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The public health impact of smoking remains as prominent as ever. At present, over 400,000 premature deaths—far and away the highest tally for any product or substance on the market—are attributable to smoking. And, per capita use and trend rates suggest no reason for relaxed regulatory scrutiny. In this article, I offer a view of past efficacy and future promise of tobacco control strategies. After a brief treatment of the demographics of smoking, indicating the distance that has been covered in reducing tobacco use, I discuss the main factors contributing to that partial success story; in particular, informational initiatives, clean air regulations, and taxation. Then, I address the strategies that, to my mind, have been somewhat less successful: litigation and advertising controls. Finally, I comment on the array of public health initiatives that might sensibly be considered at this point in time, with particular emphasis on reducing the prevalence of youth smoking.

Tobacco Control Strategies: Past Efficacy and Future Promise

Robert L. Rabin*

The period of greatest turbulence in the world of tobacco control appears to have passed. Roiled by massive disclosures of deceptive practices in internal documents, the major tobacco producers came to be seen as a rogue industry in the mid-1990s.¹

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¹ This perception served as a capstone for public health concerns about the link between smoking and lung cancer that had begun to crystallize as early as the mid-1950s. See **Allan Brandt, The Cigarette Century** 357-58 (Basic Books 2007).

By the turn of the new century, political support, particularly in Congress, that had stayed the hand of any significant federal regulatory control was nowhere in evidence. Yet, only a few years later, as legislation that would subject the industry to federal regulatory scrutiny for the first time remains in doubt, tobacco seems to have—at least for the moment—virtually disappeared from the radar screen; obesity and pharmaceutical-related harms now dominate the agenda of current public health concerns.²

² Under the current bill before Congress, introduced on February 15, 2007, the Food and Drug Administration (“FDA”) would be given plenary authority over the tobacco industry. [Check final version at time of publication] On October 3, 2007, FDA Commissioner Andrew C. von Eschenbach testified before the Subcommittee on Health of the House of Representatives’ Committee on Energy and Commerce regarding the proposed Family Smoking Prevention and Tobacco Control Act. He noted a few concerns about the bill’s proposal to give the FDA authority to regulate tobacco. Family Smoking Prevention and Tobacco Control Act: Hearing on H.R. 1108 Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 110th Cong. (2007) (statement of Andrew C. von Eschenbach, Comm’r, Food & Drug Admin.), available

But if attention to tobacco control may be flagging, the public health impact of smoking remains as prominent as ever.³

at <http://www.fda.gov/ola/2007/tobacco100307.html>. For example, he regarded this proposed authority is at odds with the FDA's public health role, since the FDA cannot "approve" the use of tobacco where there is no science to suggest ways in which its benefits outweigh its risks. Id. In addition, he expressed unease about the budgetary constraints that the FDA would encounter here, since it would have to develop an entirely new program for dealing with tobacco controls. Id. The Commissioner's testimony is hardly grounds for eager anticipation of the consequences of enactment under the present Executive leadership.

³ This article is limited in scope to the U.S. But the public health dimensions of smoking are, of course, a worldwide problem. See Bill Marsh, A Growing Cloud Over the Planet, **N.Y. Times**, Feb. 24, 2008 at 4. And the U.S.-based tobacco companies continuously expand overseas markets posing distinct issues about a framework of regulatory controls. See Lawrence O. Gostin, Global Regulatory Strategies for Tobacco Control, 298 **J. Am. Med. Ass'n** 2057 (2007); see also Vanessa O'Connell, Philip

In 2005 some 438,000 premature deaths—far and away the highest tally for any product or substance on the market—were attributed to smoking.⁴ And as the next section indicates, per capita use and trend rates are not a cause for relaxed regulatory scrutiny. In view of these developments, as my title suggests, I offer a view of past efficacy and future promise of tobacco control strategies. After a summary treatment of the demographics of smoking, indicating the distance that has been covered in reducing tobacco use, I will discuss the main factors contributing to that partial success story. Then, I will address the strategies that, to my mind, have been somewhat less successful. And finally, I will comment on the array of public health initiatives that might sensibly be considered at this point in time.

I. Some Demographics

Morris Radies Aggressive Global Push: Division Spinoff Enables Blitz of New Products; High-Tar Smokes in Asia,
Wall St. J., Jan. 29, 2008, at A1.

⁴ See Centers for Disease Control & Prevention, Fact Sheet: Tobacco-Related Mortality (Sept. 2006),
http://www.cdc.gov/tobacco/data_statistics/Factsheets/tobacco_related_mortality.htm.

The baseline fact is that cigarette smoking is a twentieth century phenomenon. Prior to 1900, cigars, chew, and a variety of other tobacco uses were widespread, but cigarette smoking was negligible.⁵ By mid-century, however, its popularity was evident in all walks of life: doctors attested to the smoothest smoking experience available; movie stars lit up on the screen as a sign of camaraderie or romantic interest; soldiers flocked to the commissaries on military bases for a free supply to satisfy their daily needs. As late as 1965, 42.4 percent of the adult population (over 18 years of age) smoked.⁶ If that year signaled a peak, however, it also marked the inception of a steady downward trend. By 2005, just under 21 percent of the adult population (23 of males; 18.5 percent of females) continued to

⁵ See Brandt, supra note 1, at 25; see also **Richard Kluger**, **Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris** 14 (Alfred A. Knopf, Inc. 1996).

⁶ See Am. Lung Ass'n, Trends in Tobacco Use 16 (2007), available at http://www.lungusa.org/atf/cf/%7B7A8D42C2-FCCA-4604-8ADE-7F5D5E762256%7D/TREND_TOBACCO_JUNE07.PDF.

smoke regularly—a striking reduction of more than 50 percent of the adult population over forty years.⁷

The demographics tell a further story: 22 percent of the white population smoked in this latest tally; 20 percent of African-Americans; and a somewhat lower figure among Hispanics.⁸ In the critical underage population, the data are somewhat less clear, but appear to indicate that about 20 percent of current high school seniors smoke.⁹ Two other salient features also stand out. First, the trend-line in adult smoking has been relatively flat over the past decade; this, of course, is an important qualifying factor in assessing the overall decrease of some 50 percent over the period 1965-2005.¹⁰ Second, and of

⁷ See **Institute of Medicine, Ending the Tobacco Problem: A Blueprint for the Nation** 51, 62 (2007) [hereinafter **IOM Report**].

⁸ See id. at 60. The exact Hispanic percentage per the report is 15 percent. Id. All percentages here are from 2004.

⁹ See id. at 31.

¹⁰ Recent data for the first quarter of 2007 is more encouraging. See **National Center for Health Statistics, Early Release of Selected Estimates Based on Data from the January-June 2007**

similarly vital concern, smoking has become increasingly concentrated in the lower socioeconomic groups.¹¹

Behind these demographics, of course, are many years of experience with an array of regulatory control strategies. I will turn next to a brief assessment of these strategies, identifying those that seem to have been most successful in turning the tide of smoking in this country.

II. Principal Sources of Reduction in Tobacco Use

As an introductory proposition, it is important to point out the somewhat misleading nature of considering the array of tobacco initiatives independently because there can be no doubt that the aggregate effect has been more than simply a sum of the

National Health Interview Survey 49-54 (2007),

http://www.cdc.gov/nchs/data/nhis/earlyrelease/200712_08.pdf

[hereinafter **NCHS Data 2007**] (reporting a sharp national reduction in smoking rates for adults, down to 18.6 percent, which is about a 10 percent reduction in one year). The trend was flat for three years preceding the first quarter of 2007, per the CDC chart. Id. Overall, the trend shows only a very gradual decline, from 24.7 percent in 1997, until the recent preliminary data from 2007. Id.

¹¹ See **IOM Report**, supra note 7, at 247-48.

individual contributions. It is nonetheless possible to identify particularly salient initiatives. With an eye to the future, I will also comment on the extent to which, in my view, there is further mileage to be gained from these strategies at this juncture in the life history of tobacco control.

A. Informational Initiatives on Health Risks

The starting point is the landmark Surgeon General's Report of 1964.¹² A decade earlier, the first authoritative laboratory studies on the linkage between smoking and lung cancer had been published.¹³ In the interim, many more studies followed.¹⁴ While the early research findings did catch the attention of the public—and indeed triggered an initial short-term health scare among smokers—it was the Surgeon General's Report, collecting the data, and providing the official imprimatur of the federal government's leading health authority, which created a singular

¹² See **U.S. Dep't of Health, Educ. & Welfare, Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service** (1964) [hereinafter **Surgeon General**].

¹³ See **Kluger**, supra note 5, at 132-36.

¹⁴ See id. at 193-97.

level of public concern.¹⁵ The industry responded, as it would at every subsequent stage, with new products and creative advertising aimed at allaying public disquiet; in particular, the filter cigarette.¹⁶ But the foundation had been laid for public health sensitivity to the risks of smoking.

In the ensuing years, the federal government remained episodically involved on the informational front. The industry was seriously caught off guard in 1967, when in response to a public interest lawsuit, the Federal Communications Commission ("FCC") implemented its "Fairness Doctrine" by requiring broadcast stations to run antismoking messages as a counter to cigarette advertising on television.¹⁷ In fact, the industry

¹⁵ See Stanton A. Glantz, *The Cigarette Papers* 25 (1996) (discussing wide media coverage of the Surgeon General's 1964 report, including the **New York Times** and **Life Magazine**).

¹⁶ See Brandt, *supra* note 1, at 244-45.

¹⁷ See Banzhaf v. FCC, 405 F.2d 1082, 1098-99 (D.C. Cir. 1968) (holding that advertisements must count as expression covered by the fairness doctrine because of their profound effect on consumer consciousness). For a discussion of how the "Fairness Doctrine" affected the tobacco industry, see generally Kenneth E. Warner, Tobacco Policy in the United States, in **Policy**

soon thereafter joined hands with its allies in Congress in offering support for a ban on tobacco advertising on the broadcast media; such was the perceived power of the impact of risk-related information on the hazards of smoking.¹⁸

Challenges in Modern Healthcare 99, 100-102 (David Mechanic ed., 2005); Michael Siegel, Mass Media Antismoking Campaigns: A Powerful Tool for Health Promotion, 129 **Annals Internal Med.** 128 (1998); Sandra J. Teel et al., Lessons Learned: From the Broadcast Cigarette Advertising Ban, 43 **J. Marketing.** 45 (1979); and James L. Hamilton, The Demand for Cigarettes: Advertising, the Health Scare, and the Cigarette Advertising Ban, 54 **Rev. Econ. & Stats.** 401 (1972).

¹⁸ **Brandt**, supra note 1, at 267-72. On another front, Congress passed the Cigarette Labeling and Advertising Act of 1965, which required cigarette packages to contain the message "Warning: Cigarette Smoking May Be Hazardous To Your Health." Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 5(b), 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. 1331-1340 (1994)). In 1969, the Public Health Cigarette Smoking Act upgraded the labeling requirements requiring the warning to read, "Warning: The Surgeon General Has Determined That Cigarette Smoking Is

On a significant second front, the Surgeon General, followed by the Environmental Protection Agency ("EPA"), published reports on the risks of environmental tobacco smoke to the nonsmoking public.¹⁹ Once again, the model was the landmark

Dangerous To Your Health." Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 88 (1970) (codified as amended at 15 U.S.C. §§1331-1332, 1335-1340 (1994)). These requirements were also strengthened by the 1984 Comprehensive Smoking Prevention Education Act, which mandated four rotating warnings adopting a somewhat more stringent tone. Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2201-02 (1984) (codified at 15 U.S.C. § 1333(a)(1) (1994)).

¹⁹ The Surgeon General first reported on the effects of secondhand smoke in 1972. **Office on Smoking and Health, U.S. Dep't of Health and Human Servs., The Health Consequences of Smoking: A Report of the Surgeon General** 7-8 (1972) (reporting that secondhand smoke puts nonsmokers at potential risk of developing pulmonary and cardiac disease). In 1986, the Surgeon General concluded that secondhand smoke was a human carcinogen. **Office on Smoking and Health, U.S. Dep't of Health and Human Servs., The**

Surgeon General's report of the mid-1960s: neither the EPA nor the Surgeon General undertook independent research on the hazards of secondhand smoke exposure; rather, both agencies reviewed the aggregate findings on the studies to date. The industry sought to discredit the findings, but the message hit home. The public was alerted; most critically the nonsmoking public. And the effort to ban smoking in worksites and public places, discussed below, was given a significant boost.

In an important sense, the most salient impact of these governmental initiatives was that they triggered secondary reverberations. Beginning, in fact, in the mid-1950s, before there was any action in the regulatory arena, the Reader's Digest—at the time the most widely read periodical in the nation—published an article under the daunting title "Cancer by the Carton" in which the esoteric scientific research findings on cancer risks from laboratory studies on mice were brought

Health Consequences of Involuntary Smoking: A Report of the Surgeon General 7-8 (1986). see also **Environmental Protection Agency, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders** (1993).

home to the public.²⁰ Since then, there has been a steady drumbeat of newspaper and magazine coverage on the steadily growing mountain of data depicting the wide variety of health risks associated with smoking.

Polling data attests to the effectiveness of this steady stream of information in raising the level of awareness of the general public, and smokers in particular, to the risks of tobacco use, including the addictive properties of nicotine.²¹

²⁰ Roy Norr, Cancer by the Carton, **Reader's Digest**, Dec. 1952, at 7.

²¹ See **IOM Report**, supra note 7, at 91 ("[M]ost (96 percent) smokers, both youth and adults, agreed that the longer you smoke, the harder it is to quit."). I discount revelations regarding industry wrongdoing as a major contributor to reduction in use—or more precisely, I discount this factor as a direct cause of quitting. On this score, adult smoking rates remained relatively flat after revelations surfaced in the early 1990s. But revelations of industry malfeasance were undoubtedly important in creating a political climate for tax increases, and for (limited) litigation success. See infra Part III.A.

Looking to the future, however, the question is whether the well has run dry on the promise of an informational strategy. In my view, there does not appear to be much left to be achieved on the informational front, as far as the adult population is concerned. By contrast, the youth audience is quite another matter—particularly through health measure initiatives. But I will postpone that discussion for later when the youth smoking population is the central focus of my analysis.²²

B. Clean Air Regulations

In the mid-1960s, as public awareness of the risks of smoking became widespread, the effects of secondhand smoke exposure remained at most an annoyance factor for those desiring a smoke-free workplace or restaurant setting. As long as this perspective was dominant, the “rights” arguments remained in relative equipoise: freedom to enjoy the pleasures of smoking versus freedom to enjoy a smokeless environment. But this was soon to change. Beginning in the mid-1970s, nonsmokers’ rights groups began to press health-based arguments.²³ Much of this

²² See infra Part IV.B.

²³ See **Glantz**, supra note 15, at 391. For a brief history of the nonsmokers rights movement and its tactics, see **Americans for Nonsmokers’ Rights, Recipe for a Smokefree**

activity was at the grass-roots level—although separate nonsmoking sections on long-distance domestic airline flights were mandated in 1973—and remained based on speculation rather than grounded in health data until a decade or so later.

The nonsmokers' rights movement caught fire at that point.²⁴ Over the course of two decades, from the mid-1970s to the mid-1990s, states and localities across the country acted to restrict smoking in the workplace and public places of entertainment, in tandem with the publication of widely-publicized reports by the Surgeon General and the EPA, disseminating the growing body of evidence that secondhand smoke exposure contributed significantly to the toll of premature death from cancer and heart disease, as well as a variety of respiratory problems in the young.²⁵ The rationale for regulatory restriction had moved from a tenuous foundation in public nuisance theory to the far more solid (and traditional) protection of public health and regulation of externalities.

Society (May 1, 2003), <http://www.no-smoke.org/pdf/recipe.pdf>.

²⁴ See **IOM Report**, supra note 7, at 115 and et seq.

²⁵ See **Surgeon General 1986 Report**, supra note 19, and see also Environmental Protection Agency, supra note 19.

By 2006, 18 states and 342 municipalities had enacted bans on smoking in restaurants, and as of 2005, 44 states had adopted similar provisions targeting smoking in the workplace.²⁶ A striking feature of this antismoking success story is the public choice perspective: small tightly knit coalitions banded together to exert forceful political pressure at the state, and particularly at the local level.²⁷ By contrast, the tobacco

²⁶ See **IOM Report**, supra note 7, at 191, 245. See also Americans for Nonsmokers' Rights, <http://www.no-smoke.org/learnmore.php?id=185> (last visited Feb. 29, 2008) (providing a current list of places where second hand smoke laws are in effect). Restrictions on workplace smoking are more varied. See **IOM Report**, supra note 7, at 189. On Jan. 1, 2008, Illinois joined more than 20 states and many municipalities in enacting a total ban on smoking inside places of public recreation (including restaurants, bars, and in Illinois, pool halls, casinos and bowling alleys) and workplaces. See Monica Davey, In Illinois, a Ban Sends Smokers Out Into the Cold, **N.Y. Times**, Jan. 2, 2008, at A11.

²⁷ See, e.g., Jane Gross, New York No-Smoking Law: Echoing Society's 'No More!', **N.Y. Times**, July 24, 1998, at 1.

industry's success in Congress, featuring campaign contributions to key federal legislators, did not translate into an effective strategy for fighting brushfires across the nation. The worst fears of the industry were realized: loyal smokers huddled together outside buildings or in alleyways, beleaguered in their efforts to satisfy their habit.

This inconvenience factor is worth noting. While the direct health benefits of the bans were realized by nonsmoking office and service workers, there are data indicating what common sense would suggest. The "hassle factor" in deferring gratification to segregated locations on work breaks or the end of the day, and involuntarily forgoing the pleasures of lighting up in restaurants and bars cumulate, one would expect, to the point where many smokers would simply conclude that it was no longer worth the effort to maintain the habit. Hence, the secondary impact of these measures is on the smoking population itself.²⁸

²⁸ See **IOM Report**, supra note 7, at 192. "Various studies have shown that smoke-free workplace laws reduce smoking prevalence by amounts ranging from 3.8 percent to 6 percent and consumption among continuing users by 2 percent to 14 percent." Id. at 192. "[S]moking prevalence was inversely

Once again, the question at this juncture is whether this sea change in the smoking environment has run its course, or whether there are remaining byways for realizing further effective restraints on smoking.²⁹ Ironically, perhaps, for all

related to the degree of restriction of the clean indoor air policy. The average smoking prevalence was 28 percent in states without clean indoor air laws and 24 percent in states with extensive clean indoor air laws." Seth L. Emont et al., Clean Indoor Air Legislation, Taxation, and Smoking Behaviour in the United States: An Ecological Analysis, 2 **Tobacco Control** 13, 14 (1992). Not only do these restrictions stimulate some to quit, they also help stop relapse and help restrain some from starting (as well as aiding some in not making the transition from being weekend social smokers to daily smokers). See IOM Report, supra note 7, at 191.

²⁹ Arguably, there remains more to be done in this area: (1) many states still do not have secondhand smoke laws (or have weak ones), and (2) even where there are strong laws covering areas such as public buildings, workplaces, restaurants, and bars, there are new targets that no longer seem so daunting such as commons areas in multi-unit

of the success realized by the antismoking movement in the clean air domain, the victim class that from the earliest studies figured most prominently in the epidemiological data remains relatively unprotected: children and nonsmoking partners in private residences. This, of course, touches a raw nerve, as it implicates regulation of lifestyle activities within the privacy of one's home.³⁰ Moreover, from a practical perspective, the enforcement issues would be daunting.

housing. Also, there is currently a strong drive to relieve people in multi-unit housing from burdens of drifting smoke. See Public Health Law & Policy, http://talc.phlpnet.org/pubs/publications.php?choice=new_browse&search=1#housing (last visited Apr. 5, 2008).

³⁰ On the periphery, there has been some movement to regulate in this domain by treating smoking as a factor in custody/visitation proceedings and through the adoption of some condominium regulation. See **Pub. Health Inst.**

Technical Assistance Legal Ctr., Smoking in an Apartment Building: What Can Be Done to Protect the Nonsmoking

Neighbors?, 3 (Sept. 21, 1999), available at

http://talc.phlaw.org/pdf_files/0032.pdf. See also **Pub.**

Health Inst. Technical Assistance Legal Ctr., Protecting

In the end, my view is that forceful initiatives in this private sphere will be regarded politically as excessively draconian. Although somewhat conflicted, I regard other priorities, to be discussed below, as higher, given the intrusive social costs: better to recognize and consolidate the political gains that have been realized in this area and to move on to other strategies.

C. Taxation

A signal event in tobacco control was California's 1988 enactment of Proposition 99, which increased the excise tax on cigarettes by 25 cents a pack.³¹ Against the backdrop of exceedingly modest federal and state excise tax levels,³² the

Children from Secondhand Smoke When Parents Divorce or Separate 2-4 (June 5, 2003), available at http://talc.phlaw.org/pdf_files/0044.pdf. For a vivid illustration of the sensibilities stirred up in this sphere, see Anemona Hartocollis, A Lawsuit Aimed at the Smoker Next Door, **N.Y. Times**, Feb. 9, 2008, at B1.

³¹ See Tobacco Tax and Health Protection Act, Cal. Prop. 99 (1988).

³² As late as 1995, state excise taxes ranged from 3 cents in Virginia to 82 cents in Washington. See **Ctrs. For**

campaign for Prop. 99 in health-conscious California was explicitly billed as a tobacco control measure. Most states were somewhat slow to get on the bandwagon, but eventually they did—spurred on as much by general revenue shortfalls as by explicit anti-tobacco sentiment. In 2002 alone, 21 states raised their cigarette taxes and, within the space of a single year, the average state excise tax had doubled from 31 cents to 62 cents per pack.³³

Disease Control and Prevention, State Tobacco Activities Tracking and Evaluation System,

http://apps.nccd.cdc.gov/StateSystem/stateSystem.aspx?selectedTopic=602&selectedMeasure=10005&dir=leg_report&ucName=UCLegSmkFreeSummaryExciseTax&year=1995_4&excel=htmlTable&submitBk=y (last visited Feb. 29, 2008).

³³ See **IOM Report**, supra note 7, at 176. Still, the range among the states was striking; in 2007, taxes ranged from 7 cents in South Carolina to \$2.58 in New Jersey. See **Ctrs. For Disease Control and Prevention**, supra note 32,

http://apps.nccd.cdc.gov/StateSystem/stateSystem.aspx?selectedTopic=602&selectedMeasure=10005&dir=leg_report&ucName=UCLegSmkFreeSummaryExciseTax&year=2007_4&excel=htmlTable.

The key question, of course, is whether consumer demand is sufficiently sensitive to price increases to have a substantial impact on smoking behavior. A legion of economists has studied this question with varying findings on price elasticity. But the conclusion is virtually always the same: that adult smoking behavior is quite sensitive to price increases.³⁴ Presumably, even in the present era, characterized by far more hardcore

³⁴ "Price has been found to affect virtually every measure of cigarette use, including per-capita consumption, as derived from aggregate macro-level data as well as smoking prevalence and the number of cigarettes smoked daily, as derived from individual micro-level data. . . . Higher cigarette prices increase the probability that a current adult smoker will make an attempt to quit." See IOM Report, supra note 7, at 182; see also Frank J. Chaloupka and Kenneth E. Warner, The Economics of Smoking, in Nat'l Bureau of Econ. Research Working Paper No. 7047 4-16 (Mar. 1999) (collecting various studies and concluding that most studies find cigarette price elasticity to range from -0.3 to -0.5, but noting that studies have varied, and, therefore, the overall range elasticity is from 0.14 to -1.23).

smokers than a generation ago, the concentration of smokers in lower socioeconomic groups would, if anything, enhance the price sensitivity to cigarette consumption.

But this raises a troublesome issue, in my view. If one recognizes the traditional taxation/confiscation argument, raising the excise tax at some point becomes tantamount to a ban on smoking. Linked with the regressive effects of the tobacco tax under the current demographics, this pointedly raises paternalism and fairness concerns that the tobacco control strategies discussed earlier (that is, providing consumer information and regulating third-party health effects) managed to avoid. For now, I simply pose these concerns. The issue cannot really be resolved without recognizing its inextricable link to reducing youth smoking by raising the tobacco excise tax—a topic I discuss later.³⁵

Whatever conclusions one reaches on the merits of further reliance on tax increases, two related measures warrant discussion. First, any discussion of tax increases would be incomplete without reference to the Master Settlement Agreement of 1998, which I will address from another strategic vantage

³⁵ See infra Part IV.B.4 discussing evidence that youth are even more price sensitive than adult smokers.

point under litigation. In this landmark settlement with the states, the five major tobacco companies committed to paying out more than \$200 billion over 25 years.³⁶ The immediate consequence was a sharp spike in the price of cigarettes, estimated to have been a 39 cent rise in price per pack.³⁷

In a second addendum to the discussion of excise taxes, I shift focus to a handful of studies that have explored the interactive effects of tax increases coupled with restrictions on smoking at worksites and public places, and/or with informational strategies. Not surprisingly, the findings

³⁶ See **Brandt**, supra note 1, at 432-434.

³⁷ See **IOM Report**, supra note 7, at 50. Premium brand cigarettes cut their wholesale price in 1993 from \$1.23 per pack to 84 cents to compete with discount brands, and raised it back to \$1.23 right after the MSA, "in large part to cover the cost of the settlement." Id. On the related question of the MSA price increase's immediate impact on smoking prevalence, the IOM Report states that "per capita consumption among adults has decreased unevenly from year to year [since 1985 but by] . . . 7.9 percent between 1998 and 1999 (following the Master Settlement Agreement and price increases)." Id. at 54-56.

support the intuition that documented reductions in smoking prevalence are attributable to the synergistic effect of pursuing these strategies in tandem.³⁸ When tax increases have been enacted along with roughly contemporaneous restrictions on workplace and/or public place bans, this result is particularly unsurprising. Once again, what I have referred to as the "hassle factor" is prominent: the more discomfort it takes to maintain the smoking habit--discomfort in the pocketbook along with place restrictions--the greater the likelihood that many smokers will be pushed to serious efforts at cessation.

More generally, as I will discuss in concluding observations, a multi-pronged approach remains far more promising for further reductions in the incidence of tobacco use. But before I turn to questions of a forward-looking agenda, I will discuss the regulatory strategies that appear to have been less successful, in my view, in reducing tobacco use.

III. Less Successful Control Strategies

My assessment of less successful avenues of regulatory control begins by tracing the long and rather tortuous path

³⁸ See **IOM Report**, supra note 7, at 184-85.

taken by the tobacco tort litigation.³⁹ Litigation, of course, is not really a regulatory "strategy" in the same sense as the federal, state, and local regulatory initiatives addressed elsewhere in this article. When the courts entertain lawsuits brought by private plaintiffs, they are not engaging in the public health politics of policy formation. Nonetheless, it is obvious that tort law is public law in the sense that damage awards can play an important regulatory function. Whether tort has in fact played a meaningful role in the sphere of tobacco regulation is, of course, another matter to be assessed in the following discussion.

A. Litigation

Beginning in the mid-1950s, there were sporadic efforts by personal injury lawyers seeking tort compensation on behalf of individual smokers suffering from lung cancer. Remarkably, from then through the early 1990s, over the course of forty years,

³⁹ For a more detailed but earlier version of this analysis of the tobacco tort litigation, see Robert L. Rabin, The Third Wave of Tobacco Tort Litigation, in **Regulating Tobacco** 176 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

not a single one of these cases—more than 200 claims in total—succeeded.⁴⁰

But then the tobacco industry's fortunes shifted dramatically, as revelations surfaced of longstanding efforts by the industry to suppress information about the health risks of tobacco and target the underage youth population through promotional and advertising strategies.⁴¹ Beginning in 1993, a considerable number of sophisticated plaintiffs' attorneys, who had previously shown no enthusiasm for involvement in tobacco litigation, filed claims against the industry.⁴² And these claims took on a new character: smokers came to be conceptualized in aggregate terms, rather than solely as individual victims.

⁴⁰ On the first two waves of tobacco tort litigation, 1954-65 and 1983-92, see Robert L. Rabin, Institutional and Historical Perspectives on Tobacco Tort Litigation, in **Smoking Policy: Law, Politics, and Culture** 110 (Robert L. Rabin & Stephen D. Sugarman eds., 1993) (discussing the singular lack of success by plaintiffs in that era).

⁴¹ See generally **Peter Pringle, Cornered: Big Tobacco at the Bar of Justice** 77-81 (1998).

⁴² See **Brandt**, supra note 1, at 404.

The opening salvo on the tort front was Castano v. American Tobacco Company,⁴³ a nationwide class action filed in a Louisiana federal district court. In a novel variation, a second front was opened in a Mississippi state judicial forum, with the filing of a state claim for reimbursement of health care expenditures on behalf of impecunious smokers.⁴⁴ At roughly the same time, the growing sensitivity to claims of harm from exposure to environmental tobacco smoke triggered a class action alleging secondhand smoke-related disease.⁴⁵ And finally, the injury claims of individual smokers were revitalized.

What can be said about the consequences of these endeavors? In this section, I provide an overview of these four fronts of tobacco tort litigation, concluding that tort litigation as a regulatory strategy for limiting tobacco use has played a highly

⁴³ 160 F.R.D. 544 (E.D. La. 1995), rev'd, 84 F.3d 734 (5th Cir. 1996).

⁴⁴ See Complaint, Moore ex. rel. State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994).

⁴⁵ See Broin v. Philip Morris Cos., Inc., No. 91-49738 (22) (Fla. Cir. Ct. 1991).

visible but limited role among the broad array of tobacco control strategies.

1. Class Action Tort Claims

Although the Castano nationwide class potentially represented upwards of 40 million claimants, the case was, in a sense, narrowly conceived. Rather than resorting to the conventional claim for health-related damages from smoking, the Castano lawyers made nicotine addiction the centerpiece of their case. The class was framed to include smokers medically diagnosed as addicted and those who had been medically advised to quit but had not yet done so. This narrower characterization of the harm resulting from industry conduct linked nicely with the developing evidence that tobacco executives engaged in a disingenuous pattern of conduct, in which they strove to conceal and misrepresent information about the addictive properties of nicotine—indeed, they appeared to manipulate the content of nicotine in tobacco products.⁴⁶

In denying the industry's effort to get the case dismissed, the trial judge found the technical requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure dealing with class actions satisfied—in essence, finding that questions

⁴⁶ See **Pringle**, supra note 41, at 77-81.

common to the class predominated over individual questions, and that the class action was a superior vehicle for litigating the questions.⁴⁷ He reached these conclusions (and certified the class) as to two critical issues: (1) whether the industry had engaged in a fraudulent course of conduct; and (2) if so, whether punitive damages were warranted. With regard to more particularistic issues of individual reliance and case-by-case need for medical monitoring, he decided that it would be necessary to resolve these claims at a later stage, perhaps through carving out sub-classes. By resorting to this bifurcated approach, the judge held that foundational issues of industry responsibility could be tried in consolidated fashion.

On appeal, however, the Fifth Circuit Court of Appeals rejected the class certification, relying heavily on the recently decided In re Rhone-Poulenc Rorer,⁴⁸ in which Judge Richard Posner, writing for a panel of a different federal appellate court, decertified a class action brought by hemophiliacs suffering from AIDS against blood solids manufacturers. Publicly, at least, the Castano plaintiffs'

⁴⁷ Castano, 160 F.R.D. 544, 552-56 (E.D. La. 1995), rev'd, 84 F.3d 734 (5th Cir. 1996).

⁴⁸ 51 F.3d 1293 (7th Cir. 1995).

attorneys took the concern about applying the tort law of fifty states emphasized in Rhone-Poulenc to be the gist of the Fifth Circuit's decertification decision, and accordingly went on to file "Son of Castano" cases in a number of state courts, each of which would have had to apply only the law of its own jurisdiction.⁴⁹

A careful reading of the Castano opinion, though, seemed to belie this narrow interpretation. The Castano court saw a considerable number of knotty problems raised by consolidation—among others, the arguably individual determinations of reliance, comparative fault, consumer expectations, and actual damages—that would need to be confronted at some stage, even if they could be disregarded in an initial phase of the trial. And most significantly of all, these issues potentially would have to be faced for some 40 million claims generated by Castano itself. In sharp contrast, there were about 100 or so ongoing individual claims at the time Castano was decided—claims which might wither away or remain at about the same quantitative level if tobacco cases continued to be brought individually.

⁴⁹ See Susan E. Kearns, Decertification of Statewide Tobacco Class Actions, 74 **N.Y.U. L. Rev.** 1336, 1353-55 (1999).

The aftermath of Castano largely confirmed this reading. Virtually all of the second-round Castano cases that were filed were eventually dismissed in state courts, thus contradicting the notion that choice of law was the essence of the tobacco consolidation concern.⁵⁰ If Castano itself seemed doomed from

⁵⁰ But see Engle v. R.J. Reynolds Tobacco Co., No. 94-8293 CA 20 (S.D. Fla. 2000), reh'g denied, motion granted, Philip Morris, Inc v. Engle, 746 So. 2d 457 (Fla. Dist. Ct. App. 1999); writ of error denied, R.J. Reynolds Tobacco Co. v. Engle, 751 So. 2d 51 (Fla. 1999); rev'd on subsequent appeal, Liggett Group, Inc. v. Engle, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), an initially little-noticed Florida state court class action, filed independently of Castano (but roughly contemporaneously) by an attorney team with no links to the Castano lawyers, who relied on the traditional disease-related basis for claiming injury instead of limiting their sights to an addiction-based theory. After a circuitous route on appeal, a trial court holding that awarded three class representative plaintiffs \$12.7 million in compensatory damages, and awarded \$144.8 billion in punitive damages to the entire class, was eventually vacated by the Florida Supreme Court. Engle v. Liggett

Group, Inc., 945 So. 2d 1246, 1276 (Fla. 2006). The state Supreme Court held that certification of the class had not been warranted since each case would present individualized issues of liability, affirmative defenses, and choice of law. Id. at 268. For a follow-up on individual filings, see David Ball, Tobacco Plaintiffs Now Number 2,500, **Fin. News & Daily Rec.**, Jan. 7, 2008, available at http://www.jaxdailyrecord.com/showstory.php?Story_id=49186&text=. See also Scott v. American Tobacco, Inc., No. 968461 (La. Dist. Ct., Orleans parish 2004).

On a related front, a number of "light cigarette" class action fraud cases have been brought under state consumer protection statutes, claiming that "light" brands convey deceptive and misleading messages that these cigarettes do not pose the health risks of regular brands. A closely-watched Illinois case yielded a trial court award of \$10 billion against the defendant tobacco company, but the state Supreme Court struck down the award on appeal, ruling that the FTC had authorized the use of "light." See Price v. Philip Morris, Inc., 848 N.E.2d 1, 53-55 (Ill. 2005). Other light cases remain in the pipeline, but have not yet led to a breakthrough against the industry. See

the outset by inevitable appeal to a conservative Fifth Circuit Court of Appeals, one may ask why a consortium of high-powered plaintiffs' attorneys invested so much time and money in the case. It is speculation, of course, but a real possibility is that the team was in essence engaged in very high stakes poker—that is, gambling that certification at the trial court level (which did in fact occur) would create sufficient unpredictability about a potentially catastrophic loss to persuade the industry finally to consider the prospect of settlement. Interestingly, this was precisely the course that unfolded in the contemporaneous state health care litigation,

Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006), rev'd, *McLaughlin v. American Tobacco Co.*, 2008 WL 878627, at *14 (2nd Cir. 2008). See also Tobacco Control Legal Consortium, <http://tclconline.org/Tclc.asp> (last visited Mar. 3, 2008) (providing updates on light cigarette litigation). Another attack on this litigation involves a claim that the cases are preempted by the federal cigarette labeling legislation. The U.S. Supreme Court has granted certiorari on this question. See *Altria Group v. Good*, 128 S.Ct. 1119 (2008).

spearheaded initially by a rival group of plaintiffs' attorneys retained by the states.

2. The State Health Care Reimbursement Cases

The pioneering venture in the state health care reimbursement litigation, the Mississippi case, was filed roughly contemporaneously with Castano in May 1994.⁵¹ In some ways, the two efforts to recover for aggregated claims shared an affinity beyond near-simultaneous filing. Both were undertaken by attorneys experienced in mass tort litigation and convinced that the unfolding revelations of industry indifference to public health concerns could be translated—in tobacco, as in asbestos—into mass industry liability.⁵² But the health care reimbursement claim, which would soon be replicated in one state after another across the nation, rested on a very different premise from Castano. Although the reimbursement claim was based on precisely the same tort-type conduct, the state's theory of recovery was, in fact, not based on products liability law—since the state was not a “direct” victim suffering from tobacco-related disease. Instead, Mississippi and the states

⁵¹ Complaint, Moore ex. rel. State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994).

⁵² See **Pringle**, supra note 41, at 13-15.

that followed its lead argued for relief on equitable grounds such as unjust enrichment.⁵³

In essence, the states' legal theories—which later included statutorily based claims, such as violation of consumer protection laws—asserted that the industry's deceptive and misleading conduct constituted a wrong against the public as well as against individual smokers. In arguing unjust enrichment, the claim was for restitution of public tax funds that were allocated to treating impoverished smokers whose health problems were allegedly the industry's responsibility. A similar theory—wrongfully profiting at the expense of the public—undergirded claims of conspiracy and consumer fraud, particularly those targeted against industry tactics aimed at making smoking attractive to underage youths.⁵⁴

In reality, these theories were largely untested, and the claim that the state's interest was independent of and distinct

⁵³ See id. at 30-32.

⁵⁴ For a detailed account of the strategy relied on in one key state, Minnesota, see Gary L. Wilson & Jason A. Giller, Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Minnesota's Consumer Protection Statutes, 25 **Wm. Mitchell L. Rev.** 567 (1999).

from the individual smoker's generally rested on a shaky foundation.⁵⁵ Untested or not, the theories of recovery

⁵⁵ Consider, for example, the claim of unjust enrichment. The industry was only "unjustly enriched," presumably, if it profited from harm for which it should have been held legally responsible. But this sounds suspiciously circular. Industry responsibility presupposes smoker non-responsibility, which is precisely the issue at the core of the individual cases. Similarly, a public nuisance or conspiracy claim rests on the wrongful imposition of harm on the public—where "wrongful" once again arguably raises individual issues of reliance and comparative responsibility, even if the tobacco companies misrepresented health information. Moreover, in purely economic terms, the claim for recovery of health care costs would seem to be interlocked with the excise tax payments levied on the industry, if not, as some economists argued, the net health cost savings to social welfare programs from premature deaths of smokers, as well. Compare W. Kip Viscusi, A Postmortem on the Cigarette Settlement, 29 **Cumb. L. Rev.** 523, 532-37 (1999), with Gary T. Schwartz, Tobacco,

multiplied—coming to include deceptive advertising, antitrust violations, federal RICO (racketeering) claims, unfair competition, a variety of fraud allegations, and in at least two states (Florida and Massachusetts) statutory claims based on specific health care cost recovery legislation. The number of states bringing suit also multiplied. By summer 1997, the roster had grown to forty states, with virtually every still-uncommitted state considering action. Blue Cross and labor union insurers were devising parallel lawsuits, and in California, cities and counties had joined in the fray.⁵⁶ The documents told a tale of industry deceit and indifference to public health considerations. Could trial court judges in every, or virtually all, state health care recovery cases be counted on to enter favorable summary judgments, or would the industry be at the mercy of juries exposed to the tale of industry wrongdoing?

Liability, and Viscusi, 29 **Cumb. L. Rev.** 555, 557-59 (1999).

⁵⁶ See Milo Geyelin, Second Wind: Is Big Tobacco Reeling? Maybe Not; It Wins New Round in Court, **Wall St. J.**, June 5, 1998, at A1.

In the end, the industry settled individually with the four states that were closest to trial, and that, with one exception (Texas), perhaps presented the greatest threat of a litigation setback: Mississippi, Florida, Texas, and Minnesota—settlements that totaled some \$40 billion, to be paid out over twenty-five years.⁵⁷ Within a year, in November 1998, the industry and the forty-six remaining states had negotiated a \$206 billion Master Settlement Agreement (“MSA”) of all outstanding state health care reimbursement claims.⁵⁸

It is difficult to assess the significance of the health care reimbursement litigation.⁵⁹ The MSA, which extinguished any

⁵⁷ David E. Rosenbaum, The Nation; Politics of Tobacco: Taxes vs. Kids, **N.Y. Times**, June 21, 1998.

⁵⁸ See **Brandt**, supra note 1, at 432-34 (describing the MSA). See also id. at 422-29 (describing a failed congressional global legislation effort that immediately preceded the MSA). See also Jeffrey Taylor, A New Call for National Tobacco Laws, Prompted by States’ Deal, Faces Hurdles, **Wall St. J.**, Nov. 17, 1998, at A1.

⁵⁹ See Stephen D. Sugarman, W. Kip Viscusi’s Smoke-Filled Rooms: A Postmortem on the Tobacco Deal, 13 **Law & Pol. Book Rev.** 1 (2003) (book review); Stephen D. Sugarman, Book Reviews, 22 **J.**

further liability of the industry to the states, contained some restrictions on advertising and promotion aimed at the youth

Pol'y Analysis & Mgmt. 712 (2003) (reviewing **Martha A. Derthick, Up in Smoke: From Legislation to Litigation in Tobacco Politics** (2001); **Michael Pertschuk, Smoke in Their Eyes: Lessons in Movement Leadership from the Tobacco Wars** (2001); and **Mark Wolfson, The Fight Against Tobacco: The Movement, the State and the Public's Health** (2001)). Sugarman suggests that perhaps the MSA (as well as the tobacco litigation more generally), although intended to restrain and punish the tobacco industry, may not have actually had that effect. MSA settlement funds have been used in many states for public projects unrelated to tobacco harms; the costs to the industry were relatively easily passed on to consumers; and the industry has continued to prevail in most of the litigation against it. For these reasons, Sugarman argues that a more substantial impact on tobacco use might have been achieved through the proposed "global" legislation, referred to *supra* note 58). See id. For a similarly skeptical view, see **Brandt**, *supra* note 1, at 432-38. Whatever the case, note that litigation costs generally, not just MSA payments, are tantamount to a tax in raising the cost of doing business. See Viscusi, *supra* note 55, at 539.

market: billboard advertising was banned and brand name sponsorship of recreational activities was limited, among other things.⁶⁰ But critics pointed out that more far-reaching measures, such as industry "look back" penalties if scheduled reductions in teenage smoking were not met, or an acknowledgment of the FDA's jurisdiction to regulate tobacco products—a separate battleground that was then before the Supreme Court, which subsequently ruled that Congress had not given the FDA regulatory authority⁶¹—were notably absent.⁶²

⁶⁰ Some of these limitations are now largely beyond the power of Congress or the states to enact. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001) (invalidating a number of state and local restrictions on outdoor advertising of tobacco products on the First Amendment and federal preemption grounds).

⁶¹ Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155 (4th Cir. 1998), aff'd Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 142-44 (2000).

⁶² These provisions had been included in the failed Congressional settlement effort, supra note 58. On look-back penalties as a control strategy, see Stephen D.

While it is estimated that MSA payments increased the per pack price of cigarettes by thirty nine cents, there was no assurance that the states would spend a significant proportion of the industry payments on smoking reduction programs. To the contrary, it soon became clear that the states were earmarking the funds for a variety of projects unrelated to tobacco control, and, in many instances, bearing no relationship to public health concerns.⁶³ Many argued, with some justification, that the major beneficiaries of the MSA were the plaintiffs' lawyers, who stood to realize billions in attorneys' fees.⁶⁴

Sugarman, Give the Tobacco Companies Responsibility for Reducing Smoking Rates, **Nat'l. Law J.**, Feb. 7, 2005. Sen. Mike Enzi of Wyoming has introduced a bill in Congress that would take this approach.

⁶³ See Michael Janofsky, Tiny Part of Settlement Money is Spent on Tobacco Control, **N.Y. Times**, Aug. 11, 2001, at A9. As the years passed, the diversion to other state purposes became even more pronounced. See, e.g., Alison L. Cowan, Connecticut is Criticized on Spending on Smoking, **N.Y. Times**, Jan. 1, 2008, at B1.

⁶⁴ See Henry Weinstein, Fees of Anti-Tobacco Attorneys Criticized, **L.A. Times**, Mar. 15, 2001, at C1. Moreover,

In sum, the industry arguably sealed off any continuing concerns about catastrophic liability to third-party claimants at a cost that was regarded as unlikely to have a substantial impact on its future revenue stream. But one looming threat on the horizon remained. In 1999, the federal government brought a civil fraud and racketeering case against the tobacco industry, seeking the reimbursement of Medicare spending, as well as civil penalties under RICO.⁶⁵ While the Medicare claim was thrown out at an early point, the RICO case persisted⁶⁶ to the surprise of those who thought the Bush administration would allow it to wither away. The case continues, at the time of this writing, although its most significant threat to the industry—a claim for

the third party claims of insurers and union health funds, modeled on the state reimbursement suits, have been singularly unsuccessful with courts dismissing the claims on remoteness grounds. See Scott Ritter, Unions' Claims on Tobacco Firms are Rejected by Appeals Court, **Wall St. J.**, May 23, 2001, at B13.

⁶⁵ United States v. Philip Morris, 116 F.Supp. 2d 131 (D.D.C. 2000).

⁶⁶ See United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72, 82 (D.D.C. 2004).

disgorgement of illegal profits, totaling the staggering figure of \$280 billion—was dismissed on interlocutory appeal to the Court of Appeals for the District of Columbia.⁶⁷ On remand, the district court judge entered a remedial order, enjoining the defendants from misrepresenting health and safety concerns, including a ban on labeling cigarettes as “low tar” or “light,” and requiring corrective statements to be disseminated.⁶⁸

With the disgorgement possibility removed from the case, the remaining claims for injunctive relief, if upheld on appeal, do not appear to be a significant advance beyond the MSA requirements.

3. Environmental Tobacco Smoke Claims

The earliest tobacco class action effort, *Broin v. Philip Morris Cos.*⁶⁹ commenced near the end of 1991, was filed on behalf of nonsmoking flight attendants alleging secondhand smoke

⁶⁷ *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1193 (D.C. Cir. Feb. 4, 2005).

⁶⁸ *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 1 (D.D.C. Aug. 17, 2006).

⁶⁹ See *Broin v. Philip Morris Cos.*, No. 91-49738 (Fla. Cir. Ct. filed 1991).

injuries. The flight attendants claimed to be suffering from tobacco-related disease from harm in the workplace—the airline cabins where they were regularly exposed to tobacco-using passengers prior to the 1990 ban on in-flight smoking.⁷⁰

The case was brought in Florida state court by the same attorneys who subsequently filed the earlier-mentioned Florida state court class action, Engle, on behalf of direct victims of smoking-related diseases. Broin was given very little chance of succeeding when it was filed.⁷¹ This was before Castano, let alone any indication that the aggregation technique might generally supplant case-by-case litigation. Moreover, secondhand smoke harm had not yet attracted the general attention that it would after the publication of the 1992 EPA report designating environmental tobacco smoke as a known human lung carcinogen with no established safe level of exposure.⁷²

To the surprise of most observers, the trial court's refusal to grant class certification was reversed by the Florida

⁷⁰ Id. at 889.

⁷¹ See Milo Geyelin, Flight Attendants Tobacco Trial Nears, **Wall St. J.**, June 2, 1997, at B7.

⁷² **U.S. Environmental Protection Agency**, supra note 19.

Court of Appeal, and the Broin class was certified for trial.⁷³ The Court of Appeal, in a brief opinion, made the matter seem clear-cut: generic causation and industry course of conduct were questions common to the class, as was an assessment of the egregiousness of the defendants' conduct.⁷⁴ Any choice of law problems and individual issues of damages could be decided at a later stage, the court remarked, perhaps by recourse to subclassing—notwithstanding some 60,000 potential claims nationwide.⁷⁵

Whether Broin would have survived trial is open to serious question. As the state court of appeal opinion approving the parties' subsequent settlement made clear, the defense had arguments of real substance on the merits: no generic causation, no fraud as to secondhand smoke claimants, preclusion of suit by the statute of limitations, among others.⁷⁶ But in the midst of trial, before these issues could be addressed, a \$349 million settlement was announced.

⁷³ Broin, 641 So. 2d at 890-91 (Fla. App.1994).

⁷⁴ See id.

⁷⁵ Id. at 891.

⁷⁶ Ramos v. Philip Morris Cos., Inc., 743 So. 2d 24, 32 (Fla. Dist. Ct. App. 1999).

On closer inspection, the significance to be attached to the Broin settlement is far less clear. Like the individual state agreements, it came in the midst of the industry's effort to build a positive image in support of the congressional debate over a global tobacco settlement. It involved not a penny of compensation to the flight attendants themselves; rather, it set up a scientific research foundation (and made concessions on the statute of limitations and burden of proof in any individual flight attendant cases that might be brought in the future).⁷⁷ Perhaps most important, it is highly doubtful whether it has any wider applicability. In the individual workplace, secondhand smoke cases that followed Broin-lung cancer claims brought by a barber for long-term exposure in his shop and by a nurse who worked for many years in a veterans' hospital—the industry made

⁷⁷ As of Dec. 31, 2007, the industry had prevailed in ten of eleven cases brought by individual flight attendants. See Tresa Baldas, Big Tobacco Snuffs Out Secondhand Smoke Suits, **Nat'l. L. J.**, Jan. 7, 2008. The earlier estimate was that 3,125 suits might be brought. See Philip Morris v. Jett, 802 So. 2d 353, 354 (Fla. Dist. Ct. App. 2001).

no concessions and prevailed before juries.⁷⁸ And other occupational groups that might be consolidated are not likely to replicate the widely-shared exposure characteristics of the flight attendants, who themselves were still highly vulnerable to a no-causation defense. Thus, in the aftermath of Broin, secondhand smoke litigation has never shown promise.

4. Individual Claims

In 1996, a Florida state court claim, brought on behalf of an individual plaintiff and framed in modest terms (conceding comparative fault, eschewing punitive damages), broke the industry's forty-year string of success in these cases.⁷⁹ But the initial optimism fueled by the case (and the underlying reliance on the damaging internal industry documents) was short-lived. The score-card, in the immediately ensuing years, was

⁷⁸ See Tobacco Industry Ruled Not Liable in Mississippi Case, **Wall St. J.**, June 3, 1999, at A12.

⁷⁹ See Brown & Williamson Tobacco Corp. v. Carter, 723 So. 2d 833 (Fla. Dist. Ct. App. 1998), quashed by Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932 (Fla. 2001), cert. denied Brown & Williamson Tobacco Corp. v. Carter, 531 U.S. 950 (2001).

mixed: a handful of trial court victories (invariably subjected to long appeals) and a roughly equal number of defeats.⁸⁰

By mid-2005, the tide appeared to have turned somewhat in favor of the industry. While a \$50 million punitive damage award in Henley v. Philip Morris Inc. survived the appellate process,⁸¹ and joined the just-mentioned Carter case in the victory column for plaintiffs, all of the remaining individual pro-plaintiff awards remained on appeal, and Philip Morris was able to report a clear drop-off in filings: in May 2005, 273 individual cases remained pending, down 60 percent from late 1998; and only 30 new cases had been filed in 2004.⁸²

Putting aside the outcomes in individual cases, what are the critical differences, if any, between the single-plaintiff tobacco tort suits brought since the mid-1990s and those brought

⁸⁰ For discussion, see Robert L. Rabin, The Uncertain Future of Tobacco Tort Litigation in the United States, 7 **Tort L. Rev.** 91 (1999).

⁸¹ Henley v. Philip Morris Inc., 9 Cal. Rptr. 3d 29, 75 (Ct. App. 2004), cert. denied, 544 U.S. 920 (2005).

⁸² See Vanessa O'Connell, Lifting Clouds: New Tactics at Philip Morris Help Stem Tide of Lawsuits, **Wall St. J.**, May 11, 2005, at A1.

earlier? In short, the distinction is in the documents. By the late 1990s, a tobacco litigator could build a case against the industry on the voluminous document discovery in the state health care cost recovery suits and the class action litigation, as well as the earlier caches of whistleblower revelations. A narrative could be woven beginning with tobacco officials discussing, in clandestine fashion, the targeting of teenagers before they had developed to maturity and the retention of the adult market through the addictive powers of nicotine. In Henley, for example, the plaintiff's attorney put together a package of 790 damning industry documents, and, although the trial judge allowed only ten to be introduced, this was sufficient to trigger a punitive damage award from the jury of \$50 million, more than twice the punitives that the plaintiff had, in fact, sought.⁸³

Moreover, plaintiffs' attorneys drew not just on the same now-public documents, but consulted among each other on micro-management issues—which documents to rely on, which lines of argument to pursue, and which expert witnesses to call. By 1999, the Tobacco Trial Lawyers Association had been formed, an organization dedicated to networking and coordination among

⁸³ See Henley, 9 Cal. Rptr. 3d at 74.

those involved in tobacco trial litigation. And by then, the term "trial in a box" had come to characterize plaintiff attorney preparation in the individual cases.⁸⁴

But as the returns to date indicate, if large liability awards now seem a possibility as never in the past, the industry still remains armed with effective weapons. Relying on the strongly individualistic strand in American culture, freedom of choice can still be mustered as a powerful defense. This is especially true as the industry shifted ground and confessed to its past machinations, arguing instead that it has now reformed its ways under new "enlightened leadership."⁸⁵ If the documents are eventually viewed as a matter of only historical interest, and if the industry concedes that addiction means it is very

⁸⁴ See Gordon Fairclough, California May be Hazardous to Big Tobacco's Health, **Wall St. J.**, June 8, 2001, at B1.

⁸⁵ Rick Bragg, Tobacco Industry has Changed Its Ways, Executive Says, **N.Y. Times**, June 13, 2000, at A24. But the confessions of past sins were certainly no sure bet before an otherwise-incensed jury, as is indicated by the \$3 billion award in Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005). For subsequent history of the case, see infra note 93.

hard but nonetheless possible to quit—and this plaintiff, unlike so many other ex-smokers knowledgeable of the health risks, did not demonstrate the requisite will power—it may be that the freedom of choice defense will remain a powerful weapon.⁸⁶

Another shift in grounds, away from a defense that eventually became an embarrassment, has now taken place. From the outset of the litigation, the industry argued that the causal link between smoking and allegedly tobacco-related diseases had never been conclusively established: correlation is not causation. This argument, too, finally became an albatross, not just because of the voluminous epidemiological findings but also because of the hypocrisy revealed in the documents. But the concession of generic causation does not close the door on arguing that the particular plaintiff before the court has a type of lung cancer not strongly associated with smoking, or

⁸⁶ But there is a possible interplay here between the fruits of the Master Settlement Agreement—the state health care cost reimbursement initiative—and the individual cases. To the extent that MSA funds (or, for that matter, other sources of funding as well) are allocated to counter-advertising, they may keep the public's attention focused on a message that this is a death-dealing industry.

died from an independent disease, or died from lung cancer but was massively exposed to asbestos, and so forth. Because of the long latency of tobacco-related disease, the plaintiff's life history often creates the possibility of multiple causes of life-threatening illness.

These latter considerations bring us back full circle to the matter of cost. It remains the case, as in the earlier individual litigation, that expert witnesses are central to trying a tobacco tort case. The documents do not change this critical feature of the cases. The etiology of tobacco-related disease frequently requires the testimony of a pathologist, a pharmacologist, an oncologist, and, in its broader dimensions, an epidemiologist, an addiction specialist, and public health experts. Aside from the health perspective, there is frequently the need for experts in marketing and promotion, and product design aspects of the case. And, as long as the plaintiff's risk-taking proclivities remain an element of the defense strategy, a laundry list of character witnesses from the plaintiff's past—with corresponding pretrial deposition and interrogatory costs—is likely to be a staple of these cases. The short of it is that the documents, as a somewhat standardized package, go part of the way towards reducing the

costs of tobacco tort litigation. But they only go part of the way.

The cases remain expensive and time-consuming propositions as long as they are vigorously contested by the industry. And the leverage that industry defendants secure from uncertainty of outcome is heightened considerably by the U.S. Supreme Court's increasingly proactive stance regarding due process limitations on the size of punitive damage awards.⁸⁷ In this litigation environment, there is no reason to think that the defense needs to win every case in order to maintain an affordable product.

5. A Public Health Perspective on the Tobacco Litigation

The contribution that tobacco litigation in the United States has made to the control of smoking can be discussed from three distinct perspectives. In traditional tort terms, the litigation can be evaluated from a deterrence perspective. From

⁸⁷ See Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007) (holding that punitive damages award based in part on jury's desire to punish defendant for harming nonparties violated due process); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (holding that an award of \$145 million in punitive damages on a \$1 million compensatory judgment violated due process).

a broader public health vantage point, the litigation can be viewed as one among many strategies currently employed to reduce smoking—and the question can be asked whether litigation has had a positive interactive effect with these other approaches. Finally, the tobacco litigation can be evaluated as a medium for educating the public.

a. Litigation as a regulatory regime: Deterrence

For a generation now, a principal theme in tort theory has been the articulation of the deterrent role of tort.⁸⁸ This theme has been particularly evident in the modern development of liability in tort for product injuries—the domain that includes smoking-related harm. Deterrence theory has provided the underlying foundation for claims of inadequate warning and defectively dangerous design.⁸⁹

⁸⁸ See **Guido Calabresi, The Costs of Accidents** (Yale University 1970); **William M. Landes and Richard A. Posner, The Economic Structure of Tort Law** (1987); **Guido Calabresi, The Costs of Accidents** (1970).

⁸⁹ See **John Hanson & Kyle Logue, The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation**, 107 **Yale L.J.** 1163, 1173-78 (1998).

In the real world of tobacco litigation, however, deterrence considerations operate so haphazardly as to lose virtually all meaning. The major costs imposed on the tobacco industry through a half century of litigation have been the \$206 billion settlement with the states (and the associated billions in earlier settlements with four individual states) and the untold millions in paying the industry lawyers' bills to contest liability on all fronts—estimated in 2000 to have been in the neighborhood of \$900 million annually.⁹⁰ The former cost (the state settlements) bears no rational relationship to any intelligible notion of appropriate deterrence. It represents nothing more than the political outcome of what the traffic would bear after four years of jousting with the states over public health care costs (supplemented later in the litigation by a variety of unfair business practice claims). Similarly, the massive litigation costs of a half-century of tort warfare conform to no fine-tuned theoretical objective of internalizing accident costs.

⁹⁰ Milo Geyelin & Gordon Fairclough, Taking a Hit: Yes, \$145 Billion Deals a Huge Blow, But Not a Killing One, **Wall St. J.** July 17, 2000, at A1.

This is not to say that the massive financial expenditures imposed on the industry to buy a measure of peace have had no regulatory effect on smoking. To the extent that these costs are internalized in the price of tobacco products, they are reflected in price increases, and affect demand for tobacco.⁹¹ Reportedly, sharp price increases, beginning in late 1998 after the multi-state settlement, resulted in a drop in domestic

⁹¹ See W. Kip Viscusi, Overview, in **Regulation Through Litigation** 1, 3 (W. Kip Viscusi ed., 2002) (arguing that tobacco settlements “establishe[d] a tax on the product payable to the plaintiff and paid for almost entirely by the consumer rather than a damages payment paid for by the defendant.”); Clara Sue Ross, Comment, Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?, 56 **U. Cin. L. Rev.** 317, 337 (1987) (noting that effect of price increases on demand for tobacco products depends on factors like consumer’s age and income, with younger smokers being most responsive to price increases (citing Kenneth E. Warner, Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax, 255 **J. Am. Med. Ass’n** 1028, 1029 (1986))).

cigarette consumption of about 7 percent in 1999.⁹² But the point is that the costs bear no particular relationship to the goal of imposing on the industry a burden that reflects its proper responsibility for the disease-related harm associated with smoking.

Nothing about the recent mixed record of litigation success against the industry since the mid-1990s changes this conclusion. To the extent that these victories stand on appeal, they sharply underscore the uncertainty and potential for catastrophic loss arising from punitive damage awards.⁹³ But

⁹² Geyelin & Fairclough, supra note 90. But this report on consumption effects must be read in the context of the ten-year data, indicating a relatively flat trend in cigarette consumption; see NCHS Data 2007, supra note 10.

⁹³ As indicated, this potential for catastrophic punitive damage awards has been reduced by recent U.S. Supreme Court decisions placing constitutional due process constraints on unbounded awards. See Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). In this regard, see Bullock v. Philip Morris USA, Inc., 71 Cal. Rptr. 3d 775, 802 -07 (Ct. App. 2008), in which the court overturned a \$28 million punitive damage award on the

these punitive damage awards, in turn, reflect no more than isolated resolutions of the morality play of victim versus industry in which a particular jury decides to "send a message" to the industry. Again, a string of these awards will affect price and consequent demand—indeed in the improbable scenario of a groundswell of individual awards or even a single multi-billion dollar aggregate award, the financial viability of the industry might be threatened. However, this affords no clear signal, whether from a public health or economic efficiency perspective, that tobacco litigation is having the desired

basis of a jury instruction inconsistent with the due process limitations established in Williams). On the other hand, in Boeken v. Philip Morris, Inc., 19 Cal. Rptr. 3d 101, 108 (Ct. App. 2004), the trial court reduced a \$3 billion jury award for punitive damages to \$100 million. Id. at 108. On appeal, the court further reduced this award to \$50 million. Id. at 148. Final judgment in this latter amount was entered upon the appellate court's reconsideration in light of State Farm. See Boeken v. Philip Morris USA, Inc., 26 Cal. Rptr. 3d 638, 684-87 (Cal.Ct. App. 2005), cert. denied, 547 U.S. 1018 (2006).

impact on smoking.⁹⁴ And suppose, for a moment, that the opposing scenarios were to play out—that is, the litigation essentially dries up, through a (not inconceivable) combination of reversals on appeal and unsympathetic juries. Would the urgency of the public health concern be any less?

In any event, it seems apparent that tort liability is an exceedingly blunt weapon for doing battle with tobacco on the consumer demand front. Clearly, the industry can no longer stand behind its long-time boast that not a penny has been paid out in tort liability, not after the state settlements and the still-uncertain bill of continuing individual litigation. But the boast was always illusory in a sense. From the outset, the industry spared no litigation expense in battling tort liability.⁹⁵ Then, as now, the costs of litigation had some impact on the price of tobacco; now, it is far larger.⁹⁶ At no

⁹⁴ In fact, insolvency itself would arguably have only a minimal impact on the availability of tobacco, albeit perhaps under a rather different regime of promotion and distribution after corporate reorganization in bankruptcy.

⁹⁵ See Rabin, supra note 40.

⁹⁶ See Peter D. Jacobson & Soheil Soliman, Litigation as Public Health Policy: Theory or Reality?, 30 **J.L., Med. &**

time, however, have litigation-associated costs operated as a rational scheme from a regulatory perspective in affecting the demand for the product. Put another way, tort is a haphazard public health strategy because it is powerfully influenced, in the tobacco arena, by ever-changing ethical judgments about the scruples of the contestants, and extraordinary investments of lawyering activity in attempting to stage an effective appeal to moral sensibilities. It is not a forward-looking strategic device that aims to achieve defined risk-reducing goals through the medium of liability awards.

b. Litigation and complementary control strategies

In one sense, the public health aims and accomplishments through the array of regulatory initiatives discussed in this article highlight the limitations of litigation as a regulatory

Ethics 224, 234-35 (2002) (noting that tobacco litigation costs resulted in price hikes); see also **U.S. Dep't of Health and Human Servs., Reducing Tobacco Use: A Report of the Surgeon General** 322-37 (2000) available at http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/00_pdfs/FullReport.pdf (discussing the evidence of the relationship between price and demand for tobacco products).

strategy. Because recent data indicate that the smoking rate among teenagers remains a serious concern⁹⁷—and it is well-established that smoking initiation is largely a youth phenomenon⁹⁸—a powerful case can be made, as I discuss in a following section, that reducing underage smoking is the most salient of tobacco control goals. There is little reason to think that tort litigation contributes much in a direct sense to achieving this objective. Tort awards translate into money judgments to smoking victims rather than compelling retailers to check the age of cigarette purchasers, dictating the character

⁹⁷ See Nat'l Ctr. for Health Statistics, Health, United States, 2007: With Chartbook on Trends in the Health of Americans 28 (2007) available at <http://www.cdc.gov/nchs/data/hus/hus07.pdf> (reporting that 23 percent of high school students smoked at least one cigarette in the 30 days preceding the survey).

⁹⁸ In the United States, almost 90 percent of smokers have their first cigarette before the age of 18. See Substance Abuse & Mental Health Servs. Admin., Results from the 2005 National Survey on Drug Use and Health: National Findings 51 (2006), available at <http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5results.pdf>.

of tobacco advertising, or proscribing the possession of cigarettes.

At the same time, however, it is possible to argue that tort has had an indirect sanctioning effect. To the extent that the tobacco industry expends large sums on defense and in resolving liability controversies, these costs of doing business lead to increases in the price of cigarettes—most apparent, perhaps, in the state health cost reimbursement settlements with the states—which would have a positive impact on reducing minors' smoking. Similarly, as mentioned, the settlements with the states did provide for limited controls on advertising and promotion, as well as generating revenues that are used in some instances to fund counter-advertising.⁹⁹ In the larger scheme of things, however, it is difficult to make the case for any major inroad in teenage smoking as a result of tort liability.

⁹⁹ A major caveat, however. In addition to the diversion of settlement funds to non-tobacco uses, see supra text accompanying note 63, it appears that the tobacco industry found ways to circumvent the restrictions on magazine advertising aimed at youths. See Alex Kuczynski, Tobacco Companies Accused of Still Aiming Ads at Youths, N.Y. Times, Aug. 15, 2001, at A1.

With respect to adult smokers, as I have discussed above, the most effective long-term public health measures appear to be the increasingly stringent controls on smoking in the workplace and in places of public accommodation. In this sphere of conduct control, tobacco litigation, in contrast to legislative activity, has no immediately apparent complementary role to play (nor has it played any role until now).

c. Educational effects

In recent years, public opinion polls have consistently indicated that the public, including the smoking public, is well aware of the health risks of smoking.¹⁰⁰ Indeed, the industry has used this information to its own end in the tort litigation, as a buttress to its argument that smokers assume the risk of smoking-related disease.¹⁰¹ In my view, however, tobacco tort

¹⁰⁰ See, e.g., Lydia Saad, **Special Report: Tobacco and Smoking** (Gallup, Inc. 2002), <http://www.gallup.com/poll/9910/Tobacco-Smoking.aspx>.

¹⁰¹ See, e.g., Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 352 (6th Cir. 2000) (holding that plaintiff had common knowledge of risks of smoking because at time plaintiff started smoking, there was widespread public

proponents cannot lay claim to a significant role in creating a risk-informed public. It is important to recognize that prior to the filing of Castano and the health care reimbursement suits, tobacco tort litigation was a distinctly low-visibility enterprise—and by the time those cases were filed, the health risks of tobacco were already common knowledge by virtue of the public and media informational strategies discussed earlier in this article.

By contrast, the addictive properties of nicotine had received less attention through the early 1990s. But here, too, the educational role of tort is hard to assess. The whistleblower-leaked documents that provided support for Castano and the state health care reimbursement suits were simultaneously distributed to leading news media, congressional representatives, the FDA, and public health activists.¹⁰² In particular, the joint appearance of tobacco executives before the Waxman congressional committee, in which they avowed ignorance of the effects of nicotine, focused nationwide attention on nicotine addiction, as did the TV documentary, Day

awareness of these risks, and plaintiff “continued to smoke even after” label warnings were strengthened).

¹⁰² See Pringle, supra note 41, at 54, 73–76.

One.¹⁰³ Thus, it seems fair to say that by the mid-1990s the channels of public communication of health information about the risks of tobacco were filled to overflowing, making it impossible to identify a singularly influential source.

Nonetheless, a meaningful distinction can be drawn between the key sources of public information about the health risks of tobacco, and, beginning in 1993, the most salient source of information on the unfolding narrative concerning the industry's pattern of concealing and misrepresenting its own understanding of those health risks over a period of some thirty years. On this latter score, the determined efforts at pre-trial discovery in litigation—such as that pursued by the state of Minnesota in its health care reimbursement suit—did in fact stand out as a source of public information.¹⁰⁴ As in the earlier case of asbestos, the full story of the industry's conscious disregard for the health effects of its profit-making activity might never

¹⁰³ See **Brandt**, supra note 1, at 358-63.

¹⁰⁴ For detailed treatment of the Minnesota strategy, see Michael Ciresi et al., Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation, 25 **Wm. Mitchell L. Rev.** 477 (1999).

have become a part of the public record in the absence of the tort litigation.¹⁰⁵

If this is correct, tort law (in the tobacco context) has been notable not so much because of its direct contribution to compensating smokers or shaping public health, but for its contribution to the unfolding documentation of public affairs. In that regard, the consequent rise in public disapproval of the industry plausibly could have contributed to the political climate in which the excise tax and secondhand smoke legislation were enacted.

B. Restrictions on Advertising and Promotion

As discussed earlier, the first major initiative in this domain was the ban on broadcast media advertising in 1969.¹⁰⁶ But this was at best a mixed success from a public health perspective. The ban swept counter-advertising, which had been highly effective, off the air along with tobacco commercials,

¹⁰⁵ On asbestos, see **Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial*** (Pantheon Books 1985); for a more detailed treatment of the educational effects of tort litigation, see Robert L. Rabin, Reassessing Regulatory Compliance, 88 **Geo. L. Journ.** 2049, 2068-70 (2000).

¹⁰⁶ See supra text accompanying note 17.

and at the same time, led the industry to shift resources into other venues—heightened promotional activities, print, and billboard advertising.¹⁰⁷

What followed was a generation of exposure to the Marlboro Man, Joe Camel, and a variety of other creative industry marketing initiatives where its portrayals of the pleasures of smoking went largely unchallenged—in the context of serious First Amendment commercial speech and federal preemption issues lurking in the shadows if regulatory efforts had been pursued.¹⁰⁸

Against this backdrop, it is perhaps unsurprising that the next notable set of restrictions came through a voluntary

¹⁰⁷ See **IOM Report**, supra note 7, at 113-14.

¹⁰⁸ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558-59 (2001). Joe Camel ads were eventually banned. See *Mangini v. RJ Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994), overruled by *In re Tobacco Cases II*, 163 P.3d 106 (Cal. 2007) (overruling on grounds of preemption by federal cigarette warning legislation). However, the ad ban took effect only after years of exposure and strong evidence of positive imagery in the youth population. See J. DiFranzia et al., RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children, 266 **J. Am. Med. Ass'n** 3149 (1991).

settlement between the states and the industry, the MSA—rather than direct governmental regulation—in which the tobacco companies agreed to restrictions on industry marketing (including the elimination of cartoon characters and billboard advertising, and the restriction of industry sponsorship of recreational events) and political activity (including the disbanding of the Tobacco Institute and the Council for Tobacco Research).¹⁰⁹ But once again, the import of these restrictions is debatable. Ever resourceful, the industry reallocated its advertising and promotional budget to the retail sales environment, where it operates relatively free of regulatory constraints.¹¹⁰ At the same time, a not insignificant amount of positive reinforcement of smoking behavior flourishes on the motion picture screen and in remaining magazine advertising.¹¹¹

This brief recounting suggests very modest inroads, at most, as a consequence of advertising restrictions. Consider the long view. In the twentieth century, advertising

¹⁰⁹ See **IOM Report**, supra note 7, at 123.

¹¹⁰ See generally id. at app. L.

¹¹¹ See Smoke Free Movies,

<http://www.smokefreemovies.ucsf.edu/solution/index.html>.

(last visited Mar. 31, 2008).

transformed the role of smoking in popular culture.¹¹² From early on, the industry promoted female smoking through imagery of the independent and glamorous woman. Similarly, the male population was targeted through portrayals of smoking associated with rugged individualism, most effectively embodied in the Marlboro Man years. In a like vein, industry documents reveal conscious efforts to target minority groups and the youth population.¹¹³ And frequently, advertising campaigns took explicit aim at countering popular anxieties over health effects, illustrated vividly by the vigorous promotion of the filter cigarette as a counter to the early Surgeon General's Report.¹¹⁴

And where was regulation of advertising, in these years, directed at countering these multiple channels of promoting tobacco use? It was nowhere to be found. Moreover, as I have suggested, when restrictions on one medium of advertising were adopted, the industry creatively shifted to another.

Without a doubt, banishing tobacco ads from billboards, sports stadiums, and promotional wear, per the MSA, has been a

¹¹² See **Brandt**, supra note 1, at 262.

¹¹³ See **IOM Report**, supra note 7, at 247-48.

¹¹⁴ See id. at 48.

salutary move, even if the precise impact on smoking prevalence cannot be measured. But further efforts in this vein, such as proposed black-and-white-only advertising,¹¹⁵ not only are dubious on First Amendment grounds, but seem to me of marginal benefit. The case for meaningful impact has to rest on the premise that "tombstone" advertising, to stay with the noted proposal, as compared to present visual advertising will lead to substantial further reductions in the attractiveness of smoking in a present-day environment where the serious health effects of tobacco are widely recognized and where MSA-based restrictions on locality and imagery are already in place. This seems to me a hard case to make out.

If an assessment of advertising restrictions and litigation initiatives does not appear especially promising for the future, and if many of the more successful past strategies have perhaps provided about as much momentum as can reasonably be expected, then the question is whether pathways can be identified that might be fruitfully taken now in combating the continuing high mortality rate from smoking.

IV. What Next?

A. Adult Smoking

¹¹⁵ See id. at 323-37.

In a somewhat perverse sense, the hardcore 20 percent of the adult population that continues to smoke serves as a reality check on the successful implementation of an array of tobacco control strategies discussed earlier—successes realized predominantly through provision of information about health risks, protection of third parties, and taxation. The message seems clear. Unless excise tax levels rise to the point of constituting a de facto ban on smoking, we are at a crossroads where there either is no further governmental coercion of adult smokers or public policy commits to a new package of strategic approaches to controlling tobacco use.

At the outset, however, why not a de facto ban through aggressive use of the excise tax? As a practical concern, a smoking ban carries all of the attendant risks of smuggling and other illegal forms of access. The historical experience in the Prohibition Era has left an indelible imprint on American political thought. But more fundamentally, an outright ban raises the ethical issue of whether the state should engage in such a proactive course of paternalism. The addictive character

of cigarettes complicates the latter question, of course, but it does not put it to rest.¹¹⁶

If, at first blush, this seems to argue for leaving the adult smoking population alone, the matter is not quite so straightforward in my view. First, it seems strongly advisable to maintain a steady-state of health information awareness, rather than allowing public awareness to grow stale or retreat into the background as other health concerns assume center-stage. This can be done in part through reliance on continuing news media attention to findings on the health risks of smoking, but research funding (and corresponding advances in etiological findings), like public attentiveness, tends to flow in new directions as the scientific community explores fresh challenges on the disease frontier. Hence, the need to maintain a governmental commitment to funding counter-advertising by

¹¹⁶ For a thoughtful perspective on the addictive character of cigarette smoking, see N.L. Benowitz & J.E.

Henningfield, Establishing a Nicotine Threshold for Addiction: The Implications for Tobacco Regulation, 331 **New Eng. J. Med.** 123 (1994).

antismoking forces that continues to make vivid to smokers the long-term hazards of indulging in tobacco use.¹¹⁷

In addition, smoking cessation services can be thought of as a default strategy of sorts for those adult smokers who do desire to quit. A recently-offered proposal along these lines would be to require all insurance, managed care and employee benefit plans, including Medicaid and Medicare, to cover reimbursement for effective smoking cessation programs as a lifetime benefit, in addition to employing mass media techniques to increase demand for these programs.¹¹⁸

¹¹⁷ As the data on public place restrictions indicate, see supra note 26, another goal might be wider dispersal of smoke-free public place laws.

¹¹⁸ For a broad ranging strategy for promoting smoking cessation services, see **IOM Report**, supra note 7, at 231-41. In particular, David Levy notes the importance of services such as a well-publicized quitline, accompanied by free nicotine replacement therapy for a specified period of time, and other behavioral and pharmaco-therapy. See id. at apps. J-7, J-8. The IOM defends its recommendation that these services receive lifetime coverage from insurers on the grounds that the costs of cessation treatment will be

Finally, federal regulation could play a crucial role here. A successful effort to grant the FDA regulatory authority over tobacco could make possible a long-term strategy that, carefully implemented, might finally address the addiction problem; specifically, ratcheting down, in incremental fashion, the nicotine content of cigarettes. The behavioral issues here are not straightforward; among other salient points is the research indicating compensating behavior on the part of smokers—inhaling more deeply and smoking down to the filter in past experimental efforts to introduce low-nicotine cigarettes.¹¹⁹ But these problems are not insuperable, and there is another positive dimension to this strategy: the spillover effects on the residual youth population that will invariably “graduate” to the

offset by the decrease in lost-productivity costs and health care costs for no-longer-continuing smokers. See id. at 239.

¹¹⁹ See Jed E. Rose & Frederique M. Behm, Effects of Low Nicotine Content Cigarettes on Smoke Intake, 6 **Nicotine & Tobacco Res.** 309 (2004); see also **Nat’l Cancer Inst., Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine** (2001).

class of adult smokers, no matter how effective the next generation of youth prevention strategies.

Beyond these measures, I would leave the adult population alone. It is important to retain perspective on the fact that for some smoking is a pleasurable and/or psychologically rewarding experience. And correlatively, we should not lose perspective on the question of how restrictive a society we want to create; that is, how far we want to go in reducing individual autonomy, including what can be perceived as self-destructive behavior. In this regard, adult smoking, as its rights-based proponents have long argued, is on a continuum with other self-harming behavior, whether it be engaging in risk-laden dietary habits, or hazardous adventurous pursuits.

B. Youth Smoking

Regulating youth smoking is another matter. Like provision of information and regulation of third-party effects, there is a longstanding tradition, grounded in the concept of *parens patriae*, for government taking proactive steps to safeguard the youth population from the hazards of immaturity. In the case of smoking, the argument for protective action is especially strong: it is well-documented that the overwhelming majority of

smokers begin smoking in their teenage years,¹²⁰ when the long-term risks of contracting a fatal disease are heavily discounted and the vulnerability to peer pressures is at its highest. Then follows the slide from experimentation to addiction; youth is the gateway to adult habituation.

The regulatory framework discussed earlier plays out differently in the case of the youth population. To begin with, the paradox of strongly discouraging a lawful activity is

¹²⁰ See id. Recently, the industry has launched a marketing campaign aimed at the 18-24 age group. Here the rates seem not to be going down. One risk is that reduced childhood smoking will become only delayed smoking. For discussion of this concern, see Stephen D. Sugarman, A Balanced Tobacco Control Policy, 93 **Am. J. Pub. Health** 416-18 (2003), available at <http://www.ajph.org/cgi/content/abstract/93/3/416>, in which Sugarman comments on Sherry Glied, Is Smoking Delayed Smoking Averted?, 93 **Am. J. Pub. Health** 412 (2003), available at <http://www.ajph.org/cgi/content/abstract/93/3/412> (follow "Full Text (PDF)" hyperlink) (raising delayed onset as a potentially substantial problem).

absent: it is illegal in every state to smoke under the age of 18.¹²¹ As a consequence, the starting point for a regulatory policy—indeed, the endpoint if it were truly effective—might logically seem to be regulation of supply through state and local enforcement of the prohibition of sales to minors.¹²²

1. Youth Access

In 1992, Congress enacted the Synar Amendment, aimed at addressing the continuing illegal sales of tobacco to minors.¹²³ The legislation required that all states enact and enforce youth access laws, with the sanction of loss of federal block grant substance abuse and treatment funding for non-complying states. Under subsequently adopted DHSS regulations, states were

¹²¹ And also under federal law. Alcohol, Drug Abuse, and Mental Health Reorganization Act of 1992, Pub. L. No. 102-321, § 202, 106 Stat. 323, 394-95 (1992) (codified at 42 U.S.C. § 300x-26 (West 2008)) [hereinafter Synar Amendment].

¹²² For a more detailed version of the following two subsections on youth access and point of purchase promotion and advertising see **IOM Report**, supra note 7, app. L at 641-52.

¹²³ See Synar Amendment, supra note 121.

required to reduce the rate of retailer violations of youth access laws to 20 percent or less by 2003.¹²⁴

The Synar Amendment reflected the fact that in the 1990s, when attention focused on youth access, there was a widespread perception that states and localities were simply not enforcing these provisions with any vigor.¹²⁵ This striking indifference

¹²⁴ In a complementary move, the FDA adopted a comprehensive set of youth regulations in 1996 that included a major compliance check program under the auspices of the Agency. The regulations had a short shelf-life, however: The FDA program was invalidated by the U.S. Supreme Court in 2000 on the grounds that tobacco regulation was outside the scope of the Agency's authority. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 142-44 (2000).

¹²⁵ Nancy Rigotti documents a considerable number of studies, beginning in 1987 and extending well into the 1990s revealing widespread merchant indifference to the laws and a like indifference on the part of enforcement authorities. See Nancy A. Rigotti et al., U.S. College Students' Use of Tobacco Products: Results of a National Survey, 284 *J. Am. Med. Ass'n* 699 (2000), cited in IOM Report, supra note 7, app. A at 380.

to enforcement, however, masked widespread agreement among tobacco control activists and public health experts on the provisions that would be incorporated in a model access restriction law. The principal guideposts, summarized by one leading authority, were to: (1) establish a minimum age of at least 18; (2) require that retailers establish proof of age through checking identification; (3) create a tobacco sales licensing scheme; (4) require periodic tests of retailers' compliance; (5) establish administrative or civil law penalties for illegal sales; and (6) prohibit self-service displays of tobacco products.¹²⁶ The existing state and local laws on the books, as might be expected, incorporated many of these provisions.¹²⁷

Once the Synar Amendment came into effect, the logical inquiry was whether it would exert an independent positive influence on state and local enforcement practices. Unfortunately, that appeared not to be the case. In an analysis

¹²⁶ See id.

¹²⁷ In a considerable number of instances, however, local ordinances that appeared strong, at least as written, were diluted by weaker state laws preempting inconsistent local provisions.

of 1997 substance abuse block grant applications from all states, DiFranzia concluded that "states and DHHS are violating the statutory requirements of the Synar Amendment rendering it ineffective."¹²⁸

During the late 1990s, a number of studies were conducted of communities that did engage in proactive enforcement, in order to assess the efficacy of these efforts. Rigotti analyzed the studies in detail through 2001, and concluded that the results, in terms of efficacy were mixed, at best.¹²⁹ Later studies simply reconfirm this discouraging picture of supply-side restrictions, underscoring two critical dimensions of the problem in reducing tobacco use by minors through access

¹²⁸ See DiFranzia, supra note 108.

¹²⁹ See Rigotti, supra note 125. Another approach, either complementary or taken independently, would be to criminalize either purchase or possession; in other words, relying from a deterrence perspective on the threat of criminal action against the purchasing minor (demand side), as well as the vendor of the product. In tandem, these sanctions might prove more efficacious than relying exclusively on punishing the seller.

restrictions.¹³⁰ At the threshold, there is the temporal concern; that is, the very real prospect that a short-term commitment to vigorous enforcement will yield only short-term effects—staying power by the enforcement authorities has yet to be demonstrated. The still more complicated factor is the presence of noncommercial sources of tobacco—friends and family—as alternative sources, which appear to play a more significant role when commercial sources are subjected to closer scrutiny.¹³¹

In the final analysis, while the efficacy of proactive enforcement has yet to be established, it can be argued that continued efforts at supply-side access restrictions are warranted, not as the endpoint of an effective tobacco control policy, but as a complementary component of a comprehensive package of control initiatives, if for no other reason than the symbolic value of demonstrating that the public commitment to

¹³⁰ See **IOM Report**, supra note 7, app. L at 643.

¹³¹ Studies post-2001 suggest that the effectiveness of commercial restrictions is often undercut by social access to cigarettes. Youth smokers perceived access to cigarettes as easier than nonsmoking youth, and sixty five percent of youth smokers reported acquiring cigarettes from noncommercial sources such as family and friends. See id.

reducing tobacco use in the critical early years of smoking initiation is not simply a matter of lip-service. Beyond this, on the basis of presently available data, it cannot be predicted with any degree of confidence that positive outcome determinations in smoking prevalence will result from investing resources in proactive merchant compliance activities (although recent experience in New York, discussed below, provides some grounds for cautious optimism).¹³²

2. Point of Purchase Promotions and Advertising

As mentioned, with the adoption of the MSA in 1998, billboard advertising was prohibited; brand item logos were limited; and public entertainment forum signage was sharply restricted.¹³³ As a consequence, there was a dramatic shift in the tobacco industry's advertising and promotion budgets.¹³⁴ In

¹³² See infra notes 169-170 and accompanying text.

¹³³ See **IOM Report**, supra note 7, at 123.

¹³⁴ Pierce reports that by 2001 "more than 80 percent of the total advertising and promotion expenditures by the industry were targeted at incentives to merchants and retail value-added offers; in short, retail marketing became the dominant strategy." **IOM Report**, supra note 7, app. L at 645 (citing John P. Pierce & Elizabeth A. Gilpin,

2000, tobacco manufacturers spent \$4.26 billion on point-of-sale advertising and promotional programs, and \$3.52 billion on retail value-added items (free gifts, multi-pack discounts)—expenditures totaling over 80 percent of cigarette manufacturers' marketing budgets for the year.¹³⁵

The main venues of such advertising are convenience stores, small grocery stores (often in tandem with the sale of gas), liquor stores, chain supermarkets, and chain pharmacies—with youth access especially concentrated at the first two of these sources. Concomitantly, it appears that a notably disproportionate share of the industry's advertising and promotion budget is channeled to those outlets, where underage youths tend to hang out or make purchases, raising serious questions as to the efficacy of the MSA advertising limitations in addressing the problem of underage smoking.

How Did the Master Settlement Agreement Change Tobacco Industry Expenditures for Cigarette Advertising and Promotions?, 5 **Health Promotion Prac.** (Supp.) 84S (2004).

¹³⁵ **Federal Trade Commission, Report to Congress for 2000 Pursuant to the Federal Cigarette Labeling and Advertising Act** tbl. 2B (2002).

What are the principal strategies used in the retail environment? For analytical purposes, it is possible to identify a set of promotional policies and a set of pricing strategies. The former include product placement initiatives, such as self-service displays. Self-service readily lends itself to shoplifting, as well as providing a particularly prominent enticement to an on-the-spot purchase attempt. Apparently, however, self-service is on the decline as a voluntary matter. Retailers do not like it, precisely because of the pilferage problem, and at least one of the tobacco manufacturers—Philip Morris, in fact—has come down against the practice; most likely, as part of its effort to present a better image.¹³⁶

Closely related to self-service as a strategy is a broader set of height and visibility display considerations, which are in fact the subject of detailed specification in the

¹³⁶ See Helping Reduce Underage Tobacco Use—Philip Morris USA, http://www.philipmorrisusa.com/en/cms/Responsibility/Helping_Reduce_Underage_Tobacco_Use/default.aspx (follow “Our Focus Areas - Learn More” hyperlink; then follow “Youth Access Prevention” hyperlink) (last visited Apr. 5, 2008).

manufacturer-retailer contract—indicating the importance of these marketing considerations to the tobacco companies. Indeed, contractual arrangements regarding placement and promotional initiatives are highly site-specific. In the case of independent stores, manufacturers' representatives generally make site visits to discuss these matters, while arrangements with chains are more commonly conducted through dealings with the central retailing office.

Related to these specifications are the so-called "slotting fees," which are industry fees paid to the retailers—in the form of discounts—linked to advantageous placement and promotion vis-à-vis competing brands. In addition to product placement itself, these merchandising strategies address an array of product accessories: signage (e.g. regarding discount deals), logos, banners, display racks, and window posters.

The second set of strategies involves pricing policies. So-called "buy-downs" feature inventory clearance deals, which are time-constrained discounts. Then, there is the most basic of pricing strategies: straight volume discounts. Finally, there is an array of other stratagems, ranging from "buy one, get one free" to coupon-related inducements. In tandem with the promotional strategies, these initiatives constitute the industry's current effort to shift directions, post-MSA, from

the traditional mass medium advertising to a frame of reference that is much closer to the potential buyer's immediate impulse for gratification.

Paul Bloom discusses an array of options that policy makers might consider by way of limiting the recent shift in industry strategy.¹³⁷ First, he suggests that government entities could impose a full ban on slotting fees and trade promotions by tobacco companies. He cites similar action taken by the Bureau of Alcohol, Tobacco, and Firearms in 1995, in an attempt to protect small wineries and breweries from being ousted from retail shelves due to high product placement fees paid to large retailers by the major alcohol producers.¹³⁸ An outright ban could serve to alleviate the economic pressure felt by retailers to court the big tobacco manufacturers and thereby become their political allies on issues related to teen smoking.

Bloom notes, however, that such a ban could have unwanted effects. As noted above, tobacco companies spend exorbitant amounts of money every year on such promotional fees—money that

¹³⁷ See Paul N. Bloom, *Role of Slotting Fees and Trade Promotions in Shaping How Tobacco is Marketed in Retail Stores*, 10 **Tobacco Control** 340 (2001).

¹³⁸ Id. at 342-43.

would remain in the pockets of the industry if such payments were banned.¹³⁹ These savings might be reallocated to reductions in product price, a move that might actually increase youth access to tobacco products.

Another option might be to regulate retail prices as a means of preventing retailers from passing on manufacturer-created price breaks to customers. Bloom refers to a New York regulatory scheme that prohibits retailers from selling tobacco products below cost (plus a statutorily imposed markup).¹⁴⁰ He contends that by limiting the degree to which manufacturers' special offers can actually affect the market price, states can diminish the stimulation of demand through trade promotions. On this score, however, in a comparative study of states with and without retail minimum price controls—half the states fall into each category—Feighery found no conclusive evidence that states with controls had lower prices or lower retailer-participation rates in these promotional programs.¹⁴¹

¹³⁹ Id. at 343.

¹⁴⁰ Id.

¹⁴¹ See Ellen C. Feighery et al., How do Minimum Cigarette Price Laws Affect Cigarette Prices at the Retail Level?, 14 **Tobacco Control** 80, 80 (2005). Note, however, that these

Still other regulatory options, such as elimination of self-service displays and restrictions on signage—or requirements of antismoking warning signage—would take direct aim at the retailing environment. The likely efficacy of these measures varies. One can question whether more prominent warning signage at the point of sale would add much, if anything, as a deterrent to consumption decisions by minors intent on making illegal purchases. Self-service display bans, by contrast, may very well have a salutary effect, as discussed above. But this practice appears to be on the way out in any event.

When one turns to more restrictive controls on advertising and promotion in the retail setting, constitutional considerations become a matter of considerable salience. In Lorillard Tobacco Co. v. Reilly,¹⁴² the U.S. Supreme Court invalidated Massachusetts regulations, adopted as a more stringent supplement to the restrictions on advertising in the MSA, that prohibited outdoor advertising within 1,000 feet of schools (including, in particular, billboard advertising), and

programs, with the exception of New York, do not exclude promotional programs from their minimum price formulas.

¹⁴² 533 U.S. 525 (2001).

proscribed certain retail sales practices, such as displaying tobacco product advertising lower than five feet from the floor of the establishment. The Court left only the narrowest of the regulations in place—a ban on self-service displays—on the tailored rationale that the self-service proscription was not aimed at advertising but at product placement per se (with ease of underage access the immediate basis for the prohibition).¹⁴³

The case may sound a virtual death-knell for regulation of advertising at point of purchase. Reilly stands on a two-pronged foundation: first, the commercial speech doctrine as enunciated in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,¹⁴⁴ and broadly applied in Liquormart, Inc. v. Rhode Island;¹⁴⁵ and second, the statutory preemption provision in the Federal Cigarette Labeling and Advertising Act of 1966, which, as interpreted in Cipollone v. Liggett Group, Inc.,¹⁴⁶ establishes immunity from tort suits based on claims of failure to adequately warn for tobacco

¹⁴³ Id. at 570.

¹⁴⁴ 447 U.S. 557 (1980).

¹⁴⁵ 517 U.S. 484 (1996).

¹⁴⁶ 505 U.S. 504 (1992).

advertising complying with the labeling requirements of the statute.

The broad reach of the latter provision is evident in the Reilly court's assertion that "a distinction between state regulation of the location as opposed to the content of cigarette advertising has no foundation in the text of the pre-emption provision."¹⁴⁷ Most of the constraints on product placement and advertising content in the retail setting are put in jeopardy by one or the other prong of Reilly, just as the five-foot-or-lower proviso is explicitly struck down. At the same time, however, Reilly would seem to have no bearing on measures aimed at outlet limitations or other price-related discount restrictions.

It would be possible to address controls on the retail sales environment from a distinctly different perspective; namely, placing limits on the number of retail outlets in a particular community. This strategy has been employed, at times, in the context of retail sales of alcoholic beverages.¹⁴⁸

¹⁴⁷ Reilly, 533 U.S. at 551.

¹⁴⁸ See Harold D. Holder, Supply Side Approaches to Reducing Underage Drinking: An Assessment of the Scientific Evidence, in Reducing Underage Drinking: A Collective

Licensing schemes and public monopoly systems are two methods states have used to limit alcohol retailers in their jurisdictions. Under a licensing scheme, the state requires retailers to obtain a license in order to sell alcohol products. Licenses are issued for a limited period and require reapplication for renewal. Retailer density can be directly controlled by the licensing body either by limiting the total number of licenses distributed or by limiting the density of licenses within geographic areas. Imposing prohibitive application fees can also serve as an indirect limit on the number of retailers in an area. A public monopoly system prohibits the sale of a certain product by private retailers, and establishes the state (or local government) as the sole distributor of the good.

The rationale for these measures is that reducing the number and density of outlets makes access to the product less convenient and increases the opportunity cost of using the product (i.e., the time and resources expended on search

Responsibility, 458 (Richard J. Bonnie & Mary Ellen O'Connell, eds., 2004).

costs).¹⁴⁹ While either of these approaches may succeed in limiting the supply and availability of tobacco products, it should be noted that neither approach is targeted directly at youth access. It would probably be hard to justify outlet restriction as a primary strategy for reducing youth access to tobacco—it would be regarded as overkill because of spillover effects to adults if this were the principal justification. In the Holder study, reduction in youth access is regarded as a salutary secondary consequence of policy reasons for reducing the number of outlets for the purchase of liquor across-the-board.

Then the question becomes whether the "inconvenience effects" (search costs) of outlet restriction can serve as a direct justification, or strategy, for reducing tobacco consumption across-the-board (i.e., not just of youth). As discussed above, the present array of strategies that impose inconvenience effects do so as a secondary consequence of achieving other goals; in particular, secondhand smoke zoning-type restrictions on smoking in public accommodations, which are justified either on the grounds of health effects or public

¹⁴⁹ See George A. Shipman, State Administrative Machinery for Liquor Control, 7 **Law & Contemp. Probs.** 600 (1940).

nuisance effects on nonsmokers (with inconvenience to smokers and consequent reduction in smoking serving as a collateral benefit). These considerations, along with the certain opposition of politically potent current tobacco sales outlets, suggest the formidable political barriers that would confront an outlet restriction strategy.

3. Counter-Advertising

The first successful venture in counter-advertising, discussed above, was the media campaign under the FCC's Fairness Doctrine waged from 1967-70—perceived to be so successful in fact that the tobacco industry retreated to other forms of advertising in order to foreclose public attention to public service health messages on television.¹⁵⁰ The Fairness Doctrine campaign was not particularly targeted at the youth population; not surprisingly, perhaps, since adult smoking at that time was still so pervasive that it was viewed as a first-order concern in itself. Whatever the case, once broadcast media advertising

¹⁵⁰ See Kenneth E. Warner, The Effects of the Anti-Smoking Campaign on Cigarette Consumption, 67 **Am. J. Public Health** 645 (1977). See also, **IOM Report**, supra note 7, at 223.

was prohibited, counter-advertising as a public health strategy was abandoned for three decades.¹⁵¹

Its revitalization was attributable to two discrete public health initiatives in the 1990s: the turn to the excise tax as an explicit control measure and the MSA. When California's excise tax increase of 25 cents per pack became effective in 1999, one proviso was that approximately 20 percent of that revenue was to be allocated to media counter-advertising.¹⁵² And the subsequent campaign, soon followed by Massachusetts, focused heavily on ads aimed at the youth population. In both states, impact studies indicated that smoking, and in particular youth smoking, was reduced in some measure as a consequence of exposure to the ads.¹⁵³ Nonetheless, the campaigns foundered

¹⁵¹ See **IOM Report**, supra note 7, at 223. The ban on broadcast advertising meant that counter-advertising time was no longer required of the broadcast media.

¹⁵² **IOM Report**, supra note 7, at 224.

¹⁵³ On Massachusetts, see Lois Biener et al., Impact of the Massachusetts Tobacco Control Programme: Population Based Trend Analysis, 321 **Brit. Med. J.** 351, 353 (2000) (finding that "[o]ur analysis of the Massachusetts tobacco control programme shows that a strongly implemented, comprehensive

after a short run, victims of the states' thirst for revenue enhancement in a period of budgetary crises.

Just as the California and Massachusetts excise tax-based campaigns played out, however, a new source of funding filled the breach: state revenues realized under the MSA. These revenues were partially earmarked by Florida, in a widely-publicized effort, at counter-advertising explicitly aimed at the youth population.¹⁵⁴ At roughly the same time, a national campaign by the Legacy Foundation, again relying on MSA funding and modeled on the Florida youth-centered initiatives, was

control programme can reduce a population's health risks from tobacco use."). Another Biener article discussing the same study suggests that youths that were exposed to these counter-ads on television were more likely to have an accurate perception of the prevalence of smoking in the youth population, and notes that perceived prevalence of smoking is a factor in youths deciding to take up smoking themselves. See Michael Siegel & Lois Biener, The Impact of an Antismoking Media Campaign on Progression to Established Smoking: Results of a Longitudinal Youth Study, 90 Am. J. of Pub. Health 380 (2000).

¹⁵⁴ See IOM Report, supra note 7, at 228.

undertaken.¹⁵⁵ Both of these ventures were also the subject of impact studies, and once again the findings suggested positive public health returns.¹⁵⁶ After a short run, however, the funding again dried up.¹⁵⁷

The question is whether these experiences suggest a promising pathway at this point for further success in reducing youth smoking. In my view, the answer is a qualified yes. Obviously, the threshold issue is to determine what accounted for the success of these campaigns and whether it can be replicated. The theme that most clearly emerges is that getting across the message in vivid, indeed stark terms, that the industry was cynically manipulating the youth population through indifference to the deadly character of tobacco use and reliance on deceitful conduct, promoted a sense of anger that translated into reduced smoking activity.

Tobacco use remains just as deadly as ever, of course, and the industry continues to merchandise the same product. But two questions seem critical with the passage of a few years since these campaigns realized a measure of success. The first is

¹⁵⁵ See id. at 229.

¹⁵⁶ See id. at 229-231.

¹⁵⁷ See Brandt, supra note 1, at 436.

whether villainizing the industry retains the same salience as the egregious conduct highlighted in revelations more than a decade ago recede into the past. At some point, the internal industry documents that yielded the MSA become largely of historical interest, and then the somewhat more abstract characterization of industry greed and cynicism based exclusively on marketing a highly risky product becomes the centerpiece of a rogue industry campaign. Whether this leads to lower impact on the youth population is an empirical question; and I am uncertain about the answer. It is of course possible to shift gears to another strategy, based more centrally on peer-delivered messages that smoking isn't "cool"; past efforts to take this tack appear to have met with some success.¹⁵⁸

The second question can be viewed as more foundational. As youth culture centers far more on the Internet and computer-based activities than was true even a few short years ago, one can ask whether broadcast media-based campaigns would veer increasingly wide of the target audience. Again, this is an

¹⁵⁸ See **IOM Report**, supra note 7, at 227-29. See also Lois Biener, Anti-Tobacco Advertisements by Massachusetts and Philip Morris: What Teenagers Think, 11 **Tobacco Control** ii43 (Supp. 2 2002).

empirical question, centered on how youth of various demographic characteristics use their leisure time. It suggests another reason for caution on whether the strategies that worked (to some extent) in the past, are relevant for the future.

4. Taxation and Complementary Strategies: An Endgame for Now

As the earlier section on excise taxes suggested, there are robust data indicating moderately high consumer sensitivity to tax increases.¹⁵⁹ A similar consensus exists that the elasticity of demand in the youth population is, if anything, even higher.¹⁶⁰ Since underage smokers are an especially cash-starved population, this comes as no particular surprise. Moreover, it is almost certainly the case that evasive measures such as lower-cost internet purchases on credit cards and cross-boundary shopping via travel mobility are less open to the youth population.

A recent study of teenage smoking rates in New York City confirms in dramatic fashion the research findings.¹⁶¹ The 2007

¹⁵⁹ See supra Part II.C.

¹⁶⁰ See **IOM Report**, supra note 7, at 183.

¹⁶¹ Youth Risk Behavior Survey: Overview,
<http://www.nyc.gov/html/doh/html/episrv/episrv->

New York City Youth Risk Behavior Survey reported that teenage smoking declined by 20 percent between 2005 and 2007, and by more than half over the past six years—from 18 percent smoking in the City’s teenage population in 2001 to 8.5 percent in 2007.¹⁶² By contrast, nationwide data from 2005 indicate a 23 percent rate of smoking in the same age cohort, reflecting a slight increase from 2003 to 2005.¹⁶³ While there are no econometric studies conclusively linking this dramatic decrease in New York City to excise tax rates, city health officials pointed out that there has been a steady rise in city and state tobacco taxes during this period, now adding \$3.00 to the price

youthriskbehavior.shtml; Youth Risk Behavior Survey:

Methodology, <http://www.cdc.gov/mmwr/PDF/rr/rr5312.pdf>

¹⁶² Id. The definition of smokers was based on the percentage of students who smoked cigarettes on one or more of the past 30 days.

¹⁶³ See IOM Report, supra note 7, at 53. Nationwide data for 2006 indicate the 23 percent figure remains steady; see Centers for Disease Control, “Youth and Tobacco Uses: Current Estimates” Fact Sheet (Dec. 2006), available at http://www.cdc.gov/tobacco/data_statistics/Factsheets/youth_tobacco.htm.

of each pack and cumulating in a retail price of \$7.00 and above.¹⁶⁴

Putting aside for a moment the synergistic effects of complementary control strategies, how is one to weigh the apparently powerful impact of the excise tax on teenage smoking against the regressive spillover effects on the lower-income adult smoking population? Obviously, there is no need for reconciliation if one views this coercive pressure on the adult population as a positive health benefit that overrides concerns

¹⁶⁴ See Thomas R. Frieden, Adult Tobacco Use Levels after Intensive Tobacco Control Measures: New York City, 2002-2003, 95 **Am. J. of Public Health** 1016 (2005) (“[A]n increase in the city’s cigarette tax (from \$0.08 to \$1.50 per pack), became effective on July 2, 2002. New York State had already increased its tax from \$1.11 to \$1.50 per pack on April 1, 2002. Together, the state and city tax increases raised the cost of a pack of cigarettes by approximately 32 percent, to a retail price of approximately \$6.85.”) On May 9, 2008, a random check at a Duane Reade drugstore in New York City revealed that a pack of Marlboros cost \$7.03; a mid-March check at a Manhattan subway station kiosk revealed a price of \$7.50 per pack.

about individual autonomy.¹⁶⁵ It is also possible to trump the autonomy concern by giving great weight to the addictive character of smoking. These are points I raised but did not pursue in the earlier section on the taxation strategy.¹⁶⁶ In my view, the relative deficiencies of other strategies for reducing teenage smoking, combined with the gateway effect of youth tobacco use to an addicted adult population if only limited regulatory measures are taken, overrides (even if it does not put to rest) the fairness concern about the spillover impact on a socioeconomically disadvantaged adult smoking population. In the end, a relatively steady 20 percent smoking rate in the teenage population simply seems too heavy a public health burden to tolerate indefinitely.

It is critical to note, as well, that the synergistic effects of regulatory resort to excise tax increases appear to be quite substantial, if the New York experience is examined closely.¹⁶⁷ Along with proactive taxation, New York maintains an

¹⁶⁵ See **IOM Report**, supra note 7, at 187, which takes this position.

¹⁶⁶ Supra at Part II.C.

¹⁶⁷ See Anthony Ramirez, Teenagers in the City Smoke Less, Report Finds, **N.Y. Times**, Jan. 3, 2008 at B3.

active media campaign against teenage smoking, featuring ads that vividly dramatize the health impacts of tobacco use.¹⁶⁸ At the same time, the City has a particularly aggressive sales-to-minors enforcement program, relying on inspections that employ teenagers in undercover purchase efforts backed by fines and prospective license revocations.¹⁶⁹ This latter regulatory initiative has been strikingly successful: the Dept. of Consumer Affairs, which runs the program, reported an 89 percent compliance rate at the retail store level in 2007.¹⁷⁰ Even if the precise contribution of each of these strategies has not

¹⁶⁸ Id. See also, Thomas Frieden & Michael Bloomberg, How to Prevent 100 Million Deaths from Tobacco, 369 **The Lancet** 1758 (2007). For an earlier description of the adult program, see Thomas Frieden et al., Adult Tobacco Use Levels After Intensive Tobacco Control Measures: New York City, 2002-03, 95 **Am. J. of Public Health** 1016 (2005).

¹⁶⁹ See Ramirez, supra note 167.

¹⁷⁰ Id. For penalty schedule, see New York Adolescent Tobacco Use Prevention Act (ATUPA). A summary can be found in, Youth and Tobacco: They Buy, You Pay (Fact Sheet). Links to the language of the ATUPA law can be found at <http://www.nyc.gov/html/doh/html/smoke/smoke2-legal.shtml>.

been carefully measured, in tandem they appear to be achieving impressive results.

It would be risky to conclude that the New York experience—even assuming it has staying power—can simply be picked up and transported elsewhere without reference to the character of local communities. But a model need not be a precise blueprint, if it is highly suggestive of an approach warranting serious consideration. My assessment is that the priorities reflected in the current New York multi-pronged effort constitute the best bet for achieving further substantial reductions in youth smoking at this particular juncture in the road to controlling tobacco use.