

CITIZENS FOR  

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DECENCY





# ***Pornography: The New Tobacco***

Research, Legislation, and Litigation

## **THE QUESTION TO SOLVE**

In 2013, the U.S. Supreme Court struck down an appeal by Philip Morris, R.J. Reynolds, and Liggett (three of the U.S.'s largest tobacco companies) to reverse a \$2.5 million award in compensation to the Douglas family for the death of Charlotte Douglas (Join Together Staff, 2013). While an outcome in favor of the individuals affected by cigarette smoking may not surprise many today, just 50 years ago doctors and athletes glorified cigarette smoking on TV and the radio (Cummings & Proctor, 2014). Public attitudes about tobacco and cigarettes has since changed due to medical research. Today the U.S. Government attributes 20 percent of all deaths in the U.S. to cigarette smoking and estimates the annual cost to society through medical care

“Jane began “noticing a steady, negative change in him. . . . Six years later, he was a different man. . . . He confessed that he was addicted to pornography and had been for years.”

and lost productivity due to smoking to be \$193 billion (Food and Drug Administration).

How could a drug once so widely accepted come to be held in such pervasive disdain that it came to be so extensively regulated? Studying the steps taken toward tobacco regulation can procure an effective strategy for regulating and combating another equally, if not more, harmful practice: the widespread public consumption of pornography. The process that was required to take down big tobacco companies provides an effective pattern which, if followed, will assist in creating greater regulations on the pornography industry.

### THE HARM OF PORNOGRAPHY

Studies have shown that the harm of pornography to individuals,

families, and society is extensive (Citizens For Decency, 2016). Kirk Doran and Joseph Price found that married men who have watched an X-rated film within the past year are 60 percent more likely to get divorced and 80 percent more likely to have an affair (Doran and Price & 2014). Pornography leads to sexual objectification of women (Peter & Valkenburg, 2007) and has been shown to decrease the quality of relationships between children and parents (Ybarra & Mitchell, 2005; Citizens for Decency, 2016).

The studies mentioned above are just a sampling of the research indicating that pornography use leads to various physical and relational problems. A 2002 study conducted for PBS/Frontline reported that 80 percent of pornography viewers surveyed felt “fine” about their pornography viewing (Weir, 2014). However,

many who have been affected by pornography will readily assert that pornography use is anything but fine. One such person, Jane, was incalculably affected by her husband’s pornography addiction. Jane and her husband, who had eight children, were happily married until Jane began “noticing a steady, negative change in him. . . . Six years later, he was a different man. . . . He confessed that he was addicted to pornography and had been for years.” After struggling to overcome his addiction and admitting to having violent thoughts against his wife, Jane’s husband took his own life (Citizens for Decency, 2016). Pornography is an evil that demands greater regulatory efforts to prevent tragedies such as those experienced by Jane. We stand with researchers, legislators, parents, and all others who are committed to battling this harmful drug.

### WHY A STUDY OF TOBACCO’S HISTORY CAN HELP

Citizens for Decency is not the first to link the addictive nature of pornography to that of tobacco (Fight the New Drug, 2015). Tobacco, like pornography, provides a danger to individuals, families, and societies. However, unlike tobacco, pornography is still widely seen as permissible within society and an unsatisfactory lack of regulation surrounds it. Just as tobacco addictively destroys individuals internally, research has suggested that pornography is also addictive and that it alters the chemistry of both mind and body. (Hilton & Watts, 2011; Kuhn & Gallinat, 2014;

Centre for Neuro Skills; Citizens for Decency, 2016). Furthermore, just as tobacco pulls families apart (via court mandate (e.g. Daniel v. Daniel) or early death), pornography can drive wedges in marriages and, in some cases, even lead spouses to abandon their families (Citizens for Decency, 2016; Doran & Price, 2014).

The history of the fight against tobacco provides a viable strategy which can guide future anti-pornography advocates. The following elements have been key in securing increased tobacco regulation and could effectively be applied to the

fight against pornography:

1. Motivate **government-sponsored research** on the harmful effects of pornography through individual research and lobbying/raising awareness
2. **Convince** through research, the hazards of pornography to (1) the government, (2) individuals, families, and societies, and (3) courts
3. Motivate and establish **regulatory jurisdictions** to determine what organizations have the duty to protect

the public from the harms discovered through the research

4. Motivate and establish **successful legislation** to protect individuals, families, and society from the now established and accepted hazards associated with pornography (in accordance to past and ongoing research)
5. Bring individual and state **lawsuits** against distributors of pornography to recover



for proven damages caused to individuals, families, and societies

If pornography is to be put under greater regulation, research, legislation, and litigation must combine, as they did in the fight against tobacco, to motivate the U.S. Government, businesses, and individuals to limit the influence of tobacco on individuals, families, and society.

What follows is a brief history of the battle to regulate tobacco. We invite all who are committed or interested in the fight against pornography to consider the following and see for themselves how what once seemed impossible became reality in a matter of decades as research, legislation, and litigation worked together to change public opinion and place handcuffs on the monstrous tobacco industry

## EARLY RESEARCH

By the 1950's, suspicions of a potential link between cigarette smoking and lung cancer were growing. Through the early 1950's, several of medical studies were published with inconclusive results regarding smoking's link to lung cancer (Surgeon General's Advisory Committee on Smoking and Health, 1964, p. 6). In December 1953 (Brandt, 2012), the Tobacco Industry Research Committee (T.I.R.C.) was organized with the stated purpose of sorting fact from fiction regarding the link between cigarette smoking and lung

cancer. This research was to be led by "a scientist of unimpeachable integrity and national repute," (Tobacco Industry Research Council, 1954), and although the sincerity of the T.I.R.C.'s efforts was later called into question (as evidenced by its disbandment in the 1998 Master Settlement Agreement), the establishment of such a group showed that governments and organizations were taking seriously these health claims and wanted answers.

The United States Government began taking official action in 1956 when the National Cancer Institute, the National Heart Institute, the American Cancer Society, and the American Heart Association, under the direction of the Surgeon General, were tasked with jointly assessing the available research on the link between smoking and lung cancer (Surgeon General's Advisory Committee on Smoking and Health, 1964, p. 7). At the end of their studies, this group came to the monumental conclusion that "the sum total of scientific evidence establishes beyond a reasonable doubt that cigarette smoking is a causative factor in the rapidly increasing incidence of human epidermoid carcinoma of the lung" (Parascandola, Weed, & Dasgupta, 2006). These results led to a series of official statements by the Surgeon General identifying "cigarette smoking as the principal factor in the increased incidence of lung cancer" and to the establishment of the Surgeon General's Advisory Committee on Smoking and Health (Surgeon General's Advisory

Committee on Smoking and Health, 1964, p. 7; National Commission on Marijuana and Drug Abuse).

By 1962, over 7,000 research studies had been published on the potential health hazards of smoking (Office of the Surgeon General, 1989). The effects of these early studies were monumental. In 1964, a major landmark was achieved in the battle against cigarette companies when the "first federal government report linking smoking and ill health, including lung cancer and heart disease" was released (U.S. Department of Health & Human Services, n.d.): "Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service." Through this report, the Surgeon General's Advisory Committee (1964) cited the studies performed by the NCI, NHI, and ACS and argued causal relation between tobacco and lung cancer (p. 37), chronic bronchitis (p. 38), "babies of lower birth weight" (p. 39), and an average 70 percent increase in death rate (p. 35). The report did not characterize tobacco as addictive (p. 34) and did not claim nicotine to "represent a significant health problem" (p. 75), although it did suggest that nicotine did play some role in the equation, noting: "nicotine-free tobacco [products] . . . do not satisfy the needs of those who acquire the tobacco habit" (p. 34).

The impact of this report and subsequent actions by government were critical in overcoming tobacco's widespread acceptance and public use. By 1968, 78 percent of the American

population believed cigarette smoking led to cancer (in 1958 this number was only at 44 percent) (U.S. National Library of Medicine, 1993).

## EARLY LEGISLATION

Although the Surgeon General's 1964 report claimed that the public damage caused by cigarette smoking "warrant[ed] appropriate remedial action," the task of regulating tobacco and seeking remedy was left

to the United States Government (U.S. National Library of Medicine, 1993). Fortunately for the American public, the government quickly got to work putting regulations in place to adequately warn the American public of the newly promoted dangers of cigarette smoking.

After the publishing of the Surgeon General's report, several acts of legislation were passed, the bulk of them coming in the seventies and eighties. The purpose of these acts of legislation was to define which agencies (if any) had authority over

tobacco regulation and to create proper warnings to the public about the dangers of smoking.

The first major act of legislation regulating tobacco was the Federal Cigarette Labeling and Advertising Act of 1966. This act was the first to require warning labels on cigarette cartons. The wording to be placed on the packaging was very specific: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Controversy surrounding this labeling would come however, as "a substantial number of individual





physicians would protest that a link between tobacco and cancer had not been “demonstrated scientifically” (1969, p. 4).

However, in 1969, still feeling that research supported the link between tobacco and health risks, Congress passed the Public Health Cigarette Smoking Act. This act strengthened the 1966 act and broaden its reach. It modified the required labeling on cigarette packages to read “Warning: Excessive Cigarette Smoking Is Dangerous to Your Health” (1969, p. 2) after finding the previous labeling was ineffective (p. 8). The Public Health Cigarette Smoking Act of 1969 also made it “unlawful to advertise cigarettes by television or radio” (p. 2) and held tobacco companies to the charge “that with respect to all other advertising, they would avoid advertising directed to young persons” (p. 20).

This Act called for an annual report to be presented to Congress by the Secretary of Health, Education and Welfare to help Congress stay up to date on tobacco research and make needed legislation to protect American citizens. These reports, which generally came from the Office of the Surgeon General, were to contain both (a) updates on research related to consequences of smoking and (b) recommendations for legislation. The reports were also to provide updates on the effectiveness of both cigarette labeling and cigarette advertising practices. (p. 5).

These Surgeon General reports excellently track the history of

tobacco legislation and research. They capture the general public feeling for tobacco and show the influence government offices can have on protecting the public from poorly understood hazards.

## EARLY LITIGATION

Although the U.S. government was making tremendous progress in the battle against tobacco, individuals taking cases to courts of law were finding less success. The first major case involving tobacco companies was brought by Ira C. Lowe to a District Court in Missouri in 1954 (Lowe v. R.J. Reynolds et al). Lowe sued tobacco companies hoping to hold them liable for his developing cancer, but the case was dismissed in 1957 (Medical University of South Carolina, n.d.) and Lowe would never find success in his attempts to bring liability against Big Tobacco (Campbell, 2008).

In 1955, Eva Cooper brought a similar case against R.J. Reynolds Tobacco Company (Cooper v. R.J. Reynolds Tobacco Co) claiming that R.J. Reynolds deceitfully advertised their cigarettes and that her husband's death was caused by a reliance on that advertising. In similar fashion, Cooper's charges were dismissed and R.J. Reynolds was freed of charges due to an inability to prove the existence of the specific advertising with which Cooper found fault (Cooper v. R.J. Reynolds Tobacco Co.,

(D.Mass. 1957)).

The next major case that would come against big tobacco came when Edwin Green sued American Tobacco Company in 1957 claiming that smoking Lucky Brand Cigarettes was leading to his lung cancer. After his death in 1958, Edwin's widow carried the case forward under Florida's Wrongful Death Statute (Green v. American Tobacco Company, 304 F. 2d 70 - Court of Appeals, 5th Circuit 1962).

Green's case was originally structured around six charges, though the court sustained only two: breach of implied warranty and negligence. These two charges were presented to the jury for review and, in a monumental moment, the jury decided that cigarettes led to the cancer that killed Edwin Green. This would serve as an important precedent and was the first time cancer was linked to cigarette smoking on legal record (Medical University of South Carolina, n.d.). The same jury however also decided that American Tobacco Company could not have foreseen the damages its cigarettes caused and was therefore not liable for Green's injuries (Green v. American Tobacco Company, 304 F. 2d 70 - Court of Appeals, 5th Circuit 1962). This ruling would also set an important precedent, one that tobacco companies could use in their favor in subsequent cases. In the end, after years of fighting and appealing up to the Florida Supreme Court (Green v. American Tobacco Company, 154 So. 2d 169 - Fla:

Supreme Court 1963), the Green case was ultimately decided in favor of the American Tobacco Company (Green v. American Tobacco Company, 391 F. 2d 97 - Court of Appeals, 5th Circuit 1968, (Medical University of South Carolina, n.d.).

Through the next few decades, various others would bring suit against Big Tobacco seeking recovery from damages caused by cigarette smoking. Each case was settled in favor of the tobacco companies based on the premises that (1) tobacco had not been proven harmful to smokers, (2) smokers' cancer could have been caused by other factors, and (3) smokers assumed the risk of cancer when they decided to smoke (Michon, 2015).

The case that perhaps came the closest to breaking Big Tobacco's winning streak was Cipollone v. Liggett, which was first filed in 1983. In this case, evidence was brought to the table that suggested tobacco companies were aware of the addictive nature of cigarettes. Attorney Marc Edell (who had fought in similar asbestos cases prior), who was representing the now deceased Rose Cipollone, argued that tobacco companies had, among other things, acted in fraud as they promoted a product they knew to be harmful without fair warning (Levin, 1988).

After the first hearings were completed, both sides were presented with a victory. For the first time in U.S. history, a plaintiff was awarded damages for harm caused by

cigarettes (Cipollone was awarded \$400,000). However, the court also reaffirmed that the plaintiff was largely at fault (80%) for her damage due to her failure to quit smoking after knowing of its harm (downplaying the role of nicotine addiction). A later appeal in 1990 would then go on to cancel Cipollone's \$400,000 rewards, claiming that there was no proof Cipollone actually relied on Liggett's advertisements. The U.S. Supreme Court would then decide in 1992 to prohibit future lawsuits against tobacco companies for disease caused by tobacco prior to 1969 (when warning labels were first required) and set other regulations around future litigation. The case was eventually dropped due to the increasingly oppressive legal fees and once again, Big Tobacco was largely let off the hook.

## MASTER SETTLEMENT AGREEMENT

*Tobacco Loses its Defense: First Whistleblowers*

In 1994, Jeffrey Wigand, a former VP of Research and Development at Brown & Williamson testified before a grand jury in Mississippi, going on official record that he knew big tobacco had been concealing awareness of the harmful and

addictive effects of cigarettes. Wigand would then appear on a controversial 60 Minutes segment and further testify of big tobacco's dubious practices (Frontline; Jeffrey Wigand, n.d.).

Wigand's testimony provided a critical development in the fight against tobacco, as it was the first major instance in which courts had an insider testify that tobacco companies had been intentionally deceiving the public and courts in regard to its awareness of tobacco's fatal consequences. The decisions of past court cases largely relied on tobacco companies' claims that they were unsure of tobacco's harm or lack of harm on consumers, and Wigand's testimony threatened that stronghold (Lyman, 1999) (note: these events were dramatized in the Michael Mann directed film: *The Insider*).

Wigand's testimony was fortified when, in the same year, attorney Merrell Williams, Jr. copied and distributed internal documents from Brown & Williamson proving indubitably that the company had been lying in its claims that: "cigarettes don't cause cancer, nicotine is not addictive and we [Brown & Williamson] don't market to kids" (Martin, 2013; quote from Mike Moore). Wigand's and William's testimonies confirmed suspicions and removed the keystone that tobacco companies had been relying on,

creating a powerful avenue of attack for individuals and states seeking restitution from Big Tobacco (Lyman, 1999; Frontline).

## MISSISSIPPI TAKES A FIRST STEP

Between 1954 case and 1994, over 800 individual charges had been brought against tobacco companies seeking reparations for smoking-related health damages. As has been shown however, nearly all of these individual cases had resulted in unsuccessful verdicts for the plaintiff (Tobacco Control Legal Consortium, 2015). In 1994, Attorney General Mike Moore led Mississippi in becoming the first state to file suit against the tobacco industry (Mahtesian). The suit was on behalf of the state of Mississippi, the plaintiff seeking reimbursement for medical costs incurred by smoking-related illnesses, particularly in Medicare costs. Mike Moore's case was brought against the big four tobacco companies of the time: Philip Morris Companies, RJR Nabisco holdings Corporation (parent company of R.J. Reynolds Tobacco Company's), B.A.T. industries P.L.C. (parent company of Brown & Williamson Tobacco Corporation), and Loews Corporation (parent company of Lorillard Corporation) (Meier, 1997) based on the ongoing suspicions that Big Tobacco was "lying and altering research" (Chicago Tribune, 1996).

In 1996 the governor of Mississippi, Kirk Fordice, who had been suspected of accepting money from Big Tobacco, sued Mike Moore in an attempt to get him to drop the controversial case, claiming he should have been notified prior to Mike Moore's filing of the case (Chicago Tribune, 1996). Governor Fordice's charges were declined however due to the fact that Attorney General Moore's case had been well underway for two years by the time Governor Fordice brought his case against him (In RE Kirk Fordice, As Governor of the State of Mississippi (1997)).

## MASTER SETTLEMENT AGREEMENT

Not long after Attorney General Mike Moore filed his case, other

states followed bringing similar cases against tobacco companies. By 1997, Mississippi, Minnesota, Texas, and Florida had already settled state cases against tobacco and the number of state cases was increasing (Tobacco Control Legal Consortium, 2015). On June 20, 1997, the Attorneys General of 40 states entered into a proposed national settlement against America's large tobacco companies. Each state's claims were consolidated into a single settlement, the National Settlement Agreement (Schneider & Thom, 1998).

The main goals of the Attorneys General in the National Settlement Agreement were to (1) reduce youth smoking, (2) receive reimbursement for tobacco-related Medicaid costs, and resolve the future landscape of state/national suits against the

tobacco industry (Schneider & Thom, 1998). Part of the agreement also mandated that tobacco companies drop any present and future cases against critical opponent Jeffrey Wigand (Lyman, 1999).

On November 23, 1998, the massive Master Settlement Agreement was signed by 46 US states (plus 4 territories, Puerto Rico, and the District of Columbia) and the four largest tobacco manufacturers (Tobacco Control Legal Consortium, 2015) in order to "settle and resolve with finality all Released Claims against" tobacco companies (Master Settlement Agreement, 2014), p. 1), putting an end to the National Settlement Agreement and all future state claims against tobacco companies. The stated purpose of



this agreement was to “reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States. . . [in order to] avoid further expense, delay, inconvenience, burden and uncertainty of continued litigation” (p. 2).

The Master Settlement Agreement both required strong payouts from tobacco companies and put strong regulations on the tobacco industry. Over the period of the next 25 years, participating tobacco companies would be required to pay out \$206 billion in predetermined increments and methods (Wilson, 1999). This money was, among other things, to be used in reparations for medical costs, and to go to programs and research to help prevent youth smoking (e.g. through the establishment of the American Legacy Foundation (Tobacco Control Legal Consortium, 2015)).

In terms of regulations, any advertising that directly or indirectly targeted youth was prohibited. Use of cartoon characters, billboard/transit advertisements near retail establishments selling tobacco products, product placements in entertainment media, free product samples (except in adult-only facilities; see *Evans v. Lorillard*), branded merchandise, and tobacco-brand name sponsorships were all expressly prohibited as well. Furthermore, lobbying against certain tobacco legislation and efforts to suppress health-related research and

misrepresent health consequences of tobacco were prohibited (as part of this, potentially biased research groups such as The Tobacco Institute and The Council for Tobacco Research were dismantled (Tobacco Control Legal Consortium, 2015)). Ultimately, the goal was to end and prevent the “massive disinformation campaign designed to create the perception of uncertainty about the health risks of cigarettes, when in fact research by those same tobacco companies confirmed the adverse health consequences of smoking” (as stated in 2002 *Estate of Michelle Schwarz v. Philip Morris USA, Inc.*).

The application and enforcement of the MSA has been an ongoing process with a few hiccups (Jones & Silvestri, 2010); however, as of 2014, 40 additional tobacco companies had signed on to the agreement (Tobacco Control Legal Consortium, 2015).

Ultimately, the Master Settlement Agreement was the victory tobacco activists had been fighting for. Big Tobacco was finally held liable for the damages caused to society, and a path was paved for what future litigation and legislation would look like. The MSA forever changed the landscape of the tobacco battle, and for the first time in history (on a major scale), the effects of tobacco smoking on society were monetized and enforced.

## RECENT LITIGATION

### *The Shift to Successful Litigation*

The Master Settlement Agreement closed the doors for future state litigation against tobacco companies, but it opened the door for successful individual cases though the 2000's. None of these cases were easy, and many of them would see major reductions in damages awarded in later appeals (see Table 1). Many of these cases would stem from the class action *Engle v. R.J. Reynolds, et al.*, a three-phased suit where 700,000 individuals tried to seek recompense damages from tobacco companies. Ultimately, the \$144.8 billion award was dismissed and the court mandated that individuals, who would be allowed to lean on the trial court ruling that tobacco leads to disease and that nicotine is addictive, seek litigation on an individual level (Harris, 2012).

Many individuals involved in the *Engle* case did take up individual cases against Big Tobacco. Some of the largest of these early *Engle* progeny cases were *R.J. Reynolds Tobacco Co v. Martin* (the first *Engle* progeny case), *R.J. Reynolds Tobacco Co. v. Gray, Liggett Group LLC, et al. v. Campbell*, and *R.J. Reynolds Tobacco Company Co. v. Hall*. Combined, these four cases cost Big Tobacco \$60,442,000 (Harris, 2012). By 2013, “more than 4,500 smokers’ suits . . . [were] pending in Florida” in

# TABLE 1: MAJOR CASES SINCE THE MSA

Case Name	State	Original Verdict Year	Initial Punitive Damages	Final Punitive Damages	Final Compensatory Damages
Henley v. Philip Morris	CA	1999	\$50 million	\$9 million	\$1.5 million
Williams-Branch v. Philip Morris	OR	1999	\$79.5 million	\$79.5 million	\$1.23 million
Whiteley v. R.J. Reynolds, et al.	CA	2000	\$20 million	\$0	-\$1.69 million
Engle v. R.J. Reynolds, et al.	FL	2000	\$144.8 billion	\$0	\$0
Boeken v. Philip Morris	CA	2001	\$3 billion	\$50 million	-\$5.54 million
Schwarz v. Philip Morris	OR	2002	\$150 million	\$25 million	-\$168.5 thousand
Bullock v. Philip Morris	CA	2002	\$28 billion	\$13.8 million	\$850 thousand
Boerner v. Brown & Williamson Corp.	AR	2003	\$15 million	\$15 million	\$4.025 million
Price v. Philip Morris	IL	2003	\$3 billion	\$0	\$0[1]
Frankson v. Brown & Williamson Corp.	NY	2004	\$20 million	\$5 million	\$175 thousand
Smith v. Brown & Williamson Corp.	MO	2005	\$20 million	\$1.5 million	\$500 thousand
Evans v. Lorillard	MA	2010	\$81 million	\$0[2]	\$35 million

Main chart data from Appendix 14.3 in (Office of the Surgeon General, 2014)

Total damages were \$10.1 billion before appellate court decided in favor of Philip Morris (Price v. Philip Morris, Inc., 2015 IL 117687)

Lorillard settled this case for \$79 million to prevent future assessment of punitive damages (Scurria, 2013)

Engle's wake, and "juries in the state . . . [had] returned verdicts totaling more than \$500 million against the tobacco industry" (Join Together Staff, 2013).

In 2010, a case directly related to the Master Settlement Agreement's provisions was brought before Massachusetts courts: *Evans v. Lorillard*. In this case, the son of the deceased Marie Evans brought suit against Lorillard Tobacco Company for Marie's death. When Evans was 9 years old she was targeted by Lorillard Tobacco Company and given free cigarettes at the playground. By the time she was 13 years old Evans was addicted to cigarettes. Courts would later find that the target of Lorillard's free giveaways in this instance was low income black children like Marie. The courts held Lorillard responsible for Marie's death and, after some appeals, settled on \$35 million in compensatory damages. Lorillard would later pay \$79 million to settle the case and prevent any punitive damages (Scurria, 2013).

## LIGHT CIGARETTES

By 2001, a little over half of all surveyed smokers were smoking "light" or "low tar" cigarettes. The use of these "light" or "low tar" cigarettes was based on a belief that they were less harmful (Shiffman, Pillitteri, Burton, Rohay, & Gitchell, 2001). However, in 2001, the National Cancer Institute published suspicions that tobacco industries were branding cigarettes as "light" despite knowledge that they were no healthier or less addictive than their non-light counterparts. This publication, and the increased evidence that light

cigarettes were not healthier, led to a series of individual and class action suits against tobacco claims (Office of the Surgeon General, 2014).

One of the greatest examples of this is the 2002 case: *Estate of Michelle Schwarz v. Philip Morris Inc.* Here, the husband of Michelle Schwarz was awarded \$25 million dollars in punitive damages (and \$168,514.22 in compensatory damages). Michelle passed away after changing her smoking methods due to a belief that the light cigarettes she transitioned to were healthier. Her husband sued Philip Morris for fraud in manufacturing, marketing, and research based on advertisements claiming the light cigarettes contained far less tar and were healthier. In the language of the court, Philip Morris' "behavior with respect to the development and marketing of low-tar cigarettes was but one iteration of a larger pattern of deceiving smokers and the rest of the public about the dangers of smoking." The court noted that while light cigarettes may have less nicotine, the addiction of the smoker to nicotine led them to smoke in a manner that resulted in the same amount of tar delivery to the lungs, all the while thinking they were acting in a healthier manner (First trial hearing of *Estate of Michelle Schwarz v. Philip Morris, Inc.*, 2002).

## SECONDHAND SMOKE

Starting in the early 90's, the number of secondhand smoke cases brought to court began to increase. Studying these cases gives us an outline to guide the potential development of pornography litigation (e.g. see Idaho

House Bill No. 636 (2010) and Idaho House Bill No. 205 (2011)).

Secondhand smoke cases differed greatly from other cases. Only rarely were Tobacco Companies directly involved in the lawsuits. Rather, what we see is a trend for individuals to bring suit against employers and places of business by employees and invitees. This allows for restrictions, as to the place and method in which tobacco may be smoked, to be instituted without directly holding the tobacco companies responsible. The premises on which the cases were made ranged from lethal sickness caused by environmental smoke (e.g. *Husain v. Olympic Airways*), discrimination against disabilities (e.g. *Staron, et al. v. McDonald's Corporation*), workers compensation (e.g. *Magaw v. Middletown Board of Education, New Jersey Department of Labor, Division of Workers' Compensation 1998*), the Eighth Amendment (e.g. *McKinney v. Anderson 1991*), and public nuisance (e.g. *50-58 Gainsborough St. Realty Trust v. Haile, et al. 1998*), etc. (Sweda, 2004).

The majority of these cases ended in a successful collection of damages by the plaintiff and brought about subsequent restrictions on how and where tobacco can be smoked. For example, in *Husain v. Olympic Airways*, Rubina Husain was awarded \$1,400,000 by the court after her husband (Dr. Abid M. Hanson) suffered a fatal asthma attack on an international flight decidedly due to environmental smoke on the airline. Cases such as this create strong incentives for companies to apply

their own restrictions on tobacco smoking. This was demonstrated, during the proceedings of *Staron, et al. v. McDonald's Corporation*, in which McDonald's decided to ban smoking in all of its corporately owned restaurants (Sweda, 2004).

The outcomes of secondhand smoke cases demonstrate that public participation in harmful activities can be limited without ever directly confronting the tobacco distributor. Outcomes in favor of the victims of secondhand smoke help to preserve individual rights and freedoms while protecting the general public from unnecessary harm. This concept was stated beautifully by the court in the landmark case *Shimp v. New Jersey Bell Telephone Co.*: "cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely on the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to perform properly the duties of their jobs."

The case listed above was the first major secondhand smoke case settled in court and served as a landmark precedent for subsequent cases. In this case, Donna M. Shimp sued her employer for "causing her to work in an unsafe environment by refusing to enact a ban against smoking" and consequently allowing a large amount of environmental smoke to exist in the workplace. Donna's complaint centered around her allergic reaction to the smoke, and led to the court mandating all smoking be restricted

to non-work areas in the company. This was a crucial victory that served as a precedent for many similar cases that would follow (e.g. *McCarthy v. Dept. of Social and Health Services*, *Smith v. Western Electric Company*, *Wilhelm v. CSX Transportation, Inc.*).

Secondhand smoke has been shown to result in many harmful effects for developing children (e.g. asthma, slower lung development, greater risk of lower respiratory infections, etc.) (Jarvie & Malone, 2008). For example, in the 2002 case *In Re. Julie Anne, A Minor Child*, an Ohio court stated "a family court that fails to issue court orders restraining people from smoking in the presence of children . . . is failing the children whom the law has entrusted to its care." Similarly, in 1998 a child of divorced parents was removed from the mother's custody and placed in the father's largely due to the presence of secondhand smoke in the mother's household (*Daniel v. Daniel*).

These cases have created strong incentives for employers to restrict the amount of environmental smoke allowed in the workplace and eventually helped pave the path for individual state ordinances restricting the locations where cigarettes may be smoked (as was previously demonstrated). Furthermore, cases such as those mentioned above have brought to public attention the dangers of secondhand smoke, and helped to form a negative opinion of secondhand smoke amongst the general public. As the US Court of Appeals for the Ninth Circuit affirmed, "society's attitudes have evolved to the point that unwanted exposure to ETS

may amount to a violation of 'society's evolving standards of decency'" (*McKinney v. Anderson* paraphrasing *Avery v. Powell*).

Although most secondhand smoking cases were brought against employers and places of business, one major class action was brought against the tobacco companies themselves. In 1991, a class action suit was filed by a group of flight attendants against Philip Morris Companies Inc. in hopes to recover damages caused by thick environmental smoke on the airlines they serviced *Broin, et al. v. Philip Morris Companies Inc., et al.* The case was settled in 1997 with the court mandating Philip Morris Companies Inc. to pay \$300,000,000 to set up a research fund to further assess the impact of secondhand smoke (Sweda, 2004). The individual flight attendants were then given the opportunity to bring charges individually against tobacco companies for damages (e.g. see *French v. Philip Morris, et al.*).

## RECENT LEGISLATION

### *Tobacco Control Act*

In 2009, President Obama signed into law what is easily the most significant recent development in the fight against tobacco: The Family Smoking Prevention and Tobacco Control Act. The purpose of this act was to amend the Federal Food, Drug, and Cosmetic Act (FFDCA) in order "to provide for the regulation of tobacco products by the Secretary of Health and Human

# GETTING INVOLVED:

## INDIVIDUALS AND ORGANIZATIONS INVOLVED IN THE FIGHT AGAINST PORNOGRAPHY

- Donna Rice Hughes: President, Enough is Enough
- Ron DeHaas: CEO, Covenant Eyes
- Jill Manning: LMFT
- Dawn Hawkins: SVP and Executive Director, National Center on Sexual Exploitation
- Tomi Grover: Human Trafficking Expert
- Melissa Henson: Director of Public Education, Parents Television Council
- Craig Cobia, Ph.D.: Chairman and Co-Founder, Citizens for Decency
- Patrick Trueman, Esq.: President and CEO, National Center on Sexual Exploitation
- Phil Burress: President, Citizens for Community Values
- Donald Hilton: MD, Neurosurgeon
- Robert Cahill, Esq.: Chairman, National Center on Sexual Exploitation
- Robert P. George: McCormick Professor of Jurisprudence at Princeton University
- Clay Olsen: CEO & Co-Founder, Fight the New Drug

Services through the Food and Drug Administration” (Congressional Research Service)

Past attempts by the FDA to regulate tobacco products resulted in courts chastising the agency for overreaching its bounds (*FDA v. Brown & Williamson Tobacco Corp.*). The FDA also had struggled in the past with its willingness to regulate the industry, defining tobacco products as medical devices not under their jurisdiction via the FFDCA (Merrill, 1998). With the passing of the Tobacco Control Act however, responsibility for regulating the tobacco industry was now given to the FDA, clearing up the confusion that surrounded the

issue of jurisdiction and creating a clear path for tobacco regulation moving forward.

The 2009 Tobacco Control Act also set out some regulations of tobacco of its own. The Act (2009) specified the “location, size, type size, and color” or tobacco warning labels. The Act also prohibited cigarettes from containing “any artificial or natural flavors” (flavored cigarettes were found to be especially appealing to youth (see Tobacco Control Legal Consortium, 2014) or from claiming ‘light,’ ‘mild,’ or ‘low’ descriptors without being first approved by the FDA. These provisions protected citizens from misleading advertising

claims that were being pushed by tobacco companies (see *Schwarz v. Philip Morris USA, Inc.*; *Price v. Philip Morris, Inc.*; etc.). All of this limited the tobacco companies’ ability to appeal to younger generations. The younger generations were further protected as the “promotion and advertising of menthol and other cigarettes to youth” was banned (2009). The sale of any tobacco products to minors or through vending machines, as well as tobacco-brand sponsorship of sports/entertainment events was also banned, and cigarette companies would no longer be allowed to give away free samples or merchandise of any kind (Congressional Research Service,

2009). Recent studies have shown that 80 percent of all smokers began smoking before the age of 18, making it all the more imperative that the government protect youth from early exposure to tobacco (Food and Drug Administration).

On May 5, 2016, the FDA extended regulations to prevent the sale of e-cigarettes, hookah tobacco, and cigars to individuals under the age of 18 (Food and Drug Administration, 2016). Protecting the public from the externalities of tobacco smoking will be an ongoing battle. As time progresses, tobacco companies will continue to find new ways to sell and market their products (e.g. tobacco companies spent \$10.4 billion dollars in advertising and promotion in 2008 (Food and Drug Administration)). Despite the progress that has been made in fighting tobacco, smoking is and will continue to be a part of American society. However, through the actions of individuals and agencies, the harm caused by smoking to non-smokers has been vastly minimized.

Though research, litigation, and legislation, a drug that was once widely popular and generally accepted has now been exposed for the danger that it truly is. The public is more widely educated on the harmful effects of tobacco than it has ever been. Citizens can rest well knowing that steps have been taken to ensure research led legislation continues to be put in place to keep families safe from the auxiliary effects of tobacco smoking.

## STATE LEGISLATION

Today, much of the legislation that can be affected against tobacco remains the responsibility of individual states. As of October 1, 2016, 846 U.S. cities and 26 states have 100 percent smoke-free laws in non-hospitality workplaces, restaurants, and bars (Americans for Nonsmokers' Rights, 2016). Much of this legislation has come about in response to increased research and litigation in the area of secondhand smoking. The effect of these smoke-free laws has been to isolate and marginalize the activity of smoking itself, indirectly giving way to a culture that views smoking as an undesirable activity or hobby. Due to efforts from lobbyists, proponents of public health, and the government, smoking has gradually been phased out as a recreational activity in the United States.

The efforts of these three groups have solidified legislation on smoking bans, or smoke free zones, which have limited individual use of tobacco and overall tobacco consumption considerably. These smoke free zones have become mostly accepted due to the scientific evidence backing the rationale for the implementation of that legislation. A 2012 meta-study analysis regarding the implementation of smoke free zones significantly decreased the likelihood of emphysema, acute myocardial infarction and strokes resulting from blockages in carotid arteries (Tan, 2012). A 2013 study and consequent 2014 study discussed the effects of secondhand smoke on the health of an unborn child. Studies suggested that early birth terms and

complications resulting in lifelong asthma were reduced by at least ten percent (Kelland, 2014). These results are significant enough to justify a long-term ban on the consumption of tobacco. Moreover, smoking has been labeled as an “invasive” activity which disrupts the health and comfort of those around the smoker.

The consumption of tobacco itself has been notably reduced since the implementation of smoking bans. The cigarette company Philip Morris discussed that overall smoking activity since the implementation of such bans has decreased 11 to 15 percent. Philip Morris further lamented that once bans were implemented, smokers who then quit were 84 percent more likely to abstain from smoking permanently (Heironimus, 1992).

At the root of smoking ban arguments is the reasoning that although smoking is optional, breathing is not. Smoking bans within the United States have crystallized a culture which sees smoking as an obstacle to overall societal productivity (See House of Commons Bill On Smoke Free Areas, 1997). Smoking detracts not only from human health but from the overall quality of the immediate environment of a smoker. The habit of smoking affects the health of others through secondhand smoke. It also affects the economic health of society through medical costs imposed by the smoker (Barendregt, 1997).

Additionally, individual US States have been allowed to post graphic warnings regarding cigarettes in some instances so long as they do not

obscure the message already posted by the surgeon general. (see *Discount Tobacco City & Lottery v. United States*) Tobacco industries have been marginalized by public health officials and the opinions of religious and temperance advocates regarding the consumption of tobacco. The overall consequence of these efforts is the marginalization of the tobacco industry and its effects on the culture of America.

### CURRENT LEGISLATIVE HURDLES

Critics have argued that the culture created by such bans is harmful to businesses and will economically depreciate the national economy significantly. A consequent 2014 meta-analysis specifically sampled places where smoking was most prevalent. Bars and restaurants were surveyed nationwide. The findings were that no net loss or profit was gained from the implementation of smoke free zones (Siegel, 480). Proponents of smoke free zones argue that studies such as this justify the economic rationale of smoke free zones.

One of the largest obstacles for smoke free zones is the argument that bans on smoking violate concepts of individual property rights and liberty (Hoggart, 2007). Those advocating for individual rights for smokers argue that although smoking may be a deleterious act, it is one that individuals should be free to engage in if they so choose. They submit that the smoker should be free to face the consequences of his or her actions.

Economist counterarguments concede that smoking is an activity that one is free to engage in, but not without its consequences affecting the entire community. Smoking is inherently addictive, and once a smoker is addicted, the consequences of poor health become much more likely. The public costs from rehabilitating or hospitalizing a smoking addict are significant and something the community should not be subject to.

Another statistical argument is that individuals who have addictive tendencies will find other means of indulgence if smoking is no longer available to them. For example, a survey in 2008 found that smoking bans in certain areas increased DUI fatalities up to 16 percent. The underlying argument of this study is that smoking bans will drive already addicted individuals to more reckless behaviors in order to compensate for the stimulation provided by cigarettes. Some who argue this line of reasoning also point out that addicted smokers who become involved in DUI's do so in order to find an area that is not smoke free so they can indulge in smoking once more (See *Unlucky Strikes*, 2008).

Although the counterarguments presented suggest that smoking bans do not address individual rights, proponents of the smoke free ban propose a majoritarian approach. What is better for the entire community at large must sometimes supersede the rights of the few (Amartya, 2007). This argument will continuously be under fire by proponents of individual liberties and anti-tobacco legislation. What

cannot be argued is that smoking bans have significantly lowered tobacco consumption nationwide. The bans have accomplished their intended purpose.

## A STRATEGY TO FIGHT PORNOGRAPHY

The history of tobacco regulation provides a powerful insight into how research, legislation, and litigation can work together to create powerful changes in society and protect citizens from harmful products, processes, and technologies. At Citizens for Decency, we are inspired by the accounts of individuals and organizations who have made a stand against the harms and injustices caused by tobacco companies. We are confident that similar steps and actions can be taken to combat the evil of pornography and regulate the industry in a manner that protects individuals, families, and societies.

### PROPOSED TIMELINE/ AVENUES OF ATTACK

**Step One:** Motivate government-sponsored research on the harmful effects of pornography through individual research and lobbying/raising awareness.

Ultimately, the government needs to accept and publish the damaging effects of pornography. In order for this to happen, research needs to be conducted by official agencies. However, this work must start with individual research. Before the U.S.

Government began publishing and mandating its own studies (starting with the studies performed by the NCI, NHI, AHA, and ACS), nearly 7000 other studies had already been published (Office of the Surgeon General, 1989).

**Step Two:** Convince (1) the government, (2) individuals, families, and societies, and (3) courts, through research of the hazards of pornography.

In order for pornography to ever be seen as a sizable problem to the government, society, and courts, objective research needs to show in a convincing manner that pornography is harmful. Furthermore, these research studies need to demonstrate how pornography is specifically harmful. Tobacco research, for example, pointed to specific health hazards (e.g. lung cancer) and early death (Surgeon General's Advisory Committee on Smoking and Health, 1964). This will give legislators, individuals, and courts specific battles they can wage against the pornography industry, both narrowing and legitimizing the attack.

**Step Three:** Motivate and establish regulatory jurisdictions to determine what organizations have the duty to protect the public from the harms of pornography as discovered through research.

When the government begins to further implement pornography regulations, it needs to be determined early on what agencies and organizations will have the authority to set up and enforce regulations.

A lack of clarity in this realm can lead to unnecessary roadblocks and delays in the process of regulating pornography (as was seen in the FDA's various attempts to regulate and define cigarettes). Individual pressure on government agencies via ongoing litigation and awareness-raising events can help facilitate this process by keeping the fight against pornography in the forefront of American politics.

**Step Four:** Motivate and establish successful legislation to protect individuals, families, and society from the now established and accepted hazards associated with pornography (in accordance to past and ongoing research).

Once regulations actually start to be formulated, individuals and activists must continue to be involved to ensure the regulations are relevant, effective, and backed by solid (and ongoing) research. Based on the success of specific tobacco regulations and past successes in regulating pornography, it can be successfully regulated in the following areas:

1. Labeling that adequately warns the user of the harmful consequences of pornography use.
2. Protection of minors, as early studies have shown that, similar to tobacco, early exposure to pornography can have serious negative impact (Ybarra & Mitchell, 2005).
  - a. Protection from exposure in public areas (Citizens for Decency has already fought

battles in this realm: Idaho House Bill No. 636 (2010) and No. 205 (2011))

- b. Protection from early exposure via internet and advertising
  - i. Internet use has grown increasingly fundamental to the activities of everyday life. Pornography companies have a much greater advantage than tobacco companies ever had. Rather than going to a single location and targeting a specific group, pornography companies have the ability to flood the internet with eye-catching images that draw curious individuals in for more. Internet platforms are more capable of targeting users based on past searches, but given the fact that people of any age have access to the internet, it is increasingly more difficult to protect children and teens from targeting.
  3. Ensuring that advertising excludes pornographic material.

**Step Five:** Bring individual and state lawsuits against distributors of pornography to recover for proven damages caused to individuals, families, and societies.

Individuals need to make a stand for their rights and give courts the

opportunity to make decisions in favor of greater restrictions and punishments for pornography distribution. Litigation will hold pornography companies and companies who promote it/use it to target audiences accountable and may result in some self-moderation in order to avoid suit (just as McDonald's self-moderated by prohibiting tobacco use in restaurants after *Staron, et al. v. McDonald's Corporation*).

One qualifier: the lawsuits brought by individuals and states need to be focused on damages supported by research and on gaps in enforcement of legislation. In the end, courts will be forced to monetize the societal, family, and individual damages of pornography viewing.

Increased pornography regulation must be founded in research, legislation, and litigation. Focusing on these three pillars will unify and legitimize efforts to regulate the pornography industry, exponentially increasing the chances of success. The landscape of America has changed drastically since the pivotal battles against tobacco companies took place. It is unclear how long it will take to significantly increase pornography regulation using these strategies, however, we are confident that every effort put forth to fight pornography today will have a monumental impact on the future of pornography regulation.

## CALL TO ACTION

Citizens for Decency calls on all men and women everywhere to join us in the battle against pornography. Pornography is an evil that affects all of us, whether or not we view it ourselves. The dangers and long term damage that pornography cause are still not understood by most. While some may view pornography as a form of erotic art or expression protected under free speech, it is in reality a drug whose physical, emotional, and mental consequences must be prevented through increased legislation. In the words of Edmund Burke, "All that is necessary for evil to triumph is for good men to do nothing." This problem is not going away and it will only get worse unless we choose to act. Each of us can make a difference if we so choose.

The battle begins as we call upon lawmakers and researchers to give attention to this problem. Those who promote pornography must be held accountable for the damages they are causing to our society, our families and individuals. As we follow in the footsteps of those who fought the spread and use of tobacco, we are confident that such a cause can be realized in this ongoing fight against pornography.

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