Here's Smoking at You, Kid: Has Tobacco Product Placement in the Movies Really Stopped?

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HERE’S SMOKING AT YOU, KID: HAS TOBACCO PRODUCT PLACEMENT IN THE MOVIES REALLY STOPPED?

Robert Adler*

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I. INTRODUCTION

In the popular children's film, *The Muppet Movie*,¹ Orson Welles, playing a movie mogul, eyes the puppet character, Kermit the Frog, in a scene that infuriates smoking critics.² Not only is smoking portrayed in a positive manner in this movie, but also, it turns out, tobacco manufacturer Philip Morris quietly supplied the filmmakers with free tobacco products for use in the film.³

Similarly, in all three *Superman* films, Philip Morris paid to have its cigarettes smoked or displayed.⁴ In *Superman I* (1978) and *Superman II* (1980), for example, Lois Lane, who never smoked in the comics, puffs on Marlboros throughout the films.⁵ Meanwhile, Superman battles his enemies amidst towering Marlboro billboards and ubiquitous Marlboro delivery trucks,⁶ leading one critic to denounce these scenes as “watching the best of the Marlboro Man.”⁷

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¹ See *The Muppet Movie* (Henson Associates/ITC Entertainment Group 1979).
² Minnesota's Attorney General, Hubert H. Humphrey III, cited this movie in decrying the tobacco industry's "insidious" marketing technique of "secret payment of fees to movie producers to feature cigarettes and smoking in popular films...." As a result, in settling a lawsuit brought by the State of Minnesota against members of the tobacco industry for reimbursement for health care costs from smoking, Humphrey insisted that the defendants agree to a nationwide ban on making payments, directly or indirectly, for showcasing tobacco products in movies. Minnesota Attorney General's Office, *Humphrey Achieves Historic $6.1 Billion Settlement of Tobacco Lawsuit With Ironclad Ban Against Marketing to Children* (visited May 20, 1998) [hereinafter Minnesota Attorney General's Press Release]. See also infra notes 122-23 and accompanying text for a discussion of the terms of the Minnesota settlement.
⁵ See id.
⁶ See id.
The tobacco industry maintains that it has voluntarily abandoned the practice of "product placement" in movies since 1990. Moreover, in 1998, the major tobacco makers entered into a consent judgment with the State of Minnesota, agreeing to a nationwide ban on paying to place tobacco products in motion pictures. Nonetheless, serious concerns remain about the tobacco industry's pledge to abandon product placement—does it contain so many loopholes that the industry can still place its products without significant restraint? Beyond these concerns lies the fundamental question whether the industry can be trusted to live up to its word.

This article addresses the issues surrounding product placement of tobacco products in movies; assesses whether the tobacco industry's "voluntary ban" on product placement in movies can be taken seriously; discusses what further measures might be taken to ensure that the industry, indeed, is living up to its "ban"; and suggests further steps that might be taken to reduce the dramatic upswing in smoking in movies. As shall be discussed, resolving these complex issues requires careful trade-offs among competing values of free speech, free enterprise, and freedom from deception.

II. BACKGROUND ON TOBACCO PRODUCT PLACEMENT AND SMOKING IN THE MOVIES

A. Product Placement in General

Although the placement of tobacco products in movies for children may represent an unprecedented low in the practice of product placement, inserting commercial products into movie

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8. I define "product placement" as the display or mention of a product, usually a specific brand name, in return for consideration of some sort. Consideration, as used here, has broad connotations: a gratuity, favor, or the receipt of some good or service. See infra Part II.D.1.


10. See infra Part II.D.3 for a discussion regarding the limits to the voluntary ban on product placement.


12. For a discussion of the incidence of smoking in movies, see infra Part II.B.3.

13. This practice is not limited to THE MUPPET MOVIE. See infra Part II.C.2.

scenes at the behest of, and often for payment by (or free products from), product manufacturers is not unusual or new. To say the least, product placement arouses strong emotions among its critics, but the practice has become so entrenched in recent years that any hope for eradicating it seems unrealistic.

1. Product Placement: Madison Avenue Tackles Hollywood

Product placement may have occurred on a sporadic basis as early as the 1930s. Hollywood and Madison Avenue, however, did not really join hands in a big way until the 1980s, when several dramatic examples demonstrated the merchandising power of strategically placed products in films. In 1982, in perhaps the most notorious instance of effective product placement, film director Steven Spielberg reportedly pitched to Mars, Inc., the idea of having the lovable alien in E.T. munch on Mars’ M&M candy. Evidently, Mars disliked the thought of extraterrestrial characters enjoying its products and rejected the idea. Spielberg then approached Hershey Foods Corp., maker of Reese’s Pieces. They accepted, and to their delight, saw sales rocket by more than 65 percent within a month after the movie hit the streets. Another widely cited example occurred in the

15. See, e.g., Lackey, supra note 4, at 275 (describing how motion pictures in the past decade have become “veritable moving billboards” creating the impression that “Hollywood is more interested in producing feature length advertisements than making films”); Bruce Horovitz, New Twist in Tie-Ins: ‘Home Alone 2’ May Redefine Merchandising, LA TIMES, Nov. 12, 1992, at D1 (noting that critics describe the product tie-ins in movies like HOME ALONE 2 as “product placement at its ugliest”); and Snyder, supra note 14, at 302 (noting how outraged “social interest groups and various legislators have sought to outlaw or regulate product placement”).

16. See Klein, supra note 14 (“As early as the 1930s, . . . MGM studio had its own product-placement office.”).


18. Hershey reportedly did not pay a fee to the producers of E.T. Rather, Hershey agreed to do a special “movie tie-in” promotion in which Hershey would mention the film in its advertising for Reese’s Pieces. See Snyder, supra note 14, at 304, and Aljance Harmetz, Fox to Sell Rights to Plug Goods in Films, N.Y. TIMES, Dec. 21, 1983, at C19.

19. See Snyder, supra note 14, at 302 n.5 (reviewing several articles in which the
film *Risky Business*\(^{20}\) starring actor Tom Cruise. In one scene in the movie, Cruise wore Ray-Ban sunglasses—and little else. Within months after the film’s release, sales of the sunglasses reportedly tripled.\(^{21}\)

In the years since *E.T.* and *Risky Business*, product placement has grown into a multimillion-dollar business with product placement packages costing upwards of $500,000 per movie\(^{22}\) and virtually every movie made in Hollywood having products placed in it by commercial businesses.\(^{23}\) So powerful has product placement become in movies that marketers, on occasion, feel free to insist that scenes be rewritten\(^{24}\) or re-shot\(^{25}\) in order to enhance the visibility of their products.

Although product placement occurs most often in movies, it has also invaded television in an increasingly aggressive manner,\(^{26}\) prompting a backlash in England that led the British Broadcasting Corporation to ban the practice.\(^{27}\) Incredibly, the percentage increase of Reese’s Pieces has variously been estimated from 60-70 percent).

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22. *See* Balasubramanian, *supra* note 14, at 33. *See also* Roger Baird, *Bond Secures £35 Million in Product Placement Deals*, MARKETING WK., June 12, 1997, at 8 (noting that the James Bond film, *Tomorrow Never Dies*, secured product placement deals with five companies, BMW, Omega, Bollinger, Smirnoff and Gateway 2000 for a combined value of £35 million); and Cheryl Wetzstein, *Tobacco Companies Decide to Stop Smoking Up the Silver Screen*, WASH. TIMES, Dec. 20, 1990, at C1 (noting that Disney and other studios charged on a sliding scale depending on whether stars used the product; for example, in *Mr. Destiny* (Disney 1990), Disney priced product use by stars Michael Caine and Jim Belushi at $60,000).


24. The script for *Rocky III*, for example was rewritten to include a scene in which actor Sylvester Stallone endorses Wheaties cereals as the “breakfast of champions.” *See* Janet Maslin, *The Art of Plugging Products in the Movies*, N.Y. TIMES, November 15, 1982, at C11.


27. *See* Product Placers Need a Sure Hand, *supra* note 14, at 5 (noting that BBC
according to one observer, product placement has even crept into novels.28

2. The Power and Appeal of Product Placement

Why would a manufacturer turn to product placement rather than rely on more traditional forms of advertising? First, and most critical, effective product placement can boost sales dramatically.29 Product placement sneaks past the normal defenses that consumers erect against advertising and makes even controversial product uses appear normal and desirable,30 often glamorous.31 Second, product placement is extremely cost-effective. Although product placement in a movie or television show may cost tens of thousands of dollars, equivalent advertisements cost hundreds of thousands of dollars32 and often reach fewer viewers.33 Third, given the longevity of many

guidelines stipulate that "products and services may not be included in sound or vision in return for cash or other remuneration").

28. Beth Ann Herman, author of the novel Power City, featured a Maserati in her book about the 'sizzling, unforgiving world' of Hollywood public relations. In return for the publicity, a Maserati dealership in Beverly Hills threw a $15,000 party for Herman that attracted nationwide television coverage. Bantam Books, who published Herman, also published a line of books in which the heroine's hair colors were the same shades as a new line of Clairol dyes. Snyder, supra note 14, at 308 (citations omitted).

29. Endless instances of substantial increases in sales exist in addition to the Reese's Pieces and Ray-Ban examples cited above, see supra notes 17-21 and accompanying text. For example, when the producers of the legal thriller The Firm featured Red Strip lager beer, sales immediately jumped 50 percent. See Mitchell, supra note 14, at 82.

30. As discussed infra Part II.C.1, the appearance of normality and acceptability undoubtedly convinces many teenagers that smoking is an appropriate and exciting social custom.

31. See Klein, supra note 14 ("What happens is, people are so taken in by the visuals when they see [celebrities using a product] on the screen, and you say to yourself, 'I want to live in that fantasy world, and I want to be like those people.'").

32. According to Steven Rasnick, vice-president of UPP Entertainment Marketing, a product placement firm, "Let's start with costs . . . . You want to buy a 30-second spot on 'Seinfeld'? It's about 550 [thousand dollars] . . . . Our fee is considerably less." Klein, supra note 14 (also noting that a manufacturer "for a fraction of the cost" of a $450,000 commercial got the stars of the popular television show, Friends, to use its product). See also Mitchell, supra note 14, at 82 ("[C]ompared to conventional advertising, [product placement] is a very cost-effective means of brand exposure."); and Snyder, supra note 14, at 309 (noting that product placement is generally a more cost-effective marketing device than other forms of advertising).

33. Even movies with poor reviews can reach 70 million people given that they will be shown in foreign markets and on television re-runs. See Randall Poe, Invasion of the Movie Product-Pushers, ACROSS THE BOARD, Jan. 1984, at 36.
movies, product placement can have an impact year after year. Finally, from the point of view of the filmmaker, product placement can help defray the enormous costs associated with movie production.

The appeal of product placement to moviemakers extends beyond the obvious financial benefits. Adding commercial products to movies can enhance the realism of a film by showing products familiar to moviegoers. It can also create synergies between products and films. Seeing products displayed in movies may stimulate more purchases of the products and, in turn, seeing movies featured in ads and commercials may entice more consumers to visit local theaters.

B. Tobacco Product Placement: Special Concerns

Of all the products that have been “placed” in movies, none triggers more controversy than those associated with tobacco. When actors smoke in movies that appeal to teenagers (and those younger), public health advocates and other concerned critics voice strong objections notwithstanding the claims of the creative community to free expression. When facts emerge that cash and other benefits flowed from tobacco companies to members of the film community, objections become even stronger.

34. Movies today have a predictable life cycle. First, they are shown in first-run movie theatres (and overseas markets), then to videocassettes, then to premium television channels, and then finally to network television. Thereafter, they may air regularly on “classic television” channels. Of course, the impact of product placement “ads” may lessen over time because the placements “wearout.” See J. Axelrod, Advertising Wearout, J. ADVERTISING RES. 13 (1980) (noting that while repetition in advertising is beneficial up to a point, the “wearout” phenomenon limits the ability of commercials to generate new or repeat sales); See also, Douglas R. Scott and Debbie Solomon, What Is Wearout Anyway? J. ADVERTISING RES., Sept.-Oct. 1998, at 19.

35. See, e.g., Balasubramanian, supra note 14, at 34 (“[P]lacements help subsidize the huge costs associated with movie production.”); Lackey, supra note 4, at 276-77 (“As film production costs soared during the 1980s, producers began to more actively seek this type of financial help from manufacturers in order to cut expenses.”); and Rocky the Salesman: Brand Name Advertising in Motion Pictures ECONOMIST, Apr. 20, 1991, at 70, 75.

36. See, e.g., Anita M. Busch, FTC Looking Into Movies With Paid Tobacco Placement, BACK STAGE, Apr. 6, 1990, at 1 cited in Lackey, supra note 4 at 277 n.17 (quoting senior counsel to congressional committee as indicating that tobacco product placement arouses greater ire than other products because “[t]oothpaste doesn’t kill people”).
1. The Health Effects of Smoking

To understand why public health advocates and other critics object so vigorously to smoking in movies, it is necessary to review briefly the evidence surrounding the health effects and addictive nature of tobacco. Although tobacco companies have insisted for many years that the connection between smoking and adverse health effects remains unproven, few observers take these claims seriously today. Given the recent scientific advances in understanding cancer and other health effects associated with smoking, disclosures of secret industry documents that belie the industry’s claims, admissions of health and addiction risks by industry insiders, and the industry’s tacit admission in settling state lawsuits seeking reimbursement for adverse health effects of tobacco products,

37. See, e.g., Cancer-link Study Raises Questions, WORLD TOBACCO, Nov. 1996, at 10 (quoting Martin Broughton, CEO of B.A.T. Industries as challenging the results of a study in Science Magazine asserting a direct molecular link between cigarette carcinogens and lung cancer. CEO Broughton insists that “important missing links” remain in the understanding of cancer causation.).

38. See, e.g., William Weiss, Cigarette Smoking and Lung Cancer Trends: A Light At The End Of The Tunnel, 111 CHEST 1414-16 (1997) (noting that the temporal association between “cigarette smoking prevalence and lung cancer mortality provides additional support for the causal relationship between smoking and lung cancer”) and Found: The Smoking-And-Cancer Link, U.S. NEWS & WORLD REP., Oct. 28, 1996, at 8 (noting that scientists have recently discovered the “first direct evidence that a compound found in smoke causes the genetic damage responsible for most lung cancers”).

39. Secret documents have poured out about the industry’s knowledge regarding tobacco’s health and addiction hazards from whistleblowers, see David Henry, Whistleblowers Wreak Havoc, USA TODAY, Mar. 19, 1996, at 2B; government investigations, see David Johnston, Federal Thrust Against Tobacco Gets New Vigor, N.Y. TIMES, Mar. 18, 1996, at A1; congressional inquiries, see Motley Identifies Most Significant of 39,000 Documents, Tobacco Industry Litigation Reporter (visited June 2, 1998) <http://www.andrewspub.com/tobacco1.htm> (summarizing the “nine most significant” tobacco industry documents recently made public by the Senate Commerce Committee that show an industry cover-up of the links between smoking and cancer); and the state settlements of lawsuits that require full disclosure of previously secret documents, see Minnesota Attorney General’s Press Release, supra note 2.

40. See John M. Broder, Cigarette Maker Concedes Smoking Can Cause Cancer, N.Y. TIMES, Mar. 21, 1997, at A1 (noting that the Liggett Group, Inc., one of the nation’s major cigarette makers, “[i]n an extraordinary admission . . . acknowledged today that tobacco is addictive and causes cancer”).

41. See, e.g., Minnesota Attorney General Press Release, supra note 2 (detailing the terms of the settlement of a lawsuit by the Minnesota Attorney General against the nation’s tobacco companies and the Tobacco Institute in which, inter alia, the defendants agreed to pay more than $6.1 billion dollars to reimburse Minnesota and Blue Cross for the costs of treating smoking-related diseases. Settlement also required tobacco defendants to disband the Council for Tobacco Research, which the state alleged the industry used as “a propaganda machine to mislead Americans” about the hazards of
past industry denials simply lack credibility.

By all accounts, tobacco use is the most preventable cause of illness and premature death in the United States, leading one commentator to conclude that “tobacco products pose the greatest contribution to public health risk of any product available for retail sale in the United States.” Tobacco products kill more than 400,000 Americans each year and 3 million people worldwide. In the United States, tobacco use causes more deaths each year than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires combined. Twenty-two percent of all deaths of adults older than 35 years old result from smoking and to provide the industry with ‘cover’ by mounting costly and endless research tailored to avoid learning anything about the link between smoking and disease, and designed to perpetuate the myth that endless additional research was needed).


45. See Christopher N.H. Jenkins et al., Tobacco Use in Vietnam: Prevalence, Predictors, and the Role of the Transnational Tobacco Corporations, 277 JAMA 1726 (1997) and authorities cited therein. See also, Richard W. Pollay et al., The Last Straw? Cigarette Advertising and Realized Market Shares Among Youths and Adults, 1979-1993, 60 J. MARKETING 1 (1996) (noting that the World Health Organization estimates that, of adolescents who continue smoking throughout their lives, “half will be killed by tobacco . . . we can expect 200 million to 300 million children and adolescents under 20 (world-wide) currently alive to eventually be killed by tobacco”).

from tobacco use.\footnote{47} Tobacco use contributes to four of the five leading causes of death in the United States.\footnote{48} Compounding the health effects of tobacco is its addictive nature. Although one can certainly find contrarians\footnote{49} or industry apologists\footnote{50} who dispute that tobacco is addictive, the weight of scientific research overwhelmingly indicates that nicotine in cigarettes is an extremely addictive drug.\footnote{51} Currently, some 48 million Americans smoke—approximately 25 percent of the adult population in this country.\footnote{52} Of these, roughly 33 million reportedly would like to stop smoking, but find themselves too addicted to do so.\footnote{53} Each year, about 16 million smokers try to quit, but only 1.2 million succeed.\footnote{54} Young smokers using tobacco on a regular basis seem to find quitting as difficult as adults.\footnote{55} Although nicotine does not

\begin{footnotesize}
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\item See Cornelia Pechmann and S. Ratneshwar, The Effects of Antismoking and Cigarette Advertising on Young Adolescents' Perceptions of Peers Who Smoke, 21 J. CONSUMER RES. 236 (1994) and authorities cited therein.
\item See, e.g., Wally Pritchard and Pat Lippiello, Scientific Research Highlights Evidence in Smoking's Favour, WORLD TOBACCO, Mar. 1995, at 11 (arguing that smoking is fundamentally a habit, not an addiction).
\item A psychologist at R. J. Reynolds Tobacco Co. argues that nicotine is fundamentally different from alcohol, heroin and cocaine. See John Robinson, Smoking: Habit Not Addiction, CHEMISTRY & INDUSTRY 700 (1994).
\item See Robert Langreth, Why Smokers Don't Quit: New Clues to How Nicotine Affects the Brain, WALL.ST. J., May 5, 1997, at B1 (noting that "the most widely accepted scientific evidence" contradicts tobacco companies' claims that tobacco is not addictive); OFFICE OF SMOKING & HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) (noting that most adolescent smokers are addicted to nicotine and report that they want to quit but are unable to do so) [hereinafter 1994 SURGEON GENERAL'S REPORT]; OFFICE OF SMOKING & HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING – NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL at i (1988) (concluding that the "pharmacological and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine") [hereinafter 1988 SURGEON GENERAL'S REPORT]; and Wayne Hearn, Nicoteen Addiction, AM. MED. NEWS, Nov. 28, 1994, at 13 (noting that the addictive nature of nicotine "makes smoking experimentation particularly dangerous").
\item See Langreth, supra note 51.
\item See Langreth, supra note 51 (citing a study by the Centers for Disease Control). See also Marcus et al., supra note 48, at 20 ("[M]ost current smokers (83 percent) wish they had never started smoking.").
\item See Langreth, supra note 51. See also Marcus et al., supra note 48, at 20 ("Most smokers who try to quit resume regular smoking within a year.").
\item See Hearn, supra note 51, at 13 (noting a CDC report involving 1,600 young
\end{enumerate}
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produce a “high” similar to that of heroin or cocaine, it appears to have the unique power to be a stimulant or tranquilizer depending on smokers’ needs at the moment.\textsuperscript{56} In short, tobacco’s potent health hazards coupled with its addictive nature have created a massive public health problem.

2. Youth Smoking: Widespread and Increasing

The addictive nature of tobacco adds considerable peril to youth experimentation with cigarettes, cigars, and smokeless tobacco. Although smoking by children and teenagers under age 18 is illegal in all 50 states and the District of Columbia,\textsuperscript{57} virtually all adult smokers begin as adolescents (or younger).\textsuperscript{58} Notwithstanding its illegality, teenagers and children face few difficulties in obtaining tobacco products,\textsuperscript{59} and the vast majority have tried smoking at one time or another before graduating from high school.\textsuperscript{60} This translates into troubling statistics:

- roughly 3 million American adolescents currently smoke, and an additional 1 million adolescent males use smokeless tobacco;\textsuperscript{61}

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smokers who reported that they had quit smoking. Of these successful quitters, 73 percent reported that quitting was “really hard”).

56. See Hearn, supra note 51, at 13 (quoting Neal Benowitz, a renowned tobacco researcher: “[Nicotine] is one of the few drugs that can be a stimulant first thing in the morning, a tranquilizer later in the day for people who are anxious, and a mild antidepressant for people who are feeling a little down.”).


58. See id. (“Approximately 90 percent of all tobacco use initiation occurs among persons [under] 18 years.”). See also, 1994 SURGEON GENERAL’S REPORT, supra note 51, at 1 (reporting that nearly all first use of tobacco occurs before high school graduation); FDA Tobacco Regulations, supra note 42, at 44398 and authorities cited therein (“Eighty-two percent of adults who ever smoked had their first cigarette before age 18.”); and Boaz Meijer, Cigarette Smoking Habits Among Schoolchildren, 110 CHEST 92 (1996) (“Most adult smokers began smoking before the age of 18 years.”).

59. See 1995 Office on Smoking and Health Report, supra note 57, at 223 (finding that among smokers under 17 years of age, 38 percent report they regularly bought cigarettes in a store, 32 percent usually borrowed cigarettes from someone else, fifteen percent usually gave someone else money to purchase cigarettes for them, two percent bought them from vending machines, and four percent reported stealing them).


61. See FDA Tobacco Regulations, supra note 42, at 44398 and citations contained
each year, one million teenagers (and younger) will become regular smokers; one of every three will die prematurely as a result; and

roughly one billion packs of cigarettes are consumed each year by those under age 18.

One jarring statistic about youth smoking that particularly troubles public health advocates revolves around the "initiation age" of smoking. Stated bluntly, if young people do not begin smoking before age 18 -- the earliest legal age to smoke -- most are unlikely ever to start. In effect, tobacco companies would lose a huge portion of their business if their young customers ever stopped breaking the law.

Therein.

62. See FDA Tobacco Regulations, supra note 42, at 44398. See also, Marcus et al., supra note 48, at 22 ("Persons who begin smoking at younger ages are at increased risk of becoming regular smokers, of becoming heavy smokers, and of becoming ill or dying from smoking-attributable causes."); and Naomi Breslau & Edward L. Peterson, Smoking Cessation in Young Adults: Age at Initiation of Cigarette Smoking and Other Suspected Influences, 86 AM. J. PUB. HEALTH 214, 215 (1996) ("[E]arly initiation of cigarette smoking has been associated with a greater potential for problems, including heavy daily consumption, longer duration of smoking, and nicotine dependence.").

63. See Pollay et al., supra note 45, at 1 ("[A]proximately one billion packs of cigarettes worth more than $1 billion are consumed annually . . . by minors less than 18 years of age.").

64. See Tobacco Use Among High School Students -- United States, 1997, 279 JAMA 1250 (1998) (noting that approximately 80 percent of tobacco use occurs for the first time among youth less than 18 years of age); Statement of Robert Pitofsky, Chairman, Federal Trade Commission on the Advertising, Marketing, and Antitrust Issues in the Global Tobacco Settlement (March 3, 1998) (visited June 11, 1998) <http://www.ftc.gov/os/1998/9803/tobacc98.tes.htm> (statement by FTC Chairman on behalf of Federal Trade Commission that "most of those who use tobacco products begin when they are under 18, when they are less likely to fully understand the serious long-term health effects posed by tobacco use") [hereinafter Pitofsky Statement]; FDA Tobacco Regulations, supra note 42, at 44398 and authorities cited therein (noting that studies suggest that anyone who does not begin to use tobacco as a child or adolescent is unlikely to start as an adult); 1994 SURGEON GENERAL'S REPORT, supra note 51, at 1 (concluding that if adolescents can be kept tobacco-free, most will never start using tobacco); and Escobedo et al., supra note 60, at 1394 (noting that the age at which most smokers begin is 13-14 and that by age 15-16, smoking initiation rates level off).

65. Although young smokers consume roughly $1 billion worth of cigarettes a year, which is not insignificant, see FDA Tobacco Regulations, supra note 42, at 44398, it is the future years as smokers that makes their smoking so financially critical to the tobacco industry. See Pollay et al., supra note 45, at 6 (noting that the "high rate of people quitting smoking and dying means that sales for this industry would drop precipitously were it not for a continuing influx of new starters"). See also John P. Pierce & Elizabeth Gilpin, How Long Will Today's New Adolescent Smoker Be Addicted to Cigarettes?, 86 AM. J. PUB. HEALTH 253, 255 (February 1996) (estimating that for American adolescents who start smoking now, "the median smoking duration may . . . be [close] to 20 years for males and 30 years for females").
The reactions of public health advocates and tobacco companies to this statistic, to no one's surprise, diverge dramatically. Public health advocates have long sought aggressive enforcement of antismoking laws and have promoted antismoking education campaigns targeted at youth. In contrast, critics argue, the tobacco industry perennially undertakes marketing campaigns designed to appeal to young smokers, all the while insisting that these campaigns seek only to switch adult smokers from one brand to another and insisting "cigarette advertising has no significant effect on the prevalence of smoking by young people." Given the extremely high costs

66. See Breslau & Peterson, supra note 62, at 219 (calling for education campaigns to discourage early smoking); Escobedo et al., supra note 60, at 1394 (calling both for enhanced efforts to enforce existing tobacco sales laws, and for smoking-prevention education during childhood and early adolescence "before smoking becomes a problem"); Massachusetts Anti-Smoking Campaign Shows Effects of Prevention, ALCOHOLISM & DRUG ABUSE WEEK, Nov. 18, 1996, at 1 (citing with approval a media campaign that featured "a series of hard-hitting advertisements targeting adolescents and pre-teenagers"); FDA Tobacco Regulations, supra note 42, at 44396 (summarizing FDA's regulations that would stiffen youth antismoking laws and establish new antismoking education campaigns); 1995 Office on Smoking and Health Report, supra note 57, at 224 (calling for enforcement of youth antismoking laws to be strengthened); and Brian S. Flynn et al., Prevention of Cigarette Smoking Through Mass Media Intervention and School Programs, 82 AM. J. PUB. HEALTH 827 (1992) (endorsing mass media interventions in middle schools to promote antismoking message).

67. See Pollay et al., supra note 45, at 5 (noting that tobacco advertisements deliberately depict "vigorous people in pristine outdoor environments" using themes like independence, adventure seeking, social approval, success, sophistication, and healthfulness which are "known to appeal to young people"); John Carpi, New Evidence That Cigarette Ads Targeted Teen Girls, AM. MED. NEWS, Mar. 14, 1994, at 8 ("New research presents the most compelling evidence to date that youth-oriented cigarette ads encourage minors to pick up the habit."); Gerard B. Hastings & Philip P. Aitken, Tobacco Advertising and Children's Smoking: A Review of the Evidence, EUR. J. MARKETING, Nov. 1995, at 6 ("An extensive range of evidence now points to the conclusion that advertising does encourage smoking, especially among the young."); and Morton Mintz, The Tobacco Pushers' Marketing Smokescreen, BUS. & SOC'Y REV., Fall 1991, at 50 (reviewing evidence from a trial in Canada in which tobacco companies challenged Canada's Tobacco Products Control Act of 1988 and noting that "the [Canadian] government introduced as evidence internal corporate documents that describe with stunning candor how the industry deliberately hooks children and markets to them").

68. According to the Tobacco Institute:

A number of experts have explained in Congressional testimony that the purpose and function of advertising for any "mature" product like cigarettes is not to stimulate overall demand for the product category, but to (1) increase the market share of a particular brand at the expense of competing brands and (2) retain brand loyalty against other brands.

Tobacco Institute, Major New Initiatives to Discourage Youth Smoking Announced, December 11, 1990 (press release) (Tobacco Institute announces that henceforth its members will not engage in paid movie product or cigarette advertising placements, but insists that "cigarette advertising has no significant effect on the prevalence of smoking by young people") [hereinafter Tobacco Institute Press Release]. See also, Jacob Sullum,
associated with switching smokers from one brand to another and the industry's documented fascination, if not obsession, with teen smoking trends, one is entitled to a substantial degree of skepticism about the industry's position.

Whether the tobacco industry deliberately targets underage smokers or whether cigarette ads that appeal to adults inevitably appeal to youth, teens (and younger children) appear to be drawn irresistibly to smoking, particularly in recent years. By all accounts, the incidence of smoking among the young has increased dramatically — as much as 25 percent between 1991 and 1995. This in spite of a significant drop in adult

Cowboys, Camels, and Kids, REASON, Apr. 1998, at 32 (arguing that “there is remarkably little evidence that people smoke because of messages from tobacco companies” and that “building brand loyalty among teenagers is still not the same thing as making them into smokers”).

69. It is arguably not cost-effective for tobacco companies to try to switch smokers given that cigarettes have the highest brand loyalty of all consumer product categories. See Pollay, et al., supra note 45, at 6 (“High brand loyalty resulting from the nicotine ‘satisfaction’ of those addicted makes it difficult and expensive to convert competitors’ customers”). See also Pollay et al., supra note 45, at 12 (concluding that tobacco companies have greater interest in recruiting new young smokers than in switching current smokers based on “[s]trategic analysis [indicating] that new users who subsequently become addicted and loyal clientele offer greater expected net present value than do brand switchers”); and The Tobacco Trade, ECONOMIST, May 16-May 22, 1992, at 21 (quoting super-investor, Warren Buffett, as saying, “I like the cigarette business [because] . . . it's addictive and there's fantastic brand loyalty.”).

70. See, e.g., Former Exec: Ads May Have Wooed Teens (visited June 8, 1998) <http://www.usatoday.com/news/smoke/smoke166.htm> (although denying that this company tried to hook teens, former Philip Morris president James Morgan conceded in trial testimony that his company tracked teen smoking patterns and stated that “[i]f you're asking me to swear that [advertising] did not influence people under 18, I cannot do that”); and Hubert H. Humphrey, Minnesota Attorney General, Do Cigarette Companies Market to Young People? (visited March 12, 1998) <http://www.pioneerplanet.com/archive/tobac/decide/docs/013824.htm> (identifying and summarizing four documents from state’s litigation against tobacco companies that “show the industry, while publicly claiming it did not market to minors was, in fact, studying and researching the habits and lifestyles of America’s youth”).

71. See H. Wechsler et al., Increased Levels of Cigarette Use Among College Students: A Cause for National Concern, 280 JAMA 1673 (1998) (finding that cigarette smoking among college students jumped from 22 percent in 1993 to 28 percent in 1997. The study also reported a 32 percent rise in smoking by high school students from 1991 to 1997); Sherryl Gay Stolberg, Rise in Smoking by Young Black Erodes a Success Story, N.Y. TIMES, Apr. 3, 1998, at A24 (noting that smoking rates among all high school students increased by one third from 1991 to 1997 — among young black males, rates doubled during that period); Kevin Heubusch, More Teens Lighting Up, AM. DEMOGRAPHICS, Mar. 1997, at 36 (noting that “the share of teens who smoke has been rising steadily since 1991” and that the number of high school smokers rose from 28 percent in 1991 to 35 percent in 1995); Christina Kent, Adolescent Drug Use Up, As Younger Teens Experimenting, AM. MED. NEWS, Jan. 13, 1997, at 9 (“The good news is that illicit drug use among high school seniors appears to be leveling off. The bad news is that more, younger students are experimenting with the ‘gateway' drugs marijuana

https://scholarship.law.umt.edu/mlr/vol60/iss2/1
3. Smoking in Movies: Widespread and Increasing

A particularly ominous trend that has accompanied the jump in teen (and younger children) smoking—almost in lock-step fashion—is the dramatic increase in smoking in the movies73 and on television in recent years.74 In one 1994 study, for example, researchers examined 62 randomly selected high-grossing motion pictures for each year from 1960 to 1990 to determine the extent of smoking in films over time.75 They found that, despite a major decline in tobacco use during this period, smoking continued unabated in the movies.76 Moreover, films' portrayal of smoking was almost always positive:

Films present a smoker who is typically white, male, middle class, successful, and attractive, a movie hero who takes smoking for granted. As in tobacco advertising, smoking in the movies is associated with youthful vigor, good health, good looks, and personal/professional acceptance.77

More recent studies heighten the bad news. The incidence of smoking in movies has increased since the 1994 study. In a
1997 follow-up report, the authors examined 35 randomly selected high-grossing motion pictures since 1990 and discovered that smoking had jumped significantly in films of the 1990s—"In contrast to actual American smoking patterns, smoking in films is now increasing, with levels of tobacco use [in movies] comparable to that observed [in movies] in the 1960s... before the issuance of the U.S. Surgeon General's first report." Moreover, and extremely distressing to those concerned about positive portrayals of smoking in movies, 80 percent of the male leads and 27 percent of the female leads in the 1997 study smoked. In sharp contrast, none of the leads smoked in their 1994 study.

Many observers see a strong link between the portrayal of smoking in movies and teen smoking. Both have shown a dramatic upward trend since 1990, creating a strong inference that increases in movie smoking have helped trigger the upswing in teen smoking. Given that teens are three times as likely as adults to be frequent moviegoers and given the tendency of teens to mimic the "cool" behavior of actors in films, one sees good reason to be concerned about the frequency of smoking in movies.

C. Smoking in Movies: Usually Enticing, Sometimes Paid For

A multitude of factors not always understood or easily combated underlies the fascination that youth finds in tobacco products. Peer pressure, often cited by the tobacco industry as

78. See Stockwell & Glantz, supra note 73, at 283. See also Douglas Carnall, Smoking on Celluloid, 316 BRITISH MED. J. 712 (1998) (citing a study by the British Health Education Authority of the top 10 box office films in 1990 and 1995 in which the researchers found "that the number of smoking incidents had increased from 83 to almost 300").

79. See Hazan & Glantz, supra note 74, at 283.

80. See id.

81. See, e.g., Hazan et al., supra note 73, at 1000 (arguing that "films reinforce misleading images and overstate the normalcy of smoking, which may encourage children and teenagers, the major movie audience, to smoke"); See also Movies May Be Contributing to Rise in Teen Smoking, UC Irvine Study Shows (visited Nov. 26, 1997) <http://www.uci.edu/~inform/releases/131sa96.html> (press release from the University of California at Irvine stating that "[t]eenagers are more likely to think smoking is 'cool' after they've watched their Hollywood idols light up on screen").

82. See Mintz, supra note 67, at 52.

83. See infra note 90 and accompanying text.

84. See Hastings & Aitken, supra note 67, at 6 ("[T]here is no single, simple explanation as to why many children smoke.").
one of the main reasons that young people smoke, provides no clear explanation for youth smoking because it leaves unaddressed the reasons behind peer pressure. The tobacco industry would be happy to end the debate by pointing to peer pressure. If the inquiry ended there, it would eliminate tobacco marketing as a potential culprit in inducing youth to smoke. Yet, it seems likely that the $4 to $6 billion spent annually in promoting tobacco products plays a major role in creating the peer pressure that leads young people to smoke. When those promotional dollars result in actors' smoking in movies, concerns quickly arise.

1. Movie Smoking: A Powerful Behavioral Model

What troubles critics of tobacco product placement in films is the heavy appeal that films have for youth. Not only are young people more likely to attend movies, they are also more susceptible to the implicit messages contained in movies. Among these messages: smokers are attractive, independent, grown-up, witty and generally "cool." Smoking in movies, even by villains, tends to glamorize smoking because young people

85. See Tobacco Institute Press Release, supra note 68 (arguing that "the principal factors that impact youth smoking are peer pressure and parental/sibling influence").


87. See, e.g., Lackey, supra note 4, at 279 (condemning the fact that "[t]obacco companies ... have continued to place their products in a number of films that appeal to children (for example, the three Superman films, License to Kill, and Beverly Hills Cop), despite the fact that tobacco use is the most preventable cause of illness and premature death in the United States ..."); See also ASH Petition, supra note 7 (citing similar movies and pointing out that SUPERGIRL contained scenes showing the smoking of Eve cigarettes: "It surely cannot be wholly a coincidence that a movie with an obvious appeal primarily to young girls was chosen to feature a cigarette which also, through its name and advertising, seeks to attract young girls.").

88. See supra text accompanying note 82.

89. See FDA Tobacco Regulations, supra note 42, at 44398 (stating that young people are "very impressionable and therefore vulnerable to the sophisticated marketing techniques employed by the tobacco industry, techniques that associate the use of tobacco products with excitement, glamour, and independence"); See also Heubusch, supra note 71, at 36 (theorizing that one of the explanations for increased teen smoking is the "high visibility of smoking in movies"); and Fielding, supra note 71, at 1073 (noting the ongoing strategy of the tobacco industry "first and foremost is to make smoking attractive to teenagers" and that the "bait is bigger-than-life movie stars and producers who accept payment to smoke or have their characters smoke in movies").
find fascination in rebelliousness and outrageousness:

The problem is that young people [don't] think that the all-American look is very cool. Young people gravitate toward the quirky and weird – anything that older people are not – and there will be great pressure on magazine editors and advertisers [and moviemakers] to come up with ever more outlandish styles and modes of behavior to match the self-inflicted alienation of the target audience.90

In addition to their attraction to the antisocial aspects of smoking, teens (as well as adults) undoubtedly find an erotic appeal in smoking.91 Anyone who casually peruses the Internet today can find a strong and often explicit link between sex and smoking.92 As smoking has fallen increasingly out of favor, its erotic appeal evidently has jumped both in videos and on the Internet.93 Some of the Internet sites focus particularly on teen smoking.94 A great number of sites contain long lists of movie

90. Rance Carin, ‘Heroin Chic’ vs. Joe Camel: What’s Hippest to Our Young People?, AD. AGE, June 30, 1997, at 16 (arguing that movies and television are “[f]iar more pernicious” in attracting young smokers than the Joe Camel ad campaign that features a cartoon dromedary that smokes).

91. Movies have always used smoking to eroticize romantic moments. See, e.g., Carnall, supra note 78, at 712 (“The key moment of positive association of cigarettes with romance and desire is the final scene of Now, Voyager (1942), in which Paul Henreid lights two cigarettes and hands one to Bette Davis... marking the heroine’s transition to sexual maturity – and the cigarette’s to gender parity.”); Hollywood Lights Up, WASH. POST, Aug. 30, 1997, at A 26 (“Since the days when Bogart and Bette Davis ruled the fan magazines, smoking has been used to convey sex appeal, nonchalance, villainy and anxiety... ”); and Tobacco Talks Imperil Hollywood’s Love Affair With Cigarettes, NEWS & RECORD (Greensboro, N.C.), June 15, 1997, at E1 (“After all, viewers got the message when Bacall blew a plume of smoke toward Bogart in ‘To Have and Have Not.’”).


93. A medical expert on fetishes has noted, the smoking-fetish underground really sprang to life when cigarette smoking became socially unacceptable. See Suein L. Hwang, ‘Smoxploitation’ Films Signal that Smoking is Becoming a Fetish Among Many, WALL ST. J., Jan. 31, 1996, at A1 (interviewing Chester Schmidt, chief of psychiatry at Johns Hopkins’ Bayview Medical Center, who notes that, “If anything, the bans [on smoking] might make it a little more precious, more forbidden, more dangerous... It’s part of the turn-on.”).

94. See Jenny’s Teen Smoking Page (visited Mar. 2, 1998) <http://eccentrica.org/teensmoke/> (“I started this page because I think smoking is sexy and I hate all the anti-
SMOKING IN THE MOVIES

scenes that describe actors and actresses smoking, with careful attention paid to erotic details. Some examples from the Internet:

Act of Piracy (1990) Nancy Mulford
She runs her tongue repeatedly along a big fat cigar and sucks suggestively on the end before eventually lighting it. I'm sure you get the idea. 95

Airheads (1994) Amy Locane
Amy should be a poster child for the 'How To Smoke In A Sexy and Sensual Fashion' movement. In one all-too-brief scene, there is a great dangling while driving scene. Despite it's [sic] brevity, she looks awesome. In another not-quite-as-brief scene, she has a gorgeous inhale and a long full exhale in a dance club. 96

Excellent scenes throughout. She's another actress who's not acting when she enjoys a smoke. Smokes in four scenes. She first appears lighting up and talking through her smoke. She then takes two drags and exhales one of them straight into the guy's face. Later there is a French inhale with a voluminous exhale, plus two other drags. Watch her tongue come forward to appreciate the flavor! ... She sure knows how to enjoy her cigarettes! 97

Although one could postulate that these Internet sites are part of a vast conspiracy by the tobacco industry to appeal to the fantasies of American smokers, a more reasonable assumption is that many of the sites have appeared spontaneously to reach out to those who find smoking both glamorous and sexy. Similarly, a great deal of smoking in movies likely stems from the desire of moviemakers to portray sexiness, "coolness," or rebelliousness through smoking. Having said that, one is still justified in reacting angrily to discover that these portrayals may be paid moments rather than genuine creative expressions.

2. Tobacco Product Placement in Movies: Appeals to Youth

The idea that smoking in movies occurs because filmmakers take money or other consideration to advertise tobacco products

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95. Movie list (visited Nov. 26, 1997) <http://www.cs.brown.edu/people/lsh/stories/movie_list1> (containing hundreds of movies analyzed according to the sexiness of the smoking scenes).

96. Id.

97. Id.
is, to many observers, appalling. In view of the negative reaction to the placement of tobacco products in movies, one can see that neither tobacco manufacturers nor Hollywood filmmakers have been or are likely to publicize instances in which placement occurs. Nonetheless, over the years, a number of deals have become public, often as a result of congressional hearings and sometimes by happenstance.

Sadly, but not surprisingly, most of the examples of paid placement of tobacco products in movies arise in films that either are pitched directly to young people or that have a strong youth appeal. Some examples:

- **License to Kill** (1987): Philip Morris paid $350,000 to display Lark cigarettes prominently in the movie. For this payment, actor Timothy Dalton, playing British spy James Bond, smoked Lark cigarettes at different points during the movie. Moreover, the brand is conspicuously displayed when James Bond uses a pack of explosive Lark cigarettes to shatter the bulletproof glass of a villain's office. Protests over this movie led the producers to put the Surgeon General's health warning in the final credits of the film.

- **Beverly Hills Cop** (1984): American Tobacco Co. supplied more than $25,000 in Lucky Strikes and Pall Malls to the makers of this movie for a scene in which comedian Eddie Murphy poses as a smuggler with a cigarette-filled truck.

- **Harry and Son** (1984): Brown & Williamson paid $100,000 to have Paul Newman smoke Raleigh

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98. *See supra* notes 87-90 and accompanying text.
101. *See* Klein, *supra* note 14 (listing this and other examples of paid tobacco product placement in movies); *See also* ASH Petition, *supra* note 7.
104. Reportedly, the company paid $50,000 in air travel and $42,307 for a car for
cigarettes. Newman played a construction worker, thereby positioning Raleighs as a blue-collar cigarette.  

- **Supergirl** (1983): Liggett Group paid $30,000 to show Eve cigarettes in this movie.  

- **Five Stallone Films** (1983): For $500,000, actor Sylvester Stallone arranged with Brown & Williamson to incorporate the company's products into five of his proposed films, *Rhinestone Cowboy, Godfather III, Rambo, 50/50* and *Rocky IV*.  

- **Other Films**: A number of other films with great youth appeal have included payments to have stars smoke.  

### D. The Tobacco Industry Agrees to Stop Product Placement . . . Perhaps  

In the face of a strong public outcry against its placing its products in movies, the tobacco industry, in 1990, imposed a "voluntary" ban on this practice and, in 1998, agreed to a court-ordered ban on product placement. Notwithstanding these actions, many observers remain skeptical about whether tobacco product placement has ceased in films.  

#### 1. The Tobacco Industry's Voluntary Ban  

In 1989, the Subcommittee on Transportation and Hazardous Materials of the U.S. House Committee on Energy...  

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105. *See* ACROSS THE BOARD, supra note 33.  

106. *See* ASH Petition, supra note 7, and Lackey, supra note 4, at 278.  

107. *See* Hilts, supra note 104 (noting that "the money was for the most part delivered in the form of expensive gifts" such as jewelry, automobiles, an American saddled horse, and a payment of $25,000 for charity).  

108. *See* Hilts, supra note 104 (listing the following films and amounts paid for placing tobacco products: NEVER SAY NEVER AGAIN ($20,000), THE TEMPEST ($70,000), SHAKER RUN ($5,000), BLUE SKIES AGAIN ($7,500), SMOKEY AND THE BANDIT III ($10,000), TANK ($25,000), WHERE THE BOYS ARE ($100,000), and SUDDEN IMPACT ($50,000). *See also* Eben Shapiro, *B&W Tobacco Paid to Get Brands in Films, Notes Say*, WALL ST. J., May 16, 1994, at A11.  


110. *See infra* note 121 and accompanying text.  

111. One study shows an increase in movie smoking from 1990 through 1995, despite the tobacco industry "voluntary ban" in 1990. *See supra* note 78 and accompanying text.
and Commerce conducted an investigation of tobacco product placement in movies.\textsuperscript{112} At that hearing, subcommittee chair, Thomas Luken, revealed numerous instances of paid product placement by the industry.\textsuperscript{113} Concerned by the number of instances in which tobacco companies had paid to have their products displayed in movies, Congressman Luken introduced legislation to prohibit the placement of tobacco products in movies\textsuperscript{114} and asked the Federal Trade Commission (FTC) to review tobacco product placement practices. Pursuant to its authority to conduct investigations,\textsuperscript{115} the FTC responded by issuing investigative orders to the leading tobacco companies requiring them to file annual "special reports" on their sales and advertising expenditures.\textsuperscript{116} Reacting to the strong public outcry against tobacco product placement, the Tobacco Institute shortly thereafter announced a voluntary ban by all major tobacco manufacturers on paid product placement in movies.\textsuperscript{117} Since 1989, the tobacco industry has denied paying for product placement in its responses to the FTC.\textsuperscript{118}

2. \textit{The Minnesota Settlement}

In 1994, Minnesota's Attorney General, Hubert Humphrey III, filed a lawsuit against the tobacco industry seeking, among other things, redress for the health effects of smoking on the

\textsuperscript{112} See Tobacco Product Placement Hearings, supra note 99.

\textsuperscript{113} Many of the examples cited, supra text accompanying notes 103-110, were first identified in Congressman Luken's hearings.


\textsuperscript{116} The order required each company to answer questions regarding the extent to which it paid to have its products placed in movies and on television. The orders have been issued annually from 1990 (requesting 1989 data) to the present. See Federal Trade Commission, Order to File Special Report, Feb. 20, 1990 (copy on file with author).

\textsuperscript{117} See Tobacco Institute Press Release, supra note 68. See also Steven W. Colford, Tobacco Group Ends Paid Placements, \textit{Ad Age}, Dec. 17, 1990, at 31 (quoting Tobacco Institute Vice-President Brennan Dawson that the thirteen members of the Institute will "end paid placement of tobacco products in films . . . effective [in December 1990]"); and Wetzstein, supra note 22 (quoting a Tobacco Institute spokeswoman as indicating that the industry has "formally eliminated paid product placements in movies").

\textsuperscript{118} See 1995 FTC Annual Report, supra note 86 ("As in every year since 1989, the [tobacco] industry reported that no money or other form of compensation had been paid to have any cigarette brand names or tobacco products appear in any motion pictures or television shows."); See also Simon Chapman & Rondal M. Davis, \textit{Smoking in Movies: Is It a Problem?}, 6 \textit{Tobacco Control} 269 (1997).
Minnesota populace. On May 8, 1998, the parties reached agreement in an historic settlement that required the industry to pay $6.1 billion to the state of Minnesota and to stop a number of marketing practices deemed unfair by the Minnesota Attorney General. Included among the settlement terms was a nationwide ban on paid product placements in motion pictures. Henceforth, if the tobacco industry violates the terms of the agreement, the defendants presumably face substantial civil penalties.

3. Loopholes and "Wiggle Room"

Notwithstanding the bans agreed to by the tobacco industry, loopholes and "wiggle room" remain that, at least theoretically, permit significant product placement activity to continue. Perhaps the biggest loophole arises with respect to "paid" versus "unpaid" product placements. In 1990, when the Tobacco Institute announced its voluntary ban on product placement, an industry spokeswoman carefully stated that, while paid product placement activities would cease, "unpaid" product placement of tobacco products would not be affected. The Minnesota consent judgment adds no restrictions on this point. It bars "any payment, direct or indirect" to place tobacco products in movies,


120. For example, the tobacco industry must refrain from marketing its products specifically to children, must remove billboards and advertising on buses, taxis, and near bus stops, and must stop selling "branded merchandise" (logos on T-shirts, hats, etc.). See Minnesota Attorney General's Press Release, supra note 2.

121. According to the terms of the settlement:

Settling Defendants shall not make, in the connection with any motion picture made in the United States, or cause to be made any payment, direct or indirect, to any person to use, display, make reference to, or use as a prop any cigarette, cigarette package, advertisement for cigarettes, or any other item bearing the brand name, logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of domestic tobacco products.


122. See Colford, supra note 117 (noting that when Tobacco Institute Vice-President Brennan Dawson announced an end to paid product placement, she said that "unpaid" product placement would not be affected). Although the Vice-President did not define the term "unpaid product placement," she presumably meant that efforts not involving direct payments to moviemakers to get tobacco products placed in movies would continue. Whether these efforts would include providing consideration in the form of free products is unclear and controversial. See infra notes 124-128 and accompanying text.
but says nothing about unpaid product placement.\textsuperscript{123} Even if no payments occur to have tobacco products placed in movies, serious concerns remain. According to product placement industry insiders, most product placement — up to 90 percent or more — is "unpaid."\textsuperscript{124} Under the industry's definition, although the product's manufacturer pays a product placement firm to have its product displayed in a film, no money changes hands from the product placement firm to the filmmaker.\textsuperscript{125} Instead, the filmmaker receives free samples of the product in return for using the product as a prop in the film.\textsuperscript{126} Notwithstanding that the product placement industry considers this to be "unpaid product placement," the amount of free goods involved is not insignificant. For example, in 1984 the American Tobacco Company provided an estimated $25,000 worth of Lucky Strikes and Pall Malls as props to the makers of \textit{Beverly Hills Cop}\textsuperscript{127} and may have done so for the 1990 production of \textit{Goodfellas}.

At one point, the Federal Trade Commission took the position that the tobacco industry's "unpaid product placement" activities lay beyond its knowledge.\textsuperscript{129} Somewhat surprisingly, in 1991, the agency indicated that its annual investigative orders did not require disclosure of this practice.\textsuperscript{130} In 1995,
perhaps to address this problem, the FTC expanded its orders to include more specific questions regarding payments or other consideration to those “engaged in the business of product placement in motion pictures or television shows.” Even this expanded language, however, would not necessarily trigger disclosures from someone intent on interpreting the FTC’s orders narrowly.

The tobacco industry can look to other loopholes in the product placement bans to which it has agreed. A careful reading of these agreements reveals that nothing in them prohibits the industry—from paying filmmakers to show smoking in

have any of its cigarette brand names or tobacco products appear in any motion picture(s) or television show(s) . . . .” (supra note 116 and accompanying text). Providing free products to be used as props would seem to fit within the scope of this request for information, but the FTC evidently interpreted the question more narrowly.

131. Federal Trade Commission, Order to File Special Report, July 28, 1995 (copy on file with author). Specifically, the FTC asked the following questions:

Question 6A.

State whether the company or any of its subsidiary or parent companies paid any money or compensation, or made any other contribution, including but limited to, goods or services, in connection with any production or filming of any motion picture(s) or television show(s) during calendar year 1994. If so, please state which show(s) or movie(s), and the dollar value of each payment or contribution.

Question 6B.

State whether the company, any of its subsidiary or parent companies, or any other persons working for or on behalf of the foregoing, paid any money or compensation, or made any other contribution (including, but not limited to, goods or services) during calendar year 1994, to any individual, partnership or corporation engaged in the business of product placement in motion pictures or television shows. If so, please identify: the person who made the contribution; the recipient of the payment or contribution; the nature and amount of the payment or contribution; and the name of each and every motion picture or television show in which any company product appeared in return for such payment or contribution.

132. The FTC’s tolerance of a narrow interpretation of its early investigative orders, see supra note 129, invites strained parsing by tobacco companies of its later orders. For example, a tobacco manufacturer that offered free products for use in movies generally—as opposed to any specific movie—might interpret even the 1995 FTC language as not applicable to this practice. That is, the giving of tobacco products for use in movies generally could be argued not to be “in connection with any production or filming or any motion picture(s) or television show(s).” See supra note 131.

Similarly, a tobacco company that paid an annual retainer to a public relations firm might conclude that using a PR firm rather than a product placement firm to get product placements in movies need not be disclosed to the FTC. Given the FTC’s previous narrow interpretation of its annual investigative orders, a tobacco manufacturer might seek to avoid FTC action by arguing that the PR firm’s intermittent product placement activities did not constitute engaging in “the business of product placement.”
films without identifying specific brands. Although generic smoking scenes would not favor one brand over another, if they stimulated greater interest in cigarettes, they would trigger increased sales for the whole industry.

Stepping outside of the United States arguably presents another avenue to the tobacco industry to avoid the product placement bans that it has agreed to. For example, Philip Morris, U.S.A., apparently has not paid for product placement in movies since 1990. Another entity, Philip Morris International, however, allegedly has paid for placements in movies made outside of the United States since 1990, evidently without disclosing this practice to the FTC and notwithstanding the fact that these movies would be shown in the United States. Whether this charge is accurate and whether other tobacco companies have undertaken paid placements in films made outside of the United States after announcing its 1990 voluntary ban remains unclear, but questions continue about whether the practice has truly ended.

In short, even if the tobacco industry were living up to its agreements to end paid product placement, there is sufficient "wiggle room" in these agreements to permit a significant amount of the practice to continue.

4. Can the Tobacco Industry Be Trusted?

In spite of the tobacco industry's several agreements to end paid product placement, smoking in movies has increased dramatically. To say the least, this turn of events, although not constituting proof of industry involvement, raises suspicions

133. See Stockwell & Glantz, supra note 73, at 284 ("The Tobacco Institute now claims that the practice of paying for cigarette brand placement has ended, although this statement avoids the possibility that tobacco companies are paying to place tobacco use in general."). See also Chapman & Davis, supra note 118, at 270 ("Cynics may wonder whether cigarette companies might achieve product placement or portrayal of generic smoking scenes in movies . . . .").

134. See Hilts, supra note 104 (quoting a spokeswoman for Philip Morris, U.S.A.).

135. See Hilts, supra note 104. During the interview with the spokeswoman for Philip Morris, U.S.A., which took place in 1994, the spokeswoman indicated that international product placements had continued until about three years before the interview, which would have meant that they occurred up until 1991. Yet, a recent FTC report on tobacco marketing practices stated that "[a]s in every year since 1989, the [tobacco] industry reported that no money or other form of compensation had been paid to have any cigarette brand names or tobacco products appear in any motion pictures of television shows." See 1995 FTC Annual Report, supra note 86.

136. See 1995 FTC Annual Report, supra note 86.

137. See supra Part III.B.3.
about the industry's "pledge" to cease product placement.

Several possible interpretations could explain the increased smoking in films. It is possible, for example, that the creative community in Hollywood has decided for artistic reasons to show more smoking in movies in recent years.\textsuperscript{138} Smoking, indeed, can add elements of rebelliousness, coolness, or eroticism that filmmakers feel necessary to illustrate themes in their works.\textsuperscript{139} Although objectionable on public health grounds, artistic motivations to show smoking in movies do not directly implicate the tobacco industry. In addition, First Amendment concerns impose significant restraints upon those who would seek to restrict smoking in movies based upon artistic judgments.\textsuperscript{140}

It is also possible that Hollywood has expanded smoking in films for commercial reasons, but ones unrelated to payments from the tobacco industry. That is, filmmakers might show smoking in motion pictures because teens attend movies in which smoking is portrayed more often than they do those in which no smoking occurs. Smoking perhaps conveys an element of excitement or authenticity that teen moviegoers crave.\textsuperscript{141} If so, no payments from the tobacco industry would be necessary to induce profit-seeking filmmakers to include smoking in movies.

A third and more ominous possibility remains. It may be that the tobacco industry finds smoking in movies so effective in enticing teens to smoke\textsuperscript{142} that it has decided to continue this practice surreptitiously. Many observers certainly hold this

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{138} This is the stated view of Dean Ayers, president of Entertainment Resources Marketing Association, the trade group of the product placement industry. According to Ayers, "I talk to producers all the time. No one [in the product placement industry] is placing tobacco products." See telephone interview with Dean Ayers, President of Entertainment Resources Marketing Association (Apr. 27, 1998).
  \item \textsuperscript{139} See infra Part II.C.1.
  \item \textsuperscript{140} See infra Part III.B.2.
  \item \textsuperscript{141} See, e.g., Karen Thomas, \textit{No Waiting to Inhale: Cigarettes Light Up Movies} (visited Mar. 12, 1998) \texttt{<http://kohary.simplenet.com/glamour/lef450.htm>} (quoting Larry Deutchman of the Entertainment Industries Council Inc., a group that advises Hollywood on social issues, that the "success of smoke-filled independent films has created a new buzzword: Today's Hollywood aims to be 'edgy'. Smoking has become part of the definition of edginess").
  \item \textsuperscript{142} Films have enormous influence over moviegoers' habits and tastes. See David Ansen, \textit{Our Movies, Ourselves}, NEWSWEEK, June 29, 1998, at 10-11 ("We have all had that moment when we realize that the movies have seized our dreams, co-opted our imaginations, snatched our bodies . . . From Hollywood movies, we have learned how to live, how to love, what shoes to wear."). In the film, \textit{It Happened One Night}, for example, Clark Gable appeared without an undershirt, causing undershirt sales to plummet almost overnight. Similarly, when the Beatles appeared in \textit{A Hard Day's Night} with long hair, American youth became shaggy shortly thereafter.
\end{itemize}
\end{footnotesize}
Unfortunately, if product placement is taking place, those involved are unlikely to volunteer that they are participating given the public furor likely to be ignited and the possible illegality of the activity.

What makes the tobacco industry’s denials questionable is its decades-long history of deception and obfuscation on a variety of fronts. Among the examples:

- the establishment of a pseudoscientific “research” center that served merely to attack legitimate efforts to understand the health effects of tobacco and smoking;\(^\text{144}\)

- the denials of adverse health effects from tobacco and smoking despite internal documents documenting the hazards of tobacco;\(^\text{145}\)

- the refusal to acknowledge the addictive nature of

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\(^{143}\) See, e.g., David Kalish, Movies Too Smoky, Studies Say Fewer Americans Smoke, but Hollywood Can’t Kick The Habit, Studies Show, NEWS & RECORD (Greensboro, N.C.), Oct. 21, 1996, at A1 (noting that the increase in movie smoking “is reviving concerns the tobacco industry is paying for its products to appear in movies”); ASH Petition, supra note 7 (“At least five different lines of evidence strongly suggest that at least some of the smoking in movies occurs because cigarette manufacturers pay or otherwise induce move makers to include their brand of cigarettes in movies as a form of ‘hidden cigarette advertisements,’ a violation of 15 U.S.C.A. 1333.”); Elaine Dutka, Force of Habit, L.A. TIMES, Sept. 5, 1996, at F1 (quoting Roland McFarland, vice-president of Broadcast Standards for Fox Television that “[t]he tobacco industry has become aggressive. Since TV is no longer an option, it approaches filmmakers, prop people, set decorators, with financial inducements to place and popularize tobacco products. That’s a given in this industry.”); and Snyder, supra note 14, at 301 (quoting a marketing executive that “[n]othing in the movies is incidental . . . . If a product appears on camera in a movie, you can be sure somebody put it there.”). Ann Landers, the personal advice columnist, voiced strong suspicions about the industry’s practices in her response to a reader who complained about the high rate of smoking in movies: “You are right on when you say, ‘Very little having to do with tobacco happens by coincidence.’ The product placement department is clever about putting certain products in the hands of actors in a way that appears to be uncontrived. Meanwhile, the tobacco industry is hard at work behind the scenes.” See Ann Landers, Actors Who Smoke Are Sending Message, NEWS & RECORD (Greensboro, N.C.), Jan. 19, 1997, at D10.

\(^{144}\) See Cornelius B. Pratt, The 40-Year Tobacco Wars: Giving Public Relations a Black Eye?, PUB. REL. Q., Winter 1997/1998, at 5 (noting that in 1958 the tobacco industry established the Council for Tobacco Research ostensibly to fund “independent” research into the health effects of tobacco, but that privately, however, CTR “was organized as a public relations effort . . .”); TOBACCO INDUSTRY LITIG. REP., supra note 39 (quoting an internal Philip Morris document dated November 17, 1978 describing the industry’s Council for Tobacco Research as a “shield” for the industry).

\(^{145}\) See Judge: Tobacco Memos Show Deception, NEWS & RECORD (Greensboro, N.C.), Dec. 18, 1997, at A7 (quoting a Minnesota court official that internal tobacco industry documents show that cigarette makers for decades pursued “a strategy of deception aimed at concealing the health risks of smoking from the American public”).
nicotine despite company records to the contrary\textsuperscript{146} and notwithstanding the industry's manipulation of nicotine to optimize nicotine delivery to smokers.\textsuperscript{147}

Cumulatively, the industry's record of deception has led critics to describe big tobacco as carrying a "dominant culture of denial, of deception, of fraud, and of manipulation,"\textsuperscript{148} as having engaged in "deceitful" behavior for decades,\textsuperscript{149} and as "the longest running misinformation campaign in U.S. business history."\textsuperscript{150} Even industry insiders have acknowledged the numerous lies told by tobacco interests.\textsuperscript{151}

Given the industry's history of dishonesty over many decades, it would be naive to accept unquestioningly any claims that it has stopped product placements. That said, honesty compels a call for evidence rather than speculation to justify accusing the industry of this practice. To date, no such evidence has emerged.\textsuperscript{152}

\textsuperscript{146} See Pratt, supra note 145 at 5 (quoting numerous internal documents indicating that tobacco companies knew as far back as 1963 that nicotine was addictive, including an internal memorandum from the vice-president and general counsel of Brown & Williamson, dated July 17, 1963, that states "... nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.").

\textsuperscript{147} See Alix M. Freedman and Suein L. Hwang, Three Ex-Employees Say Philip Morris Deliberately Controlled Nicotine Levels, WALL ST. J., Mar. 19, 1996, at B1 (quoting three ex-Philip Morris executives as saying that Philip Morris "not only believes it is in the nicotine-delivery business but deliberately controls nicotine levels in its cigarette brands"); Barry Meier, File Suggests A Possibility Of Deception On Tobacco, N.Y. TIMES, Jan. 9, 1998, at A16 (citing an internal company memorandum that the Brown & Williamson Company had developed tobacco with high nicotine levels despite having denied to federal investigators in 1994 that the company had ever bred tobacco with high or low levels of nicotine).

\textsuperscript{148} Pratt, supra note 145, at 5.

\textsuperscript{149} See Hedrick Smith Productions, Inc., The Tobacco Lobby: Money, Grassroots, and Telemarketing (Interview With Congressman Henry Waxman) (visited May 20, 1998) <http://www.pbs.org/powergame/files/waxman.html> (interview with Congressman Henry Waxman in which the Congressman states, "I think the tobacco industry is engaged in a deceitful campaign, for decades, of trying to withhold information that they've known about the connection of cigarette smoking and disease, about the connection of nicotine and addiction and their practices to manipulate the nicotine in order to keep people smoking, and their targeting of kids, particularly, to start smoking.").


\textsuperscript{151} See Elefthetria Parpis, Up In Smoke: Kicking Butt, ADWEEK, October 13, 1997, at 33 (quoting tobacco lobbyist, Victor Crawford, as admitting shortly before he died of lung cancer that "I was a [tobacco] lobbyist, and I know how tobacco companies work ... I lied and I'm sorry").

\textsuperscript{152} Perhaps the best argument that the industry has ceased product placement is
III. MEASURES TO REDUCE SMOKING IN THE MOVIES

A. Complete Disclosure of All Tobacco Product Placement in Movies

Basic information is needed about what, if anything, the tobacco and motion picture industries do with respect to smoking in films. Specifically, information is needed regarding whether the tobacco industry does anything, paid or unpaid, through product placement firms or other agents, domestically or internationally, whether for specific brands or for tobacco products generally, to solicit smoking in movies or on television. Despite the FTC annual reports, this basic information remains unavailable. Once the information is secured, then policymakers can assess what action, if any, needs to be taken.

If "sunshine is the best disinfectant," then disclosing tobacco industry involvement, if any, whenever an actor smokes in a movie or on television or whenever a tobacco product ends up on the screen seems useful and important. Revealing that a scene in which the lead character nervously reaches for a cigarette or triumphantly lights a cigar resulted not from the creative genius of the screenwriter, but, instead, from the dollars or other benefits showered upon the filmmaker exposes the true motives of the enterprise. Such disclosures can embarrass the motion picture industry and anger the public, arguably leading to non-governmental pressure to curtail the practice without offending First Amendment principles.

the fact that, despite the enormous and widespread jump in on-screen smoking, no one has publicly documented tobacco's unseen hand manipulating Hollywood's activities. Given the difficulty of concealing a massive behind-the-scenes push to place smoking in movies, one might well conclude that other, less sinister, factors account for the jump in movie smoking. See supra notes 139-143 and accompanying text. See also Michael Fleeman, Smoking on Screen Smolders as Issue in Hollywood, NEWS & OBSERVER (Raleigh, N.C.), July 14, 1998, at E8 (quoting Minnesota Assistant Attorney General Doug Blanke, "Am I saying that we have evidence that producers were paid money [to show smoking in movies]? We don't have that evidence . . . but there have been a lot of films lately that would cause one to wonder.").

153. In an effort to gain information, the author made a number of phone calls to product placement firms asking what, if anything, they knew about tobacco interests arranging smoking in movies. Although all denied that they engaged in this activity, one firm that did not wish to be identified insisted that tobacco companies now widely use public relations firms, not the product placement industry, for product placements. The author has been unable to confirm or refute this assertion.

154. Nothing is mandated or barred by disclosure. Instead, the commercial nature of the scenes in which smoking results from tobacco industry involvement is injected into the marketplace of ideas.
Although congressional inquiry has played a key role in exposing tobacco influences in filmmaking, relying on Congress to repeat its inquiry is an iffy proposition. So many issues compete for congressional attention that it may be years until the legislature focuses on this issue again.

At least two federal bodies have shown interest in tobacco’s product placement activities. First is the Justice Department, which can investigate possible violations of the Public Health Cigarette Smoking Act, namely whether the tobacco industry is using product placements as “hidden cigarette ads.” The antismoking group, Action on Smoking and Health (ASH), has pursued this angle, petitioning the Justice Department to conduct an investigation into the tobacco industry’s product placement activities. In a creative twist, ASH has asked the Justice Department not only to investigate the tobacco industry, but also to query filmmakers as well. The obvious benefit of such an approach is to put to the test any denials from the tobacco companies that they have engaged in product placement activities.

According to ASH, the Justice Department has agreed to “thoroughly review” whether the recent dramatic increase in smoking in films “is caused in whole or in part by payments of money or other things of value by tobacco industry representatives to induce [filmmakers] to feature tobacco products.” Given the tobacco industry’s reservation of the right to conduct “unpaid” product placements, the Justice Department should inquire broadly into the matter. The Department should ask both tobacco companies and motion picture studios whether the tobacco companies have encouraged motion picture makers, directly or indirectly (i.e., through

155. See supra Part II.D.1.
158. See ASH Petition, supra note 7 (“It would take very little time or effort for the Department to write to the six major tobacco companies to ask whether during the last five years their companies have directly or indirectly (e.g., through agents) provided or promised anything of value to induce the placement of their product in movies.”).
159. See ASH Petition, supra note 7 (“[Investigative] letters can also easily be sent to major movie studios, asking them to deny in writing, and under the penalties for lying in an official investigation, whether they or any of their agents or employees has accepted such payments of money or other things of value from cigarette manufacturers.”).
160. ASH Petition, supra note 7. As of January 1999, the results of any such investigation remain unknown.
agents) for consideration or not, to feature tobacco products in movies.

The Federal Trade Commission presents another alternative for obtaining critical information about tobacco industry promotional practices. In fact, the FTC’s annual tobacco industry questionnaires, at first blush, seem to cover all possibilities for paid or compensated product placement in movies, including the providing of jewelry, cars or other non-monetary consideration. Similarly, the questionnaires also seem to require disclosure of what the product placement industry calls “unpaid” product placement – that is, paying a product placement (or public relations) firm to insert smoking scenes in a movie even though the filmmaker never receives any consideration for doing so. The FTC’s current questionnaire, in particular, requires disclosure of any consideration paid “in connection with any production or filming of any motion picture(s) or television show(s)” rather than simply to consideration flowing to filmmakers. One could make a good argument that monies paid to anyone – product placement firms, public relations firms, or whomever – to get actors to smoke in movies should have been regularly disclosed. Whether tobacco companies do so remains unclear.

To ensure that it knows the full extent of the tobacco industry’s activities in promoting the use of its products in movies, the FTC should consider two alternatives. First, it should send a letter to the tobacco companies making clear that its questionnaire has always sought information about payments and other consideration from the companies whether or not filmmakers ever received the consideration. The letter should also encourage tobacco companies to amend their previous responses in light of the clarification. Second, the agency should expand its questionnaire to include all promotional activities, whether for consideration or not, by the industry directed at inducing the placement of tobacco products or the use of tobacco products in movies.

One might question the incentive a filmmaker, otherwise indifferent to whether smoking occurs in his or her film, has to portray smoking or tobacco use in movies without receiving a

161. See supra note 131 and accompanying text.
162. See supra note 131 and accompanying text.
163. The letter should also make clear that providing free samples to filmmakers has always been something that must be disclosed. See supra note 131 and accompanying text.
financial benefit for doing so. Rather than engage in endless speculation on the point, the Justice Department and/or the FTC should first simply determine whether product placement in any form is taking place. If it is, then the agencies, if they wish, can investigate the motivation behind the behavior.

Assuming that a federal inquiry into tobacco industry product placement activities reveals that the industry, in fact, has continued in some fashion to secure scenes of smoking in movies, some sort of legislative or regulatory reaction seems called for. Even assuming that no information emerges that product placement activities are underway, action to discourage filmmakers from placing so many smoking scenes in movies and on television seems amply warranted given the harm associated with smoking.

B. Statutory Ban on All Tobacco Product Placement in Movies

Assuming that society wishes to discourage the portrayal of smoking in movies, careful attention must be paid to the First Amendment implications of any actions that might be taken. As with most public policy challenges, an unrestrained "pull-out-all-the-stops" approach, although tempting, threatens values that appear as important as the specific challenge of smoking. In particular, governmental action to ban smoking in movies carries implications that extend beyond smoking. As two editors of a publication that focuses on the hazards of smoking addressed the issue, they voiced caution at too aggressive an approach:

Any attempt to develop policy on the depiction of smoking in films needs to reflect first on the wisdom of attempting to do so. There might not be too many steps from regulating artistic expression in the name of public health to the suppression of a wide variety of allegedly pernicious influences on the community. History records regimes which persecuted novelists, dramatists, artists, and film makers through laws, doctrines, and fatwas because they were said to have offended various moral codes.164

1. Product Placement As Commercial Speech

To what extent, if any, can the government regulate tobacco product placement in movies or on television in light of the protection accorded speech under the First Amendment? The

164. See Chapman & Davis, supra note 118, at 269.
answer depends, in part, on the degree to which product placement is considered "commercial speech," i.e., speech that does "no more than propose a commercial transaction."\textsuperscript{165} Although the United States Supreme Court has increasingly extended First Amendment protection to commercial speech,\textsuperscript{166} the Court has nonetheless permitted greater restrictions on commercial speech than on political speech.\textsuperscript{167}

Determining whether product placement constitutes commercial speech is no easy task. The Supreme Court has sent mixed signals both with respect to what constitutes commercial speech and the extent to which it may be regulated even if it is commercial speech.\textsuperscript{168} The issue of product placement in films has never been addressed. What makes the determination regarding product placement so difficult is that commercial and non-commercial elements of speech are blended into the final work. In such cases, the Supreme Court will look to whether the work is one "inextricably intertwined" unit or whether it can be parsed into component parts. In \textit{Board of Trustees of State University v. Fox},\textsuperscript{169} the Court concluded that if the commercial elements of the speech in question could not be separated from the non-commercial elements, the speech as a whole would be protected under a strict First Amendment approach.\textsuperscript{170} On the other hand, where the elements of speech were less intertwined, the Court did not accord stringent First Amendment review and protection.\textsuperscript{171}

Different commentators reviewing the same Supreme Court rulings, have reached different conclusions about product placement in films. Steven Snyder, although conceding that the Supreme Court may be skeptical when advertisers


\textsuperscript{166} \textit{See} John E. Nowak et al., \textit{Constitutional Law} 904 (3d ed. 1986) (noting that under recent court rulings, "commercial speech appears to be vested with extensive first amendment protection").

\textsuperscript{167} \textit{See} id.

\textsuperscript{168} \textit{See} Snyder, \textit{supra} note 14 and Lackey, \textit{supra} note 4, for extensive discussions of the Supreme Court's mixed signals on commercial speech.

\textsuperscript{169} 492 U.S. 469 (1989).

\textsuperscript{170} \textit{See} id. at 488. According to Justice Scalia, where "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781, 796 (1988).

argue that their commercial messages are "inextricably intertwined" in films. 172 argues that "verisimilitude" strongly supports this argument with regard to product placement—"[i]f a movie is to accurately depict today's America, it also must depict the commercialization that has seeped into every corner in our society." 173 William Lackey responds, however, that even the need for cinematic realism would not satisfy the Supreme Court test for commercial elements to be considered inextricably intertwined with non-commercial elements. 174 Moreover, and perhaps even more convincing, nothing in a tobacco product placement ban (or other regulation) would bar moviemakers from using tobacco products in their movies; moviemakers would be prohibited, at most, from accepting consideration for displaying tobacco products. In short, it would seem that tobacco product placement, when it exists primarily to sell products, constitutes commercial speech which could be regulated.

2. Restricting Tobacco Product Placement Under the First Amendment

As previously noted, 175 congressional opponents of tobacco product placement have already dipped their toes in the water by introducing legislation to bar this practice completely. Assuming arguendo that tobacco product placement constitutes commercial speech, one still needs to analyze whether a ban on this practice would withstand constitutional scrutiny. Three cases provide insight and guidance in making such an assessment. First, in Capital Broadcasting v. Mitchell, 176 a

172. State law does not require a filmmaker . . . to include product placements in her movie. If Justice Scalia requires a government-forced intertwining before he will classify hybrid speech as noncommercial speech, then a movie containing product placement may not qualify as for the Court's full First Amendment protection. Snyder, supra note 14, at 326.

173. Snyder, supra note 14, at 326.

174. [Snyder] has argued that products used in movies are inextricably intertwined with the film because it would be virtually impossible for a film to be realistic if all commercial references were excluded. Under the reasoning of Fox, however, cinematic realism is not a "law of man or nature" [Fox, 492 U.S. at 474] that makes it impossible to sell products without producing movies, or to produce movies without placing products. Under the holding in Fox, therefore, product placement can be regulated. Lackey, supra note 4, at 285.

175. See supra notes 114-116 and accompanying text.

three-judge federal district court upheld a Congressional ban on cigarette advertising on television and radio. The United States Supreme Court affirmed this decision without opinion. Although the case has been vigorously criticized by commentators and carries a dubious rationale (i.e., that Congress can ban truthful, non-misleading commercial speech) in light of more recent rulings, it has never been overruled or rejected by the Supreme Court. Given its far-reaching scope with respect to regulating the promotion of cigarettes, Capital Broadcasting stands as a powerful precedent for any action that Congress or state legislatures might take regarding tobacco product placement in movies and on television.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission,* the Supreme Court invalidated a Michigan state regulatory commission ban on all public utility advertising that promoted the use of electricity. In doing so, the Court established a four-part balancing test for assessing the constitutionality of restrictions on commercial speech that has largely survived subsequent rulings. Under this test, courts must ask whether (1) commercial speech concerns lawful activity and is not misleading and (2) the asserted governmental interest is substantial. If the answer to these questions is yes, courts must then determine whether (3) the regulation directly advances the governmental interest asserted, and (4) it is not more extensive than is necessary to serve that interest.

A third case with broad bearing on the issue of tobacco product placement is *Liquormart, Inc. v. Rhode Island,* in which the Supreme Court declared that Rhode Island’s ban on the advertisement of liquor retail prices (except at the place of sale) violated the First Amendment. In this case, the Supreme Court seems to have set more stringent requirements

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177. *See* NOWAK ET AL., *supra* note 167, at 910. ("Capital Broadcasting is a troublesome case. If Congress may forbid truthful advertising for the purchase of a legal, validly offered item, it is hard to see a way to establish a principled limitation in its power to restrict advertisements for anything it chooses to consider "harmful.").


179. *See id. at 566.*

180. *See id.*


than *Central Hudson* for the government to meet in order to regulate commercial speech. In particular, the Court made clear that comprehensive bans on truthful, nonmisleading commercial speech would henceforth face rigorous review.\(^{183}\) According to the Court:

> Precisely because bans against truthful, nonmisleading speech rarely seek to protect consumers from either deception or overreaching, they usually rest on the offensive assumption that the public will respond “irrationally” to the truth. [citation omitted]. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about the chosen products.\(^{184}\)

In reaching this ruling, the Court implicitly overruled one of its previous rulings, *Posadas de Puerto Rico Associates d/b/a Condado Holiday Inn v. Tourism Company of Puerto Rico*,\(^{185}\) in which the Court had reasoned that restrictions on commercial speech could be justified if the underlying conduct could be banned.\(^{186}\) After *44 Liquormart*, the Court seems unlikely to base its rulings on the *Posadas* rationale.\(^{187}\)

Applying the Court’s constitutional tests to the case of tobacco product placement leads to the following conclusion. Assuming *arguendo* that the Supreme Court determines that product placement constitutes commercial speech, even an outright ban on the practice would be unlikely to draw the Court’s disapproval.\(^{188}\)

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184. *Id.* at 503.
186. According to the *Posadas* court:

> [I]t is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions of advertising.

*Posadas*, 478 U.S. at 346.
187. *According to the 44 Liquormart Court*:

> Because the 5 to 4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to highly deferential approach. Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.

*44 Liquormart*, 517 U.S. at 510.
188. Although noting that the Supreme Court seems to have abandoned its greater
As a starting point, to the extent that a tobacco product placement ban targets youth-oriented films, it would seem to fall outside of the "lawful activity" rationale underlying Central Hudson since it is illegal for under-eighteen-year-olds to purchase cigarettes. If a practice is illegal, then stringent government regulation of advertising in support of the practice presents no constitutional issue. The current FDA antismoking regulatory campaign is premised on this rationale, prohibiting promotional efforts aimed at young people.\textsuperscript{189} Along the same lines, if the courts were to view tobacco product placement as either "deceptive"\textsuperscript{190} or "unfair,"\textsuperscript{191} the Central Hudson test would permit tobacco product placement regulation to pass the first prong of the constitutional test.

Assuming tobacco product placement were to pass the first prong of the Central Hudson test, the remaining parts of the test would seem to permit regulation of this practice. Reducing tobacco use and addiction clearly constitutes a "substantial" governmental interest, and prohibiting tobacco product placement would seem to advance this governmental interest.\textsuperscript{192} With respect to whether a ban on tobacco product placement would be no "more extensive than necessary to serve [the governmental interest],"\textsuperscript{193} the matter is less clear. In Board of

\textsuperscript{189.} See Sandra E. McKay et al., The FDA's Proposed Rules Regulating Tobacco and Underage Smoking and the Commercial Speech Doctrine, 15 J. PUB. POL'Y & MARKETING 296 (1996) (concluding that FDA's proposed regulations would withstand congressional scrutiny and noting that "[u]sing tobacco products is a legal activity for adults but not for minors. The government is not seeking to restrict all advertisements, only those that appeal to young people or are placed in youth-oriented print media.").

\textsuperscript{190.} Section 5 of the Federal Trade Commission Act prohibits "deceptive" acts or practices in or affecting commerce. 15 U.S.C. § 45(n) (1994). One might argue that tobacco product placement misleads consumers, especially young ones, about the frequency, desirability and health effects of smoking.

\textsuperscript{191.} Section 5 of the Federal Trade Commission Act prohibits "unfair" acts or practices in or affecting commerce. 15 U.S.C. § 45(n) (1994). The fact that smoking is portrayed favorably in movies as a result of the exchange of consideration without disclosure of the fact of that exchange arguably constitutes unfairness.

\textsuperscript{192.} Studies show that product placement is a very effective form of advertising. Moreover, cigarette companies have often placed their products in films that are obviously designed to appeal to children and young adults. Restricting the product placement of cigarettes would therefore reduce the aggregate amount of cigarette advertising to which viewers are exposed.

\textsuperscript{193.} Central Hudson, 447 U.S. at 566.
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Trustees, State Univ. of N.Y. v. Fox, the Supreme Court seemed to back off from this requirement, substituting instead, a requirement that there be only a “fit between the [government’s] ends and means chosen to accomplish those ends.” The means must be “reasonable” and “narrowly tailored to achieve the desired objective.” Under such a test, a tobacco product placement ban would seem to pass muster. Even if the Supreme Court’s opinion regarding “rigorous review” of truthful, non-misleading commercial speech in 44 Liquormart, Inc. does not narrow the Fox test, it is still likely that a tobacco product placement ban would be upheld. Given the numerous alternative ways to promote cigarettes, the unfairness of tobacco product placement when it is not disclosed, the recent Minnesota settlement prohibiting this practice, and the ability of moviemakers to show cigarette smoking without restriction, it is unlikely that the Supreme Court would overturn a governmental ban.

C. "Shaming" of the Movie Industry

Assuming arguendo that a full and thorough inquiry of the tobacco and movie industries revealed no tobacco product placement, paid or unpaid, being conducted, what options, if any, remain for those concerned about the influence of tobacco consumption in movies and television on the public’s health? One immediate option, of course, is to do nothing with the hope that the current saturation of smoking in movies will prove to be a fad and will change as the public’s taste in films changes. The fact that smoking in movies has increased for many years may indicate, however, that this hope is illusory.

Another approach increasingly being tried is to adopt

195. Id. at 480 (citations ommitted).
196. Lackey argues this point forcefully. See Lackey, supra note 4, at 289.
197. As Langvardt & Richards note, the term “ban” is extremely imprecise. See Langverdt & Richards, supra note 183, at 555. Every restriction, however minor, “bans” the activity that is restricted. What is critical, according to them is the “relative importance of information and the presence or absence of alternative avenues of communication.” Langvardt & Richards, supra note 183, at 556. Given the insubstantiality of the information in product placements and the numerous alternative avenues of communication, one is hard pressed to make the case that this practice merits constitutional protection.
198. In discussing this point, the author notes that the issue of tobacco product placement remains unresolved.
199. See supra Part II.B.3.
"shaming" strategies designed to embarrass moviemakers who continue to show smoking in films. Although these strategies may cause discomfort in Hollywood, they rely on the First Amendment—free speech challenges other free speech in the marketplace of ideas. Filmmakers who insist on a First Amendment right to make movies as they see fit should not be taken seriously if they protest critics' objections to what they have shown in their movies.

Among the recent examples of creative "shaming":

- In a recent issue of *Parade Magazine*, perhaps the most widely-read weekly in the United States, the editors included a column listing numerous celebrities who have smoked and died of lung cancer.\(^{200}\) In the same column, the magazine notes that the American Cancer Society has repeatedly admonished individual stars, directors and studio executives "regarding Hollywood's influence on the nation's smoking habits, particularly those of its teenage audience."\(^{201}\)

- The Clinton Administration has publicly attacked Hollywood's use of smoking in movies in a variety of ways, including criticism from Vice-President Al Gore in meetings with studio and network executives, and criticism from Hillary Rodham Clinton, the President's wife, in which she deplored the fact that 77 percent of all films in 1996 had scenes depicting smoking as did every film nominated for best picture at the Academy Awards.\(^{202}\)

- The American Lung Association has launched the "Hackademy Awards," a list of movies that portray the most harmful tobacco scenes of the year, to coincide with the Academy Awards ceremony each year. In 1998, the group deemed *Titanic*, the "biggest disaster in the war against teen-age tobacco use" because of a scene in which Kate Winslet's character, Rose, lights up a

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201. *See* id.

cigarette at the dinner table as a sign of rebellion. 203

- Numerous public interest groups have established Internet web sites that maintain ongoing public criticism of Hollywood's fascination with smoking in movies. Perhaps the best known and most widely cited is ASH, Action on Smoking and Health, which both criticizes moviemakers 204 and prods government agencies to investigate whether there is a connection between the rate of smoking movies and payoffs by the tobacco industry.205

Although there is little likelihood that shaming approaches can produce quick results in reducing on-screen smoking, they do create pressures that, in the long run, create an atmosphere in which moviemakers may think twice before injecting smoking scenes in movies.

IV. CONCLUSION AND RECOMMENDATIONS

Harm from tobacco products to the nation's youth justifies strong attempts to eradicate commercial connections between the tobacco industry and the entertainment industry. While recognizing that zealous efforts to achieve commendable social results can sometimes overreach, one finds it difficult to see how serious objections can be raised to ending tobacco product placement in the movies. The devastating economic costs and physical destruction caused by tobacco products are well known and clearly documented. Proposals to end tobacco product placement place no restrictions on Hollywood's artistic discretion; they merely restrict the provision of consideration as a means to influence artistic discretion.

To summarize the recommendations of the article, I propose that:

1. Congress enact legislation to ban tobacco companies, directly or indirectly, from supplying consideration to moviemakers designed to display smoking, either of specific brands or of tobacco products generally, in movies or on television;


204. See supra note 7 and accompanying text.

205. See supra note 7 and accompanying text.
2. the Federal Trade Commission make clear that its annual questionnaire has always sought information about payments and other consideration from the companies whether or not filmmakers ever directly received the consideration;

3. the Federal Trade Commission expand its annual questionnaire to the tobacco companies to seek information about all promotional activities directed at inducing the placement of tobacco products (including the generic use of tobacco products) or the use of tobacco products (including the generic use of tobacco products) in movies and on television;

4. the Federal Trade Commission send its annual questionnaire to the Tobacco Institute and any other organization controlled by or acting as an agent of tobacco companies or the tobacco industry seeking the same information as from individual tobacco companies;

5. the Federal Trade Commission and/or the Justice Department conduct an investigation of the major Hollywood studios seeking information on whether any filmmakers have received compensation from any source for the placement of tobacco products in films or the use of tobacco products (specific brands or generically) in films; and

6. both government and private groups expand their "shaming" strategies against the portrayal of smoking in movies.

If the heavy emphasis on smoking in movies continues, filmmakers ought to be reminded repeatedly of the role they may play in encouraging smoking habits among young people. Filmmakers may be free to continue these portrayals, but they should not be free to delude themselves into believing that their actions carry no adverse social consequences. Nor should filmmakers be free to engage in such actions without criticism.