

Plain Packaging

**Commercial expression,
anti-smoking extremism
and the risks of
hyper-regulation**

Christopher Snowden



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Executive summary

1. The UK government is considering the policy of ‘plain packaging’ for tobacco products. If such a law is passed, all cigarettes, cigars and smokeless tobacco will be sold in generic packs without branding or trademarks. All packs will be the same size and colour (to be decided by the government) and the only permitted images will be large graphic warnings, such as photos of tumours and corpses. Consumers will be able to distinguish between products only by the brand name, which will appear in a small, standardised font.
2. As plain packaging has yet to be tried anywhere in the world, there is no solid evidence of its efficacy or unintended consequences.
3. Focus groups and opinion polls have repeatedly shown that the public does not believe that plain packaging will stop people smoking. Even ardent anti-smoking campaigners do not make such a claim. Instead, activists assert that nonsmokers take up the habit as a result of seeing “glitzy” tobacco packaging. This claim lacks plausibility and is bereft of empirical evidence.
4. One in nine cigarettes smoked around the world is counterfeit or smuggled. The illicit market lowers prices, fuels underage consumption, deprives the treasury of tax revenue and makes an unhealthy habit still more hazardous. It is hard to think of a policy that could delight counterfeiters more than standardising the design, shape and colour of cigarette packs.

5. The wholesale confiscation of an industry's brands and trademarks represents an unprecedented assault on commercial expression. It not only tramples on the principles of a free market, but it may also be illegal. Expert opinion, including that of the European Communities Trade Mark Association, the British Brands Group and the International Trademark Association, says that plain packaging is an infringement of intellectual property rights and a violation of international free trade agreements to which the UK is a signatory.

6. Anti-smoking lobbyists claim that plain packaging will not be imposed on other industries in the future, but this is a hollow reassurance in the light of the accelerating war on alcohol, sugar, salt and fat. What happens to tobacco tends to happen to other products sooner or later. Public health organisations around the world have been applying the blueprint of anti-tobacco regulation to other products for years. Sin taxes and advertising bans are increasingly common for certain types of food and drink, and various campaigners have called for graphic warnings to be placed on bottles of alcohol. It should be no surprise that in Australia, where a plain packaging law was passed in 2011, activists are already demanding that 'junk food' be sold in generic packaging. Australian anti-smoking lobbyists, meanwhile, say that the next step after plain packaging is to force the tobacco industry to make cigarettes "foul-tasting".

7. Plain packaging is not a health policy in any recognisable sense. It neither informs nor educates. On the contrary, it limits information and restricts choice. It will serve only to inconvenience retailers, stigmatise consumers and encourage counterfeiters. Wholesale expropriation of private property to make way for public propaganda represents an unacceptable intrusion into an already over-regulated marketplace which will set a dangerous precedent for other products.

1 A short history of plain packaging

“Something must be done. This is something, therefore it must be done.”
— Sir Humphrey Appleby, *Yes, Prime Minister*

When the British parliaments introduced a comprehensive smoking ban in 2006-07, the casual observer might have expected the anti-tobacco lobby to be satisfied. The most controversial and far-reaching public health initiative for decades had given them everything they had asked for. The interior of the country had been won for nonsmokers and all that was left for Action on Smoking and Health *et al.* to do was to monitor compliance. Having won this historic victory, would the smokefree campaigners now acknowledge that informed adults had a right to smoke in their homes and outdoors without further harassment?

They would not. Within days of victory, the coalition of pressure groups which had masterminded the smoking ban drew up a new list of targets: a ban on cigarette vending machines, graphic warnings on packs, still more duty on tobacco, and raising the smoking age to 18. It is a tribute to the power of the anti-tobacco lobby that all of these policies became law over the next few years and still more schemes had to be devised.

The latest wheeze is a ban on all branding of cigarette packs, known as 'plain packaging'. When Action on Smoking and Health (ASH) surveyed the public in 2008, plain packaging was the least popular of the twelve anti-smoking policies they suggested, with less than half of those questioned in support, but ASH were given renewed hope in 2011 when Australia became the first country in the world to give the scheme the green light.¹

It is unlikely that anyone will ever occupy St. Paul's to demand the right to be served cigarettes in a branded pack. No one will ever take to the street to protest the abolition of a logo. The rights of businesses do not excite the same popular interest as individual liberties and even the nation's weary smokers may see plain packaging as one of the less effective, and therefore less threatening, attempts to 'denormalise' them. And yet, the wholesale confiscation of a company's intellectual property should make us uneasy, as should the growing tendency of health campaigners to infantilise the public with ever more bizarre and desperate schemes.

It says something for the poverty of ambition in both politics and public health that such an idea can be proposed with a straight face, let alone be described by ASH as "an enormous leap forward for public health".² Having lobbied successfully for the total prohibition of tobacco advertising, and with enormous graphic warnings on every pack, increasingly tenuous excuses must be made for the smoking rate failing to fall as quickly as campaigners predicted. The coalition government, meanwhile, is under heavy criticism from the medical establishment over its NHS reforms and has been accused of cosying up to the food and alcohol industries. In such a climate, with politics bereft of grand ideas and prohibition back in fashion, any gesture which involves 'clamping down' on tobacco, no matter how absurd, becomes the subject of legitimate debate.

The idea of mandating plain packaging of tobacco products can be traced back to the early 1990s when the Canadian government embarked on a particularly zealous crusade against smoking. A series of tobacco control policies between 1992 and 1995 led to an epidemic of cigarette smuggling which ultimately forced the Canadians to lower tobacco duty and abandon some of the more far-out ideas that anti-smoking campaigners had suggested.

Amongst these campaigners was Rob Cunningham who had begun his anti-smoking career as a law student in the 1980s. Whilst writing a paper about banning tobacco advertising at University in 1988, Cunningham discovered that the minimum legal age for buying cigarettes in Ontario was 18. Despite being a twenty-three year old who had never smoked, Cunningham was shocked that he had hitherto been unaware of this fact and swiftly formed the Student Movement Aimed at Restricting Tobacco (SMART). The budding activist recruited minors to go into shops attempting to buy cigarettes and found that 25 of the 30 outlets tested were willing to sell them. With a keen eye for publicity, Cunningham called a press conference to announce the news and filed a private prosecution against Shoppers Drug Mart which resulted in a \$25 fine.³ Upon graduation, he began working for the Canadian Cancer Society where he championed the idea of plain packaging. The government gave it serious consideration for a short time, but ultimately rejected it in 1995 on the grounds that it would breach international trade rules and because there was no evidence that it would reduce the smoking rate.

The idea faded out of sight for the next thirteen years. Barely any research was conducted into its workability and even the most fanatical anti-smoking campaigners did not raise the issue publicly. That began to change in 2008 when the Australian sociologist Simon Chapman co-authored an article called ‘The case for the plain packaging of tobacco products’ in the respected journal *Addiction*. Like Cunningham, Chapman was a somewhat obsessive anti-smoking crusader who had co-founded the activist group BUGA-UP in the 1970s. An acronym for Billboard Utilising Graffitists Against Unhealthy Promotions, BUGA-UP was a loose coalition of anti-capitalists and youthful wowers who vandalised billboards across Australia in protest at the advertising of unhealthy or politically incorrect products. Cigarette advertisements were a favourite target. Chapman went on to become editor of the journal *Tobacco Control* and helped lead the campaign for plain packaging in Australia.

The original reason campaigners gave for wanting plain packaging was that it would weaken the influence of tobacco sponsorship. It would, as Rob Cunningham put it in 1995, “break the connection young people make between tobacco company-sponsored event advertising and cigarettes, by removing

the critical links of colour, unique font style and logo designs that connect the event advertising to a specific brand of cigarette.”⁴ It was also claimed that plain packaging would make shopkeepers reduce the size of their tobacco displays and that it would get rid of ‘enticing’ messages on packs such as “naturally mellowed premium tobacco for a smooth, full flavour”.⁵ Seventeen years later, these arguments are redundant. All tobacco advertising and sponsorship is illegal, packs are heavily regulated and a retail display is on its way. Plain packaging has become a solution looking for a problem, but with total prohibition still out of reach, it serves as an “incremental step” while campaigners prepare for what they call the “endgame”.⁶

2 Advertising?

All tobacco advertising has been banned in the UK since 2003 and the final tobacco sponsorship deal ended in 2005. With no tobacco advertising to link packaging to, anti-smoking lobbyists have resorted to portraying the packs themselves as the last remnant of tobacco marketing. ASH describe them as the “most ubiquitous form of tobacco advertising”, but they did not make this argument until very recently.⁷ When the total advertising ban was introduced, ASH congratulated themselves on an unequivocal victory which left no form of marketing untouched. “The ban is broadly defined,” they said in 2006, “a prohibition on any advertisement that has the purpose or effect of promoting a tobacco product.”⁸ Cigarette packaging would already be banned if it met this criteria. It isn’t because it doesn’t.

ASH expressed concern about brand-sharing when the 2003 ban came in and they worried about tobacco sponsorship of foreign Formula One races in 2005, but not a word was said about packaging and there was no complaint that cigarette packs were ‘exempt’ from the ban. Only in 2008, after the smokefree legislation had been secured and new targets were needed, did they change tack. Prior to this, neither ASH nor anybody else considered cigarette packaging to be advertising.

The World Health Organisation’s Framework Convention on Tobacco Control (FCTC) defines “tobacco advertising and promotion” as “any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly”.⁹

Although the FCTC requires governments to undertake a “comprehensive ban of all tobacco advertising, promotion and sponsorship”, it does not mention plain packaging and does not portray branding on cigarettes as a form of promotion.¹⁰

Cigarette packs do not provide information, they do not make claims and they do not seek to persuade. By their nature, they can do no more than remind customers of the brand’s existence and—in some cases—its price. The redefinition of packaging as a form of advertising by groups such as ASH is fresh rhetoric designed to serve fresh policy objectives. Necessity being the mother of invention, cigarette packaging has to be reinterpreted as a form of advertising so that anti-smoking lobbyists can complain about a “loophole” in an advertising ban which they had once praised for being comprehensive.

3 Scraping the barrel

In 2007, the BBC ran a poll asking: “Will graphic images on tobacco products stop you smoking?”. 36.3% of the 12,500 respondents said yes.¹¹ When the policy was later introduced, however, it had no observable effect on the smoking rate.¹² Indeed, none of the policies pursued by tobacco control in recent years has fulfilled its promise of lowering the smoking rate. A report commissioned by three anti-smoking groups in 2011 concluded that “whilst there has been a downward trend in smoking prevalence over several decades, this appears to have stagnated since 2007.”¹³ The authors did not dwell on the uncomfortable fact that this stagnation coincided with the rise of ‘denormalisation’ and aggressive anti-smoker policies, including smoking bans, graphic warnings and advertising campaigns showing the faces of smokers severed with fish hooks.

The BBC poll made no claim to be scientific and no one seriously expected 36.3% of smokers to give up as a result of graphic warnings being introduced. It is likely that many of the people who clicked ‘yes’ were nonsmokers and many of the smokers may have been only expressing vague approval rather than any commitment to quit. The survey told us nothing about what would happen in real world conditions, and yet in most respects it was no worse than the ‘scientific evidence’ used by groups like ASH in favour of graphic warnings and plain packaging.

The two policies are closely linked. One of the key arguments given in favour of plain packaging is that it will direct consumers' attention to the graphic warnings. It is difficult to believe that smokers are unaware of these images as it is (they take up 90% of the back of a cigarette pack in Australia), but nevertheless, that is their argument.

In recent years, cigarette packets have undergone a number of changes as a result of government policy. First, the health warnings became more direct, with messages that said 'Smoking Kills' rather than 'Tobacco seriously damages health'. Then, in 2003, the warnings doubled in size so that they took up 30% of the front and 40% of the back of every pack. Finally, in 2008, all cigarette manufacturers were required to place graphic images of disease and death on their packs. On each occasion, the anti-smoking lobby promised great things as smokers suddenly noticed that cigarettes were not good for them. The reality was less impressive. The new warnings would stand out for a few days, but soon became part of the furniture as smokers got used to them.

Each time the anti-smoking lobby wanted the warnings changed, enlarged or made more gruesome, they would point to recently published evidence showing that people found the next phase of pack design more off-putting than the last. Members of the public were shown the latest idea and their reactions were recorded. Because the new warnings were novel and different, respondents would usually say that they were more eye-catching. Nonsmokers would be asked to imagine how they would feel about the warnings if they were smokers, while smokers were asked if they felt "better informed" or "thought about quitting". Invariably, the majority of respondents said that they noticed the new warnings more than the old warnings. This was not surprising—they had long since become accustomed to the old ones. Even so, the effect is modest. In Australia, where graphic warnings were said to be a great success, the number of smokers who agreed with the statement, "Seeing the health warnings on packs makes me think about quitting" only rose from 50% to 56% between 2000 and 2008.¹⁴

It does not require a focus group to tell us that large things are more noticeable than small things, nor that photos of rotting teeth and gangrene tend to elicit

feelings of disgust. The question is not whether gory warnings grab people's attention when they first see them, nor whether they make smokers think about quitting (smokers often think about quitting), but whether smokers actually quit and nonsmokers do not start. The track record of the anti-smoking lobby's favoured blood-and-guts approach is unimpressive when it comes to these practical consequences.

A comprehensive study in Canada, the first country to introduce pictorial warnings, found that “the warnings have not had a discernible impact on smoking prevalence.”¹⁵ A similar study in Britain found that those who saw the warnings said that it put them off smoking, and some smokers said that it made them think about quitting, but when it came to actually increasing the quit rate, the warnings made no difference. As the researchers noted: “With the exception of an increase in avoiding the messages, there were few behavioural changes post implementation of the pictures.” They continued:

There were few changes post implementation of the picture health warnings in the number of health effects recalled or participant's perception of risk... There were no differences post implementation of the picture health warnings in the number of smokers reporting forgoing a cigarette when about to smoke one or stubbing out a cigarette because they thought about the health risks of smoking... Among young people, the impact of picture health warnings was negligible.¹⁶

Whereas traditional health warnings provide information, graphic warnings are designed only to shock and disturb. They neither arm the smoker with useful knowledge, nor educate the abstainer. They might just as well show a photo of crawling maggots or a pile of excrement, since the only intention is to appeal to reflexive human disgust. This was the view of Judge Richard. J. Leon who blocked a move by the US Food and Drug Administration to place gross-out images on cigarette packs in 2011. He refused to describe the images as warnings at all, noting that:

While characterizing the mandatory textual statements as ‘warnings’ seems to be a fair and accurate description, characterizing these graphic

images as 'warnings' strikes me as inaccurate and unfair. At first blush, they appear to be more about shocking and repelling than warning¹⁷

The failure of graphic warnings to lower the smoking rate will come as no surprise to psychologists. The problem with shock tactics is that they have a short shelf life. Like a sudden fright in a horror film, they get your attention the first time, but are soon forgotten or ridiculed. A number of studies have shown that adverts which elicit fear and disgust backfire because the viewer engages in aversive mental behaviour which makes him less able to process and remember the information being presented.¹⁸ The mind recoils, the heartbeat rises, but the message is rejected. Anti-smoking campaigners seem unaware of this. Their only aim is to chose the most graphic and shocking images.¹⁹ Consequently, as Leshner *et al.* say, "One possible explanation for the failure of anti-tobacco messages to meet hoped-for objectives is that they have been produced with limited understanding of how the intended audience cognitively and emotionally processes media messages."²⁰

It seems that abandoning sober medical advice in favour of gruesome images has been counter-productive. If so, it would explain why larger, graphic health warnings have not made a dent on the smoking rate in most countries. A 2009 report commissioned by the Australian government found that awareness of health warnings on the front of cigarette packs fell from 98% to 91% amongst smokers between 2000 and 2008 and from 80% to 56% amongst nonsmokers.²¹ This coincided with larger warnings and graphic images, but while the Australian Preventative Health Taskforce accepted the findings, they did not blame their sledgehammer approach, instead they called for a larger sledgehammer.

Plain packaging increases the prominence of warnings ... researchers concluded that warnings needed to increase to 90% if they are to 'connect with emotions of various styles of young smokers' and 'make cigarette packs less attractive'.²²

All that needed to be done to catch those stupid smokers' eyes was to ban branded packaging and increase the size of the warnings until they made up nine-tenths of the pack!

The sociologist Howard Becker once observed that moral crusaders often find themselves in the awkward position of having to insist that their methods are effective while simultaneously complaining that the situation is getting worse.²³ They can only hope that the public has forgotten that it was they who presided over the worsening situation. Fortunately for anti-smoking campaigners, the field of tobacco control is sufficiently obscure to escape serious scrutiny. No one holds campaigners responsible for past failings. Extravagant promises are quickly forgotten and they are smart enough to move onto the next campaign before anyone notices that the last policy fell flat.

As each change came and went without any measureable impact on the smoking rate, campaigners resorted to bigger and uglier warnings while implicitly admitting that previous efforts had been ineffective. Rather than accept that smokers knew the risks of their habit and continued to buy cigarettes for what was *in* the pack, not what was *on* the pack, the anti-smoking lobby held to its belief that if only warnings were larger and more disturbing, consumers would change their behaviour. If taken to absurd lengths, this would one day lead to demands for packs to be nothing more than one giant image of a diseased organ. That day is drawing closer.

4 Will it work?

The claims made in favour of graphic warnings in Britain were so modest that it is impossible to test whether the policy has worked at all. Campaigners originally claimed that it would lead to between 5,000 and 10,000 smokers giving up the habit.²⁴ This amounts to less than 0.05% of the smoking population and is so small as to be undetectable.

In the case of plain packaging, the claims made in its favour are even more feeble. Anti-smoking campaigners do not predict that the policy will have any effect on existing smokers, nor do they claim that it will have any impact on the smoking rate for many years. “Its primary target is not current smokers, hoping they will quit. If that happens it will be a bonus,” admitted Simon Chapman in June 2011, adding that the policy could only be evaluated “over the next 20 years.”²⁵ Considering the track record of previous initiatives, playing down expectations is a wise move and we can expect this proviso to be repeated by anti-smokers around the world, especially if plain packaging in Australia turns out to be another damp squib.

Since even the strongest advocates of plain packaging do not expect it to have much effect on existing smokers, the justification for the policy essentially boils down to the idea that children as yet unborn should not be “exposed” to the sight of the logo of a cigarette brand lest it stimulate the desire to smoke. Why cigarette branding should elicit such a response remains a mystery. No one born

this century will have even the dimmest recollection of tobacco advertising. No one under the age of fifty will recall ever having seen a cigarette advertisement on television. The logos and colours of *Marlboro*, *Silk Cut* and *Regal* bring back no glamorous memories to modern teenagers and can evoke no image for a whole generation of children, nor for any generation yet to come. For them, they are merely names which appear alongside pictures of black lungs and the words SMOKING KILLS. Very soon, they will not even be visible in shops and supermarkets; a total display ban is due to come into force between 2012 and 2015. The case for plain packaging therefore rests on the damage done to innocent young minds from seeing a cigarette pack laid on a table or pulled out of a pocket. Having been strangely influenced by the sight of the cigarette's logo, perhaps through some form of past-life regression, the child must remain under its sway until they reach the age of eighteen whereupon they enter a tobacconist—if such places still exist—to select the fabled brand and begin their new life as a smoker.

To state this proposition is to refute it. We are not talking here merely of a smoker being attracted to the colours blue or red and purchasing their tobacco according to their taste. Rather, we are talking about a nonsmoker making the decision to engage in a habit, the risks of which could not be more loudly trumpeted, simply as a result of seeing a colour and a logo peeking out from grandfather's top pocket. It is an extraordinary claim and its proponents offer less than ordinary evidence on its behalf.

The studies cited as evidence for plain packaging are of the same breed and calibre as those used to push graphic warnings. A number of papers were produced in the early 1990s when Canada contemplated plain packaging, and researchers have revisited the subject recently as a result of events in Australia. (The timing of this research suggests policy-based evidence rather than evidence-based policy.) Online surveys, focus groups and behavioural experiments have been conducted which typically lead to the conclusion that the old health warnings do not have much impact, but that punters are highly responsive to the next phase of pack design. In a typical experiment, researchers do little more than show branded and unbranded cigarette packs to their sample group and ask them for their thoughts. A number of studies involve images of different packs being

flashed up on a screen and participants being asked to recall what the warning labels said. Some find that plain packaging improves recollection of warnings,²⁶ others do not.²⁷ Either way, as experiments they bear a closer resemblance to something from *The Generation Game* than to serious science.

Regardless of whether plain packaging detracts from the warnings or draws attention to them, the anti-smoking lobby fails to acknowledge the crucial point: these health messages only tell people what they already know. The notion that people do not notice grisly images because the warnings ‘only’ take up half of the pack, or that the logo somehow detracts from the warning, is an insult to the public’s intelligence. The real reason that changes in the way warnings are presented make little or no difference is that knowledge about smoking’s health hazards is practically universal. Amongst the target audience of the under-18s, the Office for National Statistics found in 2006 that: “Almost all pupils thought smoking causes lung cancer (98%), makes your clothes smell (97%), harms unborn babies (97%), can harm non-smokers’ health (96%) and can cause heart disease (94%). These proportions have remained at similar levels since the 1990s.”²⁸ Information about the health implications of smoking clearly reached saturation point some years ago. According to ASH, a pack-a-day smoker sees the health warnings 7,000 times a year.²⁹ The idea that these people continue to smoke because they are insufficiently aware of the risks is risible.

One problem with the survey-based approach of the plain packaging ‘science’ is that respondents can easily guess the purpose of the experiment and are therefore more likely to give what they think is the ‘right’ answer. A more fundamental flaw is the implicit assumption that people who prefer branded packs to plain packs will not buy cigarettes if branding is banned. This is a leap of faith, to say the least—even the Department of Health describes the evidence as “speculative”—and the young people who participate in these surveys know it, even if advocates do not.³⁰ A study of Canadian and American school children found that the majority agreed that plain packaging made cigarette packs look “more boring” and “uglier”, but when asked what impact it would have on youth smoking rates, 71% said that it would make no difference at all.³¹ Indeed, most studies which involve direct questioning find that the majority of respondents expect plain packaging to have no effect on smoking prevalence and cigarette

consumption. This includes ASH's own "citizen's jury" who were "sceptical that branding encouraged people to start smoking or to continue smoking and so did not believe that plain packaging would reduce the number of smokers significantly."³²

Only one study has gone beyond the hypothetical to get a glimpse of the revealed preferences of consumers. This involved 12-17 year olds being shown images of branded and unbranded packs and being asked which celebrities would smoke them. (Cher and Mike Myers were said to be most likely to smoke cigarettes in plain packaging because the former is "outrageous" and the latter "doesn't care what people think."³³ Make of that what you will.) Most respondents said they would prefer to be seen with the branded packs, but when the time came for them to be paid for participating in the experiment, the 16 and 17 year olds were offered the choice of a compact disc, some movie tickets or some cigarettes. Those who chose the cigarettes were given the choice of branded or plain packaging. Most of them chose plain.

As if acknowledging the shakiness of their case, ASH has resorted to using dubious surveys which hinge entirely on conjecture. Disappointed with the apparent unpopularity of plain packaging in their previous survey, they commissioned a new poll in 2011 asking people how they would feel about plain packaging *if* there was evidence to support it.

Three quarters of people (75%) would support plain packaging if there is evidence that they make health warnings more effective

Four fifths (80%) would support plain packaging if there is evidence that they are less attractive to children

Almost two thirds (64%) would support plain packaging if there is evidence that they were less misleading about the relative safety of different cigarettes.³⁴

It seems that flights of fancy now count as evidence-based policy in the world of tobacco control. If hypothetical responses to speculative scenarios are to be the

guide, why not ask whether the public would support plain packaging if there was evidence that it would stoke the black market and lower prices? The answer, of course, is that this would not draw the answers ASH wants to hear, and yet these outcomes are rather more plausible than the possibilities listed above.

5 Unintended consequences

1 in 9 cigarettes smoked around the world is counterfeit or smuggled.³⁵ According to HM Revenue and Customs, tobacco fraud costs the British treasury £2.2 billion in foregone income.³⁶ Smuggled and non-duty paid cigarettes have been around for many years, but Europe has recently seen a significant growth in the market for counterfeit cigarettes made by organised criminals in completely unregulated environments. 190 billion counterfeit cigarettes are made each year in China alone³⁷ and 65% of the cigarettes seized in the EU are counterfeit.³⁸

Chemical analyses of these illicit products show that they contain two, three or even ten times the level of heavy metals found in legitimate brands.³⁹ It has been estimated that smoking 20 of these cigarettes is as bad for one's health as smoking 100 legal cigarettes.⁴⁰

Black marketeers will have two reasons to celebrate if plain packaging is introduced. If, as the behavioural experiments suggest, smokers generally prefer branded packages, some demand for them will remain after they have been banned. Consumers may associate their brands with quality, see them as a novelty, or regard them as having a familiar or classic design. This demand can only be met on the black market and there will be many opportunities to buy

from other EU countries which, whilst not illegal, will mean less tax revenue for Britain.

Yearnings for old-style packs may not be a widespread phenomenon—this is, after all, a virgin policy with unknown consequences—but counterfeiting could be a greater problem. Under current proposals, all packs will have to be the same shape and have the same dimensions. All packs will be the same colour and all packs will show the name of the brand in the same simple font. This is a law that might as well have been written by counterfeiters. They will need to do no more than shove their identical cigarettes into identical packs and change the brand name according to their customers' tastes. Although we should not follow the anti-smoking lobby's lead by making grand predictions about untried policies, readers can come to their own judgement as to whether standardising a product's packaging so that brands can only be distinguished by a word or two of simple text will help or hinder the illicit trade.

Smuggled and counterfeit cigarettes have a significant impact on public health by virtue of being cheaper to buy, as the Campaign for Tobacco-Free Kids notes:

Smuggling, whether of genuine or counterfeit brands, delivers cigarettes that are cheaper to buy. Because cheaper cigarettes lure youth and other new customers, they boost sales and consumption and make it harder for smokers to quit.⁴¹

Any policy which helps the illicit trade can only hinder efforts to reduce smoking, but it does not stop there. Plain packaging will result in people paying less for their cigarettes for other reasons. The first is that manufacturers operating in a completely “dark market”—ie. one in which they have no communication with their customers—are only able to compete on price. The second is that many consumers will drift towards cheaper brands when the premium brands lose their identity.

It is no secret that many consumer goods are virtually identical and can only be distinguished by their brand names. Sometimes this fact is so well known that manufacturers make little attempt to conceal it (petrol and salt, for example,

are sold with minimal branding), but in most cases industries rely on building a trusted brand in the hope that consumers will pay a premium. Paracetamol, for example, can be bought for a few pence in a generic box or for considerably more in a glossier box with a well-advertised brand name. Bottles of mineral water compete in a multi-billion pound market on little more than brand recognition.

Knowing the power of packaging to imply quality, companies often produce two barely distinguishable versions of the same product and give the budget brand a consciously inexpensive-looking package, even though it would cost no more to make it look glitzier. The same is true of cigarettes which are branded and packaged according to the price point. One in two smokers cannot distinguish between similar cigarettes in blind trials and it is reasonable to expect many of them to downgrade to cheaper brands under a regime of plain packaging.⁴² This is the main reason the tobacco industry is so vehemently opposed to plain packaging: its top brands are worth billions of pounds and any government which misappropriates them can expect to be sued, as is already happening in Australia.

Anti-smoking campaigners have been very effective in portraying the industry's opposition as an admission that it will reduce the smoking rate. Why, they ask, would cigarette companies fight plain packaging so vigorously if it was not going to deter people from smoking? From the perspective of the zealots, plain packaging has passed what they call the "scream test" which assumes that anything that angers the industry must be good for public health.⁴³

This facile interpretation reduces politics and economics to the good-against-evil stereotypes of a comic book. Anti-smoking crusaders benefit from polarising the issue in this way, but it is simply not true that the interests of the industry and the interests of public health are inevitably in conflict. Just as public health and the industry will both suffer from a booming black market, so they will both suffer from the crippling of premium brands. Anti-tobacco crusaders fail to understand, or choose to ignore, the difference between turnover and profit. It is the profitability of premium brands which is at stake in the plain packaging issue, not cigarette consumption *per se*.

Advocates for plain packaging mislead the public when they claim that the industry fears a drop in overall consumption as a result of plain packaging. In its briefing paper, ASH states that “industry analysts believe that plain packaging would have a significant negative impact on cigarette sales”.⁴⁴ This is a reference to an interview published in the trade magazine *Tobacco Journal International* which quotes a Citigroup analyst as saying:

“If the proposal is carried out, it would reduce the brand equity of cigarettes massively. In my opinion, more than half the brand impact is in the design of the cigarette packet, as opposed to the name of the particular brand. As the industry’s profits depend on some consumers paying a premium of as much as £1.50 (EUR 1.90) for certain brands, anything that weakens this will dramatically reduce profitability. In terms of market shares, you would expect an even more rapid trend of downtrading. Over time, I think the proposal would result in a very severe reduction in the industry’s profit.”⁴⁵

No fair-minded reader could read this interview and interpret it as a prediction that there will be a “significant negative impact on cigarette sales”. It is clear that the analyst’s view is that the negative impact will be on the premium market as smokers switch to less profitable brands. There is no suggestion that total cigarette sales will fall as a result of plain packaging, nor that the number of smokers will decline. Not only do ASH misrepresent the view of industry analysts, they also fail to mention that the same interviewee said that plain packaging is “a complete confiscation of intellectual property” which he is “convinced” will fuel the black market.⁴⁶

Anti-smoking lobbyists insist that cigarette packaging is used to “lure” in nonsmokers. As we have seen, this is a relatively new claim on their part and there is no evidence for it. We can say this with some certainty because we know more about the internal workings of the tobacco industry than we do about any other business. 79 million pages of private tobacco industry documents spanning decades were made public in the 1990s and other secret documents continue to leak out.⁴⁷ This extraordinary hoard of memos, letters, books, briefings and speeches has been pored over by anti-smoking researchers for years. If cigarette packaging was designed to attract nonsmokers, we would expect to find some

admission of it in these pages, and yet not a single document has ever come to light showing that this is the case.

There is, however, ample evidence that the tobacco industry sees branding as an important way of competing for market share. Numerous documents show that cigarette companies view packaging as a means of encouraging existing adult smokers to switch to their brands (since the total advertising ban, it has become their *only* means of competing). Despite this evidence, the anti-smoking lobby denies that brand switching is the real aim. They say that most smokers stick to the same brand of cigarette for years (true) and that only 1-3% of smokers wait until they get to the counter before deciding which brand to buy (probably true).⁴⁸ This, they claim, means that there is not enough switching to make any kind of marketing worthwhile. Again, this is not true. That 1-3% represents a market worth many millions of pounds and is well worth fighting over.

ASH inadvertently highlight the importance of brand-switching when they quote the industry's own words in their briefing paper. Most of a page is devoted to a "case study" involving *Lambert & Butler*, which is presumably supposed to demonstrate the urgent need for plain packaging. *Lambert & Butler* was given a makeover in 2006 to mark its 25th anniversary and ASH quote Imperial Tobacco's Global Brand Director as saying: "The effect was very positive. Already the number one brand, our share grew by over 0.4% during this period—that might not sound a lot but it was worth over £60 million in additional turnover and a significant profit improvement."⁴⁹

To ASH, this little story illustrates the importance of branding to the tobacco industry. Indeed it does—the industry does not deny it—but it actually shows something more interesting. Firstly, it confirms that cigarette companies focus on market share, ie. tempting existing smokers away from rival brands. Secondly, it shows that large profits can be made from a very small number of smokers switching brands. Anti-smoking campaigners too often forget that the tobacco industry is not a monolithic entity but an assortment of rival firms fighting for the business of millions of smokers. It is natural that they should wish to retain their right to compete for that existing market.

Should we care if cigarette companies becomes less profitable and are only able to compete on price? If smokers buy cheaper cigarettes from the licit and illicit market, perhaps we should. Price is widely seen as the single most important factor in influencing cigarette consumption, and yet here is a policy that will reduce demand for the most expensive brands, that will encourage the industry to compete by lowering prices and which is likely to stimulate the black market. For the zealots of the anti-tobacco industry, anything that harms Big Tobacco's profits is a good thing, but in this instance, what is bad for the tobacco industry is also likely to be bad for public health.

6 Intellectual property

Leaving the efficacy of the proposal to one side, it is far from certain that plain packaging is compatible with Britain's international trade commitments or with intellectual property law. Various international trade agreements protect trademarks and other intellectual property, including the Agreement on Trade-Related Aspects of International Property Rights (TRIPS), the North American Free Trade Agreement (NAFTA) and the Paris Convention for the Protection of Industrial Property.

All of these treaties allow exemptions if a benefit to public health is likely to occur but, as we have seen, there is little reason to believe that any such benefit will result from plain packaging. This is why the Canadian government rejected the policy in the 1990s. Unable to find good evidence that it would lower the smoking rate, and therefore improve public health, the Canadians concluded that plain packaging would breach international trade agreements and ditched it. "We would have to buy the tobacco companies' trademarks," said a spokeswoman for the health ministry in 1995, "and that would cost us hundreds of millions of dollars."⁵⁰

None of these treaties have been changed to the advantage of the anti-smoking lobby since 1995. With the tobacco companies signalling their intention to challenge the expropriation of their trademarks, the British government would

be left arguing for an exemption on grounds of health despite its own health department describing the evidence as “speculative”.

Expert opinion suggests that the government would lose. The European Communities Trade Mark Association, which has given expert advice on intellectual property since 1980, says “the introduction of plain pack legislation would involve various violations of treaty obligations.”⁵¹ The British Brands Group has told the Department of Health that plain packaging would be “contrary to the harmonised EU and international system of trade mark protection with which it is obliged to comply.”⁵² The International Trademark Association has come to a similar conclusion, saying:

*In light of the onerous implications of the Regulations on intellectual property rights, and considering the lack of discernible evidence linking restrictions on trademark use to the public health, we believe that the proposed regulations do not meet the requirements of necessity under the TRIPS Agreement.*⁵³

It is possible that all these trade organisations are wrong and do not understand the law. Or they could be right, and yet the courts may nevertheless choose to “cut a great road through the law to get after the Devil”, to quote the famous line from *A Man for All Seasons*. If that happens, other industries might heed Thomas More’s next line in that film and ask where they will hide when all the laws are flat and the Devil turns on them.

7 Who's next?

The tobacco industry is not alone in jealously guarding its brands. Any industry would fight to protect its intellectual property, especially when there is no compelling case that such theft would yield public health benefits. If plain packaging is introduced, other industries may soon find themselves embroiled in a battle to protect their own trademarks because, as the International Chamber of Commerce told the Australian government in 2011, “plain packaging legislation, even if targeted only at tobacco products, creates a dangerous precedent that will have far-reaching impacts on the rights of trademark owners, on intellectual property rights in general, and most important, on Australian consumers.”⁵⁴

If the public health lobby succeeds in convincing politicians that packaging is a form of advertising, the implications for other companies will be profound. There would be a strong argument for placing other products which cannot be advertised in brown wrappers with graphic images. The most obvious targets would be alcohol, fatty foods and sugary drinks, all of which are subject to a pre-watershed ban and may soon be subject to a total broadcast ban. If children are to be ‘protected’ from seeing advertisements for these products, why should they be “exposed” to their “glitzy” packaging on supermarket shelves?

The extension of plain packaging to other products is not just possible, it is highly likely. In recent years, the public health industry has engaged in what one doctor calls “extreme mission creep”.⁵⁵ What happens to tobacco today tends

to happen to other ‘unhealthy’ products tomorrow. It happened with sin taxes, it happened with advertising bans, it happened with health warnings and we can be confident that the temperance lobby and the diet police will fight for it to happen with plain packaging.

This ‘slippery-slope’ took hold in Australia before the ink was dry on the plain packaging bill, as Australian Senator Cory Bernadi recalls: “[O]n the very first day [after the plain packaging legislation was passed] they moved onto drinking. People who were advocating plain packaging were saying “We should have this for alcohol. We should have it in fast food”. Where does it end? The nanny state will never end because there is always another cause to advocate for.”⁵⁶

This is no exaggeration. In May 2010, an Australian anti-obesity group suggested extending plain packaging to the food industry. “If the health and welfare of people is important enough to our government to control the tobacco industry,” they said, “then the same approach should be applied to the junk food industry ... It might seem radical but perhaps the junk food industry needs to be forced to use plain packaging too.”⁵⁷ A few days later, a letter appeared in the *Medical Journal of Australia* written by two public health professionals challenging the Prime Minister to explain why ‘junk food’ was getting off so lightly.

*In light of the Australian Government’s recent mandate on plain packaging for tobacco products, we can see no reason why this should not be extended to processed foods possessing no redeeming nutritional qualities. This would include soft drinks, potato chips, a great many of the so-called foods offered as replacements for fruit in children’s school lunches, biscuits and sweets. We challenge the Prime Minister and Minister for Health to do this, or explain why they won’t.*⁵⁸

Twenty years ago, slippery slope arguments could be dismissed as conjectural, even paranoid. Even ten years ago, one could be forgiven for thinking that the campaign against smoking was, as the anti-smoking lobby always maintained, a unique response to a unique problem. In those ten years, however, there has been abundant evidence from around the world demonstrating that campaigners see tobacco-style regulation of alcohol and food as a natural progression. All

draconian public health policies begin with smoking, but once they have been enshrined in law, it is not a question of if, but when, they are extended to other lifestyle choices. Temperance lobbyists waste no time in complaining about the perceived ‘loophole’ which allows killer alcohol to be exempt from regulations that are applied to killer tobacco. Obesity campaigners and food faddists then jump on the bandwagon, comparing ‘Big Tobacco’ to ‘Big Food’. All that is required for them to seize the moral high ground is to remind the public that alcohol is linked to throat cancer and processed meat is linked to colon cancer. Why treat one carcinogen differently to another? The result is a spiral of self-perpetuating illiberalism which gives fanatics of every persuasion an array of tried-and-tested weapons with which to further their own agendas. To think that plain packaging will be any different is to allow hope to triumph over experience.

When ASH campaigned for a total ban on tobacco advertising in 1997, they issued a briefing paper which stated that the ban was “not a precedent for wider restriction”.

A ban on the promotion of tobacco is occasionally portrayed as the harbinger of wider restrictions and an authoritarian ‘nanny state’. Often this is made into a reductio ad absurdum argument in which the government is portrayed as regulating everything. This is false: the case for action against tobacco is based on its unique characteristics and enormous toll of death and disease even when used as intended. No other product comes close to matching this.⁵⁹

Fifteen years on, all alcohol and various types of food have been prohibited from advertising on television at times when children might be watching. In 2009, the British Medical Association announced their intention to “implement a complete ban on [alcohol] advertising as has been done very successfully with tobacco”⁶⁰ because “any level of drinking increases the risk of cancer”.⁶¹ In 2011, a comprehensive alcohol advertising ban was put before the House of Commons by a Conservative MP, but failed to proceed due to a lack of parliamentary time.⁶²

Meanwhile, the New Zealand neo-temperance group Alcohol Healthwatch called for “prominent, specific and bold health warning labels using graphics

to be placed on all alcohol products”⁶³ and Australia’s Preventative Health Taskforce recommended graphic warnings on alcohol based—inevitably—on “the tobacco labelling experience”.⁶⁴ Simon Chapman, Australia’s champion of plain packaging, has spoken out in favour of graphic warnings on booze,⁶⁵ as has the British Medical Association.⁶⁶

In 2010, just five years after mandating graphic warnings on cigarettes, the government of Thailand became the first in the world to unequivocally endorse photos showing domestic violence, suicide, diseased livers and car accidents on all cans and bottles of wine, beer and spirits. The justification for this policy was familiar. Alcohol, like cigarettes, “must not be regarded as an ordinary commodity in any circumstances.”⁶⁷ The debt owed to tobacco control was obvious and freely stated. By “drawing experience from tobacco control”, advocates demanded pictorial warnings which would take up 30-50% of the container, including those imported from other countries.⁶⁸ On this occasion, however, the policy stumbled when the World Trade Organisation condemned it as an unnecessary restraint of trade. The EU was also nonplussed by the proposal. Despite actively pushing for graphic warnings on cigarettes, the European Commission wrote to the Thai government, inviting them to consider “less trade restrictive measures” and “different, less costly and burdensome alternatives”.⁶⁹ Ironically, Australia was amongst the countries to protest at the Thai proposal.

Mandating graphic warnings on cigarettes is a newer idea in the US, but when they were proposed in summer 2011, one San Francisco journalist leapt at the chance to take the ‘next logical step’:

It’s about time we take the graphic warning notion and direct it toward obesity. There should be someone injecting insulin into themselves on a package of cookies. There should be someone getting liposuction on a bag of potato chips. There should be a picture of a man having a heart attack on every bucket of fried chicken. Energy drinks should show a person convulsing on the floor.

After all, there are pictures of fit and toned people on packaging for fitness equipment, so why not show the effects of fatty, processed foods right

on the labels? ... The standards to which cigarette packaging is held to should be applied to all unhealthy products—not just tobacco. If health is a political issue, it should be given equal treatment under the law.⁷⁰

Meanwhile, the Los Angeles Times told its readers:

With French fries and potato chips—and, of course, sweetened drinks—named this week as culprits in the nation’s growing girth, perhaps the same approach should be applied to junk food. Pleas to exercise and eat better haven’t worked, and the junk-food tax proposals are going nowhere fast.

But with obesity now linked to almost 17% of the nation’s medical costs, something must be done.

Perhaps images of bulging stomachs or dimpled thighs? Or limbs amputated because of diabetes or chests cut apart in desperate attempts to treat late cardiovascular disease? Could such images on a bag of chips or a can of soda be a deterrent come snack time?⁷¹

Not a precedent for wider restrictions, indeed! And yet, here is the anti-smoking lobby in December 2011 still recycling the same old line in relation to plain packaging:

Myth #7: It may be tobacco today but other consumer products will follow

FACT: Tobacco is not like any other product, it is the only legal product on the market which is lethal when used as intended. The UK and over 170 other governments have signed up to the WHO Framework Convention on Tobacco Control which places legal obligations on governments to regulate tobacco co would not set a products. Plain packs for tobacco would not set a precedent for other products.⁷²

It takes a very trusting personality, or perhaps a bout of amnesia, to take such promises seriously.

8 Conclusion

In her book *Marketing Health*, the public health historian Virginia Berridge charted the transition in health education between 1945 and 2000. In the 1950s, messages from the Ministry of Health were strictly advisory, with authorities reluctant to tell people how to lead their lives. This began to change in the next decade when the “older local ‘information-giving’ model was being superseded by persuasive messages produced by a centralized technocratic agency.”⁷³ Modern advertising techniques were harnessed to bring about behavioural change, and yet the focus remained on education and free will. As the century wore on, shock tactics were employed in anti-smoking efforts, later being adopted by campaigners against drink-driving, binge-drinking, obesity and climate change.

By the end of the century, a fully professionalised, neo-prohibitionist tobacco control movement had become the *de facto* policy-makers in matters of smoking. In the new millennium, persuasive techniques were dropped in favour of naked paternalism. Several anti-tobacco marketing campaigns were so aggressive that the Advertising Standards Agency declared them to be unfit for children to view⁷⁴ and the British Medical Association revealed the true authoritarian nature of their “smokefree” campaign when they called for a ban on smoking in cars even if no other person was present.⁷⁵

It is no coincidence that the shift from education to coercion occurred at a time when a large class divide was opening up between smokers and nonsmokers. “Those who knew the history of public health sensed that a change was in

the air,” wrote Berridge of the shifting attitudes of the 1990s, “Once a habit was associated with the poor, it was much easier to adopt a more punitive approach.”⁷⁶ People in social class V are currently three times more likely to smoke than those in social class I.⁷⁷ Paternalists view this ‘hardcore’ of smokers as unresponsive to the educational approach and are prepared to resort to heavy-handed tactics which would be viewed as patronising and authoritarian if the target audience was predominantly middle-class.

The rationale for introducing plain packaging is infused with a profoundly misanthropic view of the public as feeble-minded dupes who are so impressionable that the mere glimpse of a colour and logo peeking out from above a photo of a tumour inspires them to take up smoking. It is the most condescending policy yet advanced by the increasingly desperate tobacco control movement. Even its strongest advocates do not pretend that it will educate or inform. On the contrary, as the British Brands Group says, it is a “move in the opposite direction to other Government policies, leading to less informed, empowered consumers, less competition and markets that work less well, with the burden on enforcement authorities becoming heavier not lighter. At the same time we see no assurance that the stated policy objective will be achieved.”⁷⁸

If the true aim of the anti-smoking lobby is to remove what they routinely, if laughably, describe as “glitzy” packaging, this could be achieved by removing the branding and leaving the pack white. Instead, focus groups have been convened to decide what is the most off-putting colour for use on these “plain” packages. The answer, in Australia at least, is “olive green” (a decision that has angered olive farmers!)⁷⁹ This appeal to disgust is a further indication that neither informing the public nor “protecting” children from marketing is the real issue. This was shown beyond all doubt in January 2012 when Australian anti-smoking activists announced that their next objective was to make cigarettes “foul-tasting”.⁸⁰

Plain packaging is a further move towards what the artist David Hockney describes as the “uglification of England”.⁸¹ Just as millions of superfluous No Smoking signs bludgeon smokers with reminders of their deviancy, so too will plain packaging and retail display bans marginalise twelve million people while

softening up the rest for the neo-prohibitionists' unconcealed "endgame" of total prohibition. "Plain packaging presents an opportunity to further 'denormalise' tobacco products and change the social acceptability of tobacco use", says the Department of Health.⁸² But since when has the Department of Health's role been to decide what is socially acceptable? The architects of the National Health Service surely never intended it be a vehicle for social engineering, manipulation and 'denormalisation'.

The case for viewing cigarette packaging as a form of advertising is spurious and the claim that brand recognition encourages participation is extraordinarily weak. I am aware of the brands *Tampax* and *Winalot*, but this does not tempt me to purchase either. In any case, cigarette brands will still exist under a plain packaging regime, including those which supposedly imply quality or low tar. Perhaps the next stage of the anti-tobacco campaign will involve the abolition of brand names in their entirety.

Plain packaging cannot be regarded as a public health policy in any accepted sense, let alone as a health education policy. It is one thing to force a manufacturer to label a product with a warning, but quite another to confiscate the packaging in its entirety to create public propaganda from private property. Rather than helping people make informed decisions, it seems that the overriding goal of plain packaging is to annoy the tobacco industry, inconvenience retailers and stigmatise consumers. Few of us will feel especially sympathetic towards the cigarette companies, but hard cases make bad law and the senseless trampling on property rights, along with the likelihood of further "mission creep", has implications that go far beyond tobacco.

As the coalition of anti-tobacco groups sets its well-oiled public relations machine in motion for yet another legislative campaign, we can expect flattering talk of politicians taking "bold" and "courageous" action, as if there was something heroic about buckling to monomaniac pressure groups. Implicit in this flattery is the threat of being denounced as weak and cowardly if they do not support the proposal. Many MPs will capitulate for this reason alone. Despite the absence of evidence that plain packaging will do any good and the likelihood that it will do harm, campaigners will claim that the policy will at least "send a message".⁸³

Indeed it will, but it will not be the message the anti-smoking lobby has in mind. The real message that will be sent if the plain packaging advocates prevail is that there is no policy too preposterous that it cannot be enshrined in law on the cynical and disingenuous pretext of protecting children. It will be the triumph of a dogmatic minority over a government which claims to be opposed to “unnecessary legislation” and “excessive regulation”.⁸⁴ It will send a message that laws masquerading as public health initiatives are no longer constrained by evidence, reason or common sense. Indiscriminate, frivolous and illiberal, the endorsement of plain packaging will serve to confirm the old adage that if all you have is a hammer, everything looks like a nail.

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