"Of Deaths Put on by Cunning and Forced Cause": Reality Bites the Tobacco Industry

Paul A. LeBel
BOOK REVIEW ESSAY

"OF DEATHS PUT ON BY CUNNING AND FORCED CAUSE": REALITY BITES THE TOBACCO INDUSTRY


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Immediately after the death of Hamlet, confronted by demands from Fortinbras and the English ambassadors for an explanation of what has occurred, Horatio responds:

And let me speak to the yet unknowing world
How these things came about: so shall you hear
Of carnal, bloody, and unnatural acts,
Of accidental judgements, casual slaughters,
Of deaths put on by cunning and forced cause,
And, in this upshot, purposes mistook
Fall'n on the inventors' heads: all this can I
Truly deliver.¹

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1. WILLIAM SHAKESPEARE, HAMLET act 5, sc. 2, ln. 390-97 (Hardin Craig ed.,
It is a telling measure of the profound moral ambivalence evoked by the history recounted in these recent books about the tobacco industry that one seeks an allusion in the works of Shakespeare rather than in the Nuremberg trials for crimes against humanity. Nevertheless, Richard Kluger, Philip Hilts, and Stanton Glantz and his colleagues do "Truly deliver" a powerful indictment of the behavior of the tobacco industry over the last forty years, with much of the most damning evidence coming from the industry's own files.

What will ultimately turn out to have "Fall'n on the inventors' heads" is still very much an open question in the context of how this society and its legal system deal with the health effects of smoking. The Food and Drug Administration (FDA) has promulgated the jurisdictional predicate for regulating cigarettes as a medical device for the delivery of the drug nicotine. On a different legal front, an August 9, 1996, verdict by a Florida jury in *Carter v. Brown & Williamson Tobacco Corp.* awarding three-quarters of a million dollars in damages to a lung cancer victim and his wife offers more than a little encouragement to those who are committed to pursuing a litigation strategy against the industry. From the perspective of the ordinary citizen observing the power exerted by the tobacco industry, the gap between realism and pessimism may have shrunk to the point where it is difficult to shake the belief that raw emotion and political power struggles will affect the resolution of the tobacco and health issues as much as will reason and scientific inquiry. What is considerably clearer after an encounter with the story told in the sixteen hundred pages of these three books is that we can no

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2. For another invocation of Shakespeare in tobacco litigation, see *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 89 & n.5 (3d Cir. 1992) (quoting from *WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH* act 1, sc. 2).


longer plausibly be said to inhabit a "yet unknowing world" with regard to these "deaths put on by cunning and forced cause."

These books lay out the background against which the current round of litigation and regulatory measures needs to be evaluated and the future courses of conduct planned. Richard Kluger's *Ashes to Ashes*\(^6\) is a detailed social history of cigarettes in the United States. Kluger is probably best known as the author of *Simple Justice*,\(^7\) a justifiably acclaimed history of the legal battle for school desegregation. Just as that book gave the reader an exposure to the development of the strategy that culminated in a declaration of the unconstitutionality of school segregation in *Brown v. Board of Education*,\(^8\) *Ashes to Ashes* takes the reader into the operations of the various parties—tobacco companies, scientific researchers, public interest groups, the public health community, the smoking public, anti-smoking advocates, state and federal legislators, and government administrative officials in a variety of agencies—with an interest in the role that cigarettes play in this society.\(^9\)

Kluger's book is comprehensive in its attention to the product development, marketing, scientific research, lobbying, and legal maneuvers that have encircled cigarettes since their serious introduction into American commerce more than a century ago. As the book's subtitle suggests, the progress made by Philip Morris from minor player to industry leader plays a prominent role in Kluger's history.\(^10\)

The other two books are more narrowly focused than *Ashes to Ashes*, which surveys the entire history of cigarette production and smoking, seeming to devote at least some attention to every imaginable aspect of that history. Both *New York Times* reporter Philip Hilts, in *Smokescreen*,\(^11\) and the collaborators on *The Cig-

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9. All three of the books reviewed here give little attention to the agricultural side of the tobacco business. Kluger proposes eliminating the federal price support for tobacco, and recommends a transition period in which tobacco growers would receive subsidies. Kluger, *supra* note 6, at 762.
10. See id. at 765. Kluger focuses on Philip Morris, in part, because of the considerable file access granted by the company.
11. Philip J. Hilts, *Smokescreen: The Truth Behind the Tobacco Industry*
arette Papers" concentrate on a much more narrow and disturbing feature of that landscape—the decades-long deception about the health effects of smoking that the tobacco companies perpetrated on public health authorities and the consuming public.

The eponymous papers of the book by University of California Medical School professor Stanton Glantz and his colleagues are internal industry memoranda from the files of Brown & Williamson Tobacco Corporation, and their availability to litigators, regulators and legislators is changing the nature of the debate about the tobacco industry's accountability for the health of its consumers. Excerpts from twenty-one of these documents were introduced into evidence in the *Carter* trial, and are likely to have been at least partly responsible for the plaintiff's verdict in that case. The FDA's assertion of jurisdiction over tobacco rests to a degree on the analysis of key internal documents from the industry. Furthermore, the most dramatic scenes to date in the history of the tobacco industry—the 1995 appearance by executives of seven tobacco companies to testify under oath before a Congressional subcommittee chaired by Representative Henry J. Waxman of California and the subsequent solo appearance by the CEO of Brown & Williamson—were prompted in large part by the legislators' access to the information in these documents.

*The Cigarette Papers* is an expansion of an influential set of articles published in the *Journal of the American Medical Association* in 1995 analyzing the contents of those memoranda. Hilts was an early recipient of much of that same material, and

Cover-Up (1996).

13. See id. at 6-14.
15. See FDA Jurisdiction, supra note 3, at 44,847-5,150.
16. One writer described the image of "the 1994 lineup of seven chief executives swearing ... that they do not believe nicotine is addictive" as "a scene that defies parody." Walter Goodman, *Covering Tobacco: A Cautionary Tale*, N.Y. TIMES, Apr. 2, 1996, at C16.
17. HILTS, supra note 11, at 147-54.
he broke the story of the industry’s knowledge in his reports for the *New York Times*.\(^{19}\) *Smokescreen* goes beyond the Brown & Williamson memoranda, however, and incorporates Hilts’s analysis of a good deal of the material developed in the *Cipollone*\(^{20}\) litigation as well as some material to which he had exclusive access.\(^{21}\)

The most striking feature of the Brown & Williamson papers is the stark contrast between the candor and scientific sophistication displayed within the industry and the denials and obfuscation presented to the public by the industry. Presentations and research proposals discussed at research conferences held by Brown & Williamson’s parent corporation, BAT Industries, formerly British American Tobacco, dealt with nicotine’s addictive properties, the carcinogenic and cardiopulmonary effects of cigarette smoke, and the risks from environmental tobacco smoke, or “passive smoking,” well in advance of nonindustry parties’ initial publication of concerns and research findings about those matters.\(^{22}\) Internal industry communications wholly contravene the

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20. *Cipollone v. Liggett Group, Inc.* was originally filed in federal district court in New Jersey on August 1, 1983. The case was subjected to a number of interlocutory appeals. See, e.g., *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986) (interlocutory appeal of a preemption ruling by district court). A four-month jury trial resulted in a $400,000 verdict for the plaintiff on some of the claims that had been asserted. See *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208 (D.N.J. 1988) (denying all of the post-trial motions made by plaintiffs and defendants). Both sides appealed from the judgment entered on that verdict. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990). Nearly a decade after the case had been filed, the United States Supreme Court ultimately upheld the viability of some of the legal theories upon which *Cipollone* had been litigated, and remanded for further proceedings. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The expense and delay made it impossible for the plaintiffs (the children of the original plaintiffs, both of whom had died during the litigation) and their attorney to continue. The case is discussed at length in Kluger’s book. See *Kluger*, supra note 6, at 639-77. Hilts also characterizes the plaintiffs and their attorney as “folding” because of the exhaustion produced by the 10 year litigation process that led up to the Supreme Court decision. See *Hilts*, supra note 11, at 201.

21. See, e.g., *Hilts*, supra note 11, at 210-15 (describing exclusive early interviews related to the development and test marketing of a “smokeless” cigarette developed by the RJR tobacco company).

22. See *Glantz et al.*, supra note 12, at 58-103 (discussing addiction); *id.* at 109-
denials made throughout those periods to the public and to the
government agencies that had expressed concern about the
product's negative health effects.23

Were we ever as blind to the link between cigarette smoking
and health as the tobacco industry spokespeople would have had
us believe we should have been, at least until their legal self-in-
terest caused them to switch their position and assert that every-
one knew precisely what risky behavior they chose to adopt? The
term "coffin nails" appeared in American popular literature at
least three-quarters of a century prior to the 1964 report of the
United States Surgeon General that articulated the health effects
of smoking.24 In Raymond Chandler's 1939 novel The Big Sleep,
detective Philip Marlowe, needing to pass time on a stakeout,
tells the reader that he "sat there and poisoned myself with ciga-
rette smoke."25 Common sense undoubtedly made the vast ma-
jority of smokers, as well as their family members, aware of the
connection between the impaired state of their health and their
indulgence in cigarette smoking.

Likely to have been missing throughout the relevant period,
however, was a smoker's appreciation of the extent of the harm
attributable to smoking and of smoking's addictive nature. A
smoker's lack of understanding, when combined with the
industry's knowledge of the full import of those facts, results in a
state of affairs that falls well short of any truly informed consent
by the average smoker to continue being exposed to the hazards of
smoking. For much of the time that the government and individu-
al smokers' own experiences were announcing that there was a
problem, the industry strongly resisted the existence of any such
link as more than speculative. This position adopted by the indus-
try further undermined the consuming population's appreciation
of the nature and the extent of associated health risks.

67 (discussing adverse health effects); id. at 393-410 (discussing passive smoking).
23. See id. at 100-05, 140, 154, 168-69, 413-16; HILTS, supra note 11, at 23-41, 144-74.
24. See 1 J.E. LIGHTER, RANDOM HOUSE HISTORICAL DICTIONARY OF AMERICAN
SLANG 451 (1994) (citing usage of the phrase "coffin nails" in the works of Bret Harte
(1873), O. Henry (1906), Sinclair Lewis (1920), and John Dos Passos (1930), among
others). Partridge refers to its usage from around 1885. See ERIC PARTRIDGE, A DI-
The Cigarette Paper's analysis of the Brown & Williamson memoranda accuses the tobacco industry of "trying to have it both ways: maintaining that there are no health dangers in smoking but providing 'healthier' cigarettes to those people who are worried about possible dangers." Recent litigation postures assumed by the tobacco industry reveal that the convoluted illogic of its position involves even more grotesque contortions. If the tobacco industry is to be believed, smoking has not been conclusively proven to be harmful; nicotine is not addictive; and cigarette advertising is directed only at adults to influence their brand preference. Because the dangers of cigarettes have been known so well for so long, however, a person's decision to begin or continue to smoke reflects a fully informed choice to indulge in this nonaddictive, not-dangerous product.

In the words of H. Lee Sarokin, the federal district judge who, by virtue of presiding over tobacco litigation for ten years, acquired the clearest insight into the behavior of the tobacco industry:

All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!

As the . . . facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and dis-information. .

. . . Plaintiff has presented evidence from which a reasonable jury could conclude that the tobacco industry in general, and defendants in particular, were aware of the risks of smoking; were concerned about the publication of those risks by others and the consequent impact upon cigarette sales; and sought to discredit or neutralize the adverse information by proffering an independent research organization, the Council for Tobacco Research (the "CTR"), which purportedly would examine the risks of smoking and report its finding to the public. The evidence presented by plaintiff supports a

finding that the industry research which might indict smoking as a cause of illness was diverted to secret research projects and that the publicized efforts were primarily directed at finding causes other than smoking for the illnesses being attributed to it. A jury might reasonably conclude that the industry's announcement of proposed independent research into the dangers of smoking and its promise to disclose its findings was nothing but a public relations ploy—a fraud—to deflect the growing evidence against the industry, to encourage smokers to continue and non-smokers to begin, and to reassure the public that adverse information would be disclosed.\(^{27}\)

The unequivocal message of that opinion led the appellate court to remove Judge Sarokin from the litigation, citing the language of the opinion as calling into question the appearance of the judge's impartiality.\(^{28}\)

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28. See Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992). The court stated:

The district judge in this case has been a distinguished member of the federal judiciary for almost 15 years and is no stranger to this court; he is well known and respected for magnificent abilities and outstanding jurisprudential and judicial temperament. On the basis of our collective experience, we would not agree that he is incapable of discharging judicial duties free from bias or prejudice. Unfortunately, that is not the test. It is not our subjective impressions of his impartiality gleaned after reviewing his decisions these many years; rather, the polestar is "[i]mpartiality and the appearance of impartiality."

The final decision to be rendered by an eventual jury here is whether petitioners, consisting of leading members of the tobacco industry, conspired to withhold information concerning the dangers of tobacco use from the general public. The plaintiffs seek to prove that petitioners participated in an organized concealment of potential health hazards. This, we repeat, is the ultimate issue to be determined by a jury, as fact finders, after appropriate instructions given them by the trial judge.

Measured against these precepts, it is impossible for us to vindicate the requirement of "appearance of impartiality" in view of the statements made in the district court's prologue to its opinion. . . . [W]e conclude that the appearance of impartiality will be served only if an assignment to another judge is made, and we will, pursuant to our supervisory power, so direct.

*Id.* at 98.
Whatever one's view of the propriety of that opinion or its treatment as grounds for removal, the strength of Judge Sarokin's impression created by his immersion in the record of the tobacco industry likely will be replicated by the reader who delves into the three books reviewed here.

For the industry leaders to persist in their denials in the face of such compelling evidence acknowledged by the industry in its internal discussions is to display a willful ignorance that is but a small step removed, if at all, from lying. Indeed, one of the phenomena of the current tobacco scene is a proliferation of grand jury investigations regarding whether the industry tactics sank to the level of indictable fraud and perjury.

These books do not limit their investigation of the deception of the public to the tobacco industry proper; their scope also covers professions a bit closer to home. All three books, but in particular those by Glantz et al. and Hilts, paint a picture of the role of the legal profession in the affairs of the tobacco industry that is disturbing, to say the least. The Cigarette Papers characterizes this as perhaps "the most important insight" offered by the Brown & Williamson papers, and the authors devote considerable attention to the topic. The line between providing legal advice on company affairs and assuming a more hands-on direction of company activity can become blurred in many corporate representation situations, particularly when tort liability for that activity is a realistic prospect. The tobacco industry experience seems to be unique, however, in the way in which lawyers played a dominant role in deciding how to direct or shut down

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29. Kluger quotes the reaction of Professor Richard Daynard, head of the Tobacco Products Liability Project at Northeastern University Law School, to Judge Sarokin's removal: "He called it straight and did it in a way that was highly quotable. I had always thought that one of the functions of judges was to show moral indignation. . . ." KLUGER, supra note 6, at 677.


31. See GLANTZ ET AL., supra note 12, at 437.

32. The authors' summary of the role of the lawyers, see id. at 437-40, is supported by references and examples throughout the book.
scientific research and in how research results should be communicated or buried.\(^{33}\)

No one would credibly claim that even as despicable a creature as Charles Manson, for example, should not have zealous representation by a competent lawyer charged with a professional responsibility to see that Mr. Manson received a fair trial and that the state proved its case beyond a reasonable doubt, adhering to the relevant constitutional, procedural and evidentiary requirements. One is likely to have a different reaction, however, to the notion of a lawyer on retainer to the Manson family, charged with the task of producing a "User's Manual for Helter Skelter,"\(^{34}\) in which the lawyer is not only explaining how to avoid accountability for past criminality but also becoming even more fully involved in planning the crimes to increase efficiency and decrease detectability. The picture painted in the cigarette books of the role played by some of the lawyers associated most intimately with the tobacco industry comes alarmingly close to that latter image.

One can read the corporate histories recounted in Kluger's book and begin to feel some sense of admiration for the business acumen of the people who piloted the industry leaders to their unquestionable marketing success.\(^{35}\) One gets the impression, confirmed by the stock market performance of the largest firms, that many of these people were awfully good at what they did. The books by Glantz et al. and Hilts, however, are likely to leave one with an unqualified sense of outrage at the conclusion that the industry was not just awfully good at what it did, but that what it did was awful. The Hilts chapter on the use of tobacco product advertising and the promotion of smoking to entice teenagers and pre-teens into smoking is especially powerful,\(^{36}\) and it reminds the reader that success in the cigarette business means addicting more children than one's competitors. When one accounts for all the evidence set out in these books, the

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33. See id. at 288-338; KLUGER, supra note 6, at 359-64, 479-80.


35. See, e.g., KLUGER, supra note 6, at 292-97 (describing the origin and success of Philip Morris's Marlboro Man advertising campaign).

36. See HILTS, supra note 11, at 63-101.
realization remains that admiring the tobacco industry for its marketing success is like congratulating the German railroads for lowering the cost per passenger-mile of transporting people to the death camps.

The health of the smoking public and the health of the body politic may be equally implicated in our reaction to the posture taken by the industry since the first evidence of smoking-related illness began to surface. Suspicion in spite of unremitting denials by the industry can breed public cynicism; knowledge of the cynical exploitation of the public can provoke action. At some point in public discourse, there can be no escape from the consequence of knowing. These three books on the state of the industry's knowledge of the health effects of smoking lay out a powerful case for the proposition that we have passed that point of knowing and thus action of some sort inevitably must follow.

Generating optimism about the wisdom of such action is difficult, however, if one draws exclusively on the historical intransigence of the tobacco industry and the ineffectiveness of almost all of the efforts of the legal system up to this point. The remainder of this Review Essay examines a number of important developments that offer promise for breaking out of the constraints within which the legal system has traditionally approached at the issues surrounding the relationship between tobacco and health.

I. THE CHANGING FACE OF THE LEGAL LANDSCAPE

After a decades-long legal record of undistinguished and incremental action providing imperfect protection to the public health, the developments regarding smoking and health in the last couple of years have occurred almost faster than one can follow. Until the middle of this decade, the truly noteworthy interventions by the legal system could be counted on one hand: the authorization and annual publication of the Surgeon General's report on smoking,37 the warning labels required by

37. See 15 U.S.C. § 1337(a) (1994) (requiring an annual report by the Secretary of Health and Human Services on "current information on the health consequences of smoking" and recommendations for legislation deemed appropriate by the Secretary). Kluger describes this as "a provision, thought to be harmless by the industry's law-
the Federal Cigarette Labeling and Advertising Act, as subsequently amended by the Public Health Cigarette Smoking Act of 1969 and the Comprehensive Smoking Education Act, the ban on cigarette advertising on broadcast media, and a variety of provisions adopted at the federal, state, and local levels prohibiting smoking in some locations.

Even those few interventions did not necessarily produce a positive result for public health. For example, the 1992 Supreme Court decision in Cipollone v. Liggett Group, Inc. applied the doctrine of federal preemption to the federal statutes requiring warning labels in such a way as to conclude that common law claims for damages were preempted if they were based on an assertion that the tobacco manufacturers should have said something in their advertising or promotion that differed from what the statute required. As a result of this ruling, the required

yers," KLUGER, supra note 6, at 291, thrown in as a concession to the Federal Trade Commission and the (then) Department of Health, Education and Welfare, agencies that were being deprived by the legislation of jurisdiction over cigarette labeling and advertising. See id. "That sop to the two agencies," Kluger concludes, "would in time help turn smoking into a pressing public issue." Id.

42. See, e.g., MASS. ANN. LAWS ch. 270, § 22 (Law. Co-op. 1990) (regulating smoking in public places (first adopted in 1987); N.Y. PUB. HEALTH LAW § 1399-o (Consol. Supp. 1996) (codifying indoor smoking restrictions). This measure was first enacted in 1975. See N.Y. PUB. HEALTH LAW § 1399-o for municipal efforts at setting restrictions on smoking dates back to 1983—the date of the passage of an influential San Francisco referendum, Proposition P, ratifying an ordinance requiring non-smoking areas in workplaces. See GLANTZ ET AL., supra note 12, at 251, 431.

At the federal level, the legislation banning smoking on domestic airline flights is probably the most noteworthy smoking restriction development so far. See 49 U.S.C. § 41,706 (1994). Both the Environmental Protection Agency and the Occupational Safety and Health Administration had entered the arena of smoking and health by 1994, demonstrating concern about the effects of environmental tobacco smoke and beginning the process of regulatory action. See KLUGER, supra note 6, at 737-40; see also Occupational Safety and Health Administration, Indoor Air Quality, 59 Fed. Reg. 15,968 (1994) (to be codified at 29 C.F.R. pts. 1910, 1915, 1926 & 1928) (providing notice of proposed rulemaking for regulation of workplace air quality, including environmental tobacco smoke).
44. See id. at 524.
warnings on cigarette packages and in advertising have protected the industry from legal accountability not only for failing to provide stronger warnings but also for public relations and marketing efforts that directly and effectively undermined the message of the federally mandated warning labels.

Similarly, the tobacco industry viewed the federal ban on broadcast advertising of cigarettes as beneficial in two ways. First, the ban eliminated the anti-smoking commercials required by the Fairness Doctrine then in effect under the rules of the Federal Communications Act. Second, the ban allowed the industry to forego the most expensive advertising medium, leading to lower advertising costs but not lower prices, and thus increasing the profits to the firms, all of this occurring with no appreciable reduction in product demand.

Looking at the current legal landscape, however, one finds half a dozen developments that deserve attention as the legal system struggles not only with the question of social consensus concerning smoking and health issues but also with the implications of the compelling evidence of more than thirty years of industry concealment of what was known internally and denied publicly. If it is not too simplistic a notion to see one of the functions of the legal system as providing a fix for what is broken in the larger social arena, then the current legal developments might be divided into two categories: one set of legal responses that have at their heart an attempt to "fix" blame, and the other consisting essentially of efforts to "fix" the problem.

The first set, which adapts tort litigation models to the tobacco industry scenario, is primarily retrospective in nature. This category comprises developments in (1) traditional tort litigation by or on behalf of individual smokers seeking damages for per-
sonal injury or death, (2) class action, mass tort litigation on behalf of large groups of smokers or those affected by the smoking of others to which they could not help but be exposed, and (3) litigation brought by public officials to recoup from the tobacco industry some of the public expense attributable to use of the industry’s products.

The second set of developments, employing legislative and regulatory techniques, is more prospective in nature, starting with the development of an accurate understanding of where we are and then trying to create responsible programs designed to lead to a better future. Included in this second set are efforts to regulate, by legislation or administrative rule, (1) the information that is available and communicated about tobacco, (2) the access of children to tobacco products, and (3) the content of those products.

Each of these developments, on its own, merits an article or more. The following discussion offers a brief summary of each technique for coming to grips with the tobacco and health problem and provides the grounds for a somewhat pessimistic assessment of each development’s prospects, at least as things now stand.

A. Individual Smoker Litigation

Products liability claims asserted by individual smokers seeking damages from tobacco companies constitute one of the more discouraging personal injury litigation sagas of the last forty years. By mid-summer of 1996, damages had been awarded to

49. See infra notes 55-75 and accompanying text.
50. See infra notes 76-96 and accompanying text.
51. See infra notes 97-111 and accompanying text.
52. See infra notes 112-26 and accompanying text.
53. See infra notes 127-39 and accompanying text.
54. See infra notes 140-41 and accompanying text.
55. The story of litigation brought against the tobacco industry until the beginning of this decade is recounted in Robert L. Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 STAN. L. REV. 853 (1992). Professor Rabin concludes his article with the observation that “[t]ort law and tort process seem to conspire against any effective role for the tobacco litigant.” id. at 878, but he views the individual rights perspective of tort litigation as leading to a generally less promising line of endeavor than a public health perspective supporting legislative and regulatory action. See id. at 876.
plaintiffs in only two cases, *Cipollone v. Liggett Group, Inc.*\(^5^6\) and *Carter v. Brown & Williamson Tobacco Corp.*,\(^5^7\) that challenged a "normal" cigarette as a dangerously defective product.\(^5^8\) The $400,000 award by the jury in *Cipollone* was set aside on appeal,\(^5^9\) and the plaintiffs and their attorney were unwilling to extend the litigation effort into a new trial testing the legal theories that the courts held were still available to them.\(^6^0\) The $750,000 award to the Carters in August 1996\(^6^1\) also faces the hazards of the appellate process before it may solidly assume the posture that the plaintiffs' bar would assign to it, as the initial swell of the wave of the future.\(^6^2\) Indeed, only two weeks after the verdict for the plaintiffs in *Carter*, an Indiana case resulted in a defense verdict.\(^6^3\)

The admissibility into evidence of documents from the files of Brown & Williamson will certainly be among the issues contested on appeal in *Carter*. An important part of the history recounted in these books is the effort by the industry to shield from discovery much of its internal workings, including the results of

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56. *See supra* note 20.
58. A third plaintiff also has received an award of damages from a tobacco company, but this occurred under an unusual set of circumstances. For a brief period during the 1950s, P. Lorillard manufactured the Kent brand of cigarettes with a "Micronite" filter containing asbestos fibers. *See, e.g.,* Lesnick v. Hollingsworth & Voss Co., 35 F.3d 939, 940 (4th Cir. 1994). Some of the smokers of those cigarettes have alleged that their lung cancers were caused not by the tobacco smoke but by the inhalation of asbestos from the filter. *See id.* In 1995, a San Francisco jury returned a verdict of $1.3 million in compensatory damages and $700,000 in punitive damages to the plaintiffs in *Horowitz v. Raybestos Manhattan, Inc.*, the first of the "Micronite Filter" cases in which plaintiffs were successful. *See California Jury Awards Smoker $2 Million for Cancer from 'Micronite' Cigarette Filter*, 23 Prod. Safety & Liab. Rep. (BNA) 961 (1995). These cases are obviously a very small subset of the total population of actual and potential claims by cigarette smokers.
60. *See supra* note 20.
62. *See, e.g.,* Ravo, *supra* note 5, at A1 (quoting Mr. Carter's lawyer, Norwood Wilner, as stating that the victory in that case "means that private citizens that are injured by products made by tobacco companies can seek redress in the courts across the country . . . and succeed. . . . We proved the cigarette industry is not above the law. This is a wake-up call").
research performed by, or under the sponsorship of, the industry. Although the industry has stretched beyond any plausibility claims that these documents are protected by the work product doctrine and the attorney-client privilege, the defense is likely to engage in a document-by-document challenge to admissibility on just such grounds and additionally to challenge the relevance of particular documents to specific defendants.

Cipollone’s federal preemption holding also could contribute significantly to the rocky passage that a tobacco litigation plaintiff’s verdict must traverse on appeal. With the Cipollone ruling rendering significant portions of post-1969 tobacco company behavior unavailable to plaintiffs as a basis of liability, the relationship between the harm to any individual plaintiff and the conduct of the tobacco company that can legitimately serve as a basis of liability becomes more attenuated. One would think, for example, that causation becomes a very complicated legal issue when a smoker’s cancer manifests itself long after the federally mandated warnings began to provide protection for the industry from warnings-based claims. The timeliness of claims that are based upon pre-1969 conduct of the industry offers still another avenue of attack on a judgment entered on a verdict for the plaintiff in individual smoker litigation.

At the present time, plaintiffs must still consider success in individual smoker litigation to be a long shot. A number of states have enacted legislation that sets up barriers to recovery on a products liability theory. Even without such legislation, persuasively putting the liability theory before a trier of fact can be difficult.

A significant part of the doctrinal problem with smoking-related claims lies with the drafters of the Restatement (Second) of

64. See GLANTZ ET AL., supra note 12, at 235-41; HILTS, supra note 11, at 197-200; KLUGER, supra note 6, at 653-54.
65. See GLANTZ ET AL., supra note 12, at 235-41.
66. See supra notes 43-46 and accompanying text.
67. See, e.g., CAL. CIV. CODE § 1714.45 (West Supp. 1996) (stating that there is no liability for an inherently unsafe common consumer product, such as tobacco, known to be unsafe by the ordinary consumer); N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987) (stating that there is no liability on a design defect theory if a harm is caused by an inherent characteristic of a product known to be unsafe by the ordinary consumer).
Torts. At the same time that the American Law Institute made its breakthrough articulation of a generally applicable doctrine of strict tort liability for defective products, the Institute expressly observed in the comments that cigarettes were not unreasonably dangerous defective products. Although that comment may reflect the social mores of the time and the predilections of the drafters, the subsequent history of products liability litigation in other areas supports the view that legal doctrines are capable of evolving as the scientific evidence of a link between "good tobacco" and health effects has become irrefutable. At a more fundamental level, however, the Restatement comment reflects the conceptual confusion created by the need to reconcile a liability doctrine that employs a category of defective products with a class of products that are best understood as lethal, that is, that are deadly when used in precisely the way they are intended to be used.

The information contained in the Brown & Williamson papers, along with whatever further revelations come from elsewhere in the industry, may provide enough of a change in the litigation dynamics to increase appreciably the industry's risk of losing individual smoker lawsuits. In its public relations release regarding the American Medical Association's plans to publish articles analyzing the Brown & Williamson papers, a company statement included the following passage:

Brown & Williamson would hope to achieve a fair hearing in the court of public opinion. However, based on continued one-sided presentation of the issues, the company will continue to rely on the legal system, where the facts are presented in an impartial manner and decided by impartial juries.

If Carter v. Brown & Williamson Tobacco Corp. should

68. See Restatement (Second) of Torts § 402A cmt. i (1965) ("Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful.").
69. See, e.g., infra notes 73-75 and accompanying text (discussing the history of tort litigation regarding asbestos, the Dalkon Shield, and breast implants).
71. Glantz et al., supra note 12, at 444.
emerge from the appellate process as the wave of the future rather than as one aberrational plaintiff victory in a sea of losses, the tobacco industry may very well come to rue the attitude that those words convey.

Nevertheless, even if the momentum in tobacco litigation shifts from the industry to the plaintiffs, the prospect of repeated and larger verdicts for plaintiffs does not necessarily lead to a future that embodies sound social policy. The tobacco industry is not the first segment of the United States economy to be subjected to the tort litigation process in such a manner. One of the significant features of mass tort litigation in the last thirty years has been the emergence of a cycle faced by a number of industries or firms. From an early position of defense-dominated litigation, the cycle runs through some isolated litigation losses, to the availability of a sufficient body of evidence of highly culpable conduct to support punitive damages awards, and ultimately to a retreat to the safe harbor of bankruptcy law to protect against the massive liability that looms on the litigation horizon. That precise cycle has played itself out with asbestos, with the Dalkon Shield intrauterine device of the A.H. Robins Company, and most recently with the silicone gel breast implants of the Dow Corning Corporation.

The message of Carter, viewed against the backdrop of this mass harm litigation cycle, may satisfy those who win early in the litigation process, but it certainly is not likely to produce compensation in any realistic approximation of the harm that actually can be attributed to the tobacco industry. Individual smoker tort litigation is ill-suited to providing an effective and rational resolution of the problem of tobacco and health when

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75. See In re Dow Corning Corp., 86 F.3d 482 (6th Cir. 1996) (resolving the issue of the scope of bankruptcy court jurisdiction over claims against parties other than Dow Corning); In re Silicone Gel Breast Implant Prods. Liab. Litig., No. 94-p-11558-5, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (approving the settlement of a class action that subsequently was renegotiated after Dow Corning filed for bankruptcy).
viewed from a broad social perspective, and when one seeks a solution that looks forward as well as back.

B. Class Action Litigation

The clearest lesson of the tobacco industry's response to the products liability litigation filed by individual smokers is that industry members will incur whatever expense necessary to defeat each and every claim.\textsuperscript{76} Kluger reports that the defense of the Cipollone case was estimated to cost between thirty and fifty million dollars.\textsuperscript{77} A large part of that cost included paying for litigation tactics that drove up the plaintiff's cost, thereby adding to the disincentive for individual plaintiffs to take on the industry. The cost of the plaintiffs' case in \textit{Cipollone} was nearly three million dollars, and that substantial investment only got the case to a point at which it was ready to be taken back to a trial court after remand from the United States Supreme Court's ruling that some of the claims that had been asserted were not preempted by the federal labeling legislation.\textsuperscript{78}

Given the enormous costs that individual plaintiffs face, it is not surprising that attention has turned to the use of class action litigation as a way to level the playing field for the contest between plaintiffs and the tobacco industry. Two types of class action litigation, distinguished by the nature of the plaintiffs, are worth noting in the current legal landscape. In one type of litigation, the plaintiff class consists of smokers, while in the other, the plaintiffs represent classes of people who have been exposed to the effects of smoking by others.

\textsuperscript{76} See HILTS, supra note 11, at 196-97. This unyielding posture is what adds to the significance of the recent settlement of the claims against the Liggett Group, the smallest of the tobacco firms. See Liggett Group SETTLES SUITS BY FIVE STATES SEEKING REIMBURSEMENT FOR MEDICAID COSTS, [Current Reports, Jan.-June] 24 Prod. Safety & Liab. Rep. (BNA) 281 (Mar. 22, 1996); Liggett SETTLES LIABILITY SUIT IN 'CASTANO'; AGREEMENT NEAR IN STATE REIMBURSEMENT SUITS, [Current Reports, Jan.-June] 24 Prod. Safety & Liab. Rep. (BNA) 233 (Mar. 15, 1996). Although the settlement amounts may not be substantial when compared to the potential liability of the rest of the industry, this does open the door to obtaining additional information about the industry and creates the possibility of an adversarial posture between the Liggett Group and the rest of the industry.

\textsuperscript{77} See KLUGER, supra note 6, at 674.

\textsuperscript{78} See id. at 674-75.
What appeared to be the 800-pound gorilla of the smoker class action litigation, *Castano v. American Tobacco Co.*, was originally filed in March 1993 with three named plaintiffs—two smokers and one widow of a smoker. The named defendants were seven tobacco companies and their various affiliated companies, plus the Tobacco Institute. The major significance of the *Castano* litigation was its pooling of the resources and the efforts of the plaintiffs’ bar so that they could take on the well-funded industry’s defense.

The prospects for this litigation strategy received an initial boost when the federal district court certified a plaintiff class consisting of all nicotine-dependent persons who had purchased and used cigarettes manufactured by the defendants, their spouses, children, relatives, and “significant others” as heirs or survivors, and the personal representatives of deceased smokers who were nicotine-dependent. The air was let out of the *Castano* balloon, however, when the class certification order was reversed on appeal. The court of appeals held that “class treatment is not superior to individual adjudication” and expressed a preference for the “collective wisdom of individual juries . . . before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury.” Coming less than two weeks after another court of appeals had rejected the relaxation of class action prerequisites when a plaintiff class in an asbestos case had been certified for the purpose of settlement rather than litigation, the ruling in *Castano* casts a substantial pall on the prospect of mass tort litigation of individual smoker claims. After the failure to sustain a national class action at the federal

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80. *See id.* at 548.
81. *See id.*
82. *See HILTS, supra* note 11, at 203.
85. *Id.* at 752.
level, the next round of litigation in this vein attempts to reconstitute the smoker classes at the level of individual states.\textsuperscript{87}

The most noteworthy of the class action lawsuits so far in the environmental tobacco smoke (passive smoking) category is the claim being litigated on behalf of airline flight attendants exposed to the recirculated cigarette smoke prior to the banning of smoking on domestic airline flights. That action, \textit{Broin v. Philip Morris Cos.,}\textsuperscript{88} was filed in state court in Florida in 1991.\textsuperscript{89} The trial court originally dismissed the class action allegations stated in the complaint, but that ruling was reversed on appeal. The trial court then certified a class consisting of “[a]ll nonsmoking flight attendants who are or have been employed by airlines based in the United States and are suffering from diseases and disorders caused by their exposure to second hand cigarette smoke in airline cabins.”\textsuperscript{90} Appellate challenges by the defense to that class certification failed,\textsuperscript{91} and by the summer of 1996 the case was ready to proceed as a class action litigation.

What remains to be seen, of course, is whether a convincing case can be constructed to establish the link between the exposure to the toxic by-products of other people’s cigarettes and whatever specific harms that the plaintiff class members allege. On that point, the mass tort litigation cycle referred to above\textsuperscript{92} may be at an earlier stage in the passive smoking litigation than it is in smoker litigation. Although there is sufficient evidence for the federal government to have begun the regulatory process,\textsuperscript{93} the tobacco industry has adopted in full trumpet the

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\item \textsuperscript{88} 641 So. 2d 888 (Fla. Dist. Ct. App. 1994), rev. denied, 654 So. 2d 919 (Fla. 1995).
\item \textsuperscript{91} See Philip Morris, Inc. v. Broin, 672 So. 2d 37 (Fla. Dist. Ct. App. 1996) (per curiam), rev. dismissed, 676 So. 2d 1369 (Fla. 1996).
\item \textsuperscript{92} See supra notes 73-75 and accompanying text.
\item \textsuperscript{93} See KLUGER, supra note 6, at 690.
\end{itemize}
same cry of "not proved" that it employed so misleadingly for many years regarding the connection between smoking and disease. The stakes for the tobacco industry in this type of litigation may be considerably higher than for direct smoking claims, given the industry's reduced ability in these cases to blame the victims for deciding to be exposed to the risk.

C. Attorney General Litigation

Another technique being employed to accommodate the imperfect fit between tobacco and health litigation and the parameters of traditional tort litigation is the initiation of lawsuits by state attorneys general against the tobacco industry. The key element of these actions is the claim for reimbursement of expenses incurred by the state for treatment of tobacco-related harm. By the end of September of 1996, sixteen of these lawsuits had been filed, and more can be expected to follow.

Although the process of litigating these claims has begun quite recently, the issues raised already have received some appellate attention. Two rulings are particularly noteworthy.

The Supreme Court of Florida recently had occasion to consider an intermediate appellate court's ruling that the legislation authorizing the state to sue the tobacco companies, the Medicaid

94. See HILTS, supra note 11, at 106-07.
95. See id. at 12-17.
96. See id. at 105-06.
97. See Latest Reimbursement Suit Names Law Firms As Defendants, Alleges Fraud and Conspiracy, [Current Reports] 24 Prod. Safety & Liab. Rep. (BNA) 817-18 (Sept. 6, 1996). Since Mississippi filed the first suit of this type in 1994, 15 other states have taken similar action, including two states that filed late in September. See id. The other states that have filed suit are Arizona, Connecticut, Florida, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oklahoma, Texas, Utah, Washington, and West Virginia. See id. Similar claims have been filed at the local level by authorities in New York, San Francisco, San Jose, and Los Angeles counties. See N.Y. Lawsuit Attacks Tobacco Research Front Groups, WASH. POST, Jan. 28, 1997, at A6.
Third-Party Liability Act, was unconstitutional. The court upheld the facial constitutionality of the legislation but ruled that the defendants were free to raise challenges to the constitutionality of the act as applied during later stages of the litigation process. In a more damaging blow to the prospects for Florida recovering damages from the tobacco companies in order to recoup its Medicaid expenses, the court found to be violative of due process a statutory provision that relieved the state of its obligation to identify individual Medicaid recipients whose medical expenses were smoking-related.

The attempt to stretch a standard third-party liability rule to cover the peculiar circumstances of tobacco-related health problems illustrates the conceptual problem inherent in this kind of litigation. In the normal state of affairs, the party who pays for medical treatment steps into the shoes of the injured person for the purpose of pursuing a subrogation claim against the third party who was responsible for the harm. The claims by the state attorneys general instead try to create a class-based subrogation right that is comparable to the innovative settlement class treatment afforded to the veterans in the Agent Orange litigation. In that case, Vietnam veterans claimed that exposure to Agent Orange had caused a variety of medical ailments. Although it might have been possible to conclude that the class as a whole had suffered harm, it likely would not have been possible to prove that a specific individual's harm was related to that exposure. The class action litigation device enabled federal district Judge Jack B. Weinstein to approve a settlement fashioning relief that reflected the harm to the class as a whole.

98. Fla. Stat. Ann. § 409.910 (West Supp. 1996). Although the legislation on its face applies to all situations in which a third party acted in a way that caused the state to incur Medicaid obligations, the governor issued an executive order limiting the use of the statute to claims against the tobacco industry. See Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1246 (1996).
99. See Associated Industries, 678 So. 2d at 1243.
100. See id.
101. See id.
103. See id. at 775-87.
104. See id. at 833-37.
105. See id. at 837-43, 857-62. Judge Weinstein's reflections on the lessons of this
Adopting doctrinal or procedural stances that try to cram these cases back into the confines of traditional tort litigation could sound the death knell for this legal development. It is not at all unlikely that a requirement for individual identification of Medicaid patients could increase the administrative costs of pursuing this reimbursement strategy beyond what a state would be willing to pay.

Legislation adopted in 1996 in Virginia constructed a similarly daunting doctrinal hurdle.106 This amendment to the Medicaid reimbursement statute requires that any Medicaid reimbursement litigation "shall be decided under the same laws, rules and standards including applicable bases of liability and defenses as would apply if the individual receiving the services had brought the action directly."107 As with the Florida decision regarding identification of Medicaid patients who received health care for smoking-related illnesses, the Virginia legislation attempts to enforce the application of traditional subrogation and third-party liability notions in this litigation setting, and serves as an effective brake on any attempt to recoup substantial sums from the tobacco industry.108

The other appellate decision that offers valuable insight into the health care cost reimbursement cause of action dealt with an attempt by a private insurer to piggy-back on the state claim to recover damages from the tobacco industry for its Medicaid payments. The Supreme Court of Minnesota, in the course of upholding the claim on behalf of the state, recently held that a private health insurer lacked standing to pursue tort remedies from the tobacco industry for the additional health care costs it was required to meet as a result of smoking-related harm to its policyholders.109 The court allowed the private insurer to proceed

and other mass tort cases can be found in Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolutions, and Other Multiparty Devices (1995).

107. Id.
108. The brake metaphor is admittedly incongruous in a state as committed to the tobacco industry as Virginia. Reality is more accurately captured by an image of applying the brakes in a pick-up truck that has been mounted on concrete blocks and had its wheels removed.
with its statutory antitrust and consumer protection claims, but the relationship between the insurer's obligation to pay for smoking-related health care and the conduct of the tobacco industry was held to be too remote to support an industry duty enforceable by tort damages that extended to the insurer.

Limiting the scope of the attorney general lawsuits to the recovery of health care expenditures that have been made from public funds may be justifiable as a matter of current tort doctrine, but it results in an unfortunate assignment of a higher priority to the recovery of health care costs that have been spread over a tax base than to the same category of costs when they are spread over a private insurance base. As described below, a proposed modification of legislation enacted by a few states to shift some of the costs of smoking to tobacco companies can expand the reach of the cost-allocation idea underlying these actions on behalf of the states and accomplish much the same goal through another method.

D. Information Regulation

The cigarette trade has featured government-mandated warnings since 1965, when Congress enacted the first such requirement. Instead of acting as a meaningful public health measure, the required warning label probably is viewed more realistically as the single most effective insulation against liability to smokers that the tobacco companies have been able to obtain.

Information requirements that surpass current federal labeling requirements can easily be justified. The most glaring omission from the warnings currently required is any reference to the addictive nature of nicotine. If the warnings legitimately

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110. See id. 495-97.
111. See id. at 493-95.
113. See GLANTZ ET AL., supra note 12, at 255-56, 342. Hils quotes from a document in which lawyers for Brown & Williamson and British American Tobacco Company speculate that the litigation posture of the industry would be well served by issuing or acquiescing to warnings before the government acted to require them. See HILTS, supra note 11, at 35.
114. See KLUGER, supra note 6, at 547-48 (describing lobbying efforts by the tobac-
are expected to produce a public health benefit, one surely would think that the probability of addiction is an essential part of the message that should be communicated.

Information about cigarette additives is another issue on which regulatory attention might be focused more clearly in order to reduce the adverse health effects of smoking. Congress enacted legislation in 1984 requiring tobacco companies to file reports on what additives were used, but, at the same time, it required that the information be kept confidential and thus the reports could not be used in any meaningful way. More effective efforts to make use of the information about additions may occur at the state level. The Massachusetts legislature, for example, enacted a statute in 1996 requiring the manufacturers of tobacco products to provide information about the contents of their products to the state Department of Public Health. This statute requires manufacturers to report, beginning in 1997, the identity of any added constituent, in rank order by weight or volume. The legislation's concession to the trade secret argument set forth by the industry is that it does not require the disclosure of the actual amount of any such constituent that has been designated as safe when burned. The legislation also requires the reporting of the nicotine yield of the product but states that the report is to be based on standards that will be established by the Department of Public Health. That provision is potentially significant because of the growing dissatisfaction with the way that the Federal Trade Commission's nicotine measurement methods understate the impact that the nicotine content actually produces, given the way that smokers really consume the product. Because the statute does not require the information to become part of the

117. See id.
118. See id.
119. See id.
120. See KLUGER, supra note 6, at 452-55.
product labeling or advertising, *Cipollone*’s federal preemption ruling should not bar the state from forcing this method of disclosure of this information.\(^{121}\)

This legislative development and possible dissemination of information about the elements other than tobacco that are included in tobacco products may prove to have its greatest significance in undercutting the central premise of the standard tort doctrine that cigarettes are not defective.\(^{122}\) Preliminary indications from the tobacco companies’ partial disclosure of the reports made under the federal legislation reveal that substantial numbers of carcinogens are added to tobacco products.\(^{123}\) To the extent that “good tobacco”\(^ {124}\) is thought not to be unreasonably dangerous, the revelation of the carcinogenic substances that end up in cigarettes and other tobacco products could lead to a realization that “good tobacco” is a thing of the past, and that current industry practices result in a highly adulterated and processed product.\(^ {125}\) The chief limitation on the utility of this disclosure of information for tort litigation purposes is establishing that any specific substance is present in sufficient amounts to be dangerous to health.

**E. Access Regulation**

All three of the books reviewed here provide compelling evidence that the commercial success of the tobacco industry depends on acquiring a consumer base in the population that is too young to smoke legally.\(^ {126}\) The FDA has taken the lead role in blocking industry efforts to lure young people into smoking, by pursuing measures to regulate the distribution of tobacco prod-

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121. The preemption holding in *Cipollone* does not apply to “a state law duty to disclose . . . facts through channels of communication other than advertising or promotion . . . [as] for example, if state law obliged respondents [tobacco companies] to disclose material facts about smoking and health to an administrative agency.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528 (1992).

122. *See supra* note 68 and accompanying text.


125. *See Hiltz, supra* note 11, at 57-62 (describing the adulteration of the cigarette).

126. *See Glantz et al.*, *supra* note 12, at 249; *Hiltz, supra* note 11, at 63-101; *Kluger, supra* note 6, at 445-46, 700-03.
ucts to children.\textsuperscript{127} Among the measures in the FDA's regulation is a prohibition on the sale or distribution of tobacco products to children under the age of eighteen.\textsuperscript{128} The FDA rule reinforces the effectiveness of that age limit by imposing a requirement that sales take place in a face-to-face transaction rather than through such devices as vending machines.\textsuperscript{129} The regulation also restricts the promotional activities of tobacco companies\textsuperscript{130} and limits their advertising to text-only formats in print media that have a significant readership among young people.\textsuperscript{131} A provision in the proposed rule to require tobacco companies to spend at least $150 million a year to maintain educational programs and to purchase television advertising to discourage young people from smoking was not included in the final rule.\textsuperscript{132}

At the heart of the FDA effort is the conceptual decision by then-Commissioner David A. Kessler, a pediatrician, to treat the prevention of smoking as a matter of pediatric medicine.\textsuperscript{133} Following that strategy, the FDA's rules are intended to make it more difficult and less attractive for people to smoke at the young age when almost all smokers begin to do so. On the day that the White House announced the FDA measure in 1995, and the day before the FDA actually published its notice of proposed rulemaking, tobacco companies brought a suit in federal court in North Carolina to block the rulemaking effort.\textsuperscript{134}

Measures to restrict juveniles' access to tobacco products that they are prohibited by law from purchasing have been enacted at the state level prior to the FDA proposal to federalize this type of smoking prevention effort.\textsuperscript{135} Hilts is quite critical of

\textsuperscript{128} See id. at 44,616-17.
\textsuperscript{129} See id. at 44,616.
\textsuperscript{130} See id. at 44,616-18.
\textsuperscript{131} See id. at 44,617.
\textsuperscript{134} Coyne Beahm Inc. v. FDA, No. 2:95CV00591 (M.D.N.C. Aug. 10, 1995).
\textsuperscript{135} See, e.g., VA. CODE ANN. § 18.2-371.2 (Michie 1996) (prohibiting, inter alia, the
the tobacco companies’ attempts to influence state legislatures, citing the companies’ efforts to lobby for low fines and the authorization of law enforcement rather than more motivated public health officials to issue citations. Moreover, even stronger measures regulating juveniles’ access to tobacco products have been enacted at the local level. An example is the ordinance adopted by the City Council of the City of New York in 1990, prohibiting the sale of tobacco products from vending machines in many locations, setting fines of up to $1000, and making cigarette license suspension a risk of violating the ordinance.

When the ordinance was challenged by firms engaged in the vending machine business, the Court of Appeals held that more lenient legislation adopted at the state level did not preempt the more stringent (and likely more effective) municipal legislation.

**F. Content Regulation**

The most dramatic of the regulatory initiatives on smoking and health would be an aggressive follow through to the assertion that cigarettes need to be understood as devices for the delivery of a drug. If the implications of that characterization were fully applied to cigarettes, then the FDA arguably would be required to go beyond regulation of child access to tobacco products and instead carry out its statutory mandate to approve the safety and the efficacy of drugs and medical devices.

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136. See HILTS, supra note 11, at 91-92, 100. The Virginia statute described in the preceding footnote, for example, sets a fine of $50 for an initial violation of the prohibition on sales to minors, rising to $250 for a third offense. See VA. CODE ANN. § 18.2-371.2(D). It also refers to summons being issued by “any law enforcement officer,” and does not mention public health officials. Id. The provision also states that there is no private cause of action created by the statute. See id. § 18.2-371.2(F).

137. See NEW YORK, N.Y., ADMIN. CODE § 17-177.


139. See FDA Jurisdiction, supra note 3.

II. THE CURRENT ENVIRONMENT

As this Review Essay was completed, the FDA had issued a final rule embodying many of the regulations that had been offered for notice and comment in August 1995, and a Florida jury has awarded plaintiffs a verdict of three-quarters of a million dollars in damages in a smoking-related harm case. It is thus possible to describe both the regulatory picture and the litigation picture as being on the verge of massive change from the status quo under which the tobacco industry operated for so many years with legal impunity and indifference. And yet...

It is just as possible to describe the regulatory and litigation pictures as offering aberrational movements before sliding back into what has come to be the normal, static refusal by legislatures, courts, and the tobacco industry to make meaningful efforts to deal with the health effects of tobacco products. Forecasting is even less exact for legal change than it is for the weather, but by the end of the decade, we might look back at a legal climate in which was reversed on appeal and the disposition of other cases was more in line with the string of victories won by the industry lawyers.

We might also look back at a legal climate in which the FDA generally lost its jurisdiction over tobacco or had its specific measures struck down by the courts. Whatever the ultimate outcome of the judicial consideration of the agency's jurisdiction and of any action that the agency eventually takes pursuant to that jurisdiction, the history of the smoking and health problem in this country leaves little room for optimism that the regulatory route offers much promise. The tobacco industry is so influential in Congress, and tobacco money plays such a significant role in so many areas of commerce, politics, sports, culture, and education, that it is difficult to believe that the FDA could proceed with any measure that threatens the viability of the tobacco industry as directly as would regulation of the safety of ciga-

141. See supra notes 127-32 and accompanying text.
143. See HILTS, supra note 11, at 175-93.
144. See KLUGER, supra note 6, at 617-25.
rettes as drug delivery devices.

III. TAX "THE BEJESUS OUT OF THE TOBACCO INDUSTRY": A PROMISING STRATEGY THAT LOOKS TO THE FUTURE

In the 1960s, the Federal Communications Commission invoked the Fairness Doctrine to require broadcasters that aired cigarette commercials to begin to run anti-smoking messages as well. Richard Kluger quotes a publicist for the American Cancer Society characterizing the effect of that new medium for public service announcements against smoking as "scaring the bejesus out of the tobacco industry." Whatever psychological solace one might derive from believing that to have been the case, the lesson of the last thirty years is that a legal-business-as-usual approach to the relationship between smoking and health has failed to accomplish much of what the proponents of the various measures have sought. To break out of the rut without totally abandoning the conventional legal molds, one might draw on the quoted language and suggest that serious thought be given not only to scaring but also to taxing "the bejesus out of the tobacco industry."

Although higher taxes on tobacco have often been proposed and enacted, such "sin taxes" have generally functioned primarily as revenue-raising measures. A promising strategy for supplementing whatever else the legal system does with the smoking and health problem would be to place a tax on tobacco products that is devoted to the twin goals of deterring smoking and partially shifting costs of tobacco use from the public at large to the tobacco industry. Such a strategy is proposed by Kluger at the end of his lengthy examination of the history of the tobacco business and the public health, and different versions of such a tax strategy have been put into place in three

145. Id. at 310.
146. See supra note 47 and accompanying text.
147. See KLUGER, supra note 6, at 304-08.
148. Id. at 310.
149. See id. at 510-12 (noting that the tobacco industry's profit margins were unaffected by the 1983 increase in the cigarette "sin tax").
150. See id. at 759-63.
states—California, Massachusetts, and Arizona—in the last eight years.\textsuperscript{151}

The first major effort along these lines was undertaken in California in 1988, where a tax increase on tobacco products was adopted explicitly to fund a variety of government services.\textsuperscript{152} Not surprisingly, given the very strong evidence presented in these books for the lobbying strength of the tobacco interests,\textsuperscript{153} the California measure (and those in the other two states to have adopted this approach) originated by referendum rather than through the normal legislative process.\textsuperscript{154} Proposition 99, as the measure adopted in the November 1988 election was known, raised the state excise tax on cigarettes from ten cents per pack to thirty-five cents per pack, with the money going into a Cigarette and Tobacco Products Surtax Fund for distribution to a variety of research, health care, and educational purposes.\textsuperscript{155} The constitutionality of the measure was attacked soon after its enactment, but it was upheld by the Supreme Court of California in \textit{Kennedy Wholesale, Inc. v. State Board of Equalization}.\textsuperscript{156}

The California initiative set out four major uses for the money: "an antismoking educational campaign, cancer research, medical services for indigents, and reforestation of areas ravaged by cigarette-ignited fires."\textsuperscript{157} The positive results following its enactment, particularly a sixteen percent decline in the percentage of smokers,\textsuperscript{158} were described by Kluger as "immediate and sensational."\textsuperscript{159}

Similar legislation has been enacted following successful voter initiatives approved in Massachusetts in 1992\textsuperscript{160} and in Arizo-
The Massachusetts legislation imposed an additional excise tax on cigarettes, raising the rate from twenty-six cents per pack to fifty-one cents. The revenue from the additional tax is credited to a Health Protection Fund, which is charged with responsibility for financing a variety of educational and public health programs related to smoking. Included among the programs are education and smoking cessation assistance programs in schools and workplaces, and community health programs for prenatal and youth preventive health care as long as the programs include smoking cessation assistance and education about the adverse effects of smoking.

An indication of the political attractiveness of an increased tax on tobacco can be found in the action taken in the 1996 legislative term in Massachusetts to increase the tobacco tax yet another twenty-five cents per pack, bringing the state tax to seventy-six cents per pack. After the two chambers of the state legislature worked out their differences in the language of the legislation, the Governor vetoed the bill, but that veto was overridden in July 1996. Because the revenues from this tax increase are to be used to finance such programs as expanded health insurance coverage for children and subsidies for prescription drugs for the elderly, this latest legislative enactment should be seen more as a revenue-raising measure than as one that is designed expressly to shift smoking-related costs to the tobacco industry.

The Arizona legislation, following voter approval of Proposition 200 in the 1994 election, established a Tobacco Tax and Health Care Fund financed by a tax increase of forty cents per pack, in addition to higher tax rates on other tobacco prod-

161. See infra notes 169-70 and accompanying text.
163. MASS. GEN. LAWS ANN. ch. 64C, § 7(c) (West Supp. 1996).
164. See id. at ch. 29, § 2T.
165. See id.
166. See Shelley Murphy, House Votes To Hike Cigarette Tax To Pay for Health Care, BOSTON GLOBE, June 11, 1996, at 36.
168. See id.
ucts.\textsuperscript{169} As with the other state ventures along these lines, the additional tax money is earmarked for educational, research, and health care financing purposes.\textsuperscript{170}

The programmatic support that a measure of this sort can provide can be quite substantial. Conservative estimates of the amount of money expected to be generated by this new tax in Arizona were far surpassed by actual revenues.\textsuperscript{171} The Arizona legislature initially appropriated thirty-four million dollars for the programs that were to be financed by the Fund; however, receipts in the first year of the tax's collection came in at a rate that would produce more than three times that amount.\textsuperscript{172}

The tax increase legislation enacted by these three states is well worth careful consideration in other jurisdictions, but it is possible to go even further in moving toward the twin goals of reducing the incidence of smoking and shifting more of the costs of the consequences of smoking to the tobacco industry and its consumers. The dimensions of this more robust tobacco tax increase strategy can be best understood if one looks briefly in turn at its purpose, its uses, and its implementation.

\textbf{A. The Purpose of a Tobacco Tax Increase}

Two goals justify a substantial increase in tobacco taxes. First, increases in the price of tobacco products may deter some people from undertaking the use of the products and may reduce the rate of use by others. Second, tobacco tax increases can place on the tobacco industry the costs of a variety of socially beneficial programs to deal with the consequences of this deadly product.

The consideration of the tobacco tax increase proposal should rest on both grounds, deterrence and cost shifting. The major policy shortcoming of previous efforts and proposals has been the identification of one or the other, rather than both, as the rationale for the tax. Experience has demonstrated that the twin rationales are mutually supportive, and together they provide a

\textsuperscript{169} See ARIZ. REV. STAT. ANN. § 42-1241 (West Supp. 1995).

\textsuperscript{170} See id. §§ 42-1241 to 1245.


\textsuperscript{172} See id.
compelling justification for a sizeable increase in the tax on tobacco products.

The effectiveness of a tax that attempts to produce a deterrent effect is related to the size of the tax increase. A recent study suggests that a ten percent increase in the size of the tax will produce a five percent decrease in the smoking population. If that rate is accurate, cutting the smoking rate in half could be accomplished by doubling the tobacco tax. The early experience following the Massachusetts tax increase suggests a more modest drop in smoking, more on the order of six percent. Whatever the specific decrease should turn out to be, one can expect a substantial improvement in public health as some people stop smoking and others reduce their consumption following a tax increase.

There is a need for caution, however, about over-promising the beneficial health effects of a tax increase on tobacco products. The health benefits of such an increase may not be as high as anticipated for at least two reasons.

First, some smokers who pay more for their cigarettes may change their smoking behavior as a result of the higher price of the product. Studies within the industry and by government agencies have established the existence of a phenomenon called "smoker compensation," where smokers respond to changes in the content of cigarettes. If the tar and nicotine content of a cigarette is reduced, smokers may compensate for the different effect the cigarette produces by taking deeper draws on the cigarette, reducing or negating whatever health benefits might be thought to flow from the supposedly safer product. Along those same lines, one might suspect that at least some consumers would compensate for a higher-priced pack of cigarettes by smoking more of each cigarette, and perhaps even by compensating for the fewer packs that are affordable by inhaling deeper on those cigarettes that are consumed.

A second reason for caution in attributing too much of a

175. See GLANTZ ET AL., supra note 12, at 87-91; KLUGER, supra note 6, at 452-53.
176. See GLANTZ ET AL., supra note 12, at 87-91; KLUGER, supra note 6, at 452-53.
health benefit to an increase in the tobacco tax is the huge profit margin that the cigarette market has frequently enjoyed. If the demand were to begin to decrease at significant levels, there could be a considerable cushion within which the industry could lower its profit and maintain sales at higher levels than would otherwise be expected if the full effect of the tax increase were to be passed along to consumers.

Linking a substantial tobacco tax increase to a deterrence goal may be a considerably more effective strategy for dealing with the problem of tobacco and health when the focus is directed to the youngest segment of the tobacco products market. Demand for tobacco products may very well display different degrees of price elasticity at different age groups of smokers. The following excerpts from two documents from the Brown & Williamson papers indicate that the industry itself was aware of, and quite concerned about, the disproportionate impact that excise tax increases would have on young smokers.

First:

[Anti-smoking groups may find that one of the most successful methods of reducing the use of tobacco products will be the enactment of a high rate [of] taxation on such products, since by this method tobacco products can be priced at a level so as to place the product beyond the financial reach of many consumers.]

Second: “Excise taxes are related to smoking and health, because taxes influence the price of cigarettes. The price affects the ability of young people to buy cigarettes.”

Although there is admittedly a need for caution about claiming excessive benefits from a tax increase, it is undoubtedly true that smoker behavior will change at the margins. Even though uncertainty may exist for some time about the size and composition of those margins, gains in public health ought to be welcomed from whatever deterrent effect a tax increase is ultimately found to produce, particularly if it reduces the affordability of

177. Kluger reports Philip Morris profit margins approaching 40% in the mid-1980s. See KLUGER, supra note 6, at 581.
178. GLANTZ ET AL., supra note 12, at 249.
179. Id.
tobacco products to young people in the critical years when they are most likely to become dependent.180

When the cost-shifting goal of the tobacco tax increase is included as an essential part of the rationale for the expanded proposal, the additional public benefit traceable to the operation of the programs to which funds from the increased tax are directed reinforces the deterrence goal. As suggested above, the combination of goals for this expanded proposal is critical: the focus on the good that the tax revenues can accomplish is as significant as the identification of the harm that the tax itself can deter.

B. The Uses of Increased Tobacco Tax Revenues

The legislation enacted in Massachusetts, California, and Arizona indicates the major uses to which the revenues ought to be devoted: education of young people, assistance in smoking cessation, health care for smoking-related illness, scientific research into the problems associated with tobacco products, and monitoring of the success of the various efforts that are undertaken.181

The first order of business to be funded by the revenue generated by the increased tobacco tax is the reinforcement of the deterrence goal by measures other than price increases. Following the lead of the states that have already adopted a measure of this sort,182 the highest priority for the revenue from the tax increase should be the financing of an effective smoking education program directed at young people. Because the FDA proposed regulations requiring the tobacco companies to fund programs of this sort were deleted from the final rule,183 there is even more of a need for state money to be used for this purpose.

An important part of the cost-shifting goal of the tobacco tax

180. About 75% of smokers are addicted by the end of high school. See KLUGER, supra note 6, at 413.
181. See ARIZ. REV. STAT ANN. § 42-1241(C) (West Supp. 1995) (allocating the fund's revenues for health education, health research, and the medically needy); CAL. REV. & TAX. CODE § 30122 (West 1994) (creating a fund from cigarette taxes to support school and community education programs, disease research, the medically needy, and environmental conservation efforts); MASS. GEN. LAWS ANN. ch. 29, § 2T (West Supp. 1996) (establishing a Health Protection Fund for similar purposes).
182. See supra notes 152-72 and accompanying text.
183. See supra note 132 and accompanying text.
increase can be accomplished by directing some portion of the tax revenues to financing health care, as is done by each of the three states that have enacted an increased tobacco tax initiative.\textsuperscript{184} An expanded proposal for uses of the revenues ought to be considered as well, taking the programmatic support one step further, so that it includes privately as well as publicly funded health care services. That proposed expansion reacts in part to developments in the states that have enacted these measures and in part to the previously expressed perception of the limitations of the state attorney general litigation to recover Medicaid expenses,\textsuperscript{185} but it is, in any event, a matter of sound public policy.

The first impetus for expanding the scope of the health care services that receive funding produced by the revenue earned from the tobacco tax increases is the recent experience with those revenues in California. Anytime a new source of revenue becomes available to a governmental entity, human nature would suggest that the temptation for legislators or the executive to divert that money to general purposes will be strong.\textsuperscript{186} One of the more important lessons of the California Proposition 99 experience is that, even though the funds generated by the increased tobacco tax were earmarked at the outset for specific uses related to the health effects of smoking, that does not mean that the temptation to use those funds in a different manner disappears.\textsuperscript{187} Kluger reports California Governor Pete Wilson's attempt to use tax revenues generated by Proposition 99 "to plug his budgetary shortfall."\textsuperscript{188} Legislation has been enacted\textsuperscript{189} in

\textsuperscript{184} See \textit{supra} note 181.

\textsuperscript{185} See \textit{supra} notes 105-07 and accompanying text.


\textsuperscript{187} See \textit{CAL. REV. & TAX. CODE §§ 30122, 30122(a) (West 1994)} (mandating that funds from the Cigarette and Tobacco Products Surtax Fund be used only for (1) tobacco-related education programs; (2) "tobacco-related disease research"; (3) medical and hospital care for the indigent; and (4) fire prevention programs, environmental conservation, wildlife areas, state and local parks, and recreation purposes).

\textsuperscript{188} \textit{KLUGER, supra} note 6, at 705.

recent sessions of the California legislature to alter the formula allocating the tax revenues among the six accounts established by the original legislation.\textsuperscript{190} Court challenges succeeded in blocking some of the earlier diversions,\textsuperscript{191} but similar efforts can be expected to continue as the tobacco tax revenues flowing into the special fund offer inviting targets for legislators who are hard-pressed for ways to finance other programs.

The innovative part of the proposal being set out in this Review Essay is that this proposal would not follow either of the two models for tobacco tax-related health care financing that have been put forward in the past. Under the measures enacted in Arizona, California, and Massachusetts,\textsuperscript{192} and in the claims asserted by the state attorneys general against the tobacco industry,\textsuperscript{193} the tobacco tax revenues are intended to reimburse the state for the costs of health care provided to indigents under the state's Medicaid responsibility. Under the Clinton Administration health care reform initiative\textsuperscript{194} and in the latest Massachusetts tobacco tax legislation,\textsuperscript{195} on the other hand, increases in tobacco taxes are viewed as an important source of funding for the provision of broad-based, if not truly universal, health care services. What needs to be considered instead is a high priority use of the revenues that sets a course between those two models.

The cost-shifting function of the tobacco tax increase proposal is best served if its focus is directed at the smoking-related costs of the health care system at large, not just at the smaller subset of costs that are financed directly by public authorities. If health

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\textsuperscript{190} That legislation was effective through July 1, 1996, with the amendments scheduled to be repealed on January 1, 1997. See id. 1996 Cal. A.B. 3487, approved by the governor on July 20, 1996, extended the diversions until July 1, 1997. See 1996 Cal. Legis. Serv. 1355 (West).

\textsuperscript{191} The six accounts comprising the Cigarette and Tobacco Products Surtax Fund are the Health Education Account, the Hospital Services Account, the Physician Services Account, the Research Account, the Public Services Account, and the Unallocated Account. See CAL. REV. & TAX CODE § 30122(b) (West 1994).

\textsuperscript{192} Prop. 99 Fund Shift, supra note 186, at 7 (reporting that two restraining orders have been issued to prevent legislatively enacted fund transfer of tobacco tax money).

\textsuperscript{193} See supra note 152-72 and accompanying text.

\textsuperscript{194} WHITE HOUSE DOMESTIC POLICY COUNSEL, THE PRESIDENT'S HEALTH SECURITY PLAN 96 (1993).

\textsuperscript{195} See supra notes 166-68 and accompanying text.
care providers could be reimbursed from a tobacco tax fund for services provided to a wider class of patients than just the needy for the treatment of smoking-related conditions, then the cost of insuring for other services ought to decline.

This expansion in the uses of the tax revenues can be accomplished by adapting a class-based relief model to the context of the smoking-related illnesses. Epidemiologists should be able to determine the extent to which the rates of certain medical conditions within a state are higher than would be the case if there were no use of tobacco products. That estimate of the cost of smoking-related health care can be used as a distributional baseline for health care providers so that a proportional share of the revenues from the tax fund roughly corresponds to the services rendered by that provider.

The tax increase being suggested here is designed to shift specific costs from the public at large to the tobacco industry through the imposition of the additional tax, but it is important to acknowledge that there is already a significant tax levy on tobacco products. Presumably, existing tobacco excise taxes are already being used for important governmental purposes, and that support should continue at existing levels. The cost-shifting and programmatic support associated with the increase in the tobacco tax should be seen as a supplement to what is currently being done with the excise tax, not as simply a realignment of the tax burdens or as a substitute for those current uses.

Just as it was previously emphasized that deterrence alone offers only part of the rationale for the tobacco tax increase, so too is it the case that cost-shifting needs to be understood as an incomplete justification for this tax proposal if it were to be divorced from the deterrence goal. Some of the economics literature on tobacco taxes suggests that earlier mortality associated with smoking saves society more in resources than the smokers actually pay in tobacco excise tax. Although this thesis would seem to place the tobacco industry in the awkward posi-

196. See Kluger, supra note 6, at 735 (reporting that the 1992 average federal-state tax levy on cigarettes was $.46).

tion of claiming to be performing a public service by marketing lethal products, it also points out the need for caution in pronouncing that the health effects of smoking constitute a net economic loss for society.\textsuperscript{198}

\textbf{C. The Implementation of a Tobacco Tax Increase}

The politics of the last decade and a half offer ample support for the proposition that suggesting tax increases is the functional equivalent of grabbing an uninsulated electric wire: it may create quite a sensation at the time, but it is not recommended for long-term well-being.\textsuperscript{199} Still, the experience of the California, Massachusetts, and Arizona electorates in approving initiatives offers considerable encouragement to those who would propose that the public could support a specifically targeted tax increase that was consistent with its underlying image of what government ought to do and how it ought to be done.

In a politically charged environment, which history suggests is always the case when the tobacco industry's interests are threatened,\textsuperscript{200} capturing the imaginative high ground is an essential part of the battle for public support.\textsuperscript{201} The nature of the proposal can be conveyed by a label that underscores the fact that the increased tax on tobacco products is not a measure that would add to the general revenues of the government but instead would be linked directly to programs and effects that are in the public interest. The goals of the tax proposal might be expressed in a label such as "The Health Tax on Tobacco."

\textsuperscript{198} See KLUGER, supra note 6, at 734-37.  
\textsuperscript{199} See HILTS, supra note 11, at 175-84 (describing the wealth and influence of the tobacco lobby, which can be withdrawn from, or used to back opponents of legislators disfavored by the tobacco industry).  
\textsuperscript{200} See KLUGER, supra note 6, at 681-90 (describing the tobacco industry's concentrated lobbying efforts to combat society's increasingly intolerant view of smoking).  
\textsuperscript{201} An example of this phenomenon is the advertising campaign employed by those involved in the public health campaign to reduce the underage and minority populations' use of tobacco products. A rap music video is used to mock the tobacco industry and to lower some of the putative glamour associated with tobacco use. Video lyrics include "We use to pick it. Now they want us to smoke it. Yeah right, you must be jokin' . . . . Tobacco blacks it's killin' many." See Shari Roan, Laker, Rapper Team Up To Carry Anti-Smoking Message to Blacks, L.A. TIMES, June 12, 1990, at A3; KLUGER, supra note 5, at 704.
The appropriate size of the tax increase must depend on an assessment of a variety of political and pragmatic factors in the taxing state. The nature and the scope of each of the functions of the tax increase proposal—how much deterrence should occur because of the increased tax on the tobacco industry and how much cost-shifting ought to be accomplished through the tax—are the most critical determinants of the tax rate. In the three states that have enacted such a provision, the increases ranged from twenty-five cents per pack in California and Massachusetts to forty cents per pack in Arizona.\(^{202}\)

One final aspect of the proposal for an increased tax on tobacco products needs to be addressed. Anytime a tax proposal contemplates action on a state level that is likely not to be replicated by other states, one needs to anticipate the consequences of taxpayers looking for tax avoidance strategies.\(^{203}\) The Massachusetts experience, for example, included a period of hoarding of tobacco products in the period just before the tax increase went into effect.\(^{204}\)

When the tax is going to be levied on products that are sold in every state but taxed only in a few states, the tax can be avoided simply by purchasing the products in untaxed states.\(^{205}\) Although a law can be passed banning the importation of those untaxed items, one needs to account for the effects of the smuggling of tobacco products from low-tax states to high-tax states. After Arizona enacted its Tobacco Tax and Health Care Fund legislation in 1994, state agents confiscated 1.5 million cigarettes smuggled in from lower tax states.\(^{206}\)

The most serious impact of avoiding the higher taxes by purchasing cigarettes in a lower tax state is obviously the lower tax revenue that is available for the programs supported by the tax

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\(^{202}\) See Mass. Gen. Laws Ann. ch. 64C, § 6 (West Supp. 1996); Kluger, supra note 6, at 704, 735.

\(^{203}\) See Foreman, supra note 174, at 29 (accounting for a 33% decrease cigarette sales by noting increased sales in neighboring states).

\(^{204}\) Cigarette sales rose 20% in the month before the tax hike took effect, and declined sharply in the first month in which the increased tax was imposed. See id.\(^{205}\) See id.

increase, but that revenue loss problem can be solved fairly easily. Before the higher tax takes effect, the taxing state could establish a baseline of tobacco products sales in its own state and in the adjoining areas that would be the most likely venues to which its citizens would divert their purchase dollars to the lower taxed products. When the tax increase goes into effect, monitoring of the sales volumes in the respective areas can be used to gather data that would show shifting purchase patterns. The taxing state could then simply adopt a presumption that any increase in sales in the adjacent areas is attributable to tax avoidance by its citizens, absent some convincing explanation to the contrary.

Because the changing purchase practice of its citizens removes the possibility of collecting the tax based on the sales transaction itself, the presumption of tax avoidance would then have to form the basis for a surtax levied on the tobacco industry to cover the taxes that would have been collected had the taxing state’s citizens continued to purchase the products within the state. Each tobacco company would be required to pay to the taxing state, over and above its other tax burden, a share of the tax that would have been levied on the “shifted sales” in proportion to the sales of its products within the taxing state.

IV. CONCLUSION

The evidence is irrefutable that cigarettes and other tobacco products have been responsible for untold misery and massive expense in the last century. Undoing that history of suffering and death is of course impossible, but we owe it to future generations to address the health effects of tobacco products in a manner both more realistic and more courageous than that which has been displayed in the story recounted in these most recent books on the industry.

In the last two years, the legal system has moved from torpor to ferment on the tobacco and health issue, proceeding more aggressively on the half dozen litigation and regulatory fronts surveyed in this Review Essay. Although activity on those fronts is useful and the benefits are surely welcome, the viability of each as a long-term strategy raises at least a sufficient level of concern that the search for a solution to the smoking and health
problem needs to continue to expand into new areas.

The proposal set out here for a tobacco tax increase that is specifically directed at deterrence and cost-shifting goals offers another avenue for further investigation. Perhaps the strongest selling point for a strategy of increasing tobacco taxes is that it is forward-looking in its effects. Instead of going back and assessing blame for past transgressions, it offers a potential common ground on which citizens and policy makers can deal with the consequences of smoking on the public health and the public fisc, and can support effective measures to reduce those consequences over time.

The experience in the three states that have adopted more limited versions of the tax needs to be examined carefully. If that experience turns out to be positive, ways to capitalize on the strengths of this technique and to extend its application can be developed. It is true that no policy or program is going to be a panacea, but it is equally true that no promising path ought to be ignored.