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ARTICLE

BREATHE DEEPLY: THE TORT OF SMOKERS’ BATTERY

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Table of Contents

I. INTRODUCTION ........................................... 616
II. THE ROLE OF ADVERTISING .......................... 635
III. THE SMOKERS’ BATTERY CAUSE OF ACTION ....... 660
   A. Factual Cause ........................................... 672
   B. Legal Cause ............................................ 675
   C. The Consent Defense ................................. 676
   D. Assumption of the Risk Defense ................... 680
   E. The Preemption Defense .............................. 682
IV. DAMAGES .................................................. 687
V. EPILLOGUE—WHY BATTERY? ............................ 694

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I. INTRODUCTION

Smoking kills 434,000 Americans each year. That should be a sobering statistic, but we may be becoming inured to it. Recent widespread publicity about the newly uncovered dangers of tobacco and its addictive qualities, the mounting


2. As early as 1981, a case study reported that “nictitae” caused physical illness in workers in a tobacco manufactory. JAMA 100 Years Ago, 286 JAMA 2086, 2087 (1991). Recent studies reveal more detailed findings about the negative effects of tobacco on health. For example, cigarette smoking has recently been associated with an increased risk of leukemia in older smokers. See Dale P. Sandler et al., Cigarette Smoking and Risk of Acute Leukemia: Associations with Morphology and Cytogenetic Abnormalities in Bone Marrow, 85 J. Nat’l Cancer Inst. 1994, 1994 (1993) (concluding that cigarette smoking is associated with an increased risk of leukemia and that the association varies with age).

Both the Environmental Protection Agency and the Surgeon General have concluded that environmental tobacco smoke (ETS or secondhand smoke) harms the health of nonsmokers. See Office of Health and Environmental Assessment, U.S. Environmental Protection Agency, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders 1-1 (1992) [hereinafter Lung Cancer] (concluding that ETS causes approximately 300 lung cancer deaths annually in nonsmoking adults and heightens the risk of lower respiratory tract infections, asthma, fluid buildup in the middle ear, and respiratory tract irritation in nonsmoking children); Office on Smoking and Health, U.S. Dept of Health and Human Servs., The Health Consequences of Involuntary Smoking: A Report of the Surgeon General 10 (1986) [hereinafter Involuntary Smoking 1986] (concluding that involuntary smoking “is a cause of disease, including lung cancer, in healthy nonsmokers”). Recent research has begun to explain the connection between ETS and lung cancer. See Secondhand Smoke’s Effects, Wash. Post, Nov. 18, 1993, at A40 (noting a recent study’s finding that exposure to the smoke of a burning cigarette quadrupled the level of a potent carcinogen in nonsmokers’ bloodstream). In fact, restaurant and bar employees have about a 50% greater chance of developing lung cancer than office employees. Julie G. Shoop, Secondhand Smoke Threatens Restaurant and Bar Workers, Trial, Nov. 1993, at 18, 18 (observing that the increased risk is “in part attributable to tobacco smoke exposure in the workplace”).

In addition to the risk of leukemia, lung cancer, and other respiratory ailments, children who live with a smoking parent have lower levels of “good cholesterol” than children who live with nonsmoking parents. USA Today, Nov. 15, 1994, at 5D (suggesting that a child’s risk of developing heart disease is increased by secondhand smoke). Secondhand smoke may affect the outcome of custody battles. See, e.g., Unger v. Unger, 644 A.2d 691, 694 (N.J. Super. Ct. Ch. Div. 1994) (noting that “the effect of ETS is a factor that may be considered by a court in its custody determination” and instructing the court’s psychologist to consider it in drawing up her custody evaluation); Lizzie v. Lizzie, 618 N.Y.S.2d 934, 937 (N.Y. Fam. Ct. 1994) (declaring cigarette smoking to be a “pivotal issue” in the case and awarding father custody of the child because of the father’s decision to quit smoking); Heck v. Reed, 529 N.W.2d 165, 165 (N.D. 1995) (reversing lower court’s decision to grant custody to once-abusive father but ruling that mother’s custody should be conditional on her not smoking around her child).

A list of nearly 700 ingredients found in various cigarettes has recently been
evidence that tobacco manufacturers carefully monitor nicotine levels in cigarettes in order to ensure addiction and satisfy the cravings of smokers, and evidence that, since the 1950s,

disclosed. See Anastasia Toufexis, Are Smokers Junkies?, TIME, Mar. 21, 1994, at 62 [hereinafter Toufexis, Are Smokers Junkies?]. (Indicating that some of these substances are classified as hazardous, “including some carcinogens”). Two other dangers have been associated with smoking. An Australian study has linked smoking to osteoporosis, an increase in bone fragility that accompanies aging. See John L. Hooper & Ego Seeman, The Bone Density of Female Twins Discordant for Tobacco Use, 330 NEW ENGL. J. MED. 287, 287 (1994) (concluding that women who smoke one pack of cigarettes each day throughout adulthood may suffer from a deficit in bone density that is sufficient to increase the risk of fracture). As well as increasing their own risk of abnormal pregnancy, women who smoke during pregnancy sharply increase the risk that their daughters will miscarry. See Robert Cook, Smoking, Pregnancy Danger, NEWSWEEK, Feb. 15, 1994, at 59 (discussing this so-called “grandmother effect,” which was discovered by a British study of 14,893 pregnancies).

3. The Surgeon General stated in 1988:
   After carefully examining the available evidence, this Report concludes that:
   * Cigarettes and other forms of tobacco are addicting.
   * Nicotine is the drug in tobacco that causes addiction.
   * The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.

OFFICE ON SMOKING AND HEALTH, U.S. DEPT OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION at i (1985) [hereinafter NICOTINE ADDICTION 1985]. On August 2, 1994, a panel of the Food and Drug Administration (FDA) found that nicotine was addictive and that the nicotine levels in cigarettes could addict the “typical smoker.” Marlene Simons, Key FDA Panel Finds Nicotine Addictive, L.A. TIMES, Aug. 3, 1994, at A1; see also Leslie Iversen, Introduction to BIOLOGY OF NICOTINE DEPENDENCE 1 (Greg Bock & Joanna Marsh eds., 1990) (noting that smokers develop a “clear psychic craving” for nicotine and exhibit tolerance to its effects); Paul B.S. Clarke, Mesolimbic Dopamine Activation—The Key to Nicotine Reinforcement, in BIOLOGY OF NICOTINE DEPENDENCE, supra, at 153, 154 (comparing the neurological effects of nicotine to those of amphetamines and cocaine and noting that “animals will work hard” for such stimulation). Many smokers started when young and the addictive power of nicotine has kept them hooked ever since. Emmanuel C. Nsafl, Products Liability: Breaking Through the Cocoon of the Cigarette Industry, 9 IN PUB. INTEREST 43, 48 (1989) (noting that about 85% of teenagers who smoke more than one cigarette become regular dependent smokers) (citing Donald W. Garner, Cigarette Dependency and Civil Liability of Cigarette Manufacturers: A Modest Proposal, 53 S. CAL. L. REV. 1425, 1444 (1980)).

4. In February of 1994, FDA Commissioner David Kessler wrote a letter to the Coalition on Smoking OR Health stating that the FDA was considering regulating the tobacco industry. John Schwartz, FDA Targets ‘Nicotine Delivery Systems’, WASH. POST, May 31, 1994, at A1, A11. The letter related that the FDA was accumulating evidence that tobacco companies artificially maintain the levels of nicotine in their cigarettes and other products. Id. In March of 1994, Kessler testified before the House Energy and Commerce Committee’s Subcommittee on Health and the Environment. Id. He described a 1972 internal memorandum written by a Philip Morris research supervisor who suggested that the company “think of the cigarette pack as a storage container for a day’s supply [and each] cigarette as a dispenser of a dose unit of nicotine.” Id.; see also Toufexis, Are Smokers Junkies?, supra note 2, at 62 (noting the researcher’s observation that “no one has ever become a cigarette smoker by smoking cigarettes without nicotine”). During his testimony before the House Subcommittee, Kessler charged Philip Morris with suppression of “groundbreaking” research concerning nicotine’s addictiveness and possible substitutes...
tobacco companies have been suppressing evidence and deceiving consumers about the dangers of tobacco\(^6\) and its addictive

that do not involve health effects. Schwartz, supra, at A11. Kessler also cited patents filed by tobacco companies as indicating the companies' ability to manipulate nicotine levels. Shannon Brownlee & Steven V. Roberts, Should Cigarettes Be Outlawed?, U.S. NEWS & WORLD REP., April 18, 1994, at 32, 35. Kessler testified that Brown & Williamson Tobacco Corporation "secretly developed a genetically engineered tobacco that would more than double the amount of nicotine delivered in some cigarettes" and that the company conceded having at least three million pounds of the tobacco in American warehouses. Warren E. Leary, Cigarette Company Developed Tobacco with Stronger Nicotine, N.Y. TIMES, June 22, 1994, at A1.

Allegations that tobacco companies manipulate nicotine levels are the subject of a major lawsuit filed by Melvin Belli and a coalition of high-profile lawyers on behalf of everyone who has ever been addicted to nicotine, seeking $5 billion for conspiracy and fraud on the part of the nation's major cigarette makers. Christopher J. Farley, The Butt Stops Here, TIMES, Apr. 18, 1994, at A9. Belli said "[w]e will prove that the tobacco industry has conspired to catch you, hold you and kill you."

Id.

The tobacco companies deny the allegations. See Carol Jouzaitis, High Stakes, Deep Worries of More Tobacco Regulation, CHI. TRIB., June 24, 1994, at 1, 12 (noting that the chairman of Brown & Williamson denied the existence of anything "sinister or secretive" concerning the company's development of a high-nicotine tobacco); see also John Schwartz, Internal Papers Fuel Tobacco Debate, WASH. POST, May 14, 1994, at A1, A13 (observing that Brown & Williamson denied that it increased the level of nicotine in its products "above that naturally found in the tobacco plant"). Tobacco companies admit that they can control the amount of nicotine in cigarettes, but contend that nicotine is controlled for purposes of flavor. See Jouzaitis, supra, at 12 (quoting Brown & Williamson chairman Thomas Sandefur's description of nicotine as a "flavoring agent").

5. Internal Brown & Williamson documents (which the company alleges were stolen by a former employee) reflect a debate within that company in the 1960s and 1970s about whether to disclose what the company knew about the hazards of cigarettes and try to make safer ones or to keep silent about their research and work to minimize the impact of the research of others. Philip J. Hilts, Tobacco Company Was Silent on Hazards, N.Y. TIMES, May 7, 1994, at A1. Apparently, this debate was echoed at the other major tobacco companies, and some of Brown & Williamson's documents and arguments were shared with executives of other companies through the Tobacco Industry Research Committee and later the Council on Tobacco Research. Id. at A11. The documents demonstrate that the general counsel for the company, apparently aware of the impending 1964 Surgeon General's Report, suggested in July of 1963 that the company "accept its responsibility" and disclose the hazards of cigarettes to the Surgeon General. Id. Apparently, that suggestion was rejected. Id. The research reports remained secret for 30 years and further work on safer cigarettes was halted. Id.

Even as far back as the 1950s, tobacco companies were aware of a link between smoking and cancer. Don Colburn, The Report That Kicked America's Smoking Habit, WASH. POST, Jan. 11, 1994, at 11 (noting that medical journals have reported a link between smoking and lung cancer since the 1950s). In 1954, to counter scientific studies linking cigarettes to cancer, six major cigarette manufacturers formed the Tobacco Industry Research Committee, a public relations arm of the industry. Michael J. Goodman, The Cigarette Papers, L.A. TIMES MAGAZINE, Sept. 18, 1994, at 34-35 (reporting that the manufacturers enlisted Hill & Knowlton, a world-class public relations firm, to plan a counterattack against new scientific studies linking tobacco to disease). In 1965, facing disclosure orders in several wrongful death lawsuits, a senior lawyer for Brown & Williamson recommended that much of the company's medical research in the "behavioral and biological area" be declared "dod-
qualities, even halting research into the development of safer

wood" and shipped to England, home of Brown & Williamson's parent company. Myron Levin, Tobacco Firm Sought to Cull Studies as 'Deadwood', L.A. TIMES, Aug. 2, 1994, at A1. The lawyer advised that no one "should make any notes, memos or lists" of the material. Id. A seasoned trial attorney and former president of the American Trial Lawyers Association, J.D. Lee, who is currently involved with Melvin Belli in a class action against the tobacco companies, opined that "[t]he evidence in these newly discovered files is so damning of the cigarette companies it is unreal." Mark Curriden, The Heat is On, A.B.A. J., Sept. 1994, at 58, 61.

Recent evidence reveals that one of the ways in which the companies have kept results of their studies and discussions from public scrutiny has been to maintain the involvement of attorneys in its processes, thus gaining the cover of attorney-client privilege or the work-product privilege. Id. at 61. In fact, in one case, a U.S. district court judge ruled that the companies had improperly used this privilege to hide documents from discovery. Haines v. Liggett Group, Inc., 975 F.2d 81, 83 (3d Cir. 1992). The ruling was reversed, however, and the trial judge was removed after the appellate court ruled that he had overstretched his authority in demanding to inspect internal company memos. See id. at 97, 98 (holding that the district judge had compromised the appearance of impartiality by, among other things, referring to the tobacco industry as the "king of concealment and disinformation" in a published opinion).

6. See Hiltz, supra note 5, at A1 (discussing Brown & Williamson's decision to remain silent about the health effects of smoking). In more than 100 documents, letters and cables from the 1950's and 1970's [sic] that provide a rare look at the internal discussions among tobacco executives, the officials spoke of the hazards of cigarettes and stated plainly to one another that nicotine is addictive." Id. In 1963, Brown & Williamson's general counsel wrote a 2000-word analysis, labeled "strictly private and confidential," which discussed the possible benefits and risks associated with disclosing the results of the company's research. Id. at A11. He noted that the research had shown some positive effects of nicotine, including weight loss and tranquilizing effects, and that "moreover, nicotine is addictive." Id.


Chronic intake of nicotine tends to restore the normal physiological functioning of the endocrine system, so that ever increasing dose levels of nicotine are necessary to maintain the desired action. Unlike other dopings, such as morphine, the demand for increasing dose levels is relatively slow for nicotine.

. . . A body [deprived of its accustomed dose of nicotine] craves for renewed drug intake in order to restore the physiological equilibrium. This unconscious desire explains the addiction of the individual to nicotine.

Id. at 13; see also Anastasia Toufexis, A Health Debate that Won't Die, TIMES, Apr. 18, 1994, at 61 [hereinafter Toufexis, Health Debate (noting that a nicotine-free cigarette introduced during the 1970s flipped) (emphasis added)].

Representative Henry Waxman, whose subcommittee recently investigated the tobacco industry's role in hiding information about nicotine addiction, charged that Philip Morris forced its scientists to withdraw a 1983 study from publication because it showed that nicotine induces addictive behavior in rats. Brownlee & Roberts, supra note 4, at 36. The study showed that nicotine functions as a positive reinforcer for rats. Scientists Say Nicotine Research Was Suppressed, L.A. TIMES, Apr. 23, 1994, at A57. The study revealed that rats pushed levers to inject themselves with nicotine much more frequently than they pushed levers to inject themselves with a saline so-
cigarettes, have prompted numerous efforts around the nation, through both litigation and legislation, to restrict

Philip Morris issued a statement denying that the company suppressed the research results, instead asserting that the authors had merely failed to complete Philip Morris's standard "manuscript review process." William J. Eaton, Nicotine Study Suppressed, Waxman Says, L.A. TIMES, Apr. 1, 1994, at A20.

7. The Assistant Director of Research at Liggett and Myers Tobacco Company has stated that his colleague had created a safer cigarette in research that began in 1955 and that the product was ready for the market in 1973. Philip J. Hills, Method to Produce Safer Cigarette Was Found in 60's, but Company Shelved Idea, N.Y. TIMES, May 18, 1994, at A20. However, he was told that the executives voted not to produce a safer cigarette, and they were not allowed to publish their paper that had described the work. Id. By the early 1960s, tobacco companies knew of many of tobacco's dangers and, in 1966, patented a critical step in making safer cigarettes that involved heating the tobacco rather than burning it. Id. Brown & Williamson tested the idea in a project, code-named "Ariel." Id. However, the prototype developed in project Ariel was never marketed. Id. According to company documents and interviews with scientists working on the projects, the company feared that it would make their other products look bad. Id. Since the 1960s, several tobacco companies have created cigarettes that can greatly reduce the amounts of disease-causing chemicals and can nearly eliminate secondhand smoke and the fire hazard of cigarettes, but they are not currently on the market. Id.

8. Several large-scale lawsuits have been filed in recent months against tobacco product manufacturers, including one filed on March 28, 1994 in New Orleans, charging the defendants with misrepresentation and fraud for denying and concealing the addictive nature of nicotine and for controlling and manipulating the levels of nicotine in cigarettes in order to create and sustain addiction. Castano v. American Tobacco Co., 870 F. Supp. 1425, 1430 (E.D. La. 1994) (listing over two pages of attorneys involved in the case and alleging claims on behalf of all nicotine-dependent persons in the United States). The plaintiffs seek recovery for economic losses and emotional distress and request punitive damages and equitable relief. Id. They have considered adding racketeering charges to their case. Claudia MacLachlan, Plaintiffs See Civil RICO in Nicotine Suit, Nat'l L.J., May 23, 1994, at 1. Flight attendants in Florida have sued for injuries caused by secondhand cigarette smoke in airplane cabins. Michael Janofsky, Ailing Smokers Sue the Tobacco Industry, N.Y. TIMES, May 7, 1994, at A11. Finally, a suit for $200 billion has been filed in the same Florida court by a group of smokers suffering from lung cancer and emphysema and contending that addiction has caused their health problems. Id. In this case, the plaintiffs accuse the industry of deceiving the public about the consequences of smoking by denying that it is addictive and by suppressing research. Id. In another case, the Supreme Court of Louisiana reversed a grant of summary judgment in favor of the defendants, permitting the plaintiff to go forward with his claims that cigarettes are "unreasonably dangerous per se," that the cigarette company suppressed health information about cigarettes, and that addiction makes continued smoking involuntary. Gilbey v. American Tobacco Co., 592 So. 2d 1263, 1266 (La. 1991). In early September, 1995, a San Francisco jury handed down the largest verdict ever in a tobacco liability lawsuit. Suein L Hwang, Former Smoker is Awarded $2 Million, WALL St. J., Sept. 5, 1995, at B8. The verdict, consisting of $1.3 million in compensatory damages and $700,000 in punitive damages, was awarded to a smoker who claimed to have contracted a rare lung disease from asbestos that Lorillard Inc. and its filter manufacturer used in Kent cigarette filters in the early 1950s. Id. Although the impact of this verdict on other smokers' suits was predicted to be "limited," one commentator noted that the flood of adverse publicity about the tobacco industry had "really prepared juries to focus on the industry's faults." Id.
tobacco sales, advertising, and use and place the tobacco product manufacturers under new scrutiny. From businesses\textsuperscript{10} and even towns\textsuperscript{11} declaring themselves to be smoke-free, to local bans on outdoor advertising of cigarettes,\textsuperscript{12} to a ban on smoking in public schools\textsuperscript{13} and places of work,\textsuperscript{14} to state and federal laws banning smoking in public places,\textsuperscript{15} to a ban on

Plaintiffs have also charged that cigarette advertising has violated various state consumer protection statutes. In a June 30, 1994 decision, the California Supreme Court held that the Cigarette Labeling and Advertising Act does not preemp\textsuperscript{16} a cause of action alleging that certain advertising allegedly aimed at inducing teens to smoke constitutes an unfair business practice under California law. Mangini v. R.J. Reynolds Tobacco Co., 875 F.2d 73, 83 (Cal.), cert. denied, 115 S. Ct. 577 (1994). In finding the plaintiff's claim cognizable, the trial court found that these practices offend public policy as reflected in the California statute prohibiting the sale of cigarettes to children. \textit{Id.} The California Supreme Court, quoting the lower court's opinion, declared that "the targeting of minors is oppressive and unscrupulous, in that it exploits minors by luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking despite its health risks." \textit{Id.} at 76 (quoting Mangini v. R.J. Reynolds Tobacco Co., 21 Cal. Rptr. 2d 223, 241 (Ct. App. 1993)). The court found persuasive the argument that the advertisements cause substantial physical injuries to the children. \textit{Id.}

9. See, e.g., David E. Rosenbaum, \textit{House Subcommittee Backs Cigarette Ban}, \textit{N.Y. Times}, May 14, 1994, at A20 (noting that the House Subcommittee headed by California Democrat Henry Waxman has approved legislation that would require any building entered by more than 10 people daily to ban smoking in all rooms that do not have a separate exhaust system); Farley, \textit{supra} note 4, at 58 (discussing the new law and its provisions requiring buildings to have smoke-free zones or face daily fines of $5000). Another House Subcommittee proposed to raise the tax on a pack of cigarettes to $1.25. \textit{Id.}

10. On February 23, 1994, the McDonald's Corporation announced that it would ban smoking in its 1400 wholly-owned restaurants. \textit{See 10 Largest Local Employers Based Outside the Area, Wash. Post}, Apr. 17, 1995, at F44.


13. \textit{See Brownlee & Roberts, \textit{supra} note 4, at 55 (noting that the House of Representatives recently approved a ban on smoking in all public schools).}

14. \textit{See Philip J. Hilts, Two States Adopt S\textit{trict Smoking Bans}, N.Y. Times, July 22, 1994, at A12 (reporting that California has banned smoking in any enclosed space that is also a place of employment). Maryland's Department of Licensing and Regulation has adopted a similar measure. \textit{Id.} In March 1994, the Clinton Administration proposed a ban on smoking in every workplace in the country. Frank Swoboda, \textit{U.S. to Propose Smoking Ban at All Work Sites}, Wash. Post, Mar. 25, 1994, at B1. (reporting that the ban is part of a broader plan to improve air quality in the workplace).}

15. Representative Henry Waxman introduced such legislation in the U.S. House of Representatives. \textit{See MacEachlan, \textit{supra} note 8, at A21 (pointing out that bills are pending in Congress to regulate tobacco manufacturing and sales and to ban smoking indoors unless smoking areas are segregated and separately ventilated). California has been the "trendsetter" in smoking restrictions. Cannon, \textit{supra} note 11, at A3. Seven other states, including Maryland, Colorado, Delaware, Idaho, Massachusetts-}
smoking in the White House, to a proposed significant increase in the federal tax charged on purchases of cigarettes, to the recent move by the Food and Drug Administration (FDA) to assert jurisdiction over cigarettes as drugs and possibly even ban those with addictive levels of nicotine, to a federal investigation of the industry, the effort to decrease the prevalence of smoking may be having an effect. Even partial success by these measures, while stemming the tide of new addicts, will still leave approximately fifty million remaining smokers in the United States alone. Of these smokers, 3.1

setta, Michigan, and Vermont, have also instituted smoking bans. Id.

16. See Parley, supra note 4, at 60 (pointing out that "President Clinton and Hillary Rodham Clinton sent a message that the war on smoking was getting personal when they banned smoking in the White House on Inauguration Day").

17. See H.R. 1246, 103d Cong., 1st Sess. (1993) (proposing to "increase excise taxes on cigarettes and other tobacco and tobacco-related products and to use the increased revenues to expand Medicaid eligibility, and for other purposes").

18. Recently, President Clinton announced that he will allow the FDA to begin the process of asserting regulatory jurisdiction over tobacco. Philip J. Hilts, President to Give F.D.A. a Big Role to Fight Smoking, N.Y. TIMES, Aug. 10, 1995, at A1. The next day, the President, admonishing the industry that "it is wrong as well as illegal to hook one million children a year on tobacco," proposed a sweeping set of regulations that would use the FDA's new power to prevent American teenagers from taking up smoking. Todd S. Purdam, Clinton Proposes Widespread Curbs on Young Smokers, N.Y. TIMES, Aug. 11, 1995, at A1. The proposed regulations would allow sales of cigarettes and chewing tobacco only to customers who are 18 or over and require proof of age; ban the sale of individual cigarettes or packs of fewer than 20; forbid brand-name tobacco advertising at sporting events and on products like T-shirts that are not related to smoking; forbid outdoor advertising within 1,000 feet of schools and playgrounds, and limit cigarette advertising in magazines with significant numbers of young readers to black and white text with no pictures. Id. at A1, A11. The same day, the nation's five largest tobacco companies sued the FDA in federal district court in Greensboro, North Carolina. Glenn Collins, Companies Sue to Prevent Control of Cigarette Sales, N.Y. TIMES, Aug. 11, 1995, at A10. The companies claimed that the proposed regulations exceeded the FDA's regulatory authority, hurt the companies' ability to compete in the marketplace, and violated their First Amendment rights. Id.

19. Curriden, supra note 5, at 58.

20. Richard Daynard, a law professor at Northeastern University and chair of the Tobacco Products Liability Project, describes the situation this way: "The tobacco industry has always been king of the mountain, able to beat down plaintiffs one by one. But everyone has started rushing the mountain all at once, and the king no longer looks invincible." Id.

21. "With more than 400,000 Americans succumbing every year to the effects of tobacco, industry executives are locked 'into a perpetual search for new (young) smokers. Their need is as gruesome as it is basic—live ones to replace the dead ones." Bob Herbert, Avoiding the Obvious on Tobacco, N.Y. TIMES, Mar. 6, 1994, at A15. I use the term "addicts" carefully yet justifiably here, given the recent definitive evidence that nicotine is addictive. Refer to notes 4, 6 supra.

million are teenagers, seventy percent of whom became addicted to cigarettes by the age of eighteen. Ninety-seven percent are unable to quit the habit even after several attempts. Like their elders, they too will succumb to cancer, emphysema, heart disease, chronic bronchitis, leukemia, and other diseases. These tobacco victims, when they fall prey to the diseases and death caused by tobacco smoke and nicotine, seem to deserve some compensation from tobacco manufacturers for

are even more frightening considering the fact that approximately 10 million Americans have died from tobacco-related diseases. Curriden, supra note 5, at 88. In fact, cigarette smoking is the “single largest preventable cause of premature death and disability in the United States” and causes over 16% of all deaths. Preface to IN Voluntary Smoking 1986, supra note 2, at 3.


24. “Each year, nearly 20 million people try to quit smoking in the United States, but only about 3 percent have long-term success.” PREVENTING TOBACCO USE 1994, supra note 1, at 31 (citations omitted). “Surveys indicate that more than 70 percent of smokers want to quit [and] every year, one American smoker in three tries to quit, but 90 percent fail by year’s end.” Herbert Kleber and David Conney, Don’t You Believe that Nicotine Isn’t Addictive, N.Y. TIMES, Apr. 4, 1994, at A14 (Letter to the Editor) (the authors are addiction researchers). Out of those people who successfully abstain from cigarettes for a year, about a third relapse. Id. “Even among addicted persons who have lost a lung because of cancer or have undergone major cardiovascular surgery, only about 50 percent maintain abstinence for more than a few weeks.” PREVENTING TOBACCO USE 1994, supra note 1, at 31.

25. Refer to note 2 supra for a discussion of recent research into tobacco-related diseases. Many other dangers of tobacco have been long established. See Office on Smoking and Health, U.S. DEPT of HEALTH and HUMAN SERVS., THE HEALTH BENEFITS OF SMOKING CESSATION: A REPORT OF the SURGEON GENERAL 107, 147-59 (1990) (discussing tobacco’s causal effect and contribution to several diseases including oral cancer, lung cancer, esophageal cancer, pancreatic cancer, and bladder cancer); Office on Smoking and Health, U.S. DEPT of HEALTH and HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE: A REPORT OF the SURGEON GENERAL at i-ii (1984) (reporting the contribution tobacco makes to chronic obstructive lung diseases such as chronic bronchitis and emphysema); LUNG CANCER, supra note 2, at 1-2 (observing that tobacco is known to cause cancer, particularly in the lungs, and other respiratory disease as well as contributing to heart disease).

Cigarette smoking has been linked to hearing loss, tissue hypoxia, retinal degeneration, myocardial infarction, and early menopause. Bryan D. McElvaine, Note, Liability of Cigarette Manufacturers for Smoking Induced Illnesses and Deaths, 18 Rutgers L.J. 165, 179 (1986). There are specific health difficulties suffered by pregnant women, such as greater chances of miscarriage, stillbirth, and premature births. David M. Reaves, Comment, Strict Products Liability on the Move: Cigarette Manufacturers May Soon Feel the Heat, 23 San Diego L. Rev., 1137, 1141 (1986).

26. There are those who dispute the argument that smokers should be compensated for their suffering, viewing their suffering as self-inflicted. Bruce Levin, The Liability of Tobacco Companies—Should their Ashes be Kicked?, 29 Ariz. L. Rev. 195, 244 (1987). Some have argued either that smokers are equally as culpable as tobacco product manufacturers or that they voluntarily assumed the risks of smok-
the misrepresentation, fraudulent concealment, and deceit. and for the aggressive attempts to addict them when they were young and most vulnerable. Given the current interpretations of the relevant law, however, smokers have not yet been successful in their attempts to receive compensation from tobacco product manufacturers.

ing. Richard C. Ausness, Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems, 39 SYRACUSE L. REV., 897, 953 (1989). Unfortunately, though, because of all the judicially-sanctioned defenses available to manufacturers, this question is often not even reached by the courts. Refer to subparts III-C-2 infra for a thorough discussion of the defenses tobacco companies have used successfully against plaintiffs.

Even if cigarette smokers are somewhat blameworthy, the tobacco industry's blameworthiness is much greater. See Levin, supra, at 222-25 (arguing that tobacco companies should be liable because they are the ones who have placed a dangerous product on the market without even mentioning its addictive qualities). Levin argues that tobacco companies should not be entitled to assumption of the risk as an affirmative defense. See id. at 223. If the tobacco companies knew of smoking's risks and hid them, this is "blatant bad faith." Id. Even if their belief that smoking is harmless is held in good faith, they should be held liable—since they market the cigarettes, they are in a much better position to analyze the "mountains of technical material" about smoking than is the average consumer. Id.

When we examine the facts involved in the manufacture and distribution of cigarettes [under the requirements of the assumption of the risk defense], it becomes obvious that the defense should not be available to defendants in [this] area. The fundamental, basic facts to be remembered here are, first, that most cigarette smokers begin to acquire a habit-based dependency while still children, and, second, that the cigarette habit, once formed, is a clinging monster, escape from which is beyond the ability of many.

A.A. White, The Intentional Exploitation of Man's Known Weaknesses, 9 HOUS. L. REV. 889, 915 (1972) [hereinafter White, Intentional Exploitation].

27. Refer to notes 5-7 supra (discussing allegations that cigarette companies had knowledge of the dangers of tobacco use and actively kept this information from the public).

28. Most smokers pick up the habit in adolescence. Transmittal Letter to PREVENTING TOBACCO USE, 1994, supra note 1. In fact, the average age at onset of smoking is 14.5 years of age. Steven Roberts & Tracy Watson, Teens on Tobacco, U.S. NEWS & WORLD REP., Apr. 18, 1994, at 38. Nicotine dependence has been compared to dependence on opiates, heroin, and cocaine. See NICOTINE ADDICTION 1988, supra note 3, at 15 (declaring that the pharmacological and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine).

29. Tobacco product manufacturers have yet to pay a dime for injuries sustained as a result of smoking cigarettes. See Charles Straun, Major Lawsuit on Smoking is Dropped, N.Y. TIMES, Nov. 6, 1993, at B1, B5 (asserting that "after four decades the cigarette industry has been successful in defending itself in these cases, never settling nor paying any damages or compensation"). The tobacco industry has defeated smokers in several notable cases, including Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 250, 255-56 (6th Cir. 1988) (affirming the district court's judgment and holding that the claim of failure to warn under Tennessee state law was preempted by federal law and that cigarettes were neither defective nor unreasonably dangerous) and Ross v. Philip Morris & Co., 328 F.2d 3, 13-14 (9th Cir. 1964) (affirming the district court's judgment and stating that while a manufacturer is held as an absolute insurer against knowable dangers, the court cannot eliminate knowl-
This Article explores the long and faltering history of attempts to impose liability on tobacco product manufacturers. Part II traces the manufacturers' historical and current actions of targeting youth through both promotions and deceptive advertising. Part III argues in favor of an expanded cause of action against the manufacturers for the intentional tort of battery. Part IV discusses the prospect of awards of punitive damages in these cases, and the Epilogue summarizes other advantages of the battery cause of action.

Might something be wrong with our system of civil justice? Given that it was founded on the assumption that injured parties should be entitled to compensation for civil wrongs they suffer at the hands of those who do them harm,30 might that system have failed the injured who happen to be cigarette smokers? How the law treats smokers is important: "The question of whether tobacco companies can be held liable for their products—a question still not resolved—profundely impacts upon the public interest."31 Still, with few exceptions,32 since the 1960s courts have been rubber-stamping defenses...
created by the tobacco industry.\textsuperscript{33} Regardless of the efforts following World War II to impose strict products liability on the manufacturers of defectively dangerous products based on the theory that the cost of an injury should be borne by the manufacturer,\textsuperscript{34} the tobacco industry has yet to pay out even one dime for the deadly injuries suffered by smokers.

One reason for this may be that millions of dollars worth of lobbying efforts by the cigarette manufacturers have effectively staved off substantial regulation or the creation of industry-funded compensation schemes.\textsuperscript{35} With the 1965 publication of the Restatement (Second) of the Law of Torts ("Restatement"), the American Law Institute itself handed a legal defense to the cigarette manufacturers by way of section 402A,\textsuperscript{36} comment i, when it noted, "[g]ood tobacco is not unreasonably

\textsuperscript{33} See Jason Crawford, Note, Overcoming Tobacco Company Immunity: Cipollone Clears an Uncertain Path, 27 GA. L. REV. 253, 276 (1992) (noting that courts have relied on defenses of unforeseeability, assumption of the risk, and contributory negligence "without significant analysis"). It has been said that there are "two reasons for tobacco's perfect win-loss record: the industry's history of hiring the best lawyers and . . . its ability to dictate the standards by which it is judged." Curriden, supra note 5, at 59. One critic has used the phrase "special immunity" to describe the historic treatment that the courts have given cigarette manufacturers. Richard A. Daynard, Smoking Out the Enemy: New Developments in Tobacco Litigation, TRIAL, Nov. 1993, at 16. This apparent immunity could be explained by viewing the issue through the lens of the legal realist. From that perspective, the hold of tobacco companies on the local economies in many cities throughout the country affects judges deciding these cases and eases their consciences as they interpret ambiguities in legal doctrine in favor of the companies. Refer to note 286 infra.

To understand the companies' apparent immunity, one might look at the nuisance case of Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). The Boomer court conceded that dirt, smoke, and vibrations from the defendant cement company's operations caused a tremendous hardship to those living in the vicinity. Id. at 871. The court also noted that the plant was worth $45,000,000 and employed over 300 people. Id. at 873 n. *. Reasoning that the "total damage to plaintiffs' properties is . . . relatively small in comparison with the . . . consequences of [an] injunction [shutting down the plant]," the court denied the injunction and instead limited plaintiffs' relief to "permanent" damages for past and future harms. Id. at 872, 875.

\textsuperscript{34} Refer to note 54 infra.

\textsuperscript{35} In 1992, the industry gave $5.6 million to political candidates for federal offices. Curriden, supra note 5, at 59. In 1991-92, "the tobacco industry contributed $2.39 million to Congress, including PAC money and donations from executives." Roger Rosenblatt, How Tobacco Executives Live With Themselves, 89 BUS. AND SOC'Y REV. 22, 24 (1994). In 1993, the $1.6 million in campaign contributions were only a fraction of the contributions made on behalf of the cigarette lobby. Brownlee & Roberts, supra note 4, at 83. The tobacco industry also contributes to charities favored by key lawmakers and even their spouses. Id. For example, Representative Tony Hall's Hunger Institute received the most contributions. Id. Hall is the swing vote on the House Rules Committee, which decides whether the anti-smoking bills ever get to the floor. Id.

\textsuperscript{36} Section 402A, entitled "Special Liability of Seller for Physical Harm to User or Consumer," discusses strict liability.
dangerous merely because the effects of smoking may be harmful. In the years since, this comment has essentially deprived most smoker plaintiffs of even the possibility that courts might find cigarettes to be defectively dangerous.

37. Section 402A, comment i states:

"Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

RESTATMENT (SECOND) OF TORTS, § 402A, comment i (1965). Given comment i, one should not be surprised to learn that the R.J.R.-Nabisco Foundation has contributed $200,000 to the American Law Institute's project, "Enterprise Responsibility for Personal Injury," AMERICAN LAW INSTITUTE, THIS IS THE AMERICAN LAW INSTITUTE (1994). Apparently, the lobbying efforts of the tobacco product manufacturers over the years have had their effect on moves to control the industry. One congressman summed up the problem by saying: "Let's face it, though. When you combine the money and power of the tobacco . . . . interests with advertising agencies, newspapers, radios, and television . . . . there is too much political muscle involved to expect much accomplishment." A.A. White, Strict Liability of Cigarette Manufacturers and Assumption of the Risk, 29 LO. L. REV. 599, 601 n.33 (1969) [hereinafter White, Strict Liability].

38. See Daynard, supra note 33, at 15 n.14 (noting that early courts followed comment i and tended to find tobacco companies not liable if the tobacco was "good tobacco" but that some state and federal courts have recently discarded this view). A law professor who wrote on this issue back in 1969 may be surprised at the hold which comment i to § 402A has had on the law, as he stated even then, "[a]s surely the courts will not follow such false analogies as those contained in [c]omment i which equates cigarettes to butter and sugar to reach such absurd results." White, Strict Liability, supra note 37, at 619. Professor White's article was, in hindsight, an excellent critique of both the defenses then being developed by the cigarette industry and the courts' acquiescence in those defenses. Professor White maintained that notwithstanding comment i, cigarettes are "defective and unreasonably dangerous" in the common sense meaning of those terms. Id. at 620. Further, warnings should not reduce the manufacturers' liability in view of the industry's heavy advertising, the strength of the habit, and the fact that most smokers start young. Id. at 620-22.

Thus, White argued that cigarette companies should be held strictly liable for the harm caused by their products unless they can prove the smoker assumed the risks of smoking. Id. at 622. White would allow assumption of the risk only if the tobacco company proved the smoker had "actual knowledge of the risks, full appreciation and understanding of them, and [engaged in] action voluntarily encountering them." Id. While Professor White's critique of the application of various comments to § 402A to the cigarette issue were insightful, they have been largely unheeded by the courts over the ensuing 25 years. See, e.g., Hite v. R.J. Reynolds Tobacco Co., 578 A.2d 417, 420-21 (Pa. Super. Ct. 1990) (recognizing that the Pennsylvania courts have adopted 402A and comment i, and holding that "good tobacco" is not unreasonably dangerous). However, some courts have attempted to narrow the scope of comment i's preclusion in other ways. See, e.g., Burton v. R.J. Reynolds Tobacco Co., 854 F. Supp. 1515, 1522 (D. Ky. 1991) (declaring that although "good tobacco" may qualify for comment i's protection, tobacco containing chemical additives or foreign substances may be unreasonably dangerous); Rogers v. R.J. Reynolds Tobacco Co., 557 N.E.2d 1045, 1053-55 & n.8 (Ind. Ct. App. 1990) (accepting that comment i instructs
One may initially be sympathetic to the defenses proffered by the tobacco product manufacturers. In the 1960s, before evidence concerning the dangers of tobacco had been widely disseminated, but not before the cigarette manufacturers knew of its dangers, the primary defense employed by the companies was that the harm from smoking was unforeseeable. Then, with the 1964 publication of the United States Surgeon General’s Report concluding that cigarettes cause cancer, and the ensuing public awareness of the dangers of tobacco, the industry needed to search for additional arguments against

that a product is not unreasonably dangerous if its dangers are known to the community while acknowledging that cigarettes could be deemed unreasonably dangerous if their addictiveness was not known in the community or if tobacco companies had rejected safer alternative cigarette designs).

Also, a few courts have recently begun to buck the trend and have imposed forms of strict liability on tobacco manufacturers. The Willks court recently imposed absolute liability upon a cigarette manufacturer based on the fact that, in order to effectuate the policy objectives underlying the doctrine of strict liability, cigarette manufacturers must be held liable for the death and disease arising from the use of their products. Wilks v. American Tobacco Co., No. 91-12, 356(B)(W), 1993 WL 226136, at *2 (Miss. Cir. Ct. May 11, 1993). Still, the company was not ultimately held liable, as the jury found insufficient causal relation between the plaintiff’s smoking and cancer. Deynard, supra note 33, at 23 n.1; see also Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1265 (La. 1991) (reversing defendant’s summary judgment because material fact issue existed as to whether cigarette manufacturers’ product was unreasonably dangerous per se); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1253 (N.J. 1990) (refusing to apply the “good tobacco” exception of 402A against plaintiffs).

Of course, comment i has not precluded lawsuits against cigarette companies based on dangers from cigarettes other than those inherent in tobacco use. See Hwang, supra note 5, at B8 (reporting a jury’s award of $1.3 million in compensatory damages and $700,000 in punitive damages to a smoker who claimed to have contracted a rare illness from asbestos-laced filters used in Kent cigarettes during the early 1950s).

39. Refer to notes 5-7 supra (taking notice of the various sources that reveal the tobacco companies’ knowledge of the risks associated with smoking).

40. Crawford, supra note 33, at 276. In Larrique v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), cert. denied, 375 U.S. 865 (1963), the defendant successfully argued that the plaintiffs began smoking at a time when the dangers of smoking were too unknown or unproven to provide a fair basis of liability. Id. at 39-40 (noting that to hold manufacturers liable for smoking injuries in 1963 would make them “insurer[s] against the unknowable”).

41. PUBLIC HEALTH SERVICE, U.S. DEPT OF HEALTH, EDUC. AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERV., 31 (1964) [hereinafter HEALTH EFFECTS 1964]. Before the issuance of the report, the tobacco industry tried to minimize its impact by confidently asserting that it would find no link between smoking and cancer and even recommending tobacco stocks as “good buys.” PTA Pushes Effort Against Cigarette Ad Appeals to Teens, Advertising Age, June 3, 1963, at 78.

42. See Paul Raeburn, 26% of Americans Still Smoke 30 Years After Surgeon General’s Report, CH. TRIB., Jan. 10, 1994, at 2 (recognizing that the 1964 Surgeon General’s report generated heightened public concern and awareness about tobacco usage and caused a 20% decrease in cigarette consumption).
liability—hence the more aggressive stance of blaming the victims with the defense of assumption of the risk. While the appropriate use of this defense continues to be widely debated, particularly as it has been applied to minors, it

43. See William Ryan, BLAMING THE VICTIM at xiii (rev. updated ed. 1976) (explaining the nature of this phrase, which originated in the Welfare Rights Movement of the 1970s, as “justifying inequality by finding defects in the victims of inequality”).

44. See Roger J. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 370 (1965) (reasoning that “abundant public discussion of the cancer-producing possibilities of cigarette smoking has insured common knowledge of potential dangers”). The author, then Chief Justice of the California Supreme Court who helped to draft § 402A of the Restatement, discussed at length the question of whether injuries from the use of tobacco should be compensable under § 402A in light of the statement in comment I that “good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful.” Id. Even in 1965, the validity of the assumption of the risk defense in the smoking context was questioned by Justice Traynor, who cautioned that “[g]iven the habit-forming nature of cigarettes, it is questionable how voluntarily many consumers are continuing to smoke.” Id. at 371. Justice Traynor authored the influential products liability case of Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 898 (Cal. 1963). Greenman was a major precursor to § 402A of the Restatement. See Wilks v. American Tobacco Co., No. 91-12, 355(B)(W), 1993 WL 326136, at *1 (Miss. Cir. Ct. May 11, 1993) (stating that § 402A owes its origin to Greenman). Justice Traynor’s article was published when the Restatement was still in tentative draft form. See Traynor, supra, at 365 n.14 (citing the Restatement as Tentative Draft No. 10, 1964).

In a law review article published the following year, Richard Wegman concluded that, in light of the extremely broad publicity given to the Surgeon General’s Smoking Report, it was almost inconceivable that a rational smoker could claim to be unaware of the risks involved in smoking, and that “if the defense [of assumption of the risk] is to have any viability at all, it ought to apply in a cigarette-cancer case.” Richard A. Wegman, Cigarettes and Health: A Legal Analysis, 51 CORNELL L.Q. 678, 721 (1966). Other authors disagree. See Ausness, supra note 26, at 554-55 (opining that because smokers, who are generally “hooked on” cigarettes, were not aware of the risks associated with smoking until 1964, tobacco companies cannot persuasively argue that smokers voluntarily assumed the risks).

45. Refer to subpart III(D) infra (addressing the defense of assumption of the risk in more detail). Legislative changes may be the most successful way to assure a fair opportunity for cigarette plaintiffs to reap benefits. In Florida, legislation enacted on May 27, 1994 has granted the state the right to bring class actions against cigarette manufacturers on behalf of its Medicaid recipients who smoke. Larry Rohter, Florida Prepares New Battle to Sue Tobacco Industry, N.Y. TIMES, May 27, 1994, at A1, B18. The legislation outlaws the use of the assumption of the risk defense by cigarette manufacturers in these cases. Id.

Recently a few courts have resisted the pressure to make it difficult for plaintiffs to prevail against tobacco companies. The Wilks court, for example, observed that

[It is clear that to effectuate the policy objectives underlying the doctrine of strict liability—the reduction of hazards to life and health and placing responsibility on the manufacturer for injuries caused by his defective products—cigarette manufacturers must be held liable for the deaths and disease arising from the use of their products.

Wilks, 1993 WL 325136, at 2 (granting the plaintiff’s motion to impose absolute liability on the defendants). The Wilks court then proceeded to grant the plaintiff’s motion to strike assumption of risk as a defense. Id. at 3. In spite of this forceful decli-
has served to protect the tobacco industry to the present day."

* * *

46. One court held that, unless a minor's employer specifically instructed the youth of the dangers of a job and how to avoid them, the issue of whether the minor assumed the risk of dangerous employment was a question for the jury. *Texas & Pac. Ry. Co. v. Erick*, 20 S.W. 511, 513 (Tex. 1892), *cert. dismissed*, 154 U.S. 619 (1894). To avoid liability, the employer must inform the minor employee of not only the danger of the employment, but also the extent of the danger. *Id.* The minor also needs to have "sufficient experience and discretion" to understand and appreciate the risk. *Id.* Moreover, a minor is held to have assumed only "those ordinary risks [that] would be obvious to, or pointed out in a manner suited to, the comprehension of a youth of similar age, judgment, and experience." *Tabert v. Zier*, 368 P.2d 685, 690 (Wash. 1962). Thus, where a minor is concerned, ordinary risks are for evidential purposes always treated at the outset of the inquiry as extraordinary, and the burden of establishing the servant's comprehension of the particular risk is cast upon the employer." *Chicago, R.I. & E.P. Ry. Co. v. Easley*, 149 S.W. 785, 789 (Tex. Civ. App.—Amarillo 1912, writ ref'd).

It is difficult to see how a fair reading of the requirements as applied to the master-servant area leads to a sound conclusion that minors can be held to have assumed the risks of smoking. Many courts and scholars have agreed that minors, as well as adults, were unaware of the dangers associated with smoking, thus making assumption of the risk an inapplicable defense. Refer to note 6 *supra* (discussing reports alleging that the tobacco companies knew of tobacco's addictive qualities but failed to inform smokers); note 393 *infra* and accompanying text (asserting that there is evidence that teenagers' "choice" to smoke is not voluntary and thus they cannot be held to have voluntarily assumed the risk).

To apply the assumption of the risk defense, we must find that these children knew and fully understood the risks of cigarette smoking. That will be difficult, given advertising and promotions which at least muddy the waters, and at most make deliberate misrepresentations, on the issue of smoking and health. Refer to Part II *infra* (discussing in detail the relationship between advertising and smoking). Professor White, writing in 1969 of tobacco companies whose practice it was to hide the dangers of smoking, anticipated the use of this defense when he warned that "[i]t is . . . legally significant if cigarette manufacturers should defend against future damage suit actions by invoking assumption of the risk." *White, Strict Liability, supra* note 37, at 608. "It is . . . 'pure fiction,' speaking in the social context of our beginning teenage smokers where normal teenage pressures are intensified by an incessant bombardment of tempting advertising, to say that they assume the health risk of smoking." *Id.* at 602. "[I]f we say that by the time the cigarette habit is set these youngsters have assumed the risk, we are saying that they are competent to responsibly make a decision that may cost them up to 35 years of their lives." *Id.* at 603-04.

47. Early on, in 1965, a case came before the Third Circuit Court of Appeals in which a smoking plaintiff had been denied recovery based on the jury's finding that the plaintiff had assumed the risk. *Fitchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 482 (3d Cir. 1965), *cert. denied*, 392 U.S. 987 (1965). The plaintiff had begun smoking at the age of 15 and became an habitual smoker. *Id.* The jury determined that he had assumed the risks of smoking. *Id.* The appeals court held that no evidence was raised at trial to show that the plaintiff had knowledge of the risks of cigarettes, and thus the assumption of the risk defense should not have been submitted to the jury. *Id.* at 485-86. The court nonetheless, at least in principle, recognized the potential applicability of assumption of the risk in cigarette liability cases. *Id.* at 485-87. A classic example of the assumption of the risk defense appears in *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 208 (D.N.J. 1988), *aff'd in part, rev'd in part, and remanded*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in
To some, it may seem hypocritical for tobacco manufacturers to rely on the assumption of the risk defense while denying a causal connection between smoking and disease.\textsuperscript{49} Because lawyers are well acquainted with “arguing in the alternative,”\textsuperscript{49} the hypocrisy has not raised many legal eyebrows. The irony of these contradictory defenses, though, becomes even more pronounced when one notes that, as each new danger from tobacco has been uncovered, the industry has simply increased its advertising and promotion budget, which is now nearly four billion dollars annually,\textsuperscript{50} shifted the focus of its advertising to refute or distract consumers from each newly uncovered danger,\textsuperscript{51} and continued to argue that it is

\textbf{Footnotes:}

48. See, e.g., \textit{Cipollone}, 833 F. Supp. at 1492 (remarking, “defendants contend that Mrs. Cipollone was sufficiently warned by what these defendants contend was unproven and unreliable, and is barred from recovering from them . . . because she believed what they said about the subject of smoking and health”).

49. The cigarette manufacturers continue to deny a causal connection and even dispute the claim of danger from secondhand smoke. Recently, Philip Morris took out a full-page ad in major newspapers announcing that they “believe that secondhand smoke has not been proven to cause disease in nonsmokers.” \textit{E.g., Hous. Chron.}, Oct. 27, 1994, at A27.

50. Legal professionals may not see a contradiction in this form of pleading. See \textit{Fed. R. Civ. P. 8(e)(2)} (specifically allowing inconsistent or alternative pleadings).

51. Preface to \textit{PREVENTING TOBACCO USE 1994}, supra note 1, at iii. Largely because of the ban on cigarette advertising in broadcasts, there has been a shift from advertising to promotion. Id.
not responsible for these injuries because the injured smokers surely knew of the dangers of tobacco. Yet, "it was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed."  

It is primarily because of the strength of the assumption of the risk defense that strict product liability actions, now a common basis for tort recovery involving defective products,

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52. The unacceptable contradiction inherent in this argument became obvious during the Cipollone trial. At trial, the court recognized the internal inconsistency of the manufacturers' assertion that Rose Cipollone should have been held to have knowledge of the dangers of smoking commonly considered in the public domain. *Cipollone*, 683 F. Supp. at 1492. The defendants had asserted, at other times and in that court, that "the relationship between smoking and lung cancer is deficient and unreliable and without scientific and medical basis." *Id.* The inherent inconsistency in this position was deemed sufficient to permit the jury to infer that the defendants' contentions lacked good faith and credibility. *Id.* The irony of the defendants' position was compounded by its additional assertion that the type of cancer suffered by Mrs. Cipollone was not the type typically caused by or associated with smoking. *Id.* The implication here is that there are cancers caused by or associated with smoking, which again contradicts the defendants' general claim that smoking has not been shown to cause cancer. *Id.*

The contradiction did not get lost in the courts. Media accounts of the tobacco companies' battle against cigarette plaintiffs have picked up on it. "In beating back every individual suit that has been brought against them, the [cigarette] companies have maintained that anyone who takes up smoking knowingly assumes all the risks associated with smoking and that those who sue did not conclusively prove that smoking caused their illnesses." Rohrer, *supra* note 45, at A1.

Professor White noted the contradiction even back in 1969. White, *Strict Liability*, *supra* note 37, at 610-11. White realized the likelihood that cigarette producers would counter damages actions with the defense of assumption of the risk. *Id.* at 599. He argued this defense, at least as applied to children, should be rejected as a matter of law. *Id.* at 604 n.75. "[T]he defendant should not be able to claim, as a matter of law, that plaintiff was aware of [the] risk which defendant incessantly and over long periods of time had been, by its advertising, telling plaintiff did not exist." *Id.* at 610-11.


54. The theory behind strict products liability is well established. "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring). Justice Traynor repeated his view in the majority opinion of *Greenman v. Yuba Power Pros*., 377 P.2d 897, 900 (Cal. 1962). In decisions following *Greenman*, the California Supreme Court held that a plaintiff is not required to prove lack of awareness of the defect. See, e.g., *Luque v. McLean*, 601 P.2d 1163, 1168 (Cal. 1972). In addition, the California Supreme Court has held that "the modern approach does not preclude liability solely because [the] danger is obvious." *Pike v. Frank G. Hough Co.*, 467 P.2d 229, 235 (Cal. 1970).
have been unsuccessful when brought by injured smokers.\footnote{55} This is so notwithstanding that the most common products liability test, that of balancing the risks of a product against its utility,\footnote{56} yields a result undoubtedly favoring smoker plaintiffs. Under this analysis, if a company markets a product whose risk is found to exceed its utility, the manufacturer will be held strictly liable for the damage the product produces.\footnote{57} With regard to tobacco, Professor White has concluded under this test that liability should rest with the tobacco product manufacturers.\footnote{58} The only arguable benefits of cigarettes, other than profits for the tobacco industry\footnote{59} and jobs for more


\footnote{56} See, e.g., Phillips v. Kimwood Machine Co., 626 F.2d 1033, 1039 (Or. 1974) (noting that no matter whether courts use the doctrine of negligence, ultra hazardousness, or strict liability, they are essentially making a risk-utility determination); O'Brien v. Muskin Corp., 465 A.2d 298, 304 (N.J. 1983) (asserting that the risk-utility test "has gained prominence"); see also White, Strict Liability, supra note 37, at 592-99 (weighing the claimed economic benefits of smoking against the drawbacks and concluding the balance is heavily on the debit side against smoking).

\footnote{57} See O'Brien, 463 A.2d at 306. In this products liability case, the plaintiff sued an above-ground swimming pool manufacturer. Id. at 301. The court declared that a jury issue existed as to whether, under the risk-utility analysis, the manufacturer was strictly liable for using a particularly slippery material on the bottom of the pool and failing to adequately warn about the slippery condition. Id. at 307.

While placing a warning on an otherwise defectively dangerous product might remove the danger, these actions do not always insulate companies from liability. See, e.g., Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1250 (N.J. 1990) (holding that placing warning labels on cigarette packages as required by the Federal Cigarette Labeling and Advertising Act, §§ 2-11, as amended, 15 U.S.C.A. §§ 1331-1340, does not immunize a tobacco company from a state tort claim for failure to adequately warn). Refer to subpart III(E) infra (discussing the effect of the federally-mandated cigarette package warnings on causes of action against the manufacturers).

\footnote{58} "Tobacco is neither food nor medicine, and it is doubtful that it satisfies any significant desires other than those of its own creation. . . . [T]he low utility of the [tobacco] industry and the gravity of the risks it poses makes it an appropriate industry for the imposition of such [strict liability] policy." White, Strict Liability, supra note 37, at 599. The Surgeon General's Advisory Committee has also noted that "it would be difficult to support the position that these attributes [minor health benefits of smoking] would carry much weight in counter-balancing a significant health hazard." HEALTH EFFECTS 1964, supra note 41, at 355.

\footnote{59} For example, even during the present period, when there have been significant efforts to rein in the tobacco industry, Philip Morris reported earnings, up 17.6% in the year preceding July 1994, of $1.2 billion. Glenn Collins, Philip Morris Posts Income Gain in Quarter, N.Y. TIMES, July 14, 1994, at D4. In the same report, sharp gains were reported in the sale of Marlboros. Philip Morris's decision to slash
than one million people employed in the industry nationwide, are claims that cigarettes somewhat increase the ability to concentrate and, for those already addicted, temporarily satisfy the addiction and hence ward off withdrawal symptoms. Weighed against these meager benefits, the risks are far greater, ranging from death by many different types of cancers to emphysema and various forms of heart and lung ailments. Notwithstanding the strength of this argument, however, very few courts have concluded explicitly that the risks of smoking outweigh the benefits.

The burden of comment i of the Restatement section 402A has proven to be yet another hardship that has hindered the ability of smoker plaintiffs to prove their product liability cases. Commonly known as the "inherent characteristics" exception, the rationale is that "one who purchases a product known to be unwholesome cannot charge unwholesomeness in a claim for injuries that resulted from the product" unless the article sold is dangerous to an extent beyond that which would be contemplated by the ordinary consumer. This comment has been particularly harsh in smoker lawsuits, as it lends itself to the interpretation that there should be no cause of action whatsoever based on smoking injuries.

When one steps back from the myriad of arguments and counterarguments that have been operating for almost three

the price of Marlboros raised accusations that the company was targeting the youth market. Refer to note 202 infra.


61. Nicotine Addiction 1988, supra note 3, at 149, 381-82. Additionally, one of the adverse effects of quitting smoking is considered to be weight gain. Health Effects 1994, supra note 41, at 355 (noting the "anti-obesity" effects of nicotine).


63. Refer to note 2 supra (discussing the various illnesses caused by tobacco).

64. E.g., Gilboy, 582 So. 2d at 1264. Courts often uphold jury verdicts imposing strict liability in the asbestos context. See Halphen v. Johns-Manville Sales Corp., 494 So. 2d 110, 114 (La. 1986) (finding the question of an asbestos manufacturer’s knowledge of the risks of the product irrelevant to strict liability determination); Boren v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1087-88 (5th Cir. 1973) (recognizing that even though the utility of asbestos may be great, the jury was entitled to find that the manufacturer’s duty to warn made asbestos unreasonably dangerous), cert. denied, 419 U.S. 869 (1974).

65. "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . ." Restatement (Second) of Torts § 402A cmt. i.


67. Refer to notes 36-38 supra and accompanying text (quoting comment i to § 402A and noting its effect on smoker’s lawsuits).
decades now, it all seems like a well-written tragicomedy. Private companies produce, advertise, promote, market, sell, and profit from substances that each year kill approximately 434,000 people in the United States alone and cost the nation in excess of sixty-five billion dollars in medical expenses and lost income. Then these same companies use the evidence of the dangers of their products and the publicity attendant on those dangers to blame the smokers and avoid liability. The companies reap profits of at least $3.1 billion annually while avoiding compensating their victims even one dime. The situation has become so bleak for the plaintiffs, and victories so ubiquitous for the tobacco industry, that tobacco victims now even have a hard time just finding counsel who will represent them.

II. THE ROLE OF ADVERTISING

An understanding of the role of advertising and promotion in the tobacco companies’ efforts to attract youthful consumers is key to understanding the basis of the suggestions made in this Article.

Eighty-five to ninety percent of new smokers start using tobacco during their teenage years, and sixty percent are addicted by the time they finish the ninth grade. Almost all

68. Refer to note 1 supra.


70. William Kepko, Comment, Products Liability—Can it Kick the Smoking Habit?, 19 AKRON L. REV. 269, 270 (1985); see also Collins, supra note 69, at D4 (indicating that the Philip Morris companies’ net income for 1993 was over $3 billion and that net income for one quarter in 1994 was $1.2 billion).

71. Cipollone cost three New Jersey law firms $5.2 million over 10 years to litigate. Curriden, supra note 5, at 58-59. Soon thereafter, the court in Haines denied plaintiffs counsel’s request to withdraw based on the assertion that the lawsuit had become an “unreasonable financial burden.” Haines v. Liggett Group, Inc., 514 F. Supp. 414, 418, 425 (D.N.J. 1983). “After ten years of protracted litigation and an expenditure of approximately $6.2 million, not one of the tobacco cases filed by Budd Lerner or its co-counsel [has] been ultimately resolved on the merits.” Id. at 421 (citing Opposing Brief at 1-2). Moreover, “the industry does everything it can to cause plaintiffs’ attorneys to spend a great deal of money.” Id. at 421 (citing Movimg Brief at 5). Not surprisingly, J. Michael Jordan, counsel for R.J.R., stated: “The way we won these cases was not by spending all of [RJR]’s money, but by making that other son of a bitch spend all of his.” Id. at 423 n.23 (citing Opposing Brief at 8).

first use has occurred by the time people graduate from high school.\textsuperscript{73} The Surgeon General determined in 1994 that “[m]ost people who are going to smoke are hooked by the time they are 20 years old.”\textsuperscript{74} Twenty-eight percent of high school seniors currently smoke cigarettes.\textsuperscript{75} Studies reveal that the earlier young people begin smoking, “the more heavily they are likely to use [tobacco] as adults, and the longer potential time they have to be users.”\textsuperscript{76} Because of nicotine addiction, “many of today’s adolescent smokers will regularly use tobacco when they are adults.”\textsuperscript{77}

The Surgeon General emphasized that “early addiction is the chief mechanism for renewing the pool of smokers.”\textsuperscript{78} This

\begin{itemize}
\item \textsuperscript{73} Philip R. Lee & David Satcher, Foreword to Preventing Tobacco Use 1994, supra note 1, at i.
\item \textsuperscript{74} Preface to Preventing Tobacco Use 1994, supra note 1, at iii.
\item \textsuperscript{75} Foreword to Preventing Tobacco Use 1994, supra note 1, at i.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Preface to Preventing Tobacco Use 1994, supra note 1, at iii. The Surgeon General has noted that
\end{itemize}

[d]rug addiction is the term most widely used to label various medical and social disorders related to the compulsive ingestion of psychoactive chemicals. The primary criteria for drug dependence are that the behavior is highly controlled or compulsive, the chemical is one whose mood-altering or psychoactive effects are central elements of the drug’s activity, and the drug itself has the demonstrated capability of reinforcing behavior. Preventing Tobacco Use 1994, supra note 1, at 30. Two medical disorders associated with nicotine addiction have been identified by the American Psychiatric Association: nicotine dependence and nicotine withdrawal. \textit{Id.} The first is “a psychoactive substance-use disorder characterized by a cluster of cognitive, behavioral, and physiologic symptoms that indicate that the person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences.” \textit{Id.} (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 166 (3d rev. ed. 1987) [hereinafter DSM-III-R]). The most common form of nicotine use is cigarette smoking, “in part because the rapid absorption of nicotine through the processes of smoking leads to a more intensive habit pattern that is more difficult to give up” than other forms of use. \textit{Id.} (quoting DSM-III-R, supra, at 181).

Tobacco-delivered nicotine can be highly addictive. Nicotine Addiction 1988, supra note 3, at 6. Each year, nearly 20 million people try to quit smoking in the United States, but only about 3% have long-term success. Preventing Tobacco Use 1994, supra note 1, at 31. Even among addicted persons who have lost a lung because of cancer or have undergone major cardiovascular surgery, only about 60% maintain abstinence for more than a few weeks. \textit{Id.} In a 1991 Gallup Poll, 70% of the people surveyed who smoked stated that they thought they were “addicted” to cigarettes. \textit{Id.} These findings are consistent with data from the 1985 National Household Survey on Drug Abuse (NHSDA) which found that out of the 12 to 17 year olds who smoked one pack or more per day, 84% felt that they “needed” or were “dependent” on cigarettes. Jack E. Henningfield et al., Involvement of Tobacco in Alcoholism and Illicit Drug Use, 85 British J. Addiction 279, 280 (1990). “The NHSDA data show that young smokers develop tolerance and dependence, increase the amount they smoke, and are unable to abstain from nicotine.” Preventing Tobacco Use 1994, supra note 1, at 31. Other researchers have made similar findings. Henningfield
is the point of cigarette advertising: to attract the young to begin smoking at an early age, to get them addicted, and thus to add new smokers to the pool of consumers to replace the dead ones.79 These new smokers will, once addicted, often continue smoking in spite of the dangers and ill effects of the activity.

"In the 1920s advertising sold the cigarette habit to the American public."80 During the 1940s, a Harvard Business School professor commented on the diminution of consumers' reservations about smoking, noting that "[t]he campaigns of testimonials featuring well-known personages and the picturing of the "right" kind of people smoking have undoubtedly had an influence in breaking down such prejudices .... [and] undoubtedly has played a part in speeding up social acceptance of women's smoking."81 Ten years later, an article discussing the cigarette industry observed that "[c]igarettes offer the classic case ... of how a mass-production industry is built on advertising."82

Until the early 1950s, when reports were published linking cancer to smoking, cigarette advertisers used explicit health claims and reassurances, such as "Not a Cough in a Carload," "No Throat Irritation," "More Doctors Smoke Camels Than Any Other Cigarette," and "Smoking's More Fun When You're Not Worried by Throat Irritation or 'Smoker's Cough.'"83 One tobacco company used slogans in bold type stating "Chesterfields Are Best For You", "Chesterfields Are As Pure As The Water You Drink And The Food You Eat", "A Good Cigarette Can Cause No Ills", "Nose, Throat And Accessory Organs Not Adversely Affected By Smoking Chesterfields", and "Play Safe Smoking Chesterfields."84 With greater public concern about

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et al., supra, at 281. Tolerance is a pharmacological phenomenon in which "after repeated doses, a given dose of a drug produces less effect or increasing doses are required to achieve a specified intensity of response." NICOTINE ADDICTION 1989, supra note 3, at 44. These findings suggest that the addictive processes in adolescents are fundamentally the same as those studied in adults. Id at 31.


81. PREVENTING TOBACCO USE 1994, supra note 1, at 172-73.


83. PREVENTING TOBACCO USE 1994, supra note 1, at 171. "[H]ealth claims were the most frequently made type of claim for the period before 1954." Id. at 180.

84. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 482 (3d Cir. 1965) (discussing whether cigarette advertisements containing health claims constitute war.
cancer, continuing these health claims was likely to increase consumer awareness of the suspected health risks of smoking. An article in *Fortune* magazine noted that many campaigns were so "riddled with warnings and appeals to fear" that "the present cigarette turmoil could be considered an inside job." A *Business Week* article pointed out that the manufacturers' explicit health claims were exacerbating consumer concern. The leading trade journal noted that tobacco companies had been warned that "the "health" theme was a risky one" and suggested companies sell ""pleasure" instead of health." Thus, "[a]s scientific evidence of the health risks of smoking became increasingly known to the general public in the 1950s and 1960s, the pseudoscientific claims" made earlier "were replaced by unadorned statements of filter effectiveness against tar and nicotine." These statements "strongly suggested that smoking a particular [cigarette] was significantly less harmful than smoking others.

Advertisers discovered that they were more successful when they cajoled "the smoker with soft, "gentle" phrases and oh-so-gay jingles." To determine how to cajole smokers, psychological research was conducted on the motivation of smokers. It concluded that "[a]dvertising makes cigarettes respectable, and is thus reassuring." Research also pointed to the importance of the themes of freedom and escape to smokers and also showed that the "psychological satisfactions" are, when implied, "the best material[s] for advertising." Advertisers thus recommended using "reassuring pictures, not words; images, not information[,] . . . employing visual imagery, lifestyle portrayals, and drama to create mood and attitude." In fact, a study of cigarette advertisements from 1964 to 1984

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86. *Cigarette Scare*, supra note 82, at 56.
87. PREVENTING TOBACCO USE 1994, supra note 1, at 171.
88. Id. at 180.
89. Id.
90. Id. at 172.
92. PREVENTING TOBACCO USE 1994, supra note 1, at 171.
93. PIERRE MARTINEAU, MOTIVATION IN ADVERTISING: MOTIVES THAT MAKE PEOPLE BUY 65 (1957).
94. PREVENTING TOBACCO USE 1994, supra note 1, at 171. The Supreme Court of New Jersey recently acknowledged the power of tobacco manufacturers to influence consumers by "saturat[ing] the public with information regarding the benefits of cigarette smoking, the aim of which is to rebut the assertions of public-health advocates and the Surgeon General." Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1238, 1234 (N.J. 1990).
revealed the notable characteristic that they showed virtually no smoke at all.95

The advertising efforts succeeded. "[F]requent and unabashed comments on the power of advertising"96 were commonplace. In 1953, the industry's trade publication observed that "'advertising . . . has become a powerful tool for the construction of the massive edifice of this industry.'"97 In 1963, the same journal noted that "'[t]he money invested by the tobacco industry in various forms of advertising and promotion essentially reflects the industry's faith in the effectiveness of advertising as a vital sales-building tool [and] appears justified by the continued annual rise in sales of cigarettes in this country.'"98 As a result of this advertising program, legislative efforts to deter smoking, such as the 1971 ban on cigarette advertising on television, were of limited success.99 In 1981, when the Federal Trade Commission reviewed the changes in cigarette advertising since the influential 1964 Surgeon General's report, it noted the continuing glamorization of smoking and found that in the last sixteen years there had been "'little change . . . Ads have continued to attempt to allay anxieties about the hazards of smoking and to associate smoking with good health, youthful vigor, social and professional success.'"100

The tobacco companies apparently agree on the importance of well-financed advertising to "fuel expansion" of their market.101 Advertising outlays are great:

In 1990, cigarette advertising and promotional expenditures grew to almost $4 billion, making cigarettes the second most promoted consumer products (after automobiles) in the United States. . . . Advertising and promotional expenditures account for 10 to 12 percent of the revenue generated by the tobacco industry in the United States. More than three quarters of these expenditures were for promotional activities, which had steadily increased to over $3 billion . . . .

In 1990, expenditures for outdoor advertising and transit posters for cigarettes were at an all-time high of $435 million.

95. Kenneth E. Warner, Tobacco Industry Response to Public Health Concern: A Content Analysis of Cigarette Ads, 12 HEALTH EDUC. Q. 115, 122-23 (1989) (asserting that "for the past two decades cigarette advertisers have considered smoke sufficiently undesirable as to air-brush it out of their ads").
96. PREVENTING TOBACCO USE 1994, supra note 1, at 173.
97. Id.
98. Id. at 174.
99. Id. at 174.
100. PREVENTING TOBACCO USE 1994, supra note 1, at iii.
101. Id. at 174.
The largest category of cigarette promotion that year was that of coupon use and retail value-added promotions, which at $1.2 billion represented nearly 30 percent of all cigarette advertising and promotional expenditures. . . .

In 1990, the cigarette companies also expended over $125 million on public entertainment (including sponsorship of sporting events and concerts). . . .

Cigarettes continue to be one of the most heavily advertised products in print media. In 1988, cigarettes ranked first among products advertised in outdoor media, second in magazines, and sixth in newspapers.102

This great increase in advertising and promotion expenditures in the print media resulted in an eight-fold increase in the volume of magazine advertisements for cigarettes between 1957 and 1977.103 Not surprisingly, tobacco companies were advertising their products in almost exact proportion to their market share.104

“One of the early consequences of motivation research was to help the industry give brands of cigarettes distinctly male or female identities,” enabling them to target specific consumer groups for market expansion.105 No brand more dramatically demonstrated this strategy than Marlboro, which in 1956 was converted through an enormously successful advertising campaign, from a previously stereotypical “female” cigarette106 to the stereotypical “male” image that culminated in the Marlboro Man.107 This success led Philip Morris to create another brand, Virginia Slims, with stereotypical female characteristics.108 “The success and durability of both these campaigns evidence the power of nonverbal imagery to communicate subjective values such as independence, masculinity, and femininity and to attract and retain consumers.”109

Studying the ways in which the Marlboro campaign

102. Id. at 160 (citations omitted).
104. Id.
105. PREVENTING TOBACCO USE 1994, supra note 1, at 172.
106. “Marlboro had long been sold as a woman's cigarette, with lipstick-colored filters and a 'Mild as May' slogan.” PREVENTING TOBACCO USE 1994, supra note 1, at 177.
107. Id. For an account of the transformation of Marlboro's image written by the advertising executive responsible for it, see Leo Burnett, The Marlboro Story: How One of America's Most Popular Filter Cigarettes Got That Way, THE NEW YORKER, Nov. 15, 1956, at 41.
108. Id. at 172.
109. Id.
targeted men sheds light on how current cigarette ads appeal to the young. In preparing to market Marlboros to men, a Philip Morris researcher determined that post-adolescents in search of an identity were “beginning to smoke as a way of declaring their independence from their parents.”\textsuperscript{113} In their search for the “right image to capture the youth market’s fancy,” the advertisers developed “commercials that would turn rookie smokers on to Marlboro.”\textsuperscript{111} They created the Marlboro Man, “a perfect symbol of independence and individualistic rebellion.”\textsuperscript{112} “The power of the associative psychological style of advertising was demonstrated by the Marlboro brand’s capture of a significant market share of starters every year, until it soon became the best-selling brand.”\textsuperscript{113} This theme of masculine independence has been used by advertisers of Camel, Newport, and Old Gold,\textsuperscript{114} who have, for example, featured race car drivers and sponsored racing events and teams.\textsuperscript{115}

Women have also been targets of the industry’s efforts to expand its market.\textsuperscript{116} Males had been the primary smokers early on,\textsuperscript{117} but in the 1920s, the American Tobacco Company hired an advertiser, Albert Lasker, for the Lucky Strike campaign.\textsuperscript{118} The advertising budget started at $400,000, growing to $19 million by 1931.\textsuperscript{119} The advertising campaign featured women and associated cigarettes with the attribute of slimness, selling the idea that smoking was an aid to weight loss.\textsuperscript{120} The theme was explicitly communicated by the slogan, “Reach for a Lucky Instead of a Sweet.”\textsuperscript{121} The company then hired the nation’s most famous public relations consultant, Edward Bernays. Bernays consulted with psychoanalyst A.A. Brill, who advised that cigarettes should be promoted as “symbols of freedom.”\textsuperscript{122} The company placed women in the 1929 New York Easter Parade carrying placards identifying the cigarettes they

\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} PREVENTING TOBACCO USE 1994, supra note 1, at 177. “In 1993, Marlboro commanded 21 percent of the domestic market share—by far the largest share.” Id. (citation omitted).
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 178.
\textsuperscript{116} Id. at 164.
\textsuperscript{117} Id.
\textsuperscript{118} JOHN GUNThER, TAKEn AT THE FLOOD: THE STORY OF ALBERT P. LASKER 163 (1960).
\textsuperscript{119} Id. at 169.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} PREVENTING TOBACCO USE 1994, supra note 1, at 165.
smoked as “torches of liberty.” Later, various cigarette campaigns featured movie stars, Miss America contest winners, women in heroic World War II roles, mothers, and brides. Some explicitly portrayed cigarette smoking as appropriate for young people. Lorillard ran a campaign that showed “a woman running on the beach [and] encouraged viewers to ‘Light an Old Gold for young ideas.’”

As advertisers made Marlboro a man’s cigarette, advertisements portrayed Virginia Slims as a woman’s cigarette, appealing to “feminine independence.” An advertising executive, who asked not to be named, was quoted in the Wall Street Journal as saying, “We try to tap the emerging independence and self-fulfillment of women, to make smoking a badge to express that.” Advertisements in major magazines depicting women as cigarette consumers peaked in the mid-1960s and again in the early 1970s, portraying “women jogging, biking, backpacking and playing tennis, all while smoking a cigarette.”

The industry’s power to use advertising to manipulate and expand its market has also been shown by its recent efforts to procure new black American smokers and to halt the decline in the number of adolescent blacks who smoke. The industry

123. Id.
125. PREVENTING TOBACCO USE 1994, supra note 1, at 166.
126. Id. at 178.
128. Holly Howe, An Historical Review of Women, Smoking and Advertising, HEALTH EDUC., May/June 1984, at 3, 8. “It would be difficult to argue that these positive images are not influential on young, image-conscious teenagers.” Id.
129. A study appearing in 1987 found that magazines targeting blacks had significantly more cigarette-advertising and more ads for menthol brands. K. Michael Cummings et al., Cigarette Advertising and Black-White Differences in Brand Preference, 102 PUB. HEALTH REP. 688, 700 (1987). Blacks are twice as likely to smoke menthol cigarettes as are whites. Id. The Surgeon General later commented that “[t]his racial disparity may mark the cigarette industry’s reaction to the notable decline in black adolescent smokers during the past decade.” PREVENTING TOBACCO USE 1994, supra note 1, at 184. One noteworthy method of attracting these smokers was the intensive use of billboards in black communities. Id. These billboards account for 37% of all billboards and most feature menthol brands. Id.; see also Richard W. Pollay et al., Separate, But Not Equal: Racial Segmentation in Cigarette Advertising, 21 J. ADVERTISING 45 (1992) (discussing the targeting of black consumers by cigarette advertisers and noting that such tactics have been used since the 1950s). In 1990, R.J. Reynolds abandoned an attempt to introduce “Uptown” ciga-
has also tried to recruit potential users of smokeless tobacco, following the 1986 enactment of new federal restrictions placed on its sale, advertising, and packaging. The effects of cigarette advertising on children have long been the object of concern for parents, educators, policy makers, and even advertising executives. "In 1929, a Senate

rettes, an extremely high tar cigarette targeted at blacks, in the face of severe public criticism. Id. at 45.

130. See PREVENTING TOBACCO USE 1994, supra note 1, at 163.
131. The Comprehensive Smokeless Tobacco Health Education Act of 1986 requires that (1) the public be informed of any health dangers of smokeless tobacco use, (2) smokeless tobacco advertising and packaging include three different warning labels, and (3) smokeless tobacco advertising be restricted from radio and television. Pub. L. No. 99-252, §§ 2-3, 100 Stat. 30, 30-32 (1986) (codified as amended in scattered sections of 15 U.S.C.). The Act also encouraged all 50 states to establish 18 as the minimum age to purchase smokeless tobacco. Id. § 2. Smokeless tobacco sales decreased from 1985 to 1988, but increased during the following three years. PREVENTING TOBACCO USE 1994, supra note 1, at 163. By 1991, annual consumption had returned to the 1985 level of over 120 million pounds consumed per year. Id. The increase can be attributed to "more aggressive marketing by the smokeless tobacco industry, new smokeless tobacco products, the teaming of smokeless tobacco with well-known sports and entertainment personalities, the increased accessibility of smokeless tobacco products, and a growing market of young males." Id. Since the enactment of the Comprehensive Smokeless Tobacco Health Education Act of 1986, promotional activities have gained increasing importance, partly because the Act banned radio and television advertising. Id.

Advertisements for these products have stressed that smokeless tobacco is easy to use, that it is convenient "in places where you can’t light up," and that "a pinch is all it takes." By providing explicit instructions for use (sometimes delivered by well-known professional athletes) and by suggesting that the product could be used without adult detection, smokeless tobacco advertisements have appeared to target male adolescents.

Id.

The strategy of attracting people to try smokeless tobacco has apparently succeeded. "In 1970, men over the age of 55 . . . were the heaviest users of moist snuff; by 1985, the usage rate was two times higher among males aged 16 through 19 than among older men." Id. See generally Arden Christen, The Case Against Smokeless Tobacco: Five Facts for the Health Professional to Consider, 101 J. AM. DENTAL ASSN 464 (1980) (discussing advertising of smokeless tobacco products and noting that demand is greatest among 18 to 30 year olds).

132. A founder of Young & Rubicam, which had previously worked for the tobacco industry, observed in 1964 that cigarette makers had continued to use "attractive boys and girls" as "decoys in cigarette advertisements." Bickhams Dserved, Young Says, ADVERTISING AGE, Feb. 3, 1964, at 3. He declared that advertising agencies "are retained by cigarette manufacturers to create demand for cigarettes among both adults and eager youngsters. The earlier the teen age boy or girl gets the habit, the bigger the national sales volume." Id. An agency executive who worked on the Marlboro account later wrote:

"I don't think cigarettes ought to be advertised. . . . [W]hen all the garbage is stripped away, successful cigarette advertising involves showing the kind of people most people would like to be, doing the [kind of] things most people would like to do, and smoking up a storm. I don't know any way of doing this that doesn't tempt young people to smoke. . . ."

PREVENTING TOBACCO USE 1994, supra note 1, at 173 (quoting from DRAPER DANIELS, GIANTS, Figsies AND OTHER ADVERTISING PEOPLE 245 (1974)). In 1981, the late Em-
proponent of amendments to the Pure Food and Drug Act declared, "[n]ot since the days when the vendor of harmful nostrums was swept from our streets, has this country witnessed such an orgy of buncombe, quackery and downright falsehood and fraud as now marks the current campaign promoted by certain cigarette manufacturers to create a vast woman and child market." Yet, in the 1920s, 1930s, and 1940s, despite an increasing overall number of smokers, the industry openly "continue[d] its efforts to recruit more young consumers." The U.S. Tobacco Journal reported in 1950 that "[a] massive potential market still exists among women and young adults," and it is both the immediate and long-term goal to recruit these millions of prospective smokers. "At a 1955 press conference announcing redesigned brand packaging, the president of Philip Morris Companies" explained the packaging thus: "We wanted a new, bright package that would appeal to a younger market." Philip Morris's advertising director was even more explicit: "Our ads are now aimed at young people and emphasize gentleness." It was only a few years later

In 1962, an article charged the American Tobacco Company, R.J. Reynolds, and Lorillard with using advertising and promotional activities aimed explicitly at young people. Cigarette Ads: A Study in Irresponsibility, CHANGING TIMES, Dec. 1962, at 33, 34. "Nowhere in that bright, wonderful world depicted in the ads is there any hint to youngsters that cigarettes might be harmful." Id. at 35. The National Congress of Parents and Teachers coined the expression "smokewashing" to imply that children were being brainwashed by cigarette advertising. PTA Pushes Effort Against Cigarette Ad Appeals to Teens, ADVERTISING AGE, June 3, 1963, at 78. Specific criticism was leveled at the American Tobacco Company's 1963 Lucky Strike campaign slogan: "Luckies separate the men from the boys, but not from the girls." American Tobacco Sets 'Adult' Theme for Lucky Strikes, ADVERTISING AGE, Aug. 5, 1963, at 102. A typical print ad from this campaign showed "a young man looking longingly at an accomplished, mature man (such as a race car driver) who was enjoying a cigarette while receiving recognition for a feat (such as a trophy for winning a race) and being admired by an attractive woman." PREVENTING TOBACCO USE 1994, supra note 1, at 169. LeRoy Collins, then President of the National Association of Broadcasters, called the campaign a "brazen, cynical flouting of the concern of millions of American parents about their children starting the smoking habit" because Lucky Strike well knows "that every boy wants to be regarded as a man." COLLINS 'RESSENTS' Luckies Ad; it's 'Brazen, Cynical', ADVERTISING AGE, Dec. 2, 1963, at 1.

133. PREVENTING TOBACCO USE 1994, supra note 1, at 166.
134. Id.
135. Id.
136. Id.
137. Id.
that Philip Morris launched a comic strip campaign featuring a “handsome, rough and ready” adventure hero, Duke Handy, placed in the Sunday color comic sections of forty newspapers nationally, supported by a heavy promotional campaign including “stories and ads in major newspapers . . ., Duke Handy campaign buttons, truck posters, newspaper display cards, newsboy competitions and supporting publicity and promotional activities.”

Tobacco companies maintained these youth-oriented marketing strategies even in the face of increases in youthful smoking and increasing reports from scientists warning of the health risks of smoking. A *Fortune* magazine article linked the reported increase in teen smoking to advertising: “[C]igarette ads often portray and seem to be pitched directly at young people.”

The focus of the cigarette companies’ research makes clear that youthful smokers have been their target. Documents generated by The Imperial Tobacco Company show that Imperial closely studied the questions of when and why young people begin smoking. Imperial determined that “[s]erious efforts to learn to smoke occur between ages 12 and 13 in most cases.” Imperial Tobacco Limited’s Players cigarette, for example, “evaluated the feasibility of a flavored cigarette targeted primarily at males aged 15 through 25.” Both Imperial and R.J. Reynolds-MacDonald generated several “research studies focused on beginning smokers; some of these studies identified the perceived risks and rationalizations of preteens and teens at smoking onset.” In documents produced for a case challenging Canada’s cigarette advertising ban, it has been

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138. *Id.*

139. *Embattled Tobacco’s New Strategy*, FORTUNE, Jan. 1963, at 100, 101 (reporting the statement of Dr. Herman B. Kraybill, Executive Director of the Surgeon General’s Advisory Committee on Smoking and Health, that current information “definitely suggests tobacco is a health hazard”). Estimates of smoking rates among adolescents 13 to 19 had increased from 25% in 1960 to 35% in 1962. The study also found that 44% of graduating seniors smoked. *Id.*

140. *Id.* at 120.

141. *PREVENTING TOBACCO USE* 1994, supra note 1, at 175. The study went on to note that “by the age of 16 or 17 many [young smokers] regretted their use of cigarettes for health reasons and because they feel unable to stop smoking when they want to.” *Id.*

142. *Id.* “The project was the subject of at least 33 different market research reports supplied by at least six external research sources over [a period] of just four years. Research documents discussed the behavior of 11, 12, and 13 year olds and the nature of the process of beginning to smoke.” *Id.*

143. *Id.*

learned that at least some tobacco companies "explicitly targeted youth as recently as the 1980s." 145 The company learned in its studies that "[t]he adolescent seeks to display his new urge for independence with a symbol, and cigarettes are such a symbol." 146

Creative guidelines for the Player's brand followed this lead, specifying that the target market would "emphasize the under 20 year-old group in its imagery reflection of lifestyle." 147 Conscious of their own self-regulatory agreement not to use models under twenty-five years old, the industry sidestepped its own rule using models that looked young despite being the required age. 148 The models used in Player's advertising were to be "25 years or older, but should appear to be between 18 and 25 years of age." 149 To target the young, who were perceived to be "extremely influenced by their peer group," an advertising agency recommended "imagery which portrays the positive social appeal of peer group acceptance." 150 Models appearing too young for the young consumer's taste were found not to sell cigarettes, as "[f]ew
decision later reversed by the Court of Appeals, declared an act of the Canadian Parliament banning cigarette advertising to be ultra vires to the Canadian Parliament and in violation of the free speech provisions of the Canadian Charter of Rights and Freedoms. Id. at 449. As of this writing, the Canadian Supreme Court has not decided this case on the merits.

145. PREVENTING TOBACCO USE 1994, supra note 1, at 175.
146. Richard W. Pollay & Anne M. Lavack, The Targeting of Youths By Cigarette Marketers: Archival Evidence on Trial, in ADVANCES IN CONSUMER RESEARCH 266, 267 (Leigh McAllister & Michael L. Rothschild eds., 1993) (quoting a study prepared by Imperial and several advertising agencies). Gaining a psychological understanding of their potential customers may have served the companies well. Outside studies showed that students intending to smoke had positive images of smoking and lower self-images with a great disparity between their self-image and their ideal self-image than did their peers. Dee Burton et al., Image Attributions and Smoking Intentions Among Seventh Grade Students, 19 J. APPLIED SOC. PSYCHOL. 655, 653 (1989) (finding seventh graders most vulnerable to smoking when they had a lower self-image coupled with an elevated image of "what sort of person a smoker is"). As a result of having a low self-image, these youth "may be drawn to smoking as a way of enhancing their low self-image, especially since smoking has been consistently associated with these attributes [i.e. being particularly healthy, wise, tough, or interested in the opposite sex] in advertising." PREVENTING TOBACCO USE 1994, supra note 1, at 192.

In the end, then, the onset of smoking may be caused largely by the discrepancy between one's self-image and one's ideal self-image—the greater this discrepancy, the more likely one is to try to make the self-image more like the ideal self-image by purchasing the product, suggested by advertisements. Id.

147. Pollay & Lavack, supra note 146, at 266.
148. SAM S. BAKER, THE PERMISSIBLE LIE 116 (1958) (noting one producer's admission that "it didn't matter how the young models looked, or how youthful their actions, as long as they possessed 'over twenty-five' birth certificates").
149. Pollay & Lavack, supra note 146, at 268.
150. Id.
teenagers, it seems, wanted an explicitly teen product, instead preferring to use products associated with adulthood.\textsuperscript{151} Clearly, the industry has consciously and intentionally targeted the young.

Even the images used in many of the cigarette advertisements "were carefully crafted to feature attainable activities [which were appealing] to youth but [which] were not so [aerobic] as to be unbelievable in the context of smoking."\textsuperscript{152} For example, a Player's Creative Guideline required the activity shown to "be one which is practiced by young people 16 to 20 years old or one that these people can reasonably aspire to in the near future."\textsuperscript{153}

The companies have employed substantial efforts to study the reasons that certain brands are successful with teenagers.\textsuperscript{154} Brands most successful with teenagers seem to be those that offer adult imagery filled with connotations of independence and self-reliance and those that offer the sense of freedom from authority.\textsuperscript{155} Imperial Tobacco tested ""overtly masculine imagery, targeted at young males."\textsuperscript{156} An RJR marketing strategy document asserted that "very young starter smokers choose [R.J. Reynolds's] Export A because it provides them with an instant badge of masculinity, appeals to their rebellious nature and establishes their position amongst their peers."\textsuperscript{157}

To cap off this advertising campaign aimed at attracting teenagers, one of Player's reports suggested that their cigarette show someone "free to choose friends, music, clothes, own activities, to be alone if he wishes... self-reliant enough to experience solitude without loneliness."\textsuperscript{158}

The search for the teenage market did not end in the laboratory. Since the 1980s, cigarette companies had been buying network radio time and sponsoring popular radio programs.\textsuperscript{159} A single hour of the Sir Walter Raleigh Review contained

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\item \textsuperscript{151} Preventing Tobacco Use 1994, supra note 1, at 176.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} See Follay & Laveck, supra note 146, at 268-69 (describing the exhaustive market analysis Imperial performed in order to compete with RJR's Export A brand for the "starters market" of young smokers).
\item \textsuperscript{155} Id. at 268.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id. at 268-69.
\item \textsuperscript{158} Id. at 269.
\item \textsuperscript{159} Specific examples include Camel Pleasure Hour, All Star Radio Revue, and Camel Caravan. Nannie M. Tilley, The R.J. Reynolds Tobacco Company 342 (1985).
\end{itemize}
seventy promotional references to Raleigh cigarettes. The true impact of tobacco advertising began with the advent of the television. By 1950, the companies sponsored more than seven hours of television each week. One writer in a tobacco trade journal pronounced cigarette companies "the dominant factor in television advertising sponsorship"—evidence of the companies' faith that 'it is an historically demonstrated certainty that the more people subjected to intelligent advertising, the more people will buy the product advertised.' By early 1962, tobacco companies spent most of their total promotional budget on television advertising.

However, the flood of cigarette advertisements did not end with television. It followed the young into their school sports programs, onto their books, and then into their colleges. In the 1950s, the American Tobacco Company

160. Fox, supra note 80, at 155.
162. Id.
163. Id. In 1964, the Federal Trade Commission observed that both the advertisements and their placement seemed destined to attract the young:
   Whether through design or otherwise, cigarette advertising is so placed that its audience is substantially and not merely incidentally or insignificantly, composed of nonadults [and] the cigarette industry[s] ... advertising, in emphatically reiterating the pleasures and attractions of smoking without disclosing the dangers to health, has exercised an undue influence over the large class of youthful, immature consumers or potential consumers of cigarettes.

Preventing Tobacco Use 1994, supra note 1, at 169.

In 1963, almost all firms bought air time during a large number of shows, 80% of whose audience consisted of persons under 21 years old. Id. Cigarette companies sponsored 55 shows with a total air time of 125 hours a week. Id. If the average half-hour television show had two commercials, teenagers were exposed to more than 1350 cigarette commercials during 1963 alone, and younger children faced over 845 commercials during that same year. Id. An analysis of the most frequently bought time slots found a significant correlation between the time slot and the number of teenage viewers. Id. at 169-70. The FTC concluded in 1968 that "in lot counting other sponsor identifications, this schedule likely exposed the average teenage viewer to over 60 full-length cigarette commercials per month." Id. at 170.

164. In 1948, Liggett & Myers Tobacco Company provided high schools with free football programs. Id. at 167. The scorecard found at the center of the program featured a two page ad for Chesterfield cigarettes. Id.
165. In 1958, plastic-coated book covers featuring school logos on front and cigarette ads on back were being used to promote Old Gold cigarettes to students in most of the country's 1800 colleges and almost a third of its 26,000 high schools. Id.
166. Philip Morris Public Relations Director James Dowling explained the special vulnerability of students thus: "Research and experience proved that the consumer, at this age and experience level, is more susceptible to change, has far-reaching influence value, and is apt to retain brand habits for a longer period of time than the average consumer reached in the general market." Eugene Gilbert, Advertising and Marketing to Young People 184 (1957). This special susceptibility meant that even though "the advertising cost per thousand in the college market is relatively high, the actual expenditure can be a great deal more efficient." Id.
targeted college students with a massive promotional campaign for Lucky Strike cigarettes. The campaign used college newspapers, campus radio stations, football programs, and extensive campus sampling and tie-in promotions. Cigarette firms were spending about five million dollars a year on college promotions in the 1950s. While many of these students had started smoking at earlier ages, the companies felt that “continual exposure to advertising to adults through the different media has its effects on young people.” Some college students earned money as agents for the companies, and some were awarded prizes in contests run by the companies.

Magazines have been used throughout the century to advertise cigarettes. In fact, by 1985, the percentage of all cigarette ads appearing in youth magazines had grown tremendously to reach a high of thirty-six percent showing that, “regardless of the advertisers’ intent,” “adolescent magazine readers are exposed to a large quantity of cigarette ads.” The fact that these companies target specific consumer groups is evident in the study of the array of print advertisements. For example, youth magazines are significantly more likely than other magazines to depict images of adventure, risk, or recreation, but are less likely to depict erotic imagery.

167. Id.
168. Id.
169. Id.
170. Id. at 167-68.
171. Brown & Williamson employed 17 salesmen on college campuses, and Philip Morris paid 168 campus representatives $50 a month to distribute free cigarettes. PREVENTING TOBACCO USE 1994, supra note 1, at 168.
172. Dean Francis J. Larkin, of the Southern New England School of Law, was himself the official campus representative for Lucky Strike cigarettes at Holy Cross College between 1952 and 1954. Dean Larkin stated: “I always had at least 5000 packs of the 5-cigarette pack in my room, in addition to a plethora of advertising material I was to put around the campus, including life-size blow-ups of Dorothy Collins and ‘Snoopy’ Lansome.” Interview with Francis J. Larkin, Dean of the Southern New England School of Law, in North Dartmouth, Mass. (Nov. 17, 1994).
173. The Liggett & Meyers Tobacco Company awarded students cash as prizes in its contests. PREVENTING TOBACCO USE 1994, supra note 1, at 168. Philip Morris ran a college contest offering record players in exchange for empty cigarette packages. Id. At New York’s Cortland State College, one sorority won several prizes by collecting packages accounting for 1,520,000 cigarettes. Id.
175. Id. at 232.
176. See Karen W. King et al., Changes in the Visual Imagery of Cigarette Ads, 1954-1986, J. PUB. POL’Y & MKTG., Spring 1991, at 63, 71 (stating that “[a]dventure activities appeared with the greatest frequency in cigarette ads from men’s magazines . . . while sexuality portrayals appeared with greatest frequency in ads from younger women’s magazines”).
177. David G. Altman et al., How an Unhealthy Product is Sold: Cigarette Ad-
most prevalent types of ads in younger women’s magazines feature the themes of individualism (30%), recreation (27%), and sociability (21%).

“[A]ds depicting incidents of horseplay and romantic contact are most prevalent in black- and youth-oriented publications . . . [although] magazines with a younger readership are more likely to run ads featuring horseplay.”

Even readers with low smoking rates are not forgotten. While appeals to readers with high smoking rates emphasize brand characteristics, appeals to less frequent smokers focus on “models, suggesting that smoking is fun, helps you make friends, and will make you desirable.”

The most frequently pictured themes in ads targeted at younger men are individualism (22%), work (22%), recreation (21%), and adventure (15%). These statistics show that “portrayals of individualism were more likely to appear in cigarette ads placed in younger men’s and younger women’s magazines.”

Other means have also been used to attract children to smoking. One has been the sale of candy resembling cigarettes. Of course, when challenged about this by the Federal Trade Commission, the tobacco companies disclaim any intent to lure children with candy cigarettes. In fact, candy cigarettes are still available in the U.S. Not surprisingly, a

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vertising in Magazines, 1960-1985, J. COMM., Autumn 1987, at 95, 100. Out of eight publications studied, Playboy had both the largest number of cigarette ads per issue and the lowest median audience age. King, supra note 175, at 77.

177. King, supra note 175, at 74.
178. PREVENTING TOBACCO USE 1994, supra note 1, at 182.
179. Id.
180. King, supra note 175, at 77.
181. Id.
182. Five U.S. candy manufacturers distributed candy cigarettes in packs which resembled the brands Camel, Lucky Strike, L&M, Marlboro, Pall Mall, Salem, Winston, Chesterfield, Oasis, Lark, and Viceroy. Tobacco Marketers Disclaim Intent to Lure Kids with Candy Cigarettes, ADVERTISING AGE, Mar. 18, 1967, at 97. Although candy cigarette manufacturers were purportedly not given permission to use the companies' packages or trademarks, the tobacco companies never objected to the trademark infringements. Id.
183. In 1987, the FTC complained to the tobacco industry that the self-regulatory code permitting the sale of candy and bubble gum in packages that resembled those of actual cigarette brands amounted to “an indirect form of advertising aimed at children.” Id. at 3.
184. In response to the FTC's concerns, one Philip Morris official was quoted as saying “the whole thing was I think rather asinine . . . Is Winchester behind toy guns? Is Jimmy Hoffa behind toy trucks?” Id. at 97.
185. Although candy cigarettes have become less widely available over the years, they have not been banned by law. PREVENTING TOBACCO USE 1994, supra note 1, at 171. “Some gourmet sweet shops still sell chocolate cigarettes. And K-Mart, undoubtedly in the interest of the economy-minded consumer, offers generic bubble-gum cigarettes.” Alan Blum, Candy Cigarettes, 302 NEW ENG. J. MED. 972, 972 (1980)
recent study observed that a significant correlation exists between the repeated purchase of candy cigarettes and cigarette smoking, even after the sample was controlled for parents' smoking status.186

The tobacco companies' involvement in sports has led to tremendous exposure of their messages to young people as the companies have been sponsoring sports teams and have used famous sports figures in cigarette advertising campaigns for some time.187 For example, in 1963, "Phillip Morris [sic], which employed athletes' endorsements of its Marlboro brand primarily to appeal to blacks, sponsored National Football League games on CBS and the league championship games on NBC."188 Other tobacco companies have done the same.189

To bypass broadcast advertising bans and self-regulatory constraints,190 yet still reach the youth market, the cigarette

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(letter to the editor from Alan Blum, M.D.). This author found candy cigarettes available in Provincetown, Massachusetts as recently as the summer of 1994.


187. R.J. Reynolds sponsored eight different baseball teams in 1963, while the American Tobacco Company sponsored six more. Ramona Bechtos, R.J. Reynolds is Leadoff Sponsor as '63 Baseball Emerges From Dugout, ADVERTISING AGE, Mar. 11, 1963, at 10.

188. PREVENTING TOBACCO USE 1994, supra note 1, at 168.

189. In 1963, the American Tobacco Company used the New York Giants' Frank Gifford in advertisements for Lucky Strikes. Id. "Brown & Williamson sponsored football bowl games, and Lorillard had signed to sponsor the Olympic Games of 1964 and was already broadcasting previews." Id. (citations omitted).

190. In 1965, the cigarette industry began creating a self-regulatory advertising and promotion code. Id. at 170. The code restricted ads that appealed to the young, prohibited distribution of promotional items to the young, prohibited ads in school and college publications, prohibited testimonials from athletes or other celebrities perceived to appeal to the young, prohibited ads in comic books or newspaper comics, and prohibited distribution of samples at schools. Id. Certain specific representations in advertisements were also prohibited, such as representations that smoking was essential to social success, and that the healthiness of models was due to cigarette smoking. Id. Also forbidden was the use of models participating in physical activity, or the use of models who were younger (or appeared younger) than 25 years of age. Id. However, the industry did not find its code particularly inhibiting. "Four months after the code was formulated, Viceroy ads featured young tennis players lighting up after a hot game. Salem showed a young couple playing giggly games alongside a waterfall. Newport displayed a fetching blonde nymph puffing away beside dashing waves." BAKER, supra note 148, at 116 (noting that, in 1966, this code was being referred to as "the Phantom Code"). While the code "prohibited cigarette advertising on shows whose audience was 'primarily' underage [45% or more of the viewers under 21.] R.J. Reynolds continued to sponsor The Beverly Hillbillies even though the audiences for two selected shows exceeded the code requirement." PREVENTING TOBACCO USE 1994, supra note 1, at 170.

The National Association of Broadcasters Code Authority, which reviewed all advertisements under the self-regulatory process, noted its concern in a confidential report:

[Smoking is made to appear universally acceptable, attractive and desi-
companies have sponsored public entertainment events, gaining the effect of broadcasting without having to include government-mandated warnings. Examples include the Virginia Slims Tennis Tournament, Winston Cup series, Kool Jazz Concerts, and auto racing in general, through the sponsorship of particular cars and drivers.\textsuperscript{191} At the 1989 Marlboro Grand Prix telecast, the company's logo could be seen for over forty-six of the ninety-four total minutes of broadcast time.\textsuperscript{192} The Surgeon General has concluded:

Event sponsorship also provides access to youth markets of potential smokers. Because youth do not predominantly compose the attendance or viewership of such sponsored events, however, cigarette advertisers can argue that they are not actively targeting youth. Yet given the heavy concentrations of young people in these audiences, and given the limited venues available to cigarette advertisers to present their images to children, sponsored events may be among the most cost-effective promotional mechanisms.\textsuperscript{193}

Studies of children and adolescents support the observation that cigarette industry sponsorship of sporting events affects the young.\textsuperscript{194} For example, many twelve to seventeen year old schoolchildren correctly linked sponsored sports with the sponsoring brand.\textsuperscript{195} Thus, a secondary effect of sponsoring sports events—brand names becoming closely associated with the sports they sponsor—has been identified.\textsuperscript{196}

\[\text{Id.}\]

\textsuperscript{191} Preventing Tobacco Use 1994, supra note 1, at 185. R.J. Reynolds has become the leading sponsor of auto and motorcycle racing in the U.S. Alan Blum, The Marlboro Grand Prix: Circumvention of the Television Ban on Tobacco Advertising, 324 NEW ENG. J. MED. 913, 914 (1991).

\textsuperscript{192} Blum, supra note 191, at 915.

\textsuperscript{193} Preventing Tobacco Use 1994, supra note 1, at 185.

\textsuperscript{194} See P.P. Aitken et al., Children's Awareness of Cigarette Ads and Brand Imagery, 82 BRITISH J. ADDICTION 615, 615 (1987) (stating that their "findings suggest that cigarette advertising is getting through to young people, and to under-age smokers in particular"); Frank Ledwith, Does Tobacco Sports Sponsorship on Television Act as Advertising to Children?, 43 HEALTH EDUC. J. 85, 85 (1984) (finding that "children were most aware of the cigarette brands which are most frequently associated with sponsored sporting events on TV").

\textsuperscript{195} Ledwith, supra note 194, at 85.

\textsuperscript{196} Id. The study established that the young subjects' ability to link sporting
When it comes to actually placing a cigarette in a young person’s hands, the cigarette companies can do that, too. Promotion “can use sampling to put a cigarette into a consumer’s hand—along with, in some instances, the lighter to ignite it.” Not surprisingly, “[t]he $1.3 billion spent on promotional allowances and point-of-sale displays combined are funds potentially directed at new, youthful smokers.” Recently, Philip Morris’s aggressive price-cutting promotions for Marlboro, the predominant brand smoked by teenagers, provoked serious criticism. Studies indicate that lower cigarette prices may increase smoking rates among the young and other low-income groups. With the poor reminder value of a point-of-sale display for a brand-loyal smoker, these displays are intended not for the current smoker but rather to “encourage new smokers to experiment with a particular brand.”

Perhaps a primary reason the companies now focus less on tempting smokers to switch brands and more on targeting the young is that the cigarette market is considered “mature.” Marketers consider tobacco to be mature because its growth has slowed over the past two decades and because cigarettes are

events with sponsoring tobacco brands was directly related to the time spent watching that sport. Id. at 86. Also, brand awareness increased substantially following the televised broadcast of a major sporting event sponsored by that brand. Id. at 87. “Cigarette smoking may thus appear to receive an implied endorsement from race car drivers, whose expertise is associated with their ability to thoughtfully assess risks, and from tennis players, whose success partly depends on their physical endurance—a trait medically proved to be undermined by cigarette smoking.” Preventing Tobacco Use 1994, supra note 1, at 186. The FDA’s proposed guidelines would now forbid tobacco company sponsorship of major sports events. Purdum, supra note 18, at A1, A11.

188. Id. at 186.
201. See id. (noting that the move would “disproportionately affect youth, who usually have slim financial reserves and low earning power”).
202. The growth of generic and store-brand cigarettes whose lower prices appeal to these low-income groups may have contributed to a rise in smoking among blacks. Michael Janofsky, 25-Year Decline of Smoking Seems to be Ending, N.Y. Times, Dec. 19, 1993, at A24.

The choice to discount Marlboro, teenagers’ favorite cigarette, generated criticism from public health advocates who accused the industry of continuing to illegally target children in order to expand their market. Philip Morris decided not to discount brands such as Benson & Hedges, smoked almost exclusively by adults... A number of studies have shown that children are the most price-sensitive cigarette consumers and that small differences in price can have a significant impact on the youth smoking rate.

204. Id. at 174.
well-known to consumers. The obvious response to this, as one author counseled in his advertising textbook, is that advertisers "should stress new uses . . ., new users . . ., and new usage occasions in an attempt to increase overall sales of the product class." Given that "since 1964, about 44 million Americans have quit smoking, and approximately 9 million more have died of tobacco-related disease[,] [f]or the cigarette industry to preserve its . . . U.S. market status, it must attract . . . two million new smokers each year to replace these lost consumers." To reach this market of potential smokers, the industry earmarks a large proportion of the four billion dollars annually spent on advertising and promotional activities. These new smokers will primarily be adolescents, who become aware of cigarettes, in part, through cigarette advertising. Moreover, young people appear to develop brand loyalty early on, and because of the addictive properties of nicotine, these young smokers are likely to continue into adulthood as cigarette consumers.

Apparently, advertising to attract the very young has worked. Research studies demonstrate that "young people are aware of, and respond to, cigarette advertising." For example, in a recent study of eleven through fourteen year olds, the researchers found that the brands preferred by adolescent smokers corresponded to the advertisements and slogans they recognized the most. Among some of the twelve year olds and most fourteen and sixteen year olds in another study, the advertising images elicited comments indicating that the young associated smoking with adult themes such as independence, sex appeal, and success. "[T]he results from these studies

205. Id.
206. MICHAEL L. ROTHSCCHILD, MARKETING COMMUNICATIONS: FROM FUNDAMENTALS TO STRATEGIES 105 (1987). Rothschild noted that price-oriented promotions are "all too common" at the mature stage. Id. at 108. He counsels against this tactic, as it may create consumers who are loyal only to the "lowest price" and may lead to manufacturers "promoting on an almost continuous basis." Id.
207. PREVENTING TOBACCO USE 1994, supra note 1, at 175.
208. Id.
209. Id.
211. PREVENTING TOBACCO USE 1994, supra note 1, at 175.
212. Id. at 188.
214. PREVENTING TOBACCO USE 1994, supra note 1, at 189. "Children were more likely to smoke if they believed that smoking is pleasurable . . . makes a person more popular . . . and attractive . . . [which are] all common themes in cigarette advertising." DiFranza et al., supra note 76, at 3151.
show that even relatively young children are aware of cigarette advertising and are able to recall particular advertisements.215

The types of advertisements employed since the 1980s involving cartoon characters are particularly attractive to the young. A 1992 study of seventh and eighth graders revealed that students "preferred advertisements with cartoons; ads with human models were the next most popular, and tombstone ads were liked least."216 The children "ranked the two advertisements featuring Camel cigarettes' cartoon camel mascot Old Joe first and second . . . [and] [a]mong students who smoked, the buying preferences for all brands closely paralleled the reported ad appeal."217 The appeal of these ads to children may be explained by the models: "Female models were seen as predominantly 'slim' and 'good-looking[,]' [while] Joe Camel was 'cool' and 'fun . . . .' All of the positive attributes reported for the cigarette ad images also were described as positive attributes for the students' ideal self-images."218

Furthermore, children as well as adults prefer advertisements that use humor.219 However, "cartoons with talking animals are generally considered to appeal more to children than to adults; Joe Camel and Willy Penguin (the cartoon mascot for Kool) would be highly atypical examples of advertising humor if the ads that feature them were meant only for an adult audience."220

Recent studies involving high school students in grades nine through twelve and several persons over twenty one years of age compared the responses of children and adults to Camel cigarettes' Old Joe.221 These studies showed that "high school

215. PREVENTING TOBACCO USE 1994, supra note 1, at 189.
216. Id. at 190.
217. Id.
218. Id. A recent article on the new habit of "social smoking" reveals that the perceived "coolness" of smoking remains a driving force. Said one young man: "I feel like I am in a movie. . . . It just seems cool." Jennifer Steinhauer, LIGHTING UP, BUT ONLY IN PUBLIC, N.Y. TIMES, Oct. 23, 1994 (Styles), at 47, 62. This issue of self-image remains a focus for the manufacturers. "Advertisements for cigarettes too have played their part by depicting crowds of smokers puffing happily together." Id.
219. Betsy D. Gelb & Charles M. Pickett, ATTITUDE-TOWARD-THE-AD: LINKS TO HUMOR AND TO ADVERTISING EFFECTIVENESS, 12 J. ADVERTISING 34, 35 (1983) (noting that humor can be a "key variable" in a consumer's reaction to an advertisement and can help motivate consumers to buy a product).
220. PREVENTING TOBACCO USE 1994, supra note 1, at 190.
221. Id. These studies include: DiFranza et al., supra note 79; John P. Pierce et al., Does Tobacco Advertising Target Young People to Start Smoking?, 265 JAMA 3154 (1991) (concluding that among California teens, tobacco advertising is widely-known and influential in brand selection); see also Jennifer E. McCann, Tobacco Logo Recognition, 34 J. FAM. PRAC. 681, 684 (1992) (letter to the editor) (reporting
students were more likely than adults to recognize and correctly identify Old Joe (98 vs. 73 percent), to think the ads looked ‘cool’ (58 vs. 40 percent), to think the ads were interesting (74 vs. 55 percent), to think that Old Joe is cool (43 vs. 26 percent), and to report that they would like to have Old Joe as a friend (35 vs. 14 percent). Not surprisingly, “in the three year duration of the Old Joe campaign, the proportion of smokers under 18 years old who preferred Camel cigarettes over other brands rose from 0.5 percent to 33 percent. A study of children ages three through six found that “[b]y the age of six, the face of Old Joe and the silhouette of Mickey Mouse . . . were equally well recognized.”

Thus, the 1994 Surgeon General’s Report states that

[e]ven though the tobacco industry asserts that the sole purpose of advertising and promotional activities is to maintain and potentially increase market shares of adult consumers, it appears that some young people are recruited to smoking by brand advertising. . . . Adolescents consistently smoke the most advertised brands of cigarettes, both in the United States and elsewhere. Moreover, following the introduction of advertisements that appeal to young people, the prevalence of use of those brands—or even the prevalence of smoking altogether—increases.

Evidence of this association was found in a study which showed that, after the 1968 introduction of the Virginia Slims brand, “smoking prevalence among adolescent females nearly doubled” between 1968 and 1974. More recently, Camel’s Old Joe advertising campaign appears to have substantially increased that brand’s market share among those under eighteen years of age.

“Young people continue to be a strategically important

one eighth-grader’s finding that 97.3% of the students in her junior high school’s science classes recognized Old Joe as being an advertisement for Camel cigarettes.

Fury raged with the invention of Old Joe. See Anna Quindlen, Where There’s Smoke, N.Y. TIMES, Mar. 2, 1994, at A15 (calling tobacco companies’ claims that their advertising does not target children “preposterous” and citing “Joe Camel billboards” as evidence of this).

222. PREVENTING TOBACCO USE 1994, supra note 1, at 191; see also DiFranza, supra note 79, at 3151 (charting statistics of cigarette advertisement recognition).

223. PREVENTING TOBACCO USE 1994, supra note 1, at 191. Given these data, “[i]t is not surprising . . . that Marlboro and Camel cigarettes are used by up to 70 percent of adolescent smokers.” Id.

224. Id. “The recognition rate for Old Joe ranged from 30 percent for three year olds to 91 percent for six year olds.” Id.

225. Id. at 194 (citing several studies).

226. Id.

227. DiFranza et al., supra note 79, at 3151.
market for the tobacco industry," concluded the Surgeon General in 1994. After exhaustively analyzing the prevalence and sophistication of tobacco advertising, as well as the unmistakable link between advertising and teen smoking, the Surgeon General concluded that "cigarette advertising appears to increase young people’s risk of smoking."

In order to overcome the seemingly endless array of defenses successfully raised by tobacco product manufacturers, and to seek fairness and justice for tobacco companies’ intentionally deceiving consumers as to the health risks of tobacco, diluting federally mandated warnings, targeting children through their advertising, and manipulating nicotine levels in order to hasten the onset of addiction, advocates will need to be more creative than they have been. A fresh outlook may help consumer advocates and plaintiffs’ attorneys become

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228. PREVENTING TOBACCO USE 1994, supra note 1, at 195.

229. Id. Philip Morris, faced with overwhelming evidence that its advertising in fact recruits young smokers, disclaims any intent to do so. See No Sale, NEW REPUBLIC, Oct. 2, 1995, at 54 (advertisement) (stating that Philip Morris’ attitude towards underage smoking is as follows: "No one should sell cigarettes to minors. Minors should not have access to cigarettes. They should not smoke. Period."). The ad also notes that Philip Morris has taken "specific steps" to prevent teen smoking, including stopping the distribution of sample cigarettes, branding its cigarette packs "Underage sale prohibited," and encouraging the passage of laws designed to reduce minor access to cigarette vending machines. Id.

230. Oliver Wendell Holmes proposed an understanding of legal responsibility that emphasized the real-world consequences of the defendant’s conduct:

[t]he philosophical analysis of every wrong begins by determining what the defendant has actually done, that is to say, what his voluntary act or conduct has been, and what consequences he has actually contemplated as flowing from them, and then goes on to determine what dangers attended either the conduct under the known circumstances, or its contemplated consequence under the contemplated circumstances.

HOLMES, supra note 30, at 161.

231. Refer to note 5 supra.

232. Some courts have held that in order to satisfy the duty to give adequate warnings, manufacturers may not engage in advertising and promotion activities that would dilute or deemphasize the warnings. See, e.g., Brazell v. United States, 633 F. Supp. 62, 73 (N.D. Iowa 1985) (finding that intense, “hardsell” advertising of certain vaccinations by the government negated the effect of warnings concerning side effects associated with the vaccine), aff’d, 788 F.2d 1352 (8th Cir. 1985); D’Arienzo v. Clairel, Inc., 310 A.2d 106 (N.J. Super. 1973) (denying summary judgment for manufacturer based on a warning that counseled hair dye users to perform “patch tests” before using the product, which did not explain the reason for or importance of the tests sufficiently). Indeed, “[t]he tobacco industry is one of the few examples that come to mind which give warnings of the hazards associated with its product, and then, through advertising, seeks to induce the consumer to ignore such warnings.”


233. Refer to notes 182-229 supra and accompanying text for a discussion of the tobacco industry’s continuing efforts to attract new smokers.

234. Refer to note 4 supra for a discussion of these changes.
better equipped to critique the legal defenses on which the industry has been relying, and perhaps develop counterdefenses. To some degree, this is being attempted. 235 The primary purpose of the civil law is to ensure fairness in our dealings with one another, which may prevent injured parties from taking the law into their own hands. 236 In the area of tobacco products liability, the civil law can do much better.

Perhaps because of the continued faith in our system of laws, lawyers and scholars continue to search for legal principles upon which to hold accountable tobacco product manufacturers for the harm resulting from the use of their products. It seems unfortunate that lawyers and other advocates for smokers have been using merely traditional approaches to traditional theories. Success through this method, if measured by the compensation paid to injured smokers and their families, has been nonexistent. 237 What is needed is perhaps an untraditional approach to a traditional theory. That is what this Article recommends.

This Article suggests using existing, well-settled principles of law to support a cause of action in battery for injured smokers. The Article contends that this traditional legal theory must be extended and expanded in order to respond to changing social conditions and demands. 238 Arguments based on this principle are made often. Law professor Catharine A.

235. For example, since 1984, the Tobacco Products Liability Project, under the direction of Northeastern University School of Law Professor Richard Daynard, has been supporting litigation against tobacco product manufacturers by acting as a communications network and clearinghouse for factual and legal information to law firms and anti-smoking groups around the nation. Interview with Professor Richard Daynard, Director of the Tobacco Products Litigation Project at Northeastern University School of Law (Oct. 6, 1994). In addition, recent law review articles have analyzed new theories of tobacco company liability. See, e.g., Ausness, supra note 25, Levin, supra note 26; Crawford, supra note 33.


237. Refer to note 29 supra. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2508 (1992), is one case this author is aware of that produced a verdict for the plaintiff, but that result brought not a cent to the victims, primarily as a result of the defendants’ tactics of drowning plaintiffs’ attorneys in the lawsuit. Refer to note 29 supra. Another recent case has seen a verdict for the plaintiff, although the case is currently on appeal. Hwang, supra note 8, at B3.

238. Justice Cardozo himself implored us to do just that:

No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this ideal within the compass of human powers.

MacKinnon argued in 1979 that the definition of sex discrimination should be broadened to bring serious sexual harassment in the workplace within the purview of discrimination law.239 An analogous step is taken here in the suggestion that these companies should be accountable in battery to those induced by their advertising to start smoking as adolescents, when they became addicted prior to reaching the age of majority. Even though the cigarette manufacturers knew, as far back as 1968, that a danger of addiction for tobacco users existed, they did not warn the consumer.240

While the notion of liability in battery may seem a novel means of holding tobacco companies liable, some scholars have suggested legal theories that are similar to that of battery. Back in 1969, Professor White suggested an application of strict liability to cases brought against cigarette manufacturers.241 He posited that in these cases public policy should prevent assumption of the risk from operating as a defense in cases brought by either child smokers or child smokers who had become adult smokers.242 In the cause of action envisioned by this author, liability would be based similarly on the premise that the companies’ advertising campaigns target adolescents before they are legally capable either of consenting to the "touching" of tobacco smoke (or even of legally purchasing cigarettes) or of assuming the grave risks of smoking. Then, by the time these adolescents reach the age of majority and are addicted, they of course continue to smoke. This continuation, while involuntary, is sustained for years, even for their lifetimes.243 In essence, once the young people become addicted, they are incapable either of consenting to the "touching" by cigarettes or of assuming the risks of smoking, as both must be

239. The 1979 work by Catharine MacKinnon suggested that “a pervasive or continuing condition” of sexual harassment in the workplace constituted sex discrimination in employment, in violation of Title VII of the Civil Rights Act of 1964. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 2 (1979). Her argument was essentially adopted by the Supreme Court in the 1986 case of Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (recognizing a cause of action under Title VII for sexual harassment as "severe and pervasive" that it creates a hostile or abusive working environment). MacKinnon was engaging in traditional legal maneuvering, or analysis, by studying the policies behind a well-established legal principle (employment discrimination) and applying it to novel facts in order to expand the protections of the law. This type of creativity will no doubt be useful to the plaintiffs of concern in this piece.

240. Refer to note 6 supra. Since Cipollone, it has been clear that causes of action based on insufficient warnings are preempted by the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-1341 (1994).

241. White, Strict Liability, supra note 37, at 591.

242. Id. at 623.

243. Refer to note 24 supra.
voluntary.\textsuperscript{244} The advertising campaigns alluring children and adolescents\textsuperscript{245} essentially cause the touching when the adolescent purchases or otherwise acquires the cigarette and smokes it. For this wrong, basic concepts of fairness require recovery for both compensatory as well as punitive damages. As Justice Ashurst expressed, "I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty."\textsuperscript{246}

III. THE SMOKERS' BATTERY CAUSE OF ACTION

The body of law encompassing torts functions to direct compensation towards individuals "for losses which they have suffered within the scope of their legally recognized interests... where the law considers that compensation is required."\textsuperscript{247} Prosser asserted that "it is not easy to discover any general principle upon which [torts] may all be based, unless it is the obvious one that injuries are to be compensated, and anti-social behavior is to be discouraged."\textsuperscript{248} Holmes pointed out that in the area of torts a "common ground of revenge" shines through, indicating that from early times it was important to consider that someone was to blame for injuries received.\textsuperscript{249}

As we see then, "the law of torts is concerned not solely with individually questionable conduct but as well with acts that are unreasonable, or socially harmful, from the point of view of the community as a whole."\textsuperscript{250} The law should protect the helpless victims who started smoking as youngsters and who subsequently became addicted.

Prosser also noted that much conduct is considered tortious because the tortfeasor is "acting with an intention that the law

\begin{footnotesize}
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\item 244. Refer to subpart III(D) infra (asserting that the voluntary assumption of the risk defense is inapplicable to minors because their decision to smoke is neither voluntary nor adequately informed); see also PROSSER AND KEETON, supra note 236, § 69, at 490 (noting that a plaintiff will be barred from recovery under the assumption of the risk defense only if his choice is made freely and voluntarily).
\item 245. There have been lawsuits brought against the companies based on the affirmative marketing techniques used to attract minors. See Kyte v. Philip Morris, Inc., 556 N.E.2d 1025, 1026 (Mass. 1990).
\item 247. PROSSER AND KEETON, supra note 236, § 1, at 5-6; see also id. § 2, at 7 (noting that the primary purposes of a tort action is to compensate the injured party for damages suffered); see also HOLMES, supra note 30, at 70 (stating that "if a man is damaged he ought to be recompensed").
\item 248. PROSSER AND KEETON, supra note 236, § 1, at 3.
\item 249. HOLMES, supra note 30, at 33.
\item 250. PROSSER AND KEETON, supra note 236, §2, at 7.
\end{itemize}
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treats as unjustified.\textsuperscript{251} Surely the intention to convince children to smoke cigarettes is unjustified. Professor White argued this point forcefully twenty-five years ago, when he noted that if we had

found [an individual] to be intentionally praying for profit on the known disabling frailties of a small group, say a family, to induce them to begin and continue to use a habit-forming product known to all of them to take an average of six years of their lives, we would condemn him as antisocial and find a way to punish him. But our criminal law developed long ago when our relationships were simpler, more direct, and better defined. . . . But given the anonymity and diffused responsibility of corporate action, directed . . . to the disabling frailties of undetermined millions, and which produces many tens of thousands of deaths annually, we are likely to remain somewhat unmoved by it.\textsuperscript{252}

The law of intentional torts is informed historically by the criminal law, and courts have held intentional wrongdoers in civil actions "to a stricter accountability than they have less culpable actors."\textsuperscript{253} "This has been done both by restricting the limiting role of proximate cause and by adjusting the defenses available to the wrongdoer."\textsuperscript{254} Given the intentional and wrongful activities in which the cigarette manufacturers have engaged for decades, elasticity in the roles of both proximate cause and available defenses is justified in these cases of smoker battery.

Moreover, it is appropriate for courts to respond not only to specific intentional wrongful activity, but also to view changing

\textsuperscript{251} Id. at 6.
\textsuperscript{252} White, Strict Liability, supra note 37, at 617-18.
\textsuperscript{253} Id. at 616.
\textsuperscript{254} Id.; see also Commonwealth v. Feinberg, 234 A.2d 913, 914 (Pa. Super. Ct. 1967) (restricting defenses of one selling sterno for drinking purposes). In Feinberg, defendant sold cans containing a high percentage of methyl alcohol marked "Institutional Sterno. Danger Poison; Not for home use. For commercial and industrial use only." Id. at 914. It was commonly known that transients drank the ordinary sterno, which contained 4% methyl alcohol. Id. Feinberg sold the institutional sterno, which contained 54% methyl alcohol (and which was cheaper than the previous version), without giving his skid-row customers any warning of the product's greatly increased toxicity, and 31 deaths from methyl alcohol poisoning occurred. Id. The court agreed that the defendant knew the purchasers were intending to drink the product and in affirming a criminal conviction for involuntary manslaughter stated that: "[i]f the light of the recognized weaknesses of the purchasers . . . and appellant's greater concern for profit than with the results of his actions, he was grossly negligent and demonstrated a wanton and reckless disregard for the welfare of those whom he might reasonably have expected to use the product for drinking purposes." Id. at 917. Cigarette manufacturers' use of ads that appeal to minors seems to display the same kind of "wanton and reckless disregard" for their welfare.
social conditions as an impetus for expanding an understanding of the appropriate nature of tort law.\textsuperscript{255} Courts have been encouraged to "respond to changing social conditions"\textsuperscript{256} and have been implored not to bar recovery merely because a claim is novel.\textsuperscript{257} "There is no necessity whatever that a tort have a name."\textsuperscript{258} "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before."\textsuperscript{259}

The intentional infliction of mental suffering, the obstruction of the right to go where [one chooses], the invasion of the

\textsuperscript{255} See PROSSER AND KEETON, supra note 236, § 3, at 15 (asserting that the law of torts, perhaps more than any other branch of the law, is a battleground of social theory).

\textsuperscript{256} Exa, supra note 55, at 1102. Beginning in the nineteenth century, especially in the period before the Civil War, the common law "came to play a central role in directing the course of social change." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 1 (1977). During that period, "questions of private law were seen and considered as questions of social policy." Id. at 2.

\textsuperscript{257} PROSSER AND KEETON, supra note 236, § 1, at 4; see also id. § 3, at 18 (noting that the mere fact that a claim is novel does not alone defeat it) (citing Kujek v. Goldman, 44 N.E. 773, 774 (N.Y. 1896) (asserting that lack of precedent alone does not preclude recovery because every form of action, when brought for the first time, must have been without a precedent to support it)). Tort law is, by far, not the only area of law that continually undergoes a necessary expansion. Our understanding of statutory law that is based on compensatory tort principles adjusts over time as well. A prime example of that adjustment can be seen in the Supreme Court's eventual adoption of Catherine MacKinnon's argument that sexual harassment in the workplace comes within the auspices of Title VII of the Civil Rights Act. Refer to note 239 supra. George Washington University law professor John F. Banzhaf III recently drew on the development of sexual harassment law in discussing the requirement, in battery cases, that the alleged conduct be proved to be offensive. In explaining the growing success of suits seeking recovery in battery for exposure to second hand smoke, Banzhaf noted that "[w]hat these cases say is that what is regarded as offensive is changing, just as it is in sexual harassment." Junda Woo, Blowing Smoke Around Others May Be Battery, WALL ST. J., Apr. 11, 1994, at B1, B11.

\textsuperscript{258} PROSSER AND KEETON, supra note 236, § 1, at 3 (citing Jeremiah Smith, Torts Without Particular Names, 69 U. Pa. L. Rev. 91, 93 (1921) (recognizing that there are, in tort law, "wrongs without names" that are legitimate causes of action and for which damages are recoverable)).

\textsuperscript{259} Id.; see also Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, '94 YALE L.J. 997 (1985) (discussing similar creations of new actions in the area of contracts). On this point, but in reference to contract theory, Professor Dalton suggested:

It may not be possible, ultimately, to "transcend" the kinds of categories our current ways of thinking and imagining condemn us to use in order to make sense of our experience. But being self-conscious about the particular set of categories inhering in particular doctrine may at least enable us to expand our repertoire, and enlarge the number of concrete alternatives available to us . . . .

\textit{Id. at 1113 n.507.}
right of privacy, ... the infliction of prenatal injuries, ... and injury to a person's reputation by entering the person in a rigged television contest, to name only a few instances, could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to [constitute] torts.290

Other areas of tort law have welcomed new or expanded causes of action where it had been assumed that the law was settled and a cause of action already well defined.291 For example, the law of trespass has left behind the historical requirement that evidence of a trespass be visible.292 Similarly, the law of battery, affected by environmental concerns, has expanded from its original context to provide remedies for harm from toxic chemicals, commonly labeled toxic torts, and for harmful exposure to secondhand smoke.293

290. PROSSER AND KEeton, supra note 238, § 1, at 3 (citations omitted). One Georgia court recently found that a plaintiff had stated a cause of action both for battery and for intentional infliction of emotional distress with allegations that a coworker had deliberately blown pipe smoke at her. See Richardson v. Hennly, 434 S.E.2d 772, 775-76 (Ga. Ct. App. 1993) (reversing a grant of summary judgment for the defendant).

291. Refer to notes 239-41 supra and accompanying text. Richardson was recently reversed by the Georgia Supreme Court. Hennly v. Richardson, 444 S.E.2d 317 (Ga. 1994). However, a dissenting justice agreed with the intermediate appellate court that the blowing of smoke in the secretary's face was an intentional tort. Id. at 359 (Sears-Collins, J., dissenting).

292. Bradley v. American Smelting & Refining Co., 709 P.2d 782, 788 (Wash. 1985) (reasoning that "[t]respassory consequences today may be no less 'direct' even if the mechanism of delivery is ... more complex"); see also Recent Developments, 60 COLUM. L. REV. 877, 889-91 (1960) (explaining that a federal court determined that an action for trespass by invisible particles does exist because scientific instruments can detect and quantify gases and minute solids) (citing Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178, 186 (D. Ore. 1959)).

293. Over the past year, judges in Florida, Georgia, and Ohio have agreed that battery, which usually entails touching someone against her will, can apply to secondhand exposure to cigarette, cigar, or pipe smoke. See Ervin v. Philip Morris Cos., 641 So. 2d 888, 892 (Fla. Dist. Ct. App. 1994) (reinstating class action suit on behalf of 60,000 flight attendants forced to inhale secondhand smoke at work), rev'd denied, 654 So. 2d 919 (Fla. 1995); Richardson v. Hennly, 434 S.E.2d 772, 775 (Ga.-Ct. App. 1993) (concluding that the district court erroneously granted summary judgment on a battery claim where plaintiff alleged that defendant intentionally blew smoke in her face), rev'd, 444 S.E.2d 317 (Ga. 1994); Leichman v. WLW Jacor Communications, Inc., 694 N.E.2d 697, 700 (Ohio Ct. App. 1994) (reversing trial court's dismissal of battery claim based on talk-show host blowing smoke in the face of anti-smoking crusader guest's face).

The question of whether an act is considered a battery to subject a nonsmoker to sidestream smoke was addressed as early as 1978. McCracken v. Sloan, 252 S.E.2d 250 (N.C. Ct. App. 1979). In McCracken, two meetings took place between plaintiff and his employer, a postmaster. Id. at 251. On both occasions the defendant smoked a cigar in plaintiff's presence, knowing that plaintiff was allergic to tobacco smoke and that he had applied for sick leave in connection with the allergy. Id. Nonetheless, the defendant refused to stop smoking in plaintiff's presence. Id. The
The developing field of toxic torts is an example of the creative use of the traditional tort of battery, which provides for liability when an actor intentionally causes another to come in contact with an offensive foreign substance. Toxic tort theory has taken the accepted understanding of battery as the “actual infliction of corporeal hurt on another . . . , willfully or in anger, whether by the party’s own hand or by some means set in motion by him,” and has developed the operating theory that manufacturers and distributors of toxic chemicals should be held liable because they cause the eventual pollution, or hurt, to the environment. “The only unknowns are the exact times when contamination will occur, and identities of the victims whose bodies will be invaded as a result of the spill.” These actions take the form of an intentional tort when the manufacturer knows with substantial certainty that the toxic waste will reach another’s land. Traditional battery principles create liability in this area in a way akin to the battery that results when one shoots a gun; the tortious act in that case is the pulling of the trigger, while in toxic torts liability is created as soon as the toxic wastes are released in such a way that they will reach another’s land.

264. Restatement (Second) of Torts § 18 cmt. c.
267. Id. at 369.
268. See id. at 344-45 (noting that disposal of toxic wastes is a trespass when the manufacturer knew with substantial certainty the toxic waste would reach someone else’s land).
269. Id. at 347. In Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979), the defendant operated a lead smelter on property that bordered plaintiff’s farmland. Id. at 525. Plaintiff sued for trespass, claiming that his land was damaged as a result of lead particulates being deposited thereon. Id. at 526. The appeals court reversed a lower court ruling for defendant and remanded for a determination of damages, holding that an action for trespass would lie even though the damages were the result of an indirect, rather than a direct, invasion of the property. Id. at 529-30. The touching of plaintiff Borland’s farmland by the lead particles can be seen as analogous to the touching of adolescents by omnipresent cigarette advertising, which pa-
Unlawful touching "may be indirect, as by the precipitation upon the body of a person of any material substance." Even the harm or offense required for a battery need not result directly from the touching; rather, it is enough that a defendant has set in motion a force that will ultimately produce the harmful or offensive touching. Thus, setting out poisoned food has been held to be a battery.

Certainty that the manufacturing activities will cause harm, even after a long delay, may give rise to an action for battery. The action would survive even if the harm occurs at a much later date, which is typical of toxic torts.

It is a short hop from a battery for toxic damages to one for smokers' damages. First, that the companies intend to acquire new smokers is undeniable—without them, the death toll of current smokers would eventually leave the companies with no customers for their goods. If the companies did not believe there was a substantial certainty that they would acquire new smokers as a result of their advertising efforts, would they spend nearly four billion dollars each year on them? Second, as with toxic torts, the touching involved in the smokers' battery is indirect. The companies do what they

rades scenes of "cool" men and attractive, sophisticated women in order to lure the children into thinking that all they have to do is light up and they will be more like those pictured in the ads.


271. RESTATEMENT (SECOND) OF TORTS § 18 cmt. a.

272. Commonwealth v. Stratton, 114 Mass. 303, 304 (1873) (holding that lacing food with cantharides constitutes criminal battery). That court opined, in language relevant to the smoking context, that if a defendant "should hand an explosive substance to another, and induce him to take it by misrepresenting or concealing its dangerous qualities," the defendant would be liable for assault and battery. Id. at 305.

273. Carl B. Meyer, supra note 266, at 349.

274. Id.

275. A spate of lawsuits has recently been filed against cigarette manufacturers charging offenses such as fraud and misrepresentation in advertising and promotion and seeking economic damages—even cases charging intentional infliction of emotional distress for knowingly selling and distributing items that carry with them the grave risk of inflicting horrible injuries. Refer to note 8 supra. To a certain eye, though, these causes of action miss the point that could be made by a suit charging the intentional tort of battery: it is the touching of the cigarette to the smoker's lips and the resulting nicotine addiction that cause horrible injuries. Charging the companies with intentional human maiming by cigarettes seems to capture the point more precisely.

276. Refer to Part II supra for a discussion of advertising efforts that allure young smokers.

277. Refer to notes 101-04 supra and accompanying text.
must to convince manipulable, insecure teenagers, just enough to have them believe they can buy into being "cool," "independent," or "slim." Third, just as one pulling a trigger knows with substantial certainty that a shooting is likely to result, and just as the toxic chemical producer knows with substantial certainty that toxic waste will reach another's land, so do the cigarette manufacturers know with substantial certainty that the likely result of their actions is that at least some teenagers will bite their bait. The battery, finally committed when the cigarette touches the minor's lips, occurs as an indirect result of the "smokewashing" to which children and teenagers have been subjected, as the cigarette manufacturers set in motion a force that ultimately produces the harmful or offensive touching.

To argue for a new tort, it is necessary to understand existing ones. The Restatement provides for liability for battery in cases where one "acts intending to cause a harmful or offensive contact" with another and, by those acts, succeeds in causing the offensive contact, whether directly or indirectly. The Restatement's comments inform us that the essence of the grievance is the offense to one's dignity involved in the nonconsensual, intentional invasion of one's physical security and bodily integrity. "The line of distinction is very difficult to draw. It is a thing which is felt rather than defined...." To be liable, one "must have done an act" that was intended to cause the victim, directly or indirectly, to come in contact with a foreign substance.

Touching will be considered offensive if it "offends a reasonable sense of personal dignity." "The distinction between

278. The gender of the potential consumer has determined the nature of the advertising used by the cigarette companies. Refer to notes 105-28 supra and accompanying text.
279. One could argue that each time that teenager lights up another cigarette, the battery is repeated. One could also argue the converse, that the battery does not occur until some material change occurs in the smoker's body, which could take years. The first touching makes the most sense as the basis for the battery.
280. Refer to note 132 supra.
281. RESTATEMENT (SECOND) OF TORTS § 18(1)(a), (b).
282. Id. § 18 cmt. c.
283. Id.; see also Christopher J. McAliffé, Comment, Resurrecting an Old Cause of Action for a New Wrong: Battery as a Toxic Tort, 20 B.C. ENVTL. AFF. L. REV. 265, 285 (1993) (stating that under modern battery law plaintiffs are compensated for nonconsensual violations of their bodily integrity, and that this characteristic makes battery "uniquely adapted to hazardous substance injuries").
284. RESTATEMENT (SECOND) OF TORTS § 18 cmt. b.
285. Id. § 19. The cases involving conduct offensive enough to justify recovery for battery include such minor affronts (such as "a few drops of... dirty or muddy water on the hand") that one may wonder why battery causes of action for cigarette
harmful, objectionable, and harmless touching will depend . . . on whether the trier of fact considers the defendant's act socially acceptable, and whether the plaintiff voluntarily assumed the risk.\(^{286}\) A view of some of the older cases evidences the minimal contact and harm necessary to prevail.\(^{287}\) Comparing the innocuous conduct that has been recognized as battery with the aggressive advertising of deadly cigarettes to children leads to the conclusion that we should recognize the companies' actions as being truly harmful and thus constituting a battery.

A cause of action will lie even without direct physical contact between the actor and the injured party as long as the defendant sets in motion actions that ultimately produce a harmful result.\(^{288}\) In fact, the actor need not even be personally present when the tort is committed, as long as the defendant was a "principal actor, [sic] in or adviser and promoter of making the attack."\(^{289}\) So, while it is true that tobacco product manufacturers never literally touch the smokers and in fact are not actually present when the cigarette is purchased or otherwise acquired, by systematically targeting children, the manufacturers have set in motion actions that ultimately cause the children to put cigarettes into their mouths. This occurs notwithstanding that the sale of cigarettes to children is now illegal in all states.\(^{290}\) Because the evidence is undeniable that the manufacturers' campaign substantially allures and entices children and adolescents\(^{291}\) the tobacco companies must be considered "principal actors and promoters" in this "attack" on children.

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injuries to smokers have not yet been suggested. Ezra, supra note 55, at 1059.

286. Carl B. Meyer, supra note 265, at 362 (noting that in North Carolina, home of the tobacco industry, a court had declared that subjecting another person to cigar smoke was "innocuous").

287. See, e.g., Wilson v. Orr, 97 So. 133, 136 (Ala. 1923) (indicating that placing one's hand on the shoulder of another in rudeness is assault and battery); Draper v. Baker, 21 N.W. 527, 530 (Wis. 1884) (approving a $1200 damage award for spitting in another's face); see also RESTATEMENT (SECOND) OF TORTS § 18 cmt. g. illus. 4, 6 (declaring that splashing another even with a few drops of muddy water could constitute battery).

288. Commonwealth v. Stratton, 114 Mass. 303, 305 (1873) (upholding a conviction for assault and battery for merely offering poisoned food to another); see also RESTATEMENT (SECOND) OF TORTS § 9 (defining "legal cause" as conduct that is responsible for the harm resulting from an invasion of a person's protected interests through a causal sequence); id. § 18 cmt. c. (stating that an intent to cause a person indirectly to come into contact with a foreign substance in an offensive manner creates liability for battery).

289. Bell v. Miller, 5 Ohio 251, 251 (1831) (holding that when one person employs another to commit an assault and battery, both are held liable).

290. Crawford, supra note 33, at 260.

291. Refer to Part II supra.
Given that causes of action in trespass historically preceded those for battery and that, in essence, battery constitutes a trespass to the person, a comparison with the trespass cause of action is instructive on the requirements of intent and touching in battery. In the Restatement section describing “Liability for Intentional Intrusions on Land,” we see that a defendant may commit a trespass regardless of whether he harms a “legally protected interest” of the plaintiff, as long as the defendant intentionally “enters land in the possession of the other, or causes a thing or a third person to do so.” The requirement of intent is satisfied when “an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.” Similarly, in battery, the act must be “done for the purpose of bringing about a harmful or offensive contact... or with knowledge that such a result will, to a substantial certainty, be produced by his act.” Less than a substantial certainty of the result will not make the act intentional. Also, a coordinated series of acts can support a claim of substantial certainty. As Justice Holmes commented, “the co-ordination of a series of acts shows a further intent than is necessarily manifested by any single act, and sometimes proves with almost equal certainty the knowledge of one or more concomitant circumstances.” Intent was found in

292. See Bell, 5 Ohio at 251-52 (addressing act as assault and battery but, given that it was decided in 1831, considering it a trespass).
293. See HOLMES, supra note 30, at 83 (comparing trespass of coming onto another’s land to battery of touching another’s person).
294. RESTATEMENT (SECOND) OF TORTS § 168. The word intrusion is used “to denote the fact that the possessor’s interest in the exclusive possession of his land has been invaded by the presence of a person or thing upon it without the possessor’s consent.” Id. cmt. c.
295. Id. § 168(a).
296. Id. cmt. i.
297. Id. § 18 cmt. a.
298. Id.; see Green v. Douroe, 440 A.2d 973, 975 (Conn. 1982) (concluding that only substantial certainty of the result of the wrongful conduct will substitute for the required intent in a false imprisonment claim); Van Fossen v. Babcock & Wilcox Co., 622 N.E.2d 489, 504 (Ohio 1988) (stating that an employer who knows that injuries to employees are substantially certain to occur may be liable for an intentional tort but holding that mere knowledge or appreciation of a risk is not intent); Garratt v. Dailey, 279 P.2d 1091, 1094 (Wash. 1955) (declaring that a battery would be established if defendant knew with substantial certainty that when he moved the chair plaintiff would attempt to sit down where the chair had been). The Restatement requires that the defendant acted in a manner that was substantially or virtually certain to bring about an injury. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b. If this is shown, the defendant will be treated “as if he had in fact desired to produce the result.” Id.
299. HOLMES, supra note 30, at 152.
Commonwealth v. Stratton, for example, when the defendant was held criminally responsible for poisoning someone's food. When he put the poison in his victim's food, he knew to a substantial certainty, the court said, that his actions would result in the entry of the foreign matter.

Admittedly, substantial certainty is difficult to define. A court considering the question as it applied to risks an employer took with regard to employees raised the question, "how 'high' or 'great' must a risk be before it can be said that the creation of the risk is substantially certain to produce injury? How high is 'high'? How great is 'great'?" In the context of smoking, the substantial certainty exists:

The general prevalence of teenage smoking is a significant part of the context in which the cigarette manufacturer operates. He casts his product into the free and unrestricted channels of commerce where he knows that children, heedless and indiscreet, will be engulfed by exposure to them. He knows that any amount and type of warning will not likely be wholly effective, especially in view of his continuing program of seductive advertising. In this situation, as a manufacturer of a product unavoidably dangerous and of low utility, he should not be privileged to market it without paying for the damages caused by its normal and intended use.

The circumstances surrounding the sale of and addiction to cigarettes prove a case of intentional battery. Tobacco manufacturers act deliberately, for the purpose of bringing about harmful contact, knowing to a substantial certainty that harmful contact will result from their actions. The companies spend billions each year advertising and promoting the sale of cigarettes knowing that these acts will result in the entry of foreign matter, namely cigarette smoke, into the lungs of teenage smokers. Given the death rate among smokers, it is reasonable to infer that the purpose of the ads is to attract new customers, especially young ones who will each purchase thousands of cigarettes over the course of their lives. Reasonable

300. 114 Mass. 303 (1873).
301. Id. at 305 (finding that criminal intent can be inferred from an act calculated to result in physical injury).
302. Id.
304. White, Strict Liability, supra note 37, at 603 (citations omitted).
305. Id. at 616-17.
306. It seems inconceivable that cigarette companies would spend $4 billion yearly on advertising and marketing schemes unless they were "substantially certain" the expenditures would be effective.
people cannot still argue about the harmful effects of cigarettes\textsuperscript{307} or the powerful addictive properties of nicotine.\textsuperscript{308}

Advertising in ways that appeal to children\textsuperscript{309} and making smokers of them before they can even purchase cigarettes legally is tantamount to actually placing cigarettes in these youngsters’ mouths.\textsuperscript{310} The rule of trespass theory, that one who “intentionally causes another to do an act is under the same liability as though he himself does the act in question,”\textsuperscript{311} resembles the principle of battery which holds liable defendants who set in motion a chain of events that ultimately results in an unpermitted touching.\textsuperscript{312} Applying these principles in the smoking context, the fact that the companies intentionally cause children to start smoking\textsuperscript{313} should give them the same liability as if they had actually placed the cigarettes into the mouths of these children. The appeal of cigarette ads to young people is neither accidental nor inadvertent.\textsuperscript{314}

It is true that the companies do not know the names of the individual children they are causing to be touched with cigarette smoke and to addict. But they surely act deliberately, knowing that their advertising will, to a substantial certainty, result in the entry of the foreign matter, tobacco smoke, into the lungs of some children.\textsuperscript{315} This awareness is sufficient to warrant liability in battery because only “[t]he intent to do the act [is necessary], not [t]he intent to do harm or offense.”\textsuperscript{316} One need not even desire that the resulting harm occur, for “[a]ll that is necessary is that the actor intend to cause the...

\textsuperscript{307} Refer to note 2 supra.
\textsuperscript{308} See Preventing Tobacco Use 1994, supra note 1, at 175 (giving relatively concrete facts concerning the potency of nicotine).
\textsuperscript{309} Refer to Part II supra.
\textsuperscript{310} Defendants have been held liable in battery for simply making harmful substances available to persons they know will consume them. Commonwealth v. Stratton, 114 Mass. 303, 303-04 (1873).
\textsuperscript{311} Restatement (Second) of Torts § 158 cmt. j.
\textsuperscript{312} See Stratton, 114 Mass. at 305 (discussing the hypothetical of the tortfeasor who gives an explosive device to an unwitting victim knowing the device will explode on the person of the victim).
\textsuperscript{313} Refer to Part II supra. Tobacco product manufacturers, of course, deny this and claim to be advertising only to ensure brand loyalty and attain brand switching. DiFranza et al., supra note 79, at 3149. However, given the money they spend advertising and promoting their products and the youth-oriented nature of their advertising campaigns, the deliberate nature of the companies’ acts is apparent.
\textsuperscript{314} See id. at 3151-52 (asserting that cigarette manufacturers have long-standing policies of using marketing techniques designed to reach children).
\textsuperscript{315} Id. at 3152 (noting the “abundant evidence that one purpose of tobacco advertising is to addict children to tobacco” and that industry documents reveal that many ads are targeted at 13 and 14 year olds).
other, directly or indirectly, to come in contact with a foreign substance in a manner which the other will reasonably regard as offensive. Thus, courts have found sufficient evidence of intent to bring a person into contact with a particular substance when a drug company administered diethylstilbestrol without wishing to harm those it injected, and when an asbestos manufacturer exposed a plaintiff to asbestos. Similarly, the claim is not that tobacco product manufacturers desire that smokers succumb to all the harmful and deadly diseases caused by cigarettes; rather, it is that the manufacturers mean to convince nonsmokers to start smoking and to persuade smokers to continue their habit. Almost thirty years ago Professor White illustrated this point with the following analogy:

Stated conservatively, there is now substantial certainty that the making and aggressive marketing of cigarettes will cause thousands of premature deaths annually. In known certainty of results, there is no difference between the actions of cigarette manufacturers, who make, sell, and promote the use of their deadly product, and the angry man who fires his gun into a crowd. Neither knows who is to die, but both know with substantial certainty that someone will.

317. RESTATEMENT (SECOND) OF TORTS § 18 cmt. c. Where the "other" is too young to legally consent, the question of whether the other regards the contact as offensive is decided by an objective standard, not a subjective one; under this objective standard, children who smoke do not do so "freely," as they are too young under common law to consent and, today, in all states, too young under statutory law to do so as well. Refer to subpart III(C) infra (discussing the operation of the defense of consent as applied to minors). Thus, children who smoke may, as a matter of law, be held to regard the contact of cigarette smoke with their lungs as "offensive" regardless of their subjective attitude.

318. Mink v. University of Chicago, 460 F. Supp. 712, 718 (N.D. Ill. 1978). In Mink, defendant administered diethylstilbestrol to plaintiffs as part of a medical experiment. Id. at 715. Plaintiffs sued for battery, strict liability, and failure to warn. Id. at 715-16. The court found that plaintiffs had stated a claim for battery after finding that defendant's intention to administer the drug to plaintiffs was sufficient to satisfy the intent element for battery. Id. at 718. This was so even though there was no showing that defendant intended to harm the plaintiffs. Id.


320. See DiFranza et al., supra note 79, at 3152 (detailing industry research on "[how to keep] children from quitting once they are 'hooked on smoking'").

321. White, Strict Liability, supra note 37, at 617.
A. Factual Cause

In other causes of action for cigarette injuries, the problem of linking the diseases caused by smoking to cigarettes can be difficult because "the health effects of smoking are indistinguishable from those of many other diseases." Cancer comprises a variety of malignant tumors that can be produced by different mechanisms, and carcinogenic substances which invade through the respiratory tract involve many different molecular processes and target organs. The question of proximate cause is not generally an issue in the area of intentional torts, and the theory of intentional torts is particularly suited to "provide recoveries for complex injuries that result from offensive touching." As early as 1929, a plaintiff recovered for a cancerous growth that developed more than a year after the defendant struck the plaintiff in the face, even though the plaintiff had signs of possible precancerous lesions before the incident. The fact that there is no actual touching between the manufacturers and the smokers is in no way fatal to a smokers' battery claim. Courts have upheld battery claims when the touching was not accomplished directly. A good example of an indirect battery is J.A.T v. Georgia, which involved an appeal from a conviction for committing battery by siccing a dog on the victim. The court held that a battery could be committed through the use of a dog if the plaintiff showed that defendant's conduct was a "substantial factor" in causing the attack. The court emphasized that the act causing physical harm may be active or passive, done directly or indirectly through an agency, as long as it is done intentionally or with criminal negligence.

323. Id. at 238.
324. Id. at 258.
327. Id. at 365-67.
328. See, e.g., Ghassemieh v. Schafer, 447 A.2d 84, 90 (Md. Ct. Spec. App. 1982) (finding that battery through an indirect offensive touching was proved when defendant pulled chair away as plaintiff was sitting down); Commonwealth v. Dixon, 614 N.E.2d 1027, 1029 (Mass. App. Ct. 1993) (stating that offensive touching may be indirectly caused by setting in motion some force or instrumentality); Brown v. Far West Fed. Sav. & Loan Ass'n, 674 P.2d 1183, 1185 (Or. Ct. App. 1984) (noting that offensive contact may be applied indirectly through an intervening agent).
330. Id. at 880.
331. Id. at 882.
332. Id. at 881.
Professor Prosser lamented the problems that arise with factual causation when he said,

"It is easiest to dispose of that which has been regarded traditionally as the most difficult: has the conduct of the defendant caused the plaintiff's harm? This is a question of fact. It is, furthermore, a fact upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which any layman is quite as competent to sit in judgment as the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury.

Causation is a fact. It is a matter of what has in fact occurred. A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them it would not have occurred. It covers not only positive acts and active physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event. . . .

. . . The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about. Whether it was such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men could not differ. . . . As applied to the fact of causation alone, no better test [than the substantial factor test] has been devised."

It is fair to question which actual cigarette exposure constitutes the battery. The physical harm is surely not caused by the first cigarette unless one finds that this first cigarette leads to more cigarettes, which in combination produce the grievous injuries from which smokers suffer. It is this first touching

333.  Prosser and Keeton, supra note 236, § 41, at 237, 240 (4th ed. 1971) (footnotes omitted). The issue of factual causation where there are multiple wrongdoers is a separate issue. Here, it can be said that there is more than one wrongdoer—the smoker may be considered a second wrongdoer as well as a victim. Should that victim be foreclosed completely from recovery or be entitled to recover from the other wrongdoer for a proportionate part of the injuries? Though battery is an intentional tort, an analogy may be drawn here to the proportionate reduction of damages awarded to plaintiffs who have been found comparatively negligent. Given that a defendant is held "responsible for all damage, however remote, of which his act could be called the cause," proportionate recovery is in order in smoker battery cases as well. Holmes, supra note 30, at 90.

334.  In those who do not become addicted, presumably that first cigarette does not constitute a harmful touching. Even though, under the theory of liability proposed in this Article, the smokers will not sue until perhaps years later when they have become addicted and are suffering from smoking-related illnesses, the statute of limitations does not pose a barrier here. It should begin to run only when the smoker is on actual or constructive notice that he or she is suffering the ill effects of smoking. See R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776, 783 (5th Cir. 1963) (holding that plaintiff's cause of action did not accrue until he knew or should
that can be the focus, as it will be the start of the addiction for those who continue to smoke. "Since every exposure to tobacco smoke seems to increase the risk of cancer, the problem is similar to determining who murdered a victim where death resulted from 1,000 people simultaneously throwing rocks."335

The tobacco product manufacturers are factually responsible for the youngsters' smoking.339 As we see, they need not actually touch their victims, as their conduct is a substantial factor or material element, in Professor Prosser's words,337 in causing their smoking. The act of touching the cigarette to their lips is accomplished not directly but indirectly through the agency of advertising. As early as age six,338 and throughout their formative years, young Americans are consistently exposed to advertising carefully calculated to play on their deepest desires by associating cigarettes with being physically attractive, "cool," and "independent."339 Thus, a youngster's eventual purchase and smoking of cigarettes, and even his addiction, are legally caused by the companies' actions. Given that causation "embraces all things which have so far contributed to the result that without them it would not have occurred,"340 and "covers not only positive acts and active-physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event,"341 the companies' conduct is a factual cause of the onset of smoking and should be viewed as a material element and a substantial factor in its commencement.342

have known that his health problems were caused by smoking).

335. Era, supra note 55, at 1097.

336. Refer to Part II supra.

337. PROSSER AND KEESTON, supra note 236, at 240.

338. DiFranza et al., supra note 79, at 3149.

339. Refer to Part II supra.

340. PROSSER AND KEESTON, supra note 236; at 237.

341. Id.

342. See id. The causes of smoking have been widely debated. Former Surgeon General Dr. Joycelyn Elders reflected that

[a misguided debate has arisen about whether tobacco promotion "causes" young people to smoke—misguided because single-source causation is probably too simple an explanation for any social phenomenon. The more important issue is what effect tobacco promotion might have. Current research suggests that pervasive tobacco promotion has two major effects: it creates the perception that more people smoke than actually do, and it provides a conduit between actual self-image and ideal self-image—in other words, smoking is made to look cool. Whether causal or not, these effects foster the uptake of smoking, initiating for many a dismal and relentless chain of events.

Preface to Preventing Tobacco Use 1994, supra note 1, at iii.
B. Legal Cause

Once one establishes that the tobacco product manufacturers' conduct has in fact been a cause of the smokers' injuries, there remains the question of whether their actions should be considered the legal cause.\textsuperscript{343} Unlike the fact of causation, this is essentially a question of law.\textsuperscript{344}

The scope of legal or proximate causation is far greater for intentional torts than it is for negligence.\textsuperscript{345} "For an intended injury the law is astute to discover even very remote causation."\textsuperscript{346} This is "because it has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault were present."\textsuperscript{347} It also turns on questions of fairness—the question asked is whether society should impose liability on certain defendants for their acts.\textsuperscript{348} The important question of fairness raised in this Article is one we as a society must address rather than ceding that responsibility solely to the judiciary.

An exploration of the concept of joint tortfeasors may enlighten the discussion here. Tobacco product advertising and promotion conducted consciously and intentionally over decades certainly contributes to someone's decision to start smoking. However, the decision to smoke has other causes as well.\textsuperscript{349} Undoubtedly, a smokers' battery cause of action would divide responsibility between the smokers and the cigarette manufacturers, and would apportion it in proportion to a factual determination of the relative degree of fault.

\textsuperscript{343} Prosser and Keeton, supra note 236, at 272-73.
\textsuperscript{344} Id. at 273.
\textsuperscript{345} Carl B. Meyer, supra note 266, at 352.
\textsuperscript{347} Id. at 152-53.
\textsuperscript{348} "The principal task of the court is to do justice as between these parties in their present situation." John W. Wade et al., Cases and Materials on Torts 337 (5th ed. 1994); see also Kelly v. Gwinnell, 476 A.2d 1219, 1222 (N.J. 1984) ("When a court determines that a duty exists and liability will be extended, it draws judicial lines based on fairness and policy."). For an argument that it is just that tobacco companies pay the costs of their products, refer to note 26 supra and accompanying text (discussing the relative culpability of smokers and tobacco companies).
\textsuperscript{349} Refer to note 342 supra (describing as too simple the idea that smoking has only one cause).
C. The Consent Defense

Consent is a defense to an action for battery.\(^{350}\) In order to claim the defense of consent, the defendant must show that "previous full disclosure of the implications and probable consequences of the proposed conduct ... has been given in such terms as may be fully comprehended by the person giving the consent."\(^{351}\) Yet, "consent requires a reasonable degree of maturity of mind depending upon the intricacies of the subject matter to which the consent is applicable."\(^{352}\) Faced with the charge that their actions constitute battery, tobacco product manufacturers will undoubtedly assert that the children were responsible for the touching and that, even if they were not responsible, they consented to the touching by freely acquiring cigarettes.\(^{353}\) Given that the concern here is with those who began to smoke as children\(^{354}\) and teens,\(^{355}\) this argument fails principally because children are incapable of giving effective consent.\(^{356}\) An analogy to assumption of the risk may be helpful here:

When we ask whether a smoker, with full knowledge and understanding of the risk, voluntarily and responsibly assumed that risk, we must remember, if we focus on the point of beginning, that we will be asking that question about the very young. We will be asking it about them before we consider them old enough to vote or to make, though without fraud or overreaching of the other party, a binding contract involving the ordinary, transitory things of life.\(^{357}\)

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350. See O’Brien v. Cunard S.S. Co., 28 N.E. 266, 266 (Mass. 1891) (holding that a doctor was justified in touching plaintiff if plaintiff’s behavior was such as to indicate consent).


352. Id.

353. "This is a neat, superior_attitude type of theory, but it is not realistic. It treats too lightly the strength of the cigarette habit." White, Strict Liability, supra note 37, at 613. When White’s article was published in 1969, the evidence of nicotine’s addictiveness was not nearly as conclusive as it is now. Yet, even then, Professor White stated, "the habit for most is a clinging monster and extremely difficult to break." Id.

354. "About 10 percent develop the habit ‘before their teens.’" Id. at 603.

355. "By the early college years the habit [smoking] is well-formed and therefore hard to break." Id.

356. See Charbonneau v. MacRury, 153 A. 457, 462 (N.H. 1931) (holding that in the absence of evidence to the contrary, a minor is universally considered to be inciting in judgment).

357. White, Strict Liability, supra note 37, at 603.
An analogy to criminal law is also helpful. In that arena, even express consent may be invalidated in order to protect certain classes of victims. Because ninety percent of adult smokers develop the habit as adolescents or even pre-adolescents, we are concerned with acts of children, not acts of informed adults. As “the pressures under which teenagers begin smoking are very similar to those under which they buy that shiny new automobile, a transaction we will let them disavow,” why not let them disavow this one? This disavowal is essential because cigarette manufacturers have seduced minors “to become cigarette addicts before they [are] competent to assess the risks of smoking.”

Why has the law consistently protected children so? There is a general recognition “that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights.” Another court stressed the activist role the judiciary must take in protecting children’s rights:

Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule for the court of chancery to act as the superior guardian for all persons under such disability. . . . The court will take nothing as confessed against them; will make for them every valuable election; will rescue them from faithless guardians, designing strangers, and even from unnatural parents, and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court.

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388. See Bishop v. Liston, 199 N.W. 825, 827 (Neb. 1924) (holding that a victim of statutory rape was not legally capable of giving consent and allowing her to recover civilly in battery).
390. White, Strict Liability, supra note 37, at 604.
391. Note, supra note 22, at 513. Tender years, inexperience, or mental impairment has been held relevant in determining whether plaintiffs were contributorily negligent in personal injury negligence cases. See, e.g., Lynch v. Rosenthal, 396 S.W.2d 272, 277-78 (Mo. 1965) (overruling trial court’s determination that a mentally retarded man had been contributorily negligent as a matter of law in farming accident and declaring that the question of whether his retardation made it difficult to realize and appreciate danger was one for the jury); Cathay v. De Weese, 289 S.W.2d 51, 57 (Mo. 1955) (upholding jury verdict in favor of 17 year old on the basis that his age may have made it difficult for him to understand and appreciate written and verbal warnings about a dangerous farm task).
393. Union Chevrolet Co. v. Arrington, 138 So. 595, 595 (Miss. 1932).
In order to protect minors from being injured by their own improvident acts, it is universally understood that a minor cannot be held liable for personal contracts or contracts for the disposition of property.\textsuperscript{364}

The reason that consent garnered from minors is subject to such scrutiny is that it often fails to satisfy the elements of the law. To be effective, “consent must be both informed and voluntary.”\textsuperscript{365} The Restatement elaborates: “If the person consenting is a child . . . [who is not] capable of appreciating the nature, extent and probable consequences of the conduct . . . the consent is not effective to bar liability . . . .”\textsuperscript{366} Even today, “the vast majority of consumers do not know about many of the specific health risks of smoking.”\textsuperscript{367} While beginning to smoke may be termed a personal choice, the addictive nature of tobacco causes many smokers to continue smoking when they would rather not.\textsuperscript{368} Thus, one can argue that once children are addicted to cigarettes they no longer act voluntarily in continuing to smoke.\textsuperscript{369}

Even where minors have expressly consented to certain touching, courts have held their consent to be invalid as a defense to battery actions. \textit{Bonner v. Moran},\textsuperscript{370} for example, involved a fifteen year old who consented to a series of skin grafts to help his severely-burned cousin.\textsuperscript{371} Though the child consented, the appellate court stated that the trial judge erred in refusing to instruct the jury that the mother’s consent was necessary prior to the operation.\textsuperscript{372} His ill mother had neither known of nor consented to the operations.\textsuperscript{373}

In the arena of toxic torts, scholars have advanced the argument that most consumers lack the knowledge of the specific dangers of toxic materials to be held to have consented to exposure to these materials.\textsuperscript{374} For example, most home buyers lack sufficient knowledge of the presence and danger of indoor formaldehyde exposure to consent to indoor

\begin{itemize}
  \item \textsuperscript{364} \textit{Bonner}, 126 F.2d at 122.
  \item \textsuperscript{365} \textit{Aunness}, supra note 26, at 954–55.
  \item \textsuperscript{366} \textit{RESTATEMENT (SECOND) OF TORTS} § 892A cmt. b.
  \item \textsuperscript{367} \textit{Aunness}, supra note 26, at 955.
  \item \textsuperscript{368} \textit{See} Levin, supra note 26, at 226 n.247 (stating that 75% of smokers either want to quit or have tried to quit but have failed).
  \item \textsuperscript{369} \textit{See} \textit{Aunness}, supra note 26, at 955 (arguing that once hooked, smokers no longer act voluntarily).
  \item \textsuperscript{370} 126 F.2d 121 (D.C. Cir. 1941).
  \item \textsuperscript{371} \textit{Id.} at 121.
  \item \textsuperscript{372} \textit{Id.} at 123.
  \item \textsuperscript{373} \textit{Id.} at 122.
  \item \textsuperscript{374} \textit{See} Carl B. Meyer, supra note 266, at 363–67 (discussing the specific example of exposure to various pesticides).
\end{itemize}
formaldehyde emissions. Often consumers' fears are allayed simply because certain products are permitted to be marketed when they comply with federal regulations, so many teenagers may believe that cigarettes are relatively safe if they are legally for sale. This may be particularly true in light of the years of glamorous and comical advertising to which young Americans have been subjected since childhood. As consent to pollution of a home or a neighborhood is not proved without evidence that the public was informed of the quantity and nature of the toxic chemicals in the environment, consent to internal "pollution" resulting from cigarette smoke is not proved without evidence that the smoker was informed of the harmful effects of cigarette smoking.

There are exceptions to the requirement of consent. These exceptions arise during emergencies or after a child is emancipated or close to maturity. Because states have statutes forbidding the sale of cigarettes to minors, an argument based on consent is even weaker, as it would not apply where there is a statute to protect children against the harms of cigarettes. The analogy may be drawn to statutory rape, which is a crime and the basis of a civil action even if the victim manifested consent. Legislative and public policy will hold her not to have consented. While it is true that minors over fourteen generally are presumed capable of exercising sufficient judgment to assume the risks of an attractive nuisance, this exception does not apply to the instant situation. For, "[i]f minors could recognize and appreciate the dangers of smoking there would be no need to protect them by outlawing underaged smoking."

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375. Id. at 362.
376. Id. at 382-63.
377. Refer to Part II supra (recounting the history of cigarette advertising).
380. Crawford, supra note 33, at 280.
381. See Glover v. Callahan, 12 N.E.2d 194, 195 (Mass. 1937) (holding that because carnal knowledge of a female under 16 is prohibited by statute, the plaintiff was incapable, as a matter of law, of giving effective consent).
382. Id. at 196.
383. See Sidwell v. McVay, 282 P.2d 756, 758 (Okla. 1955) (finding that the 16 year old plaintiff who was injured playing with explosives had the capacity to understand and avoid danger because of his age and his previous experience with explosives).
384. Crawford, supra note 33, at 280.
D. Assumption of the Risk Defense

There are several reasons why the defense of assumption of the risk should not be employed to deny smokers' battery causes of action. First, it is not a favored defense. Second, it

385. A commonly accepted definition of assumption of the risk is "volenti non fit injuria"—"no wrong is done to one who consents." RESTATEMENT (SECOND) OF TORTS § 892A cmt. a. Assumption of the risk bars recovery "where (1) a dangerous condition exists which is inconsistent with the injured party's safety, (2) the injured person is actually aware of the condition and appreciates the danger, and (3) the injured person voluntarily exposes himself to the danger which produces the injury." Forrest City Mach. Works, Inc. v. Anderhold, 626 S.W.2d 720, 724 (Ark. 1981). To prove that a plaintiff assumed the risk of defendant's conduct, the defendant has to show that plaintiff's knowledge of the risk was specific. Id. For example, in Maxey v. Freightliner Corp., 665 F.2d 1387 (5th Cir. 1982) (en banc), plaintiff's decedent was burned alive in the cab of a truck manufactured by the defendant. Id. at 1370. The court affirmed the lower court's decision to set aside a jury finding that the plaintiff assumed the risk that the defective design of the truck would cause a great fire upon impact. Id. at 1377. "[T]he inquiry is whether [decedent] voluntarily exposed [himself] to the risk with knowledge and appreciation of the danger." Id. (quoting Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1975)). The court went on to note that the plaintiff could only assume the risk if he had an "appreciation of the particular danger involved so that the plaintiff proceeds to encounter the risk as the result of an intelligent choice." Id. (quoting Ellis v. Moore, 401 S.W.2d 788, 792-93 (Tex. 1966)). The court reasoned that:

In the present case, Freightliner made no attempt to prove that Billy or Dee Maxey possessed subjective awareness of the extent of the fire hazard that was presented by Freightliner's design. . . .

[T]he contention that Freightliner as a national manufacturer of truck/tractors was unaware of post-crash hazards relating to side-mounted fuel tanks, but that Billy Maxey, a truck driver and mechanic with a high school education should be charged with knowledge and appreciation of the nature and extent of the risk is unreasonable.

Id.

In another case the plaintiff continued to drive a four month old car even after a private mechanic told him the car had a defective suspension system that could kill him. Messick v. General Motors Corp., 460 F.2d 485, 486 (6th Cir. 1972). The plaintiff later sued the manufacturer when the car ran off the road. Id. In response to the defendant's assertion of assumption of the risk, the court stated that the defense is only effective when continued use after notice of a dangerous condition is unreasonable. Id. at 493-94. In light of the fact that the plaintiff had repeatedly requested that the car be replaced and that he had to travel for a living, the plaintiff was entitled to have a jury decide whether the claimed consent to the danger was in fact only a product of "duress of circumstances." Id. at 494.

For a contrary view, refer to note 44 supra, which discusses the argument that assumption of the risk should fall on smokers, given the broad publicity surrounding the 1964 Surgeon General's Report.

386. Blackburn v. Dorta, 348 So. 2d 237, 289 (Fla. 1977). "The phrase 'assumption of the risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring); see also White, Strict Liability, supra note 37, at 599-601 (citing efforts to
is more suited to claims sounding in negligence, not to intentional torts. Third, it is a fact-specific defense based on the subjective understanding of the plaintiff, and thus is unsuited to support generalizations across the board. Fourth, given the wide acceptance of the principle of comparative fault, which allows a jury to apportion damages based on each party's role in causing the harm, the harsh operation of assumption of the risk, which denies the plaintiff any recovery, has become outdated. Fifth, assumption of the risk has been significantly narrowed or rejected in many jurisdictions. Sixth, our motivations for protecting children who have not consented to a touching should apply with equal force here. Perhaps most

narrow the effects of this defense by judicial action, statutory enactments, or total elimination; Note, supra note 22, at 827 (arguing that these defenses should be construed in a manner favorable to plaintiffs in cigarette cases, in order to take a step toward compensating some of the victims of smoking and their families).

With the 1988 Surgeon General's Report conclusively establishing that nicotine is addictive, the arguments against applying the assumption of the risk defense should take on even more urgency. However, it still appears that this counterdefense has yet to be tested judicially. The argument should be made that, given that 50% of smokers became addicted as adolescents or even pre-adolescents, when they were legally incompetent to assume the risks of smoking and when, in many states, it was even against state law to purchase tobacco products, they could not be held to have assumed the risks. See Crawford, supra note 33, at 280. Once they reached the age of maturity where they could be held to assume the risks of their conduct, they were already addicted. Given that they were already addicted by the time they reached the age that they could assume the risks, continued use of cigarettes was not voluntary and thus could not constitute assumption of the risk. See White, Intentional Exploitation, supra note 26, at 915-16 (noting that most cigarette smokers develop the habit as children and cannot escape from the "clinging monster"). Justice Roger Traynor foreshadowed this counterdefense 30 years ago. See Roger J. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 371 (1965) (questioning "how voluntarily many consumers are continuing to smoke"); see also Nee, supra note 3, at 47-48 (arguing that cigarette companies should be liable for failing to warn smokers of addiction).

387. See Blackburn, 348 So. 2d at 293 (finding no meaningful difference between assumption of the risk and comparative negligence and merging the two).

388. See Crawford, supra note 33, at 276; Marcy, 655 F.2d at 1377; Forrest City Mach. Works, Inc., 616 S.W.2d at 724.

389. Crawford, supra note 33, at 279.

390. See Li v. Yellow Cab Co., 532 P.2d 1226, 1240-41 (Cal. 1975) (holding that the adoption of comparative negligence should merge the assumption of the risk defense into the general scheme of liability in proportion to fault).

391. See, e.g., Blackburn, 348 So. 2d at 289 (noting the "puissant drift toward abrogating the defense"); Minshina v. Sunset Ranch, Inc., 737 P.2d 1163, 1169, 1161 (Nev. 1987) (noting that the defense has been subjected to "mounting criticism and eventual abrogation by common law courts and legislatures" and abolishing all but express assumption of the risk). But see Riley v. Davison Constr. Co., 409 N.E.2d 1279, 1283 (Mass. 1980) (holding that assumption of the risk is compatible with principles of comparative fault and asserting its continued vitality). For a discussion of the assumption of the risk defense as it has been applied in the tobacco area, refer to subpart III(D) supra.

392. Refer to subpart III(C) supra (discussing the consent defense).
importantly, a finding that a plaintiff assumed the risk of certain behavior presumes that assumption to have been both voluntary and fully informed. There is much evidence, though, that the "choice" of the potential plaintiffs relevant to this Article, adolescents and teenagers, is neither voluntary nor adequately informed.\textsuperscript{393} There is no convincing argument that young smokers either knowingly or voluntarily agree to expose themselves to any of the specific health risks of smoking prior to starting to smoke.\textsuperscript{394}

\subsection*{E. The Preemption Defense}

The success of a smokers' battery case depends in part on whether the Federal Cigarette Labeling and Advertising Act\textsuperscript{395} preempts this cause of action. The Supreme Court has recently explained the breadth of preemption in \textit{Cipollone v. Liggett Group, Inc.}\textsuperscript{396} The case was brought by a smoker, Rose Cipollone, against three tobacco product manufacturers, alleging that her lung cancer was caused by smoking cigarettes manufactured and sold by the defendants.\textsuperscript{397} Mrs. Cipollone alleged several bases for recovery, including strict liability, negligence, express warranty, and intentional tort.\textsuperscript{398} The intentional torts alleged involved claims of fraudulent misrepresentation and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{393} See Ausness, supra note 26, at 953-55 (arguing that most smokers cannot be held to truly appreciate the specific risks of smoking); Levin, supra note 26, at 225 (asserting that by the time minors are mature enough to appreciate the risks of smoking, "addiction renders any new information relatively useless"). In the asbestos context, courts have refused to find that plaintiffs have voluntarily and knowingly appreciated the dangers of exposure even in the face of widespread public knowledge of the dangers of asbestos. See Borel v. Fibreboard Paper Corps., 493 F.2d 1078, 1106, 1108 (5th Cir. 1973) (noting that plaintiff received only "watered down' 'cautions' ' from his employer about the dangers of asbestos and approving the jury's finding that he did not voluntarily and reasonably encounter a known danger), cert. denied, 419 U.S. 869 (1974).
\item \textsuperscript{394} Ausness, supra note 26, at 954.
\item \textsuperscript{395} 15 U.S.C. §§ 1331-41. The Act requires that all advertisements and packs of cigarettes sold in the United States be conspicuously emblazoned with one of four different health warnings. Id. § 1333(a)-(b). The Act further provides that no other warning shall be required on any cigarette package. Id. § 1334(a). The Act declares that no "requirement or prohibition based on smoking and health shall be imposed under State law" relating to cigarette advertisements or packs labeled in conformity with the Act. Id. § 1334(b).
\item \textsuperscript{396} 112 S. Ct. 2608 (1992). For background on preemption, see Laurence H. Tribe, American Constitutional Law §§ 6-26 (2d ed. 1988).
\item \textsuperscript{397} A lengthy discussion of the case, its history, and trial result is beyond the scope of this article, but for a detailed discussion, see Crawford, supra note 33, at 259-62 (analyzing the Cipollone opinion and discussing its potential impact on tort claims). For more on the history of the Cipollone case, refer to note 29 supra.
\item \textsuperscript{398} Cipollone, 112 S. Ct. at 2613-14.
\end{enumerate}
\end{footnotesize}
conspiracy to defraud. The essence of the misrepresentation claim was that the manufacturers neutralized the federally mandated warnings through advertising and ignored and failed to act upon medical and scientific data indicating that cigarettes were hazardous to a consumer's health. The second intentional tort alleged a conspiracy to defraud the public of the medical and scientific data concerning the hazards of smoking.

The defendants interposed, as one of their defenses, that the 1965 and 1969 Acts shielded them from liability based on their conduct after 1965. The Cipollone Court reiterated the longstanding principle that "state law that conflicts with federal law is 'without effect.'" However, there is a general presumption against preemption because of the strength of a state's police power. The Cipollone Court emphasized that the preemptive scope of federal legislation must be governed by the express language of an act. Section 5 of both Acts contained preemption provisions. Upon analyzing each section independently, the Court concluded that the 1965 provisions "merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels or in cigarette advertisements," but "did not preempt state law damages actions." The Court did find, however, the language in the 1969 Act to be "much broader" than that in

399. Id. at 2614.  
400. Id.  
401. Id. at 2615.  
402. Id. at 2617 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).  
403. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating that, in interpreting federal acts, the court must start with the assumption that the historic police powers of the state were not to be superseded unless this was clearly the purpose of Congress); see also Tribe, supra note 396, at 482-83 n.8 (noting that it is "fundamentally lawless" for federal courts to preempt state law unless it is absolutely clear that Congress intended this result).  
404. Cipollone, 112 S. Ct. at 2613.  
405. Id.  
406. Id. (citation omitted). The Court quoted the relevant portions of the 1965 Act:  
(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act [which mandated the warning "CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH"] shall be required on any cigarette package.  
(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.  
Id. at 2616.  
407. Id. at 2619.  
408. Id. The Court quoted the relevant provisions of this law as follows: "No requirement or prohibition based on smoking and health shall be imposed under State
the 1965 Act and suggested "no distinction between positive enactments and common law."409 Because of this, the Court located several areas in which not only positive enactments, but also common law actions, were preempted.410 Thus,

insofar as claims under [a] failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted. The Act does not, however, pre-empt petitioner's claims that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion.411

Accordingly, the claim of express warranty, based primarily on health claims made in defendants' advertising, was not preempted: "While the general duty not to breach warranties arises under state law, the particular 'requirement ... based on smoking and health ... with respect to the advertising or promotion [of] cigarettes' in an express warranty claim arises from the manufacturer's statements in its advertisements."412 Describing a breach of express warranty claim as a "common law remedy for a contractual commitment voluntarily undertaken," the Court held that it was not a "requirement ... imposed under State law" within the meaning of the Act.413 The fact that the terms of the warranty may have been set forth in advertisements rather than in separate documents was found not to affect the preemption issue, because the breach of warranty claim was made "with respect to advertising," and did not rest on a duty imposed under state law.414

As to the fraudulent misrepresentation claim, the Court

law with respect to the advertising or promotion of any cigarettes [which are properly labeled]." Id. at 2617 (quoting the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1969) (codified as amended at 15 U.S.C. §§1331-41)). Justice Blackmun, in a concurrence joined in by two other Justices, argued that the Act's legislative history indicated that the 1969 amendments were correctly interpreted as mere clarifications of the earlier statute. Cipollone, 112 S. Ct. at 2629. He pointed out that there was no suggestion that Congress intended to preempt many state common-law damage claims by the 1969 amendments and thus "leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies." Id. at 2630. In the words of one commentator, the plurality "left the door open for future plaintiffs ... to assert valid failure to warn claims, despite the mandate of the preemption language in the ... 1969 Act." Crawford, supra note 33, at 262.

409. Cipollone, 112 S. Ct. at 2620.
410. Id. at 2621-24.
411. Id. at 2621-22.
412. Id. at 2622.
413. Id. (emphasis added).
414. Id. at 2622-23.
held that prohibiting statements in advertising and promotional materials which tend to minimize the health hazards associated with smoking "is merely the converse of a state law requirement that warnings be included in advertising and promotional materials," and was thus preempted by the 1969 Act. The second misrepresentation claim alleged that the defendants made false representations of material facts to consumers and concealed material facts from them about the hazards of smoking. The Court found a cause of action based on the manufacturers' violating the duty not to mislead or conceal facts was not prescribed by § 5(b), "insofar as those claims rely on a state law duty to disclose such facts through channels of communication other than advertising or promotion." The Court offered as an example disclosures made to an administrative agency, and held that fraudulent misrepresentation claims, even though based primarily on allegedly false statements of material fact made in advertisements, are not preempted by § 5(b) because these claims are not predicated on a duty "based on smoking and health," but rather on a "more general obligation—the duty not to deceive." Concluding that "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements," the Court found that the claims relating to conspiracy to misrepresent or conceal material facts were not preempted.

What are the implications of Cipollone on the argument for a cause of action for smokers' battery? Cipollone does not proscribe all causes of action against tobacco product manufacturers, only those actions that are based solely on inadequate warnings in advertising or promotion. Undoubtedly, there are still smokers alive who began to smoke prior to the enactment of the 1965 Act. If they sued the companies, both the 1965 and the 1969 Acts would be irrelevant. Any damage claims they

415. Id. at 2623.
416. Id.
417. Id. at 2624.
418. Id. at 2623.
419. Id.
420. Id. at 2624 (pointing out that in enacting the 1969 Act, Congress showed no intent to insulate cigarette manufacturers "from longstanding rules governing fraud" and noting that Congress explicitly authorized the Federal Trade Commission to identify and punish deceptive advertising practices).
421. Id. In this regard, the Court stated that Congress intended the phrase "relating to smoking and health... to be construed narrowly, so as not to proscribe the regulation of deceptive advertising." Id.
422. Id. at 2624-25.
brought based on acts that occurred prior to 1969 would not be subject to preemption.423 Thereafter, however, claims would be preempted to the extent that they relied on omissions or inclusions in advertising or promotions, but generally would not be preempted if based on express warranty, intentional fraud or misrepresentation, or conspiracy,424 or possibly even failure to warn, "if the warning standard imposed can reasonably be met by means other than advertising or promotion."425 These other means could take the form of package inserts, public service announcements, information conveyed through other media, responses to consumers' queries about the hazards of smoking,426 or even company representatives' visits to schools to discuss with students the hazards of smoking. At least one scholar worries about the extent of the companies' immunity from suit:

Granting tobacco companies tort immunity not enjoyed by their corporate brethren, while leaving consumer protection to the benign sanctions of the Cigarette Act, begets not a regulatory vacuum but a regulatory black hole. Congress could not have intended to leave states without power to protect their historic interests and plaintiffs without remedy to vindicate their state-created rights.427

If that were the case, tobacco companies could advertise and promote smoking in ways that would neutralize the required warnings, continue to allure minors and other vulnerable groups,428 with the states powerless to enforce common-law rights developed over centuries on behalf of their citizens. "Tobacco companies could belittle the scientific criticism . . . , induce addiction, and laugh all the way to the bank. Indeed, such may already be the case."429

On the assumption that Cipollone truly does leave open several windows for establishing liability, there may be various causes of action for which a jury could find liability consonant with Cipollone. A jury could find, for example, that companies (1) gave false statements of material facts about the health hazards of smoking,430 (2) concealed from consumers evidence

423. Id. at 2625.
424. Id.
426. Id. at 266-67.
427. Id. at 268.
428. Id. at 266-69.
429. Id. at 268 (footnote omitted). For further discussion of the cigarette companies' targeting of minors, refer to Part II supra.
430. Refer to notes 5-6 supra.
of specific harms of smoking as the companies became aware of
these, 431 (3) conspired to addict people to nicotine by halting
their own internal testing and development of cigarettes con-
taining less nicotine, 432 (4) misrepresented their intentions as
to those tests, 433 (5) conspired to addict people by concealing
the material fact that it was possible to market cigarettes con-
taining non-addicting levels of nicotine, 434 and (6) conspired
with their advertisers to target young people as potential new
customers for their wares, thus helping to cause these young
people to start smoking. 435 Under these theories, liability
would be based not on imposing a “requirement or prohibition”
with respect to “advertising or promotion,” which is preempted
by federal law, but rather, as allowed under Cipollone, on the
obligation not to deceive or conspire.

These intentional frauds, deceptions, misrepresentations,
and conspiracies result, in effect, in the eventual touching of
the cigarette to the lips of adolescents. The tobacco companies
should be held at least partly responsible for that touching, and
hence for the battery that results.

IV. DAMAGES

The smokers’ battery cause of action is particularly advan-
tageous because punitive damages may be awarded. “[M]ore
liberal rules apply to intentional tort liability than negligence
in terms of . . . types of recoverable damages, as well as the
measure of compensation.” 436 The intentional nature of the ac-
tivity giving rise to the battery as well as the invasion of bodily
integrity make a battery cause of action more likely to result in
a punitive damage award than a cause of action claiming a
non-intentional harm. 437

The use of tort law to punish socially reprehensible conduct
and deter it in the future is well-established historically. 438 A
skillful description of the severity of a plaintiff’s injuries could

431. Refer to notes 5-6 supra.
432. Refer to notes 6, 8-9 supra.
433. Refer to notes 6, 8-9 supra.
434. Refer to notes 6, 8-9 supra.
435. Refer to notes 6, 8-9 supra; Part II supra.
436. Carl B. Meyer, supra note 256, at 376 (citing Ralph S. Bauer, The Degree
of Moral Fault as Affecting Defendant’s Liability, 81 U. PA. L. REV. 586 (1933)).
437. PROSSER AND KEETON, supra note 236, § 2 at 10-11, § 9 at 40-41.
438. Id. § 1, at 5-6; see Thiry v. Armstrong World Indus., 661 P.2d 515, 518
(Okla. 1983) (approving punitive damages for instances of “reckless disregard for the
public safety” and noting that they should be calculated with regard to the
defendant’s wealth so that the wrongdoer will be “stung” by them).
well result in a substantial award of punitive damages,\(^{439}\) especially considering that "[w]hile the negligent defendant is generally only liable for foreseeable consequences, the intentional tortfeasor may be liable for every result stemming directly, or even indirectly, from his conduct."\(^{440}\)

A deliberate intention to injure the victim may be inferred from the circumstances of the battery, regardless of the defendant's denials.\(^{441}\) In the words of Holmes, "[i]f the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally."\(^{442}\) Prosser contends that battery almost always justifies imposing punitive damages because it necessarily involves intentional contact causing harm or offense to another.\(^{443}\) In battery, nominal damages may be awarded without proof of harm to the plaintiff.\(^{444}\)

The purpose of an award of punitive damages is primarily to serve as a deterrent, as well as to compensate plaintiffs for damages not formally recognized by law.\(^{445}\) The defendant's intent is a key factor in determining the propriety of punitive damages, as is a finding that the plaintiff actually suffered harm.\(^{446}\)

The traditional standard employed to measure the validity of punitive damage awards is whether the defendant's acts were malicious, oppressive, or in reckless and wanton disregard of the plaintiff's rights;\(^{447}\) in recent cases charging fraudulent misrepresentation, which can be likened to some of the charges made against the tobacco companies,\(^{448}\) some state courts have


\(^{440}\) RESTATEMENT (SECOND) OF TORTS § 435B.

\(^{441}\) See Gulden v. Crown Zellerbach Corp., 890 F.2d 195, 197-98 (9th Cir. 1989) (reversing summary judgment granted to employer on battery claim, reasoning that a jury could ascribe to employer a "deliberate intention to injure" employees by ordering them to clean up highly toxic PCBs on their hands and knees without protective clothing).

\(^{442}\) Oliver Wendell Holmes, Privilege, Malice and Intent, 8 HARV. L. REV. 1 (1894).

\(^{443}\) PROSSER AND KEETON, supra note 236, § 9 at 40-41.

\(^{444}\) Id. at 40; Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 865 n.9 (Mo. App. 1985).

\(^{445}\) Carl B. Meyer, supra note 266, at 376.

\(^{446}\) Id.

\(^{447}\) E.g., Schlessman v. Brainard, 92 P.2d 749, 751 (Colo. 1939); Wegman v. Pratt, 579 N.E.2d 1035, 1044 (Ill. App. Ct. 1991); Northrip v. Conner, 764 P.2d 516, 519 (N.M. 1988); see also Kelso v. Motorola, Inc., 384 N.W.2d 353, 359 (Ill. 1978) (stating that a defendant may be liable for battery if he "acts with such negligence as to indicate wanton disregard of the rights of others").

\(^{448}\) Refer to note 8 supra (detailing bases for numerous claims against tobacco
eased this standard of proof. Rather than requiring a finding of malice or oppressiveness, awards have been sustained based on a finding of intent to mislead, deceive, or defraud.

Because battery charges usually involve actions with the worst kind of intentions, these cases frequently justify punitive damage awards. For example, punitive damages have been permitted in battery cases involving a strike on the arm, a punch, and even a bite on the arm. Awards have also been sustained where a defendant desired to harm the plaintiff or when defendants knew that their actions were substantially certain to cause harm.

In products liability cases, the courts have not been uniform on the question of whether punitive damages are appropriate. Courts have expressed concerns that the flood of litigants involved in mass tort cases and the punitive damages associated with them have led to court congestion and long trials. Other courts have affirmed the propriety of these product manufacturers, including misrepresentation and fraud for concealing the addictive nature of nicotine and for controlling and manipulating the levels of nicotine in cigarettes.

449. See First Ala. Bank v. First State Ins. Co., 899 F.2d 1045, 1052 (11th Cir. 1990). The defendant insurance company was found to have induced the bank to purchase a policy by misrepresenting key terms of the policy. Id. at 1046-47. The court of appeals, applying a recent Alabama Supreme Court decision, declared that the mere finding of an intent to deceive or defraud would justify punitive damages. Id. at 1062. It found that Alabama had abandoned the requirement that punitive damages for intentional fraud could only be justified by a showing of "maliciousness, oppressiveness, or grossness." Id. (citing American Honda Motor Co. v. Boyd, 475 So. 2d 835, 838 (Ala. 1985)). The court of appeals later observed that Alabama law allowed plaintiffs to recover punitive damages in fraud cases merely by showing "reckless disregard of the falsity [of a statement of material fact]." Braswell v. ConAgra, Inc., 936 F.2d 1169, 1175 (11th Cir. 1991) (citing Carnival Cruise Lines, Inc. v. Goodin, 555 So. 2d 98, 103 (Ala. 1988)).

450. See Braswell, 336 F.2d 1175-76; First Ala. Bank, 899 F.2d at 1062.

451. See PROSSER AND KEESTON, supra note 236, § 2, at 9-10 (explaining that all but a few courts have allowed punitive or exemplary damages when the defendant's action has been intentional or deliberate and has the character of "outrage" frequently associated with crime).


453. Fowler v. Mantooh, 683 S.W.2d 250, 262 (Ky. 1984) (noting that punitive damages may be awarded when the assault is "willful, malicious, and without justification," even where no serious physical injury occurs).

454. Syring v. Tucker, 498 N.W.2d 370, 371, 373 (Wis. 1993) (recognizing the appellate court's decision to uphold a $10,000 punitive damage award against defendant who yelled that she had AIDS after biting plaintiff on the forearm even assuming that defendant did not transmit HIV, but remanding the case on the issue of forced medical examinations).


456. In re Asbestos Product Liability Litigation (No. VI), 771 F. Supp. 415, 418-420 (J.F.M.L. 1991) (arguing that the current system for mass tort cases has led to
damages in traditional products liability and mass tort cases as well.\textsuperscript{457} For example, in a recent case involving a claim by a city against a manufacturer of asbestos fireproofing that had been installed in the city hall,\textsuperscript{453} the Fourth Circuit Court of Appeals affirmed a two million dollar punitive damages award.\textsuperscript{459} The court ruled that there was ample evidence of the company’s knowledge of the health risks from asbestos exposure when it sold the product.\textsuperscript{460} Furthermore, there was evidence that the company knew that its product often failed to bond properly, creating a danger that asbestos fibers would be released into the city hall.\textsuperscript{461} Finally, there was evidence that the defendant had already marketed an asbestos-free product in response to concerns about asbestos exposure.\textsuperscript{462} Given this accumulation of evidence, the court determined that the jury was reasonable in concluding that the defendant “had acted willfully, wantonly, or recklessly in selling the asbestos-containing” product, in conscious disregard to known risks associated with the presence of asbestos in its product.\textsuperscript{463}

Coincidentally, in the same year, a separate opinion was authored on the propriety of a $7.5 million punitive damage award in a case involving injuries received as a result of using the Dalkon Shield intrauterine device.\textsuperscript{464} The court’s language

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\textsuperscript{457} See Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1569-71 (6th Cir. 1985) (rejecting the “overkill” and finite-resources arguments and upholding an award of punitive damages in an asbestos suit), cert. denied, 478 U.S. 1021 (1986); Fischer v. Johns-Manville Corp., 512 A.2d 466, 470 (N.J. 1986) (rejecting Johns-Manville’s claim that punitive damages are not allowed in strict product liability actions). The court stated that “we do not believe that the Tennessee Supreme Court would preclude the availability of punitive damages merely because the defendant’s alleged tortious behavior resulted in harm to a large number of people.” Id. at 1671. In other cases involving liability for defects in widely-used products, awards of punitive damages have also been upheld. City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 983-84 (4th Cir. 1987) (holding that the jury could have reasonably concluded that W.R. Grace acted willfully, wantonly, or recklessly in selling the asbestos-containing materials and that punitive damages were therefore appropriate); Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1240 (Kan. 1987) (finding that punitive damages of $7.5 million were not excessive when Robins deliberately, intentionally, and actively concealed the dangers of the Dalkon Shield); Thiry v. Armstrong World Indus., 661 P.2d 515, 516-17 (Okla. 1983) (holding that punitive damages could be paid in product liability cases).
\textsuperscript{468} Greenville, 827 F.2d at 976.
\textsuperscript{469} Id. at 984.
\textsuperscript{460} Id. at 983.
\textsuperscript{461} Id.
\textsuperscript{462} Id.
\textsuperscript{463} Id.
\textsuperscript{464} Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1215 (Kan. 1987). Plaintiff suffered a total abdominal hysterectomy, the disintegration of her marriage, and lifelong
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on the propriety of the punitive damage award should shed light on the appropriate standard in the smokers' battery cases. "In assessing punitive damages," the court said, "the nature, extent, and enormity of the wrong, the intent of the party committing it, and all circumstances attending the transaction involved should be considered." Punitive damages may be awarded whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy. They are awarded to punish wrongdoers for malicious, vindictive, or willful and wanton invasion of others' rights, to "restrain and deter others from the commission of like wrongs." Asserting that punitive damages are the most effective consumer remedy for defectively designed mass-produced articles, yet noting that no Kansas appellate court had ever upheld a punitive damage award of such magnitude, the court emphasized that it had never been presented "with corporate misconduct of such gravity and duration." Finding "substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield for year after year until those dangers worked their tragic results," the court affirmed the award.

465. Id. at 1238.
466. Id. at 1239.
467. Id. (quoting Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1033, 1033 (Kan. 1984)).
468. Id. at 1240 (discussing several other cases in which high punitive damages awards had been upheld in defective consumer product cases).
469. Id. The misconduct and the determination of fraud, both supported by the jury's verdict, were proved by substantial evidence that the manufacturer, A.H. Robins, knew the Dalkon Shield was not safe or effective; knew of the high rate of pelvic inflammatory disease (PID) and septic abortion associated with its product; misled doctors through claims of safety and efficacy knowing there was no basis for these claims; misled consumers through a lay promotional campaign and, by 1974 at the latest, had fully comprehended the enormity of the dangers it had created, but deliberately and intentionally concealed those dangers; that it put money into "favorable" studies; that it tried to neutralize any critics of the Dalkon Shield; that Robins was motivated by a desire to avoid litigation judgments rather than a concern for the safety of the users of the Dalkon Shield; that it consistently denied the dangers of the Dalkon Shield for nearly fifteen years after its original marketing of the Dalkon Shield; that it commissioned studies on the Dalkon Shield which it dropped or concealed when the results were unfavorable; and . . . that it consigned hundreds of documents to the furnace rather than inform women that the Dalkon Shield carried inside their bodies was a bacterial time bomb which could cause septic abortions, PID, and even death.
470. Tetuan, 738 P.2d at 1240. These findings are quoted in such detail because many are eerily similar to the claims made against tobacco product manufacturers. Refer to note 8 supra.
In a more recent case involving asbestos, the Maryland Supreme Court determined that punitive damages may be
awarded against a manufacturer. In that case, the plaintiff charged that he had acquired asbestosis as a result of work-
related exposure to dangerous, air-borne asbestos particles through the mid-1960s. The court’s test for punitive dam-
egages required direct evidence that a defendant had substantial knowledge that a product was, or was likely to become, danger-
ous, and a gross indifference to the danger. The Maryland Court of Appeals found evidence that the defendant conducted itself “in an extraordinary manner characterized by a wanton and reckless disregard for the rights of others.” There was
evidence that the manufacturer was aware of the results of a study linking their product with asbestosis and emphysema.
There was also evidence that the company knew by 1956 that its product contained a hazardous component and should be la-
beled to reflect this, but that it was not so labeled. There was further evidence that reports made known to the company
substantiated that those who inhaled the dust generated from the product would be adversely affected. In spite of knowl-
edge of the potential hazards, though, the manufacturer failed to either issue warnings or otherwise eliminate possible exposure to the dangerous component in its product. Based on this evidence, the court concluded that the company had been
advised years earlier that its product posed a health hazard and that, contrary to expert advice, it had failed to place warn-
ings on its product. Because the company withheld from its employees and the public long-held information that exposure to their product posed a health risk, the court concluded that the defendant’s conduct fell within the purview of behavior warranting an award of punitive damages. On appeal, the
Maryland Supreme Court determined that punitive damages were not appropriate in cases of mere “reckless” conduct.

472. Id.
473. Id. at 534.
474. Id. (citations omitted).
475. Id.
476. Id.
477. Id.
478. Id.
479. Id. at 537.
480. Id.
481. Id.
Instead, the court required proof of "(1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect." The court remanded the case for a decision under its new standard.

The significance of these three cases to the issue of punitive damages in smokers' battery claims must not be lost. Numerous points of congruence can be found between the actions of these three manufacturers, used just as an illustration, and those of the tobacco product manufacturers. First, in all three cases, substantial evidence indicated that the companies knew of their products' risks long before they directly informed either their customers or the general public of the risks. Second, the risks involved in the use of these products were particularly serious. Third, not only did the companies deliberately conceal from the public for years the dangers of their products, leading to tragic results, they also misled consumers with safety claims. In one case, evidence indicated that documents had been destroyed and scientific studies discontinued when the results were not favorable. Finally, there was proof that litigation concerns took priority over public safety.

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483. Id. at 653.
484. Id. at 650. It seems likely that the conduct described by the lower court would certainly justify an award of punitive damages under the new standard as well.
485. Compare City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 983 (4th Cir. 1987) (stating that Grace had ample knowledge of risks of asbestos exposure) and Tetuan v. A.H. Robins Co., 738 F.2d 1210, 1240 (Kan. 1987) (indicating that Robins knew the Dalkon Shield was neither safe nor effective) and MCIC, 587 A.2d at 536 (finding that an Owens industrial hygienist knew of studies that indicated asbestos exposure could lead to asbestosis and emphysema) with Aumness, supra note 26, at 954 (indicating that cigarette companies knew of smoking's risks before the public).
486. Compare Greenville, 827 F.2d at 980 (stating the opinion of the author of an EPA study that there was no safe level of exposure to asbestos) and Tetuan, 738 F.2d at 1216 (stating that the plaintiff's use of the Dalkon shield resulted in the necessity of performing a total abdominal hysterectomy) with Hills, supra note 5, at 1 (reporting that Brown & Williamson's research had found that smoking could lead to lung cancer, heart disease, and emphysema).
487. Compare Tetuan, 738 P.2d at 1240 (finding that Robins misled both doctors and consumers regarding the safety of the Dalkon Shield) with Aumness, supra note 26, at 954 (claiming that prior to 1955, the tobacco companies knew of smoking's risks but represented to the public that smoking was safe) and Hills, supra note 5, at 1 (stating that tobacco industry executives chose to remain silent and keep their research results secret).
488. Compare Tetuan, 738 P.2d at 1240 (stating that Robins commissioned studies on the Dalkon Shield that it subsequently dropped or suppressed when the results were unfavorable) with Scientists Say Nicotine Research Was Suppressed, L.A. Times, Apr. 28, 1994, at A37 (stating that a cigarette manufacturer suppressed their research and closed their lab when results suggested that nicotine was addictive).
489. Compare Tetuan, 738 P.2d at 1240 (claiming that Robins was motivated by
these points, substantial evidence abounds that the tobacco product manufacturers have acted in a similar fashion. Assuming that at the trials of the cases already filed around the country, and more importantly, of those that will be prosecuted on a theory of smokers’ battery, the evidence will be lodged supporting similar claims about the tobacco product manufacturers, punitive damage awards of substantial sums should be awarded and affirmed sometime soon.

V. EPILOGUE—WHY BATTERY?

In addition to the advantage of the availability of punitive damages, a charge of battery has several other advantages over cases brought under theories such as negligence and products liability. First, these theories have already been attempted, but have hopelessly failed smokers. Second, battery avoids the difficulties of the balancing tests applied in negligence cases. Rather, it presents a simple objective test, “devoid of any subjective determinations regarding whether the defendant’s activity was unreasonable in the past.” To succeed, battery plaintiffs need only show that the defendant intended to cause an unconsented bodily contact and that this contact did indeed occur. Third, battery also should avoid defenses such as assumption of the risk, which have devastated smoker plaintiffs in strict liability cases over the years.

Davis v. DuPont is an example of a case brought in negligence that may have been successful in battery. In Davis, the plaintiff showed that his work environment exposed him to toxic fumes and that he suffered liver damage as a result. He also proved that he had used defendants’ products, which released toxic fumes. However, unable to prove that

a desire to avoid litigation rather than promote safety) with Ausness, supra note 26, at 954 (stating that instead of warning the public about the dangers of nicotine addiction, cigarette companies relied on it to sustain their market) and White, Intentional Exploitation, supra note 29, at 905 (claiming that tobacco companies chose to reap the profits from their product rather than warn the public of its addictive nature).

490. Refer to Part I supra.
491. McAuliffe, supra note 283, at 296.
492. Id. at 296-97.
493. Id. at 297; RESTATEMENT (SECOND) OF TORTS § 18.
494. Refer to subpart III(D) supra.
496. McAuliffe, supra note 283, at 297.
498. Id. at 653 (stating that plaintiff testified that his employer used chemicals made by the named defendant and by other manufacturers not named in the suit).
defendants’ toxic product was the proximate cause of his liver damage, Davis lost his negligence case.499

Had Davis brought his claim in battery, he could have established his prima facie case by submitting proof that the defendant caused harmful or offensive contact by exposing him to toxic fumes through the paint products used at work. Davis could have proved that the defendants had acted intentionally by submitting evidence showing their awareness that at least some of its products could cause liver damage.500 While the defendant may have asserted that Davis had assumed the risk of injury by continuing to use the products for twenty-five years, as battery is an intentional tort, this defense should have been unavailable to the defendants.501 Davis could have asserted that he just painted cars and that he had no way of knowing twenty-five years earlier that he was being exposed to hazardous substances.502

The old excuse (and occasional justification) for denying awards of punitive damages, that they will lead to a flood of litigation and exorbitant jury verdicts, should not deter compensatory and even exemplary awards in smoker battery cases. As in the secondhand smoke cases, “[s]mall damage awards, litigation costs, and the problems associated with determining the identity of potential defendants provide a check on the number of smoker battery suits that will be brought.”503 Nor is it sensible to buttress the notion that, if the ultimate, unavoidable effect of the operations of a manufacturer—here one producing tobacco products—is mass destruction of life, liability should not be imposed because it would impair the companies’ ability to continue operating.504 “This position assumes a sanctity of the status quo with respect to products and the

499. Id. at 655.
500. Id. at 653 (stating that Health Hazard data on MSDS contained warnings that liver and kidney injury may result from recurrent exposure).
501. See Harvey Freeman & Sons, Inc. v. Stanley, 378 S.E.2d 857, 859 (Ga. 1989) (noting that assumption of the risk would have no bearing as a defense for an employee who committed an intentional tort against the plaintiff, but does play a role in the plaintiff’s negligent hiring action against the employer). The narrow applicability of the consent defense in intentional torts is even more reason to eliminate both the consent and assumption of the risk defenses in smokers’ battery cases.
502. Punitive damages might also have been recoverable in Davis, upon his proving that the company marketed this dangerous product without warning consumers of the danger until several years after the product was first in use. McAuliffe, supra note 283, at 297-98 (citing Davis, 729 F. Supp. at 653).
503. Ezra, supra note 65, at 1107.
504. See White, Strict Liability, supra note 37, at 618 (contrasting Workers’ Compensation, which requires an industry to pay for the few lives it unavoidably takes during the course of its operations, to the tobacco industry’s unwillingness to pay for the mass destruction caused by its products).
right to produce them, particularly those of low utility 'whose norm is danger,'\textsuperscript{505} which sanctity is unjustified. "[I]t is proposed only that the cigarette manufacturing industry pay the inevitable, and thus intentional, cost of its present system of operations.\textsuperscript{506}

In reference to toxic torts, it has been said that "[t]he tools for dealing with the tort of toxic touching are now available. They include the fingerprinting of toxic chemicals, the determination of the environmental fate of toxics, the calculation of toxic exposure, the application of the established legal doctrines of substantial certainty and the tort of battery."\textsuperscript{507} The same may be said for the tort of smokers' battery.

\textsuperscript{505} \textit{Id.}
\textsuperscript{506} \textit{Id. at 619.}
\textsuperscript{507} Carl B. Meyer, \textit{supra note 266, at 387.}