Tobacco Tax Initiative Is a Costly Pro-Business Hoax

By Norm Kjono

German philosopher Arthur Schopenhauer said. "All truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident."

But what if the self-evident is ridiculed or denied? Do we then oppose the contradiction?

Ordinarily, one leaves such questions to philosophers. But when confronted with $2.1 billion in new health care costs for a state that endures perennial budget crises, taxpayers must be pragmatic. California voters should consider the self-evident truth that comes with Proposition 86, which would add $2.60 per pack in new cigarette taxes, and also increases taxes on cigars, pipe tobacco and smokeless tobacco. Should the measure pass, the voters who do not smoke will approve $2.1 billion in new taxes on those who do and will also be fattening the bottom lines of companies that produce smoke-free nicotine products.

Proposition 86 is based on the premise that the 14 percent of California adults who smoke should finance $2.1 billion in new state health care programs that benefit all of the population. The ballot measure exploits the intolerance of a politically unpopular target group to impose a tax hoax on nonsmokers. Several sets of facts make this clear.

First, consider the research paper "Toward a Comprehensive Long Term Nicotine Policy," published by the journal Tobacco Control in 2005. The abstract says, in part, "A three-phase policy is proposed. The initial phase requires regulatory capture of cigarette and smoke constituents liberalizing the market for clean nicotine … The second phase anticipates clean nicotine overtaking tobacco as the primary source of the drug (facilitated by use of regulatory and taxation measures); simplification of tobacco products by limitation of additives which make tobacco attractive and easier to smoke (but tobacco would still be able to provide a satisfying dose of nicotine). The third phase includes a progressive reduction in the nicotine content of cigarettes, with clean nicotine freely available to take the place of tobacco as society's main nicotine source."

Second, consider Washington state's experience with initiatives that added a total of $1.20 per pack. In June 2000 and January 2006 — a period that includes both cigarette tax increases — a carton of Marlboro cigarettes and a box of Nicorette nicotine gum were purchased on the same day at the same store. On a per unit basis, the cost for a box of Nicorette increased by $12.06, corresponding with the $12.00 per carton increase in the cost of Marlboro. That phenomenon is known as parity pricing. In addition, the cost increase for nicotine gum corresponded to the comparative cost as stated in the Nicorette product handbook, "a pack and a half of cigarettes per day." The cost increase for Nicorette gum was precise as to both dollar amount and comparative cost per unit and that the increase did not occur by random chance.

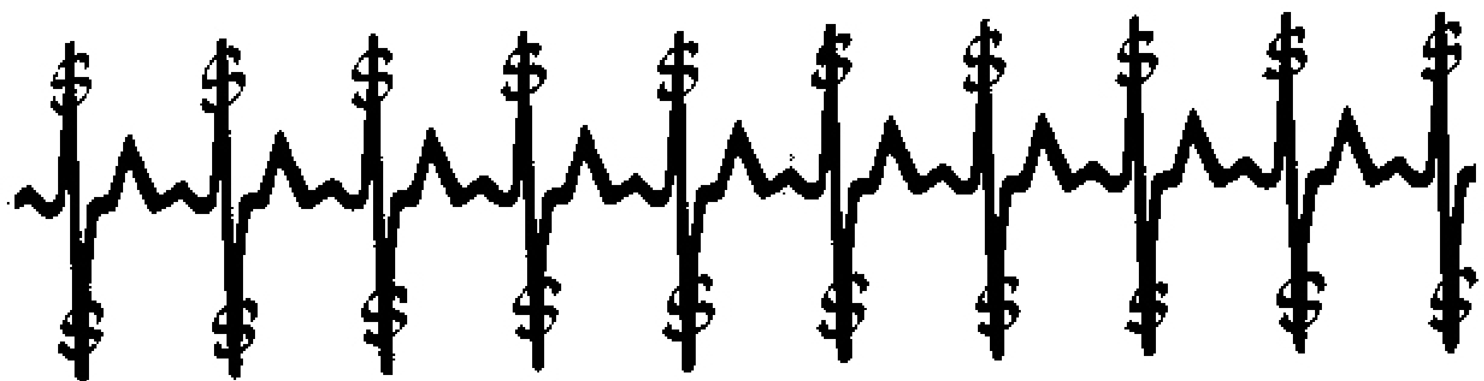
Fourth and finally, apply the tax structure for products in the FDA category known as nicotine delivery devices. Cigarette nicotine delivery devices will be taxed at $3.47 per pack should Proposition 86 pass. Smoke-free nicotine products are taxed at zero excise tax in California. When a consumer switches nicotine brands from cigarettes to smoke-free delivery devices such as Nicorette gum, consumer dollars that would ordinarily pay excise taxes to the state are transferred to corporate bottom line profits. Proposition 86 in effect legislates a $26.00 profit per box for Nicorette gum and other such products if parity pricing is applied in California.

What has not been disclosed to the voters about Proposition 86 is the plan to replace tobacco nicotine delivery devices with nicotine replacement tools. The measure will force a tax spread between tobacco and nontobacco nicotine delivery devices that will assure significant profits for nicotine replacement device distributors.

Should Proposition 86 pass, nonsmokers who went into the voting booth to tax the other guy who smokes to pay for health care programs will actually turn state cigarette tax revenues into corporate subsidies. Absent the $2.3 billion in cigarette excise taxes that Proposition 86 would allegedly provide, who is left holding the proverbial bag for $2.1 billion in costly new state health care programs?

Perhaps in this contradiction we find an ironic but self-evident truth: those who can be baited by intolerance to charge their neighbor for benefits they enjoy can be readily switched to enacting multibillion-dollar costs for themselves. Having passed a self-evident contradiction, do voters then oppose themselves and their own best interests?

Norm Kjono is a Seattle-based columnist for www.forces.org, an advocacy group that opposes Proposition 86. He also serves as an expert witness in securities fraud cases.



Untreated, Patients Become Plaintiffs for Medi-Cal

By Clea Benson

Marketing consultant Ivanna Zelaya did not have health insurance in August 2005 when she fell asleep at the wheel of her car and plunged off a Northern California freeway.

Zelaya, of San Jose, spent three weeks in a coma. After she awoke, she spent months more at Stanford Medical Center recovering from a lacerated liver and brain injuries.

Zelaya qualified for Medi-Cal, the state's health coverage for the needy and disabled, because her injuries impaired her ability to work. But it took 10 months for the state to enroll her. As a result, she still did not have coverage by the time she left the hospital and was unable to get follow-up neurological tests, rehabilitation, or pain treatment.

Zelaya is the lead plaintiff in a recent lawsuit charging that the state is causing needless suffering and even death among thousands of people with disabilities illegally forced to wait months for medical care because of a staffing shortage in a state office.

State law says it should take no more than 90 days to sign qualifying applicants with disabilities up for Medi-Cal. But the process is now taking an average of 145 days — and as in Zelaya's case, sometimes even longer.

People with disabilities must first get approval from a state office in the Department of Social Services that determines whether they are really impaired. That office has a backlog of about 12,000 pending Medi-Cal applications.

"There's no practice of catching people who are critically ill or near death and getting them enrolled quickly, triaged quickly or effectively," said Kimberly Lewis of the Western Center on Law and Poverty, one of the attorneys who filed the case this month in San Francisco Superior Court.

The suit asks the court to order the state to end the delays and take immediate action in cases where people with urgent health needs and the wait time, Washington said.

But the suit says that is still too slow, especially when the consequences can be fatal.

"Our concerns are, you have a 90-day deadline by law. You have a 12,000- or 13,000-person backlog, and your goal is to try to reduce that the next couple of years?" Lewis said. "That's not good enough."

'There's no practice of catching people who are critically ill or near death and getting them enrolled quickly, triaged quickly or effectively,' said Kimberly Lewis of the Western Center on Law and Poverty, one of the attorneys who filed the case this month in San Francisco Superior Court.

have been waiting longer than three months for approval.

The groups filing the lawsuit reviewed more than 2,000 Medi-Cal disability applications from 2005 and found that none of them were approved within the 90-day time limit.

Shirley Washington, a spokeswoman for the Department of Social Services, said the department could not comment on pending litigation.

The backlog and the wait were even worse last year, when close to 16,000 people with disabilities were waiting for their Medi-Cal applications to be approved and the state was taking an average of 310 days to process each file.

Because of state budget cuts several years ago, staffing in the Disability and Adult Programs office, which handles the applications, has been cut.

The state has hired an additional 35 workers over the past two years, which has helped cut the backlog

One cancer patient, unable to pay for chemotherapy, died without treatment while waiting for Medi-Cal, the suit says.

Eva Baez, 58, of Livermore, filed an application for Medi-Cal in January after learning she had a tumor in her liver. In March, doctors discovered a second tumor and urged her to get chemotherapy immediately. But Baez already owed $100,000 in hospital fees, so she did not begin treatment — even though she was unable to eat or move around and was in constant pain, the suit says.

State workers finally approved Baez for Medi-Cal in June, but by then it was too late. She died a few weeks later, according to the suit.

In Zelaya's case, the wait prevented her from getting rehabilitation services, pain treatment, and neurological tests after she was discharged from the hospital. When she was re-admitted to Stanford Medical Center with infections several times, the hospital's financial services representatives would call her hospital room, telling her they might have to transfer her to a public hospital because she did not have insurance.

"I don't mind paying … what I owe," Zelaya said. "But they were sending me to collections, and I wasn't working, I was on disability, and I couldn't even talk."

With help from an attorney, Zelaya finally got approved for Medi-Cal in June — almost a year after her accident and seven months after the legal time limit. Her Medi-Cal was backdated, and it retroactively covered some, but not all, of her hospital costs.

By that time, she said, she had already foregone medical care that she needed, such as rehabilitation services. She got stronger on her own by following exercise programs on television.

"I couldn't have physical therapy," she said. "I couldn't walk when I first came out of my coma. I couldn't talk too well. … I can talk better now. I did this all on my own."

Zelaya's struggles with Medi-Cal didn't end after she finally was enrolled.

The state requires people with disabilities to re-certify annually that they are still impaired and therefore still eligible for coverage. Soon after she obtained coverage, Zelaya got a thick letter in the mail.

"Two weeks after they approved me they sent me a package of 100 pages telling me my Medi-Cal was going to expire because it's been a year since I've had it," she said.

This article originally appeared in the Sacramento Bee.

Cocaine Sentencing Disparity Undermines Justice System

By Jeffrey A. Lowe

Currently, California is one of 13 states that still make a distinction in sentencing between powder cocaine and cocaine base, commonly referred to as crack, which results in a pattern of unequal treatment of the poor in our society.

Specifically, Health and Safety Code Section 11351 provides that the punishment for possessing for sale of powder cocaine is imprisonment in the state prison for two-, three- or four-year terms.

Conversely, Health and Safety Code Section 11351.5 provides that the punishment for possessing cocaine base, or crack, is three, four or five years.

This disparity in sentencing has an adverse effect on the poor and disadvantaged in our society.

According to the Justice Policy Institute, "Research has established no difference in physiological or psychoactive effects between rock cocaine or powder cocaine. They are only different in their method of consumption. Therefore, the disparity in crack and powder sentencing significantly undermines the fairness of the criminal justice system in California. Cocaine base, or 'crack,' is used by the underprivileged in our society because it is cheaper than powder cocaine."

The appeal of crack for the very poor is that they can experience cocaine's high for less money. The high is short-lived because there is so little cocaine in the product.

The California Caucus of Black Republicans state on their Web site, "The current California law adds an additional year for the exact same crime in any of the cases which involve cocaine in base form rather than powder form. We believe that this peculiarity needs to be corrected for the sake of good governance alone for starters … Continuing the present disparity in sentencing would maintain glaring though correctable bias in the criminal justice system, by giving higher-income offenders a different kind of justice than which is offered up to minority communities with a reference to the same drug."

In several reports to Congress, the United States Sentencing Commission has supported eliminating the sentencing disparity between powder and crack cocaine on the federal level. In 1997, a commission report stated, "If the impact of the law is discretionary, the problem is no less real regardless of the intent. The problem is particularly acute

The appeal of crack for the very poor is that they can experience cocaine's high for less money.

because the disparate impact arises from a penalty structure for two different forms of the same substance. It is a little like punishing vehicular homicide while under the influence of alcohol more severely if the defendant has become intoxicated by ingesting cheap wine rather than scotch whisky. That suggestion is absurd on its face. And ought to no less so when the abused substance is cocaine rather than alcohol."

The commission report further stated, "Bad laws weaken respect of good laws. Consequences follow. Sooner or later, all those people who feel alienated as a result of receiving what they believe to be unfair treatment and unjust sentences will be released from jail. Does this country really expect them to become productive members of society or might we anticipate some retributive behavior?"

Based on the California Department of Corrections 2004 admissions data, 1,113 persons were committed to state prison for possessing crack cocaine for sale. Reducing the midterm of four years to three years, with full sentence credits, would result in taxpayer savings of about $18 million per year .

Therefore, in the interest of promoting fiscal policy alone, the sentences should be the same for the powder or cocaine in base form.

California law enforcement organizations agree that the different sentencing laws are irrational, but they argue that the sentences for crack cocaine need to be decreased to match the sentences for powder cocaine.

The California Police Chiefs Association states on their Web page, "Our association … is mindful of the difference in penalties between crack cocaine and powder cocaine, and believes that the legislative solution is to increase the penalties for trafficking in powdered cocaine, not reducing the penalties for crack cocaine trafficking."

The California Narcotics Officers Association agrees that the penalty differentials between cocaine base and powdered cocaine are irrational, but the organization believes that the solution is to raise the penalties for possession for sale, purchase for sale, or transportation of powdered cocaine, rather than lowering the penalties for drug trafficking.

Both sentencing laws should be the same, and California Health and Safety Code 11351.5 should be lowered in the interests of equal protection and fiscal policy.

This inequality between rich and poor in the California criminal justice system does far more harm than done to the individual defendant. It undermines public confidence in the fairness of justice and reinforces the belief that our system of justice treats the poor far differently than the wealthy and privileged.

Until equal protection of the law in California becomes a reality for all, regardless of income level, the words of former United States Supreme Court Justice Harlan Stone still resonate: "Equal protection of the law is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand." *Hill v. Texas*, (1942) 316 U.S. 400.

Jeffrey A. Lowe is the former chair of the Los Angels County Bar Association criminal law section. He practices law in Beverly Hills.

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