



The Consumer Advocates for Smoke-Free Alternatives Association

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## **The CASAA Guide to Civil Disobedience in Defense of Smoke-free Tobacco/Nicotine Products**

### **CASAA White Paper #4**

The Consumer Advocates for Smoke-free Alternatives Association (CASAA)  
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There is an obvious role for civil disobedience in resisting the costly, unjust, unethical, and unwarranted regulations that limit our freedom to use low-risk tobacco/nicotine products, whether for tobacco harm reduction (THR; that is, replacing would-be smoking) or any other purpose. Civil disobedience (CD) has a storied history that includes Thoreau, Gandhi, and King. However, it is also often harmful to a cause when the concept is abused or practiced by confrontational activists whose agenda is self-aggrandizement or perverse entertainment. This paper seeks to educate users of low-risk tobacco products (e-cigarettes, smokeless tobacco) on the concept of civil disobedience and assess which actions might be useful (including personally) and which might be counterproductive for the cause.

It should be emphasized that CASAA is **not** calling for CD actions, nor does it have any plans to do so. This is **not** a suggestion that you engage in any of these actions. But we are aware that there is a lot of interest in CD in the vaping community, and we wanted to make sure that anyone who chooses to engage in CD does so with their eyes open, and to discourage actions that would be counterproductive. If someone is going to do this, they should do it in a way that maximizes the benefits and minimizes the costs. Please note especially the potential personal costs of taking CD actions.

#### The What and Why of Civil Disobedience

The purest form of civil disobedience is openly taking an action that is forbidden by an unjust law, such as black people sitting down at a “whites only” lunch counter or marching to the sea to collect salt. As discussed below, there are some variations on this theme in terms of what consequences the participants plan to accept or provoke. It is generally accepted that true CD must not involve any violent acts (though those who are civilly disobedient need to realize they may be the target of violent retribution from the police or others) and must avoid destruction of property (at least keeping it to a trivial level, like cutting a chain).

There is some debate among self-styled CD practitioners about the latter point, but for present purposes it is difficult to see how any action that involved substantial destruction of property could benefit THR, so it is assumed throughout that all the actions avoid violence toward people or property. It is possible to imagine useful CD scenarios that involve acts of minor property damage, such as tearing down a sign, done openly and without an attempt to avoid sanctions for the actions. Secretive vandalism clearly does not constitute civil disobedience; such guerilla tactics may or may not be productive for a cause (generally they are just done for the amusement of the perpetrator), but they are not what is being addressed here.

Civil disobedience serves several purposes.

First, if properly executed, it calls public attention to the injustice. For issues such as ours, there are millions of people who would be sympathetic if they understood the truth and the situation, but they only know what they read in the headlines. A CD action demonstrates the deep commitment that some individuals have to the cause and can encourage people to learn more and thus to care.

Second, even in situations like the lunch counters where there was a general awareness of the problem among those who were sympathetic at heart, it is easy for people to ignore an unjust law that is quietly being obeyed. Open defiance and the resulting enforcement of that law, however, are more difficult to ignore and are likely to be reported by the press.

Third, some types of CD actions are designed to inflict the cost of enforcement on those who impose the unjust laws. This includes such actions as allowing oneself to be arrested or cited and then fighting it in court to the full extent of the law. Such actions typically impose substantial costs on those engaging in the CD but can sometimes produce greater benefits also.

In contrast with the protests of King or Gandhi, protests about rights to use low-risk tobacco products are unlikely to provoke moral outrage except among ardent civil libertarians. While product consumers are outraged, it is not wise to expect the rest of the public to become animated. But there is a good chance that they can be convinced that bans are stupid government intrusion and unfair. Moreover, the public might become somewhat outraged when people are punished for violating bans. (The recent case of a 90-year-old WWII veteran who was forced to leave his public housing apartment because he smoked in the wrong outdoor space provoked outrage even among many anti-smokers.)

#### Which laws are morally appropriate targets for civil disobedience?

Laws and regulations that restrict an activity that harms no one else, and thus are based entirely on an imposed “moral” code (one that is not shared by the regulated individual) or simple discrimination against a group of people by those with greater power, are clearly unjust. Thus, any restriction on the use of smokeless tobacco (so long as it does not involve potentially offensive spitting) is clearly unjust.

Restrictions on vaping are more complicated because it is at least somewhat obtrusive, unlike smokeless tobacco use, and the details must be considered. Restrictions are clearly unjust in situations where the vaping has no physical impact on anyone who is involuntarily present (i.e., they cannot even smell it at more than trace levels), such as an uncrowded outdoor setting or in a private space where the controller of the space wishes to allow vaping (note, however, the discussion of CD in private venues below). The same can be argued for smoking restrictions in such settings, but this is not addressed in this paper. Restrictions on vaping that are based on considering the action “immoral” or the fact that some observers find the action to be offensive cannot be considered justified or ethical in a free society. These are exactly the same as the justifications used to forbid black people from using a whites-only drinking fountain.

On the other hand, violating restrictions on vaping in confined or crowded public spaces, or in any situation where people are involuntarily close to you, is not a good choice for CD and

arguably does not fulfill its tenets. You may believe that those restrictions should not exist, and you are certainly free to try to persuade people to not object to the vaping and persuade regulators to not prohibit it. But CD actions should be limited to cases where there is no negative impact on innocent bystanders, other than perhaps minor inconvenience to navigate around a crowd (and, of course, offending those who unjustly want to restrict people's personal choices, which is a given).

There is no bright line between unjust restrictions and restrictions that can be justified on legitimate grounds, however tenuous the latter might be. But this is largely unimportant for practical purposes because there clearly are situations where the restrictions are unjust. Effective CD actions can take place where the injustice is most clear, such as discrete vaping in an uncrowded park where it is banned.

#### Potential bad publicity from ill-advised civil disobedience

Whether or not a CD action imposes a burden on bystanders, it is important to consider any negative impacts it might have on those who could either be persuaded or offended.

One important consideration unique to e-cigarette CD action is engaging in discrete vaping (often known by the unfortunate term “stealth vaping,” which has negative connotations about trying to evade, and thus is quite inappropriate in the CD context). Even if a CD action takes place in a park away from busy sidewalks, blowing out large clouds of vapor sends the very counterproductive signal that vaping is obtrusive. While practicing the completely emissions-free vaping one might employ to intentionally hide vaping is not necessary – and might even be counterproductive from the perspective of making it clear that CD is taking place – blowing out large clouds (“cloud chasing”) not only sends the message that vaping does indeed pollute the air, but it makes the activists appear to be aggressive and belligerent. While clouds of vapor are obviously different from the bullying and violent messaging that is present in many protests (and that generally serve only to entertain the participants rather than advance the cause), it tends in that direction, and thus is bad for the cause.

A news photograph that captures a tobacco-related CD action and a group of children in the same frame can turn a successful action counterproductive. No matter how meaningless the juxtaposition might be, there is little doubt about how it will be spun. While it is impossible to avoid any such risk, taking the action away from schools and playgrounds, and at a time school is in session, minimizes the risk. (That timing also increases the chance of making the evening news.) Protest participants who look like they might be underage create similar potential problems.

Blocking busy walking thoroughfares – to say nothing of tempting road rage by blocking motorists – is likely to create enemies to the cause. The same is true for anything that might be considered rude by nearby pedestrians (loudness, pushy distribution of literature, cloud chasing). Of course, there is a tradeoff that need to be consciously made between being obtrusive enough to be noticed and make for a good news story versus being annoying.

It improves credibility to appear as professional as is normal and appropriate for the venue (i.e., suits and ties would be a little strange if the protest were on a beach, but not a bad idea if it were at City Hall). Wearing or carrying signs with offensive or violent messages is detrimental. With apologies to some of our favorite people, a plethora of tattoos, other body art, unusual hair styles,

tie-dye, military-style clothing (on those who are not military personnel with insignia), and other countercultural decorations among the protesters is likely to send the wrong message. The most useful message about THR products is that they are normal and mainstream. Suggesting that they are countercultural is counterproductive. If the protest attracts television, there is a good chance the footage will be of the most radically decorated individual among the protesters, so all such individuals might consider taking the role of camera operator rather than protester or spokesperson.

#### Potential high-stakes risks

Getting arrested is sometimes a goal of a CD action, and is always a risk for participants even if they try to avoid it. While arrest is quite unlikely for protesters who quietly accept any citations issued by police (which is a much more likely possibility) and disperse if so ordered, it is still possible and it is important for participants to understand this. Being arrested means being at risk of physical or emotional violence inflicted by the police, and by fellow inmates if locked up. It is possible that arrest or even a citation could create problems for future employment, government scholarships, etc. Anyone who is involved in a child custody dispute, has immigration issues, needs a security clearance, or is otherwise highly-dependent on a government judgment that can be made on arbitrary grounds should probably avoid engaging in CD.

Intentional arrest (taking every nonviolent action possible to try to provoke arrest) is a potential tactic. While yet another arrest of, say, an anti-nuclear protester provokes a collective yawn from the press and public, a high-profile arrest of a vaper engaged in CD would probably make headlines. Keep in mind, however, the costs of arrest noted above (and the note from the introduction that this paper is not intended to recommend any action, let alone a high-risk one; it is just an analysis of the implications of actions someone might choose to take). Typically in a CD action where getting arrested is intended, only a few of the participants plan to get arrested; the others obey orders to cease their protest action (e.g., vaping) and disperse and otherwise try to minimize their risk, while the few refuse.

Another potential advantage of arrest for charges more serious than the minor citation for violating a place usage ban (e.g., for failure to obey an order to disperse) is that it increases the chances of a press-covered trial. Anyone can demand a trial for just receiving a citation, but this is almost certain to be heard in a court that allows only minutes for each proceeding and will shut down any attempt to argue about justice (though this might happen for a trial following arrest on other charges too). Going to court is costly in itself and will probably increase the fines if the charges are upheld (which is very likely). The potential benefits should be seen as publicity and public sympathy, not winning a landmark case. Some CD practitioners refuse to post bail if arrested (seeing it as paying the state for arresting them) and otherwise intentionally try to maximize the costs of enforcing the law, even though that comes at greater cost to themselves.

A high-risk CD action might include vaping in an indoor space with the intention of challenging, in court, the evidence base for the law. This might be the public spaces of government buildings or public transportation facilities. Such actions increase the potential attention compared to outdoor actions, as well as the probability of citation and arrest. CD actions in crowded public spaces or in security-controlled areas (e.g., beyond the metal detectors in a government building) could provoke a backlash that focuses on inconveniencing people or posing a security threat, either of which would detract from the intended message.

CD actions should never take place in a private space without the active cooperation of the property owner/manager. Any such action becomes not a protest aimed at unjust actions of the government, but a trespass on private property and a confrontation with an innocent private individual. (In some fields of protest, of course, it is private actors who are the target of the protest, but that is not the case in our arena.) Most “public place” usage bans affect a hundred times as many private places, like bars and offices, as actual public places. The goal of the CD might be primarily about restoring civil rights in these places. But if the CD action takes place in a private venue, the proprietor may be subject to crippling fines or other penalties that are far worse than those that would be suffered by the CD participants. Should a proprietor want to host a CD action on his property, it is important that he be aware of how steep the penalties he faces might be.

#### Some specific tactics generally employed in CD

**Press:** The purpose of a CD action is generally to disseminate a message to the public. This is obviously much more likely to be effective if the press is there. Reporters who have written about THR or e-cigarettes previously are especially promising. Moreover, the presence of the press is the best deterrent against dangerous overreaction by the authorities. A mass alert to all local media could result in a leak to the police. This is unlikely to be a problem for an open space like a park, but might lead to a lock-out for some venues like the lobby of City Hall (and, of course, it is moot if the action has been publicly announced). Focusing on a few trusted reporters and making the mass announcement only as the action starts addresses the latter risk. Effective organized CD actions benefit from having someone assigned to notify the press (both those who are being told in advance and any who are given the story at the last minute) and be the contact person for further inquiries and information; this individual is typically not among those who are engaged in the CD action to minimize distractions or potential loss of availability.

**Cameras:** Cameras are a must for safe and effective CD. They guarantee that the protesters have a way to publicize what they have done and they guard against excesses by the police or private actors (which seem quite unlikely in the case of THR protests, but the possibility always exists). Everyone carries a video camera these days, which is a plus. Having participants nearby whose job it is to take video and avoid breaking any laws can be helpful. There is software available to upload mobile phone videos in realtime to avoid the risk of losing the footage if the hardware is stolen by police. Should there be a major police response to the action (unlikely for a “vape-in” in a park, but not impossible; more likely for more aggressive actions), there is a definite possibility that anyone who is not clearly a member of the press who is seen taking pictures or video will also be arrested and/or having their equipment confiscated.

**Literature:** Bystanders and the press will be interested in the topic in general as well as justification for the specific action. Pamphlets explaining the case for THR and vaping are available from CASAA and others. A pamphlet about the particular law that is being violated, the case against it, and the motivation of the participants can be created by the action organizers.

**Numbers:** One motivated individual can carry out a CD action (though it helps to have a colleague or two taking video and passing out literature). However this is unlikely to make the news unless that person is famous or it is a particularly high visibility action (e.g., a respected person violating a place usage ban while giving testimony or at a press conference). In most cases, an action taken by only a few people is likely to just create risk for the participants for no

benefit, or even be seen as merely petulant rather than principled. The press is much more likely to cover a 20-person action, and is almost guaranteed to report on a 100-person action.

Types of people: A mix of ages and other visible demographics can be useful. However, for this and many other issues, the greater the apparent average age of the protesters, the better (assuming there is no reason to skew younger, as with a university-based protest). The presence in the group of certain types of people (government officials, professors, clergy, anyone who regularly appears on television, off-duty police officers or firefighters, groups of military personnel or veterans) can increase credibility and media interest in the action, and reduce the chances of a worst-case response by authorities. The more visible they are, the more effective this will be. But even if they are just supporting the action as silent observers, their presence is useful.

Arrest preparations: Anyone engaged in the CD action could be arrested and should prepare accordingly. This includes carrying nothing that could possibly be interpreted as being a weapon (which also helps protect the protester from unintentional injury if he is violently restrained or attacked). Note that some of the larger e-cigarette mods might be interpreted as weapons by the police. Being intoxicated or carrying intoxicating or otherwise illegal substances can dramatically increase the severity of criminal charges and undermine the message of the action. If there is substantial risk of arrest, phones and cameras can be left in the hands of associates who are observing but not violating the law; phones are very likely to be confiscated and possibly inspected or erased if on the person of someone who is arrested. Preparation for arrest also includes carrying a piece of government-issued identification and a piece of paper with the name and number for an attorney or bail bondsman, and minimizing any cash, jewelry, and other valuables. There is a tradeoff about clothing choice: Dressing in a more businesslike fashion will present a better picture to the public and might reduce the chance of arrest, or at least violent arrest. On the other hand, wearing clothing that is comfortable, warm, functional, and not too costly if it gets damaged has advantages for anyone who is arrested.

High-risk arrest preparations: While most imaginable CD actions about tobacco use are unlikely to provoke the wrath that is sometimes unleashed on those protesting in other arenas, if there is any chance of that, then further preparations are wise. A more aggressive action increases the chance of this, as does protesting somewhere that the police force has a reputation for violence. Should there be such a risk, all of the above considerations become more important. Additional precautions, like time-stamped photographs of the protesters' unbruised bodies before the action are useful evidence about violence by the police. Since actions at that level of risk are unlikely in the present context, further details about this are not included here; those who believe they are approaching that risk level can find further advice offered by those who protest in contexts where such risks are greater.

Note: We do not mean to dramatize this. The chance of state-sponsored violence against CD protesters in our arena seems pretty minimal. CD actions about smoke-free tobacco products will probably rarely feel more dangerous than a rally and press conference. But everyone should be aware of what is possible and not enter into CD actions lightly.

#### What about secret actions?

A different flavor of civil disobedience consists of quietly violating unjust laws while doing no harm. Place-based restrictions on smokeless tobacco use are trivially easy to violate without

being observed for the very reason that they are so clearly unjust: there is no possible way to detect the action. Vaping is a little more difficult to hide, but it is still fairly easy in most places (subject to having the skill to eliminate all visible exhalate).

In some sense this does not qualify as proper CD since it does not involve an overt refusal to obey the law. In some sense the secrecy – if an effort is needed to be secretive – is a concession to the law rather than a challenge to it. On the other hand, widespread secret violation of an unjust law can lead to rumors and stories that have the same impacts as overt CD action. This is further facilitated by social media in which people report that they have engaged in this form of civil disobedience, making this fall somewhere between pure secrecy and open CD.

It is possible to intentionally demonstrate that one is engaged in personal civil disobedience of this sort without unambiguously violating the law. This might include openly carrying the product (assuming only use and not possession is banned) or being just visible enough while using it that observers are pretty sure what has been done, but not sure enough it could not be plausibly denied. Observers will not know for sure if you merely touched an e-cigarette to your lips or if you inhaled; nor can they tell whether what you pulled out of your snus tin was snus or one of the mints that you also keep in the tin.

Tax avoidance is another CD strategy. Special high taxes levied on consumers of tobacco products, alcoholic beverages, and the like are unjust laws designed to punish people for making the choice to consume the products. These taxes can often be evaded by crossing a border to buy where the taxes are lower, having the product shipped from a merchant who does not collect the taxes, or buying from the black market (sometimes called the “grey market” when the only thing illegal about it is the tax avoidance). Sometimes such actions are legal (as when allowed by international treaties, typically limited to a certain quantity), but in other cases the law in one’s home jurisdiction might be that the tax differential must to be paid there (often the case for purchases across U.S. state boundaries) or the importation of any product that is not tax-paid locally might be completely prohibited. Few people realize that they are required by law to pay many avoided taxes like these (even for noncontroversial goods) to their home jurisdiction, and almost no one does so whether or not they realize it.

Defiance of tax laws is generally a bad choice for open CD. The tax agencies who enforce such rules are very distant from those who imposed them, and tend to be very efficient at enforcement; the punishment can be enormous. The enforcement action is unlikely to attract much sympathy because it comes across as similar to someone who is evading legitimate taxes. Even though these taxes are often a more onerous punishment than the rare citations for banned place use, openly defying them is unlikely to make for a good news story or win supporters.

However, achieving quiet justice via tax avoidance is not a wholly invisible action. If many people are doing it, various statistics will show that there seems to be a large flow of products from one jurisdiction to another, or that consumption estimates greatly exceed local taxed sales figures. Thus, such action serves some of the goals of open CD without exposing the individuals to much risk. There is always a small chance of being caught, but so long as the quantities involved are reasonable for personal use, the punishment is probably no worse than confiscation, a small fine, and perhaps a lifetime of extra scrutiny at Customs (though, as with every CD action, the potential for Kafkaesque punishments always exists).