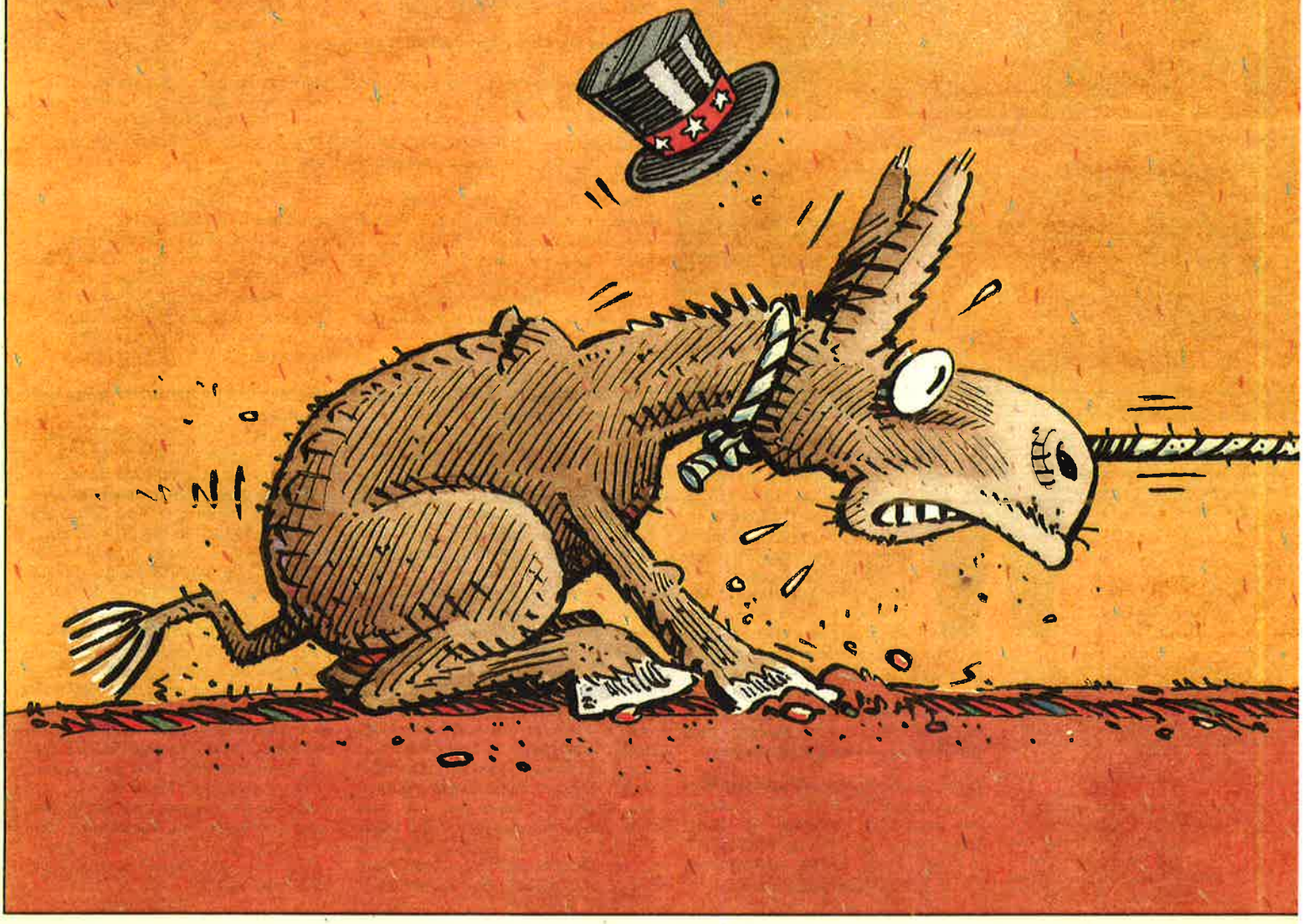
The Boston Globe Magazine

MAY 11, 1986

LEADING THE PARTY

New-age governors show the Democrats the way

BY RENEE LOTH



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Cover illustration by Elwood Smith

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EDITOR
ANDE ZELLMAN

DESIGNER
LYNN STALEY

ASSISTANT EDITOR
LOUISA WILLIAMS

EDITING
LAYOUT: DAVID COHEN
COPY: CYNTHIA DOCKRELL
HEIDI LANDECKER

STAFF WRITERS
PETER ANDERSON
KEVIN KELLY
CHARLES KENNEY
RENEE LOTH
OTILE MCMANUS

ASSISTANT DESIGNER
GAIL ANDERSON

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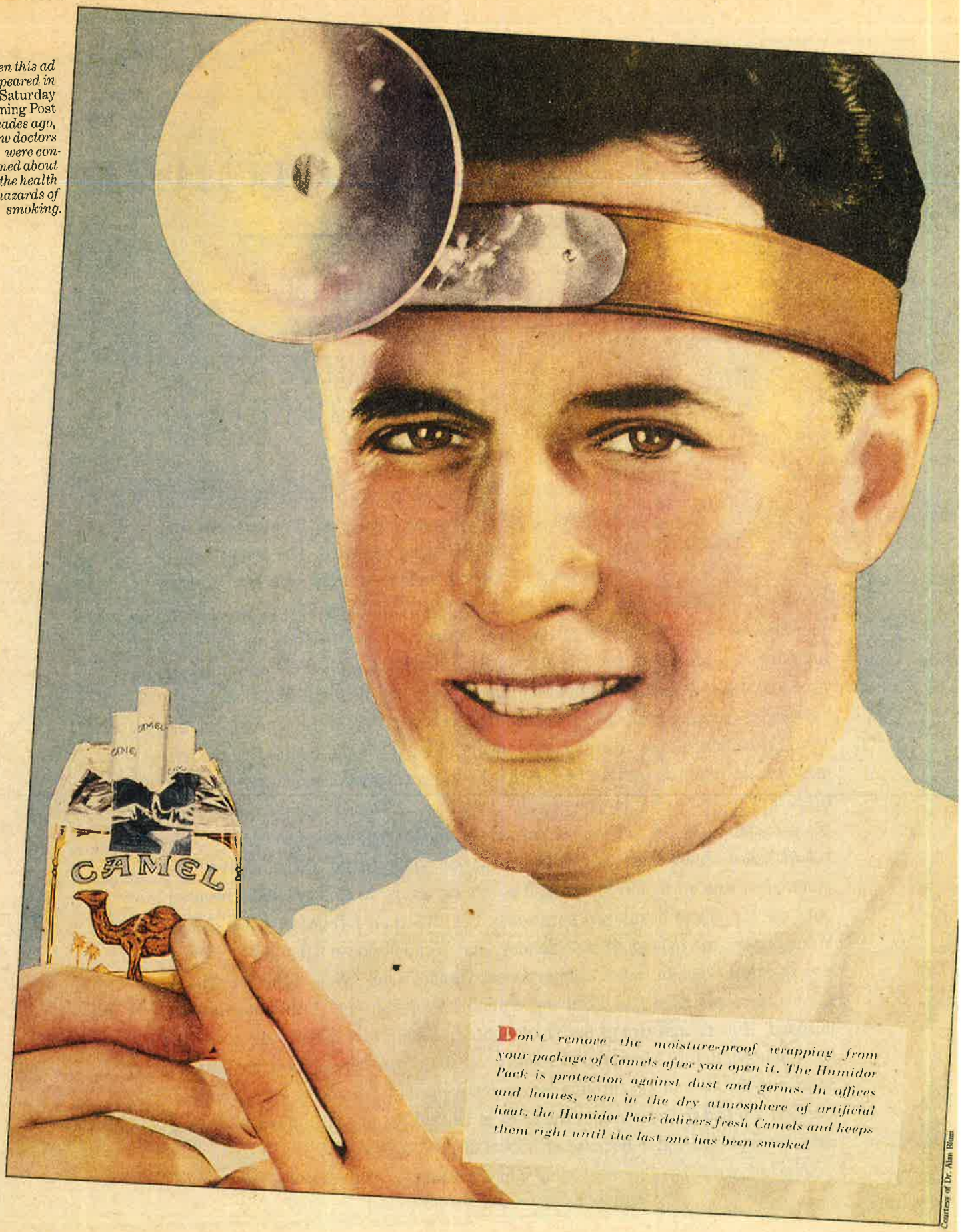
A magazine ad for cigarettes from the early 1940s (page 16)

Courtesy of Dr. Alan Blum

When this ad appeared in The Saturday Evening Post *decades ago, few doctors were concerned about the health hazards of smoking.*



Don't remove the moisture-proof wrapping from your package of Camels after you open it. The Humidor Pack is protection against dust and germs. In offices and homes, even in the dry atmosphere of artificial heat, the Humidor Pack delivers fresh Camels and keeps them right until the last one has been smoked

Courtesy of Dr. Alan Blum

By Charles Kenney

The antismoking guerrillas face their biggest battle yet: Taking the industry to court. (Second of two parts)

THE TOBACCO WARS

On a cold, snowy day in early 1986, Dr. Alan Blum paces inside his Manhasset, Long Island, home, angrily denouncing the tobacco industry. As he frowns his way from the living room to the den, out to the kitchen by way of the dining room, Blum steps carefully to avoid piles of material stacked around him. There is paper everywhere. In the living room alone, there are nine boxes and 26 piles of paper varying in height from a few inches to a foot or more. There are 32 more stacks in the den, and at least another 20 in the dining room and the kitchen. In all, more than 70 piles containing what must be tens of thousands of pages cover much of the first floor of Blum's attractive home in this quiet suburb. There are audio- and videotapes as well, and books and magazine articles. It would seem impossible for any aspect of the smoking issue — health, politics, science, advertising, litigation — to be missing from this collection. After listening to Blum for a while, it becomes quite clear that these stacks are more than just information, more than just vast quantities of paper — they are the stuff of Blum's obsession.

Blum is a gaunt man who stands an inch or two over 6 feet, yet he weighs barely 150 pounds. With glasses, drooping mustache, and rail-like physique, Blum looks something like a coffeehouse folk singer. His demeanor, though, is more like that of a sentry at the battlefront. He is remarkably intense. It is clear that his anger sometimes veers toward rage. "I'm angry, and I think that anger should be translated into ways to get other people aware of the devastation," he says.

He paces almost continuously, checking his watch to make sure he does not miss his train to New York, where he will make a connection and head off somewhere to speak to medical students. Or is it a physicians' group? Perhaps grand rounds at a hospital? It would be easy to lose track, for Blum travels the country constantly, it seems, crusading against smoking. Even some of his fellow activists who consider him abrasive and difficult concede that he is an extraordinary public speaker. His speeches are often accompanied by slide shows for which his narration is alternately grimly serious and rollickingly funny, and his cutting ridicule of cigarette advertising inevitably brings down the house. Blum has conveyed his message to millions of people through hundreds of appearances on radio and television talk shows, at demonstrations, and in speeches to all manner of groups in more than 40 states. He has become one of the antismoking movement's elite through the intelligence, passion, and tirelessness of his commitment.

With time growing short before his train is to leave, Blum rails against the tobacco industry's public relations and lobbying organization in Washington, D.C., the Tobacco Institute. "The Tobacco *Institute?*" he asks in a mocking tone. "What is this about an *institute* about public relations? You could say the Pretzel Institute. It's not science. The Tobacco Institute is public relations. It's PR flack. It's propaganda. It's like the Nazi Institute for racial studies."

In the past, Blum debated representatives of the Tobacco Institute, but he refuses to do that now, saying that they are "not decent enough" to argue with.

"Cigarette smoking is a disease in and of itself," he says. "The act of promoting it and the creating of a vehicle to sell it is a pathological and sociopathic process that's got to end. . . . I don't care so much about banning advertising . . . as much as destroying the cigarette industry. . . . You have to do something about the origin of the problem. The origin of the cigarette smoking problem is the cigarette industry. It's not the tobacco farmer, it's the manufacturer and the promoter. It's the advertising people who lend their sense of perverse reasoning and logic to selling a product that they know will result in death. . . . I'm out to end the sales of cigarettes.

"Also," he adds, quite matter-of-factly, "I think what's going to have to happen is putting some of these corporate presidents in jail for going after kids."

WHEN ALAN BLUM WAS 5 OR 6 years old, his father, a family doctor on Long Island and a three-pack-a-day Chesterfield smoker, suffered a major heart attack. After he recovered, Blum's father became convinced that smoking had contributed to his heart problem, and he quit. "We would be sitting watching baseball games in the '50s," Blum recalls, "and a commercial would come on — 'Winston *Continued on page 51*

Charles Kenney is a staff writer for the *Globe Magazine*.

Tobacco wars

CONTINUED FROM PAGE 17

tastes good, like a cigarette should,' or Lucky Strike or what have you, and he'd ask me to go turn on the tape recorder and tape these things, because people wouldn't believe one day that this went on, that people were paid far more than you or I would ever see to propagandize, to get people to smoke, essentially to kill them. He was the only person I've ever met who was talking about cigarette advertising at that point. He was shocked that they could keep on advertising like that."

After graduating from Amherst College, inspired by his father, Blum went to Emory University School of Medicine in Atlanta, graduating with the class of 1975. Blum intended to start a family practice eventually, and toward that end he began a residency in family medicine in Miami. One day he saw a patient with lung cancer "so severe it was literally eating through her whole chest wall." He despaired. What could he do for this desparately ill woman? From reading the latest research, Blum knew that nine out of every 10 cases of lung cancer were caused by cigarette smoking — that cancer of the lung would virtually disappear if cigarettes did not exist — and it was perhaps the senselessness of the woman's terminal disease, its eminent preventability, that nagged at him. One evening soon afterward Blum was driving home listening to a Miami radio station when he heard a man named Bill Dwyer from the Tobacco Institute talking on the Larry King show about the antitobacco "do-gooders."

"So I called up naively," Blum recalls, "and I said, 'What's going on there? You have the most biased, nonsensical program. You have a paid PR person from the tobacco industry; why don't you have equal time?' And they first hung up, and I called back, and they said, 'Okay, when do you want to come on?' Then he announced on the air that 'some doctor wants to challenge you, Bill.' " A debate was arranged for that April 1977.

"He beat the pants off me," Blum recalls. "He was a showman. Dwyer used this marvelous thing of being calm, being cool, talking about people like, 'this doctor here, this well-meaning doctor here.' " At this point in recounting the story, Blum slows into the imitation of an ever-so-deliberate, reasonable tone — " 'People who want to tell you how to run your life. People who don't think you're mature enough to make your own decisions in life. People who don't want to look at the evidence. We would love to know what caused cancer. We wish we could find out what it is that statistically has associated people who smoke with more diseases. We happen to feel that people who smoke are so much more outgoing, they have more fun, they enjoy life more.' " Blum stops and recalls his response. "And then when I'd get apoplectic and turn blue and say, 'but-but-but-you-you're-you're-it-says-that-the Surgeon General says . . .' he'd say, 'Doctor, you know statistics can be made to do anything.' "

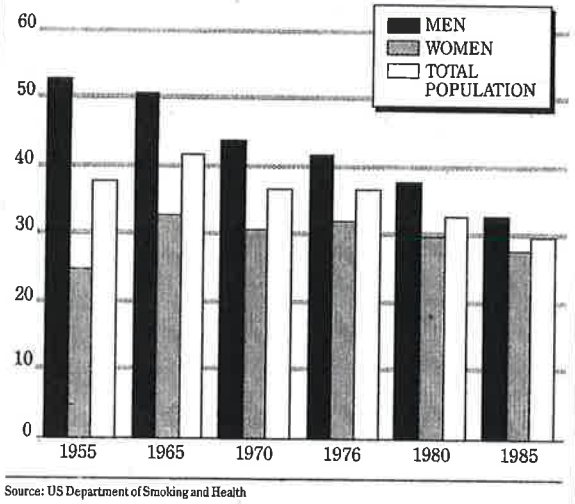
Blum pauses, lost momentarily in the vivid recollection. He says in an almost somber tone: "My wife says it's the only night in our lifetime together I didn't get any sleep. I was very upset. He made me lose my cool. He made me look like a fool."

Blum was soon obsessed with the issue. He felt compelled to act, and after thinking about various options he decided to start an organization he hoped would counter, in some small way, what he saw as the tobacco industry's insidious advertising. He called the organization DOC, for Doctors Ought to Care. Blum knew how effective anticigarette broadcast advertising could be, for he had closely followed the experience in the late 1960s of a young New York lawyer named John Banzhaf III. Invoking the fairness doctrine, Banzhaf had petitioned the Federal Communications Commission for free television time to rebut cigarette commercials. And he had won. The result was that antismoking forces were given $200 million worth of free air time to attack smoking. Their ads were so effective that to get them banished, the tobacco companies volunteered to stop their own TV advertising. Blum's idea was that DOC would raise money for anticigarette advertising. He recruited other physicians and collected funds to buy billboard space for antismoking ads. But billboard companies derive huge profits from the tobacco industry — nearly half of all billboards in the United States promote cigarettes — and the local billboard company refused to sell Blum any space. The company offered to give him free space for noncontroversial messages, but not to attack cigarettes. Blum lowered his sights a bit, bought space on bus benches in Miami, and posted signs mocking cigarette ads with slogans such as "Country fresh arsenic" and "Full-bodied cyanide." Blum and his few dozen fellow members of DOC spoke in junior high schools, organized picket-line protests of a Benson & Hedges-sponsored film festival, and, while picket-

Globe chart by Grazina Sakalas

Kicking the habit

Percentage of Americans who smoke



Source: US Department of Smoking and Health

ing the event, referred to the Virginia Slims tennis tournament as the "Emphysema Slims."

Blum also started a radio program, *The Doctor Show*, during which he discussed a variety of medical issues and gave his listeners advice. It originally ran for three hours on Sunday mornings but gained in popularity and was moved to a time slot every weekday morning for an hour. Blum was also writing five commentaries a week for the radio station and reporting medical stories for a local TV station — a relentless antismoking campaign on top of his responsibilities as a medical resident. Blum didn't mind the workload; in fact, he loved conveying his antismoking views to very large numbers of people. It was also a way for him to polish his communications skills.

While working in Miami as a resident, Blum was elected to the governing council of the American Medical Association Resident Physicians Section, and he discovered, much to his chagrin and astonishment, that the AMA held $1.4 million worth of stock in the nation's two largest tobacco companies — Philip Morris and R. J. Reynolds. At Blum's instigation, he and other residents brought this to the attention of the AMA Board of Trustees and urged the board to sell the stock. In urging divestment, Blum and several colleagues wrote to the board warning that if word of the AMA's stock ownership leaked to the public it would be very embarrassing. Nonetheless, the board rejected the proposal to sell the stock.

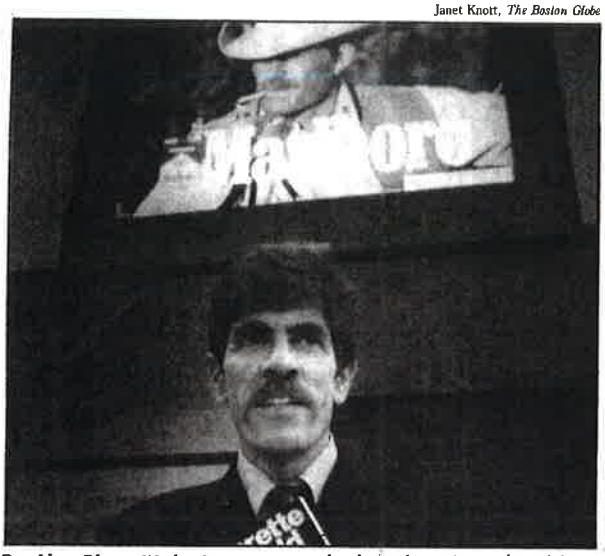
Why did the AMA buy the stocks in the first place? Kirk B. Johnson, general counsel to the AMA, explained last month that the AMA invests in tobacco companies to make money for its pension and insurance funds, and "it has an obligation to people who have stakes in those programs to use as its primary criteria and probably its sole criteria whatever will produce the best kind of income that these people are depending on it for."

Blum would not let the matter rest, however, and not long after his proposal was turned down he moved into a position where he was able to exercise more influence in such matters. Blum had long planned to go into family practice, but he had grown so enamored of the media work he was doing that when his residency was up in 1979 he chose a new direction. He applied for and was awarded a fellowship to work for a year at the *Journal of the American Medical Association* in Chicago, the official organ of the AMA. At *JAMA*, Blum worked as an editor and wrote about smoking. He also worked behind the scenes to try to persuade AMA officials to sell the tobacco stock, but the AMA brass was adamant.

The organization's House of Delegates reaffirmed that posture in the summer of 1981, when delegates voted overwhelmingly to affirm the decision not to sell the stocks.

Along with some of his colleagues, Blum made his views known to newspaper reporters, who wrote about the AMA's holdings, causing the organization some embarrassment. Soon thereafter, the AMA reversed its position and sold its shares. Blum was gratified, but he found that his efforts in that

Janet Knott, *The Boston Globe*



Dr. Alan Blum: "I don't care so much about banning advertising . . . as much as destroying the cigarette industry."

area had earned him the enmity of many officials at the AMA. By the end of his fellowship, he says, he did not find the atmosphere at the AMA "compatible."

While Blum was working in Miami, and later at the AMA, antismoking activists continued to win small skirmishes, but in important battles throughout the country they were beaten more often than not. An illustration of the tobacco industry's political muscle came in 1976, when Congress removed tobacco from the jurisdiction of the Consumer Product Safety Commission, making it the only consumable product that is totally free of federal regulation. And Philip Morris Incorporated successfully headed off the release of *Death in the West* — a powerful documentary about six Marlboro Man-style cowboys who were in various stages of dying from lung cancer or emphysema. (Philip Morris maintained, and a court agreed, that the company was deceived by the producers of the film and was not aware its commercials would be used in unfavorable light). To combat smoking, US Health, Education, and Welfare Secretary Joseph Califano established the US Office on Smoking and Health, but at least in part because of his opposition to cigarettes, Califano was fired by President Jimmy Carter, who did not want a Cabinet member alienating Southern tobacco states so close to an election. Meanwhile, in California, the industry spent $8.5 million to defeat two proposals to restrict smoking in public places.

In spite of its success, however, the tobacco industry publicly recognized the growing pressure of the opposition when the industry publication, *The Tobacco Observer*, characterized the nonsmokers' rights movement as "the most dangerous development to the viability of the tobacco industry that has yet occurred." That was not the only bad news for the tobacco companies. In 1979, Surgeon General Julius Richmond released a report stating that smoking was far more devastating than was known when the first Surgeon General's report was issued in 1964. Richmond's report stated that cigarette smoking is addictive, causes lung cancer in women, is harmful to the unborn child of a pregnant woman, and acts synergistically with occupationally hazardous materials such as asbestos. Richmond's findings jarred many smokers; public-opinion surveys later revealed that during the 14 days after his statement, more Americans tried to quit smoking than had attempted to stop during any other two-week period since the 1964 report.

Richmond's report preceded a number of important victories for the antismoking forces. Studies in Japan and Greece showed a correlation between "involuntary" smoking and lung cancer in nonsmoking wives of men who smoked; a Federal Trade Commission staff report concluded that cigarette companies specifically targeted adolescents in their advertising and attempted to offset health concerns of consumers; and a pirated copy of *Death in the West* was shown, finally, on a San Francisco television station — to rave reviews.

But what most discouraged antismoking guerrillas such as Blum was the lack of activism on the part of the government and major voluntary health organizations — the American Cancer Society, the American Heart Association, and the American Lung Association. Ironically, it was a commission established by the American Cancer Society that, in 1983, sharply criticized the inertia of the government and the major voluntary organizations. In evaluating the effectiveness of the antismoking movement, the National Commission on Smoking and Public Policy concluded that government efforts were "minimal and symbolic." The efforts of the health organizations it found "fragmented." None of the organizations, the commission stated, "has expended substantial sums in this area in relation to the size and scope of the problem." The commission's executive director estimated that the cancer society was allocating only about two-tenths of 1 percent of its annual income to combat tobacco.

Blum notes that the cancer society has done much more lately. But, he adds, "I don't think they've come anywhere near what they should be doing. It is disappointing that they haven't really rocked any boats or made any waves. I can understand a certain need for conservatism, but I think proportionate to their mission they haven't done what they could be doing."

Donald Shopland, the acting director of the US Office on Smoking and Health, agrees: "The cancer society and the heart association just were not involved to the degree they should have been, given the amount of mortality cigarette smoking causes."

After leaving the AMA, Blum spent a year in Australia as editor of the *Journal of Medicine of Australia* before returning to the United States. In January of 1983, he became editor of the *New York State Journal of Medicine*, where his objective was to create something unique: to dedicate an entire issue of a medical journal to the topic of cigarette smoking. Seven months later Blum had produced a 163-page issue of the journal that featured on its cov-

er a decades-old advertisement for Chesterfield cigarettes. The ad featured an attractive young woman posed against a red background, holding up a package of Chesterfields, with the headline: "After a man's heart." (Blum's father, the heart attack victim, was a Chesterfield smoker.)

The issue, entitled "The World Cigarette Pandemic," was a landmark document. It included more than 50 articles by respected experts on every aspect of smoking. Included were articles from five men who had served as US Surgeon General, as well as interviews with Blum and current Surgeon General C. Everett Koop. The issue included articles on health, politics, the Third World, advertising, ethics, and more. The issue was hailed as a major contribution to the literature on smoking, for unlike most medical journals, it was circulated far beyond medical and scientific circles. An editor at the *Columbia Journalism Review* praised the issue and in so doing brought it to the attention of thousands of journalists who did not specialize in science.

Almost immediately after the issue's publication, Blum headed for Binghamton, New York, to speak to medical students. When he arrived at the office of Dr. George Gitlitz, a vascular surgeon, Blum recalls that Gitlitz told him, "Alan, if you never do anything for the rest of your career, you can rest [assured] that this was great."

Blum was delighted with Gitlitz's reaction, but he shot back: "You should see what I *didn't* put in." And right away Blum went to work on a second special issue, published last July, running 219 pages, and, in Blum's mind, "a far better issue."

Unlike virtually every other important antismoking activist in the country, Blum is pessimistic about the future. "We're not winning," he says. "At best, we're holding our own. We're looking at it and saying, 'We're winning the war on smoking. All my yuppie friends are no longer smoking. They're jogging.' And we're saying that must be the world, but we're not looking at the countries where cigarette smoking is still dramatically rising, not decreasing. This is a world problem. Not only are we not winning the war against smoking, but it's probably at its origin in Africa and Southeast Asia, and nothing is being done. Virtually no one works full-time to counteract this industry."

Blum checks his watch and frowns. Caught up in the topic, he has lost track of time and missed his train. He will catch the next one, agitated that this may mean he will miss his connection. He is upset as well because he has recently been fired from his job as editor of the *New York State Journal of Medicine*. He says he was working on a third special tobacco issue this past January when he was abruptly dismissed. He says he was told that three special issues were inappropriate for a state medical journal. He says he was told as well that he had run the journal poorly. He does not regret, however, having made this crusade central to his life. "It's the thing that I can do best," he says. "It's actually my best skill. I've frittered away all sorts of clinical acumen. I've got a sick kid right now, and I don't know what's wrong with him."

On the train to New York City, heading off to speak against smoking in a distant city, Blum wonders aloud what he will do to support his wife,

who is pregnant, and his two children. He cannot conceal his distress. But his mind switches back as he looks up at a railroad station clock advertising Benson & Hedges. He shakes his head, a look of anger and disgust on his face. "See," he says, "they've even got the clock."

Many other antismoking activists express a good deal of optimism, a feeling founded in the belief that while their success in the past has been slow — often painfully so — a new weapon in the antitobacco arsenal could bring a decisive victory within the foreseeable future. The new weapon, as John Banzhaf III puts it, is to "sue the bastards!"

The man who has emerged as one of the engineers of the new weapons system is a professor of law at Northeastern University Law School named Richard A. Daynard, a man with a brilliant academic record. By the age of 29 he had earned a law degree from Harvard, a PhD in urban studies and planning from MIT, and was teaching law at Northeastern and psychiatry and the law at the New England Medical Center. Daynard is a thin, wiry man with a disheveled appearance. He seems to carry a permanent smirk on his face — not the grin of a wise guy, but a sign of affability. Daynard's initial involvement with the antismoking movement came in the mid-1970s, when he became interested in nonsmokers' rights. "I was always amazed," he says, "that as a nonsmoker I was expected to sit quietly and breathe other people's smoke."

The aggressive style of a Boston-based group called GASP (Group Against Smoking Pollution), founded in 1972, attracted Daynard, and he signed on as a volunteer. He drafted an ordinance restricting smoking in restaurants, which became the model for similiar measures in 27 Massachusetts communities. Daynard also mapped legal strategy for a state employee who wanted to work in a smoke-free environment, a landmark case that, after years of fighting, the worker finally won. By 1983, he had become president of GASP.

Daynard was always looking for ways to further his antismoking aims and, two years ago, as he was discussing products-liability law with students in a seminar, it occurred to him that the principles of such law might very well apply to the tobacco industry. At the heart of products-liability law, he says, lies a very simple principle: that companies are responsible for damage done by their products. Daynard believed it would be possible to argue successfully in court that the cigarette companies knew as early as the 1930s and '40s — long before Congress mandated warnings on cigarette packs and advertisements — that cigarettes were dangerous, yet they failed to warn smokers of those dangers, and that as a result of that failure, many people continued smoking, got sick from it, and died. Daynard knew that during the 1950s and '60s smokers who had become ill had brought suits against the companies, but they had failed, and since that time products-liability law had evolved to the point where it was less difficult for plaintiffs to win in court.

While this approach was germinating in Daynard's mind, other lawyers in different parts of the country were in the early stages of a handful of suits against tobacco companies. Before preparing a memorandum on the applicable law, Daynard called Banzhaf, founder of Action on Smoking and Health (ASH) and one of the most knowledgeable men in the country on antismoking liti-

Today's solution

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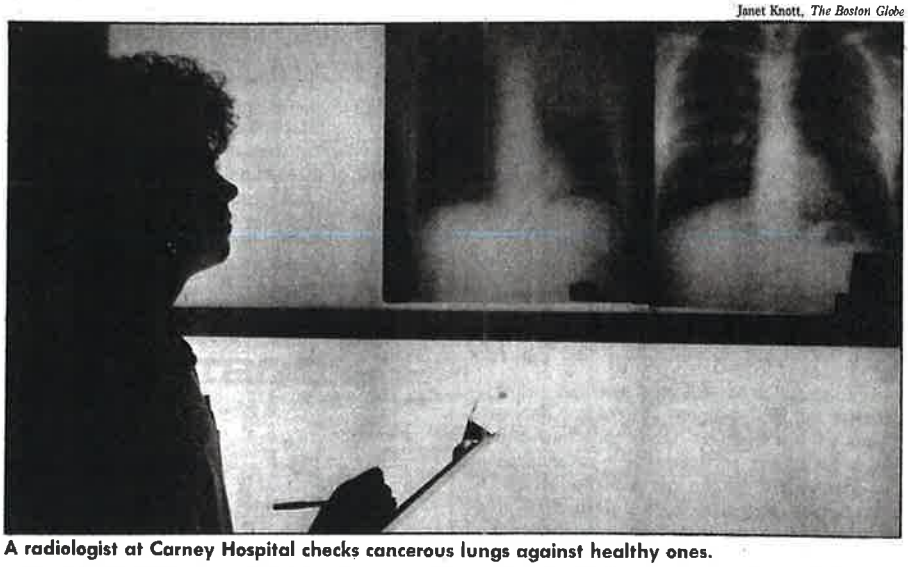
Janet Knott, *The Boston Globe*



A radiologist at Carney Hospital checks cancerous lungs against healthy ones.

gation. Banzhaf told Daynard he knew of lawyers in New Jersey, Tennessee, and West Virginia who were suing tobacco companies. Daynard called them all. "What I realized after talking to them was that they had never talked to each other before," he says. "There was a vacuum there. None of these people had talked with each other, which was hardly the case on the other side." The other side, as Daynard calls the tobacco industry, has hired some of the best and most expensive legal talent in the United States, and it has demonstrated that it will continue to fight the suits at every turn, for these are cases the companies simply cannot afford to lose. In the fall of 1984, to combat the industry's legal might and to foster the sharing of ideas, information, and strategy on the antismoking side, Daynard organized the Tobacco Products Litigation Project.

How, he asks, could the companies not have known the dangers of smoking? He refers to the study published by Drs. Ernst Wynder and Evarts Graham in *JAMA* in 1950 and fairly shrieks: *"1950!* Anybody who can believe that the tobacco industry did not know about an article in *JAMA* on the effect of tobacco can believe anything. I have zero-point-zero-zero doubt. There is *no* possibility that they didn't know about these studies."

Daynard believes it inevitable that the lawsuits will succeed, in part because the companies' defense is fundamentally contradictory. "They say, number one, cigarette smoking is not dangerous," says Daynard. "And, number two, the plaintiff should have known smoking would kill him." Put another way — smoking isn't dangerous, but the plaintiff should have known it was dangerous.

"I think they're going to lose lots of cases, because juries are going to get very angry with them," he says. "A guy comes in, and he's on his last legs, or he's dead, and they say, 'He's a jerk. He should have known.' "

Millions could be won in these suits, says Daynard, because the purpose of products liability law is not only to force the manufacturer of a dangerous product to pay for the damage done by the product, but also "to bring companies to justice and stop their outrageous behavior."

The suits against the tobacco companies come in the wake of legal action against North American asbestos companies, and it is the success of that litigation, more than anything else, that encourages antismoking activists. So effective were the suits on behalf of former workers in asbestos plants — workers who became ill and died as a result of exposure to asbestos fibers — that the industry was brought to its knees. Johns-Manville (reconstituted as the Manville Corporation) paid out so much money to so many employees and former employees who sued that it became the largest American company ever bankrupted.

"There is very little difference between these cigarette cases and the asbestos cases," says Daynard. "The crucial parallel is that the companies knew long ago about the dangers and instead of actively informing the people who were exposed, did exactly the opposite — stonewalled and tried to deep-six the evidence."

There are two major differences, however. One, which may very well affect the court cases, is that Congress never required a warning label to be placed on asbestos packages, as it did with cigarettes. And the other, which will have no effect on the suits, is an enormous difference in the number of people affected. In his book on the fall of the asbestos industry, *Outrageous Misconduct,* which was published last year, Paul Brodeur reports that over the next 30 years or so, several hundred thousand people are expected to die prematurely of asbestos-induced illness. But the Surgeon General estimates that an even greater number of Americans will die of cigarette-induced diseases in *one* year.

A lawyer who is working on eight suits against tobacco companies and who also worked on asbestos cases — on behalf of an asbestos company — agrees with Daynard's assessment that the suits are similar. Marc Z. Edell of Morristown, New Jersey, says that from a legal perspective there are no major differences between asbestos and tobacco cases. In fact, says Edell, the quality of scientific research into cigarette smoking is far better than that on asbestos. "It is unbelievable to compare the literature on asbestos to the literature on cigarette smoking," he says. "There's a much stronger case against tobacco than there is against asbestos."

Edell maintains in his lawsuits that the scientific informa-

tion on tobacco's dangers was sufficient as long ago as the 1930s and 1940s, so the tobacco companies "definitely should have warned" smokers back then.

To date, Daynard says, about 100 lawsuits have been filed by smokers or their survivors against the major tobacco companies. While the only two cases to reach trial thus far have been won by the companies, more cases may be headed for court later this year. In one suit, a Newton woman is charging the Liggett Group with negligence in the death of her husband six years ago. Joseph Palmer died of lung cancer at the age of 49 after having smoked between two and four packs of L&Ms a day for 23 years. Palmer's widow, Ann, contends that because Liggett & Myers manufactured, promoted, and sold the product she believes killed her husband, the firm bears some responsibility for her husband's death. And she is suing it for more than $1 million. Another suit, scheduled for trial this month in Oklahoma, was brought by the survivors of a 19-year-old Oklahoma man, charging that his death from mouth cancer was caused by chewing tobacco and that the company knew the product was dangerous yet never warned consumers.

Suits against the cigarette companies received a serious setback last month, when a federal appeals court — overturning a decision activists had seen as a major victory — ruled that the 1965 cigarette labeling act passed by Congress renders companies immune from suits that charge them with failing to warn consumers of cigarettes' hazards. The ruling came in a case in which Edell is suing several major tobacco firms on behalf of a New Jersey woman named Rose Cippolone, who died of lung cancer at the age of 58 after having smoked cigarettes for 42 years. Until the appeals court ruling, the Cippolone case had been considered strong because in the process of discovery — that is, pretrial disclosure of hitherto secret papers germane to the case — Edell has reviewed more docu-

ments and records from tobacco companies than any other lawyer in any suit.

Edell says he will appeal the ruling to the US Supreme Court and, if that fails, he will seek to try the case with a different legal strategy. Instead of arguing that the companies failed to warn Cippolone, he will contend that cigarettes are an unreasonably dangerous product — that their risks vastly outweigh their benefits. Edell says that, under the law, no warning is sufficient for products deemed to be unreasonably dangerous. "If the risks of the product outweigh the utility of the product, the warning is useless," he says.

The case depends in part upon whether a jury believes that Cippolone smoked cigarettes even though she knew they were dangerous — that she voluntarily assumed the risk of smoking. Before she died, Cippolone said in a deposition that she did not believe cigarettes would kill her, and according to Edell, that "certainly the government would never let people sell products that caused cancer." That belief on her part, says Edell, coupled with evidence that smoking is addictive, means that she did not voluntarily encounter the danger of smoking.

Prior to the appeals court ruling, Edell said that to win, he would try to demonstrate that the companies knew "there was sufficient information to give rise to a reasonable inference that the product which [the cigarette companies] were selling posed potential health hazards to the users of it." Now he cannot use that approach, although he says there is no question in his mind that that is true, and he has been working toward proving that point for nearly three years.

Edell has already spent about 200 days gathering depositions, questioning past and present chief executive officers of every major cigarette manufacturer, top officials at the Tobacco Institute, and officials from the AMA and advertising agencies. During the process of discovery, Edell has reviewed more than a million documents. He and his firm have already spent $1.5 million worth of legal time on the matter and, to date, have received not a dime. If he and his colleagues win the cases they will make money — perhaps a fortune — but if they lose, they will have lost millions in time. "It's a serious commitment," Edell says emphatically. "We are committed to it. We have eight cases. We will win one of these cases.

"You have got to paint a complete picture for the jury," he says. "You've got to explain to the jury what these people are like, what these tobacco companies are really like, and the extent to which they have gone, over the years, to minimize the health hazards to influence what has gone on in terms of regulation."

Edell believes he will win, in part because of a change over the years in the attitude of the public — and prospective jurors — toward smoking. "At this point the public is inclined to believe that cigarette smoking clearly causes lung cancer, whereas back in the '50s and '60s, when some of the earlier cases were being tried, there were many more smokers."

The tobacco industry is confident in its position on the suits, however. Scott Staph, a

spokesman for the Tobacco Institute in Washington, says that since the early 1950s the companies have won every case brought against them. And he points to the appeals court ruling as protection for the companies.

Shortly before Christmas of 1985, the first two suits in the modern wave against the industry went to trial in California and Tennessee. Both plaintiffs lost.

Daynard was not the least bit surprised by one verdict. In the California case of Galbraith v. R. J. Reynolds, Inc., testimony from expert witnesses in the trial made it unclear just what caused John Mark Galbraith's death. Daynard says that 350,000 Americans died of cigarette-related diseases last year, and it appeared to him that Galbraith "wasn't one of them." Daynard thinks it a moral victory of sorts that the jury's vote was only 9-3 against Galbraith.

In the other losing case, tried in Knoxville, Tennessee, a judge directed the verdict against Floyd F. Roysdon, who contends he became afflicted with peripheral vascular disease as a result of smoking cigarettes. "The judge said everybody should have known the dangers," says Daynard. "But Roysdon had peripheral vascular disease, and *nobody* knows cigarette smoking causes peripheral vascular disease except doctors and the cigarette companies." The Roysdon case is on appeal.

In spite of the losses, antismoking activists exude confidence about the lawsuits. "The minute the first one comes down, it's going to have a tremendous educational effect," says Banzhaf, the executive director of the antismoking group Action on Smoking and Health. "The tobacco industry has been telling people for years, 'There is no evidence. We're not allowed to present our side. The government is biased.' Once a jury of people decides that 'Yes, this guy's lung cancer, emphysema, whatever, was caused by smoking,' that, I think, will have an impact even on the most skeptical of people.

"Secondly, it's going to wake up a lot of people to the possibility that they can sue. The minute one of those things comes down, they're going to come jumping out of the woodwork. It will have an immediate

impact on the financial status of the industry. Imagine what's going to happen on Wall Street the day after one of these suits is decided. In the long run it'll affect their ability to raise money through bonds. It will tremendously affect their ability to get liability insurance. They're going to have a hell of a time ever getting liability insurance again.

"So, in a sense, the entire corporate financial structure will be hit very, very significantly. The first suit will be a couple-hundred-thousand bucks, a million. Five or 10 years from now there will be large verdicts, and when punitive verdicts come in, we're talking big money."

Banzhaf envisions a day when, after successful lawsuits, the companies will be required to increase the price of cigarettes by perhaps $1 per pack; some people believe the increase could be triple that. "It would be a very, very strong disincentive for people to smoke," he says.

If there was a moment in the tobacco war that symbolized the antismoking forces' coming of age, it may have come in Boston this past January 11, 22 years to the day after the publication of the original Surgeon General's report on the dangers of smoking. On that bright, wintry Saturday, leaders of the movement, from as far away as Hawaii, gathered at the Northeastern University Law School. It was a historic meeting in its own way, for it included activists who had been involved in just about every major battle of the tobacco war. Dr. Richard H. Overholt, one of the pioneers of the movement, was there, as was Banzhaf, the lawyer who had single-handedly altered the course of the battle when he secured $200 milllion worth of free television time to air antismoking commercials — the most potent weapon thus far in the war. From New York had come Dr. Alan Blum, and from New Jersey, Marc Edell. Daynard presided over the gathering of people whom he described as sharing a "determination to bring the tobacco industry to the bar of justice ... to do something about this epidemic."

There was a degree of pessimism, reflected in Blum's dark view that the struggle is not going well. That perspective was buttressed by a report,

John Blanding, *The Boston Globe*

Richard Daynard: Antismoking activists share a "determination to bring the tobacco industry to the bar of justice."

published by the Worldwatch Institute, a Washington think tank, only weeks before the meeting at Northeastern, contending that "the leading cause of premature death among adults in 1985 was not Africa's famine, warfare, or the attacks of international terrorists: It was cigarette smoking. Smoking remains at epidemic levels in industrial countries and is growing exponentially in the Third World ... Antismoking efforts are meeting with only limited success in industrial countries and are failing in developing ones. World tobacco consumption is up 75 percent over the last 20 years."

Additional bad news was the disturbing trend showing that, increasingly, class lines distinguish smokers from nonsmokers. Thomas Schelling, Harvard professor of political economy and director of the Institute on Smoking Behavior and Policy at the John F. Kennedy School of Government, who was also at the Northeastern meeting, points out that poor and working-class people are more likely to smoke than better-educated and wealthier people. Schelling put this into stark relief: College-bound high school seniors are 2½ times less likely to smoke than are seniors who are not going to college.

In spite of such signs, however, it has grown increasingly clear during the past few years that the antitobacco forces are winning, that time is running out on the industry. Steadily, over the years, the percentage of the US population that smokes has shrunk from 42 percent in 1965 to 30 percent in 1985. Many family physicians, by quitting themselves, set an example that has been followed by millions of their patients — middle-aged men in particular. The physical-fitness craze that swept the country was an important factor, for it offered no place in the new regimen of health consciousness for cigarettes. Through the years prohibitions against smoking grew steadily, then geometrically, to the point where opportunities to smoke have been significantly curtailed. And Schelling points out that cigarettes have all but disappeared from the giant mirror of pop culture: prime-time television.

At Northeastern that day in January the talk was not of defeats, but of victories — of a war being won. Those at the meeting recalled the success in San Francisco, where antismoking activists defeated the tobacco industry's million-dollar-plus campaign and won an ordinance restricting smoking in the workplace. There were additional encouraging signs. Two major Southern religious groups — the Southern Baptist Convention and the North Carolina Council of Churches, organizations in the heart of tobacco country — took tough antitobacco stands in recent years. Since 1970, one-third of all smokers — a total of 33 million Americans — have quit. Harvard University divested tobacco holdings from its endowment fund because the university believed the stocks were a poor investment. And one of the most important victories the antismoking people have won in Washington, D.C., came not long ago, in the form of a new labeling law in which four

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Tobacco wars

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strongly worded warnings alternate on packages and advertisements.

There was a sense of progress at the meeting, a notion supported by the results of a scholarly analysis conducted by professor Kenneth Warner of the University of Michigan. Warner's study showed that specific antismoking initiatives correlated highly with reduced smoking in the population, and that as of 1978, without the work of the antismoking movement, per capita consumption of cigarettes would have been more than 33 percent higher.

One of the most significant changes has been the newfound political clout of the antismoking movement. At long last, all the voluntary health organizations threw their considerable weight behind their Washington lobbying organization — called "The Coalition on Smoking *or* Health." And their first major fight — the battle over explicit warning labels for packages and advertisements — demonstrated their muscle. Never before, says former Federal Trade Commission chairman Michael Pertschuk, had the tobacco industry lost a fight on Capitol Hill. Professor Warner observes that "the very existence of the coalition is remarkable, given the long history of often-bitter noncooperation among the three associations."

Simultaneously have come the first significant divisions within the legendary tobacco lobby. Appearing on *Face the Nation* earlier this year, Representative Charles Rose of North Carolina, one of the most staunchly loyal tobacco-industry supporters through the years, said, "Our position is changing. Those of us that represent the people who grow tobacco really are taking a different approach to the companies, because the companies are beginning to import foreign tobacco in ever-increasing amounts. They are hurting our constituents very badly. I'm not the lock-step loyalist to the tobacco companies that I was five years ago. In my opinion, the tobacco companies are rapidly losing their grip on Capitol Hill."

Even the American Medical Association has joined the fight in earnest, and in recent years it has become a central force in the antitobacco movement. The AMA's House of Delegates earlier this year voted to propose legislation outlawing all advertising of tobacco in the United States, and in February *JAMA* ran an issue devoted almost entirely to the topic of smoking.

'Who's winning?" asks Dr. Ernst Wynder, author of one of the earliest and most significant studies linking smoking to lung cancer. "We've got 35 million ex-smokers. When I first started, 75 to 80 percent of men smoked. Today it's down under 30."

At Northeastern that day there was a feeling brand-new to the antismoking movement, and that was a belief that victory for them was — not possible or even likely — but *inevitable.*

Professor Schelling says, "If I had to bet money, I would bet that smoking steadily declines from now on as a percentage of the population. If it goes down a quarter every decade, in 25 or 50 years it will be down to where only 5 to 10 percent of the population is smoking."

Perhaps those most gratified by the progress of the antismoking movement are the earliest pioneers — physicians such as Overholt, one of the first surgeons to operate on a human chest and see the effects of cigarette smoking, and Dwight Harken, the first man to perform surgery on the inner chambers of the human heart. Overholt, who is 84, and Harken, who will be 76 in a few weeks, say the antismoking movement has come a very long way indeed.

"We are winning the war," Overholt says. Some people will always smoke, he says, but he adds, "I think we're going to destroy it as an industry."

Harken agrees. He says he is particularly sanguine about the potential success of the lawsuits. "I know we'll win one," he says of the suits. "I know we'll win one soon." But he is clearly alarmed by the possibility that victory will not come swiftly enough to be witnessed by activists of his generation. It is with sadness that he says that he is "scared they won't move fast enough. That none of us who were vigorously espousing this cause will be alive."

At Northeastern, Overholt and Daynard listen intently as William Townsley, a lawyer from Beaumont, Texas, talks about the 24 suits he and his partners have filed recently against tobacco companies. The physicians listen also to George Braly, a lawyer from Ada, Oklahoma, who is suing several tobacco companies on behalf of the 19-year-old man who died from mouth cancer that Braly contends was caused by chewing tobacco. Townsley and Braly have a good deal in common. Both are conservative Reagan-Republicans, quiet men who seem to make an effort not to draw attention to themselves.

"He's a very thoughtful, careful guy," Daynard says of Townsley. "He's a very sound, meticulous guy. When he moves he will be very firmly supported. He will have examined the facts carefully." Townsley is a calm, even shy, man who dresses conservatively and speaks in a quiet Texas drawl. He talks a bit about his cases and about what he calls "the cruel and dishonest response" by the tobacco industry to the 1964 Surgeon General's report. The decent thing, Townsley says, would have been never to promote cigarettes. He says that in court he will attempt to show that the industry has "dealt in bad faith with the public." That it aims its promotions at children, because "children are the replacement smokers for those who die and quit."

The industry's distortions "are causing people to underestimate the magnitude of this risk," he adds. "They need to concede that the Surgeon General was substantially correct."

These are not men given to extremism. But like Townsley's, Braly's voice takes on an edge when he talks — in almost a whisper — about the tobacco companies. Braly outlines his case, describing in painful detail the excruciating death of the 19-year-old cancer victim. Braly talks about going through the process of discovery with the tobacco companies, and as he does so he slowly, almost imperceptibly, shakes his head as though in disbelief. He narrows his eyes and says softly, "When you get involved with discovery, I am overcome with the sense of unspeakable evil from the tobacco companies."

Townsley describes some of his cases. He talks about the foundations of products-liability law, and he struggles a bit in his summation. "To encourage someone to use a deadly, addictive product," he says, groping momentarily for the word he wants, speaking in a low voice yet with a certain force, "is wrong." •