Impediments to the enforcement of youth access laws

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Abstract

Objective—To recognise obstacles to the implementation of the effective enforcement of tobacco sales laws and to identify measures that could be taken to overcome these obstacles.

Design—Interviews were conducted with health department officials in Massachusetts communities to determine why their efforts to prevent illegal sales of tobacco to minors had been only partially successful. **Setting**—Urban, suburban, and rural communities in Massachusetts, USA.

Results—Organisational problems, court challenges to citations, budgetary threats, and political pressure all combined to reduce the frequency of enforcement inspections to half the intended rate. Political pressure resulted in the exclusion of older youths from compliance tests, further undermining enforcement efficacy.

Conclusions—Suggestions for addressing the problems include obtaining support from the community, keeping elected and court officials informed about plans for merchant education and law enforcement, using efficient enforcement protocols, setting merchant compliance goals, and advising the public and government officials about progress towards those goals, using older youths to make purchase attempts, and testing all merchants frequently.

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Introduction

Several studies, including one randomised controlled trial, have reported reductions in adolescent tobacco use following the enactment and enforcement of laws prohibiting the sale of tobacco to minors.¹⁻⁵ Success at convincing a very high proportion of merchants to obey the law was a common factor. By contrast, adolescent smoking rates did not decline in one enforcement study,⁶ despite apparently ideal conditions at the beginning of the intervention. Enforcement efforts did not improve merchant compliance with the law to the extent seen in the successful interventions, and young people's ability to purchase tobacco in stores was not significantly reduced.⁶ High rates of merchant compliance are apparently necessary to make a significant impact on the ability of minors to purchase tobacco and to thereby reduce their smoking rates. In this paper, we present an account of the logistical

and political factors which prevented our study communities from achieving effective enforcement, and we suggest strategies to avoid these pitfalls. Some of our remedies have been tried and proven, whereas others represent what our informants would have done differently given a second chance.

Methods

BACKGROUND

In our previous study, health departments in three Massachusetts communities agreed to enforce the law by using underage youths to make test purchases from every merchant four times each year.⁶ The goal was to replicate the enforcement methods used in two successful interventions.¹⁻³ Over a two-year intervention period, each merchant was to be tested eight times; however, only 4.3 tests per merchant were actually conducted.⁶ Merchant compliance was measured in terms of whether 16-year-old girls were refused in their attempts to purchase tobacco. Merchants who made illegal sales were to be penalised. The enforcement programme was designed to achieve 90% merchant compliance within the first year, but this goal remained unrealised even at the end of the study. Although merchant compliance rose from 35% to 82%, at the end of the study, 58% of underage smokers reported hardly ever being refused when trying to purchase tobacco.⁶ Despite substantial effort by officials in these communities, illegal sales continued unabated.

INFORMATION SOURCES

Throughout the study, the authors and community health officials held monthly conference calls to monitor progress and events in each community. Additional information came from other projects and activities conducted in Massachusetts by the first author over the past 11 years. These activities include drafting and testifying for the enactment of local regulations, attending public hearings, designing and implementing enforcement programmes, conducting compliance tests in more than 75 communities, surveying more than 100 local health officials about their activities regarding youth access to tobacco, interviewing six of the most accomplished local programme directors,⁷ meeting with state tobacco control officials, and reviewing hundreds of newspaper articles.

The events in our active communities are described within the context of similar events that were occurring in other Massachusetts communities facing similar challenges. Individuals and communities are not named to

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preserve the confidentiality of the officials who participated in our study.

Results

COMMUNITY PREPARATION

The health departments in our communities worked to build political support for their efforts by educating the public, politicians, and tobacco retailers before starting enforcement activities. Although merchant compliance was still only 35% after the education programmes, the effort may have reduced the backlash that might have occurred had enforcement been initiated without warning.⁶ Another measure taken to reduce the backlash was to waive any penalties for a merchant's first violation, so that it served as a warning.

FUNDING

Effective enforcement cannot occur without adequate financial resources. In Massachusetts, communities can receive funding for enforcement programmes from the Massachusetts Tobacco Control Program (MTCP). The health departments in each of our communities were funded by the MTCP. Although MTCP funding insulated the enforcement programmes from financial threats, the health departments housing the enforcement programmes remained vulnerable. By pressing ahead on tobacco control efforts, health officials were potentially jeopardising funding for their other programmes as described below.

POLITICAL PRESSURE

Although efforts to prevent the sale of tobacco to youths enjoy widespread public support in Massachusetts,⁸ local merchants have been an important and vocal minority. Almost all of the opposition to the enforcement of underage sales regulations across the state has come from tobacco retailers and their supporters. When enforcement began in the communities in our study, store owners complained to elected city officials, to administrative employees, to the health departments, and to the inspectors conducting the compliance tests. Elected officials relayed these complaints to the health departments.

Across the state, merchants labelled enforcement as "entrapment", "anti-business", and "big government". They called for measures to punish youths who attempt to purchase tobacco. Enforcement is very unlikely in communities where most of the board of health share these views, or where the mayor, selectmen, city council or aldermen are opposed to having the law enforced. Health officials, who are often appointed by elected officials, take a political risk by independently adopting and enforcing regulations. One health official in a study community described the "lack of a mandate" from the public and from elected officials as a political weakness. When irate merchants voiced their complaints, some city officials defended the health department whereas others went on the attack.

The health departments' primary vulnerability is that their funding is at the discretion of

the city or town council. Health officials in some of the study communities perceived that pursuing vigorous enforcement of the laws governing underage sales was jeopardising their departmental budgets. One director was convinced that the health department budget request was cut as punishment for their tobacco control efforts. The board of health told this director not to conduct compliance tests "too frequently". In another study community, complaints from tobacco retailers translated into pressure from elected officials, and resulted in enforcement inspections being reduced to a quarter of their previous frequency (to an average of once per year). As one study has shown, illegal sales rise progressively with less frequent compliance testing.⁹ Violations occurred nearly twice as often when compliance tests occurred every four months compared with every two months.⁹ This suggests that, when our study communities drastically reduced the frequency of compliance tests, the effectiveness of their enforcement programmes was diminished.

Health officials suggested two approaches to avoiding problems with other city officials. The first is to encourage citizens to approach the board with a request to address the problem of illegal sales. This provides the enforcing agency with a stronger mandate for their activities. The second suggestion is to anticipate merchant complaints to elected officials. These officials should be kept informed throughout the process of adopting and enforcing regulations. They should be briefed about the problem of tobacco use among teens, about the hearing process surrounding the adoption of regulations, about efforts to educate merchants, and about any warnings given to merchants before the initiation of real penalties. Elected officials have sometimes changed their tone upon learning that the merchants who are complaining about being given a fine had been given a warning for their first offence. Finally, officials should be told to expect complaints from merchants who are caught breaking the law. When all this is done, elected officials will usually agree that the enforcing agency has made a good effort to be fair.

An untested strategy is to announce that the goal of the enforcement programme is to achieve a certain level of merchant compliance—for example, 95%. Enforcement officials could then advise the community of progress towards reaching the goal.

LEGAL OPPOSITION TO ENFORCEMENT

In Massachusetts, merchants can appeal citations to the board of health and then to the courts. When a citation is appealed to court, health officials must prepare documentation and appear in court. Appeals drain resources away from other enforcement activities. Some officials expressed a fear of being taken to court by a merchant, not knowing whether the courts would uphold their penalties. In Leominster, Massachusetts, for example, court officials dismissed the first few fines that were appealed. Officials fear that if one penalty is dismissed by

the court, every other merchant will appeal. If so, health officials could spend much of their time handling appeals and merchants would not fear prosecution.

In one of our study communities, a merchant who faced a US\$100 civil fine took the unusual step of hiring an attorney who mounted a vigorous defence focusing on the chain of possession of the evidence (a pack of cigarettes). The legal expense for this defence cannot be financially justified to avoid a \$100 fine and raises the suspicion that this undertaking was financed by an entity with an interest in weakening enforcement efforts. The health department suspended enforcement inspections until the case was resolved in their favour. They were concerned about whether additional procedures would be needed for record keeping and evidence collection and handling.

Experience has revealed this case to be quite an exception to the rule. Appeals of citations have been uncommon unless the vendor's tobacco licence is at risk, and when appeals do occur, the vendor rarely disputes the facts or evidence. Typically, the vendor admits guilt, claims remorse, and seeks leniency on the basis of extenuating circumstances—for example, a new employee. Some legal challenges are probably inevitable, but careful record keeping and labelling of the evidence are sufficient to establish the facts in court. Extraordinary measures such as videotaping, audiotaping, or having a witness in the store should be discouraged. They are unnecessary and may be counterproductive. They make the merchant suspicious, slow down the inspection process, and can add significantly to the expense of conducting inspections. It should be kept in mind that the purpose of enforcement is not to attain a 100% conviction rate, but rather, to convince merchants to obey the law. This can be accomplished without a 100% conviction rate.

Several communities in our area make it a policy to halt compliance tests until all of the appeals from the most recent round of inspections have been resolved. Some health departments continue to test other merchants but will not retest a merchant who has filed an appeal until the ultimate disposition of the disputed citation has been resolved. Those merchants who show no remorse when caught are the very merchants who need to be tested most often. Under this policy, they are tested least often. With both these policies, the frequency of compliance inspections does not occur at an optimal rate, but rather, the pace is set by the merchants and courts. The solution to this problem is obvious. Enforcement agencies should not postpone or otherwise reduce the frequency of inspections because merchants have challenged citations.

The support of the courts can be developed in the same way as that of elected city officials. Although it would be inappropriate for a court official to discuss a pending case, it is certainly appropriate for the enforcement agency to educate the court about their efforts before cases come before the court. These cases may be heard by a judge, a magistrate, or a court

clerk. The relevant court officials should be informed about community support for the law, about how the enforcing agency educates merchants about their responsibilities, and if warnings are given for a first offence. If the court official is convinced that the enforcement programme is important and fair, he or she is more likely to uphold the enforcement agency's decisions. This process of education has worked to convince the courts to uphold the penalties given by the enforcing agency in Leominster and other communities.

AGE OF THE UNDERAGE BUYERS

Merchants have frequently tried to shift the focus from their own illegal behaviour to the behaviour of the health department by complaining that the youths used in underage purchase attempts look too old. When one set of compliance tests in a study community resulted in numerous citations, merchants complained that the youths looked too old. Fearing that elected officials would sympathise with the merchants, the health department rescinded all of the fines, and in subsequent tests, avoided using youths who did not appear obviously underage. The exclusion of older youths from inspections seriously hampers the effectiveness of an enforcement programme and does not protect older youths from easy access to tobacco. In one study of Massachusetts retailers, 480 attempts were made to purchase tobacco from the same 80 retailers.¹⁰ Illegal sales occurred in 24% of attempts made by youths who appeared to be under 16 years of age, compared with 45% of attempts made by youths who appeared to be 16 or over.¹⁰ When communities use only youths with a young appearance to conduct compliance tests, the merchants who sell only to older youths will go undetected, and will continue to sell to older youths.

ORGANISATIONAL ISSUES

Although the communities involved in the study were better organised than many, their enforcement efforts occasionally suffered from organisational problems. In one large community, compliance tests were not occurring at the intended frequency because of a misguided effort to inspect all merchants in a single day. The logistics of arranging for six teams of youths and adults to be in the field simultaneously were fraught with complications.

One community hired a new director to run the enforcement programme. Enforcement got off to a quick start with many compliance tests and many citations issued. Soon thereafter, the director and the inspector resigned at short notice. When a merchant challenged a citation, it was discovered that the inspector's records were inadequate and it could not be determined with confidence which merchants had made illegal sales. All citations against merchants were consequently rescinded. With additional difficulties in hiring new personnel, it was almost the end of the first year of the study before enforcement actually got underway in this community.

Inefficient enforcement programmes may never achieve compliance rates that will actually reduce the prevalence of tobacco use. To help enforcement programmes reach maximum efficiency, the organisational techniques used by the six most efficient enforcement programmes in Massachusetts have been published.⁷

Discussion

By virtue of having already enacted tobacco sales regulations, the communities in our study had already cleared a significant hurdle. Direct funding for enforcement from the MTCF to the health departments removed another hurdle. Popular support for efforts to reduce tobacco use among youths was evident in a recent statewide referendum,⁸ and the health department staff in our study communities were all enthusiastic supporters of the enforcement efforts. Yet despite these advantages, and the valiant efforts of the health departments in our study, enforcement goals were not achieved.

Political pressure, decisions to suspend compliance tests pending the outcome of court challenges, and organisational problems all worked to reduce the frequency of compliance inspections to about half the intended rate. The exclusion of older youths from compliance tests further undermined enforcement efficacy. We believe these to be the primary factors explaining why compliance goals were not achieved.

Tobacco retailers managed to reduce the frequency of inspections by challenging their citations in court and by enlisting the aide of sympathetic elected officials who threatened health department budgets. The fact that health departments in two communities backed down in response to merchant complaints by rescinding their most recent fines might have convinced some merchants that they had more political power than the health department and may have reduced their fear of prosecution.

The political power that tobacco retailers wielded to scale back enforcement efforts is remarkable given their tiny numbers relative to the number of parents in these communities who support better enforcement. Nothing was done in these communities to rally support for enforcement. Community support might have provided a strong countervailing force to retailer opposition.

Those who would argue that our previous study proves that vigorous enforcement does not work have missed the point. Vigorous enforcement did not occur as planned in these communities because of the problems we have

outlined here. Others argue that, as tobacco retailers are only one of many sources of tobacco for underage smokers, efforts to reduce illegal sales will be futile. This argument ignores the four interventions that have documented reduced smoking rates among youths following enforcement against stores.¹⁻⁵ We would not want to leave the impression that enforcing the law is impossible. Despite initial setbacks, each of our communities and many others in Massachusetts have achieved compliance rates of over 90%. Eliminating tobacco sales to minors is an important prevention strategy, but establishing an effective enforcement programme may require community support, hard work, and time to become fully effective.

We have suggested counter-strategies which, while not scientifically tested, represent the wisdom of those who have been "in the trenches". These include keeping elected and court officials informed about plans for merchant education and law enforcement; obtaining a mandate and ongoing support from the community for enforcement; striving for maximum efficiency by using proven organisational techniques; and publicly setting compliance goals, and advising the public and government officials about progress toward those goals. Using older youths to make purchase attempts and frequently testing all merchants appear to be important components in an effective enforcement strategy. We hope that these strategies may help other communities to mount more effective enforcement programmes.

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