

HOW FREEDOM OF CHOICE IMPROVES PUBLIC HEALTH IN ARKANSAS: THE SPECIAL CASE OF NICOTINE POLICY



By Marc Kilmer
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Nicotine consumption used to be simple. Those who wanted to smoke tobacco grabbed a cigarette, or maybe a cigar or pipe, and lit up. Today that seems so old-fashioned. We now have electronic devices that provide nicotine in a form that resembles smoking -- but lacks many of smoking's negative side effects. Many people are turning to e-cigarettes or other devices to "vape" instead of smoking traditional cigarettes. This has drawn the attention of legislators across the nation (and the world).

Many proposals to regulate vaping or e-cigarette usage are unnecessary or counter-productive from a public health standpoint. Regulating vaping or e-cigarettes the same way we regulate tobacco will hurt individuals who want to quit smoking. Arkansas legislators recognized this fact earlier this year when they instituted a modest, well-crafted regulatory regime for vaping products and e-cigarettes. *Policymakers across the U.S. should learn from the Arkansas reforms that were passed in 2015 and use them as a model for regulating these devices in their states.*

Vaping Is Safer than Smoking

Although there are differences between e-cigarettes and vaping devices, these differences are often noticed only by users. In the context of public policy or regulation, these differing devices can be lumped together. Essentially, an e-cigarette or a vaping device uses electronics to heat up liquid to produce vapor that people inhale. This vapor can be flavored; it generally contains nicotine. The vapor may look like smoke -- and those using e-cigarettes or vaping devices may use them like traditional cigarettes -- but no actual smoke is created.

Some public health advocates and lawmakers claim that vaping is not safe and should therefore be heavily regulated or otherwise discouraged. This claim ignores the fact that vaping, while not perfectly safe, is far safer than smoking tobacco. Duncan Selbie, chief executive of Public Health England (PHE), a U.K. government agency, sums up the evidence in the foreword of an exhaustive study on the effects of e-cigarettes: "best estimates show e-cigarettes are 95% less

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harmful to your health than normal cigarettes, and when supported by a smoking cessation service, help most smokers to quit tobacco altogether.”¹

This is important, because the evidence indicates those who vape are overwhelmingly former smokers. *Reason* magazine reports:

Another study, reported in the journal *Tobacco Control* last week, found that the fears of e-cigarette critics are not materializing among adults either. In a 2014 survey of 9,300 adults in Minnesota, 18 percent had tried e-cigarettes but most had not used them in the previous 30 days. Almost all of the past-month vapers (99 percent) were also smokers. Of the nonsmokers who reported vaping in the previous month, nine out of 10 did so infrequently, defined as vaping on five or fewer days.²

If vaping is safer than smoking and it is mainly something that smokers do, then it makes no sense to discourage it. Even if vaping causes some health problems, it will cause far fewer health problems than if (hypothetically) the same set of vapers instead continued to use cigarettes. This kind of analysis is the hallmark of what is called “harm reduction.” Smokers reduce the harm to themselves if they use e-cigarettes or vape rather than continuing to smoke.

Some researchers, such as Peter Hajen of the Wolfson Institute of Preventive Medicine, recognize the positive potential of e-cigarettes:

Although there is no doubt that smokers switching to electronic cigarettes (EC) substantially reduce the risk to their health, some tobacco control activists and health organisations discourage smokers from using EC and lobby policymakers to reduce EC use by draconian regulation.

The hostility to EC may be related to a moral belief that nicotine use should be eradicated rather than allowed to morph into a relatively harmless activity. If EC are allowed to compete with cigarettes and develop further, smoking is likely to all but disappear. Discouraging smokers from making the switch and reducing EC competitiveness with cigarettes by unwarranted regulation will delay this opportunity or squander it altogether.³

There is legitimate concern about preventing children from using vaping as a gateway to tobacco use. There is also a need to ensure that if vape shops are selling or manufacturing liquid that contains nicotine, proper precautions are taken. However, on the whole, there is little reason for government to impose significant regulations on e-cigarettes or vaping. Doing so, as Dr. Hajen points out, will be counterproductive to public health.

State Vaping Regulation

Federal law is silent about the use of e-cigarettes or vaping, leaving states and localities to consider a variety of policies to govern this new method of nicotine consumption. Those policies are often modeled on anti-tobacco efforts. Because legislators continue to think of e-cigarette devices as “tobacco products” - - even though they do not contain tobacco⁴ -- e-cigarette legislation is often severely flawed.

Arkansas avoided this problem when it passed legislation governing vaping and e-cigarettes. Before examining Arkansas’s legislative successes, consider some of the misguided ways that other states or cities are regulating (or thinking about regulating) vaping.

Public Vaping Bans

Banning vaping in public spaces is perhaps the most widespread restriction around the nation. Numerous localities have enacted these bans, as have Connecticut, Delaware, Hawaii, Maine, New Jersey, North Dakota, Oregon, and Utah. Policymakers generally offer two reasons for enacting this kind of ban; however, neither one holds up under scrutiny.

The first rationale for banning vaping in workplaces, bars, and other public places is a concern over secondhand vapor. For instance, the California legislator behind a bill to ban vaping in public spaces said, “We're going to see hundreds of thousands of family members and friends die from e-cigarette use, just like we did from traditional tobacco use.”⁵

That statement has no factual basis. Even if you accept that vaping could cause some health risks for those who do it, second-hand vapor has very, very low levels of any toxic substances.⁶ Furthermore, if vaping leads to a reduction in

tobacco use (as the evidence shows it does), then public bans that discourage vaping will likely result in more people being exposed to secondhand smoke.

The second rationale is the old standby about protecting children. Here is how the *New York Times* describes one city council member's support for a public vaping ban: "Mr. Gennaro said children who could not differentiate between regular and electronic smoking were getting the message that smoking is socially acceptable."⁷

As Jacob Sullum of *Reason* magazine notes, this is not a solid basis upon which to build public policy:

*If kids must be shielded from the sight of vaping because it looks like smoking, perhaps they also should be shielded from the sight of drinking -- not just of alcoholic beverages but of any drink that resembles an alcoholic beverage. After all, how does an innocent child know the difference between O'Doul's and Budweiser, or between a Coke that contains Jack Daniels and one that does not?*⁸

High Taxes

Louisiana, Kansas, and Minnesota have imposed new (and relatively high) tax rates on e-cigarettes. There is no good public policy reason to do this. In response to a proposal in Washington State to increase taxes on e-cigarettes, the Tax Foundation's Lyman Stone explained why this is a bad idea:

*E-cigarettes don't cause damaging second-hand smoke and don't include the harmful tar and chemicals that cause lung cancer. Insofar as they substitute for more damaging products, they may actually have positive externalities. Taxing e-cigarettes may make the people of Washington less healthy rather than more. If the relative price of e-cigarettes rises, fewer people will switch away from traditional cigarettes, which means more second-hand smoke and more lung cancer.*⁹

Regulating E-cigarettes as Tobacco Products

Although there are efforts across the nation to include e-cigarettes under the banner of tobacco regulation, legislative proposals to accomplish this typically fail.

In Chicago, the mayor and city council members proposed a ban on indoor vaping, requiring that e-cigarettes be sold the same way as tobacco products and imposing a large tax on these products. Here is how one alderman justified these policies:

In our efforts to promote public health, with teen smoking at an all-time low in Chicago, he is open to opportunities that can build on the progress we have made to dissuade our youth from picking up dangerous and addictive habits like smoking and vaping.¹⁰

This alderman fails to realize (or ignores the fact) that vaping does not have the harmful effects of smoking. Equating the two by regulating vaping the way we regulate smoking does nothing to promote public health. In fact, it harms public health by discouraging a less dangerous activity that would replace smoking.

These flawed policies are generally the result of anti-smoking zealotry. Ironically, that zealotry often focuses on devices that will reduce smoking. This stance is counterproductive from a public health standpoint; it threatens to extend the nanny state further into the lives of Americans.

Arkansas Regulation

When Arkansas legislators considered how the state should regulate vaping and e-cigarettes, they had two options. Should they view them as part of a dangerous tobacco menace and impose onerous rules and taxes on them? Or should they consider them as a new method of ingesting nicotine and other chemicals and regulate them appropriately?

Thanks to legislation introduced by state Sen. Eddie Joe Williams, Arkansas chose the latter view. His Act 1235 of 2015 establishes a regulatory regime for vaping and e-cigarettes.

According to Sen. Williams, “there was a public safety issue” regarding e-cigarettes, and he wanted to fix it.¹¹ The issue he saw was not some kind of broad public safety issue that would justify any sort of regulation. When he was mayor of Cabot, Sen. Williams said, he saw vape shops and e-cigarette stores selling unregulated products, sometimes to children. He decided that situation could be

dangerous, so he wrote SB 978 (which ultimately became Act 1235) to impose minimal regulation on the industry.

That's it. He wasn't pursuing an anti-smoking crusade. He wasn't trying to use vaping as a way to raise new state revenue. He saw what he perceived as a problem and crafted legislation to address it.

Sen. Williams was concerned about children having access to vaping products and consumers not knowing what they were buying. Protecting minors is a legitimate state function, as is protecting consumers from fraud. Act 1235 addresses these concerns.

Others in the state saw things differently. Rep. Charles Blake, for instance, wanted to impose a special tax on vaping liquid. Sen. Larry Teague would have banned vaping and e-cigarette use in public facilities. As discussed above, there is no solid public policy justification for either of these proposals.

Sen. Williams disagreed with this type of vaping regulation. His goal, he said, was to "make sure the product is safe." That's a far better way to approach vaping regulation than either Rep. Blake's or Sen. Teague's. Narrowly-targeted legislation to address specific problems is preferable to a targeted tax hike on a new industry or a broad prohibition on using a product.

The legislature eventually passed Senate Bill 978 earlier this year; it became Act 1235 of 2015. Given that this legislation took less than a month to make it through the General Assembly and to be signed into law by the governor, it seems that Williams's colleagues agreed with his approach. The proposed tax and public vaping ban did not fare so well: both failed to make it out of their respective committees.

Act 1235 is generally focused on keeping minors away from e-cigarettes and vaping products, as well as ensuring a basic level of consumer protection for those products. The major power that Act 1235 gave to the state of Arkansas is the ability to enforce the ban on selling e-cigarettes to minors. Previous law had already banned this practice, but that law contained no enforcement power.

The law also touches on the safety of minors by allowing the state to impose regulations that would make vaping liquid containers child-proof. In addition, it

bans the sale of e-cigarettes and vaping products within 500 yards of schools, playgrounds, and other places primarily intended to serve children.

The legislation also allows the state to regulate vaping liquid and products by requiring registration and licensing for retailers who sell them. A more controversial aspect of this part of the law effectively bans sales through the mail of vaping liquid. According to Sen. Williams, this is to prevent minors from ordering vaping products. (In fact, this is a hard problem to solve perfectly. Both alcohol and tobacco are sold online and mailed to consumers. The sellers of these products have ways to verify age. Certainly, we have evidence that minors exploit loopholes to buy tobacco products, so the age-verification system is not perfect.¹²)

While not a perfect law, Act 1235 is far superior than most legislative proposals that pertain to vaping. It imposes reasonable regulation without going too far in interfering with consumers who wish to purchase e-cigarettes or vaping products.

According to Sen. Williams, he saw two main problems with vaping: minors could purchase vaping products and consumers had no idea what they were buying. Act 1235 targets these problems and takes reasonable steps to address them. Williams also expressed some skepticism about side effects of what we call “sin taxes,” pointing out the very concept might create incentives for public officials to encourage tax increases.

It’s important to stress the legislation had modest goals -- and it met them. It did not seek to use vaping or e-cigarettes as a way to raise revenue for the state. It did not seek to regulate vaping as an extension on the war on tobacco. There are large questions involving nicotine and society that the Arkansas state legislature may not be well-suited to address. Legislators showed restraint by keeping this legislation targeted to a few key issues.

Other States Can Learn from Arkansas

Legislators from other states could learn a lot if they study how Arkansas addressed these issues. In fact, policymakers on a global scale would be wise to copy Arkansas’s method of regulating vaping instead of imitating a more draconian regulatory regime.

Consider vaping and minors. Vaping is safer than smoking, but few people think it's perfectly harmless so it should not be controversial to keep children from picking up the habit. However, this desire can go too far. In New York, for instance, a city council member wanted to ban vaping in public spaces because he was concerned about children receiving the wrong message.¹³

If a lawmaker is really concerned about children, then it makes little sense to ban adults from smoking in bars and other places that are aimed at adults. In Arkansas, the legislature protected minors by giving the state enforcement power to stop retailers from selling e-cigarettes to them. The law also banned sales close to schools, playgrounds, and other places where children gather. In contrast to symbolic politics, these prohibitions are aimed at having a concrete impact on kids' behavior.

Arkansas legislators did not worry about some nebulous "message" that vaping sends to children. They simply made it more difficult for children to have access to e-cigarettes and vaping devices. In short, they chose substantive policy over symbolic legislation.

Other legislators support public vaping bans because they think second-hand vapor is dangerous. As discussed previously, there is no public health justification for this position. This type of ban is, at best, a symbolic measure designed to express societal disapproval of anything that resembles smoking. Arkansas legislators chose to avoid show legislation by rejecting a bill that would have included vaping in the state's public smoking ban.

Another popular idea in other states is to impose a special tax on vaping. Vaping imposes no extra costs on society so there is no reason to single it out for a special tax. However, some legislators view people who vape as an ideal revenue source. Sen. Williams told me his legislation "wasn't about generating revenue." His colleagues wisely agreed, rejecting a bill that would have imposed a vaping tax in Arkansas.

Some politicians want to regulate vaping because they are concerned about what is being ingested.¹⁴ Generally, this attitude results in proposals that treat vaping and e-cigarettes the same as tobacco. It is unreasonable to apply tobacco's regulatory regime to the devices themselves, as they do not contain tobacco. Sen. Williams was also concerned about what is in vaping liquid, so his legislation established minimal regulations to give consumers greater knowledge about what

they were ingesting. Instead of imposing heavy-handed rules on vaping, Act 1235 of 2015 largely leaves the matter in the hands of consumers.

More sensible vaping regulations are needed not only in the United States but internationally as well. The World Health Organization, for instance, discourages nations like China from pursuing a harm-reduction policy regarding vaping. Two-thirds of the men in China smoke, so vaping and e-cigarette usage could be a good way to divert some smokers to a less-harmful alternative. Instead, WHO's director-general is quoted in a Chinese newspaper saying "I recommend that national governments ban, or at least regulate, [e-cigarettes]." ¹⁵

This sort of short-sighted approach to vaping and e-cigarettes, whether nationally or internationally, is the wrong way to go. Vaping need not be treated as another front in the battle on tobacco but can, in fact, be a useful tool in reducing smoking rates. As recent data show, most vapers are either current smokers or people who recently quit smoking. ¹⁶ A miniscule percentage are people who have never smoked. It is clear that people use vaping and e-cigarettes primarily to lessen or cease smoking.

To the extent that vaping and e-cigarettes raise practical concerns, legislation should be tailored to address those specific issues. That is largely what Act 1235 does. Arkansas's sensible approach to addressing the new issues raised by vaping can serve as a model to other state legislators and policymakers around the world.

Conclusion

Vaping and e-cigarette usage certainly raise regulatory issues. Because the federal government has yet to establish a regulatory regime for the use and sale of these products, it is up to states or cities to consider what to do with them. Lawmakers are proposing laws and regulations about vaping and the use of e-cigarettes, but many of these proposals will actually hurt public health efforts. Legislators and regulators should recognize the potential for vaping and e-cigarettes to help reduce smoking rates. New rules should be tailored to address specific concerns and not lump vaping products or e-cigarettes together with tobacco products. In particular, Arkansas's sensible regulatory approach should serve as a model for other states' regulatory efforts.

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