, many of the counterfeit nicotine deliveries were out of the range expected from their labeled variety."[9]

Figure 6 illustrates the differences in nicotine levels found by Pappas for counterfeit and legitimate cigarettes. The data in the chart is aggregated into three categories "full-flavor," the term used in the study, "light" and "ultralight."

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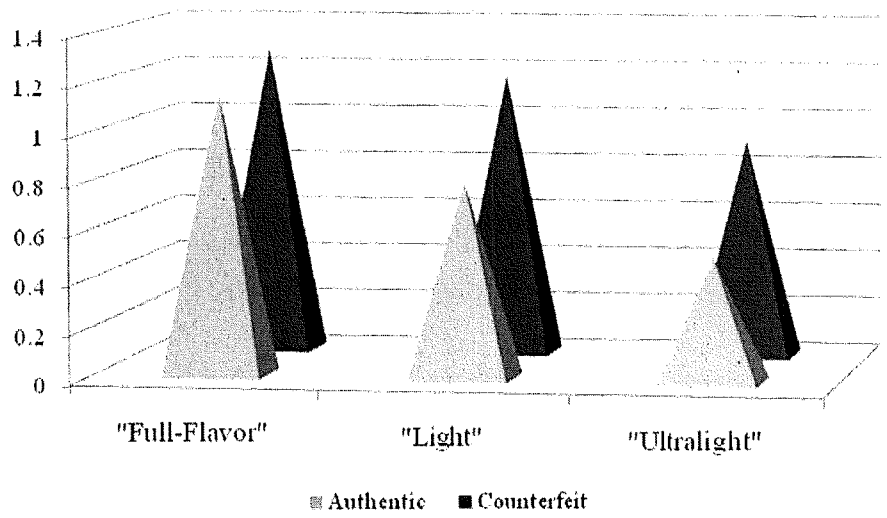
[7] ATF, "Fact Sheet."

[8] Pappas (2007), p. 205.

[9] Ibid., p. 207.

Figure 6

Nicotine Levels
Authentic and Counterfeit Cigarettes
(mg/ cigarette: mainstream smoke)



Source: Pappas (2007), Table 1

The British government also reports that counterfeit cigarettes contain higher levels of nicotine, tar and CO. Specifically, in a 2006 report on tobacco smuggling, HM Revenue and Customs states that:

> *an independent laboratory has tested a representative seizure sample and its results indicate that counterfeit cigarettes contain up to:*
>
> - *160 per cent more tar;*
> - *80 per cent more nicotine; and*
> - *133 per cent more carbon monoxide than their genuine counterparts.*[10]

[10] HM Revenue and Customs, "New responses to new challenges: Reinforcing the Tackling Tobacco Smuggling Strategy," March 2006, p. 14.

The British government had also published the data in a report, "Counterfeit Cigarettes: 2004." The 2004 paper provided additional information regarding the source of the data, "Arista Laboratories, Agency for Toxic Substances and Disease Registry –www. atsdr.cdc.gov"[11]

Overall, although the data regarding higher levels of tar, nicotine and CO in counterfeit cigarettes relative to the levels in legitimate products is somewhat sparse compared with the data for metals, it is convincing, particularly for nicotine.

The Nature of Miscellaneous Contaminants in Counterfeit Cigarettes

There are numerous reports of counterfeit cigarettes containing a variety of contaminants. For example, HM Revenue & Customs has stated that counterfeit cigarettes have "been found to contain rat droppings, camel dung, sawdust and tobacco beetles."[12] ATF has stated that "many [counterfeit cigarettes] are even contaminated with sand and other packaging materials such as bits of plastic." The Center for Public Integrity, a non-governmental organization which describes its mission as being "to produce original investigative journalism about significant public issues..." has stated that "[t]ests reveal that counterfeit cigarettes carry a bevy of products that could further shorten even a heavy smoker's life: metals such as cadmium, pesticides, arsenic, rat poison, and human feces."[13]

The Nature of the Sources of Counterfeit and Other Illegally Manufactured Cigarettes

<u>China</u>

Reports indicate that China is the leading source of counterfeit cigarettes. In a study detailing the inner workings of the China's counterfeit cigarettes industry, Shen (2010) suggests that China may be producing 400 billion counterfeit cigarettes a year – these are distinct from cigarettes legally produced for the Chinese market.[14]

Shen (2010) also provides data on law enforcement actions by the People's Republic of China based on Chinese government data from the National Tobacco Exclusive Sale Bureau (NTESB). The data, illustrated in summary form in Figure 7 for 2002-2006, provides information on the number of counterfeiting cases detected, number of rolling machines seized, quantity of cigarettes seized and number of arrests.

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[11] HM Customs and Exercise, "Counterfeit Cigarettes: 2004" p. 13.

[12] HM Revenue & Customs, counterfeit cigarette information sheet.

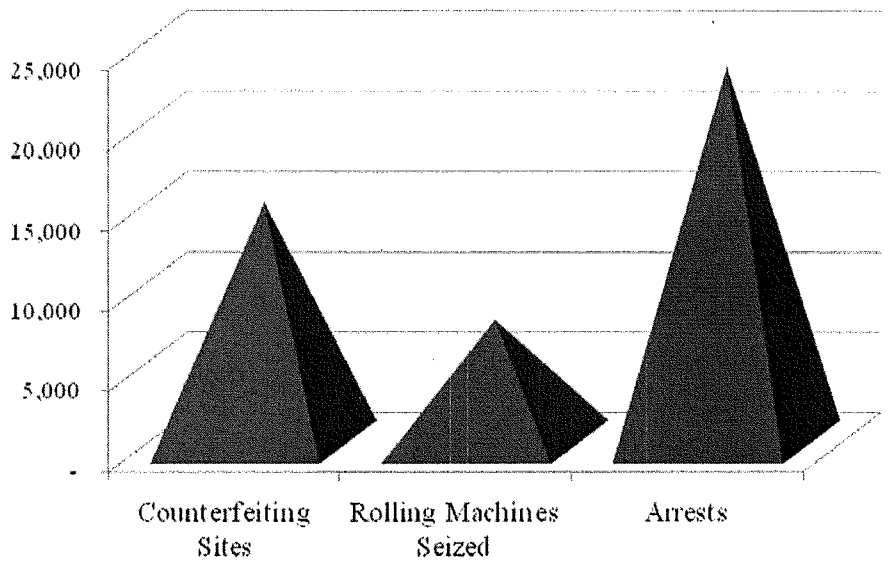
[13] Marina Walker Guevara, Tobacco Underground: The Booming Global Trade in Smuggled Cigarettes– Overview, The Center for Public Integrity, October 19, 2008.

[14] Anqi Shen, Georgios A. Antonopoulos, et al. (2010) 'The Dragon Breathes Smoke' Cigarette Counterfeiting in the People's Republic of China," British Journal of Criminology, Advance Access publication 11 November 2009, p. 239.

Figure 7

Law Enforcement Actions by China Against Cigarette Counterfeiters (2002-2006)

1,489,000 Counterfeiting Cases Detected
33,510,000,000 Counterfeit Cigarettes Seized



Source: Shen, et al (2010), Table 1

Shen notes that the data only reflects "those cases that the Chinese authorities have come across." Citing a paper not available in English, Shen (2010) relates that "the seized counterfeit cigarettes, as an official in one particular case is quoted as saying, may constitute 'only the tip of the iceberg'."[15]

One conclusion that can be drawn from the study is that there is no meaningful limit on the number of counterfeit cigarettes available for illegal transit to the US.

Shen (2010) provides additional insight into the nature of the counterfeit cigarettes themselves. The paper states that "counterfeit cigarettes can be produced from tobacco of various levels of quality, second-hand tobacco or even waste. Some of the chemicals that are used to process the low-quality tobacco, such as sulphur and carbamide, are poisonous and may cause health problems to cigarette consumers. ... Poor-quality tobacco includes the totally unprocessed raw tobacco and musty/rotten tobacco that has to go through a process with sulphur and carbamide in order to look better."[16]

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[15] Ibid., p. 244 [Note omitted].

[16] Ibid., p. 245 [Notes omitted].

It is important to recognize, however, that not all Chinese counterfeit cigarettes are low quality/ organoleptically inferior. Shen (2010) states that "[i]t is not unusual, however, for counterfeit cigarettes to be made of good-quality tobacco. Mr Li Yang, from the Central Inspection Team of the Beijing Tobacco Exclusive Sale Bureau, commented that in some cases, 'the counterfeit cigarettes intercepted are of good quality. Consumers can hardly tell the difference between these counterfeit cigarettes and the genuine ones'."[17] Thus, it cannot be assumed that the US market will reject counterfeit cigarettes based on their quality.

In an examination of the counterfeit cigarette business in Yunxiao (Fujian province), one of the area described by Shen (2010) as being "notorious for the production of counterfeit cigarettes," Te-Ping Chen found that the manufacturing is an underground industry – literally. "'Most factories are underground,' a Yunxiao cigarette broker confided in hushed tones. 'They're under buildings, unimaginably well-hidden, with secret doors from the basements.' Even the village temple—topped with an arched red roof and twisting, frescoed spires—conceals a factory below, she said."[18]

Chen relates that "[o]ne manufacturer built a factory that masqueraded as a military compound, complete with 20 laborers—dressed in castoff army uniforms—who would conduct faux-military drills and sing the national anthem in the yard every morning. Other cigarette-making machines have been hidden on ships, inside concrete bunkers, and even under a lake."

The article illustrates how counterfeit cigarette manufacturing has grown in size and sophistication to meet the demand from cigarettes markets in various countries. Specifically, in "2001, Chinese manufacturers were producing eight different varieties of counterfeit Marlboros. As of last year, though, Chinese counterfeiters were manufacturing separate versions of Marlboro tailored for some 60 countries—down to the specific details of tax stamps and regional health warnings."[19]

Chinese-made counterfeit cigarettes have shown up in large quantity in the US along with Chinese brand cigarettes that, although not counterfeit, are also illegally brought into the US and sold untaxed. The *New York Times* reported that under "the Manhattan Bridge, a popular shopping place for many immigrants from Fujian Province, there are illegal cigarettes for sale amid the shopping stalls, the private bus operators, the makeshift employment agencies and the booths where international calling cards are sold. Cautious vendors sell cigarettes mostly to customers they already know: people who speak Fujianese, people who work in restaurants, people waiting for buses to take them to jobs in Washington or Richmond, Va."[20]

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[17] Ibid. [Note omitted].

[18] Te-Ping Chen, "China's Marlboro Country: The strange, underground world of counterfeit cigarettes, Slate, Posted Monday, June 29, 2009.

[19] Ibid.

[20] Medaglia (2007). "Cigarettes are costly, but often less so in Chinatown." *The New York Times* September 18, 2007, Sec. B:2.

The 2007 NYT article also reported that in "a raid at a warehouse in Corona, Queens, in August, federal and local authorities found 600,000 cartons of cigarettes, many marked "made in China"; 125,000 counterfeit tax stamps from Kentucky, Virginia and New York; and $350,000 in cash."[21]

The article also noted that in "April, the police seized 243,000 cartons of counterfeit Marlboros and Newports from China as they were being unloaded from a van into a self-storage facility in College Point, Queens." The article quotes an ATF official stating that "[e]ght years ago, say, there were only 100 investigations, and now we have several hundred" in New York State."

North Korea

China is not the only source of counterfeit cigarettes. A 2007 Congressional Research Service (CRS) report stated that "[s]trong indications exist that the North Korean (Democratic People's Republic of Korea or DPRK) regime is involved in illicit drug production and trafficking, as well as production and trafficking in counterfeit currency, cigarettes, and pharmaceuticals, with drug trafficking likely decreasing and counterfeiting of cigarettes expanding. Overall, the reported scale of this activity is significant...."[22]

The CRS report also stated that "it is well documented that the DPRK produces counterfeit cigarettes for export, and production of seemingly genuine Japanese brand cigarettes (Mild Seven) and U.S. brands such as Marlboro appears to be flourishing."

An official with the State Department's Bureau for International Narcotics and Law Enforcement Affairs testified before Senate's Homeland Security Committee that there "are reports of as many as 12 such [counterfeit cigarette] factories, some of which appear to be owned and operated by North Korean military and security organizations, while others appear to pay the DPRK for safe haven and access to transportation infrastructure to conduct their criminal activities. These factories have the capacity to produce billions of packs of counterfeit cigarettes annually. This criminal activity extends to the United States itself. Industry investigators report that from 2002 through September 2005, DPRK source counterfeit Marlboro cigarettes, for example, were identified in 1,300 incidents in the United States."[23]

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[21] Ibid.

[22] Raphael Perl and Dick K. Nanto, "North Korean Crime-for-Profit Activities," CRS Report to Congress, Order Code RL33885, February 16, 2007., Summary.

[23] Testimony of Peter A. Prahar, Director, Office of Africa, Asia and Europe Program, Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State before the Federal Financial Management, Government Information, and International Security Subcommittee, Committee on Homeland Security and Governmental Affairs, United States Senate, North Korea: Illicit Activity Funding the Regime, April 25, 2006, S. Hrg. 109–887, p. 5.

In response to Senate questioning, the official expressed concern that the smuggling channels North Korea uses for cigarettes could also be used for other substances. "We have no information of drugs entering the United States through North Korea, although we are very concerned about the possibility of that happening, especially given the apparently well-established cigarette smuggling networks that are in place."[24]

In response to another question regarding North Korea, the official stated that a "major source of income to the regime and its leadership, we believe is the counterfeiting of cigarettes. This is a potentially enormously lucrative business, again with a U.S. connection and, of course, these cigarettes have shown up in Asian markets, as well."[25] The State Department official also noted that "it appears from what we understand about the cigarette counterfeiting that it may be the single most lucrative item in their [North Korean] portfolio."[26]

A report by the Peterson Institute for International Economics noted that the "cigarette counterfeiting appears organized in cooperation with Chinese gangs which relocated to North Korea after their government cracked down on counterfeiting in the context of China's World Trade Organization accession and pressure from trade partners including the United States."[27]

An official with the Institute for Defense Analysis testifying at the Senate Homeland Security Committee hearing described the quality of North Korean counterfeit cigarettes as "amazing."[28]

United States

Illicit domestic production of cigarettes needs to be considered as a major potential source of contraband menthol cigarettes in event of a ban – a source that could rival or exceed imports. Illicit cigarette production from domestic tobacco has been identified as a major source of contraband cigarettes in Canada and Australia. The Canadian and Australian experiences with domestic illicit cigarette production from locally-grown tobacco is an indication of the type of unlawful cigarette production that could easily and extensively take place in the US.

A study by the Ontario Tobacco Research Unit (OTRU) of contraband cigarettes in Ontario stated that "tobacco products domestically produced by illicit manufacturers who secure illicit raw leaf tobacco from licensed tobacco growers" were a major source of contraband cigarettes along with Chinese-made cigarettes, and "smuggled cigarettes manufactured on the American side of the

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[24] Ibid., p. 9.

[25] Ibid., p. 10.

[26] Ibid.

[27] Stephan Haggard and Marcus Noland, "North Korea's External Economic Relations," Peterson Institute for International Economics, Working Paper Series, WP 07-7, August 2007, Footnote 23.

[28] Senate Hearing on North Korea: Illicit Activity Funding the Regime, Transcript, p. 25.

Akwesasne Reserve" and "tax-exempt cigarettes that are designated for sale on reserves to status Natives...."[29] The OTRU describes itself as a "research network that is recognized as a Canadian leader in tobacco control research, monitoring and evaluation, teaching and training...." The OTRU is funded by the government of Ontario and its principle sponsor is the University of Toronto's Dalla Lana School of Public Health.

Health Canada, in their "Report to the Conference of the Parties on the Implementation of the Framework Convention on Tobacco Control" noted that "[r]aw leaf tobacco is regularly diverted from licenced tobacco growers and supplied to the illicit tobacco manufacturers within Canada" and that "[c]igarette manufacturing equipment has recently been acquired by illicit manufacturers in Canada that will allow them to significantly increase cigarette production."[30]

In Australia, illicit tobacco, known in local parlance as "chop-chop," was at one time "sourced primarily by diversion from licensed growers; bales of minimally processed tobacco would be purchased or stolen and distributed by organized crime groups."[31] More significantly, chop-chop also "was and is still sourced from unlicensed domestic growers or suburban homegrown production." The authors point out that chop-chop "is similar to contraband tobacco in Canada sourced from domestic production by illegal manufacturers."[32] As will be discussed, Australian smokers of illegally made cigarettes report significantly worse health than other smokers.

Based on information from multiple sources, we conclude that American grown tobacco has the potential to be a major source of raw material for contraband cigarettes. One key difference between the Canadian and Australian situations and the United States is that in the US no license is needed to lawfully grow tobacco. The Alcohol, Tobacco Tax and Trade Bureau (TTB), part of the US Department of the Treasury, states that "TTB does not license, or require a permit for, growing tobacco."[33]

The United States is a spacious, agriculturally abundant country. The experiences of other countries demonstrate that rolling machines can be easily obtained. As will be discussed, Canada's experience shows that consumers can become accustomed to purchasing inexpensive, unlabeled cigarettes in plastic baggies. Menthol flavoring agents can be readily purchased in bulk. The conclusion is that, in event of a menthol ban, America's illicit domestic production potential is virtually unlimited.

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[29] Rita Luk, Joanna E. Cohen, et al. (2007) "Contraband Cigarettes in Ontario," Ontario Tobacco Research Unit, November 2007, p. 9. [Note omitted]

[30] Health Canada, "Report to the Conference of the Parties on the Implementation of the Framework Convention on Tobacco Control," Part IV, 1(a).

[31] Campbell K. Aitken, Tim R. L. Fry, et al. (2009) "Smokers of illicit tobacco report significantly worse health than other smokers," Nicotine & Tobacco Research, Vol. 11, No. 8 (August 2009). p. 996. [Notes omitted.]

[32] Ibid., p. 997. [Notes omitted.]

[33] TTB, Tobacco FAQs and Answers, found at http://www.ttb.gov/tobacco/faq_answers.shtml

In Review

- Contraband cigarettes are cigarettes on which all required taxes have not been paid. These cigarettes may be divided into two broad categories, legally-manufactured cigarettes on which all required taxes have not been made, and illegally made cigarettes.

- There is substantial data demonstrating that counterfeit cigarettes contain higher levels of lead, cadmium and other heavy metals than non-counterfeit cigarettes.

- There is data demonstrating that many counterfeit cigarettes contain higher levels of nicotine than legal products. There is also some data indicating that counterfeit cigarettes contain elevated levels of tar and carbon monoxide.

- There are numerous reports from governmental and non-governmental sources that at least some counterfeit cigarettes contain feces and other miscellaneous contaminants.

- China is the leading source of counterfeit cigarettes and produces massive quantities of these illegitimate products despite law enforcement actions by the Chinese government. Illegal Chinese manufacturers produce high quality counterfeit packaging tailored to many different markets.

- North Korea is also a significant source of counterfeit cigarettes. Cigarettes are believed by US officials to be North Korea's single most lucrative counterfeit good.

- The United States has the capacity to illicitly produce a virtually unlimited supply of inexpensive menthol cigarettes.

III. The Causes of Contraband Cigarette Markets

Why is there a contraband market in tobacco products? "Profit" is the easy but incomplete answer as it does not address the root causes that explain why people buy contraband cigarettes.

The Cause of Demand for Contraband Cigarettes

There are two primary reasons why there is demand for contraband cigarettes. Lower prices on untaxed cigarettes is an important reason but not the only one. An additional issue is access. Cigarette traffickers sell to underage smokers who are an important source of criminal profit.

Youth Access

Since adolescents are unable to lawfully purchase cigarettes irrespective of price, they provide a demand for contraband cigarettes that is independent of tax issues.

Although most underage smokers obtain their cigarettes directly or indirectly from taxed sources, the contraband market is a significant source of cigarettes for adolescent smokers. A Research Letter in the Canadian Medical Association Journal (CMAJ) estimated that "[c]ontraband cigarettes accounted for about 17.5% of all cigarettes smoked by adolescent daily smokers in Canada overall, and for more than 25% in the provinces of Ontario and Quebec."[34] In a more recent study in *Tobacco Control*, Callaghan (2010) increased the estimate of the share of the youth market accounted for by contraband cigarettes to 43%.[35]

The Canadian experience is directly relevant for understanding the US market, particularly since Callaghan (2010) wrote that according to the Royal Canadian Mounted Police, the "bulk" of Canadian contraband cigarettes are smuggled from the US side of the boarder.[36]

Callaghan (2010) details the extent to which underage smokers consume illicit cigarettes. Based on a 2009 Ontario Student Drug Use and Health Survey, the researchers determined that most adolescent daily smokers have consumed at least some contraband tobacco, as shown in Figure 8.

Contrary to any perception that teenage boys might tend to be greater risk takers than their female counterparts when it comes to a willingness to engage in black market transactions, the Callaghan (2010) analysis revealed that most daily smokers in high school who have purchased one or more contraband cigarettes in the last 12 months are female. The data is illustrated in Figure 9.

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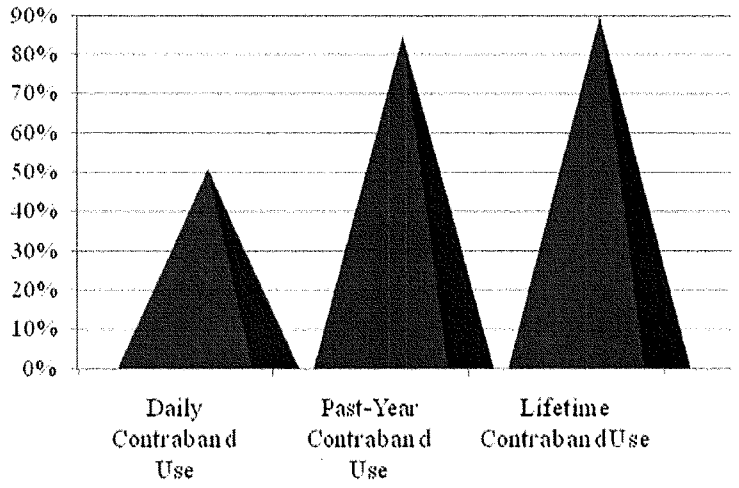
[34] Russell C. Callaghan, Scott Veldhuizen, et al., "Use of contraband cigarettes among adolescent daily smokers in Canada," CMAJ, September 15, 2009, p. 384.

[35] Ibid.

[36] 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.

Figure 8

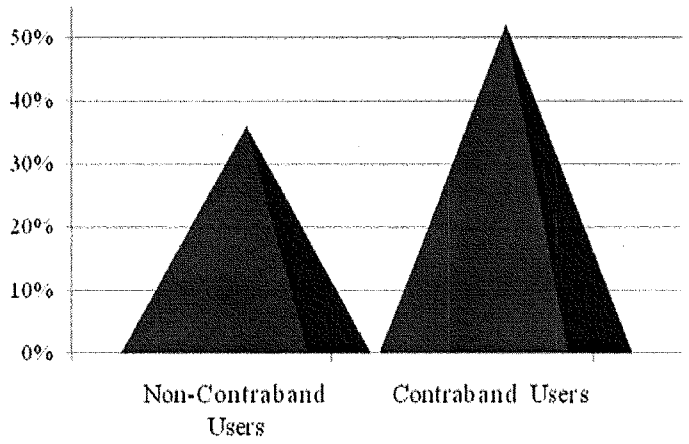
Share of Daily High School Smokers Who Consume Contraband Cigarettes in Ontario, Canada



Source: Callaghan, et al (2010)

Figure 9

Share of Contraband and Non-Contraband Daily High School Smokers Who Are Female in Ontario, Canada



Source: Callaghan, et al (2010), Table 1

It is important to note that the high rates contraband cigarette usage by youth are not limited to Canada. A study of 15 and 16 year old students in the North West of England found that 28% had purchased "fake cigarettes."[37]

When considering youth smoking rates, it should be noted that the Substance Abuse and Mental Health Services Administration (SAMSHA) produces an annual report, pursuant to the Synar Amendment, estimating tobacco sales to minors. The 2009 SAMSHA Synar Report stated that the national weighted average rate of tobacco sales to minors is 10.9%.[38] The reported rate, however, is the Retailer Violation Rate (RVR). The Synar Reports do not consider internet sales and other sales through illicit channels. Thus, the SAMSHA reports demonstrate the outsize role the contraband market plays in fueling youth access to tobacco.

The issue of illegal cigarettes sales to youth by traffickers is important for two reasons: 1) the access issue drives a portion of the contraband market irrespective of federal, state and local tax policies; and 2) the issue of illegal access to tobacco products is analogous to a possible ban on menthol-flavored cigarettes since the contraband market would become the only way to purchase such cigarettes.

The issue of underage smokers disproportionately smoking contraband tobacco is not limited to Western countries. A study analyzing who smokes contraband cigarettes in Taiwan published in the Asian Economic Journal found that "the inclination to smoke smuggled tobacco is characterized by two endogenous classes based on socio-economic status. ... First, the young are more likely to smoke smuggled cigarettes, in particular the student population."[39] Chen (2010) also discussed "the fact that low-income smokers are more likely to smoke smuggled cigarettes than high-income smokers" an issue that "has an important distributional policy implication."[40]

Price

The contraband market is, of course, driven by more than underage access to cigarettes. Contraband cigarettes cost less than lawfully sold product, in part because of the price differential between taxed and untaxed cigarettes and, in the case of counterfeit and unbranded cigarettes, the price differential between genuine brand product and illegally-manufactured cigarettes.

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[37] Sara K. Hughes, Karen Hughes, et al., "Smoking behaviours, access to cigarettes and relationships with alcohol in 15- and 16-year-old schoolchildren," European Journal of Public Health, Epub ahead of print, February 9, 2010.

[38] Substance Abuse and Mental Health Services Administration, "FFY 2009 Annual Synar Reports: YOUTH TOBACCO SALES."

[39] Hsin-Fan Chen, Sheng-Hung Chen, et al. (2010), "Who Are the Potential Smokers of Smuggled Cigarettes?" Asian Economic Journal, 2010, Vol. 24, Issue 3 .

[40] Ibid.

In a 2008 News Release, ATF stated that if someone avoided the state and federal excise taxes and the Master Settlement Agreement payment "and moved a minivan load of contraband cigarettes into New York City, in theory that individual could earn $115,000 more than a legal vendor on that load."[41] Thus, the lower price of contraband cigarettes is a key demand factor irrespective of the age of the purchaser.

Tobacco tax evasion is one of at least three sources of profit in contraband cigarette market. As has already been discussed, access to the unlawful youth market is another reason. A third profit source is the lower cost of purchasing for (unlawful) resale illegally made unbranded or counterfeit cigarettes. Yet another profit factor is that cigarette traffickers are unlikely to pay income taxes on their ill-gotten gains.

There are multiple data sources on the price differential for contraband cigarettes in the US as well as Canada and the UK. Although the data is far from comprehensive or definitive, it provides a strong sense of the contraband discount as well as the ready availability of contraband cigarettes.

Writing in the News section of CMAJ, McLaughlin (2007) reports on being able to easily find and purchase contraband cigarettes in Toronto for "a bit more than a third of what a pack of 20 cigarettes would have cost me in a store."[42] The author notes that the executive director of Physicians for a Smoke-Free Canada obtained a better deal on a visit to the Tyendinaga (First Nations) reserve where "'[w]e bought 200 cigarettes [the equivalent of 10 small packages], in a plastic baggie, for $8, as opposed to about $80 in a store.'" The article further notes that "[p]lastic baggies of 200 cigarettes, often without health warnings, can be purchased in most major cities for as little as $8-$10."

Luk (2009) reported an even greater price differential for contraband cigarettes in stating that "[b]y evading all (illegally manufactured or imported cigarettes) or part (tax-exempt cigarettes) of the taxes, cigarettes sold to non-First Nations people on reserves can cost less (as little as $6 for 200 reserve-made generic cigarettes) than lawful cigarettes sold off-reserves ($75–90 for 200 cigarettes)."[43]

Prices for contraband cigarettes in the United Kingdom are also at a sharp discount to the cost of legal products. Action on Smoking and Health (UK, established by the Royal College of Physicians in 1971) estimated that "[s]muggled tobacco may be sold on the black market at up to half the price of legitimate products...."[44]

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[41] ATF, News Release: Cigarette Smuggling – States Lose Millions In Tax Revenues," March 18, 2008.

[42] Paul McLaughlin, "Contraband cigarettes becoming a national norm," CMAJ, May 22, 2007, p. 1567.

[43] Rita Luk, Joanna E. Cohen, et al., (2009) "Prevalence and correlates of purchasing contraband cigarettes on First Nations reserves in Ontario, Canada," Addiction, 104, p. 489. (Note omitted)

[44] Action on Smoking and Health (UK), "Fact Sheet on: Tobacco smuggling," February 2010.

A 2007 article in the *New York Times* article reported that contraband cigarettes in the Chinatown area of New York City sell for $4.00/pack, about $3.50/pack less than legally sold products. The Chinatown cigarettes, according to the article, included a mix of Chinese brand and counterfeit American brands, all of which are illegal.[45] More recently, a local paper in Brooklyn (NY) reported on a tobacconist being arrested for selling untaxed cigarettes for $7/pack, about $5 a pack less than taxed cigarettes.[46]

The NBC-affiliated local television station in Seattle, KING 5, reported in October 2010 that contraband cigarettes were selling for $5 a pack.[47] Legal prices for major brand cigarettes are about $9 per pack. The television report linked the contraband market to a tax increase earlier in the year.

In New York City following a large tax increase, Shelley (2007) found that contraband cigarettes were selling at $5.00/pack compared with legal per pack prices of $7.50-$8.00.[48] The article, published in the American Journal of Public Health and discussed in greater detail below, linked the contraband trade to the tax increase stating that "immediately after the city and state cigarette tax increased, local newspapers reported a 'flood' of cigarette smuggling into NYC and a rise in illegal street sales of untaxed cigarettes, particularly in low-income neighborhoods."[49] The study also linked the tax increase to rapid inflation of the contraband market – particularly in poor, African American neighborhoods.

In quantifying the "flood" of contraband cigarettes, the paper explains that data from NYC's Community Health Survey "showed an 89% increase in cigarettes purchased through alternative sales channels." The paper concludes that "[a]lthough interest in quitting was high, bootleggers created an environment in which reduced-price cigarettes were easier to access than cessation services. This activity continues to undermine the public health goals of the tax increase." Thus, increased prices for legal cigarettes are a major force for expansion of the contraband cigarette market which, in turn, undermines smoking cessation goals.

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[45] Medaglia (2007).

[46] Andy Campbell, "Downtown smoke shop busted for tax evasion," The Brooklyn Paper, Nov. 12, 2010 found online at http://www.brooklynpaper.com/stories/33/47/dtg_smokingbust_2010_11_12_bk.html.

[47] Chris Ingalls, KING 5 News, "New cigarette tax driving more smokers to black market," October 21, 2010, see video and text found at http://www.king5.com/news/investigators/New-Cigarette-Tax-driving-more-smokers-to-black-market-105208359.html

[48] Donna Shelley, M. Jennifer Cantrell, 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, p. 1483.

[49] Ibid.

The *New York Times* reported that a "survey conducted in 2006 by the state's Department of Health found that nearly half of the smokers interviewed in New York City said that they had bought illegal cigarettes within the year."[50]

In New York City following the tax increases, obtaining lower cost cigarettes for resale did not need involve a smuggling operation more complicated than bringing cigarettes across the river from New Jersey although, as the NYT indicated, internationally smuggled cigarettes are a substantial portion of the trade. Although smuggling cigarettes in some circumstances may be easy, it would be a mistake to conclude that imposition of even extreme barriers to entry inhibit the contraband market for cigarettes.

In a study published in the Journal of Correctional Health Care, Foley (2010) examined prisons in North Carolina that instituted tobacco bans. In the prison which implemented a complete ban, a contraband market developed. Foley (2010) states that a "respondent indicated that the policy has essentially backfired, leading to comparable (and possibly higher) smoking rates as well as a new black market for tobacco products: 'They smoke as much, or if not more, and it's (the policy) created the black market.' He went on to describe that tobacco use happens 'all day, all time at night.'"[51]

Prisoners trading in forbidden goods has been going on as long as there have been prisons. Lankenau (2001), however, found that development of a prison black market in cigarettes was particularly pernicious as it resulted in violence and new health threats from homemade cigarettes (using "toilet paper wrappers or...pages from a Bible") and higher tar cigarettes. The study explains how tobacco "bans can transform largely benign cigarette 'gray markets,' where cigarettes are used as a currency, into more problematic black markets...." The relevance of the study is two-fold, one it further demonstrates that even strict access controls does not prevent development of wide-spread cigarette markets, and, two, that contraband cigarette markets can create negative consequences in the environments in which they exist over and above those created by other contraband markets.

The data shows that both youth access and cost savings both fuel the contraband market. The two factors are not, of course, wholly independent of each other. A basic economic principle is that price is inversely correlated with demand (elasticity). Callaghan (2010) noted that "[c]ontraband tobacco may be particularly attractive to adolescent smokers, owing to its lower price and lack of point-of-sale age restrictions."

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[50] Medaglia (2007).

[51] Kristie L. Foley, Scott Proescholdbell, et al., (2010) "Implementation and Enforcement of Tobacco Bans in Two Prisons in North Carolina: A Qualitative Inquiry," Journal of Correctional Health Care, 16(2) p. 101.

Current Size of the Contraband Cigarette Market

There is only fragmentary data on the size of the contraband market in the US with somewhat greater data available for Canada, Brazil and the United Kingdom. The international data is relevant for two reasons. First, the international data provides some information on growth in the contraband market. Since imports are a major source of contraband cigarettes and the market is international, growth in the contraband markets in other countries can indicate potential and/or actual growth in the US, particularly if the data is consistent with available US data.

Second, the international data is relevant because it provides a benchmark against which available US data can be measured. If the US data is at variance with estimates of the contraband market in other major industrialized countries, it would indicate either that the limited US data is misleading or, in the alternative, that there are US-specific contraband market determinants which need to be analyzed in order to understand the market. On the other hand, if contraband data for the US is in the range of market estimates for other countries, then there can be reasonable confidence that the available data is reasonable representative of the overall US market.

The Royal Canadian Mounted Police provide data on the size on the contraband market as part of reports on their Contraband Tobacco Enforcement Strategy. The data reported by the Canadian law enforcement agency in their initial 2008 report and in a 2009 Progress Report was developed by a third-party research company under contract to Canadian tobacco companies since, at "the present time the federal government does not conduct similar research." The data on the size and growth of the Canadian contraband market is shown in Figure 10.

Although there could be concern that data from an industry funded source might be biased, the Canadian government considered the data as of sufficient quality to report in their Enforcement Strategy. Moreover, the data on contraband cigarettes is consistent with the Canadian government's data on cigarette seizures. The RCMP reports that they the number of cigarettes they seized doubled between 2006 and 2008, matching the reported magnitude increase in the contraband market.[52]

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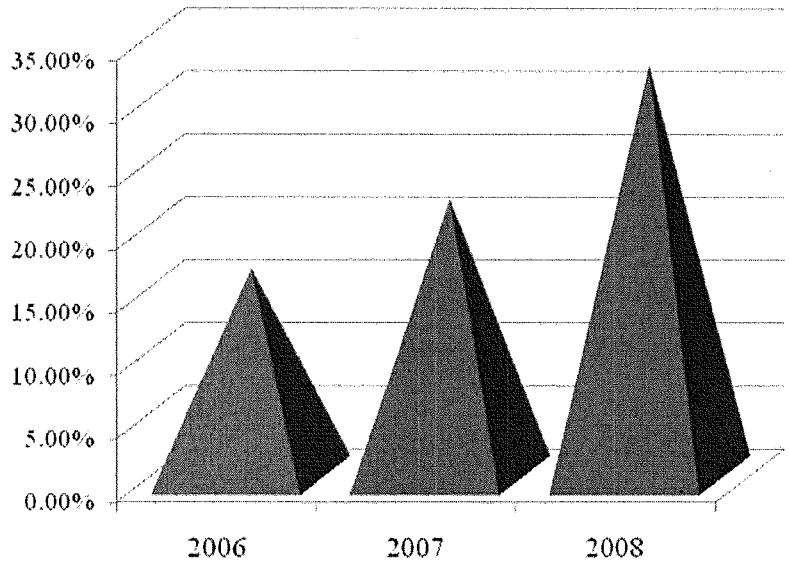
[52] Royal Canadian Mounted Police (2009) "Contraband Tobacco Enforcement Strategy – Progress Report May 2008-May 2009," p. 7.

Figure 10

Contraband Cigarettes: Share of the Canadian Market



Sources: RCMP Contraband Tobacco Enforcement Strategy 2008
RCMP Progress Report May 2008-May 2009

The data reported by the Canadian government shows that the total contraband market is substantially smaller than the 43% Callaghan (2010) estimated for the contraband youth access market. This difference indicates that the RCMP reported data is consistent with evidence of the leading role that contraband cigarettes play in fueling the underage market.

The RCMP's May 2009 Progress Update also provides information on the changing nature of the contraband market. The Update prominently notes in red-bordered box on the Introduction page that "Historically the contraband tobacco environment was based primarily on the diversion of legally manufactured products; today it is driven largely by illegal manufacturing."[53]

Canadian law enforcement's determination that the contraband market is increasingly supplied by illegal production is important since it points toward a mechanism that could potentially satisfy US demand for menthol-flavored cigarettes in event of a ban.

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[53] Royal Canadian Mounted Police (2009) "Contraband Tobacco Enforcement Strategy – Progress Report May 2008-May 2009," p. 6.

The Canadian report, citing a report from the Brazilian Ministry of Finance, states that in "2006, Brazil's illicit cigarette trade represented 35% of the market, 20% smuggling and 15% illicit manufacturing." This data indicates that Brazil's contraband was problem was worse than Canada's in that year, but is comparable to the most recent Canadian estimate – setting aside the possibility that the Brazilian market has also grown. The report also shows the substantial role of domestic illicit manufacturing in supplying the contraband cigarette market.

The UK has reported notable successes in fighting contraband cigarettes. A November 2008 report prepared jointly by HM Revenue & Customs and the UK Border Agency preliminarily estimated, based on survey data, that the illicit cigarettes share of the total British cigarette market in 2006/07 was 13%, down from 20% in 2001/02. 13% is also the government's target for 2007/08 and represents the midpoint of their estimated range for the illicit market.[54]

The British government's discussion of how the nature of contraband cigarettes has changed offers insight into why their contraband market is smaller than Canada's. The report states that prior to the launch of their anti-smuggling initiative in 2000, "the illicit cigarette market was predominantly made up of genuine cigarettes that were manufactured in the UK, exported, then smuggled back to the UK."

The report goes on to explain that after initiation of the Tackling Tobacco Smuggling strategy, " the brand mix found on the UK illicit cigarette market has been progressively diversifying. Initially, counterfeit cigarettes began to represent a rapidly growing share of the illicit market and, more recently, brands not sold on the legitimate UK market, in particular so called 'cheap white' brands made by small independent tobacco companies are representing a growing share of cigarette seizures."[55]

The report makes clear that virtually all contraband cigarettes in the UK are smuggled into the country from overseas. There is no UK equivalent of interstate contraband as in the US, nor are their sovereign tribal territories on Great Britain as there are for Canada and the US. It should also be the UK does not have much in the way of domestic tobacco production which could potentially serve for indigenous production of illicit cigarettes.

Another issue that may be limiting the contraband cigarette market in the UK is the relative popularity of hand-rolling tobacco. The report notes that in 2006, the illicit market share for hand-rolling tobacco "stood at 56%."[56] Although the government is trying to substantially decrease the market share of illicit hand-rolling tobacco, the provisional estimate for 2006/07 (the most recent

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[54] HM Revenue & Customs & UK Border Agency, (2008) "Tackling Tobacco Smuggling Together," November 2008, p. 4.

[55] Ibid., p. 7.

[56] Ibid., p. 5.

data in the report) was 53%. If the hand-rolling tobacco were converted to a cigarette equivalent, the overall illicit market share for cigarettes/hand-rolled cigarettes in the UK would be higher.

The conclusion is that there are specific attributes of the UK which make a contraband market more difficult to supply there than in Canada or the US. Although interstate tax-dodging contraband would not be an issue in event of a menthol ban, there is the potential for illicit unbranded "cheap white" domestic production as well as licit and illicit production on North American tribal territories on both side of the US-Canada border in addition to illegal imports of counterfeit and other cigarettes.

The report discussed another issue which has bearing on the expansion potential of the contraband market – the government's target data for seizing contraband cigarettes. Specifically, the agreement between the HM Revenue & Customs and the UK Border Agency (essentially a Memorandum of Understanding) for 2008/09 calls for the "seizing at least 20% of the illicit cigarettes targeted on the UK."[57] Thus, even the target goal of a successful anti-smuggling strategy expects that as much as 80% of smuggled cigarettes will reach the country.

Data concerning the US contraband cigarette market includes federal reports examining trends in tobacco smuggling and contraband seizures as well as localized estimates and analysis from state revenue agencies and academicians. It is possible, based on review of the available data, to develop a rough working estimate of the domestic contraband market.

1998 GAO testimony before the Senate Democratic Task Force on Tobacco on interstate smuggling and smuggling between Canada and the US stated that, "recent studies suggest that the level of interstate smuggling activity may now be increasing...recent estimates suggest that smuggling is responsible for states collectively losing hundreds of millions of dollars in annual tax revenues" and that "[a]ccording to the Canadian government, sharp increases in Canadian federal and provincial cigarette taxes in the late 1980s and early 1990s led to large-scale smuggling between the United States and Canada conducted almost entirely by organized crime. Violence increased, merchants suffered, and in one year alone, Canada and its provinces lost over $2 billion (in Canadian dollars) in tax revenues."[58]

A 2004 GAO report discussing increases in cigarette smuggling and associated law enforcement activities, stated that "[b]ecause of its clandestine nature, the extent of cigarette smuggling into the United States is impossible to measure with any certainty. According to ICE and ATF officials, the

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[57] Ibid., p. 23.

[58] Robert A. Robinson, United States General Accounting Office, Testimony Before the Senate Democratic Task Force on Tobacco, "CIGARETTE SMUGGLING: Information on Interstate and U.S.-Canadian Activity," May 4, 1998, p. 1.

results of investigations and intelligence collected indicate cigarette smuggling, particularly of counterfeit cigarettes, is a significant problem."[59]

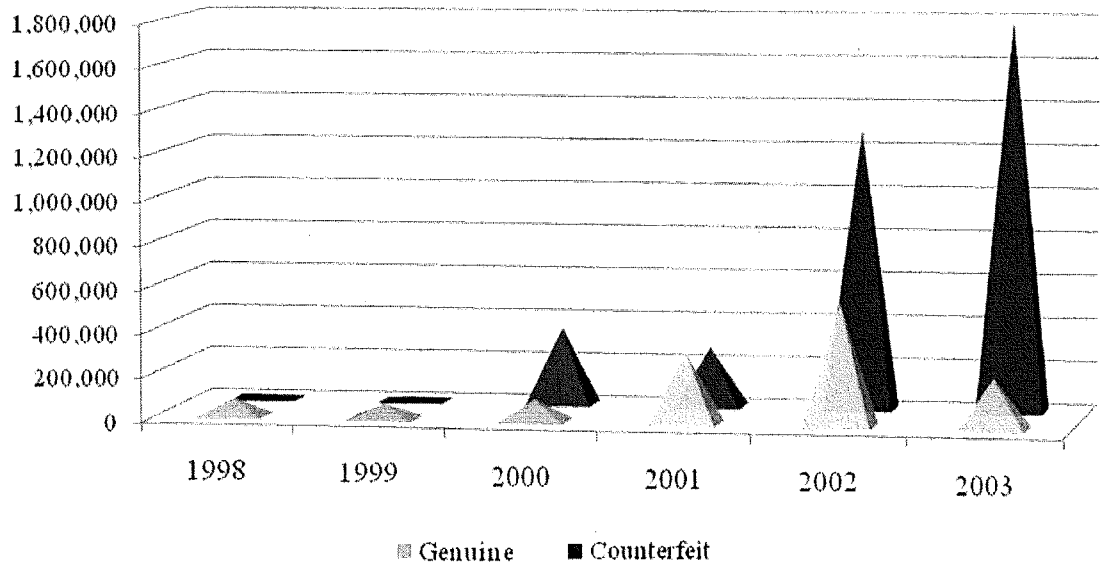
The GAO report provided data on seizures of both counterfeit and smuggled genuine cigarettes by ICE and by the U.S. Customs and Border Protection (CBP). The GAO data, illustrated in Figure 11, indicates rapid growth in the contraband cigarette market between 1998 and 2003.

The data shows a rapid growth in the number of genuine brand cigarettes seized from FY 1998-2002 with a sharp decline in 2003. By contrast, the number of counterfeit cigarettes soars in the later years of the study.

Figure 11

Federal Seizure of Smuggled Cigarettes
FY '1998-2003

Estimated Number of Cartons



Source: GAO (2004) Table 1

[59] US GAO, "CIGARETTE SMUGGLING Federal Law Enforcement Efforts and Seizures Increasing," GAO-04-641, May 2004, p.2.

Additional data presented by GAO shows that counterfeit cigarettes seized rapidly increased as a proportion of all counterfeit goods seized, based on value, from 9% in FY 2000 to 44% in FY 2003. Therefore, the rapid increase in counterfeit cigarette seizures cannot be attributed simply to an increase in counterfeit seizure activities by federal law enforcement agencies although the report does state that officials "believe the increase in seizures of counterfeit cigarettes was due to better intelligence and better inspections...."[60]

The report notes that an ATF official informed GAO that "generally, cigarette investigations take 12 to 24 months, and the investigations are extensive and complex, particularly the more recent investigations which are still ongoing. The ATF official said that unlike in the past where ATF just seized the cigarettes and vehicles because the smuggling was being performed by 'mom and pop' operations, since about 1999 more cigarette smuggling is being carried out by criminal organizations and, therefore, requires much more extensive investigation."[61]

The California contraband market is discussed in a study by the OTRU. Based on published studies, the OTRU paper states that in 2002, cigarette tax evasion was responsible for 26% of the California market.[62] The paper discusses measures taken by the state to improve the situation including "licensing of the entire supply-chain of tobacco products" and an enhanced, machine readable tax-stamp as well as funding for implementation and enforcement of the various measures. According to the study, the California Board of Equalization suggests "that overall cigarette-tax evasion has dropped by $56 million since the 2003 study, bringing the overall cigarette tax-evasion estimate to $182 million per year."[63] It is not clear how this estimate, which implies that lost revenue was $238 million in the 2003 study, is consistent with the paper's reported estimate of $292 million of lost revenue in 2002.

Nonetheless, the study indicates that the current contraband cigarette market share is perhaps 21% (estimated using a 19% reduction in contraband sales which was implied by a reduction in tax evasion of $56 million with a base of $292 million).

Of note, the OTRU study indicates that the contraband rate in California will be lower than in other places in the US. Specifically, the study states, "In California, the source of contraband is not as dynamic and adaptable as it is in other jurisdictions."[64]

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[60] Ibid., p. 21.

[61] Ibid., p. 20.

[62] Jeff Sweeting, Teela Johnson, et al. "Anti-Contraband Policy Measures: Evidence for Better Practice" *Anti-Contraband Policy Measures: Evidence for Better Practice*. Toronto, ON: The Ontario Tobacco Research Unit, Special Report Series. June 2009, p. 64.

[63] Ibid., p. 65.

[64] Ibid., p.66.

One potential shortcoming with the OTRU estimate is that it makes no mention in its discussion of cigarettes sales of street sales of contraband cigarettes, such as the type that was discussed by Shelley (2007) and captured on video in the KING 5 News story, raising the possibility that the state is underestimating lost revenue.

Another potential shortcoming in the ORTU study is that data related to role of online cigarette sales is dated and appears to underestimate the role of the internet in distributing contraband cigarettes in California. Specifically, the study states that "2002 data show that only 6 % of smokers in California actively tried to evade cigarette taxes, through either purchasing out of state, on-line, on Indian reservations, or on military bases." A 2006 letter in the Archives of Pediatric and Adolescent Medicine, however, found that internet vendors are not complying with a California state law intended to prevent sales to underage smokers. The study found that there was "zero compliance" with the law regulating internet cigarette vendors. Although some internet vendors complied with one or two of the law's six provisions, "[n]o vendors complied with the other 4 provisions"[65] rasing the possibility that some internet cigarette vendors serving California may also not be complying with state tax requirements.

The ORTU statement and Williams (2006) raise concerns that internet vendors could be contravening nationwide regulations, such as those by the US Postal Service, to prevent illegal tobacco sales. Internet cigarette sales are a substantial issue when assessing the contraband market. Goolsbee, et al (2009) warns that "the increased sensitivity from cigarette smuggling over the Internet has lessened the revenue generating potential of cigarette tax increases significantly...."[66] From the standpoint of this analysis, the issue is not the lost the lost tax revenue per se, but the magnitude of the contraband sales implied by the lost revenue.

The Washington State Department of Revenue has estimated, according to KING 5 News, that "soon one of every three cigarettes sold in Washington will be untaxed contraband."[67] This is a substantial increase over the 24% contraband rate that was estimated by the Washington State Department of Revenue for 2006.[68] The 2006 contraband estimate was based on estimating the state's smoking rate as a share percentage of the national smoking rate as well as the national average cigarette consumption. The estimate of smoking, adjusted for cigarette sales on military bases and tribal

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[65] Rebecca S. Williams, Kurt M. Ribisl, (2006), "Internet Cigarette Vendors' Lack of Compliance With a California State Law Designed to Prevent Tobacco Sales to Minors,"Archives of Pediatric and Adolescent Medicine, Vol 160, Sep 2006, p. 989.

[66] Austan Goolsbee, Michael Lovenheim, et al. (2010), "Playing With Fire: Cigarettes, Taxes, and Competition from the Internet," American Economic Journal: Economic Policy, Vol 2, No. 1, February 2010, Abstract.

[67] Ingalls (2010).

[68] Stephen D. Smith and Van Huynh, "Washington State Cigarette Consumption Revisited," Washington State Department of Revenue, January 2007, p. 12.

territories was then compared with the tax stamps sold to estimate illegal sales. The new estimate is consistent with other reports of increases in the contraband market.

A paper examining the relation between cigarette prices and purchasing patterns in western New York noted that "a recent survey of...adult smokers in 2002-2003 found that 67% of smokers reported that they usually purchase their cigarettes from an Indian reservation, where the average cigarette price was 40% that of an off reservation convenience story."[69] Given the increase in taxes since the study, it would seem plausible that untaxed purchases by non-reservation residents, *i.e.*, contraband, would be even higher today. When considering the overall contraband market, however, it should be remembered that the survey concerned a large but relatively sparsely populated area.

Shelley (2007) provides a detailed examination of the contraband market in Harlem. Although the study does not provide a point estimate of market size, its sociological examination of the market supplies an invaluable insight into the dynamics of the contraband cigarette market in a deeply disadvantaged African American community.

The study, funded by the Centers for Disease Control and Prevention and the American Legacy Foundation, used fourteen focus groups in 2003 to relate the "new underground cigarette economy" to various concepts including "perceptions of tobacco policies, social environment, stress, aspects of addiction, and community norms."[70] Six of the focus groups were composed of non-smokers or former smokers while the others were made up of current smokers. The groups were not demographically representative, instead, they "tended to be poorer and less educated than the general Harlem population."

The Shelley (2007) study examined the ubiquitous nature of the contraband cigarette market in Harlem. Although the analysis is not quantitative, quotes from the tape-recorded focus groups highlight just how widespread the contraband trade is in the community:

- "Everyone is getting them off the street. You can even get them in the hospital."(Male smoker, aged ≥50 years)

- "Now it's like 20 guys to a block and each one of them . . . they've got cigarettes for sale." (Male smoker, ≥50 years)[71]

Shelley, et al. comment that "[r]emarkably, nonsmokers were also familiar with the new underground cigarette market, suggesting the pervasiveness of this illegal activity:"

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[69] A Hyland, J E Bauer, et al, "Higher cigarette prices influence cigarette purchase patterns," Tobacco Control 2005; 14:86-92.

[70] Shelley (2007), p. 1484.

[71] Ibid.

- "That's the new push now, the cigarette man." (Female nonsmoker, ≥50 years)
- "They'll walk by with a bag on their shoulder, anybody walk up, male or female, [yelling] 'cigarettes $5, Newport $5, Marlboro $5.'" (Male nonsmoker, ≥50 years)[72]

The study also contains information concerning community attitudes toward contraband vendors and toward the cigarette taxes intended to reduce smoking that are relevant for helping to understand how a menthol ban might be perceived by the community. This information will be discussed in the next section.

Based on the data reviewed, this study estimates that contraband cigarettes will account for 25% of the US cigarette market in 2011. The factors that went into deciding to use a 25% contraband market share base case estimate include the Washington State Department of Revenue's estimate that contraband would soon account for one-third of the cigarettes in their state and the increase in this estimate from 2006, the very high rates of contraband in underprivileged urban areas, the rapidly rising number seized counterfeit cigarettes reported by GAO and the UK's goal of intercepting only 20% of smuggled cigarettes.

Other factors considered include estimates of the contraband market in Canada, and the rapid expansion of the Canadian contraband market measured in both market share and cigarettes seized. Evidence of lower contraband areas in the US, such as California, were also considered. Lastly, the tremendous illicit cigarette manufacturing capacity in China, as well as other international sources of smuggled cigarettes, informed the conclusion that the 25% contraband market share was an appropriate base number to use for estimating the potential impact of a menthol ban.

It should be noted that Joossens (2010) reported that illicit cigarettes had a 13-25% market share in the US using the "[p]ercentage of consumers that purchased lower-priced cigarettes" as the metric.[73] However, the data cited was for 1992-2002, thus not accounting for the recent growth in the contraband cigarette market reported by multiple sources.

The Cause of Community Acceptance of the Contraband Cigarette Market

How communities perceive measures intended to reduce smoking, such as tax increases, and how they perceive street level contraband vendors can provide insight into how communities would respond to a ban on menthol-flavored cigarettes. Social opprobrium can be a strong factor discouraging certain types of behavior although, of course, it is not determinative. Similarly, social acceptance could indicate that certain types of activities are more likely to increase.

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[72] Ibid, pp. 1484-1485.

[73] Luk Joossens, David Merriman et al. (2010), "The impact of eliminating the global illicit cigarette trade on health and revenue," Addiction, 105, p. 1641.

Shelley (2007) found very strong support for contraband cigarette vendors (referred to as the "$5 man") in the focus groups. The study states that the illicit tobacco vendors "were uniformly viewed as a justifiable and appreciated response to the high price of cigarettes."[74] As one study participant 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)[75]

The authors go to explain that the study participants have a "strong belief that the $5 man was a normative response to cigarettes price increases was coupled with respect for street sellers' resourcefulness in creating a lucrative source of income in a neighborhood plagued by high unemployment and limited economic opportunities. Thus, bootlegging was viewed as mutually beneficial to seller and buyer."[76] Published excepts from focus group conversations demonstrate the economic perspective of the community toward contraband cigarette sales:

- "The profit is unbearable. You know, I watch guys today in Harlem. Bought cars [with the money they made] selling cigarettes. Buy vans and jeeps [with the money they made] selling cigarettes." (Male smoker, 25–49 years)[77]

The study explores the community's perception of the cigarette tax increase aside from what it may mean to them in terms of cost savings or economic opportunity. The paper states that smokers "viewed the cigarette tax increase with cynicism. Explanations for this attitude included suspicion of the government's motivation, an expectation that the tax would increase illegal sales, and the belief that illegal sales would lead to an increase in the arrest of Black men in the community."[78] One of the study's quotes from the focus groups voicing the belief that the tax increase would result in more African Americans going to prison was:

- "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)

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[74] Shelley (2007), p. 1485. [Emphasis added]

[75] Ibid.

[76] Ibid.

[77] Ibid., p. 1486.

[78] Ibid. [Emphasis added]

Community perception of the tax increase is directly relevant to understand how a menthol ban may be viewed. If the ban is seen by economically disadvantaged communities as a government policy that will result in more young men and women of color be placed under the supervision of the judicial system, the menthol ban would inflict social harm on communities that already view themselves, with good cause, as suffering from higher rates of economic dislocation and other harmful stresses than more affluent and white communities.

Moreover, since economic and other stresses contribute to higher smoking rates in African American communities, a menthol ban could exacerbate the very problem it seeks to remedy as the following quotes illustrate:

- "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)

- "Generally it's associated with stress. I just got out of prison." (Male smoker, 18–24 years)[79]

As the study explains, for "smokers living in Harlem, smoking was an important strategy to cope with individual level stressors such as low incomes and unemployment. ... Within this socioeconomic and cultural milieu, the emergence of the $5 man was both expected and largely applauded by smokers and nonsmokers alike." Moreover, "pervasive illegal sales facilitated smoking by creating a visible trigger to smoke and ensuring easy access to tobacco products."

While recognizing that the study has "limited generalizability to other populations and settings" the authors noted that "data from the CHS [NYC Department of Health and Mental Hygiene's Community Health Survey] suggest that purchases of cigarettes from 'another person' were highest in communities with the lowest median income throughout NYC. Thus, the phenomenon may not be isolated to Harlem." The authors also state that the study provides "insight...into a form of tax evasion and illegal sales that has not been previously reported in the literature."

One of the study's conclusions that has direct implications for the effectiveness of a menthol ban in reducing smoking in underprivileged communities is that "our findings support the argument that programs and policies to alter health risk behaviors are limited without addressing the structural

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[79] Ibid.

inequalities and pressing social and material contextual factors that help sustain nicotine addiction, shape individual attitudes and behaviors, and inform community norms."[80]

The study goes on to state that "[w]ithout consideration of these issues, tax policies may negatively affect disadvantaged communities by increasing illegal sales activity and, paradoxically, cigarette availability." It seems likely that the same phenomena would hold at least as true for a menthol ban, which resembles an exceedingly high tax on the products, as it would for a conventional tax increase. Shelley (2007) notes that were studies performed in the UK which reported similar findings. For example, a qualitative analysis performed in Glasgow also emphasized the strong role of socio-economic factors in influencing smoking decisions.

Stead (2001) explains the for "people in disadvantaged communities like those in our study, smoking provides a means of coping with the combined stress of personal circumstances (low incomes, unemployment, caregiving) and the wearing influence of living in an inadequately resourced and unsafe environment." Moreover, "[l]iving in a community which is disadvantaged not only absolutely but also relative to neighbouring areas and the wider society, may lead to feelings of exclusion and stigmatisation.... Our study suggests that smoking may provide compensation for–while at the same time reinforcing–these feelings."[81]

A British study which explicitly examined the relation between social deprivation and the contraband cigarette trade also found strong support for vendors of illicit cigarettes. As one study participant explained, "to me, they're doing you a favour . . . They're doing people a service."[82]

The study makes clear that increasing taxes were "perceived as punitive, punishing the smoker and his or her family." Moreover, "[o]nly a few intimated that higher prices might act as an incentive to reduce smoking...."[83]

Wilshire (2001) concludes that "[c]igarette and tobacco smuggling is therefore viewed positively by low income smokers as a way of dealing with the increasing cost of cigarettes. Smokers in areas of deprivation may thus show little support for tackling smuggling until more action is taken to deal with the material and personal factors that make it difficult for them to quit."[84]

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[80] Ibid., p. 1487. [Notes omitted]

[81] Martine Stead, Susan MacAskill, et al. (2001), "'It's as if you're locked in': qualitative explanations for area effects on smoking in disadvantaged communities," Health & Place 7 (2001) p. 341.

[82] Susan Wiltshire, Angus Bancroft, et al. (2001), "'They're doing people a service'—qualitative study of smoking, smuggling, and social deprivation," BMJ Volume 323, 28 July 2001, p. 205.

[83] Ibid.

[84] Ibid., p. 203.

Based on a review of the literature, it can be concluded that: 1) illicit cigarette vendors receive strong social support in disadvantaged communities; and 2) these communities would likely view a menthol ban as a punitive government measure that harms underprivileged people while ignoring the underlying economic and social causes of their elevated rates of smoking.

The Cause for a "Significant" Increase in the Contraband Market: A Menthol Ban

Understanding the current state of the contraband market, including the socio-economic dynamics underlying the market, is essential for persons and organizations interested in determining how a ban on menthol-flavored cigarettes would effect the market. Once there is an understanding of the base contraband market, an informed estimation can be made regarding the extent to which a menthol ban would affect the contraband market.

The Act states that the TPSAC and the FDA are to consider whether a menthol ban would create a "significant demand" for contraband cigarettes but does not define the term "significant." There is already a demand for contraband cigarettes that is significant enough to warrant actions by law enforcement authorities in the US and around the world.

In light of the existing contraband market, the term "significant demand" could be interpreted to mean a significant increase in the demand for contraband cigarettes attributable to a menthol ban. The questions remains, though, what is a significant increase? Would a significant increase be enlarging the contraband market by 10%? 20%? 50%?

Although this paper will develop a quantitative estimate of the increase in size of the market for contraband menthol cigarettes that would result from imposition of a menthol ban, it proposes a qualitative definition of "significant demand." The TPSAC and FDA should consider an increase in demand for contraband cigarettes to be significant if it has a deleterious impact on identifiable categories or groups of smokers. More specifically, since smoking rates among adolescents and among African Americans is a major concern driving debate over a possible menthol ban, a significant increase in the contraband market should be understood to mean that the increase in the market could be reasonably expected to result in harm to underage and/or African American smokers.

CRE's model for estimating the impact of a menthol ban that will be constructed in this paper is very conservative, *i.e.*, it will substantially underestimate the increase in the menthol contraband market.

The model's primary assumption is that only those menthol smokers who already buy some contraband cigarettes would buy black market menthol-flavored cigarettes following a ban. Thus, even though researchers have found that it is quite easy to find and purchase contraband cigarettes, this paper assumes that no one who has not already purchased contraband tobacco would become a purchaser even when the contraband market expands. One result of using this assumption is that it means no increase in the non-menthol contraband market will be estimated, no matter in how many additional neighborhoods the "$5 man" takes up residence.

Demographic Characteristics of Contraband Menthol Cigarette Purchasers

The first step in estimating how the contraband market would change as a result of a menthol ban is to estimate the share of people who currently purchase contraband menthol cigarettes. A study published in the European Journal of Public Health provides data on the shares of people who have purchased contraband tobacco by gender and certain other characteristics. By applying these contraband purchase rates to US demographic data from the Census Bureau and the National Survey on Drug Use & Health (NSDUH), we can develop a picture of who in the US purchases contraband menthol cigarettes.

In developing the demographic estimates of contraband menthol purchasers, we will consider people who have purchased contraband menthol cigarettes at some point in time, rather than people who purchase only contraband menthol tobacco, because this is what we have data for. If it were assumed that contraband smokers smoke only contraband cigarettes and other smokers smoke only legally sold products, then our 25% estimated contraband share of the market would represent the share of smokers who purchase contraband cigarettes. The evidence, however, indicates that smokers who purchase contraband do so for only a portion of their total tobacco consumption. For example, the Callaghan (2010) data shows that over 80% of daily high school smokers report having purchased contraband tobacco at least once in the last year, well over the share of students who smoke contraband cigarettes on a daily basis.

A survey-based study focused on determining the types of people who use contraband tobacco provides data on the share of the total tobacco-using public who purchase at least some contraband. The Taylor (2005) study surveyed over 11,000 people 16 and older (then the legal smoking age in the UK) in the East Riding and Hull area of northeast England.[85]

The question regarding use of smuggled tobacco was worded so that survey recipients could indicate they purchased smuggled tobacco without explicitly admitting to a committing a crime.[86] The survey found that 41% of cigarettes smokers had bought smuggled tobacco. The authors explain that "[a]lthough this may seem high, it should be considered that people within this group might have only bought smuggled tobacco on few occasions because the questionnaire asked 'have you ever bought'."[87] It should also be noted that the survey area was described as "in close proximity to major ports where smuggling and contrabanding from Europe is possible."

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[85] Andrew J. Taylor, Mark Langdon, et al. (2005) "Smuggled tobacco, deprivation and addiction," European Journal of Public Health, Vol. 15, No. 4, 399–403.

[86] Ibid., p. 400.

[87] Ibid., p. 401.

The British government states that in 2003/04, the mid-point estimate of contraband's market share was 18% with a high estimate of 21%,[88] a share below the 25% estimate of contraband's share of the US market. Based on the share of the US market accounted for by contraband, it would be reasonable to conclude that the share of US smokers who have purchased contraband cigarettes may be higher than 41%. The English data, therefore, will be used as a conservative proxy for the US.

Taylor (2005) survey data on the demographic characteristics of who use contraband tobacco will also be applied to the US even though they will likely underestimate US contraband usage since contraband cigarettes are more difficult to buy in the UK. The Taylor (2005) survey over-sampled residents of "deprived" neighborhoods which was then statistically "dealt with by using logistic regression."[89] For purposes of the survey, "deprived" is defined as a score of greater than 25 "on the UK Department of Environment Trade and the Region's index of multiple deprivation in the East Riding and Hull Health Authority area...." We know from Shelley (2007) that social deprivation is strongly associated with the purchase of contraband tobacco in the US.

The UK's Multiple Deprivation Index is a more sophisticated measure of socio-economic status than is a simple poverty rate. Instead, the index, which is measured is specific areas, includes factors in addition to income such as information related to employment, health, education and geographical access to services – all factors which may relate to use of contraband cigarettes.

Other factors found by Taylor (2005) to be significant predictors of contraband purchasers are included whether or not a person was a heavy smoker (20 or more cigarettes per day) and whether they were employed. The authors hypothesized based on Wilshire (2001) that the social networks created through employment would enhance access to contraband tobacco. Based on Shelley (2005), it appears that this situation may not be relevant to the US since there is ubiquitous contraband access in at least one area with high unemployment. In Harlem and possibly other deprived areas, the social network that supports access to contraband tobacco is based in the community rather than in a place of employment.

Using an "ideal type analysis" Taylor (2005) found that the "predicted probability of having bought smuggled tobacco for a male, employed, heavy smoker living in a deprived area is 0.67." The probability for an unemployed make heavy smoker living in a deprived area purchasing contraband tobacco is 0.55. Since social networks supporting contraband access appear to function differently in the US, at least in deprived areas, we will take the mid-point of the data for a rate of 0.61 for a heavy male smoker living in a deprived area irrespective of employment status. Another reason for combining employed and unemployed contraband purchase rates is that there is not US data available on menthol smoking rates by employment status.

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[88] HM Revenue & Customs & UK Border Agency, (2008), p. 4.

[89] Taylor (2005), p. 400.

For a female heavy smoker living in a deprived area, the probability of her having purchased smuggled tobacco (mean of employed and unemployed) is 0.43. For a male heavy smoker in a non-deprived area, the probability would be 0.47 and for a female heavy smoker, the probability would of having purchased contraband tobacco based on the Taylor (2005) results would be 0.3. For non-heavy smokers (20 or fewer cigarettes a day) in deprived areas, the probability of a man having purchased contraband cigarettes would be 0.47 and for a woman 0.3. For non-heavy smokers in non-deprived areas, the probability of a man having purchased smuggled cigarettes at some point in time is 0.33 and for women, 0.19.

Th next task is to apply these probabilities to US demographic data. There is US Census data that provides estimates of the percentages of the public, by gender and ethnicity, who live in poverty. As has been discussed, poverty is a limited proxy for social deprivation. Although economic hardship is an important component of deprivation, it is only one of multiple stresses that contribute to licit and illicit tobacco consumption. Nonetheless, since poverty rate data is what is available from the Census Bureau, it will be used as a proxy for deprivation.

By applying the Taylor (2005) demographic information to US census data, we obtain a demographic picture of contraband tobacco purchases by adult Americans. Since neither the census data nor the NSDUH provides data on the average daily quantity of cigarettes consumed, to apply the Taylor (2005) contraband purchase rates to the US, we will take the mean point between heavy and non-heavy smokers for each "ideal type," *e.g.*, men in deprived areas.

From the census data, we know that 11.2% of white women live in poverty.[90] From the Taylor data we estimate that an adult female smoker living in poverty has a 36.5% probability of having purchased contraband[91] while an adult female smoker not in poverty has a 24.5% probability of having purchased contraband cigarettes at some point in time. Thus, we estimate that of 26% of white female menthol smokers have purchased contraband cigarettes for some portion of their total tobacco use.[92] It should be emphasized that this estimate indicates that about a quarter of the white female smokers have purchased contraband cigarettes at some point in time, <u>not</u> that contraband accounts for a quarter of the cigarettes smoked by white women.

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[90] US Census Department, Current Population Survey, Table POV01: Age and Sex of All People, Family Members and Unrelated Individuals Iterated by Income-to-Poverty Ratio and Race: 2007, Below 100% of Poverty -- White Alone. Note, poverty rate is for calculated all white females aged over 5 years.

[91] The mean between the purchase rate for female heavy smokers in deprived areas (43%) and for female light smokers in deprived areas (30%) is 36.5%

[92] Share of white women in poverty (0.112) multiplied by anytime contraband purchase rate for women in poverty (0.365) added to the product of the share of white women not in poverty (0.888) times the anytime contraband purchase rate for women not in poverty (0.245) equals 0.258, rounded to 26%.

For white men, the census data states that 8.7% of them live in poverty.[93] From the Taylor data we estimate that an adult male smoker living in poverty has a 54% probability of having purchased contraband while an adult male smoker not in poverty has a 40% probability of having purchased contraband cigarettes at some point in time. Thus, we estimate that of white male menthol smokers, 41% have purchased contraband cigarettes at some time for some portion of their total tobacco use.

Applying the same technique to the Hispanic population indicates that 42% of Hispanic men and 27% are estimated to have purchased contraband cigarettes.[94] For African American men and women the contraband purchase rates would be 43% and 27%.[95] The contraband purchase rates by adult Asian men and women would be 41% and 26%.[96]

Two interesting conclusions are apparent from the estimates. The first is that men purchase contraband at higher rates than women. The Taylor (2005) data shows that a man is about 50% more likely to purchase contraband cigarettes than a woman in a similar economic situation. This is at odds with the Callaghan (2010) data although that was for high school students for whom all tobacco purchases were illegal. It would be plausible to assume that, in the event of a menthol ban when all menthol purchases were illegal, that male and female menthol smokers would purchase contraband cigarettes at similar rates. Since, based on the Taylor (2005) data, we are estimating much lower contraband purchase rates for women, our estimate for the total increase in the contraband market from a ban will be quite conservative. The other notable point that emerges from our estimates is that Americans currently have similar contraband purchase rates irrespective of ethnicity.

Although ethnicity is not estimated to be much of a factor in determining the share of Americans who purchase contraband cigarettes, the purchase rates of contraband menthol cigarettes differ quite sharply by ethnicity. An official with the Centers for Disease Control and Prevention presented the TPSAC with data concerning the demographics of menthol smokers based on the NSDUH data.[97]

Figure 12 illustrates contraband menthol cigarette ever-purchased rates by gender and ethnicity. The purchase rates were estimated by multiplying the contraband purchase rate for a person of each gender and ethnicity by the menthol smoking rate for the same category. For example, we have already estimated that 26% of white women who smoke have purchased at last one pack of

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[93] Ibid.

[94] US Census Bureau, Current Population Survey, Table POV01: Below 100% of Poverty -- Below 100% of Poverty -- Hispanic Origin.

[95] US Census Bureau, Current Population Survey, Table POV01: Below 100% of Poverty -- Below 100% of Poverty --Black Alone.

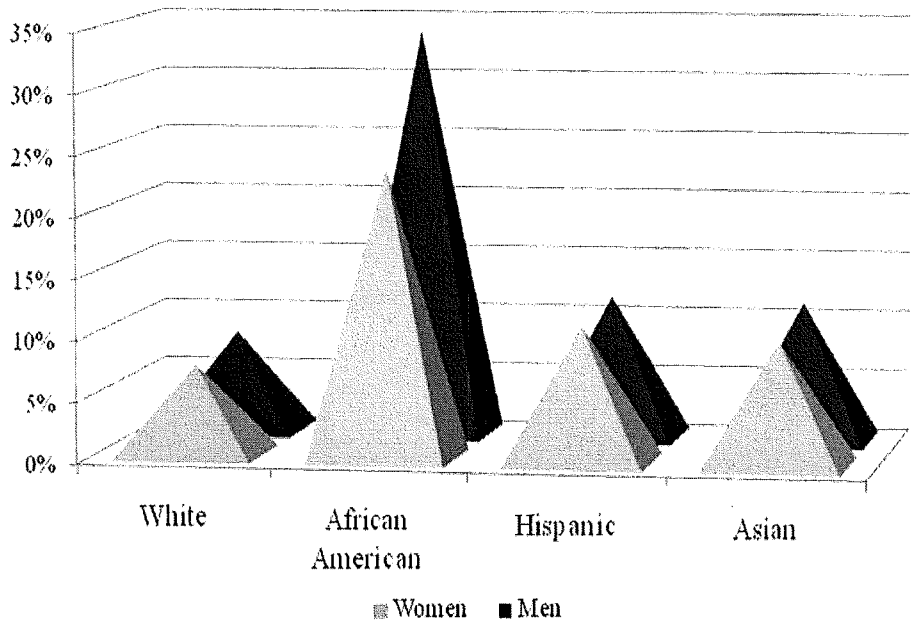
[96] US Census Bureau, Current Population Survey, Table POV01: Below 100% of Poverty -- Below 100% of Poverty -- Asian Alone.

[97] Ralph S. Caraballo, "Menthol and Demographics," CDC, Office on Smoking and Health, March 30, 2010.

contraband cigarettes. According to the NSDUH data, 28.4% of white female past-month smokers over 12 have smoked menthol in the past month (we will use the past month data as a proxy for menthol smoking preference). Therefore, we estimate that 7.4% of white female smokers have purchased contraband menthol cigarettes (0.26*0.284=0.074).

Figure 12

Share of Adult Smokers Who Have Purchased Contraband Menthol Cigarettes by Gender and Ethnicity



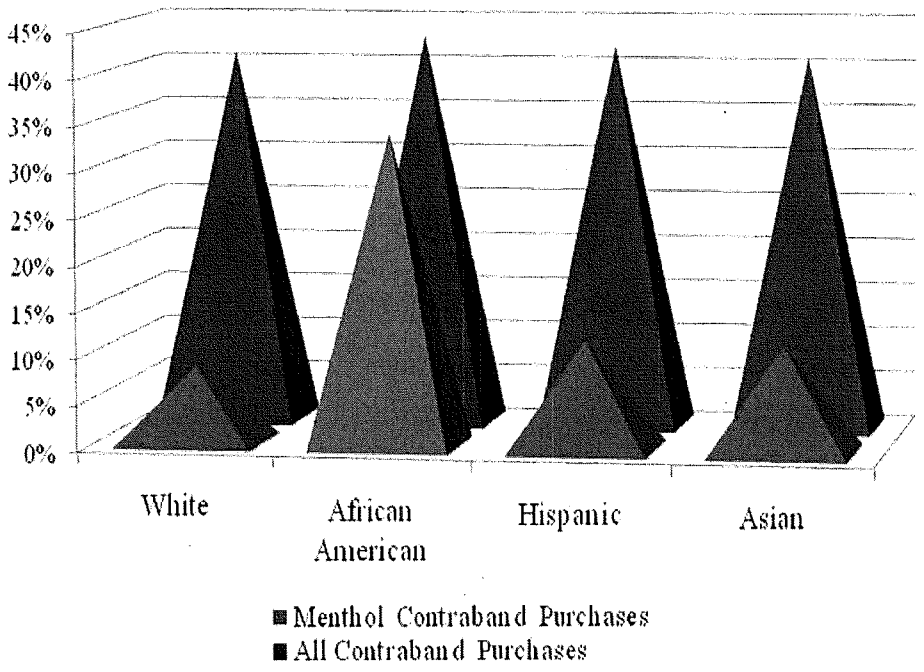
Source: CRE based on Taylor (2005), NSDUH, Census Bureau Current Population Survey

The data shows that even though adult purchase rates of contraband are about the same irrespective of ethnicity and even though, as CDC explained to the TPSAC, whites are a majority of menthol smokers, African Americans are disproportionately at risk in contraband transactions. Hispanic and Asian smokers also have higher menthol contraband purchase rates than whites. The disparity among racial/ethnic groups becomes even more clear when the adult contraband cigarette purchase rates of each group are displayed along with the menthol contraband purchase rates as shown in Figure 13.

Figure 13

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

One conclusion that can be drawn from the chart is that, in event of a menthol ban, street level law enforcement activities would disproportionately affect African Americans even though whites constitute a majority of menthol smokers.

The contraband purchase rates we have discussed so far are for legal age smokers since the survey conducted by Taylor, et al. did not cover underage smokers. There is data however, on contraband purchases by underage smokers in Canada. Callaghan (2010) estimated that contraband cigarettes accounted for about 43% "of all cigarettes smoked among Ontario high school daily smokers." The RCMP Progress report includes an estimate of contraband accounting for 32.7% of the Canadian market. Therefore, in Canada, share of contraband cigarettes consumed by underage smokers is 31.5% greater than for the population as a whole.

Given the 25% contraband share in the US and using the Canadian youth-adult contraband purchase ratio as a proxy for the US, we can estimate that about 33% of all cigarettes smoked by underage youth are contraband. Callaghan (2010) also stated that 84% of high school daily smokers reported having purchased contraband tobacco in the past year. Applying the ratio of high school past year purchases rate to contraband's share of Canadian underage smokers to the lower estimate of contraband's market share in the US results in an estimate that about 64% of underage smokers have purchased at least one contraband cigarette during the past year irrespective of ethnicity.

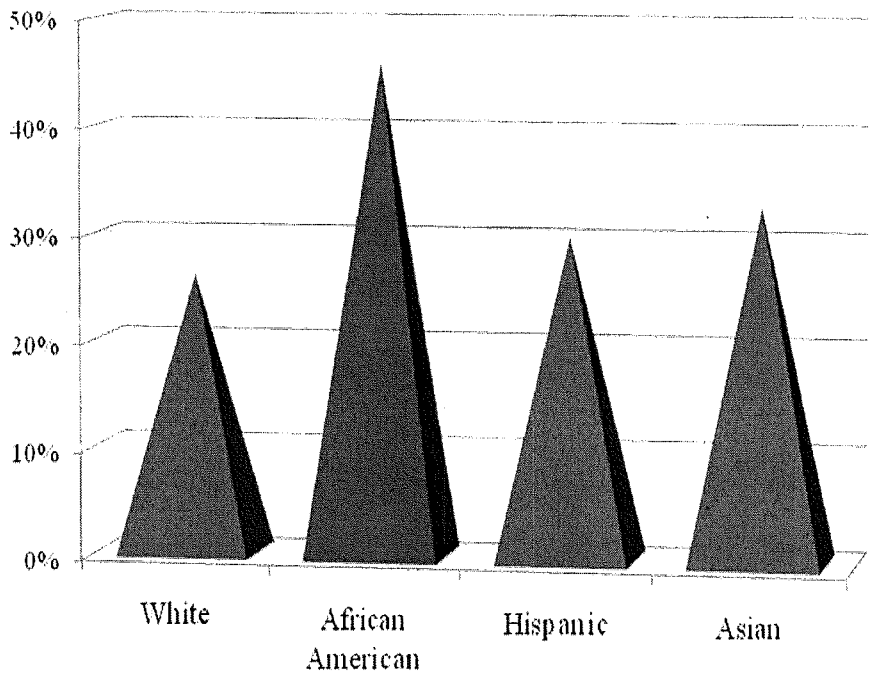
It is not clear whether the gender data in Callaghan (2010) which shows a higher rate of contraband use among women would apply to the US so we will assume that US underage smoker contraband purchase rates are the same for men and women. Another reason for using this gender-neutral assumption is that Caraballo (2010) does not provide menthol preference data for underage smokers by ethnicity and gender. Since there are relatively few underage contraband purchasers compared with adult contraband purchasers, this assumption will not materially skew the statistics.

By applying the NSDUH data reported by Caraballo (2010) to the estimate of the underage US contraband market, we can develop a demographic profile of underage smokers who have purchased contraband menthol cigarettes. Thus, the estimated share of underage Asian smokers who have purchased contraband menthol cigarettes in the last year is 33% (64% underage contraband purchase rate multiplied by 51.5%, the share of underage Asian smokers who smoke menthol reported by Caraballo (2010).

Figure 14 depicts underage purchasers of contraband menthol flavored cigarettes by ethnicity. As is the case with adult smokers, white underage smokers would be least impacted by a menthol ban while underage African American smokes would be the most affected ethnic group.

Figure 14

Share of Underage Smokers Who Have Purchased Contraband Menthol Cigarettes by Ethnicity



Source: CRE based on Callaghan (20010), NSDUH

Estimated Effect of a Menthol Ban on the Contraband Cigarette Market

Estimating the increase in the contraband market that would result from a menthol ban requires making some assumptions regarding how menthol smokers would react to a ban. We have already stipulated the assumption that non-menthol contraband consumption would remain unchanged even though expansion of the contraband market would make relatively inexpensive illicit cigarettes more widely available.

From a practical perspective, there is no reason to assume that a menthol ban would have much long term impact on US consumption of menthol-flavored cigarettes. The evidence clearly demonstrates that there is essentially limitless illicit cigarette manufacturing capacity overseas and domestically. With respect to the likelihood of shipments of foreign-made illicit cigarettes reaching the US, we found that the UK has set a target rate of capturing only 20% of smuggled cigarettes. As was noted, a 2007 *New York Times* article stated noted that two raids in Queens resulted in the seizure of almost

850,000 cartons (170,000,000 sticks) of smuggled cigarettes. Moreover, illicit menthol cigarettes could be manufactured domestically in warehouses, basements, sheds and most anywhere else.

It is also possible to reasonably conclude that a menthol ban could lead to an increase in consumption of menthol flavored cigarettes for three reasons. One, contraband cigarettes sell at a steep discount to legal retail transactions. The $5/pack contraband prices recently reported in Seattle represents a discount of more than 40% off of legal prices. Lower prices mean higher consumption.

Contraband cigarette trafficking has reached the point where it is changing the elasticity of demand for cigarettes. For example, Goolsebee (2010) in an analysis of the impact of internet contraband sales, concludes that "[o]ur estimates imply the growth in Internet penetration in the U.S. has led to an increase in the taxable sales elasticity of over 60 percent. The evidence suggests this increased sensitivity is due to smuggling and not due to any greater sensitivity of cigarette consumption."

A second reason why an increase in the contraband market would increase consumption of menthol (and other) cigarettes is that street level contraband vendors act as advertising. As one of the non-smoking participants 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)[98]

The third reason to expect that an increase in the contraband market would increase cigarette consumption is that the contraband market increases youth access to tobacco.

There are also reasons to project that a menthol ban would reduce cigarette consumption. One, at least some illicit cigarettes are perceived by consumers as being of inferior quality. Two, some cigarette consumers will refuse to engage in illegal transactions. It could be reasonably expected that if more consumers learned about the criminal organizations that are involved in cigarette smuggling, refusal to engage in illicit transactions would increase.

As we stated earlier, our primary assumption is that only smokers who have already made at least one purchase of contraband menthol cigarettes are part of the pool of potential contraband purchasers. Our estimate does not include any increase in demand from lower contraband prices nor any impact of an expanded contraband market on non-menthol contraband sales. Thus, our model assumes:

1. No change in contraband market for non-menthol cigarettes;

2. No increase in the number of menthol contraband purchasers; and

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[98] Shelley (2007), p. 1486.

3. No increase in the average number of menthol cigarettes smoked by contraband purchasers.

Therefore, the only effect of a menthol ban that we are estimating is from menthol contraband purchasers buying all of their menthol cigarettes on the contraband market instead of only a portion of them. The CRE model should be understood in terms of producing a minimal estimate of the impact on the contraband market of a menthol ban, it is not a prediction or expectation that most menthol smokers would give up menthol cigarettes.

The NSDUH data reported in Caraballo (2010) states that 18.1 million menthol smokers are adults (over 94% of all menthol smokers). Of all adult menthol smokers, the survey data indicates that 53.2% are white or 9.6 million. The NSDUH survey also shows that 21% of white men and 28.9% white women smoke menthol which means that menthol is about 38% more popular among white women then white men. Applying this same preference ratio to the number of adult white menthol smokers means that there are about 4.1 million adult white male and about 5.5 million adult white female menthol smokers.

We have previously estimated that about 41% of adult white male smokers and 26% of adult white female smokers have made at least one contraband cigarette purchase. This would indicate that there are currently about 1.4 million adult white female menthol smokers and 1.6 million adult white male menthol smokers have made at least one contraband purchase.

The Caraballo (2010) data shows that 30.3% of adult menthol smokers are African American, or about 5.5 million people, 11.6% of are adult menthol smokers are Hispanic (2.1 million smokers) and 2.2% are Asian (400,00 smokers). An additional 2.8% of menthol smokers (500,000 adults) are part of another category, including multi-ethnic, Native American, and Native Hawaiian/Other Pacific Islander.

Applying the gender-related ethnographic data in Caraballo (2010) indicates that there are about 2.6 million male and 2.9 million female adult African American menthol smokers and 900,000 adult Hispanic male and 1.2 million adult Hispanic female menthol smokers. Since Caraballo (2010) does not include equally detailed gender data for Asian and other ethnicities, we will use the gender data for all ages of smokers, adult and underage, for these two groups. The resulting estimate is 170,000 adult male and 230,000 adult female Asian menthol smokers and about 200,000 mixed ethnicity and other adult male and about 300,000 adult female menthol smokers.

Using the contraband purchase rates already discussed, with the Hispanic rates as a proxy for mixed ethnicity and other menthol smokers, we estimate that for adult menthol smokers, there are currently about 1.1 million African American male and 800,000 African American female contraband purchasers along with 370,000 male and 333,000 female Hispanic, 68,000 male and 60,000 female Asian, and 90,000 male and 80,000 female mixed ethnicity and other contraband purchasers.

With respect to people under 18 years old, Caraballo (2010) states that 1.1 million are menthol smokers. Caraballo (2010) also provides an ethnographic picture of underage menthol smokers (66.7% white, 14.2% African American, 13.8% Hispanic, 1.8% Asian and 3.3% mixed ethnicity/ other). Applying the contraband purchase rates illustrated in Figure 15 results in an estimated 190,000 underage white, 72,000 underage African American, 36,000 underage Hispanic, 7,000 underage Asian and 11,000 underage mixed heritage/other smokers buy contraband menthol cigarettes. Thus, we are conservatively estimating that a little over 300,000 underage smokers currently buy menthol cigarettes on the contraband market.

The next step in determining the impact of a possible menthol ban is to estimate how many menthol cigarettes are currently purchased on the contraband market.

A 2009 report by the Federal Trade Commission (FTC) provides estimates of US cigarette consumption, menthol and non-menthol, based on U.S. Department of Agriculture (USDA) estimates. The FTC report states that the USDA data is "based on an estimate of the number of cigarettes actually consumed." The report also states that USDA includes "sales by smaller manufacturers and importers."[99] There is no indication, however, whether the USDA data reflects the number of cigarettes smuggled into the United States. The report's most recent data is for 2006 so that is what will be used in our analysis.

There is limited data available on how smokers' per-capita cigarette consumption varies by gender and ethnicity. There is data from the California Tobacco Survey (CTS), 1990–2002 indicating that average number of cigarettes smoked per day by the "high" socio-economic status (SES) group in 2002 was 9.5, moderately less than the 12 cigarettes per day the middle SES group and the 11.7 cigarettes per day smoked by the low SES group.[100] Given the limited data, our analysis will make the simplifying assumption that per-capita menthol cigarette consumption is the same irrespective of gender, ethnicity and legal smoking age status. To the extent that persons in lower levels of socio-economic status have higher cigarette consumption, this report will underestimate cigarette consumption in Hispanic and African American communities.

The FTC/USDA data states that US cigarette consumption is 371.0 billion sticks for 2006[101] of which 74.2 billion (20%) were menthol.[102] This estimate will be used as a proxy for current consumption since it is the best data available. It should be noted that, although Caraballo (2010) provides a much higher estimate of menthol use than the FTC (31.6% of adults), this is an estimation of past month use of menthol rather than menthol consumption as a share of a cigarettes smoked.

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[99] Federal Trade Commission, "Cigarettes Report for 2006," Issued: 2009, p. 2.

[100] California Department of Health Services (2005) "Cigarette Consumption".

[101] FTC (2009), Table 1A.

[102] Ibid., Table 7.

Using the estimate that 25% of cigarettes are contraband, meaning that some or all taxes due on them in the jurisdiction in why they were sold were not paid, we estimate that current contraband sales of cigarettes are 92.75 billion. Although this may seem high, it is well within the range estimated by Joossens (2010) who reported that contraband a 13-25% market share in the for 1992-2002 time period. Based on the annual mean of the FTC/USDA estimates for cigarettes sold during that period, Joosens (2010) works out to between 60 - 115 billion contraband cigarettes.

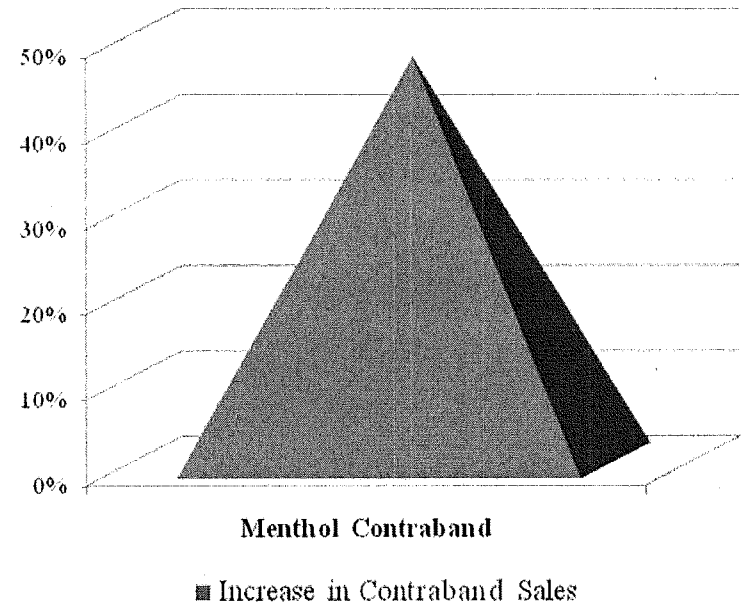
Dividing the Caraballo (2010) estimate of 19.2 million menthol smokers into FTC/USDA's estimate of menthol consumption yields an average estimated daily consumption of 11 cigarettes per smoker, just over a half-pack.

Based on the average daily cigarette consumption (11/day), the number of menthol smokers by gender and ethnicity, and the estimated share of menthol smokers who would purchase contraband menthol cigarettes in event of a ban, we can estimate the impact a ban would have on the contraband market.

Using white menthol smokers as an example, we saw that there would be just over three million white adults (over 1.6 million men and 1.4 million women) who would buy contraband menthol cigarettes in event of a ban as well as almost another half-million underage white smokers. Using our average of 11 menthol cigarettes/day, we estimate that white smokers would purchase just under 14.3 billion contraband menthol cigarettes/year. Applying this methodology to all demographic groups yields an estimate of 26.9 billion contraband menthol cigarettes/year compared with current menthol contraband sales of 18.6 billion, an increase of 45%.

Figure 15

Projected Effect Of A Menthol Ban: An Increase In The Contraband Market



Source: CRE

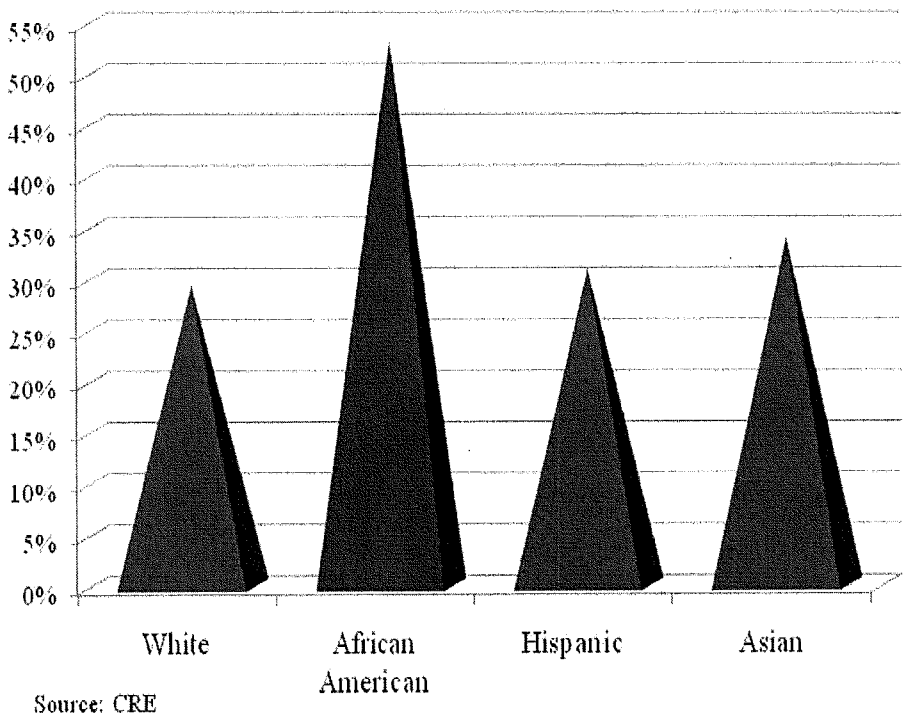
It is important recognize that the calculations used certain unrealistically conservative estimates, most prominent among these not including the effect of the elasticity of demand for cigarettes. Thus, any implied estimation that overall cigarette consumption would decline in event of a menthol ban is mistaken. To the contrary, applying an elasticity of demand to lower price for contraband cigarettes would make clear that one of a menthol ban's impacts would be to increase the number of cigarettes smoked.

Aside from increasing the size of the contraband market, a menthol ban would change the demographics of the contraband market. As was previously explained, current contraband purchase rates are virtually the same for all ethnic groups. This situation would change after a menthol ban. We estimate that, if there were a menthol ban, even though whites would purchase over 70% of all contraband cigarettes, a majority of African American smokers would purchase contraband cigarettes.

The effect that criminalizing a smoking preference strongly associated with African Americans would have on the demographics of the contraband market is illustrated in Figure 16.

Figure 16

Impact of a Menthol Ban: Share of Cigarette Purchases Which Would be Contraband



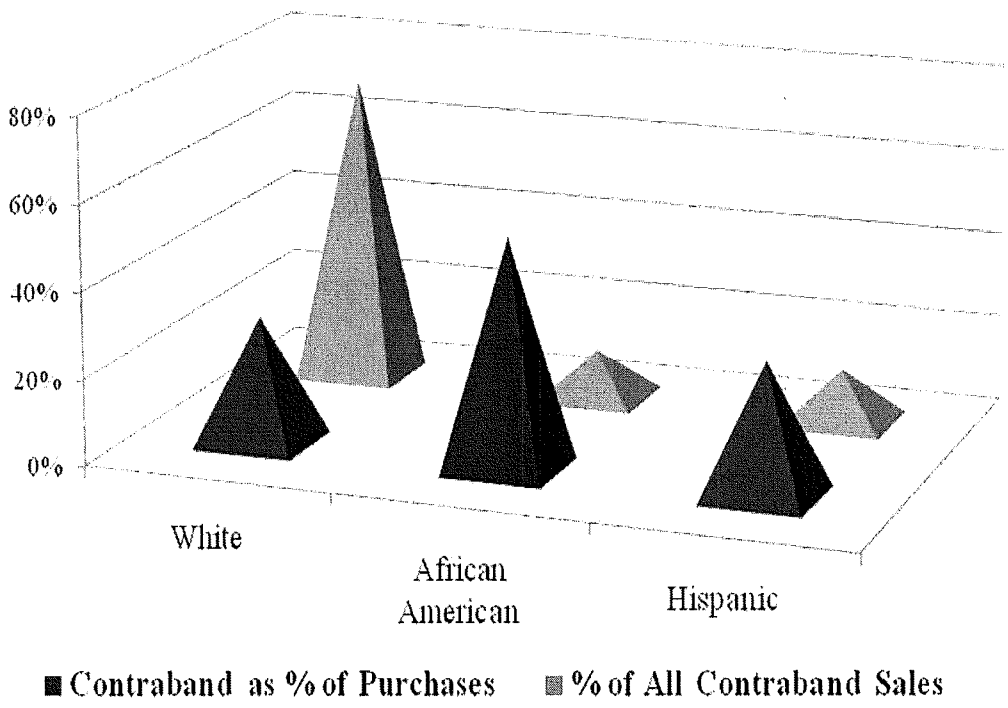
In some regards, the distributional impact of a menthol ban is more relevant that the specific estimate of the increase in the contraband market since it is robust result. Changing the data sets, model and assumptions used would change the point estimate for a ban-induced increase in the contraband market. For example, applying the realistic assumption that at least some current menthol smokers who have not already made purchases on the contraband market would do so if that became the only way to purchase menthol cigarettes would increase the estimated effect of the ban on the contraband market as would assuming that female menthol smokers purchased contraband cigarettes at about the same rate as male menthol smokers. There are also model changes that could lower the estimated impact.

What does not change under any plausible scenario is: 1) a menthol ban would increase the size of the contraband cigarette market; and 2) the impact of the ban would disproportionately impact minority communities, particular those with a strong African American component. Put simply, under any plausible scenario, a menthol ban would disproportionately increase the number of African American smokers who engage in illegal transactions.

The disproportional effect a menthol ban would have on the demographics of the contraband market is illustrated in Figure 17, which uses the same data in Figure 16 showing the percentage of contraband purchase by each demographic group and also overlaying the share of total contraband cigarette sales that would be accounted for by the same groups.

Figure 17

A Menthol Ban Would Disproportionately Impact African American Smokers



Source: CRE

The Act states that the TPSAC and the FDA have to consider whether a menthol ban would create "a significant demand for contraband" cigarettes. The next section of this paper will discuss the significance of the increase in demand for contraband cigarettes within the context of the health of underage smokers, adult smokers and non-smokers. Increased demand for contraband cigarettes resulting from a menthol ban also needs to be understood in terms of its significance to the social fabric of African American communities. A regulation with an ethnically-disparate punitive impact is not a substitute for redressing the socio-economic inequities that lead to elevated smoking rates among minorities. Moreover, it would be counterproductive, increasing the stresses and inequalities which contribute to elevated smoking rates.

In Review

- The primary causes of demand for contraband cigarettes are: 1) underage smokers cannot buy tobacco legally; and 2) contraband cigarettes cost less than legally sold products. The causes of the lower prices includes tax evasion and counterfeit and unbranded cigarettes which cost less than name brand products.

- The price discount for contraband cigarettes is reported as being between 35-45% of legal prices.

- Street level contraband cigarette vendors are welcomed and appreciated in underprivileged communities. Members of one inner city community opined that tax increases would lead to increased illegal sales and increased imprisonment of Black men.

- Street level contraband vendors act as advertising mechanism which promotes increased smoking.

- Tax increases are viewed in disadvantaged communities as a punitive measure that hurts smokers and their families.

- CRE estimates that contraband cigarettes will account for 25% of the US market in 2011.

- The share of Americans who purchase contraband cigarettes does not vary much by ethnicity.

- CRE conservatively estimates that if a menthol ban were imposed, the contraband market for menthol cigarettes would increase by about 45%.

- One sociological impact of a menthol ban would be to change the demographics of the contraband market. CRE estimates that, in event of a menthol ban, a majority of the cigarettes purchased by African American smokers would be contraband although whites would purchase over 70% of all contraband cigarettes.

IV. The Impact of Growth in the Contraband Cigarette Market

The Act requires that the TPSAC and FDA consider the effects that growth in the contraband cigarette market caused by a menthol ban would have on underage smokers, adult smokers and non-smokers. Some of the research findings, such as the higher levels of metals in counterfeit cigarettes, would affect the health of both adolescent and adult smokers. For the purposes of this study, issues that would affect the health of smokers irrespective of age will be considered in the adult health smoking section while the underage contraband impact analysis will concern only those issues that would affect youth experimentation with tobacco, initiation of smoking and/or otherwise particularly impact the health of underage smokers.

The possibility that a menthol ban could affect the health of non-smokers seems counterintuitive. The press reports, however, that the murder of two British soldiers, Sappers Patrick Azimkar and Mark Quinsey, was financed by Florida-based cigarette smuggling. ATF has repeatedly warned that the terrorist organizations and other violent criminal gangs trade in contraband cigarettes to finance their activities. Accordingly, the section of this paper evaluating the impact of a menthol ban on non-smokers will focus on the organizations involved in the contraband cigarette trade. As is the case with the other analyses of the expected impact of a menthol ban, it will further demonstrate that buying and selling contraband cigarettes is not a victimless crime.

The Impact A Menthol Ban Would Have On Underage Smokers

The TPSAC has developed a draft model for use in evaluating menthol cigarettes.[103] The model includes a box labeled "Youth Adolescents" with an arrow leading to a box labeled "Experiment" which has an arrow to a box labeled "Initiate." Access to tobacco is a prerequisite before an adolescent can experiment with cigarettes. In other words, you can't smoke 'em if you don't have 'em. Preventing underage purchase of tobacco is the goal of Break the Chain, the "FDA's new campaign to educate retailers and raise awareness about tobacco product regulations designed to protect kids from the dangers of tobacco use and its negative health impacts."[104]

The FDA recognizes that impeding youth access to tobacco is an important step in helping prevent underage smoking. Unfortunately, the contraband market undermines efforts focused on preventing unlawful tobacco sales to minors.

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[103] FDA/TPSAC, "Menthol: From Experimentation to Disease Risk," November 18, 2010, found at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM234653.pdf

[104] http://www.fda.gov/TobaccoProducts/ResourcesforYou/BreakTheChain/default.htm.

Hughes (2010) analyzed "the risk factors for smoking both legally supplied and fake, foreign and single cigarettes" by schoolchildren in North West England.[105] As was already noted, more than a quarter of the students surveyed in the study who smoke had purchased "fake" cigarettes. The study also found that the counterfeit and illegally imported cigarettes were more commonly purchased by students who were heavier smokers, explaining that "a much higher percentage of the heaviest smokers reported buying foreign (80%), fake (49%) or single (69%) cigarettes compared with other smokers...."[106] Furthermore, students who began "smoking before the age of 13" had increased "odds of being a heavier regular smoker and of accessing fake/foreign or single cigarettes." Thus, the contraband market is a primary tobacco source for the youngest smokers and for the heaviest underage smokers.

The study also expresses concern regarding the increased health concerns associated with counterfeit cigarettes for underage smokers. Hughes (2010) states, "a high percentage of smokers had bought fake, foreign or single cigarettes, with heavier smokers most at risk of use. This gives cause for concern; such products are more affordable than commercial cigarettes for young people on restricted incomes, and fake cigarettes are known to contain higher levels of tar, nicotine and carbon monoxide, as well as high toxic metal concentrations that could be damaging to health."[107] Put simply, the contraband market creates a double whammy for underage smokers, serving as a major tobacco source, particularly for the youngest and the heaviest smokers, while at the same time providing them cigarettes that are even more dangerous than licit product.

Hughes et al, repeat their warning that, in addition to other illicit tobacco control measures, "schools and parental interventions should educate about the illegal nature and health hazards of fake and foreign cigarettes obtained through social sources."

The study concludes that "[s]trategies that restrict commercial access to cigarettes among adolescents may increase their reliance on social methods of access, and use of fake, foreign and single cigarettes." Another way of looking at the same phenomena would be to say that social access to cigarettes, *i.e.* cigarettes not purchased though legal retail channels, reduces the effectiveness of measures to prevent youth access to cigarettes. This interpretation regarding the role non-retail access to tobacco by minors is consistent with the finding of researchers at the Roswell Park Cancer Institute who concluded that "[a]chieving a high rate of retailer compliance with a minors' access law appears to have caused youths to rely more on noncommercial sources of cigarettes...."[108]

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[105] Hughes (2010).

[106] Ibid.

[107] Ibid. [Notes omitted.]

[108] K. Michael Cummings, Andrew Hyland, et. al., (2003) "Is the prevalence of youth smoking affected by efforts to increase retailer compliance with a minors' access law?" Nicotine & Tobacco Research, 5(4), Abstract.

The conclusion we can draw from these studies, and the other data on youth access to contraband cigarettes previously discussed, is that the contraband market frustrates efforts to reduce youth smoking. Thus, the current contraband market contributes to more adolescents smoking more cigarettes than they would in absence of the market. The question then, is whether the expanded contraband resulting from a menthol ban would lead to a "significant" increase in youth smoking.

There is insufficient data to develop a quantitative estimate of the extent to which increased youth smoking (or decreased reduction in youth smoking) would result from expansion of the illicit tobacco market. Moreover, CRE's minimalist estimate of the increase in the contraband trade assumes that there would be no new contraband purchasers. One of the impacts of a larger contraband market however, would be not only to expand youth access to tobacco but also to increase adolescents' perception of the availability of tobacco.

A study of students in "two relatively deprived Scottish schools with different smoking rates " found that "pupils in the 'high' smoking school perceived greater access to both commercial and social sources, and had access to an active 'peer market."[109]

In Turner (2004), the students at the high smoking rate school, "perceived buying single cigarettes or packets from a shop/van as easier than" students at the low smoking rate school.[110] Smokers and non-smoking students at the high smoking rate school "made reference to a local ice-cream van that readily sold pupils both packets of cigarettes and singles. ... The fact that both smokers and non-smokers talked about the van suggested it was a well-established source. As it was described as being around everyday and working near to the school, it also seemed very accessible to pupils."[111]

By contrast, students at the relatively low smoking rate school mentioned that "vans had been shut down for selling 'foreign' cigarettes." These students "talked more generally of 'vans in the area' and gave no suggestion that these were regular providers." Thus, the study indicates that an expansion of the contraband market which results in adolescents' perceiving there to be greater illicit access to cigarettes could well lead to increased adolescent smoking.

The study also discussed student-to-student sales and found that in the higher smoking rate school "it was evident that selling and buying occurred not only between friends but also strangers. ... it was clear that some pupils sold cigarettes to enhance their financial position...." Thus, the external contraband market outside the school supported an additional contraband market within the school. As the authors explain, "it seems that the relationship between cigarette access and adolescent

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[109] Katrina M Turner, Jackie Gordon, et al., (2004) "Cigarette access and pupil smoking rates: a circular relationship?" Health Promotion International, Vol. 19. No. 4, p. 428.

[110] Ibid., p. 430.

[111] Ibid., p. 432.

smoking is circular, with access affecting smoking rates and levels of smoking influencing access."[112]

The hypothesized circular relation between youth access and adolescent smoking should also be viewed in light of the findings of Shelley (2007) regarding the advertising effect from contraband vendors openly selling their products. Moreover, the issue of the financial enhancement of underage cigarette vendors raised in Turner (2004) is particularly relevant given the Shelley, et al discussion of the visible financial rewards ("cars...vans and jeeps") from selling contraband cigarettes. Thus, we can posit an additional possible circular relation, with illicit cigarette sales affecting participation in the vending side of the contraband market and an increased number of vendors affecting cigarette sales.

Based on the information we have reviewed, an increase in the contraband market resulting from a menthol ban would likely lead to expansion of contraband sub-markets within schools as well as general perception that there is increased availability of cigarettes to adolescents. We therefore conclude that the expansion of the contraband market from a menthol ban would significantly harm the health of underage smokers by increasing their supply of cigarettes.

So far, we have primarily considered the Experimentation box in the TPSAC model although the increased youth access would also, of course, have an impact on Initiation. Another issue that needs to be considered is one specific to Initiation. Multiple sources, including the US and UK governments, have reported that counterfeit cigarettes tend to be higher in nicotine on average than legitimate products. The British government, citing data from the US Agency for Toxic Substances and Disease Registry, estimated that counterfeit cigarettes on average have 80% more nicotine than legitimate products. Other sources provide less dramatically elevated estimates of nicotine levels in counterfeit cigarettes.

Since nicotine is addictive and as Hughes (2010) discussed, a correlation exists between underage smoking and smoking of counterfeit cigarettes, the contraband market has the potential to increase the number of underage smokers who experiment with tobacco, become addicted and move from Experimentation to Initiation as regular smokers.

The indication from the literature is that the contraband market is not only supplying underage smokers with cigarettes but also supplying them, at least some portion of the time, with more addictive cigarettes. An expansion of the contraband market would, therefore, likely result in more adolescents experimenting with cigarettes and more of the underage smokers getting hooked – the most harmful effect on the health of underage smokers resulting from a menthol ban.

In addition to nicotine, lead deserves particular attention as a smoke constituent of particular concern to the health of underage smokers. Since underage smokers disproportionately smoke illicitly-made

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[112] Ibid., p. 435.

cigarettes and counterfeit cigarettes contain higher levels of lead than legally-made products, a menthol ban would increase the lead exposure of underage smokers. CDC has explained that "[l]ead poisoning can affect nearly every system in the body. Because lead poisoning often occurs with no obvious symptoms, it frequently goes unrecognized." FDA recognizes the particular dangers of lead to children and provides a non-voting federal representative to the CDC's Advisory Committee on Childhood Lead Poisoning Prevention (ACCLPP)[113]

Since a menthol ban would inadvertently increase the children's exposure to lead, it would undermine efforts by FDA and other agencies to reduce children's exposure to lead.

The Impact A Menthol Ban Would Have On Adult Smokers

This paper has reviewed literature documenting higher levels of toxic metals, including cadmium, lead and arsenic, in counterfeit cigarettes compared with legitimate products. We have also seen multiple authorities state that counterfeit cigarettes may contain higher levels of nicotine, "tar" and carbon monoxide and also are often contaminated with a wide range of chemical and biological substances. Moreover, illicit cigarettes produced with tobacco grown in a developed country (Australia) resulted in health consequences beyond those of legal tobacco. Thus, there is a strong indication that contraband tobacco products have health consequences greater than those from legally purchased cigarettes.

Stephens (2005) voiced concerns that counterfeit cigarettes were even more hazardous than the authentic products they imitate. The article stated that a "review of the health effects of heavy metal transfer from tobacco via smoke to the lungs indicates that habitual smokers of counterfeits may be risking additional harm from high levels of cadmium and possibly other metals."[114]

The study also discussed the sociological implications of the high metals content of counterfeit cigarettes stating that the "main purchasers of counterfeit cigarettes are dominantly those on low incomes, either young people who then become addicted to smoking or the socially disadvantaged for whom so many other factors impact negatively on their state of health that the addition of another factor is potentially very serious. The extent of the U.K. market share now claimed by counterfeits means that an issue once considered marginal is rapidly becoming a major problem. The health risks described above as well as social implications means that early awareness of these issues is important if remedial action is to have significant impact."[115]

The social implications of counterfeit cigarettes highlighted by Stephens (2005) are directly relevant for understanding the health impact of a menthol ban. Since African Americans are more likely than

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[113] CDC, ACCLPP Charter, see http://www.cdc.gov/nceh/lead/ACCLPP/charter.htm.

[114] Stephens (2005), Abstract.

[115] Ibid., p. 486. [Emphasis added]

other ethnic groups to smoke menthol cigarettes, they would bear the brunt of the additional adverse health impacts from smoking more counterfeit cigarettes.

Since all menthol cigarettes would be illegal in event of a ban and since counterfeit cigarettes cost less to source than legitimate products, it is probable that a substantial portion of menthol cigarettes available would be counterfeit. In the alternative, available post-ban menthol cigarettes could include unbranded/unmarked cigarettes from illicit domestic production comparable to Australian chop-chop. The result from smoking either counterfeit or otherwise illicit menthol cigarettes would be similar, additional health hazards that would disproportionately impact African American and lower income smokers.

The additional harm to human health from contraband tobacco is not merely speculative. An article in Nicotine & Tobacco Research found that smokers of illicit tobacco in Australia "report significantly worse health than smokers of licit tobacco."[116]

Aitken (2009) found that "relative to smokers of licit tobacco, current users of illicit tobacco had significantly greater odds of beginning smoking at younger than legal age, 60% greater odds of reporting below-average social functioning on the SF-8 [a standardized health survey], and nearly twice the odds of reporting a measurable disability."[117] Aitken (2009) concludes that smokers of "illicit tobacco report significantly worse mental and physical health than smokers of licit tobacco."[118]

The authors state that although they could not attribute causality between the variables due to the design of they survey, "the lack of influence of socioeconomic variables such as income, education level, and employment status suggests that illicit tobacco use is not simply a marker for lower socioeconomic status and its well-established association with relatively poor health."[119]

The study explains that the "public health message that emerges from our data is that people who smoke or have smoked illicit tobacco report significantly worse health than smokers of licit tobacco (who, of course, already have worse health than nonsmokers)."[120]

The study contradicted the views of some smokers who "consider illicit tobacco to be relatively unadulterated, more 'natural' and therefore less damaging to health than licit tobacco...."[121] Thus,

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[116] Campbell K. Aitken, Tim R. L. Fry, et al. (2009) "Smokers of illicit tobacco report significantly worse health than other smokers," Nicotine & Tobacco Research, Vol. 11, No. 8 (August 2009). p. 996.

[117] Aitken (2009), p. 998.

[118] Ibid., p. 1000.

[119] Ibid., pp. 998-999.

[120] Ibid., p. 999. [Note omitted]

[121] Ibid. 998.

there is evidence that illicitly manufactured cigarettes are more hazardous than legal products irrespective of whether they were smuggled from China or made with Australian grown tobacco.

In that illicit cigarettes are even more harmful to smokers' health than legally manufactured products, CRE concludes that an expansion of the contraband market would significantly harm the health of adult smokers. Since lower income smokers are the primary purchasers of contraband, we conclude that expanding the supply of contraband cigarettes would have a disproportionately severe health impact on already disadvantaged communities.

The Impact A Menthol Ban Would Have On Non-Smokers

A newspaper article detailed how cigarettes smuggled through Florida financed the murder of two British soldiers by an IRA splinter group called the Real IRA.[122] Cigarette smuggling is a major revenue source for numerous violent criminal organizations in the US and many other countries.

The relation between cigarette traffickers and ideologically motivated violent organizations can be understood in terms of the intersection of their operating methods. Shelley and Picarelli (2002) explain that "transnational criminal organizations and terrorist groups often adopt similar methods...."[123] The authors further explain that "[a]s terrorists develop a more diffuse, insulated network structure, the more that individual cells are left to their own devices to raise funds for their activities. As such, there is an increasing turn to organized crime activities to provide for these cells. More importantly, however, is a continuing trend in which both organizations cooperate in order to earn ill-gotten gains from two of the larger scale activities – drugs and trafficking in persons."

Shelley and Picarelli (2002) note that both terrorists and non-ideological criminal organizations traffic in cigarettes as part of their money making activities. For example, they cite "the curious case of Middle East terrorists operating in North Carolina to foment a cigarette smuggling operation that support their global activities."[124] In a subsequent paper, Shelley and Picarelli warn that "resources diverted from the fight against transnational organized crime in the post September 11th era are giving criminals a greater chance to operate and even provide services to terrorists."[125]

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[122] Tim Elfrink, "South Florida Cigarette Smuggling Funds Terrorism," Broward-Palm Beach New Times, July 2, 2009.

[123] Louise I. Shelley and John T. Picarelli, (2002) "Methods Not Motives: Implications of the Convergence of International Organized Crime and Terrorism," Police Practice and Research: An International Journal, 2002, Vol.3, No.4.

[124] Ibid.

[125] Louise I. Shelley, John T. Picarelli, et al. (2005) "Methods and Motives: Exploring Links between Transnational Organized Crime & International Terrorism," Trends in Organized Crime vol. 9, no.2 Winter 2005.

The commonality between organizations which engage which engage in both cigarette trafficking and human trafficking was also noted in a thesis at the Naval Postgraduate School written by an official with U.S. Customs and Border Protection. The author explained that the terrorist group involved in the cigarette smuggling operation cited by Shelley and Picarelli (2002) "helped secure three fraudulent visas and foster three sham marriages."[126]

Lanzante (2009) cites other instances of overseas terrorist groups being involved in US based contraband cigarette trafficking including one case in which two persons "were involved in cigarette smuggling that avoided over $20 million dollars in taxes of which part was sent to Hezbollah. It is alleged that these two had ties with the higher level Hezbollah officials and charged a resistance tax in addition to the black market price."[127]

The link between the cigarette smuggling and drug smuggling and human trafficking was also discussed by the FBI in testimony before the Senate Homeland Security Committee. The Bureau testified that in "July 2008, for example, the FBI and DEA supported Canadian law enforcement in the arrest of eight people, including a customs agent, suspected of smuggling cocaine and marijuana, contraband cigarettes, and illegal immigrants over the Quebec-New York border. This underground network reportedly ferried hundreds of kilograms of cocaine from Colombia into Canada via the Saint-Bernard-de-Lacolle border crossing. This is one of many investigations along our northern border."[128]

Multiple government agencies have discussed the nexus between cigarette smuggling and terrorist fund raising.

A 2003 GAO report explained that "[t]errorists have earned assets through the highly profitable illicit trade in cigarettes. According to officials from the ATF, Hizballah, HAMAS, and al Qaeda have earned assets through trafficking in contraband cigarettes or counterfeit cigarette tax stamps. ATF officials told us that as of August 20, 2003, they were investigating at least six such cases with ties to terrorist groups. ATF officials also believe that there are several other investigations under way that may produce evidence linking them to terrorist groups."[129]

In a 2004 statement by US Immigration and Customs Enforcement (ICE) before the House Ways and Means Committee, the agency testified that "[t]obacco smuggling also provides a lucrative source

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[126] Joseph A. Lanzante, "The Relationship between Criminal and Terrorist Organizations and Human Smuggling," Thesis, Naval Postgraduate School, November 2009, p. 6.

[127] Ibid., p. 63.

[128] Kevin L. Perkins, Statement Before the Senate Homeland Security and Governmental Affairs Ad Hoc Subcommittee on State, Local, and Private Sector Preparedness and Integration, March 11, 2010.

[129] United States General Accounting Office, Report to Congressional Requesters, Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists' Use of Alternative Financing Mechanisms," November 2003, pp. 11-12.

of funding for terrorists and other criminal organizations. In January of this year, ICE dismantled the largest nationwide tobacco smuggling organization to date and arrested 15 defendants. The 92-count indictment charged the defendants with tobacco smuggling and money laundering, among other offenses. The organization was responsible for the movement of more than 10,000 cases of counterfeit and contraband cigarettes...."[130]

ATF's Congressional Budget Submission for FY 2010 stated that "[o]rganized crime groups and individuals with ties to terrorist organizations increasingly engage in illegal trafficking of tobacco products. The proliferation of large-volume trafficking across international borders and interstate commerce to avoid taxes provides increased funding to terrorist organizations and traditional criminal enterprises."[131]

The Justice Department document further explained that "[c]urrent investigations have identified instances of terrorist groups forming alliances with tobacco traffickers to generate monies used to support their organizations and activities. Diversion activities often generate tremendous cash profits that are laundered and used to further other unlawful schemes, such as narcotics and firearms trafficking. As an example, ATF conducted two contraband cigarette trafficking cases in which individuals were convicted of Material Support to a Terrorist Organization. The individuals in the two cases that were convicted of the "Material Support" charge were members of Hezbollah."[132]

It is important to recognize that not all the violence associated with profits from cigarette trafficking would be confined to overseas or would affect only the targets selected by ideological groups. Competition over lucrative street sales could be expected to bring a new source of violence to the communities where contraband cigarettes are sold.

In that: 1) profits from cigarette trafficking provide financial resources to groups designated by the US government as terrorist organizations; 2) profits from cigarette smuggling have been used to fund narcotics and arms trafficking and other criminal activities; and 3) irrespective of whether or not a contraband trafficking organization has ideological objectives, competition in illicit cigarette distribution and sales will likely lead to violence in the neighborhoods where the cigarettes are sold, we conclude than the expanded cigarette trafficking opportunities resulting from a menthol ban would endanger the health of people in the United States irrespective of whether or not they smoke.

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[130] Michael J. Garcia, Assistant Secretary, Immigration and Customs Enforcement, Department of Homeland Security Before House Ways and Means Committee, Subcommittee on Trade, "ICE Authorization for Fiscal Year 2005 and 2006" June 17, 2004

[131] United States Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, "Congressional Budget Submission Fiscal Year 2010," p. 23.

[132] Ibid. [Emphasis added]

In Review

- Illegally manufactured cigarettes are a greater health hazard than legal products. Thus, an increase in the size of the contraband market would harm public health.

Underage Smokers

- The contraband market is a key tobacco supply source for underage smokers, increasing the contraband market would increase youth smoking.

- An expansion of the contraband market would increase adolescent participation in the buying and selling of cigarettes.

- Counterfeit cigarettes often contain higher levels of nicotine than legal products. Since underage smokers disproportionately purchase more addictive counterfeit cigarettes, an increase in their supply would result in more adolescents who experiment with tobacco becoming regular smokers.

- Counterfeit cigarettes contain higher levels of lead than legally-made products. An increase in illicit cigarettes production from a menthol ban would increase the lead exposure of underage smokers.

Adult Smokers

- Counterfeit cigarettes contain higher levels of toxic substances, such as cadmium, than legal products.

- Smokers of illicit unbranded cigarettes in Australia that were made with domestically grown tobacco report more physical and mental health problems than smokers of legal products.

- In event of a menthol ban, African American smokers would disproportionately purchase contraband cigarettes that have significantly worse health impacts than licit products.

Non-Smokers

- Federal agencies including the FBI, ATF, ICE, GAO, and the State Department have reported on the cigarette smuggling by terrorist groups.

- Cigarette smuggling trafficking profits fund drug trafficking, arms running and other criminal activity.

- Competition in the distribution and sale of contraband cigarettes would lead to violence in the neighborhoods which the illicit menthol cigarettes are sold.

V. Conclusions

- A menthol ban would harm public health. Menthol smokers would consume an increased quantity of illicitly-manufactured cigarettes, many of which contain much higher levels of heavy metals and other contaminants than legally made products.

- There is abundant of production capacity, overseas and domestically, to meet the demand for illicit menthol cigarettes in event of a ban.

- If a ban on menthol-flavored cigarettes were enacted, a minimalist projection is that the menthol contraband market would increase by about 45%.

- If a menthol ban were enacted, the increased number of illicitly manufactured cigarettes sold would result in:

  - **Underage Smokers**. Increased tobacco consumption by adolescents, undermining youth tobacco control programs.

  - **Adult Smokers**. Adult menthol smokers consuming more illicitly-made cigarettes which would cause additional health harm to the populations that smoke menthol cigarettes.

  - **Non-Smokers**. Violent international organizations gaining additional financial resources, some of the increased violence would occur in the communities where illicit menthol cigarettes would be sold.

VI. Recommendation

- Neither the TPSAC nor the FDA should support a ban on menthol-flavored cigarettes as doing so would disproportionately harm the very communities they would be trying to help, particularly underage and African American smokers.

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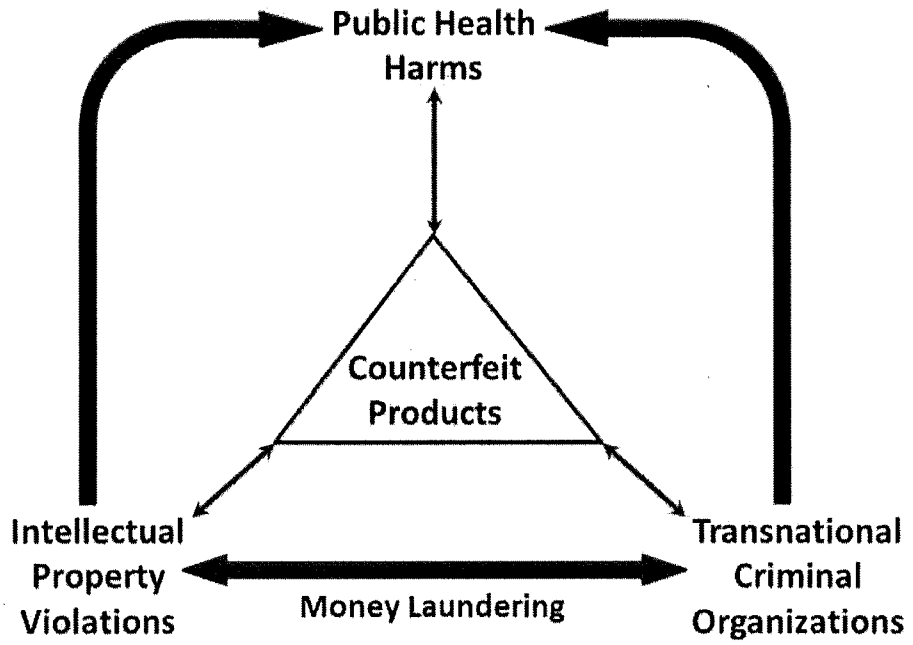
APPENDIX 4

COUNTERFEIT PRODUCTS, GENUINE HARM:

HOW INTELLECTUAL PROPERTY THEFT FUELS ORGANIZED CRIME WHILE UNDERMINING AMERICAN COMMUNITIES



January 2013

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COUNTERFEIT PRODUCTS, GENUINE HARM:
HOW INTELLECTUAL PROPERTY THEFT FUELS ORGANIZED CRIME WHILE UNDERMINING AMERICAN COMMUNITIES

Executive Summary

On July 24, 2011, President Obama signed Executive Order 13581 blocking the control of property by transnational crime organizations. The Order was part of the National Security Council's Strategy to Combat Transnational Organized Crime.[1] In the Order, the President made a formal determination

> *that significant transnational criminal organizations constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.*

Most of the organizations named in the Executive Order as examples of transnational crime organizations, and many similar criminal organizations, profit from trafficking in counterfeit items ranging from industrial parts to consumer products.

Trafficking in counterfeit products harms the public both directly, through the sale of dangerous parts and products, and indirectly by providing financing support to violent organizations and by undermining legitimate economic activity. Moreover, the social harms from the trafficking in counterfeit, pirated and otherwise contraband (untaxed) consumer goods falls disproportionately on predominately African American communities which are targeted by the traffickers as venues for their crimes.

Effectively countering the counterfeiters will require, as described in the President's Strategy, building "international consensus, multilateral cooperation, and public-private partnerships to defeat transnational organized crime."[2]

In terms of specific policies and actions, effectively countering the counterfeiters will require:

1. Consumer refusal to buy counterfeit/contraband/pirated products;
2. Enhanced law enforcement actions by all levels of government against counterfeiters; and
3. Federal regulatory policies that limit the opportunities for counterfeiting.

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[1] See, National Security Council, "Strategy to Combat Transnational Organized Crime," *available at* http://www.whitehouse.gov/administration/eop/nsc/transnational-crime.

[2] See, National Security Council, "Executive Summary – Strategy to Combat Transnational Organized Crime," available at http://www.whitehouse.gov/administration/eop/nsc/transnational-crime/summary.

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COUNTERFEIT PRODUCTS, GENUINE HARM:
HOW INTELLECTUAL PROPERTY THEFT FUELS ORGANIZED CRIME WHILE UNDERMINING AMERICAN COMMUNITIES

In the City of Los Angeles, investigations by law enforcement have substantiated the report that individuals involved in counterfeiting activities and the illegal sale of cigarettes are significant fund-raisers for known terrorist groups such as Hezbollah and Hamas.

– William F. Bratton, Chief of Police, Los Angeles, CA, May 2007.

Terrorists and insurgents increasingly will turn to crime to generate funding and will acquire logistical support from criminals, in part because of successes by U.S. agencies and partner nations in attacking other sources of their funding.

– James R. Clapper, Director of National Intelligence, January 31, 2012.

Fake cigarettes made from human excrement, asbestos, mould and dead flies are being smoked regularly in Britain, undercover detectives have found.

– The Daily Mail, 9 September 2012.

Counterfeiting – A Multidimensional Crime

Counterfeiting is a multi-dimensional crime. The production and sale of counterfeit goods triggers a series of legal violations with each criminal resonance contributing one or more social harms to the overall toll from the original crime. For example, a counterfeit product:

1. Is an intellectual property violation which causes revenue loss from the lawful property owner;

2. Is not made to a genuine product's quality standards, thus posing threats to public health and safety;

3. Is often sold without all legally required taxes resulting in reduced government revenues leading to reduced services and/or higher taxes on law abiding citizens;

4. Produces profits from the illegal sales which are "laundered," a process that the Treasury Department's Financial Crimes Enforcement Network (FinCEN) explains "has devastating social consequences;"[3] and

5. The laundered profits frequently fuel transnational organized crime.[4]

With respect to the economic harm from counterfeit/pirated[5] products, the US government estimates that "[c]ounterfeiting and piracy cost the U.S. economy between $200 billion and $250 billion per year, are responsible for the loss of 750,000 American jobs, and pose a threat to health and safety."[6] By 2015, the global trade in counterfeit and pirated products is grow to $1.5 trillion.[7]

As illustrated in Figure 1 on the next page, counterfeit products harm public health both directly and through the activities of the organized crime groups which traffic in counterfeit products, often as part of a larger financing strategy which is underpinned by money laundering.

Counterfeit products endanger public health when they are placed into service in a safety-related capacity, such a aircraft fasteners or electronics parts in an emergency communications system, or when they are consumed as in the case of counterfeit medicines and certain other consumer products such as alcohol[8] and tobacco.[9]

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[3] Treasury Department/FinCEN, http://www.fincen.gov/about_fincen/wwd/faqs.html#money.

[4] National Security Council, "Strategy to Combat Transnational Organized Crime: Definition," http://www.whitehouse.gov/administration/eop/nsc/transnational-crime/definition.

[5] Pirated goods refers to products in electronic format (software, movies, music, etc.) which are illegally copied.

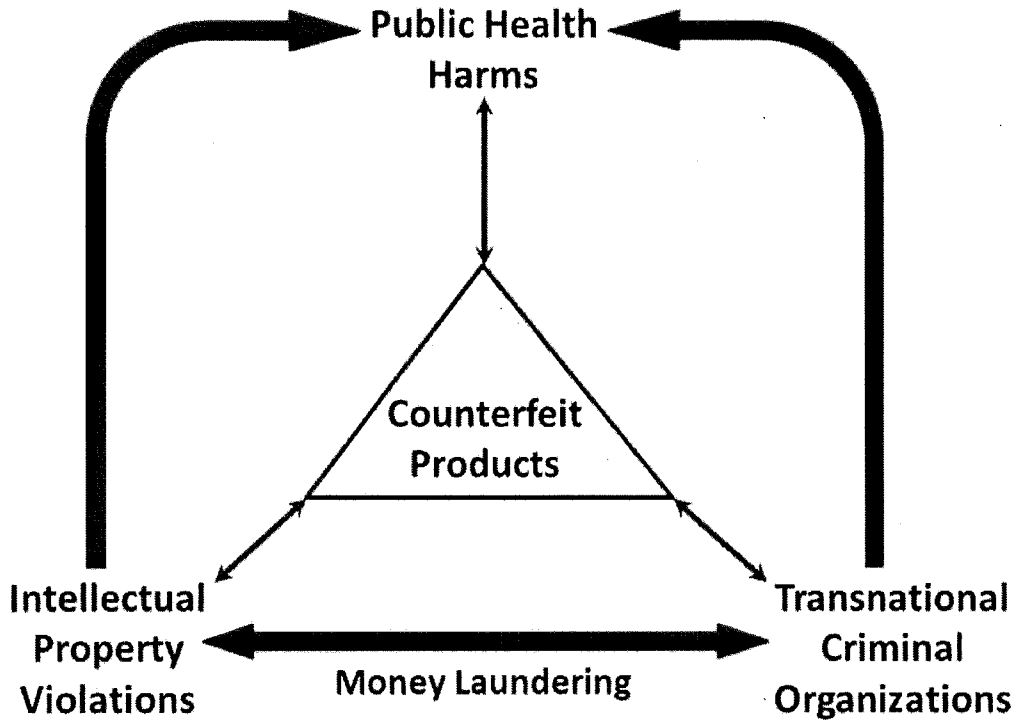
[6] Department of Commerce/International Trade Administration, "Top 10 Ways to Protect Yourself From Counterfeiting and Piracy," http://www.stopfakes.gov/sites/default/files/Consumer_Tips.pdf.

[7] Frontier Economics, Ltd., "Estimating the global economic and social impacts of counterfeiting and piracy," February 2011, p. 5, available at http://thecre.com/pdf/Global%20Impacts%20-%20Final.pdf.

[8] A. Young, The Drinks Business, "Counterfeit alcohol costs UK £1.2bn a year," http://www.thedrinksbusiness.com/2012/11/counterfeit-alcohol-costs-uk-1-2bn-a-year/.

[9] J. R. Blackwell, Richmond-Times Dispatch, Chinese delegation here to discuss counterfeit cigarette problem," http://www.timesdispatch.com/business/chinese-delegation-here-to-discuss-counterfeit-cigarette-problem/article_c299c97b-422a-5164-8305-acb751f94be7.html.

Figure 1



Rather than focusing on the economic harms from counterfeiting, which have been extensively studied,[10] this paper will focus on the less studied issue of how counterfeit products directly and indirectly threaten public health and safety. Moreover, although this paper will discuss various types of counterfeit products, it will focus the greatest attention on counterfeit products which receive the least attention but play an important role in financing international criminal organizations.

Counterfeit Products Trafficked by Organized Crime

Counterfeit Parts

A 2012 report by the Senate Armed Services Committee discussed the "flood" of counterfeit electronic parts (electronic parts being only one type of parts/supplies which are counterfeited) and determined that the problem is of substantial magnitude.

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[10] See, for example, the GAO report "Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods" available at http://www.gao.gov/assets/310/303057.pdf and the OECD study, "The Economic Impact of Counterfeiting and Piracy" available at http://www.oepm.es/cs/OEPMSite/contenidos/ponen/InformeOCDE26feb09/2009_03_03_OECD_Study_on_Counterfeiting_and_Piracy.pdf.

> *The Committee's investigation found the problem of counterfeit parts to be widespread in the defense supply chain. Looking at just part of the supply chain over a two year period from 2009 to 2010, the investigation uncovered approximately 1,800 cases of suspect counterfeit electronic parts. The total number of individual suspect parts involved in those cases exceeded one million.*
>
> *As to the source of those parts, the Committee tracked well over 100 of the approximately 1,800 cases of suspect counterfeit parts back through the supply chain. The vast majority of those trails led to China, with more than 70 percent of the suspect parts being traced to that country. U.S. government reports consistently point to China as the epicenter of the global trade in counterfeits. The Committee's findings provide overwhelming and undeniable evidence in support of that assessment.*[11]

In addition to discussing some of the economic consequences of counterfeits, the report also discussed some of the direct dangers to US citizens from counterfeit parts in the military supply chain.

> *The President of the Semiconductor Industry Association likened using counterfeit parts to "playing Russian roulette," explaining, "[w]ith luck, the chip will not function at all and will be discovered in testing. But in some cases the chip may work for a while, but because of the environmental abuse it could fail at a critical time when the product containing the chip is stressed - as in combat."*[12]

A Task Force on Counterfeit Parts established by the American Bar Association's Section of Public Contract Law recently noted that "No type of company or organization has been untouched by counterfeit electronic parts. Even the most reliable of parts sources have discovered counterfeit parts within their inventories."[13]

Although the ABA report's focus was on use of counterfeit parts in national defense applications, the paper reveals how very many industries are affected by counterfeit parts. The public dangers posed by

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[11] "Inquiry into Counterfeit Electronic Parts in the Defense Supply Chain," A Report of the Committee on Armed Services, United States Senate, May 21, 2012, ("Senate Report") pp. i-ii, *available at* http://www.levin.senate.gov/newsroom/press/release/senate-armed-services-committee-releases-report_on-counterfeit-electronic-parts/

[12] Senate Report, p. 8.

[13] Task Force on Counterfeit Parts of the Committee on Acquisition Reform and Emerging Issues of the American Bar Association Section of Public Contract Law, "A White Paper Regarding Department of Defense Implementation of Section 818 of the National Defense Authorization Act for Fiscal Year 2012" October 5, 2012, ("ABA Task Force") p. 1, *available at* http://www.americanbar.org/content/dam/aba/administrative/public_contract_law/aba_pcl_taskforce_on_counterfeit_part_white_paper.authcheckdam.pdf

counterfeit parts in the energy industry, described below by the ABA, is disturbing but not surprising and is notable for helping illustrate the extraordinarily wide-ranging scope of parts which may be counterfeit.

> *DOE first formally addressed "suspect/counterfeit items" in July 1988, after receiving a U.S. Nuclear Regulatory Commission Notice regarding discoveries of suspect electrical equipment at commercial nuclear facilities. DOE has reported discovering counterfeits of the following items at DOE or National Nuclear Safety Administration ("NNSA") sites: threaded fasteners, including assemblies containing fasteners such as ratchet tie down straps; various electrical components (semiconductors, circuit breakers, current and potential transformers, fuses, resistors, switchgear, overload and protective relays, motor control centers, heaters, motor generator sets, DC power supplies, AC inverters, transmitters, ground fault circuit interrupters ("GFCIs")); piping components (fittings, flanges, valves and valve replacement products, couplings, plugs, spacers, nozzles, pipe supports); preformed metal structures; elastomers (O-rings, seals); spare or replacement kits from other than the OEMs, weld filler material; and diesel generator speed governors and pumps.*[14]

As the ABA Task Force pointed out, even the construction industry needs to be concerned with counterfeit parts and equipment.

> *Although it is difficult to imagine a "counterfeit" building, the construction industry is just as prone to counterfeit parts – particularly with regard to construction materials and electronic building systems – as any other industry.*[15]

It is important to note that virtually everyone is at risk from counterfeit parts as illustrated by the following statement from the United States Attorney's Office – Eastern District of Michigan.

> *Two Metro Detroit residents face criminal charges following their arrests Monday during an enforcement action targeting an alleged counterfeit air bag trafficking scheme, announced United States Attorney Barbara L. McQuade and Special Agent in Charge Brian Moskowitz, U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI)*
>
> ***
>
> *The arrests come after a joint announcement Oct. 10 by ICE and the National Highway Transportation Safety Administration (NHTSA) warning consumers of the grave dangers associated with the use of counterfeit air bags.*

---

[14] ABA Task Force, p. 40.

[15] Ibid.

> *"Counterfeit auto parts like air bags not only violate intellectual property laws, they also create a serious safety risk to consumers", McQuade said.*[16]

Counterfeit military parts, counterfeit construction supplies and and counterfeit air bags are linked by a common thread – they are all smuggled and sold by organized crime groups. As the Director of U.S. Immigration and Customs Enforcement (ICE) explained with regard to the automotive equipment,

> *"Organized criminals are selling dangerous counterfeit and substandard airbags to consumers and suppliers with little to no regard to hazardous health and safety consequences."*[17]

Similarly, a 2012 University of Florida research article on how "[c]ounterfeit construction materials are flooding the U.S. market," noted that

> *New York City officials report that organized crime rings now consider counterfeiting to be a more attractive line of business than prostitution or drugs.*[18]

These organized crime rings are a serious threat to US and international security. It is in response to the national security threats posed by organized crime that President Obama established a White House strategy to combat transnational criminal organizations.[19]

Counterfeit Pharmaceuticals

As is the case with parts, pharmaceutical products are also extensively counterfeited. The problem of counterfeit pharmaceuticals can be summarized by three statements. Counterfeit medicines are:

1. Very big business. According to the Department of Justice, "fake drugs raked in an estimated $75 billion last year."[20]

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[16] United States Attorney's Office – Eastern District of Michigan, Press Release, October 15, 2012, http://www.justice.gov/usao/mie/news/2012/2012_10_15_sayoub_hjomaa.html

[17] NHTSA, "Safety Advisory: NHTSA Alerting Consumers to Dangers of Counterfeit Air Bags," October 10, 2012, http://www.nhtsa.gov/About+NHTSA/Press+Releases/2012/Safety+Advisory:+NHTSA+Alerting+Consumers+to+Dangers+of+Counterfeit+Air+Bags

[18] G. L. Lawrimore, University of Florida, Office of Research, Explore Magazine, "Buyer Beware," http://www.research.ufl.edu/publications/explore/current/story_4/.

[19] White House, "FACT SHEET: Strategy to Combat Transnational Organized Crime," http://www.whitehouse.gov/the-press-office/2011/07/25/fact-sheet-strategy-combat-transnational-organized-crime

[20] Stuart F. Delery, Acting Assistant Attorney General, Civil Division, Department of Justice, blog post "The Real Cost of Cheap Online Meds," April 26, 2012, http://blogs.justice.gov/main/archives/2161.

2. Deadly. For example, the US Food and Drug Administration (FDA) has sent out warnings about fake chemotherapy drugs.[21] Sen. Grassley, in a statement discussing a bipartisan bill to increase penalties for trafficking in counterfeit drugs, stated that "Counterfeit drugs reportedly result in 100,000 deaths globally each year...."[22]

3. Part of the global trade in counterfeit products which fund terrorist organizations and other transnational crime groups. A 2011 report by the Stimson Center on Counterfeit Drugs and National Security stated that

> *not only have groups such as the Russian mafia, Colombian drug cartels, Chinese triads, and Mexican drug gangs all become heavily involved in producing and trafficking counterfeit drugs over the past decade, but mounting evidence also points to the direct involvement of Hezbollah and al Qaeda.*[23]

The report concluded that "counterfeit pharmaceuticals pose a direct threat to national and international security."

The global nature of the trade in counterfeit medicines was made clear in an August 2012 news release from ICE noted that a "man faces up to 10 years in prison after being found guilty by a jury this week on federal charges stemming from his role as a key operative for a drug ring that distributed large quantities of Chinese-made counterfeit pharmaceuticals throughout the United States and worldwide."[24]

The Center for Regulatory Effectiveness (CRE)[25] has long been active in the fight against counterfeit drugs. For example, in 2003, CRE released its white paper, "Dirty Deals: The Drug Diversion Trade – How It Victimizes the Vulnerable and How to Stop It" which highlighted that "Drug diversion, and the intertwined crimes of adulteration and counterfeiting, is a widely recognized threat to public health."[26]

---

[21] FDA, "Another counterfeit cancer medicine found in U.S. - Illegal practice puts patients at risk," http://www.fda.gov/Drugs/DrugSafety/DrugIntegrityandSupplyChainSecurity/ucm298047.htm

[22] Sen. Grassley, "Leahy-Grassley Bill To Increase Penalties For Counterfeit Drugs Adopted In FDA Bill," http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=40786

[23] Brian D. Finlay, The Stimson Center, "Counterfeit Drugs and National Security," February 2011, http://www.stimson.org/images/uploads/research-pdfs/Full_-_Counterfeit_Drugs_and_National_Security.pdf

[24] U.S. Immigration and Customs Enforcement, News Release, August 9, 2012, http://www.ice.gov/news/releases/1208/120809losangeles.htm

[25] *See*, http://www.thecre.com/oira/?page_id=8.

[26] CRE, "Dirty Deals: The Drug Diversion Trade – How It Victimizes the Vulnerable and How to Stop It," Working Draft, July 2003, http://thecre.com/forums/attachment.php?attachmentid=22&d=1058453962

CRE also served as an information source for the book, "Dangerous Doses: How Counterfeiters Are Contaminating America's Drug Supply."[27]

Counterfeit Cigarettes and Counterfeit Tax Stamps

A counterfeit product that has received relatively little attention is cigarettes, perhaps because even the authentic products are so highly hazardous. Counterfeit cigarettes are, however, orders of magnitude more dangerous than legal products. Moreover, counterfeit cigarettes along with other forms of contraband (untaxed) tobacco, is the leading edge of a crime wave that is helping fuel organized crime around the globe.

The sale of counterfeit cigarettes is often abetted by the production and use of counterfeit tax stamps. An example of the extent to which tax stamps are counterfeited is illustrated by the experience of New York State:

> *The New York State Department of Taxation and Finance announced the arrest of two Brooklyn men for possession of over 100,000 counterfeit tax stamps with an estimated black market value of over half a million dollars. The seizure also included over 2,000 cartons of untaxed cigarettes.*[28]

It's estimated that 40% of the cigarettes sold in New York City have counterfeit tax stamps[29] which may be affixed to either counterfeit or illegally transported cigarettes.

As was noted earlier, counterfeiting is particularly serious crime because it triggers a series of other crimes. For example, the production and sale of counterfeit cigarettes creates demand for counterfeit tax stamps which, in turn, results in at least four types of harm:

- Abetting the illegal sale of hazardous products;
- The loss of state and local tax revenue;
- Providing counterfeiters with highly profitable experience in forging government documents which can than be applied to forging other government documents, such as drivers licenses; and
- Counterfeit drivers licenses, as *The Washington Post* reported, are used to commit an array of crimes ranging from underage drinking to credit card fraud.[30]

---

[27] Katherine Eban, "Dangerous Doses: How Counterfeiters Are Contaminating America's Drug Supply." http://www.amazon.com/Dangerous-Doses-Counterfeiters-Contaminating-Americas/dp/0151010501

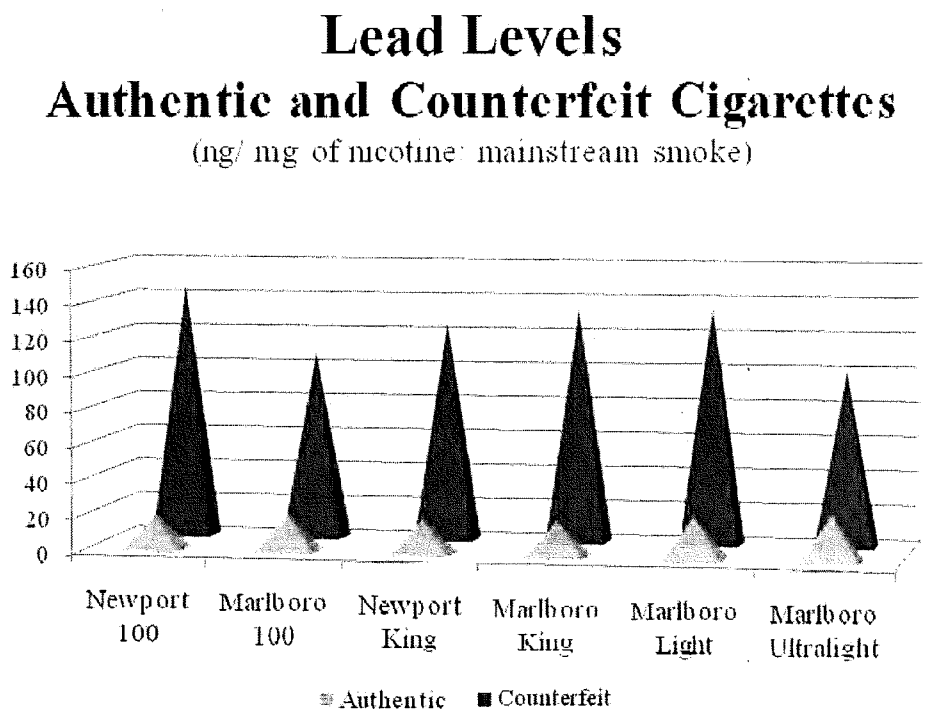
[28] http://www.thecre.com/cc/?p=880

[29] http://www.thecre.com/cc/?p=1119

[30] See, http://www.thecre.com/cc/?p=366

Health Hazards of Counterfeit Cigarettes

The particular health hazards associated with counterfeit cigarettes, as described in the peer reviewed literature, have been discussed in detail in CRE's Monograph, *An Inquiry into the Nature, Causes and Impacts of Contraband Cigarettes.*[31] Although the Monograph should be consulted for in-depth analysis of counterfeit cigarette-specific health hazards, the Figure 2 below (Monograph, p. 7) derived from data in a peer reviewed study by US Centers for Disease Control and Prevention (CDC) researchers provides an indication of the hazards by comparing the lead levels of lead in counterfeit and authentic cigarettes. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has reported that, in addition to having higher levels of lead, cadmium and other toxic metals, counterfeit cigarettes are higher in nicotine than legal products[32] which would make them more addictive, a particular concern since counterfeit cigarettes are often purchased by underage buyers since criminals don't check their customers' age.



Source: Pappas (2007), Figure 4

[31] *See*, http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM243625.pdf.

[32] *See*, http://www.atf.gov/publications/factsheets/factsheet-tobacco-diversion.html

Despite the work by researchers at CDC and other government and university laboratories discussed in the Monograph, there is much that is not known about the health effects of counterfeit cigarettes. For this reason, CRE has called for additional federal research on the health hazards of counterfeit cigarettes.[33]

Recent media reports on the contaminants found in counterfeit cigarettes have further highlighted the need for additional research on counterfeit cigarettes. The following are a half-dozen examples from a half-dozen countries of reports on the contaminants and particular hazards from counterfeit cigarettes.

From: The Australian (Australia)

> *As well as millions of dollars lost in Government revenue, the health risks are considerable because counterfeit cigarettes contain "dangerous contaminates and much higher levels of carcinogens than legitimate cigarettes". Most are imported from China and Indonesia.*[34]

From: BuaNews (South Africa)

> *This equates to more than 15 million cigarettes being sold illegally every day, or more than 6 billion per year. This defrauds the fiscus of more than R2.6 billion in unpaid excise duties.*
>
> *Furthermore, illegal cigarettes pose an even greater threat to people's health, as these products do not comply with the strict government regulations to which legal manufacturers and traders adhere.*[35]

From: Curaçao Chronicle (Curaçao)

> *WILLEMSTAD – During an inspection in a mini market, customs recently discovered and seized 15,000 fake cigarettes. These fake cigarettes were open and exposed in a large box which rats and other vermin could walk across it. "It is a serious situation which is very harmful to health", Varressa Elisabeth, the interim director for customs, stated yesterday during a press conference.*[36]

From: Shandong Provincial Tobacco Monopoly Bureau (China)

> *Many counterfeit cigarettes manufacturers use mostly tobacco waste, poor, substandard tobacco even moldy leaf tobacco. Counterfeit cigarettes in the filter*

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[33] http://www.ojp.usdoj.gov/docs/sabappendixmsabcomments062012.pdf

[34] See, http://www.thecre.com/cc/?p=1704

[35] See, http://allafrica.com/stories/201102041010.html

[36] See, http://www.thecre.com/cc/?p=1886

paper use inferior quality products even waste or contaminated waste products. Studies show that a counterfeit cigarette combustion will produce a large quantity of 3.4-benzopyrene and other carcinogenic substances. The tar content significantly exceeds the national standard. Counterfeit cigarettes contain "bemisia tabaci" eggs that, once inhaled, will be like "pork tapeworm" as chronic parasitic in humans, the large population of which will cause very great harm to the nervous system and, in severe cases, can lead to necrosis of the brain. Second, industrial dyes and industrial flavors used counterfeit cigarettes, and their combustion products, will produce severe damage to the reproductive system and visual system, resulting in "my eyesight is getting worse and even blindness" and other symptoms of toxic amblyopia and including sexual dysfunction. More seriously, is that residual sulfur ingredients used in curing smoked harm the respiratory system and even pose a direct threat to life.[37]

From: The Daily Mail (United Kingdom)

Fake cigarettes made from human excrement, asbestos, mould and dead flies are being smoked regularly in Britain, undercover detectives have found.[38]

From: Virginia State Crime Commission (United States)

• *"Most counterfeit cigarettes...tend to differ in every respect from their legal counterparts, including tobacco, paper, filter tips, and packaging "(Shen et al., 2010).*

• *This does more than result in a cigarette that is less pleasant in taste; serious health risks are implicated by counterfeit cigarettes.*
• *Contaminants and excessive levels of cadmium, thallium and lead have been found in counterfeit cigarettes.*[39]

Counterfeit and Contraband Cigarettes – Differences and Similarities

Counterfeit cigarettes are a subset of the larger issue of contraband tobacco. Contraband tobacco refers to tobacco (primarily cigarettes and loose tobacco for roll-your-own cigarettes) on which all required taxes have not been paid. Thus, contraband tobacco includes all counterfeit cigarettes as well as unbranded and

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[37] See, http://www.thecre.com/cc/?p=69

[38] See, http://www.thecre.com/cc/?p=1622

[39] See p. 52, http://www.thecre.com/cc/wp-content/uploads/2012/09/frmvscc.pdf

off-brand cigarettes sold through illicit means,[40] and major label cigarettes which have been illegally transported across state or national borders.[41]

Although not all contraband cigarettes share the extreme health hazards of counterfeit cigarettes, they do share some health-related commonalities. For example, a study in the journal Nicotine & Tobacco Research found that Australian smokers of the unbranded contraband cigarettes known locally as "chop-chop" had significantly worse health than other smokers. Specifically, the study found that

> *relative to smokers of licit tobacco, current users of illicit tobacco had significantly greater odds of beginning smoking at younger than legal age, 60% greater odds of reporting below-average social functioning on the SF-8 [a standardized health survey], and nearly twice the odds of reporting a measurable disability.*[42]

The study explained that is chop-chop is "sourced from unlicensed domestic growers or suburban homegrown production." Moreover, the study's authors point out that chop-chop "is similar to contraband tobacco in Canada sourced from domestic production by illegal manufacturers."[43] Thus, the elevated health hazards from unbranded contraband cigarettes above and beyond the health hazards of legal cigarettes is not limited to Australia.

An additional substantial health hazard from contraband cigarettes irrespective of their country of origin is from their being sold to underage smokers. As was noted, illegal sellers of cigarettes, don't adhere to age restrictions.

> *A Research Letter in the Canadian Medical Association Journal (CMAJ) estimated that "[c]ontraband cigarettes accounted for about 17.5% of all cigarettes smoked by adolescent daily smokers in Canada overall, and for more than 25% in the provinces of Ontario and Quebec." In a more recent study in Tobacco Control, Callaghan (2010) increased the estimate of the share of the youth market accounted for by contraband cigarettes to 43%.*[44]

An additional hazard to underage smokers from illicitly sold cigarettes reported in the English newspaper the Spalding Guardian is that "[t]eenagers face an added risk of being asked for sexual favours if they smoke toxic fake cigarettes...."[45]

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[40] http://www.thecre.com/cc/?p=142

[41] http://www.thecre.com/cc/?p=295

[42] See CRE Monograph p. 59 or http://www.ncbi.nlm.nih.gov/pubmed/19541950

[43] See, CRE Monograph p. 17.

[44] CRE Monograph, p. 19. [Notes omitted]

[45] See, http://www.thecre.com/cc/?p=1760

From a law enforcement perspective, the most significant commonality between counterfeit and other contraband cigarettes is that, irrespective of whether the illicit transport and sales are domestic or international, both types of cigarettes are trafficked by transnational criminal organizations.

It is because counterfeit and other contraband cigarettes are at the nexus of so many different crimes and threats to national security, from terrorism to drug trafficking, that contraband tobacco requires particular attention from:

1. Federal, state and law enforcement;

2. Government policy officials; and

3. The public who purchases illicit tobacco, often without realizing the chain of crimes involved and the consequences.

There are three key issues with respect to the criminal organizations trafficking in cigarettes:

1. The traffickers include groups designated by the US State Department as Foreign Terrorist Organizations (FTOs);[46]

2. There is a convergence between FTOs and traditional organized crime groups with cigarette trafficking being common to crime organizations irrespective of any ideological motivations; and

3. Tobacco smuggling is closely intertwined with and funds drug smuggling, arms trafficking and human trafficking.

Each of these three issues will be discussed below.

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[46] http://www.state.gov/j/ct/rls/other/des/123085.htm

The Terror– Tobacco Trafficking Connection

On July 24, 2011, President Obama signed Executive Order 13581 – Blocking Property of Transnational Criminal Organizations.[47] In the Order, the President stated

> *I therefore determine that significant transnational criminal organizations constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.*

The Order included an Annex which listed examples of significant transnational criminal organizations including Los Zetas, the violent, Mexican-based criminal syndicate which is heavily involved in the narcotics trafficking, Camorra, and Yakuza. These three groups were also named in federal report, along with Chinese Triads, La Cosa Nostra, and the Russian Mafia as being involved in cigarette counterfeiting.[48]

Although the President's Order is relatively recent, it was based on extensive federal information gathering and experience with the criminal organizations. The role of counterfeit and other contraband cigarettes in financing terrorists and other dangerous criminals has been long established. In a 2004 article published in The Police Chief, a publication of the International Association of Chiefs of Police (IACP), an ATF senior intelligence analyst explained that

> *The trafficking of cigarettes by terrorists and their sympathizers has been going on worldwide since the mid-1990s, and the last four years have seen a sudden increase in trafficking. The trafficking schemes provide the terrorist groups with millions of dollars annually, which fund the purchasing of firearms and explosives to use against the United States, its allies, and other targets.*[49]

The ATF federal official also explained that

> *Known and suspected Hezbollah and Hamas members have established front companies and legitimate businesses in the cigarette trade in Central and South America. Indications from law enforcement sources are that these companies*

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[47] http://www.whitehouse.gov/the-press-office/2011/07/25/ executive-order-blocking-property-transnational-criminal-organizations

[48] National Intellectual Property Rights Coordination Center "Intellectual Property Rights Violations: A Report on Threats to United States Interests at Home and Abroad nation Center,," November 2011, Figure 10, p. 36.

[49] William Billingslea, "Illicit Cigarette Trafficking and the Funding of Terrorism," The Police Chief, February 2004.

> *traffic in contraband and counterfeit cigarettes and tax stamps for profit and then use the proceeds to purchase arms and ammunition.*[50]

The trafficking in counterfeit cigarettes and tax stamps is not unique to any type of FTO or geographic region. For example the intelligence official points out that the "The IRA was one of the first groups to begin using cigarettes to fund their activities." Similarly,

> *The Kurdish Workers Party (PKK) is involved in the trafficking of contraband cigarettes and tax stamps. In one particular instance in 2000, the Turkish military and Turkish federal police conducted a raid at a PKK safe house, which was suspected of actually being one of the PKK headquarters for eastern Turkey. Initially, the Turkish authorities were expecting to find caches of arms, ammunition, and explosives. But the authorities actually found a gravure printing press for producing counterfeit tax stamps and other forged documentation.*[51]

More recently, an article published by Scientific American, quoting a retired FBI agent the role of counterfeit cigarette trafficking in financially supporting terrorism, stated

> *"Obviously there is a concern of what is coming into the United States and how it's being examined," said Bob Hamer, a retired FBI agent. Hamer's last assignment was Operation Smoking Dragon, lasting from 2002 to 2005. Through sales of counterfeit Marlboro cigarettes and tax stamps, the FBI learned about many of the funding sources helping to finance terrorism through the transport of items via Southern California ports. "A lot of the profits from these counterfeit cigarettes were, particularly, going to support Hezbollah and Hamas," said Hamer. "The whole thing began with counterfeit cigarettes. It eventually evolved into something much greater than that."*[52]

Similarly, a Congressional Research Service report noted that,

> *Cigarette smuggling schemes as a means for financing terrorists have been discovered in a range of countries and regions, including the United States, Europe, Turkey, the Middle East and North Africa, and Iraq.*[53]

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[50] Ibid.

[51] Ibid.

[52] Reut Rory Cohen, "Security and Commerce: Finding a Balance in a Post-9/11 World with Risk-Analysis Science," Scientific American Blogs, May 3, 2012.

[53] John Rollins and Liana Sun Wyler, "Terrorism and Transnational Crime: Foreign Policy Issues for Congress," Congressional Research Service, October 19, 2012 available at http://www.thecre.com/cc/wp-content/uploads/2012/11/R41004.pdf.

It is important to recognize that cigarette trafficking means more than just a flow of funds to violent organizations, it is about murder. In 2009, a Florida newspaper detailed the how the trafficking of cigarettes through Florida was used to finance the murder of two British soldiers.

> *The bullets rang out thousands of miles away, but investigators now believe the assault had its origin in an anonymous cargo ship docked at a bustling South Florida port.*
>
> *A gray-haired 57-year-old Cutler Bay man with no criminal history named Roman Vidal sold millions of cigarettes that had been smuggled to Dublin criminals who funded the terrorist group that killed Quinsey and Azimkar, investigators say. The charges are just the latest link between black-market U.S. smokes and violent terrorist groups around the world.*[54]

The Terror– Tobacco Smuggling – Organized Crime Connection

The peer reviewed paper "Methods and Motives: Exploring Links between Transnational Organized Crime & International Terrorism," researched and written by academicians utilizing a National Institute of Justice grant, "identifies and analyzes the points of convergence between organized criminals and terrorists to draw useful conclusions for investigators."[55]

The researchers from American University and other institutions explain that,

> *The interaction between terrorism and organized crime is growing deeper and more complex all the time. First, transnational criminal groups are expanding, both through the addition of new groups and the growth of existing ones. Such growth led to more connections between these groups as well as with other shadowy actors like insurgents, arms proliferators and indeed terror cells. For example, as gangs have evolved into the newest transnational crime groups in North America, stories have recently surfaced that an Al Qaeda operative made contact with members of one gang, Mara Salvatrucha or MS-13, in Honduras in 2004. Terrorists in European prisons recruit criminals to their cause, allowing incarcerated individuals move between their identities as terrorists and criminals.*

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[54] Tim Elfrink, "South Florida Cigarette Smuggling Funds Terrorism," Broward Palm Beach New Times, July 2009, available at http://www.browardpalmbeach.com/2009-07-02/news/south-florida-cigarette-smuggling-funds-terrorism/

[55] Dr. Louise I. Shelley, John T. Picarelli, et al, "Methods and Motives: Exploring Links between Transnational Organized Crime & International Terrorism," September 2005, p. 5, *available at* http://www.thecre.com/ccsf/wp-content/uploads/2011/06/Methods-and-Motives.pdf

> *Second, the dealings between terrorist and organized crime groups have long since ceased to be a matter of business alone; the two phenomena now intersect on many different levels. Many international terrorists sustain themselves only with the support of organized crime. That dependency, combined with the fact that terrorists commit a range of relatively minor crimes too, can be important keys to detecting and apprehending them.*
>
> *With so many individuals active in both terrorism and organized crime, there now exists a merging and blurring of functions.*[56]

Cigarette smuggling is part of organized crime and terrorist financial dealings. For example, the authors note that "[c]igarette and alcohol smuggling has fueled the Kurdish-Turkish conflict as well as the terrorist violence in both the Abkhaz and Ossetian conflicts."[57]

Los Angeles Police Chief William F. Bratton discussed the convergence of organized crime and terrorist groups in an article in The Police Chief in which he wrote,

> *The connection between organized crime and the illicit trade market has undergone a mutation of sorts, to the extent that organized-crime entities have morphed from the traditional fixed hierarchies with controlling leaders or families to more decentralized, loosely linked, multiple networks that come together and cooperate only on an opportunistic basis and then separate. In his book Illicit: How Smugglers, Traffickers, and Copycats Are Hijacking the Global Economy, Moisés Naim takes the view that this mutation is similar to that of international terrorist organizations such as al Qaeda and Islamic Jihad. As Naim puts it, the world's first unmistakable glimpse of this transformation came on September 11, 2001. Although many—politicians included—took the position that the "world changed," it may be more accurate to say that something about the world was revealed to us.*[58]

Chief Bratton also emphasized that cigarette trafficking plays a significant part of the organized crime-terrorist convergence:

> *In the City of Los Angeles, investigations by law enforcement have substantiated the report that individuals involved in counterfeiting activities and the illegal sale*

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[56] Ibid., p.11. [Notes omitted].

[57] Ibid., p. 66.

[58] William F. Bratton, Chief of Police, Los Angeles, California, "The Mutation of the Illicit Trade Market," The Police Chief, May 2007 available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1177&issue_id=52007.

> *of cigarettes are significant fund-raisers for known terrorist groups such as Hezbollah and Hamas.*[59]

More recently, the links between organized crime, terrorist organizations and the trafficking in cigarettes and other counterfeit consumer products has been widely noted around the world by reporters, commentators and government officials. Examples include:

From: Malaya Business Insight:

> *Cigarette smuggling has now become a major security concern for many countries because terrorist networks such as Al Qaeda are turning to this illicit trade to finance their criminal activities, according to a study done by a global non-profit tax research foundation. ... The ITIC study disclosed that terrorist organizations and other organized crime groups are exploiting the illicit trade in tobacco products because the highly lucrative activity is relatively low-risk compared to other heavily penalized crimes like drug trafficking and human smuggling.*[60]

From DOJ/ATF:

> *The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Atlanta Field Division, together with officials from the Georgia Attorney General's Office, Georgia Department of Revenue, the Gwinnett County District Attorney's Office, the Lawrenceville Police Department, and the Gwinnett County Sheriff's Department, announced today a large-scale enforcement operation involving the execution of multiple arrest, search, and seizure warrants in connection with the illegal trafficking of cigarettes in Georgia.*
>
> ***
>
> *Organized criminal groups, including those with ties to terrorist organizations, have increasingly engaged in the illegal trafficking of tobacco products, particularly counterfeit and lawfully manufactured cigarettes. Prior to 2003, ATF averaged about 40 new diversion investigations annually. Since 2003, ATF has initiated more than 1,050 tobacco diversion investigations, with an average of 131 investigations per year.*[61]

From: The Peterborough Telegraph (UK):

> *The Tax and Investment Centre report said: "Counterfeits of UK brands originate mostly from the Far East.*

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[59] Ibid.

[60] http://www.thecre.com/cc/?p=907.

[61] http://www.thecre.com/cc/?p=555

"The counterfeiters show ever-increasing sophistication in the face of international enforcement efforts.

"Cigarette smuggling is a highly profitable option for organised crime gangs and terrorist networks.

"People involved in the illicit trade of tobacco products are also involved in other forms of illicit trade, such as drugs, human trafficking and guns."[62]

From Business World Online (Philippines):

With the proposed sharp rise in tax rates on, and hence the price of, cigarettes, the Philippine government might have to deal with the return of cigarette smuggling into the country. ... The return of smuggling could provide new life to criminal syndicates and enemies of the State. Experiences in other countries show that smuggling provides financial muscle to organized crime and terrorist activities. Is the Philippine military establishment ready for this?[63]

From News Letter (UK):

Former Assets Recovery Agency chief Mr McQuillan said the seizure of cigarettes in Dublin would cause "serious damage" to dissidents.

"It seems quite clear that dissident republicans are inextricably linked to organised crime and they are probably using this money to fund paramilitary operations," he said.

"But really what you have here is organised crime gangs. It has to be priority for the community to get behind the police in order to stop these economic and terrorist crimes.

"I am delighted to see this seizure in Dublin but what we really need is for people to stop buying illegal cigarettes.

"They need to know that their money is going to kill their neighbours through dissident republican terrorism."[64]

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[62] http://www.thecre.com/cc/?p=1677

[63] http://www.thecre.com/cc/?p=1667

[64] http://www.thecre.com/cc/?p=479

From The Philippine Star:

> *The World Economic Forum noted in 2011 that illicit trade is a major source of revenue for terrorist groups and transnational criminal networks. According to Framework Convention Alliance (2008), recent studies estimate that over 600 billion cigarettes a year is illicit resulting in annual government revenue losses of over $40 billion.*[65]

From Rep. Peter King:

> *Yet every day, the failure to strongly combat the growing crime of contraband cigarette smuggling deprives governments of billions of dollars in tax revenues — siphoned off by terrorist and criminal organizations. ...*
>
> *Disturbingly, the financial loss and budget effect are only part of the problem. Often the state's loss is terrorist organizations' gain. In 2008, under my leadership, a House Homeland Security Committee investigation found a terrifying nexus between cigarette smuggling and terrorism.*
>
> *We uncovered far too many examples. Consider, counterfeit cigarette tax stamps were found in an apartment used by members of the Egyptian Islamic Jihad cell that carried out the 1993 bombing of the World Trade Center. The notorious "Lackawanna Six" Islamic-terrorist cell received $14,000 from a former gas station operator, who was subsequently convicted for cigarette trafficking and money laundering.*[66]

From WJLA ABC-7:

> *ATF agent Ashan Benedict has handled several major cigarette smuggling cases in our region.*
>
> *"Cigarette smuggling is as lucrative or more lucrative than smuggling drugs or smuggling guns," Benedict says.*
>
> *The Department of Justice puts the scope of the problem into the billions of dollars, with big organized crime, and even groups with links to terrorists cashing in.*

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[65] http://www.thecre.com/cc/?p=1259

[66] http://www.thecre.com/cc/?p=645

> *"You are looking at millions of dollars and the more organized they get we are seeing links to human smuggling, links to narcotics, weapons and violence," Benedict says.*[67]

The Narcotics – Gun Running – Human Trafficking – Tobacco Smuggling - Crime Connection

As reported above by a Washington, DC television station, cigarette smuggling is linked to a host of other crimes. The Voice of America has also reported on the close links between cigarette trafficking, counterfeiting and other crimes:

> *Fake designer brand purses, clothing and even prescription medications are made and sold around the world. Investigators say it is bigger business than the illegal drug trade. And police say that when consumers buy counterfeit items, they could be contributing to the funding other crimes. ... At the Port of Los Angeles, police seize counterfeit purses, clothing, prescription medications, appliances and cigarettes.*[68]

It's important to recognize that tobacco smuggling is more than simply one element in a portfolio of illegal activities by crime organizations, tobacco smuggling is the fuel for an array of crimes. As the the Former Assistant Chief Constable, Head of Organised Crime in Northern Ireland made clear, trafficking in contraband cigarettes should be understood as a gateway crime that in turn funds other crimes:

> *I have dedicated 30 years of my life to policing crime on the streets of Northern Ireland, where organised crime gangs and terrorist groups turned smuggling tobacco into a multi-million pound black market business, funding prostitution and drug trafficking.*[69]

Similarly, the Royal Canadian Mounted Police (RCMP) has reported that,

> *"The illicit tobacco trade is a global phenomenon that contributes to the growth of transnational organized crime and undermines public health objectives."*[70]

A senior Google official, during a discussion of the role of illicit networks in supporting crime, explained that seemingly different crimes in different places are closely connected and need to be understood and countered in a unified manner:

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[67] http://www.thecre.com/cc/?p=1897

[68] http://www.thecre.com/cc/?p=1204.

[69] http://www.thecre.com/cc/?p=2009

[70] http://www.thecre.com/cc/?p=1641.

> *Some illicit networks, such as Hezbollah, are involved in activities as diverse as cigarette smuggling in the United States, money laundering in West Africa, drug smuggling in Europe, and illicit arms sales all over the world. To combat such illicit activities, the first step is to view them holistically rather than through traditional silos, and the second step is to identify critical nodes, such as financial intermediaries, that could play a disruptive role if armed with the appropriate information and tools.*[71]

The Myth that Counterfeiting and Piracy are Victimless Crimes

The question arises as to why, given the close links between tobacco smuggling and violent organizations does cigarette trafficking receive relatively little attention? Part of the answer, as previously noted, is that cigarettes are an inherently hazardous product. Another part of the answer, however, is found in the myth that the sale of counterfeit and other contraband cigarettes is a victimless crime.

A consultant the IHS Jane's Information Group and writer for several trade publications explained the victimless crime myth by stating:

> *The contraband of tobacco products internationally has attracted little interest on a media level, although it constitutes an important and increasing form of revenue for a variety of illicit actors, be they organized crime figures, terrorists or extremist sects. In contrast to narcotics trade or human trafficking, tobacco smuggling constitutes no obvious social threat; nevertheless, these activities are conducted by the same people who run the bulk of other dangerous illicit trades, while fueling governmental corruption in developing nations.*[72]

The Department of Justice is long on record making the same point,

> *"Tobacco diversion is not a victimless crime," said ATF Special Agent in Charge Rich Marianos. "Depriving the government of tax revenue impacts the funding of necessary services for our citizens. Many times these investigations also lead to the funding of violent criminal organizations."*[73]

A municipal official in England similarly explained,

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[71] Neal Ungerleider, "How Google Fights Terrorists And Human Traffickers," Fast Company, July 17, 2012.

[72] Ioannis Michaletos, International Tobacco Contraband, May 11, 2012 *available at* http://www.worldpress.org/Europe/3911.cfm.

[73] http://www.thecre.com/cc/?p=1787.

> *"There is a commonly held view that dealing in imported cigarettes is a victimless crime which doesn't do any harm.*
>
> *"The perception of a 'Robin Hood' type figure, not paying tax to the government so they can sell them cheaply to the poor is totally false as it affects the livelihood of other local shops who sell cigarettes."*[74]

The mistaken view that the purchase of contraband tobacco is a victimless crime is a subset of the larger problem which is that a significant share of the public views the purchase of counterfeit/pirated products as victimless crimes,

> *Bob Barchiesi has a saying: "If you can make it, they can fake it."*
>
> *That was apparent yesterday as more than 400 people from 50 countries gathered for an international intellectual property crime conference in Halifax.*
>
> *On display were everything from fake handbags to fake circuit breakers – and many of them were indistinguishable from the real thing.*
>
> *"If you knew where your money was going, you'd probably think twice about (buying counterfeit goods)," said Barchiesi, president of the International Anti-Counterfeiting Coalition.*
>
> *"The people that are engaged in the sale of counterfeit goods are often engaged in other nefarious criminal conduct. It's been linked to organized crime, it's been linked to funding terrorist organizations. It's not victimless."*[75]

As CNBC reported,

> *Counterfeit goods may have a reputation for poor design, unsafe parts and toxic elements, but consumers don't seem to mind.*
>
> *No country has been associated with dangerous knockoffs more often than China. According to US Customs & Border Protection data, more than 75 percent of counterfeit goods seized between 2004 and 2009 were manufactured there. Apparently, people love a bargain, and they don't mind taking a risk to get one. Despite the risks, it's easy to see why counterfeit goods are appealing. The customer gets what looks like a Louis Vuitton handbag for $50 instead of $2500, and if anything shady happened on its way from the factory to the hawker's table,*

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[74] http://www.thecre.com/ccnf/?p=66.

[75] Paul McLeod, "Counterfeiting not a victimless crime, expert says," Metro News, June 26, 2008 available at http://metronews.ca/news/halifax/75395/counterfeiting-not-a-victimless-crime-expert-says/.

the buyer usually doesn't know about it. This allows most people to assume that counterfeiting is a victimless crime. The truth, however, is a different story.

Illegal Products and Illegal Labor

A counterfeit product is often created in a sweatshop, in violation of child labor laws, anti-sweatshop laws and basic human rights. Dana Thomas, described the conditions she witnessed in sweatshops in her 2007 book Deluxe: How Luxury Lost Its Luster.

"I remember walking into an assembly plant in Thailand a couple of years ago and seeing six or seven little children, all under 10 years old, sitting on the floor assembling counterfeit leather handbags. The owners had broken the children's legs and tied the lower leg to the thigh so the bones wouldn't mend. [They] did it because the children said they wanted to go outside and play."[76]

The Victims of Contraband Cigarettes: Disproportionally Young and African American

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 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 are numerous, taken as a whole, they have clear demographic characteristics. As the previously discussed article in the Canadian Medical Association Journal explained, citing an article in Tobacco Control, the young are particularly victimized by the availability of contraband cigarettes stating that a new study "increased the estimate of the share the share of the youth market accounted for by contraband cigarettes to 43%."

The contraband cigarette also disproportionately impacts lower income and non-white citizens. An article published in the American Journal of Public Health analyzing 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.[77]

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[76] Daniel Bukszpan, "Counterfeiting: Many Risks and Many Victims," CNBC, 13 Jul 2010 available at http://www.cnbc.com/id/38229835/Counterfeiting_Many_Risks_and_Many_Victims

[77] 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

> *Furthermore, the researchers found that African Americans noted that Blacks compared with all other ethnic groups and were clustered in low-income neighborhoods (NYC Department of Health and Mental Hygiene, unpublished data, 2003).*[78]

While smokers that were included in the study's focus groups cited the lower price of illicit cigarettes as an attraction, 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)*[79]

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)*[80]

> *"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)*[81]

Health, Vol 97, No. 8, pp. 1483-1488.

[78] Ibid., p. 1483 [note omitted].

[79] Ibid., p. 1485.

[80] Ibid, p. 1486.

[81] Ibid.

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

> *"The profit is unbearable. You know, I watch guys today in Harlem. Bought cars [with the money they made] selling cigarettes. Buy vans and jeeps [with the money they made] selling cigarettes." (Male smoker, 25–49 years)*[82]

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)*[83]

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)."[84]

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.*

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[82] Ibid.

[83] Ibid., p. 1485.

[84] Joseph Goldstein, "A Cigarette for 75 Cents, 2 for $1: The Brisk, Shady Sale of 'Loosies'," New York Times, April 4, 2011.

"A lot of them believe they are quitting," he said, "but they come back every day."[85]

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."[86]

   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.

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 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)[87]

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[85] Ibid.

[86] Ibid.

[87] Shelley (2007), p. 1486.

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 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.*[88]

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."[89]

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.*[90]

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.*[91]

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 "sentenced prisoners under state jurisdiction...." Among prisoners sentenced for "drugs" a category that includes "trafficking,

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[88] http://en.wikipedia.org/wiki/Fair_Sentencing_Act.

[89] Ibid.

[90] 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.

[91] Maia Szalavitz, "Study: Whites More Likely to Abuse Drugs Than Blacks," November 7, 2011.

possession, and other drug offenses" 46% where Black and only 28% were White.[92] 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))

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.*[93]

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."[94]

CRE's Monograph 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

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[92] 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.

[93] TPSAC, "Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations," p. 227.

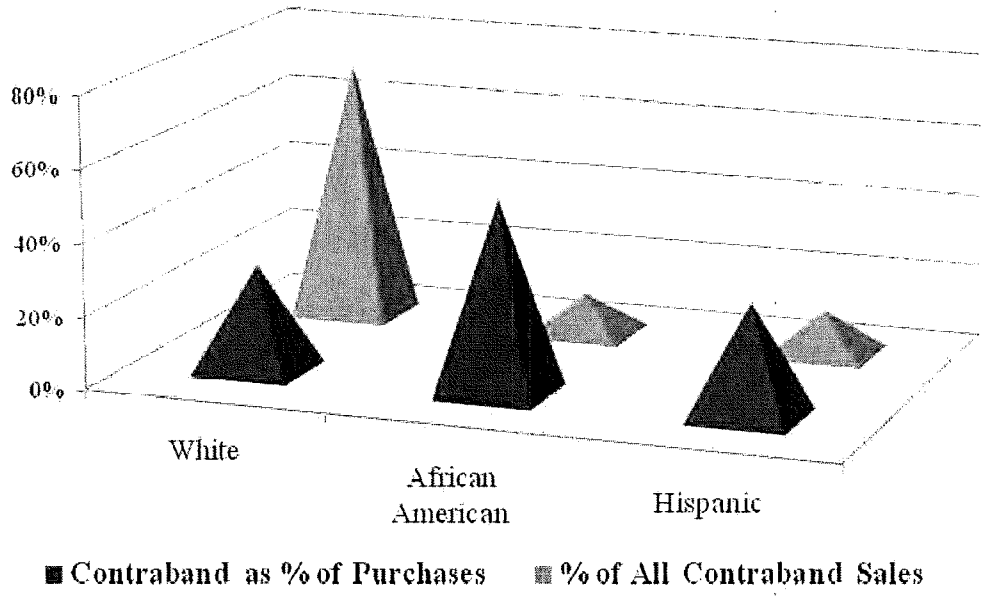
[94] Ibid., p. 225.

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, it is African Americans who are most likely to purchase contraband menthol cigarettes as illustrated in Figure 3 (appearing as Figure 13 in the Monograph).

Figure 3

A Menthol Ban Would Disproportionately Impact African American Smokers



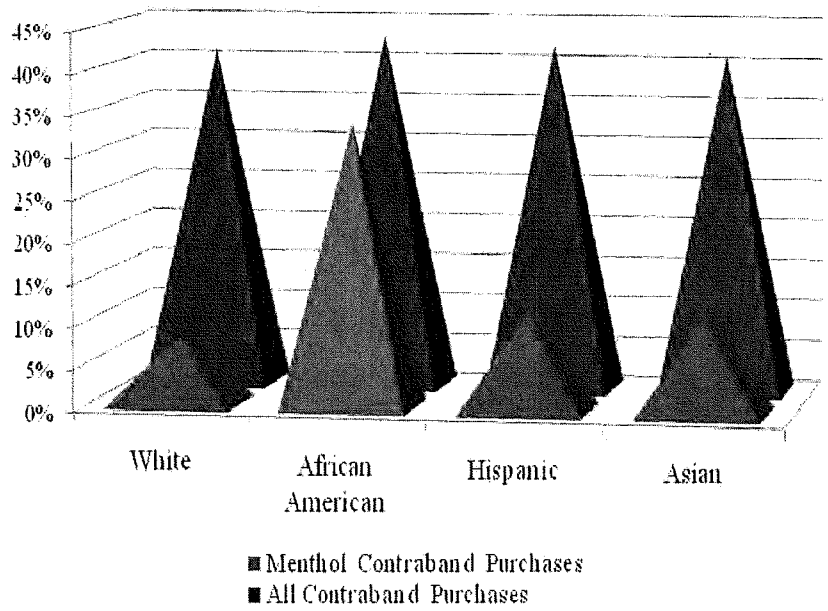
Source: CRE

CRE projected that, if there were a menthol ban, it would be African Americans who 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).

Figure 4

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

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.[95] Experience with illegal substances strongly suggests, however, that those

[95] http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM207153.pdf

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.

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 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)*[96]

- More cigarettes sold as singles, aka loosies, increasing their affordability.
- More money going to organized criminal groups to finance other criminal activities.
- More money laundering activities.

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.

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[96] Shelley (2007), p. 1486.

Conclusions

1. Transnational crime organizations are a threat to national security, as determined by President Obama in Executive Order 13581.

2. The illegal transport and sale of counterfeit and other contraband products is a major revenue source for terrorist and related crime organizations.

3. Counterfeit products pose severe health threats to consumer health and safety.

4. Counterfeiting/piracy of consumer goods is NOT a victimless crime.

5. The trafficking in counterfeit and other contraband cigarettes has a disproportionately harmful impact on African American communities.

6. Any successful strategy to reduce smoking in African American communities will need to focus on making positive improvements in peoples lives rather than on punitive actions.

Recommendations

1. Consumers refuse to buy or use counterfeit/contraband/pirated products.

2. Law enforcement agencies at all levels of government assign a higher priority to fighting counterfeiters.

3. Federal regulators not expand the opportunities for transnational crime organizations by banning menthol cigarettes.

CRE Conclusions & Recommendations

The Illicit Market in Menthol Cigarettes

CRE's Conclusions

- Contraband cigarette purchase rates do not vary much by ethnicity.
- In event of a menthol ban, the contraband market for menthol cigarettes is estimated to increase by about 45%.
- In event of a menthol ban, a majority of the cigarettes purchased by African American smokers would be contraband although whites would purchase over 70% of all contraband cigarettes.

CRE's Recommendation

- FDA should coordinate its tobacco control policies with Latin America and Carribean nations since these countries would bear a cruel, unfair share of the burden from an American-fueled rush for banned menthol cigarettes.

The Countervailing Effects of a Menthol Ban

CRE's Conclusions

A ban on menthol cigarettes would mean:

- More criminals selling cigarettes to children.
- More illegal cigarettes with extreme levels of heavy metals and other toxins.
- More African American youth profiled, arrested, prosecuted, and jailed for selling contraband menthol cigarettes in their communities.

Nota Bene

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 tobacco control policies.