ALLIES:

The ACLU and the TOBACCO INDUSTRY

by
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Morton Mintz, a free-lance writer, conceived and executed the report independently of the aforementioned organizations, which became sponsors after he had completed it.

He began covering tobacco issues for the *Washington Post*, where he was a staff writer for nearly 30 years, in 1965, and has also written about them for *The Nation, The New Republic, The Progressive, Nieman Reports, Legal Times*, and *The Non-Profit Times*. In 1990 he was the only American reporter to cover the Seventh World Conference on Tobacco and Health in Perth, Australia.

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EXECUTIVE SUMMARY

In 1986, sixty-six years after its founding as the guardian of the Constitution and the Bill of Rights, the American Civil Liberties Union became an open ally of the tobacco industry in its unceasing war against legislation to ban or restrict advertising and promotion of cigarettes.

In the following year, the ACLU secretly began to take substantial sums of money from the industry--most importantly, $500,000 from Philip Morris Inc. in the six years 1987-1992. ACLU Executive Director Ira Glasser says he solicited Philip Morris for the money.

Poverty is not and could not be the ACLU's defense for taking tobacco money. In 1990, for example, the Philip Morris contribution amounted to less than one-half of one percent of ACLU revenues. (RJR Nabisco also contributed, but Glasser did not specify how much.)

The advocacy of an industry cause and acceptance of industry money have not been disclosed by the ACLU to its approximately 300,000 members, either in Civil Liberties, the ACLU's quarterly newsletter, or in fundraising letters. This silence was vigorously defended by ACLU leaders--president (chairman) Nadine Strossen, former Washington office director Morton H. Halperin, and Glasser--in an interview. But there's dissension in the ranks: Former legal director Burt Neuborne says of the ACLU's acceptance of tobacco money, "Sure, they should disclose [it]."

The effect of nondisclosure is to add concealment to what in shorthand may be called advocacy and money. Standing alone, any of the three--advocacy, money, or concealment--could doubtless be defended. A combination of any two would raise ethical questions. The troika is a clear conflict of interest. The conflict doesn't trouble ACLU leaders. At bottom their position is that if it's the ACLU that has the conflict, it's ok. Conflict of interest is only one of numerous issues raised by the alliance:

* In taking tobacco money, the ACLU is motivated not by financial impropriety, of which there is no trace, but absolutism. The ACLU's absolute is that the defense of

corporate speech which promotes massive addiction and death is no vice. The way the ACLU reads the First Amendment is akin to the way National Rifle Association reads the Second Amendment, which is to justify a jihad against each and every government effort to restrict the "right" of anyone to buy guns for any purpose at any time.

* Ira Glasser says he would welcome a $10,000 contribution from Mafioso John Gotti. Having done this--in a conversation reported by New York Times columnist Anna Quindlen--the ACLU cannot draw a guideline under which *any* source of money--Hitler, Stalin, Pol Pot, Saddam Hussein--could be so odious as to warrant shunning by a "good" cause. This is because the ACLU's fund-raising philosophy, as concisely formulated by Burt Neuborne, is that "[i]t's self-destructive to turn away money for constructive projects."

(At least once, however, the ACLU did turn away money for a constructive project--because its executive committee, according to former member David Carliner, a Washington lawyer, imputed sexism to the man who would be honored by the First Amendment award the gift would have funded: Hugh Hefner, founder of Playboy magazine.)

* For nearly 40 years, the tobacco industry has executed a strategy for shaking public confidence and trust in the mountains of evidence, including at least 50,000 scientific studies, that incriminate its products in an ever-widening array of diseases, including addiction. A key element of the strategy, acknowledged in a Tobacco Institute internal document, is, "Creating doubt about the health charge without actually denying it." This is essentially what ACLU lawyer and lead lobbyist Barry W. Lynn has done on Capitol Hill in unsubstantiated testimony casting doubt on and scorning the evidence establishing that environmental tobacco smoke causes disease that kills non-smokers.

The scientific evidence has also incriminated environmental tobacco smoke (ETS), as has an Australian judge in a court case of which few Americans are aware. Notably, Ira Glasser has "no doubt that environmental smoke is a problem." But Barry Lynn has testified that it has not been shown to be dangerous.

* In more unsubstantiated congressional testimony, the ACLU has cast doubt on and disputed evidence that tobacco-industry advertising and promotion targets children and

increases smoking overall. Yet the evidence for both propositions is immense, although some of it has gone unreported in the mainstream press. In a 1990 Senate hearing, Morton Halperin went so far as to claim that "there is simply no evidence that tobacco advertising increases the level of smoking." Almost simultaneously, a report from Norway, the first nation to ban tobacco advertising, severely damaged Halperin's claim.

Last year, Halperin's claim was all but demolished by an official British government analysis of the results of tobacco-advertising bans in countries that now have them, Norway, Canada, Finland, and New Zealand. Importantly, the analysis--little noted in the United States--led the Health Committee of the House of Commons in London to "accept that the burden of proof for the contention that tobacco advertising increases tobacco consumption has been met..."

* The ACLU's extreme statements to Congress include this one by Barry Lynn: "The First Amendment simply does not countenance government content control of advertising of lawful products." But it does, and it has for decades. For example, the Food and Drug Administration must approve the labeling of a prescription drug before it can be sold, and the advertising of the drug must faithfully reflect the labeling. This is prior restraint, and the ACLU accepts it, just as it accepts the "government content control" imposed by the securities, postal-fraud, and other consumer-protection laws.

* Again without substantiating evidence, ACLU spokesmen in House hearings have argued that a ban on tobacco advertising and promotion would put the country on a "slippery slope" leading to bans on ads for products such as automobile and butter and finally to the evisceration of the First Amendment. Strikingly, the argument is ridiculed by two former top ACLU officials: Melvin Wulf, legal director 1962 to 1977, and Aryeh Neier, executive director 1970 to 1978.

* The ACLU's fight against the proposed bills to restrain tobacco advertising and promotion--even a bill to reduce its deductability to the level of a business meal--is rooted in a shaky constitutional proposition, a trivialization of the First Amendment. It is that a corporation is a "person" and that in consequence its speech is fully protected. Yet not a

word in the legislative history of the Fourteenth Amendment shows that the Framers intended to define a paper entity as human flesh and blood. Although the ACLU doesn't say so, the Supreme Court usurped legislative power when, in 1886, it transformed the corporation into a person constitutionally entitled to the equal protection of the laws.

* The bottom word is, disclosure. Disclosure is the sunlight that would disinfect the ACLU's conflict of interest in taking tobacco-industry money while advocating a tobacco-industry cause; and it would fairly test the doctrine that it is self-destructive to turn away money from any source for a constructive cause.

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I

In 1986, sixty-six years after its founding as the guardian of the Constitution and the Bill of Rights, the American Civil Liberties Union became an open ally of the tobacco industry in its unceasing war against legislation to ban or restrict advertising and promotion of cigarettes. In the following year, the ACLU secretly began to take substantial sums of money from the industry. The advocacy of an industry cause in Washington and acceptance of industry money in New York have not been disclosed by the ACLU to its approximately 300,000 members. The effect is to add concealment to what in shorthand may be called advocacy and money. Standing alone, any of the three--advocacy, money, or concealment--could doubtless be defended. A combination of any two would raise ethical questions. The troika is clearly a conflict of interest. But this is only one of the vexing issues raised by the alliance.

What is one to make of an organization that is a zealous advocate of government openness allying itself with an industry which, in the phrase of a distinguished U.S. District Judge, Judge H. Lee Sarokin of New Jersey, "may be the king of concealment and disinformation"? Are any sources of money so odious that "good" causes should shun them? What obligations of financial disclosure rest on a nonprofit organization that solicits money from the public? Do constitutional and ethical foundations uphold the ACLU's fight against the proposed bills to restrain tobacco advertising and promotion? Is a corporation a "person" whose speech is fully protected by the First Amendment?

What motivates the ACLU in this matter, it should be emphasized at once, is not financial impropriety, of which there is no trace, but absolutism. "Absolutes are the end of reason," a great legal scholar, the late Paul Freund, said in a Harvard Law School classroom thirty years ago. The ACLU's absolute is that the defense of corporate speech which promotes addiction and death is no vice. The way the ACLU reads the First Amendment is akin to the way National Rifle Association reads the Second Amendment, which is to justify a jihad against each and every government effort to restrict the "right" of anyone to buy guns for any purpose at any time.

II

Rank-and-file members with whom I have spoken are jolted to learn that the ACLU has joined forces with an industry that, they believe, knowingly and systematically deceives millions of people and addicts them to products which are the nation's leading cause of preventable death. Each year, by the latest count of the Public Health Service, lung cancer, heart disease, emphysema, and other tobacco-related afflictions kill 434,000 Americans--more than are killed by the combination of AIDS, alcohol, murders, suicides, automobile crashes, fires, crack cocaine, and heroin--and generate estimated medical and lost-productivity costs of $68 billion.

The membership receives frequent "emergency" and "urgent" appeals for money to carry out an ACLU traditional core mission: to protect the political, artistic, and cultural speech of flesh-and-blood human beings--even hated ones--who seek, as the Supreme Court once put it, "self-expression, self-realization, and self-fulfillment." The appeals are as impressive for what they omit as for what they say. They do not discuss commercial speech, which has the primary purpose of earning profits for corporations. They do not reveal that the ACLU has made a cause of protecting the speech of corporations, including multinational tobacco corporations. And they do not ask for money to help protect corporate speech.

Again, however, integrity is not the issue. The ACLU rigorously segregates fund-raising from its efforts in behalf of civil liberties. ACLU Executive Director Ira Glasser says that Barry W. Lynn, Legislative Counsel in the Washington office until he left in 1991, knew nothing of the tobacco money although he was the ACLU's chief spokesman on tobacco issues in Congress. Professor Burt Neuborne, of the New York University School of Law, gave the ACLU a quarter-century of devoted service. He became legal director in September 1982, working seven days a week and serving without pay the first four months. "I never saw an instance where our policy or activity was influenced by financial considerations," he said in a letter to me. "In fact, when I was legal director, I consciously walled myself off from fund raising so that I would have no idea who gave what."

Last fall, I took up all of the issues with Glasser, Executive Director since 1978. Now fifty-five he is a gruff, self-described "New York street kid" who has centralized authority in his hands. He is a former editor of Current, a liberal monthly, and had taught science and math at Sarah Lawrence College. Joining in the interview, at the ACLU's national offices in New York, were two other top officers who, unlike Glasser, are lawyers. One was Nadine Strossen, president (chairman) of the board of directors since 1991. A professor at New York Law School and former editor of the Harvard Law Review, she was named one of Ten Outstanding Young Americans by the U.S. Jaycees in 1986. The other participant was Morton H. Halperin, who was director of the ACLU's Washington office for a decade, but who resigned in October to become a senior associate of the Carnegie Endowment for International Peace. On March 31, 1993, President Clinton announced his intention to nominate Halperin as Assistant Secretary of Defense for Democracy and Human Rights. Glasser provided additional information in subsequent correspondence.

III

Philip Morris Companies, corporate parent of Philip Morris U.S.A., the largest cigarette company, has given a half-million dollars to the ACLU Foundation, which has the

same officers, directors, staffs, and quarters as the ACLU, and, of course, complementary goals.

The first blip about the Philip Morris connection showed up on British television screens in June 1992, when "First Tuesday," a program of Yorkshire Television, cited an internal corporate document listing an $85,000 grant to the Foundation in 1991. Ira Glasser filled out the picture. He told me that Philip Morris made annual grants of $75,000 1987 through 1990, and $85,000 1991-1992. Later, he wrote to tell me that Philip Morris had contributed $15,000 in 1991 and again in 1992 "to assist our AIDS project in publishing information relating to the Americans with Disabilities Act and people with the HIV virus. I had not been aware of this when we talked." The six-year total came to an even $500,000.

ACLU members who read the New York Times got the first inkling of money ties to tobacco companies from columnist Anna Quindlen last November. Listing the ACLU among numerous "good causes" that take the industry's "bad money," but providing no specifics, she wrote: "As a person who has lost family members to lung cancer, I'd want to know before donating whether a charity takes tobacco money. The most straightforward response I got from someone who does was from Ira Glasser of the ACLU who said, 'If John Gotti wanted to give $10,000, we would take it.'"

A public solicitation from a leading Mafioso invites a question: Is there *anyone* from whom the ACLU would not welcome money? If Gotti is an acceptable donor, what would render Saddam Hussein, Pol Pot, Idi Amin, Stalin, and Hitler unacceptable (I had named Hussein in the interview and the quartet of mass-murderers in a subsequent letter)? Glasser didn't answer directly but said that the ACLU would reject money from government and from "anyone who puts strings on it, limiting our ability to carry out our agenda." Under this guideline, a federal offer to fund, say, an ACLU effort to foster democracy in Haiti would be spurned.

For an unambiguous statement of the ACLU's funding doctrine I turned to former legal director Neuborne, who encapsulated it in nine words: "It's self-destructive to turn away money for constructive projects." In practice, the doctrine has not been so absolutist that it

could not be put aside to reject certain prospective donors, according to David Carliner, a Washington lawyer who in the late 1970s was a member of the ACLU Executive Committee. Told of the Philip Morris grants, he said the ACLU's policy as defined by Neuborne "appears inconsistent." He cited this episode: "A woman asked the Committee to accept a contribution to fund an ACLU award in honor of her father, a magazine publisher who had demonstrated a strong commitment to support of freedom of speech and press well beyond his narrow interests. The Committee decided not to accept the offer, considering it imprudent or not proper because some Committee members regarded him as a sexist. Indeed, they drew a preposterous analogy with a hypothetical offer from the Ku Klux Klan that would also not be accepted because it is racist." The spurned offer had been made by Christie Hefner, daughter of the founder of Playboy. After Carliner left the board in 1980 the ACLU leadership relented. This was perhaps necessary: How could a rejection of money for what would become the Playboy Foundation's "Hugh M. Hefner First Amendment Award"--presented to Morton Halperin in 1981--be squared with a public solicititation of $10,000 from a mobster?

IV

The Philip Morris grants were made on Glasser's initiative. When he solicits a tobacco company, he said, he tells its officers that the ACLU's interest is in protecting the rights of off-duty workers to smoke marijuana, say, or engage in homosexuality, because such activities are "none of the employer's business. "If you don't like it," he said he cautions company executives, "don't make the grant."

Having read "in various documents that Philip Morris had expressed interest" in privacy matters, Glasser said , he solicited it for money for the ACLU's Task Force on Civil Liberties in the Workplace. He emphasized that he acted entirely out of the ACLU's self-interest, and, seeing nothing "sensitive" in the solicitation, he didn't discuss it with his board. He said he had made it clear to Philip Morris that the ACLU "supported legislation

to restrict smoking in the workplace," and that a grant consequently would be "buying our opposition on something they supported."

Most recipients of Philip Morris contributions, including hundreds of African-American, Hispanic, women's, and cultural organizations, implicitly invoke an argument made by George Bernard Shaw in "Major Barbara": poverty is the worst crime, and a dollar in the hands of someone who does good is a dollar not in the hands of the Devil. Ignoring tobacco's terrible toll, they plead that without industry help their worthy causes would suffer grievously. But the ACLU doesn't plead poverty. Nor could it. In 1990, a representative year, the ACLU and its Foundation had combined revenues --from contributions, gifts, grants, and other sources--of $18,316,589, according to an annual public report, the Form 990, filed by each entity with the Internal Revenue Service. Of the total, the $85,000 annual Philip Morris grant was less than half (0.46) of one percent.

The IRS has granted tax exemptions to both the ACLU, which can seek to influence legislation and political campaigns, and the Foundation, which is permitted only to engage in limited lobbying. But the type of exemption possessed by the Foundation makes it far more appealing to contributors. For example, a grant to the Foundation can be deducted as a charitable contribution, while a grant to the ACLU can be deducted as an ordinary and necessary business expense only if it is *not* a true gift. The Foundation, a 501 (c) (4) organization, identifies the source of each contribution, gift, or grant exceeding two percent of the total of such income ($179,978 in 1990), while the ACLU, a 501 (c)(3) entity, identifies the source of each contribution, gift, or grant exceeding a mere $5,000. Thus Philip Morris's $85,000 contribution would have been disclosed in the IRS Form 990 if made to the ACLU (the largest single contribution it received in 1990 was $23,455, from a personal estate) instead of the Foundation.

V

Neither in its quarterly newsletter, Civil Liberties, nor in its fund-raising mailings has the ACLU informed its members of the Philip Morris grants or of a recent grant in an

undisclosed amount from RJR Nabisco, parent of R.J. Reynolds Tobacco, the second-largest cigarette manufacturer. Glasser said the RJR grant was for "a public opinion poll on personal autonomy issues," but provided no details. For that matter, the ACLU has yet to inform the membership of the obviously newsworthy generosity of its three largest benefactors--contributions aggregating $5,845,500 in the four years 1987-1990. The total breaks down this way, according to the ACLU Foundation's Form 990s, which Ira Glasser provided to me: the Edna McConnell Clark Foundation, $2,628,000; the Ford Foundation, $2,442,500, and the Carnegie Corporation, $775,000.

Glasser defended these news judgments. "Probably 90 percent of the cases and policy issues" in which the ACLU becomes involved--including prisoners' rights, on which the ACLU spends about $2 million annually, and children's rights--"are never the subject of fund-raising letters," he estimated. Rather, the letters address "burning issues of the day, [those] driving civil liberties concerns," such as impeachment and reproductive freedom. Confining fundraising letters to perceived burning issues is common practice among nonprofit groups.

Nadine Strossen acknowledged that the Philip Morris grants "probably would be of interest" to readers of Civil Liberties, but doubted that, as "a matter of editorial judgment," they would "trump" the editorial matter published in the quarterly. Thus she judged the tobacco-company grants and the huge gifts from the Big Three foundations less newsy or less interesting than the material offered the readers. This notion finds thin support in the twenty-page Winter 1992-1993 Civil Liberties. Its useful reports are outweighed by non-news and puffery. The text of fourteen of the amendments to the Constitution--news in the eighteenth and nineteenth centuries and the early twentieth century--fills most of page three. An "Ode to the Pornography Victims Compensation Act" consumes about half of page seven. A photo of the ACLU's new director of development occupies twenty-five square inches on page eight. A piece on the departing Morton Halperin--his accomplishments (helping to defeat anti-tobacco legislation goes unmentioned), praise from various senators, etc.--takes up all of page nine. An assortment of in-house ads eats a couple of pages.

VI

Philip Morris sponsors a multitude of social causes and sports and cultural events, and, to get its money's worth, spends scads of additional money to try to persuade the world that it is a truly enlightened and generous corporate philanthropist. Yet it sought no image-enhancing publicity for its ACLU grants. Why? "It's not our business," Glasser said. But it is Philip Morris's business. Months ago, I told George Knox, vice president / public affairs, that I had some questions, such as, why doesn't Philip Morris publicize its generosity to the ACLU? Knox said he would get back to me but didn't; nor did he return a second phone call. This reticence may be attributable in part to a fear of inciting right-wing ACLU haters--of whom there are many--to boycott the conglomerate's cigarettes, beers, cheeses, and numerous other products. Possibly, too, something other than undiluted devotion to civil liberties motivates its financial support of the ACLU. Evidence for this came in a November report in The Chronicle of Philanthropy on the Philanthropy Roundtable, "a self-described 'association for independent-minded grant makers'" which tries"to insure that their corporations do not give grants against their self-interest."

The report included comments on "charitable contributions" made by Roy Marden, Philip Morris's manager of corporate relations, at a Roundtable meeting in Colorado Springs. Much of what he said was public-relations boilerplate. However, he also said that in deciding on the companies' public-policy grants, "we always ask ourselves, How do we underscore our legislative, regulatory, and public interests, which eventually translate into the bottom line and eventually shareholder return?" For the bulk of the company's contributions to the ACLU, the obvious bottom line is that Philip Morris causes are enhanced in respectability when they become ACLU causes, at least so long as financial connections between the two are concealed. The First Amendment arguments made on Capitol Hill by the Tobacco Institute, the industry trade association of which Philip Morris is a leading member, and the ACLU are, in Glasser's word, "identical." Philip Morris has not been heard to complain. Glasser said, "I fail to see anything improper."

In November 1989 the Boston Globe disclosed that the ACLU "acknowledged that it has accepted grants from two tobacco entities," but, "citing confidentiality, refused to identify the contributors or the amounts..." The disclosure prompted Colleen O'Connor, then the ACLU's director of public education, to name one of the donors in a letter to directors of ACLU affiliates. "...the ACLU has in the past received a grant from Philip Morris earmarked for support of our workers' rights efforts," she wrote. She didn't specify the amount of the grant; didn't say there had been *three* Philip Morris grants, and didn't name the second entity (Glasser said it was the Tobacco Institute, which gave $1,000 in 1989). More importantly, the ACLU didn't tell its members what it had told its affiliate directors.

"We should not apologize for taking their [Philip Morris] support, any more than we would for taking Playboy's support for our First Amendment work, or trade union support for work beneficial to their members," O'Connor wrote. More bluntly, the ACLU in accepting contributions draws no meaningful distinctions among a manufacturer of cigarettes, a magazine saturated with photos of nude women, and organizations representing workers. Nor does the foundation of the ACLU's Pennsylvania affiliate. It received a $1,500 Philip Morris grant in 1991; it has also received money from the Playboy Foundation for a women's rights project. This is "the price of principle," i.e., the price paid for the opportunity to defend civil liberties, executive director Deborah Leavy said in an interview. Some would see it the other way round: the price of principle is exacted when one refuses needed or wanted money from anyone with a perceived serious taint.

Leavy emphasized the ACLU's firm commitment to the privacy of its donors, as did Glasser, Strossen, and Neuborne. They said that the ACLU, as do numerous other organizations, has donors who may not wish to be identified. Glasser was adamant: "We never disclose grants to the membership." But not everyone who respects a commitment to donor privacy embraces cigarette manufacturers as donors. Public Citizen, Inc. and Consumers Union thrive without seeking or accepting contributions from such sources. "CU works hard to earn your trust," Executive Director Rhoda H. Karpatkin said in a 1992

fund-raising letter. "...we will never compromise our independence by accepting advertising or contributions from those you expect us to judge."

Unexpectedly, Glasser told me that in his quarter-century with the ACLU he had seen "no evidence of anybody ever being interested" in its funding sources, and that until he heard from me (a duespayer for about forty years) no member had asked about tobacco-industry grants. Yet it is inconceivable that the membership would respond with a giant yawn were the ACLU to announce acceptance of money from, say, narcoterrorist Pablo Escobar, leader of the Medellin cocaine cartel. It's also inconceivable that the numerous ACLU members who have lost family members to smoking-induced diseases will be bored out of their skulls to learn that the ACLU takes tobacco money. So perhaps the imputed lack of curiosity about funding sources is attributable to the ignorance resulting from concealment, to the inattention of the mainstream press to the ACLU's campaign in Congress in behalf of tobacco advertising, and to the members' innocent assumption that their leaders would not ally the ACLU with the tobacco industry.

Matthew L. Myers, who was chief staff counsel of the ACLU's National Prison Project 1974-1980, told me, "One way for the ACLU to protect itself would be by being very open and very public about where it gets its money." Myers, now counsel to the Coalition on Smoking OR Health, which consists of the American Cancer Society, the American Heart Association, and the American Lung Association, went on to say: "That's precisely what the ACLU has been saying about how the government should conduct its business."

Toward the end of my interview with Burt Neuborne, I asked whether he would agree that the ACLU had erred in not disclosing that it was taking money from the industry. Citing "the special circumstances and emotion surrounding the tobacco issue," he broke ranks. "You're probably right," he said. "Sure, they should disclose it."

VII

A friend's reaction on hearing that the ACLU takes money from cigarette companies was instant and harsh. She would pay dues no longer, she said. "That's it." Told of this,

Glasser said: "We are anxious as a matter of policy, principle, and strategy to respond....It's harmful to us not to." In my questions, he went on to say, he discerned "some kind of implication of selective hiding here." He flatly denied there was any.

Glasser pointed out that he has no First Amendment problems with certain anti-tobacco strategies, including a most potent one: raising tobacco taxes (Canada has enacted large tax increases, with remarkable reductions in cigarette consumption resulting). But, he said, whether it's speaking up in alliance with reproductive-freedom interests (which gave money to the ACLU), or defending the constitutional rights of Communists or Nazis (none contributed), or attacking efforts to restrict tobacco advertising, the overarching guiding principle driving the ACLU is that government cannot carve out exceptions from the Amendment's protection of unwanted or hated speech.

"We are not interested in tobacco," Glasser said. "We are interested in the First Amendment." He recalled that he has stressed on television and in books and articles that the number of victims of illegal drugs is "trivial" alongside the number who die of tobacco-induced diseases. "I can't tell you how many times I've said that," he continued. In the 1960s, the ACLU had been "involved in getting anti-smoking ads on the air." Consistent with this traditional approach--fighting objectionable speech with more speech--Glasser wrote in The Nation in March 1987: "In a fair contest between medical facts and the tobacco industry's self-serving propaganda, the facts will win. That is the premise of the First Amendment. And that is what the past twenty years demonstrate." He meant that in those two decades, the proportion of Americans who smoke declined significantly. But "if it's naive to say the solution to racist spech is just more speech," as Mary Ellen Gale, a member of the ACLU Executive Committee, told USA Today in March, so may it be naive of Glasser to suggest that more speech can prevail in a "fair contest" in which one side--"the king of concealment and disinformation"--spends $4 billion a year on advertising and promotion. Thanks largely to this spending, the victory won by "the facts" was costly. During those twenty years, literally millions of Americans--hundreds of thousands annually--died of tobacco-related diseases, millions more were doomed, and millions of children were addicted.

A final point: The decline in smoking rates cited by Glasser ended in 1991 because all the speech against smoking failed to deter more and more blacks, Hispanics, and women from becoming first-time smokers.

VIII

The tobacco industry derives enormous power from spending nearly $11 million a day on advertising and promotion. Big chunks of this staggering outlay flow into the advertising, newspaper, and magazine industries--allies on the advertising / First Amendment front.

The industry derives additional significant power by investing heavily in politicians. Merely in the first three quarters of the 1991-1992 election cycle, according to a joint report by two anti-tobacco organizations, the Public Citizen Health Research Group and the Advocacy Institute, the industry's "soft money" investments in the Republican and Democratic parties were $1.34 million and $731,000, respectively. In a later joint report, the organizations revealed that in the two-plus election cycles from January 1, 1988, through June 30, 1992, tobacco interests invested $1,380,215 in sitting members of the Senate; in the eighteen months ended June 30, 1992, they invested $1,161,474 in incumbents in the House of Representatives. In addition, according to Philip Morris internal documents obtained by Doctors Ought to Care, a physicians' tobacco control advocacy group, the corporation spent $579,000 in 1989 alone to defeat nineteen major smoking-control bills in seven Southwest states, plus $158,000 on regional lobbyists to influence federal legislators from those same states.

Compared with the industry, the ACLU is a financial peashooter. Why then does it dedicate *any* manpower or money to the battle against tobacco-control bills (which were going nowhere in any case)? Because as a matter of principle, Glasser said, the government cannot be allowed "to start picking and choosing targets for exceptions to the First Amendment."

The ACLU leadership argues that the First Amendment bars government from controlling the content of ads for legal products, of which, of course, tobacco is one. By way

of example, the ACLU warns that those who regard abortion as murder would prohibit advertisements for abortion clinics, which won First Amendment protection in a peculiar 1975 Supreme Court decision rejecting "assumptions that advertising, as such, was entitled to *no* First Amendment protection..." (Emphasis added).

As an industry ally, the ACLU has been able to wheel and deal in order to achieve certain independent legislative goals in which the industry has no compelling interest. The ACLU called in some chits in an episode disclosed in the August 1987 National Journal. It decided "to use its tobacco connections to ask the Tobacco Institute to try to dissuade Senator Jesse A. Helms, R-N.C., from attaching an antipornography amendment to a bill that was intended to tighten restrictions on government eavesdropping on electronic communications," reporter Kirk Victor wrote. "Helms eventually decided to attach his amendment to legislation with an even better chance of passage, and the ACLU-supported measure passed." He went on to report that Halperin "explained that although tobacco lobbyists were called, they knew that such a request 'would not lead to our doing more on the tobacco bill---we were already doing a lot and would continue to work hard on the issue."

Halperin denounced the article. "The implication...was that we made a deal, and we agreed to do something that we would not otherwise do," he told me. "There is no evidence for that, and it is absolutely and completely false." He described the ACLU's approach to the tobacco lobbyists this way: "We have done something [opposing the bills to curb or eliminate tobacco advertising] for our own reasons, which had the effect of helping you. And now we are asking you whether, consistent with your own interests, you can assist us on another piece of legislation. We do that all the time."

But Pamela Gilbert, director of Public Citizen's Congress Watch, views the ACLU's approach to legislation as fanatical. In early 1991, the ACLU endorsed a business-backed bill designed to strip from RICO (the Racketeer Influenced and Corrupt Organizations Act) provisions enabling countless victims of white-collar criminals to sue for redress. Puzzled, Gilbert went to see Halperin. The ACLU having no position on white-collar crime, he explained, it could support the bill because it contained a provision the ACLU wanted to

see enacted. The provision--unrelated to the bill's main thrust--was intended to bar use of RICO against Operation Rescue, an organization of anti-abortion zealots. "I was startled," Gilbert recalled. She said she told Halperin that she still didn't understand why the ACLU would support the bill. In response, he illuminated the ACLU's *modus operandi* by volunteering a startling hypothetical: A bill introduced to legalize the sale of poisoned meat--another issue on which the ACLU takes no stand--contains an unrelated provision sought by the ACLU. So the ACLU would endorse the entire measure, just as it endorsed the bill to defang RICO. Whatever his personal objections to legalizing poisoned meat, Gilbert recalled Halperin saying, the ACLU would be right to do this. "I told him that I really can't believe that he would take such an irresponsible position," she said. His reaction? "He stood by it." Halperin did not respond to a written request for comment.

IX

On "First Tuesday," the British television program, Matthew Myers of the Coalition on Smoking OR Health said: "When I worked for the national ACLU the ACLU's position was a very strong one, and that was to preserve and protect the vitality of political, social and religious speech, commercial speech deserves less protection. However, suddenly over the past five-six years the ACLU has taken a very different position." "It may be a coincidence. It may not be a coincidence. But I think it's wrong for the ACLU to be accepting money directly from an organization on whose policies it's going to be issuing formal pronouncements."

Ira Glasser insisted no change in policy had occurred; rather, the ACLU continually "adapts" its tradition of protecting the freedom of commercial speech as particular threats develop. Perhaps ironically, according to Halperin, the trigger for the ACLU effort to defend the speech of cigarette companies was the effort of anti-tobacco advocates to push anti-advertising legislation. "That's what got us into it, "he told me. He also offered a what-will-people-think? rationale: If the ACLU hadn't intervened, it might have become "conspicuous by our absence" in the eyes of "many members of Congress who look to us" for

guidance on First Amendment issues and who might have inferred erroneously that such legislation was "not a civil liberties issue."

Glasser chided Myers for not having objected to the ACLU's taking of money--without disclosure--from others whose views it supported, such as family-planning and other groups supporting a woman's right to an abortion.

X

"I believe it is the obligation of the ACLU to oppose every attempt to limit the First Amendment rights of Americans , because each attempt leads to another," Morton Halperin told me. To argue otherwise, he suggested, is as unprincipled as it would be to suggest that the ACLU should abandon its support of the exclusionary rule (under which improperly obtained evidence is inadmissible in court) because it may free a criminal charged with a heinous crime. But the ACLU does not oppose "every attempt" to limit First Amendment rights. Its own statement of policy, formulated in 1975, recognizes "the need for the regulation of selling practices to minimize fraud, deception, and misrepresentations," as well as "occasions when public interest in health and safety permit valid restrictions on commercial advertising."

No less dogmatic than Halperin is Barry Lynn, his former subordinate. "The First Amendment simply does not countenance government content control of advertising of lawful products," Lynn testified at a July 1989 hearing held by Representative Henry A. Waxman (D-Calif.), chairman of the House Health and Environment Subcommittee, and again in July 1990, at a hearing held by then-Representative Thomas A. Luken (D-Ohio), chairman of the House Subcommittee on Transportation and Hazardous Materials. Not so: The First Amendment *does* "countenance government control of advertising." The ACLU itself recognizes this. To countenance "valid restrictions" on speech, as it does in its policy statement, is to countenance "content control."

The content control accepted by the ACLU is decreed by consumer-protection laws never struck down by the Supreme Court, particularly the Federal Trade Commission Act

of 1914, the Securities and Exchange Acts of 1933 and 1934, and the Food, Drug, and Cosmetic Act of 1938. The last permits a manufacturer to market a prescription medicine only with labeling approved by the Food and Drug Administration, and advertisements for the drug must faithfully summarize the labeling. Similarly, a broker offering securities must obey Securities and Exchange Commission regulations controlling not only an ad's content, but requiring a "tombstone" format--no photos, and text saying "no more" than the regulations permit.

Thus do consumer-protection laws impose prior restraints, which are normally anathema to civil libertarians. Yet the ACLU wages no campaigns against these laws. Glasser saw no conflict with the ACLU's opposition to prior restraint of tobacco advertising. If the government were to classify nicotine--the addictive component in tobacco products--as a prescription drug, the ACLU "would not oppose" all regulation of it, he said. However, he added, so long as nicotine is "a legal product which is not a prescription drug, the government cannot restrict speech" about legal products containing it. Insisting that the ACLU must be consistent, he asked rhetorically on what constitutional grounds could it resist government efforts to restrict the advertising of, say, abortions or condoms if it did not resist efforts to restrict the advertising of tobacco as well? "If government decided that it wanted to classify nicotine and distribute it the way morphine or barbiturates are distributed, the ACLU would not take a position on the government's ability to do that," he said. "When we resist attempts by government to select, prohibit, or restrict [the advertising of] a legal product, it does not matter what that product is."

In Glasser's calculus, clearly, it does not matter that government regulation of tobacco as a drug has historically been impossible. Thanks to the immense political clout wielded by tobacco-state legislators, legislation and administrative decisions have specifically exempted tobacco products from regulation by federal agencies whose mission under law is to protect the public from hazardous products. Nor does it matter that were cigarettes today--magically--to be proposed for sale for the first time, the government would unquestionably regulate them. In Halperin's similar calculus, "political realities" cannot be

permitted to "trample on the First Amendment," although First Amendment absolutism can trample on the public health. In May, Representative Mike Synar (D-Okla.) accepted Glasser's challenge by introducing a bill to make the FDA responsible for regulating the manufacture, sale, labeling and advertising of tobacco products. More than likely he's tilting at windmills.

XI

In his April 1987 testimony before Representative Luken, Barry Lynn said that bills to ban tobacco advertising and promotion incorporate "the assumption that every commercial speaker is obligated to give not only his side of the issue, but everybody else's." *Every* commercial speaker? *Everybody* else's? He followed this absolutism with a preemptive strike. In March 1989 he issued a 3 1/2-page single-spaced press release headlined: "BANNING PICTURES IN TOBACCO ADVERTISING: / AN UNCONSTITUTIONAL REGULATION OF SPEECH." The text began: "Congressman Michael Synar (D-Ok.) will announce later today the introduction of a bill to restrict the use of models, slogans, scenes, or colors in tobacco advertising." Exactly: The intent of the bill was to require tombstone ads for tobacco products--ads devoid of hype, particularly so that children would find them dull. Would this be "unconstitutional"? The American Law Division of the Congressional Research Service thinks not. It reasons that "[a] total ban on tobacco advertising would likely be upheld by the Supreme Court as constitutional" because restrictions short of a total ban would assuredly also be upheld.

A cornerstone ACLU claim is that tobacco ads have constitutional protection because they provide information. If the information is objectionable, Ira Glasser argued in The Nation, the remedy is more information. But do the ads provide *useful* information? This question was crucial to Alan B. Morrison, director of the Litigation Group of Public Citizen. His credentials to address it were impressive. In *Virginia Board of Pharmacy*, he had persuaded the Supreme Court, in 1976, to overturn a blanket prohibition on dissemination

of prescription-drug prices and accord them First Amendment protection because they provide useful information.

Morrison, testifying at a July 1990 Waxman subcommittee hearing, pointed out that in most cases where the courts have struck down ad bans, they found that the information the ads sought to convey was "truthful and verifiable." Unlike *Virginia Pharmacy's* prohibition on providing information on prices and availability, "there is nothing in any cigarette ad other than an attempt to persuade the reader to choose one brand rather than another for reasons that can most charitably be described as irrational," he said. Most cigarette ads "have no information at all, but simply present visual images, with a few catchy phrases like 'Alive with Pleasure.'" Saying he found it difficult to imagine how one could verify such a claim, he suggested that "a more appropriate caption ought to be 'Dead with Cancer.'" That would be useful information.

Lynn testified that the ACLU "does not oppose the...warning messages regarding smoking and health currently required in packaging or advertising" because they were attributed to the Surgeon General. But, he said, the ACLU opposed the proposed stronger, more prominent rotating messages on tobacco packages (for example, "WARNING: Tobacco Is an Addicting Drug") because they would be unattributed.

Lynn omitted three relevant points. First, for nearly twenty years, without protest by the ACLU, the words "The Surgeon General..." did not precede the cautions and warnings on cigarette packs. Second, the legislation's sponsors say privately that they would have been delighted to attribute the warnings to the Surgeon General if this would have won the ACLU's support in advancing the bill; but the ACLU showed no interest in exploring the possibility of such a compromise. Third, again without ACLU protest, the government has required unattributed warnings on numerous products--including, as noted, medicines--to protect the public health and safety, no matter the self-serving beliefs professed by manufacturers.

Lacking attribution to the Surgeon General, the proposed warnings are constitutionally out of bounds, Lynn went on to say, because they "amount to compelling

advertisers to include messages in their advertisements which *they* believe to be empirically false," or "to say those things which *they* do not believe to be true [emphasis added]." Under Lynn's implied standard, tobacco executives wanting to block the warnings would need but profess to "believe" to be "empirically false" and untrue the approximately 50,000 scientific studies incriminating tobacco in multiple grave diseases. Indeed, in depositions introduced into evidence in product-liability cases in the late 1980s, many of them, *swore* to their belief in the harmlessness of tobacco.

The late Milton E. Harrington, a former president of Liggett & Myers, testified that "smoking was not harmful...in any way." "What facts do you base that belief on?" New Jersey plaintiff's lawyer Marc Z. Edell asked. "Just my belief," he replied. The late Robert K. Heimann, a former chairman of American Tobacco, was asked whether the Surgeon General is "more qualified...than you" to determine whether smoking was hazardous to health? "No," he replied.

Well after the National Cancer Advisory Board had found "sufficient evidence for a cause-and-effect relationship between smokeless-tobacco [snuff] use and human cancer," and well after the International Agency for Research on Cancer had reported "sufficient evidence that oral use of snuff...is carcinogenic to humans," Louis F. Bantle, president of United States Tobacco, the leading maker of smokeless tobacco (snuff), testified: "I am unaware that anyone has said that snuff causes cancer."

Under a 1990 bill sponsored by Chairman Waxman and others, the warning would be at the top of the front and back of the package, occupying at least 25 percent of the space, and being printed in black on white, or vice-versa; the word "WARNING" would be in red letters. Lynn objected that specifying the placement and prominence of the warning would be constitutionally unacceptable. If the sponsors "wanted that warning to be specifically to encompass 80 percent of the advertising space, then I would say that it is so costly and unreasonable that [it] would violate the First Amendment."

He had his facts wrong: The space occupied by the warning would be not 80 percent, but 25 percent of the front and 25 percent of the back. He also omitted an important reality:

In prescription-drug ads targeted to laymen, the FDA routinely requires the advertiser to devote a large proportion of his space to contraindications, warnings, cautions, and other small-type matter that he may not only believe to be empirically false, but that significantly counter the sales pitch. Consider a two-page ad in lay publications for Lederle Laboratories' "Prostep / nicotine transdermal system." The first page features a happy young couple amid lovely autumn foliage; the second consists entirely of unsettling small-print warnings. "Nicotine from any source can be toxic and addictive," one says. None of the warnings is attributed. The ACLU hasn't complained.

XII

A legislative proposal offered as an amendment to the 1992 tax bill would have curbed tobacco advertising and promotion indirectly, avoiding direct restrictions on commercial speech, and reducing or eliminating First Amendment problems, real or imagined. Nonetheless, it aroused the ACLU's wrath. Democratic Senators Tom Harkin, Bill Bradley, and Frank Lautenberg hoped to decrease the taxpayers' subsidy of tobacco by reducing the deduction for tobacco advertising and promotion from 100 percent to 80 percent--the deduction allowed for a business meal. The resulting increase in revenues would have been earmarked for an exercise of the First Amendment: counter-advertising intended to reduce tobacco use, particularly by pregnant women, children and minorities.

In another preemptive strike, the ACLU circulated a "Dear Senator" letter signed by Lynn's successor, Robert S. Peck, and Morton Halperin. They asserted that the bill would infringe First Amendment rights by targeting "a particular viewpoint on a commercial product for unfavorable treatment, and that "[p]romotion, which includes advertising, is an inherently expressive activity that comes under the protection of the First Amendment."

On Aug. 10, after introduction of the proposal, Peck and Halperin sent a second "Dear Senator" letter urging repudiation of this "constitutionally impermissible approach." On September 23, they renewed the plea with a third letter. The next day, the amendment was defeated, 38 to 56. It was the latest in an unbroken string of Capitol Hill victories for

an enduring coalition: the tobacco industry, tobacco-state senators, associations of national advertisers and magazine and newspaper publishers, the ACLU, and the right-wing Washington Legal Foundation, which--under pressure from Congressman Luken--made a little-noted admission that tobacco interests account for about 3 percent of its income (six times tobacco's contribution to ACLU income). Currently, the original sponsors, joined by Senator Jeff Bingaman (D-N.M.), are trying again.

XIII

"We're not experts on which products are dangerous," Morton Halperin told me. "It's not our business to decide whether products are dangerous." But while under Halperin's supervision in April 1987, Barry Lynn seemed to so decide in testimony at a Waxman subcommittee hearing on a declaration in a proposed bill that tobacco is "a uniquely harmful product when used as intended." "This phrase has demonstrably more rhetorical than scientific validity," Lynn said. "I am not aware of the basis from which one can assert that smoking one cigarette is more or or less harmful than eating one rare steak...or strapping on one hang-glider." Similarly, Ira Glasser, in a 1989 letter to a tobacco critics, asked: "What about red meat, butter and similar products deemed by many to be harmful and a leading cause of heart disease and strokes?"

It is unclear how Lynn or Glasser could be unaware of the unique potential harm in a single cigarette, particularly in light of the many warnings in writing and on television sounded by Glasser himself. In a 1991 essay on mind-altering drugs, for example, he called cigarettes "highly addictive" and, along with alcohol, one of "our two most lethal (but legal) drugs."

Millions of people have learned to their sorrow that smoking one cigarette was the first and irreversible step toward the addiction and lethality explicitly recognized by Glasser. "Many children and adolescents who are experimenting with cigarettes and other forms of tobacco state that they do not intend to use tobacco in later years," then-Surgeon General C. Everett Koop said in a 1988 report. "They are unaware of, or underestimate, the strength

of tobacco addiction. Because this addiction almost always begins during childhood or adolescence, children need to be warned as early as possible, and repeatedly warned through their teenage years, about the dangers of exposing themselves to nicotine. This Report shows conclusively that cigarettes and other forms of tobacco are addicting in the same sense as are drugs such as heroin and cocaine."

Four years later, in 1992, the National Center for Health Statistics said a large sampling showed that 12- to 18-year-olds find quitting harder than expected. "[T]hree out of four admit having already made at least one--and obviously unsuccessful--attempt to quit," the Wall Street Journal reported in January.

In his 1989 pre-emptive press release, Lynn chided Congressman Synar for having "claimed that tobacco advertising is 'targeting' young people, presumably with some kind of nearly subliminal messages about why they should start smoking." Even as he spoke the evidence of targeting was overwhelming. Currently, 20 percent of teen-agers are regular smokers, and 20 percent are considered "experimenters" running a high risk of becoming addicted. Each day, about 3,000 American adolescents become regular smokers, and many become hooked. Among smokers of all ages, 25 percent began using cigarettes before they were 12, and an additional 25 percent by the time they were 14. And among smokers aged 12 to 18, the Centers for Disease Control reported last year, the vast majority preferred three brands--Marlboro, Newport, and Camel--that were among the most heavily advertised in 1990.

Manufacturers have systematically resorted to a wide array of cunning techniques to promote cigarettes to the young. These include: buying so-called movie "product placements" seen by untold millions of under-18 youths in theaters, on television, and on VCRs; advertising on ballpark billboards seen in person or on television; distributing free samples of cigarettes to high school students, and targeting advertising to the children and adolescents who constitute a significant proportion of the readership of numerous magazines. In Sports Illustrated, for example, United States Tobacco ran ads offering free snuff samples to anyone mailing in a coupon. President Bantle conceded that under-18 teenagers read such

magazines. Asked how such youngsters were screened out, he swore that the coupon processors "reviewed the signatures," and "if they looked like they were coming from young people, they were not answered."

In May 1990, prompted by the "Old Joe" ad campaign built around the large cartoon camel character Joe Camel, Mark Green, then Consumer Affairs Commissioner of New York City, petitioned the Federal Trade Commission to declare the use of cartoon characters to sell cigarettes a violative "unfair" or "deceptive" practice. "Who watches and talks about cartoon characters--children or adults?" Green asked. If a cigarette ad targets children "it can be banned," Burt Neuborne said. "It is not protected." But the FTC hasn't acted. "It would be much easier for me to defend free speech as a principle if the watchman were not asleep," he commented.

In December 1991, the Journal of the American Medical Association (JAMA) published studies strongly correlating advertising with cigarette consumption among youth. Before the Old Joe campaign was launched in 1988, less than one percent of smokers under 18 smoked Camels; by 1990, 33 percent did. Nearly one-third of 3-year-olds correctly identified "Old Joe" as representing cigarettes; six-year-olds recognized "Old Joe" at the same rate as the Mickey Mouse logo used by the Disney Television Channel. Among secondary-school children, 94 percent were able to identify Old Joe, as compared with only 58 percent of over-21 adults in the sample.

A further testament to the impact of the Joe Camel campaign came from a study of 243 seventh- and eighth-graders in two Chicago junior high schools published in February by Tobacco Control, a British Medical Association quarterly. Joe Camel ads were far and away the most popular cigarette ads. While 43 percent of the 12- to 14-year-olds favored ads featuring humans, nearly 5 percent--regardless of their race--liked the Camel ads, Texas epidemiologist Philip Huang wrote. Those in the latter group said they would likely buy Camels if they smoked. They found Joe Camel "cool" and "fun," while seeing the Marlboro man as "tough" and "macho." Eighty-five percent recalled having seen a cigarette ad within the week before they were surveyed.

The industry has economic imperatives to hook children and adolescents everywhere. In the United States, if the smoking population is not to decrease, twenty percent of new smokers must be children and under-18 teenagers. But it was in Canada that unprecedented and compelling evidence of industry intentions about hooking youngsters surfaced, thanks to a lawsuit tried in 1989 (The Nation, May 6, 1991). The "Fiscal '80 Media Plans" of Imperial Tobacco--a subsidiary of British American Tobacco Company, as is Brown & Williamson, the third-ranking U.S. cigarette company--said that one "target group" for the Players Filter brand was French-speaking men 12 to 17; for Players Light one target group was English-speaking men and women 12 to 24, and for du Maurier the single target group was "Men and Women 12-34." The fiscal 1988 marketing plan--marked "Personal and Confidential" on every page--said: "If the last ten years have taught us anything, it is that *the industry is dominated by the companies who respond most effectively to the needs of younger smokers* [emphasis in the original]."

The ACLU's "basic position" on advertising and promotion of tobacco to youngsters, Glasser told me, is that government "can't restrict speech to a level that only children can hear. It can't bring the whole adult population down to the level of children." In other words, if tobacco advertising ostensibly designed for adults appeals to children, this must be accepted as the lesser evil. I wrote "ostensibly," because it can't seriously be doubted that a great many cigarette ads are designed, at least in part, to hook under-18 youngsters. The remedy, Glasser suggested, is to ban sales to them. Forty-nine states have such bans but enforce them poorly. A cigarette vending machine doesn't discriminate between the quarters inserted by a child and the quarters inserted by an adult.

XIV

In 1988, during the trial of a smoker-death case, plaintiff's counsel Marc Edell produced a 1972 Tobacco Institute memo in which Frederick Panzer, a vice president, described the "brilliantly conceived and executed" strategy that for nearly two decades had shaped the industry defense against the charge that smoking causes disease. The first

element of the strategy was: "Creating doubt about the health charge without actually denying it." This is essentially what the ACLU did on Capitol Hill.

While disclaiming medical or scientific credentials in the tobacco area, as noted, Barry Lynn and his bosses challenged hosts of reputable physicians and scientists who have documented smoking's adverse health effects. "In addition to the ACLU and some First Amendment lawyers [who often represent both the ACLU and the tobacco industry], only the Tobacco Institute...and the occasional representative of advertising agencies that seem to profit from the industry seem capable of denying the overwhelming evidence of harm inflicted by smoking tobacco," Melvin L. Wulf, who developed and then supervised the ACLU's legal program for nineteen years, wrote in a Washington Post OpEd piece in July 1986.

Lynn was particularly unrestrained about environmental tobacco smoke. ETS is of unique concern because it profoundly affects the health--and rights--of nonsmokers. In a July 1990 appearance before the Waxman subcommittee, Lynn was asked about proposed health warnings in pending legislation, including this one: "WARNING: Cigarette Smoke Is Harmful to Non-smokers." Lynn responded: "There is enough ambiguity about some of them, particularly in the area of second-hand smoke,...that to require the producer of the product to make the statement when he or she believes it to be empirically false raises a very significant First Amendment question."

Lynn's allegation of "ambiguity"was a stretch. Several weeks before he testified, numerous publications had disclosed that the science advisory board of the Environmental Protection Agency, in a draft report on published studies, had found ETS to be a highly efficient, prolific producer of serious diseases in children as well as adults. In its June 11 issue--on the stands more than five weeks before Lynn testified--Newsweek reported: "Few of the EPA's findings are new: both the National Research Council and the surgeon general's office sounded similar warnings in 1986, and the surgeon general's office released an earlier draft of the current report in 1990." The draft was "based on results from 24 epidemiological studies, including 11 that weren't on hand in 1986," Newsweek said.

Combining and analyzing the eleven later studies, Dr. Stanton Glantz and his collaborator, Dr. William Parmley, estimated that passive smoking kills 50,000 Americans annually--kills, that is, one nonsmoker while smoking kills eight.

The Tobacco Institute and its counterparts elsewhere have always derogated the case against ETS. Sounding much like Lynn, the Tobacco Institute of Australia (TIA), for example, published ads saying: "There is little evidence and nothing which proves scientifically that cigarette smoke causes diseases in non-smokers." To focus judicial attention on the question whether the available scientific evidence prove that ETS causes disease, the Australian Federation of Consumer Organisations sued the TIA. A federal judge ruled in February 1991 that TIA's ads were misleading and deceptive. ETS, he wrote unambiguously, causes lung cancer, asthma, and respiratory diseases in young children. "Active smokers are likely to be misled or deceived by the [TIA's] statement into believing that their smoking does not prejudice the health of non-smokers, particularly small children," he said. Although it was the first court decision of its kind in the world, it drew trivial U.S. press attention.

Lynn's testimony was battered further by a July 1992 Wall Street Journal report that EPA's science advisory board had concluded that ETS not only should be classified as a known human carcinogen, but also that exposure to it "has contributed to as many as 300,000 cases of respiratory illness and about 3,000 cases of lung cancer annually." In October, JAMA reported particularly compelling new scientific evidence. It came from the first study of the effects of ETS based on autopsies--in this case, of nonsmoking women married to smokers, and of nonsmoking women married to nonsmoking men. More lung cancer was found among the wives of smokers than among the wives of nonsmokers.

In January 1993, the EPA issued its final report. Ambiguity was not part of it. It classified ETS as a "Group A" (known human) carcinogen, the category reserved for a handful of toxic substances, including asbestos, benzene, and radon. ETS "has now been shown conclusively to increase the risk of lung cancer in nonsmokers," outgoing EPA Administrator William K. Reilly said. Each year, the agency concluded, ETS is responsible for:

@Approximately 3,000 deaths from lung cancer, or 20 percent of all lung cancers caused by factors other than direct inhalation of tobacco smoke. The risk, put at about 1 in 1,000, is higher than that of almost any chemical regulated by the EPA, and about 2 in 1,000 among spouses of persons who smoke at home, Reilly said.

@Between 150,000 and 300,000 cases of bronchitis and pneumonia in infants up to 18 months old, including between 7,500 and 15,000 who are taken to hospitals.

@Worsened asthma symptoms in 200,000 to 1,000,000 children, and increased chances of asthma in children who don't have it.

@Increasing fluid in the middle ear, enhancing the possibility of ear infections of the kind common in children.

Glasser hasn't criticized Lynn's testimony on ETS or any other tobacco issue but has acknowledged that ETS could "irritate" innocent bystanders. "I have no doubt that environmental smoke is a problem," he told me. As a result, he said, the ACLU has supported or at least not opposed laws to restrict smoking in public places.

XV

Critics of cigarette advertising say one of its central goals is to benefit the entire industry by converting nonsmokers--starting with children--into smokers. The industry disagrees, claiming that each company's huge ad outlays are intended solely to persuade present smokers to switch to its brands or to preserve loyalty to those brands. Consequently, the industry further claims, these outlays do not increase the incidence of smoking, and their elimination would not decrease it.

ACLU spokesmen have demeaned the power of tobacco advertising. Ira Glasser, in his 1987 article, bought into an industry claim by asserting that "there is little, if any, evidence that bans on cigarette advertising will reduce the percentage of Americans who smoke." A month later, Barry Lynn stiffened the ACLU line. "The evidence to date that tobacco advertising in fact is a substantial reason why persons begin to smoke, or continue

to smoke once they start, is largely unpersuasive," he testified at a Waxman subcommittee hearing.

In April 1990, Morton Halperin adopted the industry position whole. Testifying at a hearing held by Senator Edward M. Kennedy (D-Mass.), he declared "that there is simply *no evidence* that tobacco advertising increases the level of smoking, and *no evidence* that eliminating tobacco advertising will reduce the amount of smoking" (emphasis supplied). In the subsequent New York interview, Halperin told me he had "read all the literature on tobacco advertising," and concluded that it is "not important." Even if advertising influences cigarette consumption, he said, studies have not shown banning it would be the most effective way to reduce smoking.

In April 1990--almost simultaneously with Halperin's testimony, and with the U.S. press paying no attention--the ACLU/tobacco industry assessments were shaken at the World Conference on Tobacco and Health in Australia. Dr. Kjell Bjartveit of the National Council on Tobacco and Health of Norway, where the first ban on advertising went into effect in 1975, documented that cigarette sales levelled off when the legislation banning advertising took effect. "If the consumption had continued to rise at the same speed as before 1970, it would now have been about 50 percent higher than it actually is today," he said. "This levelling off took place at a rate of consumption which is only one-half that of the Canadian, UK and US peak level." Significantly, teen-age smoking in Norway fell more than in the population as a whole. Among males age 16-24, about 47 percent smoked in 1975; in 1987--the year of Glasser's article--only 30 percent did; in 1990, only 26 percent.

Advertising bans of varying severity have also been introduced in Finland (1977), Canada (January 1989), and New Zealand (December 1990). In October 1992, the effects of all four bans were analyzed in Great Britain by the Economics and Operational Research Division of the Department of Health. Taking care to allow for the distorting effects of other factors, such as price increases, taxation, and elasticity in personal disposable incomes, Chief Economic Adviser Clive Smee directly contradicted the tobacco industry claims echoed most faithfully by Halperin. Smee estimated that Norway's ban reduced cigarette consumption by

9 percent to 16 percent, Finland's by 6.7 percent, Canada's by 2.8 percent in the short term and 4 percent in the longer term, and New Zealand's by 5 1/2 percent. If an advertising ban in the United States were to decrease cigarette consumption by 4 percent, the longer-term estimate for Canada, one might expect a 4 percent decline in U.S. annual smoking mortality down the road. To put it another way, of the 434,000 Americans who die prematurely each year of smoking-related diseases, 17,360 would live.

Later in 1992, at the request of the Health Committee of the House of Commons--which is controlled by the Conservative Party--the Parliamentary Office of Science and Technology independently analyzed the evidence underlying Smee's report. "Irrespective of whether the report's analysis is taken as providing **strong** support for a relationship between advertising and consumption," the Office concluded in part, "the evidence is at least wholly consistent with the common-sense view that brand advertising not only promotes the brand but also promotes smoking in general." [Bold-facing in the original.]

In January, the Health Committee issued its own report, which, like the highly newsworthy developments leading up to it, drew negligible press notice in the United States. "[W]e accept that the burden of proof for the contention that tobacco advertising increases tobacco consumption has been met by the evidence provided to the Committee," the report said. "[W]e must conclude that, in the face of the evidence that has now been accumulated, the Government can no longer maintain its position that a further tightening of tobacco advertising controls is unlikely to contribute to a reduction of the prevalence of smoking in the U.K." Declaring that "[t]he government cannot continue to procrastinate on the issue of an advertising ban on the grounds that it is awaiting a level of proof about its effectiveness which is in the nature of things unobtainable," the committee recommended that "the Government adopt as its policy the total elimination of tobacco advertising other than at the point of sale."

XVI

ACLU officials resort repeatedly to the "slippery-slope" argument: banning tobacco advertising today will lead to banning advertising of automobiles and of products containing cholesterol tomorrow, and to the burial of our political freedoms in a final avalanche. Thus Morton Halperin asserted that "every attempt" to limit First Amendment rights "leads to another." Ira Glasser wrote in his 1987 article in The Nation that "...censorship is a contagious disease." Burt Neuborne warned in a 1986 Washington Post OpEd piece that "once any government gets a taste of using information control as an indirect way to manipulate behavior, its appetite for censorship becomes insatiable."

Halperin, Glasser, and Neuborne offered no evidence to substantiate their sky-is-falling rhetoric, and didn't cite an inconvenient fact: None of the consumer-protection laws, starting with the eighty-year-old FTC act, has created a contagion of, or an "insatiable" government appetite for, censorship.

Two former ACLU top officials who reject slippery-slope rhetoric are Melvin Wulf, who as legal director 1962 to 1977 argued ten cases for the ACLU before the Supreme Court, and Aryeh Neier, executive director from 1970 until 1978 and now executive director of Human Rights Watch.

"My former colleagues at the ACLU, together with the Tobacco Institute and the advertising industry, will declare that prohibition of tobacco advertising will be followed immediately by the end of the First Amendment as we know it," Wulf wrote in his July 1986 Washington Post OpEd article. "The only result will be a reduction in tobacco consumption, heart disease and cancer. Our real First Amendment freedoms will be as intact as ever." Neier told me: "There is no First Amendment problem in any form of regulation of tobacco advertising." Wulf attacked the slippery-slope hypothesis anew in 1987 testimony before the Luken subcommittee. As it applies to ideational speech, Wulf said, it is "often right and often effective"; but as it applies to tobacco advertising and promotion it "is wrong and ineffective. It has no merit. To believe it you must also believe that our legislators and judges do not know how to exercise judgment....don't know the difference between a substance

which has been proven to be harmful in and of itself, and a substance which is enormously useful but which may have some injurious effect. I think Congress can tell the difference between an egg and a cigarette."

XVII

Anti-tobacco activist Michael Pertschuk, co-director of Washington's Advocacy Institute, once discussed suppression of free speech by large corporations with Morton Halperin. "'That's not our department,'" he remembers Halperin saying. "'We're only concerned with government efforts to suppress speech.'" Yet the large corporation also governs, directly (defective products can sicken, maim, and kill) and indirectly (campaign "contributions" can govern the government).

The ACLU's indifference to corporate suppression of speech extends to the disparate treatment that magazines give to reports criticizing smoking. Over the years, numerous studies have demonstrated, magazines that accept cigarette advertising--$264.4 million worth in 1991--show consistent patterns of self-censorship, as compared with magazines that do not accept it. Researchers led by Professor Kenneth E. Warner of the University of Michigan School of Public Health reported in the New England Journal of Medicine in January on the performance of nearly one-hundred magazines over a quarter-century. Magazines carrying tobacco ads were 38 percent less likely to discuss smoking risks than those free of tobacco ads. Does magazine self-censorship disturb the ACLU? I asked Ira Glasser. "The simple answer to your question is, it's none of our business," he replied.

XVIII

No one is better qualified to testify to the congruence of the positions of the ACLU and the tobacco industry on proposed ad bans than Burt Neuborne, because he represented each on Capitol Hill in rapid succession. The possibly embarrassing episode began when the serious illness of his younger daughter led Neuborne to quit as ACLU legal director in January 1986 (he volunteered to handle emergency or special needs without pay). A few

months later, he learned from the ACLU's Washington office that Congressman Waxman might hold hearings on the proposed ad bans. The ACLU having "supported free speech in a commercial context" as early as 1942, Neuborne wrote in his letter to me, the organization's leaders agreed to oppose the legislation "on free speech grounds."

On July 2, the Washington Post published Melvin Wulf's OpEd piece rejecting the ACLU position on commercial speech. "I felt an obligation to defend ACLU policy," Neuborne said. "I dashed off an OpEd piece in response to Mel's piece and sent it off to the Washington Post. The response was written on my ACLU letterhead, since I was functioning as legal director and defending ACLU policy when I wrote it." But "I did not identify myself" as ACLU legal director, he said. "I did not!"

On July 7, Neuborne quit the ACLU to return to teaching, but notified the Washington office that if it were to ask him, he would testify against the proposed legislation (it didn't ask). Within a few days, he said, "I was approached to represent private clients at the hearing. I agreed to do so only because [their] position...was virtually identical to ACLU policy. I charged them the 'going rate' on an hourly basis for my work." The fee was, he said, "modest."

Eleven days later, the Post, unaware that Neuborne's letterhead had become obsolete, identified him at the end of his OpEd piece as "legal director of the ACLU." Neuborne said he doesn't recall ever seeing the piece in print. He (and the ACLU) did not request a correction.

Fourteen days after that Neuborne attacked the proposed legislation before the Waxman subcommittee. By then, as he said at the outset of his testimony, he was representing the Tobacco Institute--the "private clients." "This was as much of a surprise to me as it was to you," Glasser told me.

Matthew Myers, the former ACLU official now with the Coalition on Smoking OR Health, criticized Neuborne's representation of the Institute. It creates, he wrote--in an unanswered December 1986 letter in which he renewed his ACLU membership--"a serious appearance of a conflict of interest, badly tarnishes the ACLU's appearance of

independence, and makes the ACLU look no better than the many bureaucrats who are criticized for taking advantage of the revolving-door syndrome."

Former Executive Director Neier told me that when Neuborne, whom he had brought to the ACLU years ago, took on the Institute as a client, "I was very sorry when I had to take issue with him. He had always been a very principled person. He disappointed me more than if this had come from anyone else."

As it happened, Neuborne's representation of the Institute was a one-time thing because he felt "a moral taint," he recalled. "I walked away. I had trouble in my own mind representing them." Soon afterward, he began representing a leading advocate of his (and its) position, the Association of National Advertisers. The ANA's membership--approximately 300 companies with more than 2,000 subsidiaries and divisions--accounted for approximately 80 percent of national and regional advertising expenditures. The six cigarette manufacturers accounted for a disproportionate share of annual dues income--nearly 8 percent.

XIX

The ACLU's alliance with the tobacco industry crossed the Atlantic for a three-day "International Conference on Tolerance and Courtesy" in Copenhagen in October. Glasser said the ACLU was prominently represented at the request of the conference organizers--three Scandanavian smokers' rights groups of the kind consistently supported by the industry. The November ASA News, published by the American Smokers Alliance, reported that the conference "underscored the need for smokers and non-smokers alike to have mutual consideration for each other," and that Lewis L. Maltby, coordinator of the ACLU Task Force on Civil Liberties in the Workplace, was on hand "working out a program of legal actions." The headline atop a two-column page-one box, was: "The American Civil Liberties Union Offers to Help / Members of the ASA Who Have Been / Discriminated Against for Smoking."

Maltby made a speech, held "a number of media interviews," and gave a luncheon talk, Glasser said. Who paid his bills? Glasser, saying he would "guess," and Maltby "assumes," that the Alliance has industry backing, said the conference organizers reimbursed Maltby's out-of-pocket expenses. With rare exceptions, he said, "[o]ur policy is that we require travel expenses to be paid by the requesting group." This was stated as if simply saying something is "policy" makes it right. He stressed that the trip "wasn't exactly a pleasure junket" (and it doubtless was not).

Glasser himself raised the question why the ACLU was "speaking to such a group? The answer is that it is important to grasp the opportunity whenever we can to convert self-interest to support for the broader principles we advocate. That is why we always speak to a variety of self-interested groups in the hope of convincing them that their rights are necessarily imbedded in a broader principle that protects a variety of other groups and other interests in addition to their own."

"What Lew was doing at the conference was carrying our message to them, not the other way around," Glasser said. He quoted at length from Maltby's remarks to make his point. The essence of the message was that "the real issue isn't smoking [but] the right of each of us to live our own lives in the way that we choose....If we allow employers to regulate our off-duty conduct that is related to health, our private lives are going to become as extinct as the dinosaurs...Whether it's your right to smoke, or someone else's right to watch pornographic movies, or be a homosexual, or end their own life, the ACLU will be there."

In a September 1991 article, Maltby wrote that the ACLU, countering a threat to "the privacy of all Americans," seeks legislation in each state to prevent employers from denying jobs to smokers or otherwise controlling off-the-job behavior. The article ran in the magazine Choice, a self-described "service of R.J. Reynolds Tobacco Company."

XX

The ACLU trivializes the First Amendment by valuing it equally for corporations and human beings. It also treads on constitutional quicksand. The Fourteenth Amendment guarantees that no "person" shall be denied "the equal protection of the laws" or be deprived of "life, liberty, or property without due process of law." Not a word in the Fourteenth's legislative history suggests that the Framers imagined a corporation to be a person. Their clear intent was to protect the newly freed slave.

Congress adopted the Amendment in 1866 and submitted it to the people for ratification. Its history, Justice Hugo L. Black wrote in a 1938 dissent, "proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments."

The people ratified the Amendment in 1868. Eighteen years later, the Supreme Court agreed to decide whether the Amendment required taxation of property owned by a corporation at the same rate as property owned by a human being. California's Santa Clara County said it could tax Southern Pacific Railroad differently: How could the "person" protected by the Amendment be a paper entity? At the outset of oral argument in *Santa Clara County* v. *Southern Pacific Railroad,* Chief Justice Morrison R. Waite hurled a thunderbolt from the judiciary's Mount Olympus: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny any person the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."

Santa Clara was a judicial usurpation of legislative authority. Yet it goes unremarked by the ACLU, which would find it awkward to remind its members that it is on the infirm terrain of *Santa Clara* that it wages its fight to guarantee the freedom of speech of corporations (*Santa Clara* also goes unremarked by putative conservatives, such as former U.S. Circuit Judge Robert H. Bork, who complain bitterly that the Court usurped legislative authority in *Roe* v. *Wade,* which was fully briefed and argued.)

Despite *Santa Clara*, Melvin Wulf wrote in the Washington Post, the Court has continued for a century to distinguish between "speech by corporations and speech by individuals and groups of individuals who join together to enhance individual speech." The reasons "rest on the judicial perception that corporations are artificial creations of the state that acquire unusual powers and rights," that they are "not the 'natural persons' that the First Amendment is intended to protect," and that "being organized solely for the purpose of making money, they acquire a disproportionate power in the political sphere because of their financial resources."

No un-natural persons have acquired more disproportionate political and judicial power than tobacco corporations; none have enjoyed a warmer embrace from the ACLU.

XXI

The bottom word is, disclosure. Disclosure is the sunlight that would disinfect the ACLU's conflict of interest in taking tobacco-industry money while advocating a tobacco-industry cause; and it would fairly test the doctrine that it is self-destructive to turn away money from any source for a constructive cause.

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