

TOBACCO LITIGATION'S THIRD-WAVE: HAS JUSTICE GONE UP IN SMOKE?

DAVID A. HYMAN*

I. INTRODUCTION

Tobacco offers a target-rich environment for academic scholarship. A non-exhaustive list would include the conduct of the tobacco companies and their attorneys; the extraordinary sums earned by certain members of the plaintiff's bar as a result of their participation in the suits brought by the various attorneys general (the "Medicaid suits"); the cozy arrangements between those same members of the plaintiff's bar and the state attorneys general who picked them to participate in the Medicaid suits; the terms of settlement of the Medicaid suits; the decision by a state court judge in Minnesota to order the release of tens of thousands of tobacco company documents despite claims of attorney-client privilege; the theft and disclosure of thousands of confidential Brown & Williamson documents by a paralegal (who subsequently had a house bought for him by a prominent plaintiff's lawyer); the political battle between Democrats and Republicans over a federal tobacco bill; the decision by President Clinton to offer a budget which was balanced only if the federal government imposed taxes totaling approximately \$65 billion over five years on tobacco; the unprecedented role played by public health professionals in the framing of public policy with regard to tobacco; the assertion of regulatory authority over tobacco by the FDA; the propriety and constitutionality of restrictions on smoking in the workplace and cigarette advertising; the scope of preemption of tort litigation because cigarettes bear federally mandated warning labels (and the irony that the warning labels have turned out to be the best defense the tobacco companies have going); the marketing of tobacco products through "product placement" in movies; the price elasticity of tobacco among various groups; the regressive nature of excise taxes on tobacco; the ethics of investment in tobacco companies; the paradoxical nature of our nation's policies towards tobacco, which encourages consumption on the one hand (by subsidizing growers and prying open overseas markets), and discourages consumption on the other (by requiring

* Associate Professor, University of Maryland School of Law. The analysis in this article focuses on the policy aspects of primary tobacco use. I appreciate the helpful comments of Bob Condlin and Peter Jacobson.

warning labels, and prohibiting advertising on television); and last but by no means least, the dramatic change in norms regarding smoking.

Any one of these subjects would justify its own symposium, and some of them are addressed by the other participants in this symposium. I focus instead on two narrow issues: the extent to which the state Medicaid programs have actually suffered any damages from the use of cigarettes by Medicaid beneficiaries, and the "pediatricizing" of tobacco policy. The first point deserves analysis because it casts considerable doubt on the merits of the claims with which the states are seeking to extract hundreds of billions of dollars from the tobacco companies. The second point illustrates analogous conduct in another forum, as anti-smoking advocates seek to avoid a debate over the merits of their "reform" by packaging the issue as one involving safety and well being of children. Both points make clear that it is not just the tobacco companies that are in trouble. In our zeal to address the legacy of tobacco, we should be careful that it is not justice that goes up in smoke.

II. THE THIRD WAVE OF TOBACCO LITIGATION: THE MEDICAID SUITS

A. *A Short History of Tobacco Litigation*

Most scholars divide litigation against the tobacco companies into three waves. The first wave was from 1954 to 1973, and involved theories of deceit, breach of express and implied warranties, and negligence.¹ The second wave was from 1983 to 1992, and involved these theories, as well as failure to warn and strict liability.² Both the first and second wave involved the claims of individual smokers. In both of these waves, the tobacco companies maintained that its products were not harmful, and that smokers had assumed the risk of smoking, or were contributorily negligent.³ These defenses, along with a "take-no-prisoners" strategy of litigating, proved a near-invulnerable shield.⁴

1. See Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 71 (1997).

2. See *id.*

3. See *id.*

4. See Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 KAN. L. REV. 465, 471 (1998) ("The assumption of risk defense has 'hovered like a storm cloud over every smoker's claim against the tobacco companies,' leading to victory after victory for the tobacco industry in hundreds of lawsuits brought by smokers."). The litigating strategy of the tobacco companies was outlined by a tobacco lawyer as follows: "The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers . . . [T]o paraphrase General Patton, the way we won these cases was not by spending all of [our client's] money, but by making that

The third wave involves both class action suits brought on behalf of smokers in individual states, and "Medicaid suits," brought on behalf of state Medicaid programs, to recover the amounts they incurred for medical and nursing home care for illnesses attributable to smoking.⁵ Although it is too early to assess the impact of the class action and individual suits, the Medicaid suits have met with extraordinary success.⁶ The tobacco companies settled with four states (Mississippi, Florida, Texas, and Minnesota) for approximately \$36 billion, and then agreed on a global settlement which ultimately foundered in Congress.⁷ Talks are currently underway to settle the remaining Medicaid suits.⁸

B. *Some Background on Medicaid and the Medicaid Suits*

Medicaid is a joint state-federal program which provides funding for medical and nursing home care for the poor.⁹ Depending on the state, between 50% and 78% of Medicaid funding comes from the federal government.¹⁰ The states have limited authority to tailor the Medicaid program to their own needs.¹¹ For many states, Medicaid is the second largest program on their budgets.¹²

In 1994, the state of Mississippi initiated the first Medicaid suit against the tobacco industry.¹³ Frustrated that the tobacco companies had consistently won every case brought by a smoker, a plaintiff's law-

other son of a bitch spend all his." *Haines v. Liggett Group, Inc.*, 814 F.Supp. 414, 421 (D.N.J. 1993).

5. See Cupp, *supra* note 4, at 468-470.

6. See *id.* at 469.

7. See *Big Tobacco, Attorneys General Take Another Shot at Settlement*, STAR TRIBUNE NEWSPAPER OF THE TWIN CITIES, July 28, 1998, at 4A; see also, Barry Meier, *Settlement May be Near in 8 States Tobacco Suits*, N.Y. TIMES, Oct. 4, 1998, at 26.

8. See *id.*

9. See e.g., Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855 *passim* (1990).

10. See *id.* at 860.

11. See Trish Riley, *Medicaid: The Role of the States*, 274 JAMA 267, 267 (1995).

12. See Richard J. Manski et al., *Medicaid, Managed Care, and America's Health Safety Net*, 25 J. L. MED. & ETHICS 30 (1997).

During the past decade, Medicaid has experienced extraordinary growth, in both number of beneficiaries and total expenditures. Between 1988 and 1993, the number of Medicaid beneficiaries grew from 22 million to 32 million. While the number of Medicaid beneficiaries increased by 45 percent, expenditures increased by 145 percent, from \$51 billion to \$125 billion. Expressed in terms of its percentage of state budgets, Medicaid doubled from 10 percent to 20 percent over the same time period, to the point that it is currently the second largest budget item for most states.

Id. at 30; see also Riley, *supra* note 11, at 268.

13. See Michael C. Moore & Charles J. Mikhail, *A New Attack on Smoking Using an Old Time Remedy*, 111 PUB. HEALTH REP. 192, 197 (1996).

yer in Mississippi hit on the idea of having the state Medicaid program sue the tobacco companies for the costs associated with treating Medicaid beneficiaries for smoking-related illnesses.¹⁴ This strategy had the singular advantage of replacing an obviously blameworthy plaintiff with an entity which had never smoked, but footed the bill for people who did.¹⁵ The lawyer was a personal friend of the Attorney General of Mississippi, and persuaded him to file suit against the tobacco companies on behalf of the state of Mississippi.¹⁶ Almost forty states followed suit in short order.¹⁷

In an attempt to avoid the impact of the doctrine of subrogation (which would have subjected the state to all the defenses which could have been raised against an individual smoker), most states pursued equitable actions against the tobacco companies.¹⁸ Two states (Florida and Massachusetts) filed claims pursuant to newly enacted statutes which authorized direct action against the tobacco companies, and stripped the tobacco companies of their traditional defenses.¹⁹ In Maryland, a statute was enacted to authorize such litigation after the state judge before whom the case was pending refused to accept the Attorney General's position that the state had a non-statutory (common law and equitable) right to proceed against the tobacco companies.²⁰

14. *See id.* at 194.

15. *See* Cupp, *supra* note 4, at 476 (noting that the Medicaid suits "seek to minimize the assumption of risk argument. By bringing the lawsuits on behalf of the states rather than the smokers themselves, state attorneys general hope to focus juries away from smokers' blameworthiness.").

16. The Attorney General of Mississippi offers a spirited defense of his tactics in Moore & Mikhail, *supra* note 13.

17. Cupp, *supra* note 4, at 476.

18. *See* Cliff Sherrill, *Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution*, 19 U. ARK. LITTLE ROCK L.J. 497, 500-09 (1997) (reviewing suits and causes of action).

19. *See* Medicaid Third-Party Liability Act, FLA. STAT. ANN. § 409.910(1) (stripping defendants of all "affirmative defenses normally available," including "assumption of risk."); MASS. GEN. LAWS ANN. ch. 118E, § 22 (West 1998) and 1994 Mass. Acts, ch. 60, 276. *See also* Elizabeth A. Frohlich, Note, *Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm?*, 21 AM. J. L. & MED. 445, 445 (1995) ("In 1994, Florida and Massachusetts passed legislation enabling the states to bring suit against the tobacco industry to recover Medicaid costs of treating smoking-related illnesses.").

Most of the Florida statute was upheld in *Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239 (Fla. 1996). A federal district court abstained from ruling on the Massachusetts law, but noted that one possible characterization was that it provided a "species of subrogation right, perhaps not one subject to traditional subrogation defenses." *See Philip Morris, Inc. v. Harshbarger*, 946 F.Supp. 1067, 1077-78 (D.Mass. 1996).

20. *See* MD. CODE ANN., HEALTH-GEN §15-120 (1994 and 1997 Supp.).

C. Are There Any Damages?

The claim that the state Medicaid programs incurred damages for which the tobacco companies should be held to answer is problematic. Even if one refrains from smoking, immortality (and no medical bills) is not an option.²¹ The Medicaid program incurs expenses whether or not its beneficiaries smoke; the relevant question is the incremental cost attributable to smoking. Assessing the incremental cost attributable to smoking requires consideration of two elements: timing and magnitude.²² If beneficiaries incur medical expenses sooner because they smoke, the Medicaid program incurs a proportionately greater expense because of the time value of money. If beneficiaries die more expensively or incur greater medical expenses because they smoke, the Medicaid program incurs a greater expense as well. Although it is clear that some percentage of smokers die sooner than would otherwise be the case, it is considerably less obvious that they do so more expensively.²³ There is a good case that the Medicaid program did not incur any incremental expense as a result of smoking. If one factors in excise taxes and foregone pensions and Social Security, the state and federal governments actually appear to come out substantially ahead on smoking.²⁴

21. See Jane Gravelle & Dennis Zimmerman, *The Marlboro Math: Forget the Cigarette Tax Hike, Smokers Already Pay Their Share*, WASH. POST, June 5, 1994, at C1 (stating, "The alternative to death from a smoking-related illness is not immortality and perfect health - it is later death, and perhaps from a more costly illness.").

22. For purposes of simplicity, I assume that the number of Medicaid beneficiaries is not affected by the incidence of smoking. However, if smoking-related illnesses killed people before they qualified for Medicaid, the number of beneficiaries would decrease. Conversely, if smoking-related illnesses exhausted one's private insurance before death supervened, the number of Medicaid beneficiaries would increase. The effect on the incremental costs of the Medicaid program will depend on the direction and magnitude of this vector.

23. Compare Jan J. Barendregt et. al., *The Health Care Costs of Smoking*, 337 NEW ENG. J. MED. 1052, 1052 (1997) ("Health care costs for smokers at a given age are as much as 40 percent higher than those for nonsmokers, but in a population in which no one smoked the costs would be 7 percent higher among men and 4 percent higher among women than the costs in the current mixed population of smokers and nonsmokers.") and JANE G. GRAVELLE & DENNIS ZIMMERMAN, CIGARETTE TAXES TO FUND HEALTH CARE REFORM: AN ECONOMIC ANALYSIS, CONG. RES. SERV. REP. NO. 94-214 E., at 51-54 (Mar. 8, 1994) (concluding that smokers have lower lifetime medical expenses than nonsmokers), with Willard G. Manning et al., *The Taxes of Sin: Do Smokers and Drinkers Pay Their Own Way?*, 261 JAMA 1604, 1604 (1989) (concluding that smokers have higher lifetime medical expenses than nonsmokers).

24. See Christopher May, *Smoke and Mirrors: Florida's Tobacco-Related Medicaid Costs May Turn Out to Be a Mirage*, 50 VAND. L. REV. 1061, 1076-83 (1997); Laura Mansnerus, *Making a Case For Death*, N.Y. TIMES, May 5, 1996, § 4 at 1. But see Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L. J. 1163, 1236-54 (1998) (arguing that other economic models of smoking-related costs understate

Why, then, are the tobacco companies so eager to settle the Medicaid suits? Isn't the fact that the tobacco companies are willing to pay such astronomical sums to settle these cases proof that there are damages? Unfortunately, willingness to pay is not necessarily indicative of the merits of the case. The performance of the tort system in comparable high profile cases (*e.g.*, cases involving unsympathetic defendants and products for which causation is difficult to prove) does not suggest that judges and juries will let the merits matter.²⁵ More generally, because the Medicaid suits were designed to strip the tobacco companies of their traditional (and so-far virtually bulletproof) defenses of assumption of risk and contributory negligence, the willingness of the tobacco companies to settle indicates only that the defendants know a lynch mob when they see one.

The extent to which the tobacco companies are viewed as a piggy bank and the Medicaid suits as a tool with which to pry them open was demonstrated by a question from the audience when the papers in this symposium issue were presented. A well-meaning law student wondered why the major plaintiff's firms who were prosecuting the

costs and overstate benefits); *Moore & Mikhail*, *supra* note 13, at 200-01 (arguing that it is "ghoulish" to suggest that smoking saves the state money on foregone medical expenses and pensions).

25. Consider Agent Orange, breast implants, and Bendectin. In each of these mass exposure tort cases the correlation between exposure and injury was weak, but defendants ended up paying large sums of money.

In the Agent Orange case, the plaintiffs—more than two million Vietnam War veterans who were exposed to Agent Orange, the veteran's wives, and their children—brought suit against seven chemical companies that manufactured the toxic chemical. *See generally* PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1986) [hereinafter *Agent Orange On Trial*]; *see also* Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 342 (1986). The parties settled the case just hours before jury selection was scheduled to begin. *See Agent Orange On Trial* at 164. Although the plaintiffs' proof of causation was fatally flawed, the defendants settled the case for \$180 million while under strong pressure from the judge. *Id.* at 165. The defendants were concerned that a jury would be pro-plaintiff, the case would bring negative publicity to the manufacturers of the chemical, there would be costly appeals, and the expense of going to trial would exceed the benefits of potential victory. *See generally id.* at 143-167.

In the silicon breast implant litigation, the defendant, Dow Corning Corporation, paid more than three million dollars to the plaintiffs—tens of thousands of women who had claimed that the implants caused them illness—despite the fact that numerous scientific studies revealed no such correlation between the implants and the women's conditions. *See* Gina Kolata, *In Implant Case, Science and the Law Have Different Agendas*, N.Y. TIMES, July 11, 1998, at A2; Michael Higgins, *Mass Tort Makeover*, 84 A.B.A.J. 53 (Nov. 1998).

In the case of Bendectin, Merrell Dow Pharmaceuticals faced a number of lawsuits beginning in 1980. Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 13 (1993). Once again, the plaintiffs—individuals who claimed that the anti-nausea drug caused them to suffer birth defects—lacked any substantial evidence to support causation. *See id.* at 27. Nonetheless, juries held the defendants liable and awarded the plaintiffs significant money damages. *See id.* at 2.

Medicaid suits could not “share the wealth” by including some minority-run law firms in the litigation. Have things gotten so bad that the Medicaid suits are actually viewed as a public works project?²⁶

III. TEENAGERS AND TOBACCO POLICY

In the past few years, domestic and foreign policy have been pediatricized. As Charles Krauthammer has accurately noted,

Once upon a time, a politician would promise to do anything — abolish taxes, hold back the tides, run over his grandmother — in the name of the “working man.” Not anymore. Nowadays everything is done in the name of “families” or, better still, for “children.” From Iraq to gun control, from global warming to air bags, there is nary a public policy issue that is not sold as a way to protect kids.²⁷

Tobacco is perhaps the most stunning achievement of pediatricization. Although teenagers make up approximately 2% of smokers, the rhetoric of tobacco reform has focused entirely on children — particularly since David Kessler, the then-Commissioner of the Food & Drug Administration branded smoking a pediatric disease.²⁸ An anti-tobacco speech by President Clinton “invoked children no fewer than 34 times in 21 minutes — a new indoor record.”²⁹ It is no accident that the major anti-smoking advocacy group is the Campaign for Tobacco-Free Kids.³⁰

There is a certain surface plausibility to the pediatricizing of tobacco policy, since most long-term smokers begin smoking when they are teenagers.³¹ However, tobacco kills adults, not children, and does so only after a lifetime of smoking.³² Thus, a reduction in smoking saves the lives of children only in the most attenuated of senses. More

26. I note, as I did at the conference, the likely difficulties of persuading the Fourth Circuit that such a program meets the exacting standards which must be proven to justify a race-based quota.

27. Charles Krauthammer, *It's For the Kids*, WASH. POST, May 8, 1998, at A31. See also Ann Hulbert, *Be Fruitful and Subtract*, N.Y. TIMES, June 14, 1998, § 7 at 11, 14 (“It has become a bipartisan habit to turn vexing public problems into child-centered causes whenever possible. Poverty, health care policy, budget priorities, tobacco companies: the list of issues we must address out of concern for the fate of children keeps growing.”).

28. Krauthammer, *supra* note 27, at A31. (“Dr. David A. Kessler, the Commissioner of Food and Drugs, said today that smoking was fundamentally a pediatric disease because most addiction to tobacco begins among teenagers, and outlined steps to combat the problem.”).

29. See *id.*

30. See *Who We Are* (visited Sept. 29, 1998) <<http://www.tobaccofreekids.org>>.

31. See Kelder & Daynard, *supra* note 1, at 63-65.

32. See *id.*

to the point, the logic of restricting smoking (and other hazardous forms of behavior) to adults is that we believe those who are underage are incapable of making rational decisions about such matters. However, teenagers appear to substantially overestimate the hazards of smoking.³³ As such, the case for paternalism is less than compelling.

If we focus on means instead of ends, the centerpiece of virtually all proposals to prevent teenage smoking has been a hefty increase in the tax imposed on *all* cigarettes. Leave aside the question of the elasticity of demand for cigarettes among teenagers (including the inconvenient fact that teenage smokers do not seem to favor lower-priced generic cigarettes).³⁴ Leave aside as well the probability of a flourishing black market in cigarettes if such taxes are imposed.³⁵ Finally, ignore the fact that it is already unlawful for those under 18 to purchase cigarettes.³⁶ Instead, focus your attention on the fact that

33. W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* 129 (1992) (“[T]he youngest age cohort has a high risk perception and is more likely to overestimate the risk than the population at large, which reflects this group’s substantial reliance on recently provided information pertaining to the smoking risks. . . . [T]here is no evidence of younger consumers being lured into smoking in any disproportionate matter.”).

34. Kelder & Daynard, *supra* note 1, at 66 (“Camel, Marlboro, and Newport - the three most heavily advertised brands of cigarettes - are smoked by 86% of the teenage market.”).

35. More than a hundred years ago, Adam Smith noted the predictable consequence of excess taxation of a product:

The high duties which have been imposed upon the importation of many different sorts of foreign goods, in order to discourage their consumption in Great Britain, have in many cases served only to encourage smuggling; and in all cases have reduced the revenue of the customs below what more moderate duties would have afforded. The saying of Dr. Swift, that in the arithmetic of the customs two and two, instead of making four, make sometimes only one holds perfectly true with regard to such heavy duties. . . .

ADAM SMITH, 2 *THE WEALTH OF NATIONS* 411 (Edwin Cannan ed., University of Chicago Press 1976) (1776).

A few commentators have suggested that such a black market is unlikely:

Critics of the industry contend, however, that a black market could develop only if the tobacco companies help fuel it. . . . Industry critics also note that when the tobacco industry agreed to a 65-cent-per-pack tax increase contained in the 1997 settlement, they weren’t worrying about a black market. Now that a \$1.10 increase is on the table, the companies, according to John McCain’s chief tobacco negotiator, John Raidt, ‘are yelling about black markets and murder and mayhem and beating up working people. They never said anything when it was 65 cents.’

Jeffrey Goldberg, *Big Tobacco’s Endgame*, N.Y. TIMES, June 21, 1998, § 7 at 36, 62. However, it is unclear why the relationship between smuggling and excise tax rates should be linear. Cf. George Stigler, *The Economist as Preacher*, in *THE ECONOMIST AS PREACHER AND OTHER ESSAYS* 4 (1982) (stating, “if on first hearing a passage of [Adam Smith’s] you are inclined to disagree, you are reacting inefficiently; the correct response is to say to yourself: I wonder where I went amiss.”).

36. In addition, the FDA had decreed that everyone under 27 years of age must be carded before they can purchase cigarettes. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adoles-

we are prepared to tax 100% of consumers to keep cigarettes out of the hands of the 2% that are underage. This massive disjunction between means and ends is neither necessary nor proper — even in a case involving the protection of minors. Indeed, the magnitude of the disjunction between means and ends is the surest indication that mischief is afoot.³⁷ In a case involving a strikingly similar strategy, the Supreme Court struck down an Oklahoma statute which allowed women to buy near-beer at the age of 18, but required men to be 21.³⁸ The state defended the statute on the grounds that it was appropriate to impose “a restraint on 100% of the males in the class allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcoholic beverages.”³⁹ Justice Stevens tartly observed, “it does not seem to me that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%.”⁴⁰

So what should be done to prevent underage smoking? For the sake of simplicity, let us limit our focus to the use of excise taxes.⁴¹

cents, 61 Fed. Reg. 44396-45318 (1996); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41313-41375 (1995). However, the Fourth Circuit recently held the FDA lacked jurisdiction to regulate tobacco products. *See Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, Nos. 97-1604, 97-1581, 97-1606, 97-1614, 97-1605, 1998 WL 473320, at *1 (4th Cir. 1998).

37. As Professor Balkin has noted:

The rationale of every governmental action almost always has a nice version and a naughty version; inquiry using such proxies as means-ends fit is important, for the real legislative purpose is not always easily determined otherwise. A poor fitting of means to ends is the surest sign that the legislature's stated goals are not its real goals, and that the bill disguises some unseemly machination or invidious prejudice.

Jack M. Balkin, *The Footnote*, 83 Nw. U.L. REV. 275, 291 (1989). Those who remain in doubt whether the nice or naughty version predominates should consider the fee fight which has broken out in Florida and Texas. *See* John Gibeaut, *Getting Burned*, 84 A.B.A.J. 42, 42 (Sept. 1998) (hereinafter *Getting Burned*); John Gibeaut, *Billion Dollar PR Lesson is Snipe Publicly, Pay Privately*, 84 A.B.A.J. 56, 56 (Sept. 1998).

38. *See* *Craig v. Boren*, 429 U.S. 190 (1976).

39. *Id.* at 214 (Stevens, J., concurring).

40. *Id.*

41. Of course, there are a variety of non-financial strategies available as well, such as advertising, educational programs, and increased enforcement of existing laws — although there are good reasons to wonder about the cost-effectiveness and prospects for success of such strategies. *See, e.g.,* Nancy Rigotti et al., *The Effect of Enforcing Tobacco-Sales Laws on Adolescents' Access to Tobacco and Smoking Behavior*, 337 NEW. ENG. J. MED. 1044, 1044 (1997) (“enforcing tobacco-sales laws improved merchants' compliance and reduced illegal sales to minors but did not alter adolescents' perceived access to tobacco or their smoking.”); Stanton A. Glantz, *Preventing Tobacco Use - The Youth Access Trap*, 86 AM. J. PUB. HEALTH 156, 157 (1996) (complaining that focusing tobacco control efforts on underage smokers is likely to be ineffective).

There are certainly ways in which excise taxes can be used to decrease underage smoking without creating a pot of money for balancing the federal budget, eliminating the marriage penalty, enriching the plaintiffs' bar, and financing a host of new government programs. Consider two strategies. Why not impose a tax in the specified amount on all cigarette sales, but make the tax refundable as long as the tax seal is turned in by someone who is over 18? Alternatively, eliminate the prohibition on sales to teenagers, but impose a substantial tax on such sales, and give retailers the incentive to price discriminate by allowing them to keep a portion of the resulting taxes. Each of these proposals has its own mix of advantages and disadvantages (including the likelihood of straw purchasers), but both avoid the imposition of a tax *which misses its intended target 98% of the time.*

IV. CONCLUSION

One need not be an enthusiast of tobacco to be troubled by the Medicaid suits and the pediatricizing of tobacco policy. The states have erroneously sought to recover their total smoking-related costs, and not the incremental cost. The tobacco companies have been stripped of their traditional defenses, and the issue of tobacco control has been successfully repositioned as yet another crusade to save the children. Those who question the means and ends of the crusade are subject to attack for supporting teenage smoking. The whole affair has the distinct feel of a lynch mob, hot on the trail of a wanted outlaw – but for this particular lynching, the state provides the rope, offers up the victim, and collects most of the reward, and the shredding of civil liberties is justified by the fact that we are fighting “the powers of darkness”.⁴²

I suspect my liberal friends would not view these developments with the same equanimity if the state behaved in a similar fashion (targeting members of a disfavored group, and changing the law in

One should also not overlook the difficulties of designing an effective ad campaign intended to explain to teenagers why they should do something that is good for them. The problem is likely to be particularly acute when, “in a notable shift of marketing strategy, the No. 2 U.S. tobacco company has launched new advertisements for its much-vilified cigarettes that challenge anti-smoking activists as killjoys and prudes who deserve defiance and ridicule.” Scott Shane, *Cigarette Ads Mock Foes of Tobacco*, *BALT. SUN*, July 12, 1998, at 1A.

42. *Cf.* Gibeaut, *Getting Burned*, *supra* note 40, at 42 (noting testimony of Governor Lawton Chiles that he “didn’t care” how lawyers were selected to represent Florida in its Medicaid suit, didn’t know how terms of the contingency fee contract were arrived at, and it didn’t “bother [him a whit] that bill stripping tobacco companies of their traditional defenses was snuck through the legislature because, “I was fighting the powers of darkness.”).

the middle of the case to ensure success) in the course of prosecuting poor African-American criminal defendants in Baltimore City.⁴³ The prevention of underage smoking is without doubt a “mom and apple pie” crusade, but we might want to consider whether it is worth “burn[ing] the house to roast the pig.”⁴⁴

43. Obviously, the constitutional prohibition on *ex post facto* laws would prevent some such conduct, but the growth of civil sanctions not facially subject to such limitations is suggestive of the possibilities. Of course, the separation of powers implications are equally troubling. Regardless, one can enact criminal laws with similarly skewed distributional consequences so long as they have only prospective application – and the concern many scholars have expressed about the racially skewed distributional implications of the war on drugs demonstrates the problem is not simply theoretical.

44. See *Butler v. Michigan*, 352 U.S. 380, 383 (1957).